WHEN GOOGLE BECOMES THE NORM: THE CASE FOR PRIVACY AND THE RIGHT TO BE FORGOTTEN

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ABSTRACT

The ubiquity of the Internet is inescapable; from online banking and document transmission to social media and video communications, the digital world is becoming increasingly populated. Collective connectivity brings with it unique legal and regulatory challenges that did not exist in a pre-Internet era, particularly given the Internet's inherent technical complexities and issues around territorial jurisdiction and competing rights and values. The divide between the law and societal expectations is particularly noticeable when considering individual privacy; when personal information is easily accessible by millions of users around the globe with access to a modem or a mobile network, is there any recourse available for someone wishing to limit their personal exposure?

This paper will consider the so-called "Right to be Forgotten," enshrined in European law since 2014 but still a foreign concept in Canada. In doing so, the paper queries whether the ability for a party to apply to Google to have damaging personal information de-listed from its search algorithm would be legally possible in light of the Charter, and whether it would even be desirable from a policy perspective.

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Privacy is not simply a precious and often irreplaceable human resource; respect for privacy is the acknowledgement of respect for human dignity and of the individuality of man.¹

— First Annual Report of the Office of the Privacy Commissioner of Canada

1. INTRODUCTION

The ubiquity of the Internet in 2017 is inescapable. From online banking and document transmission to social media and video communications, the digital world is becoming increasingly populated, with no apparent signs of slowing down. Indeed, a 2016 study found that Canadians spent an average of 24.5 hours online per week,² and MacKay appropriately observed that “the verb ‘google’ has become the norm”.³ Even the Supreme Court of Canada has commented on the practical necessity of a presence in the digital world, noting that “the choice to remain ‘offline’ may not be a real choice in the Internet era”.⁴ Collective connectivity brings with it unique legal and regulatory challenges that did not exist in a pre-Internet era, particularly given the Internet’s inherent technical complexities and issues around territorial jurisdiction and competing rights and values. As Kurbalija writes: “Society is dynamic and legislation always lags behind societal change. This is particularly noticeable in this day and age, when technological development reshapes social reality much faster than legislators can follow”.⁵ One such area in which the divide between the law and societal expectations is particularly felt is that of individual privacy. When personal information is easily accessible by millions of users around the globe with access

⁴ Downe v Facebook, Inc, 2017 SCC 33 at para 56, 279 ACWS (3d) 522 [Downe].
to a modem or a mobile network, is there any recourse available for someone wishing to limit their personal exposure?

One need only consider the relatively recent amendments to the Criminal Code via the Protecting Canadians from Online Crime Act to appreciate the interests at stake in the debate. These amendments serve to punish those who publish an “intimate image” without the subject’s consent; “intimate image” is defined to not only include sexual images, but, more generally, where there was a reasonable expectation of privacy. This legislation is an example of Internet regulation by the Canadian government that balances the interests of individual privacy with that of freedom of expression, as protected by section 2(b) of the Charter. However, while punishing the nonconsensual distributor of intimate images is a relatively uncontroversial reasonable limit on one’s freedom of expression, the question becomes more difficult and nuanced when the expectation of privacy is desirable but arguably falls below that which is reasonable, and when the distributor is not an individual Internet user but rather an online search engine linking to third-party material.

In Europe, the so-called “Right to be Forgotten” has existed since the 2014 Court of Justice of the European Union (CJEU) decision Google Spain v AEPD, and it concerns precisely the situation postulated above. This paper will consider the contours of the Right to be Forgotten as outlined in that landmark decision, and will then consider the policy rationale as to why, in an era of rapidly evolving modernity, the debate surrounding such a “right” is highly relevant in contemporary Canadian society. This paper concludes by examining divergent legal opinions between Canada and the European Union, with a particular focus on the role of freedom of expression, ultimately demonstrating that while the Canadian context presents far more difficulties for those advocating for a Right to be Forgotten, as more Canadians become concerned with their personal

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7 Ibid, s 3.
8 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 2(b) [Charter].
9 Ibid, s 1.
10 Case C-131/12 Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González [2014] [Google Spain].
information being available online (as evidenced by research and recent 2017 case law), there is a legitimate argument that the Office of the Privacy Commissioner of Canada (OPC) is capable of enacting similar Right to be Forgotten legislation that could withstand Charter scrutiny. Regardless of the outcome, the public discourse around such an issue is important, in order to ensure that rights dictate the technologies, rather than the other way around.

