

3-15-2022

## Canadian Privacy Law and the Post-War Freedom of Information Paradigm

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### Source Publication:

González, G., Van Brakel, R., & De Hert, P. (Eds.). (2022). *Research Handbook on Privacy and Data Protection Law*. Cheltenham, UK: Edward Elgar Publishing.

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### Repository Citation

Penney, Jonathon W., "Canadian Privacy Law and the Post-War Freedom of Information Paradigm" (2022). *Articles & Book Chapters*. 3084.

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## 5. Canadian privacy law and the post-war freedom of information paradigm

*Jonathon W. Penney*

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### I. INTRODUCTION

A widely held assumption among lawyers and scholars is that technology drive changes in privacy and data protection laws. This is not surprising. As Colin Bennett and Charles Raab note, the ‘task’ of the ‘privacy policy community’ has always involved addressing new technologies:

It has become trite to observe that information and communication technologies are being innovated and applied with astonishing speed and creativity. The task of the privacy policy community has always been to comprehend these emerging technologies, to study their impact on privacy and to formulate appropriate responses whether regulatory, political, or technological.<sup>1</sup>

Similarly, Canadian lawyer R.L. David Hughes writes:

Perhaps more than any other single issue, the way in which judges and lawmakers respond to the privacy challenges brought about by the evolution of technology will determine the values and the type of society in which our children will grow up. Thus, as Justice Moldaver has recognized, the task of updating our privacy laws is truly a profoundly important one.<sup>2</sup>

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<sup>1</sup> Colin Bennett and Charles Raab, *Governance of Privacy: Policy Instruments in Global Perspective* (Ashgate 2003) 4.

<sup>2</sup> R.L. David Hughes, ‘Two Concepts of Privacy’ (2015) 31 *Computer L Security Rev* 527, 528.

This common assumption is actually quite pervasive,<sup>3</sup> and not just limited to privacy lawyers and experts in Canada.<sup>4</sup> And, as Lisa Austin has noted, this assumption is neither new nor novel.<sup>5</sup> This overemphasis on technology and its impact on privacy and data protection law has neglected other important factors, ideas, and norms. Moreover, as Bennett and Raab note, privacy scholarship remains largely ‘ahistorical’ and the field would be ‘enriched’ by new historical treatments relevant to privacy issues and risks today and tomorrow.<sup>6</sup> On this count, despite the fact that privacy and access to information are often seen as inextricably linked legislatively,<sup>7</sup> no work has specifically examined the impact that ideas and norms associated with information access—that is, freedom of information and the free flow of data so common in the decades after the Second World War—have had on Canada’s privacy laws historically.<sup>8</sup>

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<sup>3</sup> For just a few examples among Canadian legal scholars, see: Ronald J. Krotoszynski, *Privacy Revisited: A Global Perspective on the Right to Be Left Alone* (OUP 2016) 64; Paul D.M. Holden, ‘Flying Robots and Privacy in Canada’ (2016) 14 *CJLT* 65, 66; Graham Mayeda, ‘My Neighbour’s Kid Just Bought a Drone . . . New Paradigms for Privacy Law in Canada’ (2015) 35 *NJCL* 59, 65–68; Tamir Israel, ‘Foreign Intelligence in an Inter-Networked World’ in Michael Geist (ed) *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (University of Ottawa Press 2015) 73; Craig Forcese, ‘Law, Logarithms, and Liberties: Legal Issues Arising From CSE’s Metadata Activities’ in Michael Geist (ed) *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (University of Ottawa Press 2015) 137; Arthur J. Cockfield, ‘Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies’ (2007) 40 *UBCLR* 41; Avner Levin and Mary Jo Nicholson, ‘Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground’ (2005) 2:2 *UOLTJ* 357, 361; Lisa Austin, ‘Privacy and the Question of Technology’ (2003) 22:2 *Law & Philosophy* 119. Also, compare these two statements from the Canadian Privacy Commissioner almost 25 years apart: Privacy Commissioner of Canada, ‘Time to Break Out of Technological Trance, says Commissioner’ (Remarks by Privacy Commissioner of Canada regarding 10th Annual Report to Parliament, Ottawa, 13 July 1993) [https://www.priv.gc.ca/en/opc-news/news-and-announcements/archive/02\\_05\\_b\\_930713/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/archive/02_05_b_930713/) accessed 18 October 2021; Privacy Commissioner of Canada, ‘Statement’ (Remarks by Privacy Commissioner of Canada regarding 2015–2016 Annual Report to Parliament, Ottawa, 27 September 2016) [https://www.priv.gc.ca/en/opc-news/speeches/2016/s\\_d\\_20160927/](https://www.priv.gc.ca/en/opc-news/speeches/2016/s_d_20160927/) accessed 18 October 2021.

<sup>4</sup> See, e.g.: Rolf H Weber, ‘The Digital Future – A Challenge for Privacy?’ (2015) 31 *Computer L Security Rev* 234; Gehan Gunasekara, ‘Padding in Unison or Just Padding? International Trends in Reforming Information Privacy Law’ (2014) 22:2 *JLIT* 141; Theresa Payton and Ted Claypoole, *Privacy in the Age of Big Data: Recognizing Threats, Defending Your Rights, And Protecting Your Family* (Rowman & Littlefield 2014).

<sup>5</sup> Austin (n 3), 121–122.

<sup>6</sup> Bennett and Raab (n 1), 5; Lawrence Cappello, ‘Big Iron and the Small Government: On the History of Data Collection and Privacy in the United States’ (2017) 29:1 *Journal of Policy History* 177, 178–179. There are exceptions: See, e.g.: Colin J Bennett, ‘The Formation of a Canadian Privacy Policy: The Art and Craft of Lesson-drawing’ (1990) 33:4 *Canadian Public Administration* 551; Colin J. Bennett and David Lyon, *Playing the Identity Card: Surveillance, Security, and Identification in Global Perspective* (London 2008); David H. Flaherty, *Protecting Privacy in Surveillance Societies: The Federal Republic of Germany, Sweden, France, Canada, and the United States* (Chapel Hill 1989); David H Flaherty, ‘Reflections on Reform of the Federal Privacy Act’ (Publication of the Office of the Privacy Commissioner of Canada 2008) [https://www.priv.gc.ca/media/2044/pa\\_ref\\_df\\_e.pdf](https://www.priv.gc.ca/media/2044/pa_ref_df_e.pdf) accessed 18 October 2021. Other treatments offering historical perspective: Bennett and Raab, (n 1); David H. Flaherty, *Privacy and Government Data Banks* (Mansell 1979).

<sup>7</sup> Flaherty (2008) (n 6), 10–11.

<sup>8</sup> See Jonathon W. Penney, ‘Internet Access Rights: A Brief History and Intellectual Origins’ (2011) 28 *William Mitchell L Rev* 10, 21–24. See generally also: Jonathon W Penney, ‘The Cycles of Global Telecommunications Censorship and Surveillance’ (2015) 36:3 *U Pa J Int’l L* 693.

