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# Genealogy and the Law in Canada 2011

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## ***Genealogy and the Law in Canada***

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**Carolyn Croke, for getting me interested in genealogical concerns again, and Ruth Chernia, for keeping me interested**

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## Where the law intersects with genealogy:

- Who controls access to the information about a family that you or a patron is seeking?
- Who controls the information about a family tree that someone pulls together?

# Who controls the information in a family tree?

- **Who controls access to the information about a family that you or a patron is seeking?**
  - Privacy law
  - Personal data protection legislation
  - Access legislation
    - What about information in cemeteries?
      - Cemeteries legislation
    - What about health-related information?
  
- **Who controls the information about a family tree that someone pulls together?**
  - Personal data protection legislation for professional genealogists
  - Copyright
    - In genealogical software, in photographs, in church records, in vital statistics, in tombstones, in death notices and obituaries
  
- **What about preventing the spread of misinformation?**
  - Personal data protection legislation for professional genealogists
  - Copyright
  - Libel law

These questions cannot be answered simply by direct reference to the Canadian constitution:

- In 1867, when the Constitution Act, 1867 (former the British North America Act, 1867) was put together, **INFORMATION**, was not directly considered:
  - “copyright” was assigned to the federal government
  - But institutions like the public library remained firmly within provincial constitutional jurisdiction
- Later, in 1982, when the Canadian Charter of Rights and Freedoms was added to the Constitution, it is important to remember that the rights contained within it only relate to government action, not relationships between private parties (individuals and businesses, for example)...

**And, even in considering your relationships with government, under the Charter:**

**While s.2(b) enshrines “freedom of expression” – and this right has been judicially interpreted to include rights to access information,**

**There may be a tension between this right and another interest, *privacy*, which many people would like to claim is a value directly protected since 1982 under *Charter***

**Clearly, certain privacy interests are involved in the Charter protections:**

s. 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.

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

**→ However, “privacy,” per se, is not there...**

However, without doubt, government and the courts are taking privacy interests seriously:

The Supreme Court has stated in *Lavigne v. Canada* :

“...the Privacy Act [which, as we will see, is a personal data protection statute] has been characterized by this Court as ‘quasi-constitutional’ because of the role privacy plays in the preservation of a free and democratic society”

And in *R. v. Plant*, under s.8,

“In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s.8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.”

Who controls access to the information about family that a person is seeking?

Given this constitutional tension between access and privacy in Canada, what law specifically affects the access to information genealogists seek (or you seek on their behalf)?

→ Privacy law

→ Personal data protection legislation

→ Access legislation

## Privacy protection is best developed in Quebec

Quebec has a provincial statute which it has entitled the

### *Quebec Charter of Rights and Freedoms*

s.4 Every person has a right to the safeguard of his dignity, honour and reputation

s.5 Every person has a right to respect for his private life

s.9 Every person has a right to non-disclosure of confidential information

Some years ago, the Supreme Court of Canada rendered a decision on a case brought by a woman in Quebec whose unidentified photograph appeared in magazine published in Quebec:

**– Aubry v. Editions Vice Versa (1998)**

## Legislated Privacy Rights

A minority of the common law provinces have legislated a tort of invasion of privacy:

- Saskatchewan (1978)
- Manitoba (1987)
- Newfoundland (1990)
- British Columbia (1996)

Particularly in the first three cases, the statutes are limited to particular situations: surveillance, eavesdropping, and certain itemized commercial situations.

There do not seem to be cases directly related to genealogy decided under any of these statutes and few cases under any of them.