2. TRACING THE RIGHT TO BE FORGOTTEN

*Google Spain* centered on the unforeseen consequences of the forced sale of property belonging to a Spanish national, González, in order to satisfy a debt. The sale occurred in the late 1990s, and the problem in the case was that a search for González's name a decade later on the search engine Google returned the website of the Spanish newspaper *La Vanguardia*, which linked to the auction announcement. In his pleadings, González claimed that the “proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant”, and sought to have these links removed.\(^{11}\)

In order to appreciate how the Court came to its conclusion, one must be aware of the different legal foundation at play in the European Union. The *Charter of Fundamental Rights of the European Union* provides for both the “right to respect for his or her private and family life, home and communications”\(^ {12}\) and “the right to the protection of personal data concerning him or her”\(^ {13}\), while the *Data Protection Directive* further solidifies these rights by “protect[ing] the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data”.\(^ {14}\) Privacy is thus a fundamental concern for European citizens, and one that enjoys a considerable degree of legal protection.

\(^{11}\) *Ibid* at paras 14-15.
\(^ {13}\) *Ibid*, art 8.1.
The CJEU concluded that Google could not avoid the operation of the Data Protection Directive by virtue of being a search engine (as opposed to a publisher of information), noting the pivotal role played by such websites in contemporary society:

'It is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject’s name, including to internet users who otherwise would not have found the web page on which those data are published.'

Ultimately, the Court balanced the legitimate interests of the search provider and the free spreading of information with the aforementioned privacy rights of individuals to determine that links that are "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine" must be removed from the results by the search engine, pursuant to a request by the individual and an appropriate review.

Following the ruling, the Right to be Forgotten was limited to domains within the European Union, such that even if a party successfully removed a link from the directory of <www.google.es> (the Spanish version of Google), the link would still appear if searched on a non-European domain, such as <www.google.com>. This is true even if the search originated on a computer within the European Union. The effect was thus a limited right; however, in early 2016, the Right to be Forgotten was extended to include any search conducted within Europe, even if it was through a non-European domain. Moreover, although the 2014 judgment was confined to the CJEU's European jurisdiction, a Japanese court recently affirmed the existence of the Right to be Forgotten in

15 Google Spain, supra note 10 at para 36.
16 Ibid, para 94.
18 Peter Fleischer, "Adapting our Approach to the European Right to be Forgotten" (4 March 2016), Google Europe Blog (blog), online: <http://googlepolicyeurope.blogspot.ca/2016/03/adapting-our-approach-to-european-right.html>.
that country. Given the widening scope of the Right to be Forgotten, Canadian lawyers and policy-makers should be concerned with whether such a development would be beneficial and legally possible here.

3. THE IMPORTANCE OF THE RIGHT TO BE FORGOTTEN

Before considering how a legal change such as the Right to be Forgotten could be implemented in Canada, it is important to understand the ramifications of such a change. Google Spain did not purport to actually remove information from the Internet; rather, it required search engines, in specific circumstances, to erase “the information and links concerned in the list of results”, not the actual material on third-party websites. Nor is its application automatic, at the whim of the individual user; rather, it is a complaint-based right, whereby each request to have a link removed is internally reviewed to ensure it meets the standards established by the CJEU.

