

Challenges With The Implementation Of A Right To Be Forgotten In Canada

April 28, 2016

The Court of Justice of the European Union, exercising jurisdiction over twenty-eight E.U. member states, issued a landmark decision in *Google Inc. v. Agencia Española de Protección de Datos*.

In May 2014, the Court of Justice of the European Union (CJEU), exercising jurisdiction over twenty-eight E.U. member states, issued a landmark decision in *Google Inc. v. Agencia Española de Protección de Datos*. The CJEU in this case pronounced a broad precedent: all European residents now have the right to stop Google and other data controllers from linking to information deemed "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in light of the time that had elapsed."¹ In Europe, this new right to be forgotten is considered as a way for individuals to better protect their online reputations. In the U.S., many are of the view that this new right instead raises freedom of speech and freedom of information concerns.² The lack of consensus on the relevancy of a right to be forgotten illustrates, to a certain extent, the cultural transatlantic clash on the issue of the importance of privacy versus other rights, such as freedom of information and freedom of expression.

In Canada, the Office of the Privacy Commissioner of Canada (OPC) has recently chosen reputation and privacy as one of its priorities for the next five years. The OPC is focusing its attention on the reputational risks stemming from the vast amount of personal information posted online and on existing and potential mechanisms for managing those risks. In January 2016, the OPC published a discussion paper, entitled "Online Reputation, What are they saying about me?"³ in which it asks if a right to be forgotten can find application in the Canadian context and if so, how, as part of its consultation and call for essays on online reputation ending April 28, 2016.⁴

Éloïse Gratton, Partner and National Co-Leader, [Privacy and Data Security Practice Group](#) of Borden Ladner Gervais LLP and Jules Polonetsky, CEO of Washington based [Future of Privacy Forum](#) think tank, have recently submitted a joint-position paper to the OPC as part of this consultation and call for essays on online reputation. Their paper entitled "Privacy above all other Fundamental Rights? Challenges with the Implementation of a Right to be Forgotten in Canada" explores whether importing a right to be forgotten that would allow individuals to stop data controllers, such as Google, from providing links to information deemed irrelevant, no longer relevant, inadequate or

excessive would be advisable in Canada. They argue that not only such a right would be unconstitutional in Canada but also that such right to be forgotten may, in any event, be unnecessary and undesirable both from a legal and a public policy perspective.

The authors first argue that a right to be forgotten would most likely infringe upon freedom of expression in a way that cannot be demonstrably justified under the Canadian Constitution. Second, they argue that the current legal framework in place in Canada, at least in some provinces, efficiently addresses the privacy and reputational concerns that a right to be forgotten is meant to address. Finally, the authors raise concerns about the risks pertaining to the right to be forgotten, most notably with respect to censorship, the restrictions on the flow of information, the availability of historical information, and potential infringements on freedom of expression.

In their conclusion, Gratton and Polonetsky warn against entrusting private entities with the tasks of arbitrating fundamental rights and values and determining what is in the public interest, with little or no government or judicial oversight. They raise that a right to be forgotten would be enforced by private corporations that have an incentive to err on the side of removal in order to reduce costs and/or to avoid legal liability and potential fines to which they are exposed. The authors articulate the view that courts have the expertise and independence to properly balance fundamental rights and values and that they, as public bodies, are in a much better position than private entities to act independently and justly to determine whether, and to what extent, the disclosure of any given personal information is legal.

Moreover, in light of the European experience over recent months, the right to be forgotten has an extraterritorial reach that has important and negative ramifications, including in the Canadian and broader North American context. They suggest that efforts be put into improving the current legal framework, notably by increasing access to justice, rather than by importing a right to be forgotten that would prove to be inefficient and, to some extent, counterproductive.

1 See European Commission, "Factsheet on the 'Right to be Forgotten' Ruling", at para. 94.

2 See Mark Scott, "[Europe Tried to Rein In Google. It Backfired.](#)", The New York Times (18 April 2016). See also Daphne Keller and Bruce D. Brown, "[Europe's Web Privacy Rules: Bad for Google, Bad for Everyone](#)" The New York Times (25 April 2016).

3 Policy and Research Group of the Office of the Privacy Commissioner of Canada, "[Online Reputation, What are they saying about me?](#)" (Discussion Paper, Office of the Privacy Commissioner of Canada, 2016), at 13.

4 [Notice of Consultation and Call for Essays: Online Reputation](#)

Expertise

[Cybersecurity, Privacy & Data Protection](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.