

# The Right to Privacy in the Private Sector: What is at Stake for Historians and Historical Research

During the past year, numerous events have focused public attention on the right to privacy. Editorials and headlines have paid considerable attention to a Supreme court ruling limiting the right to photograph individuals in public places, and to a lengthy legal battle between author Pierre Turgeon and the heirs of a prominent Quebec businessman over the deceased's right to privacy. On another front, Industry Canada and the Quebec Department of Relations with Citizens and Immigration both embarked on a process of public consultation before introducing new legislation to regulate the protection of personal information in the private sector.

These events are of considerable concern to Quebec historians who, because of their government's pioneering efforts to protect privacy in the private sector, have learned to their dismay that measures intended to protect privacy can have unexpected and detrimental effects on historical practice. Their experience in this matter may be of some use to historians elsewhere in Canada who will soon face privacy legislation in the private sector.

## The Current Legislative Framework

Since the early 1980s, federal and provincial governments have enacted legislation intended to enhance public accountability by providing access to information. At the same time, many jurisdictions established measures intended to protect the privacy of individual citizens by regulating the collection, the use and the disclosure of personal information. Designed without concern for their impact on archival holdings or historical research, their early legislation was the object of sustained criticism by historians both in Québec and Canada. Through their efforts, some significant concessions were eventually achieved.<sup>{1}</sup> The recognition of both the legitimate concerns of researchers and the heritage value of archival holdings resulted in clauses limiting the right to privacy by permitting the disclosure of personal information without consent in certain circumstances.

While the protection of privacy in the public sector was being progressively reinforced, the private sector remained virtually unregulated until the early 1990s. Since that time the growth of information technologies, the ability of private enterprise and the state to amass vast personal data banks and the development of

electronic commerce on a global scale have generated more systematic attempts to protect privacy in the private sector.

Québec was the first Canadian province to legislate to protect privacy in the private sector with the *Loi de protection des renseignements personnels dans le secteur privé* in 1993. Intended to regulate the current practices of private enterprise (very broadly defined), the Québec privacy law had unintended effects on historical research because it impeded the development of access to archival holdings. Furthermore, sectors of the law explicitly prohibited the disclosure of personal information (also very broadly defined) to third parties without the consent of the individual involved, except with the approval of the Access to Information Commission and only on condition that confidentiality be guaranteed.

The extensive revision of the Quebec Civil Code in 1994 further strengthened the protection of privacy in the private sector by regulating the behaviour of individuals and organizations not subject to existing legislation. Articles 35 to 40 of the new Code establish an extremely broad definition of privacy and of what constitutes invasion of privacy. Article 35 states that "every person has a right to the respect of his reputation and privacy. No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law". The right to privacy is thus transformed into an inheritance which may be transmitted to one's heirs and continue to flourish after death.<sup>{2}</sup>

The combined effects of the *Loi de protection des renseignements personnels dans le secteur privé* and the new Civil Code are potentially devastating to historical scholarship. Gaining access to personal information in most private sector archival holdings is made into an onerous task subject to lengthy bureaucratic procedures and the unhappy knowledge that the personal information acquired cannot be made public. Even in instances where a donor allows full access to his personal records or those of his ancestors, he cannot lawfully authorize the access to or disclosure of any third party personal information.

Fortunately, the *Loi sur les archives* spares private archival records from many of these restrictions if they are held by the Québec National Archives or other public archival services. In all other instances however - private archival services, the archives

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{1} For the concessions granted, see the federal *Privacy Act* as well as the relevant sections of Quebec's *Loi de protection des renseignements personnels dans le secteur privé* and *Loi des archives*. However, the resulting legislation is far from satisfactory, as Québec historians and archivists made abundantly clear in their presentations to the Cultural Affairs Committee of the Québec National Assembly in the fall of 1997.

{2} For a more extensive discussion of the protection of privacy in the Québec civil code and its impact on historical research, see "Le Code civil et le respect du droit à la vie privée", *La Presse*, February 3rd, 1998.

of companies and private institutions, personal holdings, museums local history societies, etc. - measures designed to protect privacy take precedence over access to the past.