MacKay was not the only one to observe the pervasive nature of online search engines in directing web traffic and disseminating information. According to Internet analytical company Alexa, the ten most-visited webpages in Canada include four search engines, with <www.google.ca> the most popular. This means that Internet users rely on search engines as a primary means to obtain information, including information about other individuals. Moreover, while search engine algorithms are capable of generating massive numbers of results in seconds, research suggests that the top search result is likely to get approximately 33% of web traffic for any given search, with numbers significantly decreasing as

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20 Supra note 10 at para 94.
21 Ibid.
22 Supra note 3.
one moves down the list and to other pages of results.\textsuperscript{24} Thus, if there is something particularly damaging about an individual on the Internet, regardless of its current relevance (an illustrative example is a news report of a sexual assault charge for which there was ultimately an acquittal), and this is returned as a top result, it is more likely than not that someone who is looking for information regarding that person will find it. An uncomplimentary search result can have detrimental effects not only on that individual’s sense of privacy and dignity, but also on his or her reputation and vocational pursuits, depending on the content of the link.

The OPC commissioned a survey in 2014 that determined that “[n]ine in ten Canadians expressed some level of concern about the protection of their privacy, with just over one-third (34\%) saying they are extremely concerned about this”.\textsuperscript{25} This report went on to conclude that the proportion of Canadians who had expressed concern over posting private information online had increased since 2012,\textsuperscript{26} indicative of changing values in response to changing technologies.

From an individual, privacy-oriented perspective, the foregoing provides a rationale as to why the ability to limit the amount of personal information available online would be desirable. However, one must not ignore the other users of the Internet, or overlook the desirability of an unrestricted flow of information in our society; indeed, the Internet is a contemporary manifestation of John Stuart Mill’s nineteenth-century concept of a “marketplace of ideas”, whereby discourse and divergent opinions are crucial for ultimately arriving at the truth.\textsuperscript{27} This is the philosophical core of the right to free expression, which, in practical terms, means that the utility of online search engines is hampered if certain search results are removed at an individual’s request. Ultimately, one online searcher may have as legitimate an interest in obtaining the complete, unaltered truth about another individual as that individual’s interest in having their privacy respected, thereby


\textsuperscript{26} Ibid at 24.

leading to an uncomfortable balancing act between two competing values. Perhaps not surprisingly, the Right to be Forgotten has been criticized for its potential to rewrite history, and for facilitating an Internet where search engines "would no longer present us with an accurate image of the world".28

The conflicting policy values of individual privacy and a marketplace of ideas will be considered in a concrete, legal analysis by way of the Canadian Charter. At this point, however, it is sufficient to say that the twenty-first century has created a legitimate privacy interest at stake in the Right to be Forgotten, such that an attempt to balance these interests is not merely academic.

4. EXISTING CANADIAN PRIVACY RIGHTS

a. Common Law Torts

This entire analysis is moot, of course, if there already exists something fundamentally similar to the Right to be Forgotten in Canada. In R v Tessling, the Supreme Court of Canada accepted Westin’s definition of “informational privacy” as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”.29 This is the conceptualization of privacy with which this analysis is concerned, and Hunt identifies a number of common law tort actions available to those whose informational privacy has been invaded: malicious falsehood, defamation, breach of confidence, and appropriation of personality.30 Unfortunately, none of these legal routes provide a viable course of action for someone seeking a legal remedy to restrict a search engine from directing web traffic to specific information regarding them.31

31 See ibid for the elements of each tort. In the case of malicious falsehood and defamation, actual publication (as opposed to direction) is a necessary element; in the case of breach of confidence, use of the
b. Provincial Privacy Legislation

From a statutory perspective, several Canadian jurisdictions have implemented legislation creating a tort for violation of privacy.32 While the particular question of search engine direction has never been asked under existing provincial legislation, the statutory torts require an invasion without a “claim of right” in order to establish an actionable wrong,33 whereas search engines are merely linking to publicly accessible material. The search engine’s right to do so, even when the content is invasive, appears to have been confirmed in two relatively recent decisions of the Supreme Court of Canada, to be discussed at a later section of this paper.34 As a result, provincial legislation cannot replicate the Right to be Forgotten.

c. Federal Privacy Legislation

Finally, one piece of federal legislation not only purports to protect what personal information is disseminated, but also provides a complete complaint mechanism for individuals. The Personal Information Protection and Electronic Documents Act35 is the closest analogy to the Right to be Forgotten in Canada; subject to exceptions enumerated in the Act, “knowledge and consent of the individual are required for the collection, use, or disclosure of personal information”.36 A limited version of the Right to be Forgotten does exist, insofar as a user can file a complaint with the OPC against the problematic website to which the search engine is linking (rather than the search engine itself), thereby seeking removal. However, such a remedy is incomplete for two significant reasons.