# How does **PRIVACY** relate to genealogy then?

- Since 1982 we have had increasing **PERSONAL DATA PROTECTION** legislation in this country – in the public sector
- Since 2004, most private sector organizations have also become subject to personal data protection legislation

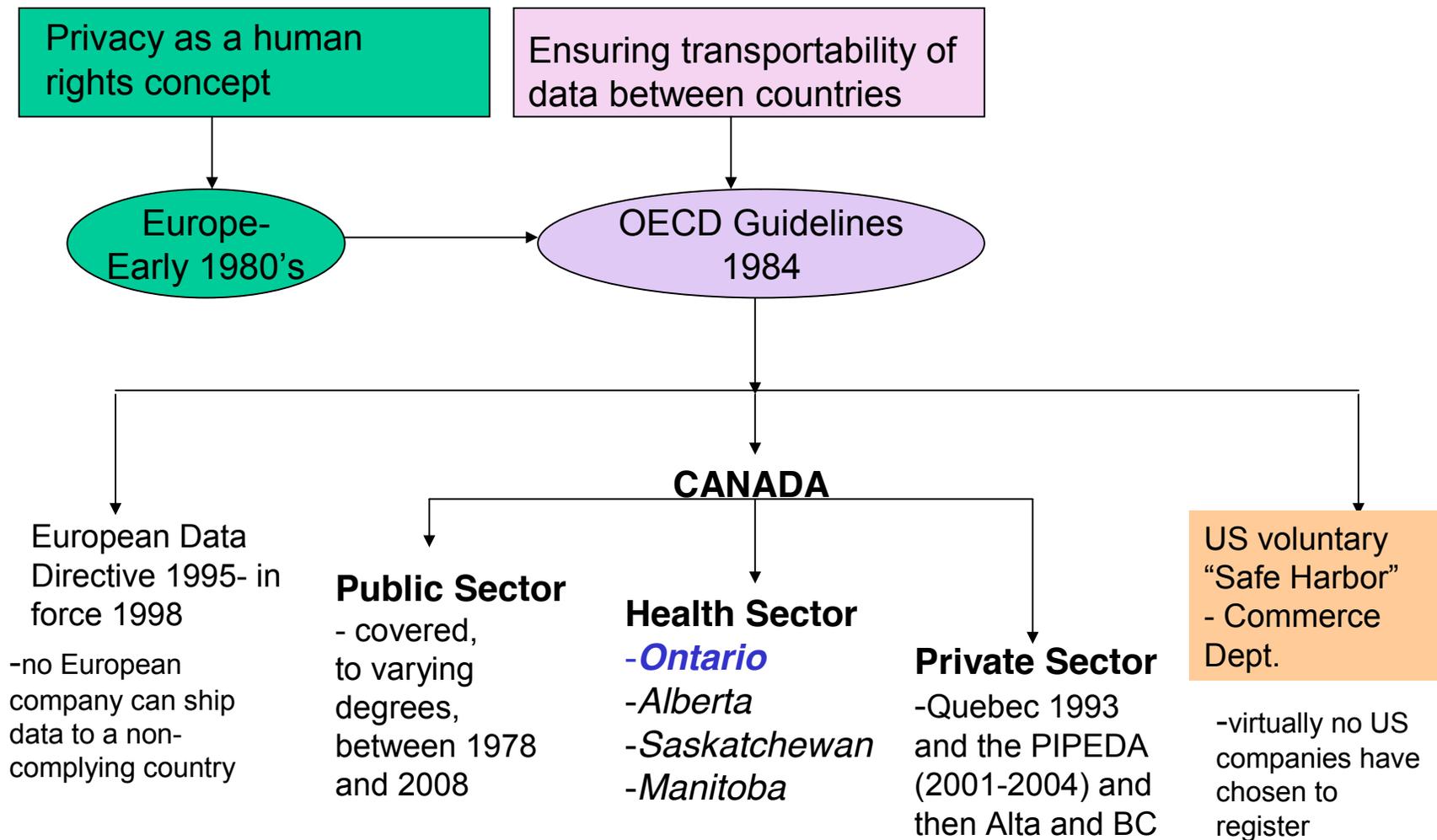
# What does personal data protection mean ?

