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Tracing Forward and the Law: Navigating Privacy and Access Rules

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**Tracing Forward
Workshop**

Toronto, Saturday
October 26, 2013.



**TRACING FORWARD AND THE LAW:
NAVIGATING PRIVACY AND ACCESS
RULES**

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WITH THANKS TO LAW STUDENT KEN FARRELL

WHERE THE LAW INTERSECTS WITH GENEALOGY:

- Who controls access to the information that you are seeking about a family or individual?
- Who controls the information about a family tree that you pull together?

WHO CONTROLS THE INFORMATION IN A FAMILY TREE?

- Who controls access to the information about a family or individual that you are 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 IN A FAMILY TREE?

- Who controls the information about a family tree that you pull 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* (formerly 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, for example, remained firmly within provincial constitutional jurisdiction
- Later, in 1982, the *Canadian Charter of Rights and Freedoms* was added to the Constitution, but it is important to remember that the rights contained within it only relate to government action, not relationships between private parties (ie., not between 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*.

However, though 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.

“privacy,” per se, is not there...

HOWEVER, WITHOUT DOUBT, GOVERNMENT AND THE COURTS ARE TAKING PRIVACY INTERESTS SERIOUSLY:

The Supreme Court has stated some time ago 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*, considering s.8 of the Charter, and protection from government intervention, the Supreme Court said:

“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.”

NONETHELESS, “PRIVACY” PROTECTION (PROTECTION OF THE STATE OF BEING LEFT ALONE) IS, IN CANADA, 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.

AN IMPORTANT DEVELOPMENT IN THE COMMON LAW: THE ONTARIO COURT OF APPEAL, IN MARCH 2011...

- A new legal action for “intrusion upon seclusion”
- There will be liability where someone
 - (1) intentionally (including recklessly) intrudes, physically or otherwise,
 - (2) by invading, without lawful justification, the seclusion of another or his private affairs or concerns, and
 - (3) that invasion would be highly offensive to a reasonable person, causing distress, humiliation or anguish but not necessarily economic harm.

In this case, *Jones v Tsige*, the defendant Tsige, one bank employee, repeatedly accessed the bank records of another employee, the plaintiff Jones, as part of a personal feud.

Jones was awarded \$10,000 (but not costs).

WHO CONTROLS ACCESS TO THE INFORMATION THAT YOU ARE SEEKING ABOUT A FAMILY OR INDIVIDUAL?

The new tort of “intrusion upon seclusion” may limit the ways in which you can go about seeking information about others...

You must avoid intruding upon the seclusion others enjoy...

Note, however, that just this past July (2013), a British Columbia court again refused to accept a common law action for protection of privacy (*Avi v Insurance Corporation of BC*) and we will return to the Ontario Court of Appeal decision in *Jones v Tsige* in a moment...

BUT IN ADDITION TO AVOIDING INTRUDING UPON SECLUSION...

- Your access to information about others held by organizations is limited because...
- Since 1977 we have had increasing PERSONAL DATA PROTECTION legislation in this country – beginning in the public sector...
- Especially since 2004, most private sector organizations in Canada 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...