The chapter aims to fill that void through a case study examining how ideas and norms tied to a broader Post War paradigm impacted on Canada's most important early privacy laws. Beyond some privacy protections in the Canadian Charter of Right and Freedoms, the primary privacy and data protection laws in Canada are statutory.<sup>9</sup> This case study will examine three foundational such enactments: (1) the 1977 enactment of Part VI of the Canadian Human Rights Act, which was the first statutory provisions on privacy enacted in Canada; (2) the 1983 enactment of the federal Privacy Act, which regulates how the federal government can use personal information gathered about citizens; and (3) the 2000 enactment of the Personal Information Protection and Electronic Documents Act (PIPEDA), which regulates how private sector companies can collect and use personal information.<sup>10</sup> Overall, the case study suggests that despite concerns being raised about privacy threats posed by technology at the time of each of the enactments, those concerns were often overshadowed by predominant concerns with freedom of information and related ideas and norms consistent with a broader international trend in those same years.<sup>11</sup> Through this case study, this chapter also offers insights as to Canada's overall privacy and data protection regulatory scheme and its development over time.

## II. THE POST-WAR FREEDOM OF INFORMATION PARADIGM

Understanding early Canadian privacy laws requires understanding a broader historical context—involving a global shift toward freedom of information—in which they were enacted. In the decades since the Second World War there has been a 'global wave' of countries' freedom of information (FOI) laws.<sup>12</sup> As of 2006, there were over 66 such states with laws granting citizens greater access to government information.<sup>13</sup> There are a myriad of reasons for this 'explosion' in innovative transparency laws, but two central ones include international pressure to keep up with this emerging global paradigm, as well as domestic political pressure due to public concerns about the need for greater government accountability.<sup>14</sup>

In terms of the emerging global paradigm, freedom of information and radio jamming were major international issues after World War II. This salience was not only due to US

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<sup>9</sup> Hughes (n 2), 528; Levin and Nicholson (n 3), 378–380; Miguel Bernal-Castillero, 'Canada's Federal Privacy Laws' (Library of Parliament Research Publication 2013) <https://lop.parl.ca/Content/LOP/ResearchPublications/2007-44-e.htm> accessed 18 October 2021; Tariq Ahmad, 'Online Privacy Law: Canada' (U.S. Library of Congress 2012) <https://www.loc.gov/law/help/online-privacy-law/canada.php> accessed 18 October 2021.

<sup>10</sup> Hughes, *ibid.*, 528–529; Levin and Nicholson, *ibid.*, 378–380; Bernal-Castillero, *ibid.*; Ahmad, *ibid.*

<sup>11</sup> John M. Ackerman and Irma E. Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' (2006) 58 *Admin L Rev* 85, 85; Donald C. Rowat, 'The Right to Governmental Information in Democracies' (1981) 2 *J Media L & Prac* 314, 314. See also: Lotte E. Feinberg, 'Managing the Freedom of Information Act and Federal Information Policy' (1986) 46:6 *Public Administration Review* 615; Harold C. Relyea, 'Freedom of Information, Privacy, and Official Secrecy: The Evolution of Federal Government Information Policy Concepts' (1980) 7:1 *Social Indicators Research* 137.

<sup>12</sup> Ackerman and Sandoval-Ballesteros, *ibid.*, 85.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 115–119, 121–123. See Penney (2011) (n 8); Penney (2015) (n 8).

influence, but also developments during the war itself.<sup>15</sup> Both war propaganda and state censorship—enabled through extensive radio jamming—were pervasive during the war and posed significant threat to guaranteeing enduring peace and stability.<sup>16</sup> For example, newly developed shortwave radio technology, which made transnational propagation of radio broadcasts possible, led countries like Germany to use information warfare strategies like ‘broadcast defense’—widespread and systematic jamming of foreign and transnational radio broadcasting.<sup>17</sup>

All this led to a strong Post War Period consensus on an international policy framework centred on the ‘free flow of information’ doctrine, promoted largely by the US and its allies in the West.<sup>18</sup> The doctrine involved the promotion of unrestricted flow of information and ideas across country borders internationally. The free flow doctrine, at least in theory, offered a single solution to pressing ‘dual’ problem of state propaganda and radio jamming experienced during the war; with information flowing freely across borders, both propaganda and jamming would be undercut by ensuring citizens would have a diversity of information sources from which draw information.<sup>19</sup> The consensus on the free flow doctrine was reflected in the substantial reduction of radio jamming after the war, as well as a wide range of international conventions, declarations, and treaties that would codify the doctrine’s principles, like the right to ‘seek, receive, and impart information’ enshrined in Article 19 of the United Nations’ 1948 Universal Declaration of Human Rights and its 1946 Declaration on Freedom of Information—which declared freedom of information a ‘fundamental human right’—adopted unanimously in the very first session of the UN General Assembly.<sup>20</sup> This international consensus and the emerging ‘freedom of information’ paradigm, and the governments (namely the Americans), civil society groups, and international organizations that helped promote it, would exact substantial pressures on countries to similarly codify its principles with domestic legislation in the years following.<sup>21</sup>

This emerging international paradigm was strengthened by related domestic concerns in the West, about the growing secrecy of government bureaucracies in the Post-War period. Again, the US played a key role here. As the US promoted the free flow doctrine abroad, it wrestled with issues of bureaucratic growth and secrecy at home.<sup>22</sup> Both early 20th Century ‘New Deal’ policies and the War itself led to a significant expansion of the US federal bureaucracy.<sup>23</sup> Concerned about executive branch secrecy and encroachment on its legislative and constitutional authority, Congress began to push back starting only years after the war, with passage of the Administrative Procedure Act (APA) in 1946.<sup>24</sup> The aim of the APA was to force federal

<sup>15</sup> Penney (2011), *ibid.*, 21–23.

<sup>16</sup> *Ibid.*

<sup>17</sup> James G Savage and Mark W Zacher, ‘Free Flow versus Prior Consent: The Jurisdictional Battle Over International Communications’ (1987) 42 *International Journal* 342, 344–347.

<sup>18</sup> Penney (2011) (n 8), 23; see generally Savage and Zacher, *ibid.*, 348.

<sup>19</sup> Penney (2011), *ibid.*, 22–23.

<sup>20</sup> *Ibid.*, 23–30; Cees J Hamerlink, *The Politics of World Communication: A Human Rights Perspective* (Sage 1994) 60; Savage and Zacher (n 17), 348 (‘Immediately after the end of the war jamming was virtually absent from the air waves...’).

<sup>21</sup> Ackerman and Sandoval-Ballesteros (n 11), 115–119, 121–123. Penney (2011), (n 8), 21–23.

<sup>22</sup> Ackerman and Sandoval-Ballesteros, *ibid.*, 116.

<sup>23</sup> *Ibid.*, 117; Feinberg (n 11), 615.