First, PIPEDA does not apply to “any organization in respect of personal information that the organization collects, uses or discloses for journalistic,
26  Privacy and the Right to be Forgotten

artistic or literary purposes and does not collect, use or disclose for any other purpose.” “Journalistic” is not defined in PIPEDA, nor has the term, in that context, been interpreted in reported case law; however, the Federal Court, in T(A) v Globe24h.com, accepted as a “reasonable framework” the following criteria:

[A]n activity should qualify as journalism only where its purpose is to (1) inform the community on issues the community values, (2) it involves an element of original production, and (3) it involves a “self-conscious discipline calculated to provide an accurate and fair description of facts, opinion and debate at play within a situation.”

In effect, had Mr. González found himself in the same predicament in Canada as he had in Spain, PIPEDA likely would have been ineffective given the journalistic exception defined above, and given that the material was contained within an unfortunate but otherwise legitimate news article.

Secondly, PIPEDA can only exercise limited jurisdiction on extraterritorial organizations and, by association, domain servers; the Federal Court confirmed that the test for the OPC to use PIPEDA to exercise extraterritorial jurisdiction is whether there is a real and substantial connection between the subject matter and Canada. This will not always be a difficult burden to overcome, but it must be read with the journalistic limitation imposed by PIPEDA itself. Conversely, the Right to be Forgotten would eliminate this dilemma entirely by ensuring that a search from anywhere within Canada would not return the result in question, even if it lacked a real and substantial connection to this country and even if an extraterritorial server, such as <www.google.com>, was the conduit by which the material was accessed.

Nonetheless, Globe24h.com provides an interesting case study as to how PIPEDA can be used to prevent the dissemination of personal information on extraterritorial servers. In that decision, the unnamed applicant brought a complaint to the OPC, alleging that the Romanian website <www.Globe24h.com> was republishing Canadian court and tribunal

37 Ibid, s 4(2)(c).
38 T(A) v Globe24h.com, 2017 FC 114 at para 68, 407 DLR (4th) 733 [Globe24h.com].
39 Ibid at paras 48-64.
decisions. On its face, there is no issue with making otherwise public documents available on a different server; however, the Romanian website was searchable by online search engines, whereas the original host websites for the decisions (for example, <www.CanLII.org>) were not. The non-searchable nature of these legal databases is a deliberate part of the Canadian judicial system. As a result, the Romanian website “make[s] available Canadian court and tribunal decisions through search engines that allow the sensitive personal information of individuals to be found by happenstance”, coupled with the fact that it contained an option for individuals to have the court decisions removed from the foreign server for a fee. The Federal Court found that <www.Globe24h.com> had acted in violation of PIPEDA because its central purpose was the collection and dissemination of information, and the website was thus ordered to “remove all Canadian court and tribunal decisions containing personal information from Globe24h.com and take the necessary steps to remove these decisions from search engine caches”.

Has Globe24h.com subtly altered the nature of PIPEDA to make it more closely resemble the Right to be Forgotten? This is a case where the OPC successfully removed factual but harmful (from a reputational perspective) personal information from an online source but, importantly, that is not what the Right to be Forgotten does. In this case, <www.Globe24h.com> was not acting in a way that could be described as journalistic, and had a purpose that actually “undermin[ed] the administration of justice by potentially causing harm to participants in the justice system”. Moreover, the Right to be Forgotten explicitly does not remove content from websites, but rather ensures that certain pages are not returned in online search engines’ results. Globe24h.com had the opposite result, with the actual decisions removed from the server of <www.Globe24h.com> because of the inherent privacy breaches. While this

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40 Ibid at para 10.
41 Ibid.
42 Ibid at para 41.
43 Ibid at para 104.
44 Ibid at para 78.
decision is a useful illustration of public attitudes towards online privacy, it is quite distinct from the Right to be Forgotten.