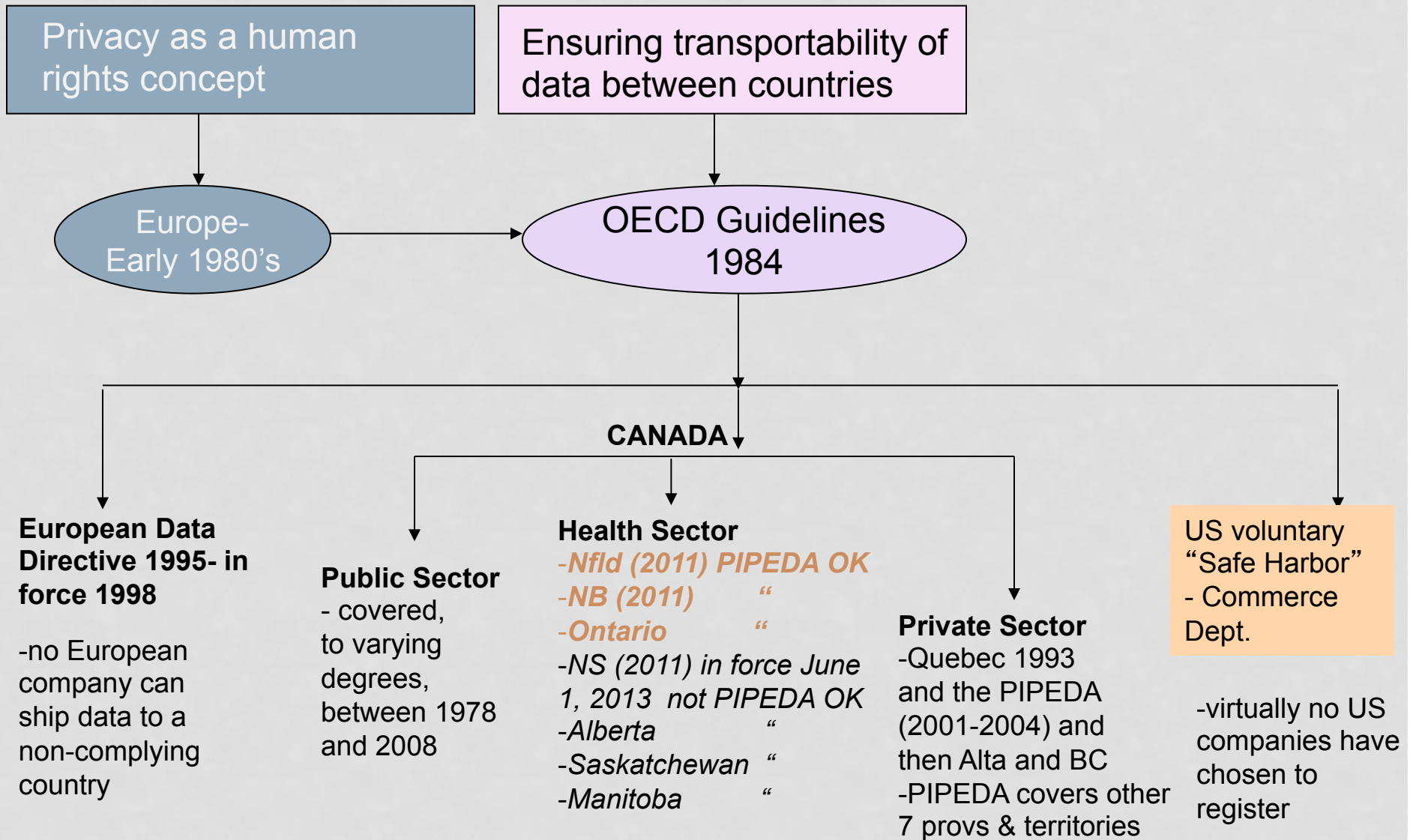
WHY DOES PERSONAL DATA PROTECTION AFFECT GENEALOGY?

- 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.

NOW MANY PERSONAL DATA PROTECTION REGIMES IN CANADA REGULATE VARIOUS ORGANIZATIONS HOLDING INFORMATION ABOUT INDIVIDUALS:

- *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 covering public and private sector health organizations in Ontario, Newfoundland, New Brunswick (in all 3 it replaces PIPEDA for the private sector health organizations) and Alberta, Manitoba, Saskatchewan and Nova Scotia (where it, for the private sector, it is in addition to PIPEDA requirements).*

Evolution of Personal Data Protection



HOW MATTERS OF PRIVACY AND PERSONAL DATA PROTECTION RELATE IS NOT ALWAYS CLEAR – EVEN TO COURTS...

In 2005, not long after PIPEDA came into effect, the Federal Court of Appeal decided, in a music copyright case (**BMG v John Doe**), that principles of privacy were the applicable law to apply, not the new personal data protection statute PIPEDA.