<sup>24</sup> *Ibid.*; Feinberg, *ibid.*, 615.

agencies to be more transparent about its processes, particularly decisions and rule-making.<sup>25</sup> The American Freedom of Information Act, passed in 1966, grew out of that same ‘distrust’ for government administrative agencies and likewise aimed to reduce their secrecy through greater freedom of, and access to, information in government.<sup>26</sup> These acts, particularly the Freedom of Information Act, would serve as models for similar legislation elsewhere, contributing to this global freedom of information movement.<sup>27</sup>

Yet, this freedom of information paradigm would also influence privacy and data protection laws internationally.<sup>28</sup> In Canada, the influence would prove even more significant—arguably commencing, enabling, and shaping the country’s most significant early legislative efforts to protect privacy far more than any technological change or technology-related threat to privacy.

### III. SHAPING CANADA’S FIRST MAJOR PRIVACY SCHEME: THE CANADIAN HUMAN RIGHTS ACT, PART IV

It is often said that Canada’s privacy and data protection laws have historically been ‘undeveloped’, due to the fact there was little public concern and no ‘dramatic event’ similar to US Congressional hearings on national databanks, to ‘focus’ public attention on the threats to privacy posed by technology.<sup>29</sup> Yet, that is not quite true, at least with respect to the years leading to the enactment of Part IV of the Canadian Human Rights Act in 1977 and the 1983 Privacy Act, the first major privacy laws of general application in Canadian history. In fact, there were several high profile and widely covered events, scandals, and stories, involving technological threats to privacy—electronic surveillance—beginning in the late 1960s, and continuing through the 1970s.

During this period, the use of electronic surveillance technology, especially by police, was a ‘major source of controversy’.<sup>30</sup> In 1965, the *Toronto Daily Star* reported it had become ‘common practice’ for car dealers to ‘bug’ their salesrooms and in 1965 that ‘four and one-half million dollars’ worth of listening device technology had been sold in Canada.<sup>31</sup> *The Star Weekly* also reported in 1965 that a Hamilton detective was fined for ‘tapping’ the telephone of a client’s estranged wife.<sup>32</sup> In November 1966, an officer with the Pulp and Paper Workers union went public with allegations that union meetings at a Vancouver meeting had been ‘bugged’ with electronic surveillance devices.<sup>33</sup> Both a former Royal Canadian Mounted Police (RCMP) detective, working for a rival union, was involved in ‘planting’ the listening

<sup>25</sup> Ibid., 117–118.

<sup>26</sup> Ibid., 118; Feinberg (n 11), 616.

<sup>27</sup> Ibid., 85; Relyea (n 11), 137.

<sup>28</sup> See the discussion: Rowat (n 11), 326–331.

<sup>29</sup> Flaherty (1979) (n 6), 231; Bennett (1990) (n 6), 551 (noting ‘...low salience in public opinion’); Canadian Department of Communications/Department of Justice, *Privacy and Computers: A Report of the 1972 Task Force* (Ottawa 1972) 10; Flaherty (1979) (n 6), 231; Flaherty (1989) (n 6), 246.

<sup>30</sup> Robert W. Cosman, ‘A Man’s House Is His Castle-Beep: A Civil Law Remedy for the Invasion of Privacy’ (1971) 29 *Fac L Rev* 3, 19.

<sup>31</sup> David A. Cornfield, ‘The Right to Privacy in Canada’ (1967) 25 *Fac L Rev* 103, 104–105.

<sup>32</sup> Ibid., 105.

<sup>33</sup> Peter Burns, ‘The Law and Privacy: The Canadian Experience’ (1976) 54 *Can B Rev* 1, 29; Stanley M Beck, ‘Electronic Surveillance and the Administration of Criminal Justice’ (1968) 46 *Can B Rev* 643.

devices, as were two officers employed in the RCMP's Security and Intelligence Branch.<sup>34</sup> There were also multiple stories in 1966 and 1967, uncovering police plans, from Victoria, to Saskatoon, to Oakville, of police using electronic surveillance devices to listen in on prison inmate conversations, including confidential discussions with their lawyers.<sup>35</sup> In fact, as of 1967, the RCMP and 'every major police force' in Canada admitted to using electronic surveillance, including press coverage of stories with police maintaining permanent wiretapping and electronic surveillance installations in major hotels.<sup>36</sup>

These incidents and national press coverage led to multiple public inquiries and national committees including the Sargent Royal Commission in BC in 1966, the Ouimet Committee on Criminal Justice and Corrections in 1969, and a House of Commons Standing Committee on Justice and Legal Affairs inquiry in 1970.<sup>37</sup> The issue would also provoke a 'wealth' of legal and academic commentary on point, including work examining the challenges electronic surveillance technology posed to privacy and the law.<sup>38</sup>

Eventually, Parliament would respond with the enactment of the Protection of Privacy Act (PPA) in 1974.<sup>39</sup> The Act would prohibit private use of electronic surveillance technology and devices to intercept or listen in on private communications, while at the same time both authorizing and regulating police use. Given there was absolutely no law or regulations impeding electronic surveillance before the PPA, the Act *did* provide a measure of privacy protection. But it would also be strongly criticized for doing far too little, particularly in terms of constraining law enforcement. Two prominent legal experts argued the PPA was 'official sanctioning of the immoral act of eavesdropping' and constituted an 'erosion of freedom as we know it'.<sup>40</sup> Others, citing judge-shopping and rubber stamping by magistrates, argued its

<sup>34</sup> Burns, *ibid.*, 29; Beck, *ibid.*

<sup>35</sup> Cornfield (n 31), 106.

<sup>36</sup> *Ibid.*

<sup>37</sup> Norman MacDonald, 'Electronic Surveillance in Crime Detection: An Analysis of Canadian Wiretapping Law' (1987) 10 *Dalhousie LJ* 141, 144–145; Yoni Rahamim, 'Wiretapping and Electronic Surveillance in Canada: The Present State of the Law and Challenges to the Employment of Sophisticated and Intrusive Technology in Law Enforcement' (2004) 18 *Windsor Rev Legal & Soc Issues* 87, 90. For reports, see: Government of British Columbia, *Report of the Commission of Inquiry Into Invasion of Privacy* (Victoria 1967) ('Sargent Report'); Solicitor General of Canada, *Report of the Canadian Committee on Corrections—Toward Unity: Criminal Justice and Corrections* (Ottawa 1969) ('Ouimet Report').

<sup>38</sup> Rosemary Cairns Way, 'The Law of Police Authority: The McDonald Commission and the McLeod Report' (1985) 9 *Dalhousie L.J.* 683, 701n64. See e.g.: Cornfield (n 31); Beck (n 33); Tom MacKinnon, 'The Right to Privacy in British Columbia Before and After the Privacy Act' (1970) 5 *UBCLR* 228; Cosman (n 30); Morris Manning, *The Protection Against Privacy Act* (Butterworths 1974); Peter Burns, 'Electronic Eavesdropping and the Federal Response: Cloning a Hybrid', 10 *U. Brit. Colum. L. Rev.* 36 (1975); E. P. Craig, 'Electronic Surveillance: Setting the Limits', 24 *UNBLJ* 29 (1975); Burns (1976) (n 33) 29; M. Manning and C. Branson, 'Wiretapping: the Morality of Snooping' (1977) 1:5 *Can Lawyer* 24; Morris M. Title, 'Canadian Wiretap Legislation: Protection or Erosion of Privacy' (1978) 26 *Chitty's LJ* 47; Peter Burns, 'A Retrospective View of the Protection of Privacy Act: A Fragile Rede is Recked' (1979) 13 *U Brit Colum L Rev* 123; Francis M. Valeriote, 'Judicial Authorization for Wiretap: An Illusory Protection' (1980) 12 *Ottawa L Rev* 215; Stanley A. Cohen, 'Invasion of Privacy: Police and Electronic Surveillance in Canada' 1982 27:4 *McGill LJ* 619.