## Recent Initiatives in Quebec

Last fall, the Québec government began a statutory five-year review of its access and privacy legislation. Québec historians and archivists used this opportunity to request a series of amendments to allow business to transfer documents containing personal information to a recognized archival service, to impose a time-limit on the requirement that consent be obtained prior to access to documents, and to permit the public disclosure of personal information for research purposes.

On June 11th, the provincial government tabled Bill 451 and with it a number of amendments responding to some of the concerns raised by historians and archivists. A number of important changes to the *Loi de protection des renseignements personnels dans le secteur privé* were announced; if adopted, these would permit businesses to provide third-party access to personal information, without requiring consent and without obtaining the approval of the Access to Information Commission. The unrestricted public disclosure of personal information would also be possible, provided 150 years had elapsed since the production of the document. While welcoming the recognition that the right to privacy is not eternal, the benchmark chosen is far from satisfactory. By maintaining the confidentiality rule for a vast quantity of the archival material created since 1848, most of the history of modern Québec will be impoverished. That is why the Institut d'histoire de l'Amérique française will again plead its case in a new round of public hearings scheduled for early September; a written brief will have to be prepared during the summer.

## In Ottawa

While Québec has been fine-tuning its privacy legislation, the federal government has been preparing its own proposal to protect privacy in the private sector. For a number of years, within the framework of the Uniform Law Conference of Canada, federal and provincial officials have been attempting to arrive at a coherent, harmonized legal framework, modelled on the Québec experience.<sup>{3}</sup> The pressure to enact federal privacy legislation has grown with recent developments in the field of electronic commerce. As a result, Industry Canada held public consultations last winter on the basis of a policy document entitled *The Protection of Personal Information: Building Canada's*

*Information Economy and Society*. A summary report outlining responses to the issues raised by Industry Canada was made public on June 19th, 1998; more substantive recommendations are expected shortly and legislation will be tabled in the fall.<sup>{4}</sup>

The federal proposal is of great concern<sup>{5}</sup> for a number of reasons: it was developed without consulting Canadian historians and archivists, and without any regard for its potential impact on Canada's cultural and heritage communities. Powerful lobbying efforts by privacy advocates raise fears that future legislation will restrict access to the private archival holdings (Manuscript groups) of the National Archives of Canada as well as other national heritage institutions and major economic institutions under federal jurisdiction. By preventing access to, and disclosure of, a wide range of personal information - from correspondence to photographs to administrative records - legislation would curtail rights which Canadian historians, writers and journalists already enjoy. Privacy will be protected, but at what cost?

## Conclusion

The rapid pace of developments in this area, the complexity of the legal issues and the very pragmatic, short-term concerns of politicians and policy makers no doubt explain why historians, archivists and representatives of cultural and heritage groups have been virtually absent from recent debates about privacy. Yet the issues at stake are of fundamental importance to all those who care about the preservation and promotion of our archival heritage, and the practice of history. It is essential that historians understand these issues if they hope to convince their fellow citizens that it is important to attempt to reconcile the competing claims of privacy and memory.

The Social Sciences and Humanities Federation of Canada has created an ad hoc committee to monitor the evolution of the new Federal privacy initiative and to respond to future legislation. We need your help! Please contact Joanne Burgess at [jburgess@cyberus.ca](mailto:jburgess@cyberus.ca) or at [burgess.joanne@uqam.ca](mailto:burgess.joanne@uqam.ca).

**Joanne Burgess**  
President, IHAF

{3} A discussion paper released by the New Brunswick Department of Justice in May of this year is part of this ongoing process; see *Privacy Discussion Paper 2*.

{4} The relevant federal documents can be consulted at Industry Canada's website: <http://strategis.gc.ca>.

{5} For a more detailed examination of these concerns, see the brief submitted by the Institut d'histoire de l'Amérique française in response to Industry Canada's consultation: <http://www.cam.org/~ihaf>.