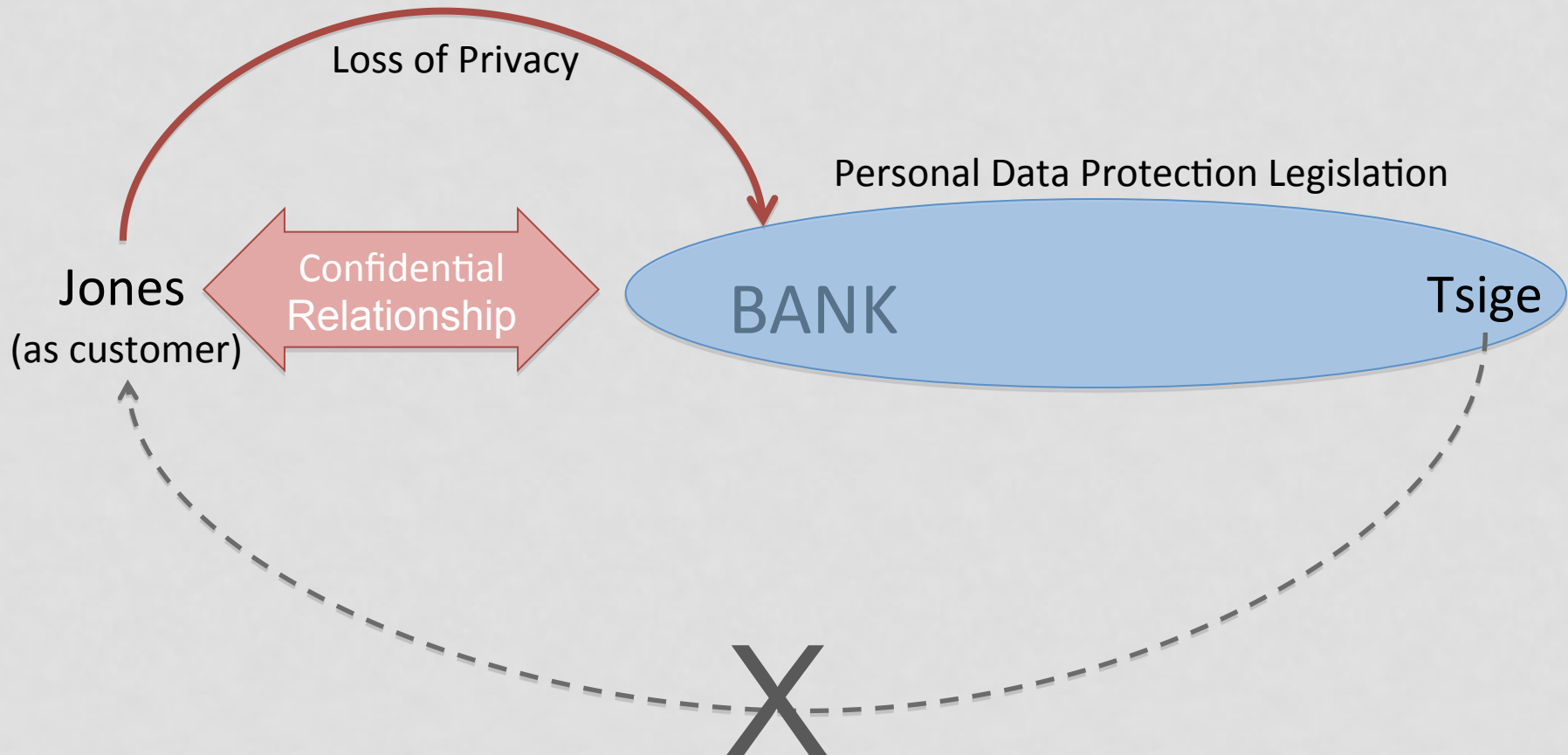
In a published piece, “Battleground between New and Old Orders: Control conflicts between copyright and personal data protection, ” I argue this case was wrongly decided in this respect.

Now, in **Jones v Tsige**, as introduced earlier today, Justice Sharpe, for the Ontario Court of Appeal , has declared a tort of “**intrusion upon seclusion**” on facts which created a situation already completely dealt with by **PIPEDA**, based upon the confidentiality which exists between a bank and its customers (a relationship of confidence made explicit in the federal *Bank Act*)...

IS THERE REALLY A NEW PRIVACY PROTECTION AT COMMON LAW FOR “INTRUSION UPON SECLUSION”?

JONES V TSIGE (OCA, 2012) ON THE FACTS

- AS DIAGRAMED BY WILKINSON IN CHAPTER “THE CONFIDENTIALITY OF SECLUSION: STUDYING INFORMATION FLOWS TO TEST INTELLECTUAL PROPERTY PARADIGMS”



SINCE EACH IS LEGISLATED BY A DIFFERENT ELECTED BODY, EACH STATUTE IS UNIQUE -- 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 or 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
 - *20 years after death, accessible (2011) or if document is over 100*
- *PIPEDA (private sector)*
 - *May disclose 20 yrs after individual's death, or, if shorter, 100 years after record made*
 - *120 years after record created or 50 years after death*

Eg. PHIA Nfld (2011)

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 in Ontario, you yourself will have to comply with the federal private sector personal data protection legislation (PIPEDA) 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.*

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 ---

which is Access legislation ---

legislation that 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* required by law – but nor is the information necessarily to be treated in 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?