<sup>39</sup> MacDonald (n 37), 145; Nathan Forester, 'Electronic Surveillance, Criminal Investigations, and the Erosion of Constitutional Rights in Canada: Regressive U-Turn or a Mere Bump in the Road towards Charter Justice' (2010) 73 *Sask L Rev* 23, 36.

<sup>40</sup> Manning and Branson (n 38).

provisions, including judicial pre-authorization, offered privacy only ‘illusory protections’<sup>41</sup> and its capacity to deter police abuse ‘seriously questioned’.<sup>42</sup> The Canadian Civil Liberties Association strongly opposed the legislation, particularly provisions allowing illegally obtained evidence to be admitted to court.<sup>43</sup>

One of the stronger criticisms was that the PPA provided a legal basis for, and legitimated, wider police use of electronic surveillance.<sup>44</sup> This criticism would ring true, with *The Globe and Mail* reporting in 1978 that not only did PPA amendments not deter police, but emboldened as Canadian law enforcement were ‘seven times more likely’ to engage in electronic surveillance when doing criminal investigations than their American counterparts.<sup>45</sup> Moreover, the PPA also opened the door to expansive electronic surveillance for the purposes of crime detection and intelligence gathering. In addition to amending the Criminal Code, the PPA also amended the Official Secrets Act, not in order to provide greater privacy protections, but to authorize electronic eavesdropping and surveillance for these purposes offered ‘virtually no safeguards at all’.<sup>46</sup> All that the PPA required was that the Solicitor General be satisfied that an ‘interception is necessary for the security of Canada’.<sup>47</sup> Noted privacy scholar Peter Burns, after an extensive analysis in 1979, would conclude that the PPA’s name was a ‘complete misnomer’ given its privacy protections were ‘small indeed’.<sup>48</sup> Even the Supreme Court of Canada would ruefully remark in 1980 that the PPA’s effect was mainly to ‘regulate the method of breach’ of privacy, rather than deter or prevent it.<sup>49</sup> In short, the PPA failed to address privacy concerns raised by electronic surveillance technologies. More needed to be done.

In light of all this, it might have been expected these issues would be addressed in the first major federal legislation on privacy enacted only years later in 1977, being Part IV to the Canadian Human Rights Act. Not so. Though Section 2 described the Act’s purpose as both prohibiting discrimination as well as protecting the ‘privacy of individuals’, nothing in the Act would address privacy concerns raised by electronic surveillance.<sup>50</sup> Nor did it address any concerns about electronic eavesdropping and intelligence gathering, nor any of the other concerns raised during wide-ranging debates concerning electronic surveillance technologies in the years leading up to enactment.

Now, it might be suggested that Part IV and the Act aimed to tackle privacy concerns raised by a different technology—emerging federal information systems, databases, and computerization of government records.<sup>51</sup> But this point also rings hollow, as commentators and academics had long made important links between government electronic surveillance practices ill-addressed by the PPA and these newly emerging computerized databases—combined, these

<sup>41</sup> Valeriote (n 38), 216.

<sup>42</sup> Title (n 38), 48.

<sup>43</sup> Dominique Clément, ‘Privacy’ (*Canada’s Human Rights History*, 2018) <https://historyofrights.ca/encyclopaedia/main-events/privacy/> accessed 18 October 2021.

<sup>44</sup> Douglas Camp Chaffey, ‘The Right to Privacy’ (1993) 108:1 *Political Science Quarterly* 117, 128.

<sup>45</sup> Forester (n 39), 37.

<sup>46</sup> MacDonald (n 37), 159; Cohen (n 38), 667.

<sup>47</sup> MacDonald, *ibid.*, 159.

<sup>48</sup> Burns (1979) (n 38), 156.

<sup>49</sup> *R v Goldman* [1980] 1 SCR 976, 994.

<sup>50</sup> Inger Hansen, ‘The Canadian Human Rights Act, Part IV’ in John D McCamus (ed), *Freedom of Information: Canadian Perspectives* (Butterworths 1985) 249.

<sup>51</sup> Bennett (n 6), 556, 558 (noting that the Act was ‘partly’ a response to the 1972 Task Force on Computers and Privacy that focused on the ‘computerization’ of personal information systems).

technologies posed even greater threats to privacy, allowing for Orwellian surveillance and, through databases, storage and linkage to individuals over time. Alan Westin's influential work *Privacy and Freedom* published in 1967, would discuss these issues at length, capturing this important point in his concept of 'data surveillance'.<sup>52</sup> Prominent Canadian experts like Stanley Beck, David Cornfield, Peter Burns, and E.P. Craig would cite Westin's work, along with Orwell's warnings from his classic novel *1984*, on privacy concerns raised by new surveillance and data storage technologies in commentaries before 1977.<sup>53</sup> And the 1972 federal Task Force on Computers and Privacy linked, in its discussion of new privacy concerns, data gathering technology like electronic surveillance with powerful new data storage and dissemination capacities.<sup>54</sup>

The more likely reason these issues were ignored, consistent with the broader Post-War paradigm, was that the drafters of the legislation were far more preoccupied freedom of information concerns. In fact, Section 2 defined 'privacy' in relation to a 'right of access to records containing personal information' as well as rights to 'ensure accuracy and completeness' in those records<sup>55</sup> and ideas of freedom of information and provisions implementing it are evident throughout Part IV. Section 52 set out basic rights of access and record correction, including rights to inquire as to records about a person are used by the government for 'administrative purposes', as well as rights to examine and correct records.<sup>56</sup> Section 52(2) placed limits on use of personal information provided to the government inconsistent with the original purpose the information was tendered.<sup>57</sup> Sections 53 and 54 set out exemptions, such as for certain federal databanks from, access rights.<sup>58</sup> Although Part IV did include important privacy measures like the establishment of a privacy commissioner's office (though with important limits as critics like David Flaherty pointed out) overall the scheme emphasized 'publicity and access'.<sup>59</sup> In the words of the first Privacy Commissioner Inger Hansen, the law 'embraced' the 'freedom of information concept'.<sup>60</sup>

In retrospect, this development was not surprising. Indeed, parallel to the public debates and press coverage surrounding privacy threats posed by electronic surveillance and related technology was another contentious debate over access to government information.<sup>61</sup> The debate began with academic writings in the 1960s and 1970s and was sustained through an 'influential' Task Force Report released in 1969, entitled 'Known and Be Known', as well as ongoing pressure from Conservative politicians tendering private members bills in Parliament.<sup>62</sup>

Adding greatly to this momentum was international pressure tied to the aforementioned global trends towards freedom of information, particularly the US, which had been moving to

<sup>52</sup> Alan F. Westin, *Privacy and Computers* (Atheneum 1967) 6.