The Right to be Forgotten, therefore, does not exist through any current legal mechanisms in Canada. This conclusion does not necessarily mean that it could, given that the Canadian legal landscape is distinct from that of the European Union; the principal impediments are the limitations generated by the Charter, and the unique nature of search engines, which direct traffic to third-party content, rather than being involved in the production and publication of material.

5. CANADIAN CHALLENGES

a. Charter Issues

Conceptually, using the word “right” when discussing the Right to be Forgotten is not helpful, given that the Charter does not explicitly guarantee a right to privacy. Nor would such a provision, on its own, be sufficient to ensure the creation of the Right to be Forgotten, given that online search engines are not connected to a government body and would therefore not fall within the ambit of the Charter’s burden. While the Supreme Court of Canada has, in interpreting section 8, confirmed that an invasion of a reasonable expectation of privacy constitutes a search, even going so far as to extend the protection of section 8 to IP addresses and informational privacy and to confirm that privacy legislation enjoys quasi-constitutional status, it is important to note that privacy is a negative right; Parliament is under no constitutional obligation to ensure citizens have unfettered personal privacy. Despite Charter developments in the protection of privacy, and despite the fact that Canadian common law is increasingly recognizing individual privacy as a means to “protecting one’s physical and moral autonomy” as a matter of public policy, any such right to privacy exists merely

45 Charter, supra note 8, s 32.
48 Dube, supra note 4 at para 59.
49 Ibid.
to prevent intrusion by government bodies. As a result, an individual upset over a personal listing on an online search engine has not been deprived of any defined Charter right, and faces a lack of standing to assert any such claim in court.50

Contrastingly, one must be cognizant of the Charter's competing right enshrined in section 2(b). Freedom of expression is one of the hallmarks of the Charter, and a fiercely protected right in Canada. According to Cory J. in Edmonton Journal v Alberta (Attorney General):

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. [...] It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.51

None of the Charter impediments in asserting a Right to be Forgotten are present when one considers section 2(b). Should a legislative change or court decision demand that a search engine provide users with the opportunity to seek the removal of unwanted links, it is clear that the website’s Charter rights have been infringed, and there is likewise standing to seek a remedy under section 24(1). Moreover, there is an equally valid argument that the rights of not only the search provider, but also the third-party website, have been infringed; according to Van Hoboken, “[t]he protected interests of information providers under the right to freedom of expression can be best understood as the freedom to be included in the search engine’s index and to find their way to an audience”.52

Of course, no Charter right is absolute; infringements of section 2(b) of the Charter have been permitted in cases of propagating hate speech53 and obscenity,54

50 Supra note 8, s 24(1)
and in the aforementioned Protecting Canadians Against Online Crime Act. However, these exceptions are necessarily rare. According to Wolf, “the ‘European view’ of Internet privacy reflects societal notions of decency; its primary emphasis is not on freedom of speech, but rather the protection of human dignity”—a distinction that played no small part in the original formulation of the Right to be Forgotten. Thus, whereas the right to privacy is much more explicit in the European context, through human rights legislation and the Data Protective Directive, the Charter issue poses a formidable legal challenge to establishing a similar Right to be Forgotten in Canada—not to mention the normative quandary of whether a right as fundamental as freedom of expression should be capable of being limited, even in the interest of privacy.

b. Hyperlinks and Publishing

The other unique challenge in Canada is that courts have made a careful distinction between a website hosting material and a website directing traffic to those other websites (i.e. a search engine). Until recently, the Supreme Court of Canada’s decision in the defamation case Crookes v Newton was the most useful analytical tool in the present issue, because the Court considered whether a website that linked to allegedly defamatory material via a hyperlink could ultimately be liable for publishing the third-party material. Writing for the majority, Justice Abella stated:

A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting control over the content. Communicating something is very different from merely communicating that something exists or where it exists. [...] Although the person selecting the content to which he or she wants to link might facilitate the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the

55 Online Crime Act, supra note 6. Note that such a constitutional challenge has not, to date, been launched against this Act.
The Supreme Court stated that linking to other webpages, and even expanding the audience and facilitating the communication of such third-party information, is not the same as publication because of the lack of control on the part of the link-hosting search engine. Conversely, in *Google Spain* a significant portion of the decision rested on the fact that the search engine, which was likewise not responsible for generating the content in question, was found to satisfy the *Data Protection Directive* definition of "controller".

A 2017 decision of the Supreme Court of Canada, *Google Inc v Equustek Solutions Inc*, effectively increased the onus on search engines to be responsible for the content they publish, without going as far as the CJEU in *Google Spain*. In *Equustek*, the Court upheld a worldwide interlocutory injunction that prohibited the online indexing of Datalink web pages which the company was using to illegally sell the intellectual property of Equustek Solutions Inc., a British Columbia technology company. The effect, therefore, was restricting the results a search engine would return. As in the CJEU decision, Google resisted the Court’s intervention into what it could and could not provide users in its indexing system. The Supreme Court dismissed the search engine’s appeal; however, whereas in *Crookes* the Court took the stance that hyperlinking was not the same as publication, in this decision Justice Abella wrote that “Google is how Datalink has been able to continue harming Equustek in defiance of several court orders” and concluded that such a reality “make[s] Google the determinative player in allowing the harm to occur”. The *Crookes* decision was not referenced in *Equustek*.

In the span of six years, the Supreme Court of Canada went from the position that hyperlinks were content-neutral to the position that search engines, whose core responsibility is to present a user with a choice of hyperlinks, do in fact have a responsibility when the links cause discernable harm. The parallels

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58 Ibid at paras 26-29 (emphasis in original).
59 Supra note 10 at para 41.
60 *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, 279 ACWS (3d) 822 [Equustek].
61 Ibid at paras 52-53.
with the Right to be Forgotten should not be ignored, but should not be exaggerated, either. The exact contours of that responsibility were limited by the Court; Google was found to be under no obligation to proactively "monitor content on the Internet", the injunction was temporary (pending the conclusion of the intellectual property litigation), and the injunction was precipitated on Datalink preserving online content that was in breach of an existing court order, as opposed to a concern for reputation or privacy. The Supreme Court of Canada’s most significant finding, for the purposes of this discussion, was that an online search engine indexing harmful content is not itself liable for that content. Thus, the CJEU and the Supreme Court of Canada still diverge in opinion on the amount of control search engines actually exert for the information that is shared on its search results, and this divergence is a material one; in effect, not only must a legal attempt to have content removed from a search engine’s database contend with the Charter protection of free expression, it must also grapple with the fact that binding Canadian law continues to distance search engines from the material to which they link, to the extent that they cannot realistically be found to be liable or to have an ongoing responsibility to online users.

In a previous section, this paper briefly discussed provincial privacy legislation that makes it an offense to publish private information “without a claim of right”. In Crookes, Abella J. clearly stated that “a hyperlink, by itself, is content-neutral—it expresses no opinion, nor does it have any control over, the content to which it refers”. In Equustek, that specific conclusion did not change; Justice Abella wrote that an injunction to remove copyright-infringing links from its search results did not equate with a requirement for “Google to monitor content on the Internet, nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites”. The Court appears to be clear

62 Ibid at para 49.
63 Ibid at para 53.
64 Freedom of expression was discussed and dismissed in Equustek, ibid at para 48: “We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods”. Had freedom of expression been a relevant factor, the balancing (and perhaps the conclusion) would have been different.
65 Supra note 33.
66 Crookes, supra note 57 at para 30.
67 Equustek, supra note 60 at para 49.
in stating that were there an otherwise actionable breach for an invasion of privacy on a website, the action under existing privacy legislation would be solely against the hosting website, not the search engine that directs online traffic in that direction.