- **Collection**
- **Use**
- **Dissemination**
- **Disposal**
- **The whole “life cycle” of personally identifiable information, in the hands of an organization subject to this law, is affected by personal data protection legislation...**

# What are these laws ?

- *federal **Privacy Act**; coupled to the **Access to Information Act***
- *Ontario's **Freedom of Information and Protection of Privacy Act***
- *Ontario's **Municipal Freedom of Information and Protection of Privacy Act***
- *personal data protection legislation for the public sector in other provinces and territories*
- *federal **Personal Information Protection and Electronic Documents Act [PIPEDA]** for the private sector*
- *Private sector personal data protection legislation in some provinces: Quebec, British Columbia and Alberta (otherwise PIPEDA)*
- *personal health information protection legislation [ **HIPA** ] in Ontario (and in some other provinces, but, other than in Ontario, it is in addition to PIPEDA requirements for organizations)*

# Evolution of Personal Data Protection



# Why does personal data protection affect genealogy?

- Under personal data protection legislation, only information about you is *your* data – information about other members of your family is *their* data
- Under personal data protection legislation, the general principle is that if organizations hold data about other people, including the members of your family, organizations must NOT release it to you.
- If, on the other hand, organizations hold information about you, those organizations must release it to you.

For example, in the private sector legislation, PIPEDA:

***“personal information” means any information about an identifiable individual, but does not include the name, title or business address of telephone number of any employee of an organization***

- *However, this particular legislation will not affect information you are gathering about individuals who have been dead more than 20 years...*
- *Or information gathered from records made over 100 years ago*
- *But each statute in Canada differs in these details...*

# How long must organizations keep personally identifiable information confidential ?

- **Federal Privacy Act** → 20 years after death – and then the information falls out of the Act
- **Ontario FOIPPA & MFOIPPA** → 30 years after death, out of Act
- **Alberta, Saskatchewan** → 25 years after death, accessible
- **British Columbia, Nova Scotia, PEI** → 20 years after death, accessible
- **Manitoba** → 10 years after death, accessible
- **New Brunswick** → Never accessible as of right, but always discretionary
- **PIPEDA (private sector)** → May disclose 20 yrs after individual's death, or, if shorter, 100 years after record made

# How does this affect genealogy work ?

→ **Government and private sources will refuse to give information about people living or recently deceased to anyone working on genealogy ...**

→ **If you are working on a genealogy for money, you yourself will have to comply with the federal private sector personal data protection legislation in your own handling of information you collect from any source about persons who are alive or recently deceased ...**

Why does a genealogist working on family histories as a hobby, not have to worry about her or his handling of information about living or recently dead people?

- ***PIPEDA s.4(2) This part does not apply to (b) any individual in respect of information that the individual collects, uses or discloses FOR PERSONAL or DOMESTIC PURPOSES and does not collect, use or disclose for any other purpose***
- ***PIPEDA s.4(2) This part does not apply to (c) any organization in respect of personal information that the organization collects, uses or discloses FOR JOURNALISTIC, ARTISTIC or LITERARY PURPOSES and does not collect, use or disclose for any other purpose.***

Can you stop someone else making information about your family members available?

***PIPEDA (if it is a private sector organization releasing the information, including a paid genealogist):***

***s.11 (1) [ You ] can file with the Commissioner a written complaint against an organization for contravening a provision of Division 1 or for not following a recommendation set out in Schedule 1.***

***(2) If the Commissioner is satisfied that there are reasonable grounds to investigate a matter under this Part, the Commissioner may initiate a complaint in respect of the matter.***

**After the time of protection has expired:**

**Government sources will give information about identifiable individuals**

**Because they are subject to the “flip-side” of personal data protection legislation in the public sector ---**

**Access legislation...**

**Which requires that any information held by government NOT explicitly required to be withheld be given to any one who requests it...**

But organizations in the private sector may not:

→ There is no access legislation, so after personal data protection ceases to apply, there is no access to a person's information by anyone by law – but nor is the information necessarily to be treated any particular way by an organization governed by PIPEDA – so it could be released, at the organization's option

- *Clause 4.9 of Schedule 1 to PIPEDA provides for the principle that an individual must be able to access personal data held by businesses covered by PIPEDA – but there is no provision for access to the information about that individual after death in either the Schedule or the Act itself, see s.8.*

But there is information people have always been able to get - and are still able to get - from government, about others - why?