<sup>53</sup> Beck (n 33), 650–651; Burns (1976) (n 33), 10–11, 31; Cornfield (n 31), 104; Craig (n 38), 29–30, 32.

<sup>54</sup> Report of the 1972 Task Force (n 29), Ch 10–11.

<sup>55</sup> Hansen (n 50), 249.

<sup>56</sup> *Ibid.*, 251.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 251–252.

<sup>59</sup> Bennett (1990) (n 6), 558; David Flaherty, 'Commentary' in John D McCamus (ed), *Freedom of Information: Canadian Perspectives* (Butterworths 1985) 262.

<sup>60</sup> Hansen (n 50), 251–252.

<sup>61</sup> Bennett (1990) (n 6), 558.

<sup>62</sup> *Ibid.*, 559; Colin J Bennett, 'How States Utilize Foreign Evidence' (1991) 11:1 *Journal of Public Policy* 31, 43–52.

address government secrecy through freedom of information reforms in the Post War Period, accentuated by Watergate and Pentagon Paper scandals in the 1970s.<sup>63</sup> In fact, concerns about government secrecy raised by Americans had also been raised in Canada.<sup>64</sup> Colin Bennett has extensively documented the influence that the US Freedom of Information Act of 1966 had on Canada, including encouraging law-makers to kick start reforms, creating pressure to legislate, and serving as a model for Canada's own law.<sup>65</sup> Even the 1972 Task Force Report on Computers and Privacy, ostensibly aimed at addressing privacy risks, emphasized that any new privacy laws must not 'interfere with the free flow of information', otherwise they would 'constitute a cure worse than the original ill'.<sup>66</sup>

In short, a preoccupation with freedom of information, consistent with (and spurred on by) a broader international free flow of information paradigm, led to a first major federal privacy enactment that emphasized freedom of information over privacy concerns for surveillance and technology.<sup>67</sup> But Part IV would not last long—its provisions did not fit well in the context of the Canadian Human Rights Act—and compared to legislative efforts elsewhere, it was modest and only experimental legislation.<sup>68</sup> Reform was coming, but freedom of information would remain a central focus.

#### IV. IMPACT ON REFORMS: THE FEDERAL PRIVACY ACT, 1983

The first major reforms to Canadian federal privacy legislation would not be driven by privacy, but predominant federal efforts to enact more comprehensive freedom of information legislation. These efforts would intensify in 1979 with the election of the Progressive Conservatives led by Joe Clarke.<sup>69</sup> The new Prime Minister made access to information a top priority, putting 'considerable pressure' on federal public servants to produce a draft bill.<sup>70</sup> Although the Conservative Government would fall by December with the Trudeau Liberals returned to power in 1980, key parts of Conservative proposals for government information access would find expression in a Cabinet Discussion Paper published by the Justice Department in 1980.<sup>71</sup> That Paper's proposals would form the basis for new comprehensive freedom of information legislation.<sup>72</sup>

Privacy law was literally an afterthought to freedom of information priorities. Changes to Part IV were only included in the draft legislation 'at the behest' of public servants.<sup>73</sup> This

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<sup>63</sup> Bennett (1990) (n 6), 559.

<sup>64</sup> See e.g.: James Eayrs, *Diplomacy and its Discontents* (Toronto 1971) 33; E.Z. Friedenberg, *Deference to Authority: The Case of Canada* (ME Sharpe 1980); Robert J Hayward, 'Federal Access and Privacy Legislation and the Public Archives of Canada' (1984) 18 *Archivaria* 47, 47.

<sup>65</sup> Bennett, (1991) (n 61), 43–52.

<sup>66</sup> Report of the 1972 Task Force (n 29), 178.

<sup>67</sup> Flaherty (1989) (n 6), 243; Bennett (1990) (n 6), 558.

<sup>68</sup> Flaherty (1989), *ibid.*, 245; Bennett, *ibid.*, 559.

<sup>69</sup> Flaherty (1989), *ibid.*; Flaherty (2008) (n 6), 6–7; Bennett, *ibid.*

<sup>70</sup> Flaherty (1989), *ibid.*; Flaherty (2008) *ibid.*7; Bennett *ibid.*, 560.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Flaherty (1989), *ibid.*

was likely to avoid problems the US experienced implementing its 1966 FOI Act.<sup>74</sup> That law's information access rights led to conflicts with federal legislation enacted in 1974 regulating disclosure of personal information.<sup>75</sup> The new Liberal Government's draft Bill C-43 would repeal Part IV and enact two new statutes—the Access to Information Act and a Privacy Act.<sup>76</sup> However, the House of Commons Standing Committee on Justice and Legal Affairs, tasked with a 'clause-by-clause' review of the draft legislation spent nearly all of its time reviewing the access to information proposals.<sup>77</sup> The review of the Privacy Act came in a 'last minute, marathon session' in June 1982.<sup>78</sup> Bill C-43 would eventually come into force in July 1983.<sup>79</sup>

Although the new Privacy Act was marginal in this reform process, and inextricably tied to broader freedom of information trends, it *did* offer important improvements to the Part IV scheme. At its core, the new Act regulated how the federal government could use and disclose personal information gathered about citizens.<sup>80</sup> Overall, the Privacy Act codified the same 'fair information practices' formulated in the US and Europe, and employed in similar data protection regulations internationally.<sup>81</sup> Those fair information practices concerned rules and regulations on the collection, retention, disposal, and protection of government held personal information.<sup>82</sup> The Act also had important innovations, most notably provisions giving the Office of the Privacy Commissioner a more active and independent role in investigating and enforcing the Act while also allowing for recourse to courts, something specifically precluded in the Americans' own Privacy Act of an earlier decade.<sup>83</sup>

But there would be important consequences to the Privacy Act being only an afterthought to freedom of information reforms—it failed to address important privacy concerns raised by new electronic surveillance technologies, and related data tracking, collection, and storage capacities. These concerns, as we have seen, were not new. The aforementioned public commentary and academic discussion on point that began in the 1960s and 1970s would continue well into the 1980s as new technologies continued to emerge.<sup>84</sup> This oversight was compounded by the fact that extensive press coverage of RCMP misconduct through 1977 would lead the Liberal Government to establish a Royal Commission, known as the McDonald Commission, to investigate illegal activities by officers in the RCMP's 'Security Services' Branch.<sup>85</sup> The Commission would issue several reports, the final one issued in 1981.<sup>86</sup> Among the RCMP's Security Services' illegal activities it documented was illegal, abusive, and over-reaching

<sup>74</sup> Hansen (n 50), 251; Bennett (1990) (n 6), 42.

<sup>75</sup> Hansen, *ibid.*; Bennett *ibid.* For an analysis of these conflicts, see: Thomas M Susman, 'The Privacy Act and the Freedom of Information Act: Conflict and Resolution' (1988) 21 *J Marshall L Rev* 703.

<sup>76</sup> Flaherty (1989) (n 6), 245.