Public sector personal data protection legislation and other laws specifically exempt from coverage various records that have traditionally been publicly available.

For example, 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...

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 personal data protection 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 Cemeteries Act is no longer in force: and the much awaited Funeral, Burial and Cremation Services Act, 2002, (in force since July 1, 2012) does not explicitly provide for a right of public access to cemeteries...

WHAT WOULD HAPPEN IN A CHALLENGE UNDER PIPEDA?

s.5(3)(c) of Ontario's newly in force *Funeral, Burial and Cremation Services Act* creates a duty for the operator of a cemetery to ensure that

“every person has reasonable access to a lot or scattering ground at any time except as prohibited by the cemetery by-laws.”

A Regulation to the new Act (Ontario Regulation 30/11), in s.110, requires a cemetery operator to maintain a register available for inspection by the public with the same information in it as was required under the old Ontario *Cemeteries Act*.

The new Act has a confidentiality provision (s.106) requiring persons who obtain information through their powers or duties under the Act or regulations to preserve secrecy.

ONTARIO'S INFORMATION AND PRIVACY COMMISSIONER ORDER PO-2807, JULY 2009

An “heir tracing company” seeking information about a deceased person and her spouse from the Ontario Office of the Public Guardian and Trustee [OPGT]

OPGT provided some information but withheld other; company complained to the Commissioner's Office -

- Decision:
 - No disclosure of deceased's SIN number;
 - No disclosure of value of estate;
 - No disclosure of spouse's racial or ethnic origin;
 - There is an unwritten presumption that there is a diminished privacy interest after death and this favoured releasing the deceased's place of death and date of burial;
 - There is presumption of benefit to unknown heirs which favours disclosure of information about individuals who have or may have a family connection to the deceased;
 - Disclosure of information about others with non-family connections to the deceased would be unjustified.

AND IN NOVA SCOTIA, A PERSONAL GENEALOGICAL REQUEST -

- Nova Scotia FOIPOP Report of Review Officer FI-09-52 January 2012
 - Africville descendent (area of Halifax) asked Halifax Regional Municipality for information about lands and deeds in the names of relatives held between 1940 and 1969 and for information about the Africville expropriation which took place
 - The government tried to claim solicitor-client privilege - which was rejected – and the relatives were deceased more than 20 years so no personal data protection bar – descendent was able to access the information requested.

MARCH 5, 2012 ONTARIO INFORMATION AND PRIVACY COMMISSIONER' S ORDER
PO-3060 (LIKE PO- 2998 SEPT 2011 “COMMERCIAL HEIR TRACER” TRYING TO
ACCESS MARRIAGE REGISTRATION; AND SEE PO-2877, PO-2979, AND PO-2802-I)

- The Ministry of Government Services would not give access to certain marriage and death records requested by a “commercial heir tracer” because of the privacy provisions in the *Freedom of Information and Protection of Privacy Act*;
- Only files where no heirs were identified (from probate records or otherwise) were at issue;
- The Commissioner ordered parts of death records released and all of marriage records –
- based on weighing sensitivity of information, expectation of confidentiality, diminished privacy interest after death, identity theft, benefits to unknown heirs...

INDIVIDUAL DECISIONS ON EACH RECORD IN PO-3060, BASED ON THE INFORMATION IN IT – NOT DECISIONS ON CLASSES OF DOCUMENTS...

Ministry to disclose

- On the Statement of Marriage under examination
 - Witnesses' signatures and addresses
- On at least one of the 4 Death Certificates under examination-
 - Dates of birth and place of birth
 - Place of death
 - Spouses' last names
 - Usual residences of the deceased

Ministry NOT to disclose

- On at least one of the 4 Death Certificates under examination-
 - Names, relationship to the deceased, signature and address of the informants

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.

ACCESSING INFORMATION:

HOSPITAL RECORDS

Health is a provincial matter constitutionally;

Relevant legislation includes -

- Public Hospitals Acts
- Provincial Health Information Acts (where passed)
- PIPEDA (except where provincial legislation has been deemed equivalent)
- Provincial or territorial public sector personal data protection and access legislation where no specific health information legislation has been passed

And, even where there is no applicable statutes, there can be Common Law precedents (except in Quebec).

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...

THANK YOU!

Genealogy and the Law in Canada.

Genealogist's Reference Shelf Series.

Dundurn Press, with the Ontario Genealogical Society, **2010.**