**The public sector legislation specifically exempts from its coverage records that have traditionally been publicly available:**

**Thus your access to birth and death records that have always been publicly available to anyone is unaffected by the passage of all this new law since 1977...**

Accessing information:  
Hospital Records

→ **Provincial**

- Public Hospitals Act
- Common Law
- Provincial Health Information Acts
- PIPEDA

# How does COPYRIGHT affect genealogy?

- **Gaining access to information –  
cemeteries, tombstones, obituaries ...**
  
- **Using the information that has been  
gathered...**
  - **Distributing genealogical information...**
  - **Publishing genealogical information...**

## **Gaining access to information:**

- We have discussed the effect of personal data protection legislation on gaining access to information about identifiable individuals in genealogical research...**
- Personal data protection legislation will have a more limiting affect on access than will copyright...**

## Cemeteries are not necessarily open to the public in all provinces:

→ PIPEDA mitigates against public access to cemeteries owned by private operators and churches (Toronto's Mount Pleasant, London's St. Peter's) because of information about living or recently dead individuals on the stones and markers...

Public sector legislation would similarly tend to restrict access to municipal cemeteries ...

→ Cemeteries legislation in some provinces states that cemeteries are to be publicly accessible (Saskatchewan and, in certain hours, BC) – but not all provinces have this law

→ Ontario's current Cemeteries Act, and expected Funeral, Burial and Cremation Services Act, 2002, do not explicitly provide for a right of public access to cemeteries...

# What would happen in a challenge under PIPEDA?

## ***Cemeteries Act (Revised) RSO 1990 ch.C.4***

- ***S. 50(2) An owner of a cemetery or crematorium may make by-laws affecting the operation of the cemetery or crematorium.***
- ***s.50 (3) No by-law made by an owner is effective until it is filed with and approved by the Registrar.***
- ***s.50(5) An owner filing a by-law shall give such notice as is prescribed to such classes of persons as are prescribed.***
- ***s.50 (6) A by-law filed with the Registrar under this section shall be approved by the Registrar unless the approval is not in the public interest or the effect of the by-law is to give the owner an unreasonable or unfair competitive advantage over another supplier of cemetery services or supplies.***

# There can be copyright in tombstones and inscriptions...

- The tombstone itself can be a copyrighted work – as an original sculpture
- Or the inscription can be copyright as an original artistic work or literary work...
- The copyright will belong to the sculpture or the tombstone company (if the sculptor was employed) for the life of the sculptor plus 50 years – unless it was sold to the deceased's family or some other party...
- A photograph of the tombstone will be a reproduction of the tombstone and, unless taken strictly for fair dealing purposes, should not be taken without the permission of the copyright holder in the tombstone...
- Once taken, there is also copyright in the photograph of the tombstone, held by the photographer, unless commissioned...
- To publish or reproduce this, except for fair dealing, the permission of the copyright holder should be obtained...

Copying records for your OWN research (or on behalf of a patron engaged in her or his own research):

photocopying or digitally reproducing church records  
photocopying or digitally reproducing vital statistics records  
photographing or digitally reproducing tombstones  
photocopying or digitally reproducing obituaries

→ ***IF you can get access, you can copy --***

→ ***Supreme Court of Canada decision in CCH et al v. Law Society of Upper Canada***

- *Great Hall Library (and librarians) versus*
- *The legal publishers*
- *2004*
  
- *Agency established, on behalf of patron, relying on the patron's "fair dealing" rights to study and research, even in a paid service*

# When a genealogist shares research with others

-

→ **Canada's Copyright Act**

– “work” - “original work”- “substantial portions of works”

→ **Ideas and facts are not covered by copyright – but if you reproduce a chart containing those facts, there may be copyright in the chart (as a compilation of the facts)**

→ **But a chart will only be a copyrightable compilation if its arrangement of the facts is completely original**

– the arrangement of a telephone directory, for example, is not original and the directory is not in copyright

-- genealogy charts seem standard – no copyright

→ **In Canada, an insubstantial taking from a copyright work is not an infringement...**

## Genealogists sharing research with others -

### “Works” include

- **Software in computer programs**
  - All the genealogists to whom I have ever spoken use genealogy programs under license and therefore must abide by the terms of the license
- **Photographs**
  - Rights are owned by the photographer, except where the photo was commissioned – and then the commissioning party owns (Bill C-32 on Copyright, currently before Parliament, may change this those who commission will have special rights to use photographs but will not “own” them in any case – but Bill C-32 is not law yet )