<sup>77</sup> *Ibid.*; Flaherty (2008) (n 6), 7; Bennett (1990) (n 6), 560.

<sup>78</sup> Flaherty (1989), *ibid.*, 5; Flaherty (2008), *ibid.*; Bennett, *ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, 560–561; Flaherty (1989) (n 6), 253.

<sup>81</sup> Bennett (1990) (n 6), 561–562; Flaherty, *ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Flaherty (1989) (n 6), 246–247.

<sup>84</sup> See works cited footnote 38.

<sup>85</sup> Cairns (n 38), 683; Iain Cameron, 'Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police. Second Report: Freedom and Security under the Law' (1985) 48:2 *Modern Law Review* 201.

<sup>86</sup> Cairns, *ibid.*, 684.

electronic surveillance, bugging, and wiretapping, with targets ranging from political parties, activists, trade unions, minority groups, academics, and even Members of Parliament.<sup>87</sup> While the Liberal Government would respond to the McDonald Commission Report in 1983 with legislation to abolish the RCMP's Security Services and establish a new national security agency—the Canadian Security Intelligence Services—which would have new surveillance and intelligence gathering powers, creating new privacy concerns.<sup>88</sup>

The Privacy Act reforms constituted an opportunity for a comprehensive federal scheme addressing not only fair information practices, but also new privacy concerns raised by these developments as well as a range of then emerging technological threats including new forms of electronic surveillance, computer matching, micro-computing technology, and trans-border data flows.<sup>89</sup> In fact, a comprehensive report issued in 1987 by the House of Commons Standing Committee on Justice and Solicitor General would make extensive recommendations for Privacy Act revisions to deal with these and other issues.<sup>90</sup> None were acted on by the then Conservative Government.<sup>91</sup>

Once again, privacy concerns about surveillance and technology were 'subordinated' to freedom of information.<sup>92</sup> And less than five years after its enactment, commentators were calling for the Privacy Act's 'modernization' particularly due to its failure to address 'new surveillance challenges'.<sup>93</sup> Yet, changes would not come soon.

## V. ENDURING LEGACY: PRIVACY REFORMS, FIPS, AND BEYOND

Beyond these noteworthy historical case studies, the enduring impact freedom of information norms have had on Canadian privacy and data protection laws is apparent in two additional ways today. First, the Privacy Act, in being closely linked to the Access to Information Act when passed, has likely deterred meaningful reforms to the legislation over the years.<sup>94</sup> David Flaherty makes this point, noting that subsequent governments 'hostility' to the Access to Information Act likely also discouraged Privacy Act reform, seeing the two laws as compan-

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<sup>87</sup> Cameron (n 85), 202–203.

<sup>88</sup> As Stuart Farson would observe in 1985, while the legislation may add some checks on CSIS, the 'system as a whole is enabling' quoted in Geoffrey R. Weller, 'The Canadian Security Intelligence Service Under Stress' (1988) 31:2 *Canadian Public Administration* 279, 293–294. See also Peter H. Russell, 'The Proposed Charter for a Civilian Intelligence Agency: An Appraisal' (1983) 9:3 *Canadian Public Policy* 326, 326, 328, 330.

<sup>89</sup> These issues would all be covered only a few years later in a comprehensive report issued by the House of Commons Standing Committee on Justice and Solicitor General in 1987: Privacy: Flaherty (2008) (n 6), 9–10.

<sup>90</sup> See House of Commons, Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy: Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act* (Ottawa 1987); Flaherty (2008), *ibid.*

<sup>91</sup> *Ibid.*, 10.

<sup>92</sup> Flaherty (1989) (n 6), 243; Bennett (1990) (n 6), 558.

<sup>93</sup> Flaherty, *ibid.*, 297.

<sup>94</sup> Flaherty (2008) (n 6), 10.

ion legislation.<sup>95</sup> Canada's Privacy Commissioner from 1991–2000 Bruce Phillips similarly argues that federal public servants tend to treat the laws as one and the same notwithstanding the fact the two laws concern largely separate spheres of government activity.<sup>96</sup> This may be one reason why, as Canada's present Privacy Commissioner Daniel Therrien has recently noted, the federal Privacy Act has largely sat 'dormant' while 'second and third generation' privacy laws have been enacted provincially and internationally since 1983.<sup>97</sup>

A second way freedom of information norms continue to impact Canadian privacy law is through the fair information practices finding expression in the federal Privacy Act of 1983 and then later, more comprehensively, in the Protection of Personal Information and Electronic Document Act (PIPEDA).<sup>98</sup> Canada's last major data protection law, PIPEDA, was enacted in 2000 and regulates the collection, use, and disclosure of personal information in the Canadian private sector.<sup>99</sup> PIPEDA largely codifies the same fair information practices formulated and widely used internationally.<sup>100</sup>

Although seen as central to an internationalization of data protection norms, those fair information practices (FIPs) were also shaped by freedom of information norms. The FIPs are generally understood to have originated in a well-known Report on Records, Computers, and the Rights of Citizens issued in 1973 by the Advisory Committee to the US Secretary for Health, Education, and Welfare.<sup>101</sup> But in the 1970s, America was far more concerned with promoting freedom of information than privacy.<sup>102</sup> Internationally, it was promoting the flow of information doctrine as foreign policy,<sup>103</sup> and legislating freedom of information at home, including its landmark FOI Act in 1966.<sup>104</sup> In fact, many Americans at this time regarded 'data protection' sceptically, as a Trojan horse for barriers to trade and the free flow of information across borders.<sup>105</sup> Meeting transcripts for the HEW Advisory Committee, which led to the Report, reflect this broader context, including tensions between privacy protections and

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Office of the Privacy Commissioner, 'Privacy Act Reform in an Era of Change and Transparency: Summary of Recommendations' (Letter to the Standing Committee on Access to Information, Privacy and Ethics, 22 March 2016).

<sup>98</sup> Lisa Austin, 'Is Consent the Foundation of Fair Information Practices? Canada's Experience under PIPEDA' (2006) 56:2 *UTLJ* 181, 181; Christopher Berzins, 'Protecting Personal Information in Canada's Private Sector: The Price of Consensus Building' (2002) 27 *Queen's LJ* 609, 620–621; Colin J Bennett, 'Adequate Data Protection by the Year 2000: The Prospects for Privacy in Canada' (2000) 11:1 *International Review of Law, Computers & Technology* 79, 80 (speaking to how the OECD Guidelines were the 'starting point' for the CSA Code).

<sup>99</sup> Austin, *ibid.*, 181.

<sup>100</sup> *Ibid.*, 198–200; Berzins (n 98), 620–621; Bennett (2000) (n 98).

<sup>101</sup> Robert Gellman, 'Willis Ware's Lasting Contribution to Privacy: Fair Information Practices' 12 *IEEE Security and Privacy* 51; Robert Gellman, 'Fair Information Practices: A Basic History' SSRN Working Paper (10 April 2017) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2415020](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2415020) accessed 19 October 2021; Colin J Bennett, *Regulating Privacy: Data Protection and Public Policy in Europe and the United States* (Cornell 1992) 96–97.