6. RESPONDING TO THE CHALLENGES

In a 1996 manifesto promoting the self-governance of the Internet, the aptly named *A Declaration of the Independence of Cyberspace*, Barlow wrote: "We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."68 In the past two decades, however, the number of people and organizations relying on the Internet as a principle means of communication has increased rapidly, such that legislators are required to regulate technologies as they emerge. Access to transparent and complete information is, on its face, a laudable goal for the Internet. However, this can come at the cost of people's reputations, relationships, career goals, and dignity—which is why the Right to be Forgotten is gaining momentum around the world.

Were that momentum to continue in Canada, however, a Canadian Right to be Forgotten is not going to be achieved in the courtroom—at least not initially. Absent an existing tort, the most viable claim for an individual would be via PIPEDA; however, given that the private information is contained within the linked webpage (and not on the search engine website), a complaint to the OPC against a search engine would likely be dismissed as the law currently stands, particularly if the private information is contained on a website that meets a legitimate exception per section 4(2)(c) of PIPEDA.

Nonetheless, this paper has demonstrated that the protection of privacy is a growing value in Canadian society, all the more so given the prevalence of the Internet and the ease of accessing information on online search engines. Indeed, this year alone has seen a number of judicial decisions rendered in Canada that

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have carved away at the autonomy of an unfettered Internet in the interest of protecting personal privacy: *Doneg* confirmed, in the context of the Internet and personal data, that privacy enjoys a quasi-constitutional status; *Globe24h.com* confirmed that when search engines have access to private information, it can cause reputational harm for which removal is a viable remedy (noting that the offender, in that case, was the hosting website itself, and not the search engine); and *Equustek* provided the court with a clear precedent for its ability to have a search engine de-index online content (notwithstanding the fact that the case was not connected to privacy, nor was freedom of expression engaged). None of these decisions created a Canadian Right to be Forgotten; however, significant legal change rarely occurs in a vacuum, such that these developments may end up being indicative of a public policy trend that will only truly become evident in retrospect.

With proper lobbying, Parliament is perfectly equipped to amend *PIPEDA*, or to introduce new legislation to reflect this trend, and indeed has the language of *Google Spain* to aid in its formulation of the law. In particular, if the material contained in a linked page is “inadequate, irrelevant or no longer relevant”, there could conceivably be a distinct complaint mechanism for the OPC to investigate and, if it deemed the complaint valid, to order the removal of the link from the search provider. Putting the administrative burden on the OPC in this way, as opposed to the search provider, instills a degree of legitimacy potentially absent in the European model, given that internal search engine review panels are not necessarily comprised of privacy experts. In addition, a reasonable apprehension of bias is more likely to be present when the party reviewing a Right to be Forgotten request is the same party with an interest in having more information available. Nonetheless, such a legislative change would almost certainly be challenged on *Charter* grounds, which is the crux of this issue, given the importance afforded to freedom of expression in Canada.

Balancing a Right to be Forgotten with the *Charter* is no small task in a country where free expression is so fundamental. Nor it is the intention of this paper, even when making a case for privacy protection, to diminish the value of

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69 Supra note 10 at para 94.
free expression online. However, given the increasing value placed on informational privacy and the sheer volume of users who rely on search engines as a primary means of information, one should not dismiss the issue, or fail to see a potential compromise. Indeed, the fact that material would be removed from search engines’ indexes but not from the Internet itself with a government-created Right to be Forgotten, and the fact that precise drafting would ensure only a very specific subsection of links would actually be susceptible to removal, it is quite possible that lawmakers could successfully strike a balance between the protection of privacy and the open, unrestricted nature of the Internet.

The European Right to be Forgotten is, of course, still in its infancy, and promises to provide a comprehensive case study on the intersection of free expression and privacy. As more research becomes available, both on the utility of the Right to be Forgotten and the demand for such in domestic Canadian law, one can expect the debate to become increasingly nuanced, stemming from the considerations elaborated on in this paper.