## Genealogists sharing research with others -

**Right to publish**

**Right to reproduce**

**Right to telecommunicate to the public**

- **Posting a work to the internet is “authorizing” telecommunication and is therefore a right of the copyright holder – and not something the genealogist can do without permission if there is any copyright interest in the material in the posting which the genealogist did not create (the software generated charts the genealogist uses or the photographs embedded in the work, for example, would require permission of the copyright holders before posting)**

**From a typical license in a genealogy product:**

**“You ... agree that all Intellectual Property Rights in all material or content supplied... shall remain at all times vested in Us [the vendor]. You are permitted to use this website and the material contained therein only as expressly authorised by us.”**

**“You... agree that the material and content... is ... for your personal, non-commercial use only and that you may... download such material and content on to only one computer hard drive for such purpose. Any other use of the material and content ... is strictly prohibited.”**

## Continuing with a typical license:

**“You agree not to assist or facilitate any third party to copy, reproduce, transmit, publish, display, distribute, commercially exploit or create derivative works of such material and content... you shall not assist or facilitate any third party to systematically extract and/or re-utilise parts of the contents... or... any substantial parts...”**

**“ You may not create and/or publish your own database that features substantial parts of this Website.”**

## **Risks in violating a software agreement:**

- The software agreement usually includes terms covering the copyright interests of the vendor – but it also covers other agreements (such as the terms of access to updates and to online resources and so on)**
- Violating the terms of the agreement would put the genealogist at risk of either or both of the following claims in a lawsuit:**
  - Breach of contract**
  - Copyright and/or patent infringement**
- And violating the agreement can mean an end to access to an online product or to updates and so on from a vendor, who may also refuse to sell to the genealogist again if the opportunity arises...**

# Who controls the information in a person's family tree?

1. Greatest control perhaps held by the **vendor of the genealogy software!**
2. Almost complete control of unpublished information about living relatives and recently deceased relatives lies, in the case of the living, with **the relatives**, individually, and in the case of the recently deceased, with their legal representatives, if that information is held by organizations anywhere in Canada.
3. Anyone can **access information in copyrighted records, but use of them is limited to research work**: no one can copy works created by others and redistribute those works without the copyright holders' permission – whether those works were created in Canada or elsewhere.
4. **As an individual in Canada, you control** in Canada:
  - Information about yourself held by government organizations and private commercial organizations (other than the press);
  - Expressions of information that you have created (unless you have agreed to give up this copyright control somehow – for instance, in your software license for using a genealogy program); and
  - Access to information held by government bodies about those who have been dead long enough (including your relatives) and also any government-held information that was public before personal data protection laws came into effect.

# What about preventing the spread of misinformation?

## Personal data protection legislation for professional genealogists

Where a genealogist is covered by this law because the work is being done as a commercial activity, the person who is the subject of the information is entitled to control the genealogist's dealings with it.

## Copyright

Where the information is being disseminated in a work which is in copyright, the holder of the right involved is entitled to control the spread of that work.

## Libel law

You cannot libel the dead – but, in speaking of a deceased person, you must be careful not to be publishing an untruth about a living person which damages her or his reputation or you could be sued successfully for libel...

# *Written by me on these matters:*

1. **Genealogy and the Law in Canada.** Genealogist's Reference Shelf Series. Toronto: Dundurn Press, with the Ontario Genealogical Society, 2010.
2. In the **Families** magazine published by the Ontario Genealogical Society:

**Legal Matters Related to Genealogy: Part 1: Privacy and Personal Data Protection for Genealogy**

(February 2007) 46(1) *Families* 14-17

**Legal Matters Related to Genealogy: Part 2: About the Business of Genealogy**

(May 2007) 46(2) *Families* 21-26

**Legal Matters Related to Genealogy: Part 3: Cemeteries as Information Sources**

(August 2007) 46(3) *Families* 26-33

**Legal Matters Related to Genealogy: Part 4: Copyright in Genealogy**

(November 2007) 46(4) *Families* 21-28