<sup>102</sup> Bennett, *ibid.*, 137; Ackerman and Sandova-Ballesteros (n 11), 116.

<sup>103</sup> Penney (2011) (n 8) 23; see generally Savage (n 17), 348.

<sup>104</sup> Ackerman and Sandova-Ballesteros (n 11), 116; Bennett (1992) (n 101), 137.

<sup>105</sup> See, e.g.: John M Eger, 'Emerging Restrictions on Transnational Data Flow: Privacy Protection or Non-Tariff Trade Barriers?' (1978) 10 *Law and Policy in International Business* 1055; Robert Bigelow, 'Transborder Data Flow Barriers' (1979–1980) *Jurimetrics* 20. See also Bennett (n 101) 137.

freedom of information.<sup>106</sup> In fact, 1973 HEW Report itself reflects those tensions too—the forward, written by then HEW Secretary Caspar Weinberger, heralds not privacy or data protection, but the ‘innovations’ destined to come in government and private industry thanks to newly emerging ‘high-speed telecommunications networks’.<sup>107</sup>

However, the influence of freedom of information norms on FIPs is even clearer with their most important and well-known expression in the OECD’s Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.<sup>108</sup> The OECD Guidelines, in the words of Colin Bennett, represent a ‘fundamental statement’ of ‘international consensus’ on communications policy and FIPs, a product of a ‘fascinating’ process of international policy convergence in 1970s.<sup>109</sup> The OECD Guidelines have been ‘tremendously influential’, with ‘direct impact’ on legislative harmonization on FIPs globally,<sup>110</sup> while also serving as the ‘foundation’ for privacy laws in Canada, particularly PIPEDA.<sup>111</sup>

Although today the OECD Guidelines are most often associated with data protection, they were drafted by an OECD expert group originally formed to address not privacy but *barriers* to the free flow of information internationally.<sup>112</sup> As Michael Kirby, the chair of that expert group, would later point out, the OECD was always an organization primarily concerned with ‘economic efficiency’ and free movement and sharing of information necessary for free markets and democracy to prosper.<sup>113</sup> And it viewed differences and inconsistencies in new laws being enacted internationally on data protection and new computing technologies as threats to the free flow of information and data across borders.<sup>114</sup> These concerns prompted the OECD to form the expert group—to ‘contribute to’ and ‘defend’ trans-border data flows.<sup>115</sup>

Freedom of information norms are clearly seen in the Guidelines themselves. The preface warns about the ‘danger’ that “disparities national legislations” might ‘hamper the free flow of

<sup>106</sup> See Chris Hoofnagle, who first released the transcripts, notes the ‘...[t]ensions among interests in efficiency, law enforcement, cost, access to knowledge and freedom of information...’ in the committee meetings: Chris Hoofnagle ‘The Origin of Fair Information Practices: Archive of the Meetings of the Secretary’s Advisory Committee on Automated Personal Data Systems (SACAPDS)’ SSRN Working Paper (16 July 2014) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2466418](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466418) accessed 19 October 2021.

<sup>107</sup> Advisory Committee to the United States Secretary of Health, Education, and Welfare, *Records, Computers, and the Rights of Citizens: Report of the Secretary’s Advisory Committee on Automated Personal Data Systems* (Washington 1973) v.

<sup>108</sup> OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, Annex to Recommendation of the Council (23 September 1980) <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowsofPersonalData.htm> accessed 19 October 2021; Bennett (n 101), 138–139.

<sup>109</sup> Bennett (n 101), 138.

<sup>110</sup> Berzins (n 98), 616; Bennett (n 101), 138–139; Austin (n 98), 194.

<sup>111</sup> Nancy Holmes, ‘Canada’s Federal Privacy Laws’ (Library of Parliament Research Publication 2008) 2 [http://epe.lac-bac.gc.ca/100/200/301/library\\_parliament/background/2008/can\\_federal\\_privacy-e/prb0744-e.pdf](http://epe.lac-bac.gc.ca/100/200/301/library_parliament/background/2008/can_federal_privacy-e/prb0744-e.pdf) accessed 19 October 2021.

<sup>112</sup> Michael Kirby, ‘The History, Achievement and Future of the 1980 OECD Guidelines on Privacy’ (2011) 1:1 *International Data Privacy Law* 6. See also David Wright, Paul de Hert, and Serge Gutwirth, ‘Are the OECD guidelines at 30 showing their age?’ (2011) 54:2 *Communications of the ACM* 119.

<sup>113</sup> Kirby, *ibid.*, 8; Wright, De Hert and Gutwirth, *ibid.*, 120; Andrew Clearwater and Trevor J Hughes, ‘In the Beginning... An Early History of the Privacy Profession’ (2013) 74:6 *Ohio State Law Journal* 897, 902–903.

<sup>114</sup> Kirby, *ibid.*; Clearwater and Hughes, *ibid.*

<sup>115</sup> Kirby, *ibid.*; Bennett (1992) (n 101), 137.

personal data across frontier'.<sup>116</sup> It also indicates the Guidelines were developed to 'harmonise' privacy legislation in a way that would not needlessly cause 'interruptions' in international flows of data.<sup>117</sup> The OECD Council recommendations include a commitment to 'advance the free flow of information between Member countries'. All of Part Three of the Guidelines is dedicated to these free flow aims.<sup>118</sup>

These elements of FIPs have surely led to fewer restrictions on global data flows over the years, but that reality—and new forms of surveillance—have also created significant privacy challenges.<sup>119</sup> Indeed, some of the earliest and most enduring criticisms for FIPs are tied to these free flow norm influences. Critics like James Rule called the FIPs principles 'efficiency' principles more concerned with the smooth and efficient operation of data processing and information flows than curtailing surveillance and other threats to privacy.<sup>120</sup> In providing largely only procedural rights, FIPs do nothing *substantively* to limit the growth or development if new forms of data collection and surveillance.<sup>121</sup> Graham Greenleaf argues these challenges still remain at the heart of FIPs today, asking to what extent do data protection laws based on FIPs actually 'limit and control the expansion of surveillance systems' beyond rendering 'personal information systems' more 'efficient'?<sup>122</sup> And Fred Cate, in a work entitled *The Failure of Fair Information Practices Principles*, takes aim at the narrow definitions of protected information and consent at the heart of FIPs, arguing these provisions offer only the 'illusion' of privacy protection in practice, as consumer 'choice' or citizen 'consent' is rarely that.<sup>123</sup>

Not surprisingly, these same sorts of critiques have been levied at Canada's PIPEDA, which essentially codified FIPs as defined by the OECD Guidelines. Echoing Graham Greenleaf and James Rule criticisms of FIPs more generally, Lisa Austin has argued that the 'consent-based privacy model' at the heart of PIPEDA is 'inadequate in addressing contemporary information practices' particularly the growing 'corporate–state nexus that has created such a striking surveillance infrastructure on the internet'.<sup>124</sup> And Samantha Bradshaw (et al) likewise argues that PIPEDA fails to properly address a range of new privacy threats and challenges posed by 'big data', that will have 'far-reaching consequences if not properly addressed' with reforms.<sup>125</sup>

<sup>116</sup> OECD Guidelines.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Wright et al (n 112), 119 (noting 'Global data flows have elevated the risks to privacy'). See also Jonathon Penney, 'Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study' (2017) 6:2 *Internet Policy Review* <https://policyreview.info/articles/analysis/internet-surveillance-regulation-and-chilling-effects-online-comparative-case> accessed 19 October 2021.

<sup>120</sup> James Rule, et al., *The Politics of Privacy: Planning for Personal Data Systems as Powerful Technologies* (Elsevier 1980) 93; Woodrow Harzog, 'The Inadequate, Invaluable Fair Information Practices' (2017) 76 *Md L Rev* 952, 964.

<sup>121</sup> Harzog, *ibid.*, 964.

<sup>122</sup> Graham Greenleaf, *Asian Data Privacy Laws: Trade & Human Rights Perspectives* (Oxford 2014) 61; Harzog, *ibid.*, 964–965.

<sup>123</sup> Fred Cate, 'The Failure of Fair Information Practices Principles' in Jane K Winn (ed) (Ashgate 2006) 344.

<sup>124</sup> Lisa Austin 'Enough About Me: Why Privacy is About Power, Not Consent (or Harm)' in Austin Sarat (ed.) *A World Without Privacy* (Cambridge 2014) 41.

<sup>125</sup> Samantha Bradshaw, Kyle Harris, and Hyla Zeifman, 'Big Data, Big Responsibilities: Recommendations to the Office of the Privacy Commissioner on Canadian Privacy Rights in a Digital Age' CIGI Policy Brief 6/2013 (Balsillie School 2013) 7.

Indeed, as the Colin Bennett (et al) has shown in *Transparent Lives: Surveillance in Canada*, private sector surveillance has grown considerably since PIPEDA was enacted.<sup>126</sup>

And as with FIPs more generally, PIPEDA has also been criticized for overemphasizing process rights. Consumer groups have criticized PIPEDA as not being ‘kind to consumers’, and calling for ‘major reforms’ promoting norms favourable to consumer privacy, rather than PIPEDA’s procedural standards.<sup>127</sup> Similar to Cate’s concerns, Austin argues PIPEDA’s ‘all-or-nothing’ regulatory approach fails to account for definitional difficulties with new forms of data, collection, and ‘identifiable’ information,<sup>128</sup> while also not necessarily providing people with meaningful choice or consent when it comes to their privacy and personal information.<sup>129</sup> All of these criticisms and the challenges and shortcomings they have identified have led to numerous calls for major reforms of PIPEDA, though none yet have come.<sup>130</sup> The legacy of Post War freedom of information ideas and norms remain with Canada’s privacy and data protection scheme through FIPs and PIPEDA—and with that legacy, persistent difficulties remain.

## VI. MOVING FORWARD

This historical case study has examined Canada’s earliest and most important privacy and data protection laws, including Part VI of the Canadian Human Rights Act of 1977, the Privacy Act of 1983, and PIPEDA of 2000, with the latter two still in force today. This analysis has suggested that while technological changes certain did play a factor in privacy enactments and reforms, a pre-occupation with freedom of information and the trans-border free flow of data was an important driver of legislative agendas and change.

Analysing whether the influence of freedom of information on Canadian privacy is definitively positive or negative would take us far beyond the scope of this chapter, including into more empirically oriented work testing privacy outcomes. Nevertheless, there would appear to be both positive and negative aspects to the influence of freedom of information in Canada’s privacy law story. On the one hand, without interest and pre-occupation with freedom of

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<sup>126</sup> Colin J Bennett, Kevin D Haggerty, David Lyon, and Valerie Steeves (eds) *Transparent Lives: Surveillance in Canada* (Athabasca 2014) 8–9, 19–39.

<sup>127</sup> Public Internet Advocacy Centre, *Report: Consumer Privacy Under PIPEDA: How Are We Doing?* (PIAC, Ottawa 2004) 3.

<sup>128</sup> Lisa M Austin, ‘Reviewing PIPEDA: Control, Privacy and the Limits of Fair Information Practices’ (2006) 44 *Can Bus LJ* 21, 28.

<sup>129</sup> See, generally: Austin, *ibid*.

<sup>130</sup> See, e.g.: Teresa Scassa, ‘It is time to overhaul Canada’s data protection —your rights are at stake’ *MacLean’s Magazine* (Ottawa, 2 February 2018) <http://www.macleans.ca/opinion/it-is-time-to-overhaul-canadas-data-protection-your-rights-are-at-stake/> accessed 19 October 2021; Susan Krashinsky Robertson, ‘Calls grow for Canada to Modernize Privacy Laws Amid EU Changes’ *The Globe and Mail* (Ottawa, 24 July 2017) <https://www.theglobeandmail.com/report-on-business/industry-news/marketing/calls-grow-for-canada-to-modernize-privacy-laws-amid-eu-changes/article35778176/> accessed 19 October 2021; Office of the Privacy Commissioner, ‘The Case for Reforming the Personal Information Protection and Electronic Documents Act’ (Report of Office of the Privacy Commissioner of Canada, May 2013) [https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/r\\_o\\_p/pipeda\\_r/pipeda\\_r\\_201305/](https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/r_o_p/pipeda_r/pipeda_r_201305/) accessed 19 October 2021; Flaherty (2008) (n 6), 33.

information ideals among Canada policy-makers and broader international trends towards the same, it is unlikely Canada would have acted as early as it did to enact privacy legislation or possibly fallen further behind in subsequent years. The history surrounding the passage of the federal Privacy Act in 1983, in particular, suggests had it not been enacted as a companion statute to the new Access to Information Act, it may have been years before a comparable statute was passed.

Fair information practices remain foundational to Canada's privacy laws today, for good or ill, in still finding clear expression in both the Privacy Act and PIPEDA, and thus the legacy of freedom of information will remain with us for some time, though the privacy law landscape continues to evolve slowly by surely. Of course, federal and provincial legislatures are now not alone in shaping core Canadian privacy and data protection rights and norms. Although the Canadian Charter of Rights and Freedoms does not include an express constitutional right to privacy, the Supreme Court of Canada has held that certain privacy interests are protected by its provisions, including the 'right to life, liberty, and security of the person' as well as right against 'unreasonable search and seizure'.<sup>131</sup> In *R v Dyment*, Justice LaForest set out a 'seminal' statement on the importance of privacy under the Charter, including finding that privacy had bodily, territorial, and informational dimensions.<sup>132</sup> In doing so, he would cite neither fair information practices, nor OECD guidelines, nor the 'free flow' of information. Rather, he would cite Alan Westin's landmark privacy text and then tie privacy to people's 'physical and moral autonomy' and 'well being'.<sup>133</sup>

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<sup>131</sup> Hughes (n 2), 528–529; Levin and Nicholson (n 3), 378–380; Bernal-Castillero (n 9); Ahmad (n 9).

<sup>132</sup> [1988] 2 SCR 417, 427.

<sup>133</sup> *Ibid.*, 427.

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