

# Best We Forget: Expressive Freedom and the Right to be Forgotten

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## Abstract

The right to be forgotten is often framed as being at odds with the freedom of expression. This paper aims to challenge that position. First, I briefly summarize *Google Spain* as an introduction to the right to be forgotten. Next, I review recent cases in the Canadian jurisprudence and argue that they potentially set the stage for a Canadian right to be forgotten. I then turn to an analysis of how the right to be forgotten is consonant with the three core purposes of the freedom of expression: democracy and self-government, the search for the truth and the marketplace of ideas, and individual autonomy and self-actualization. Given the Canadian Supreme Court's acceptance of the core justifications of expressive rights in the *Charter* jurisprudence, I suggest that constitutional considerations of the right to be forgotten be enriched by an understanding of how forgetting bolsters expressive freedom in the digital age.

## 1. Introduction

The Internet is ubiquitously heralded as a boon for self-expression worldwide. However, with the Internet has also come a permanent record of all of our online—and often offline—activity. How does this state of affairs—a state of constant archiving and surveillance—affect our expressive freedoms? How can we remedy the negative effects of digital permanence on our expression?

This paper suggests that the right to be forgotten may be a solution. First, I introduce the right to be forgotten through the seminal case of *Google Spain*. I then go on to discuss Canadian cases which may open the door to a similar right to be forgotten. I then demonstrate that the right to be forgotten actually promotes the three core purposes of the freedom of expression, which are accepted by the Supreme Court of Canada: democracy and self-government, the search for the truth and the marketplace of ideas, and individual autonomy and self-actualization. The right to be forgotten is essential to democracy and self-government, as it enables individuals to candidly debate topics and criticize powerful institutions without the fear of a permanent record. The right to be forgotten is also key to individual self-actualization. With the advent of Web 2.0, people use the Internet to express and experiment with their identities. However, we often outgrow the digital incarnations of ourselves. Sometimes, our online narratives are simply misrepresentative. Thus, the ability to have personal information de-indexed from search engines al-

lows people to develop, change, and flourish.

While the right to be forgotten is often considered antithetical to the freedom of expression, it is clear that forgetting is also beneficial to forms of self-expression. I thus suggest that, if the Supreme Court ever explicitly considers the right to be forgotten, it should recognize that forgetting actually protects expressive freedom in the digital era.

## 2. Setting the Stage for Canada's Right to be Forgotten?

A right to be forgotten was recognized by the Court of Justice of the European Union (CJEU) in *Google Spain*. Since then, there have been at least two cases in Canada which dance around the issue of a homegrown right to be forgotten. In this section, I first discuss the European case of *Google Spain* as a starting point. I then analyze two Canadian cases: *Globe24h* and *Equustek*.

### 2.1. Google Spain: New Beginnings

In 2014, the Court of Justice of the European Union handed down a decision stating that individuals have the 'right to be forgotten.' In *Google Spain*, various provisions of Directive 95/46 on the Protection of individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data—a European Union directive dealing with personal data—were interpreted to mean that search engines such as Google could be made to remove the personal information of claimants from their search results, even if they themselves had not published the content. As a 'data controller' which processed 'personal data,'<sup>1</sup> Google had the obligation to de-index search results emanating from an individual's name.<sup>2</sup> The CJEU wrote that informational privacy would trump the search engine's economic interests, as well as the public's access to information, unless the claimant's data is of public interest.<sup>3</sup>

In sum, Directive 95/46 was interpreted to provide a 'right to be forgotten,' whereby individuals may request that search engines de-index personal data posted about

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<sup>1</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12 [2014] ECLI para 41.

<sup>2</sup> *Ibid* at para 88.

<sup>3</sup> *Ibid* at 99.

them by third parties (i.e. websites).

## 2.2. Globe24h: Global Reach

On January 30, 2017 the Ontario Federal Court introduced its own version of a right to be forgotten in *A.T. v. Globe24h.com*. A Canadian respondent referred to as A.T. brought an action against Sebastian Radulescu, an owner of a website—Globe24h.com—in Romania. Radulescu used his website to republish court records he downloaded from websites such as CanLII.org. While CanLII’s documents are not indexed by search engines, they became visible in search results once he republished them on his own website.<sup>4</sup>

The search results uncovered sensitive information such as health problems, bankruptcies, divorce records, and immigration data.<sup>5</sup> Importantly, Radulescu was charging people fees to have their personal information removed from Globe24h.com. In this case, the claimant lodged a complaint under Canada’s *Personal Information Protection and Electronic Documents Act* (PIPEDA). The case raised the following issues: A) whether PIPEDA has extra-territorial application to Globe24h.com, despite it not being in Canada; B) whether Radulescu was using personal information without consent as part of a ‘commercial activity’; C) whether his activities were ‘journalistic’; and D) whether his activities were ‘appropriate’ per s. 5(3) of PIPEDA.<sup>6</sup>

The Court responded to question A in the affirmative. It determined that there was a “real and substantial connection” between Canada and the respondent. It could thus exercise jurisdiction over Radulescu. Concerning issue B, the Court determined that Radulescu was an “organization” (per s. 2[1]) using personal information for the purposes of making money from ad revenues and takedown fees.<sup>7</sup> With respect to the third issue, the Court concluded that the purposes of Globe24h were not “journalistic,” and thus did not enjoy the exception under paragraph 4(2)(c) of PIPEDA.<sup>8</sup> The website, as stated above, was in reality created for the purposes of making money from takedown requests and ad revenues.<sup>9</sup>

Question D was answered in the negative. Subsection 5(3) of PIPEDA establishes that organizations are required to “collect, use or disclose personal information

only for purposes that a reasonable person would consider are appropriate in the circumstances.”<sup>10</sup> Radulescu’s business was deemed neither *bona fide* nor proportionate, as his actions amounted to “needless exposure of sensitive personal information of participants in the justice system via search engines.”<sup>11</sup> The Court also determined that the personal information was not caught under the “publicly available” exception set out in section 7 of PIPEDA.

The Court was not unaware of the implications its decision might have for Google and the right to be forgotten, noting that a corrective order “may assist in persuading the operators of search engines to de-index the pages carried by the respondent web site.”<sup>12</sup> While providing declaratory relief, Justice Mosley alluded to Google:

A declaration that the respondent has contravened PIPEDA, combined with a corrective order, would allow the applicant and other complainants to submit a request to Google or other search engines to remove links to decisions on Globe24h.com from their search results. Google is the principal search engine involved and its policy allows users to submit this request where a court has declared the content of the website to be unlawful. Notably, Google’s policy on legal notices states that completing and submitting the Google form online does not guarantee that any action will be taken on the request. Nonetheless, it remains an avenue open to the applicant and others similarly affected. The [Office of the Privacy Commissioner of Canada] contends that this may be the most practical and effective way of mitigating the harm caused to individuals since the respondent is located in Romania with no known assets.<sup>13</sup>

The court noted that a corrective order and declaratory judgment would enable individuals to make de-indexing claims to search engines; in other words, to enable their right to be forgotten.<sup>14</sup> The court thus explicitly recognized Google’s intermediary role in privacy disputes, even if it has had no direct involvement in

<sup>4</sup> *A.T. v. Globe24h.com*, 2017 FC 114 (CanLII) [*Globe24h*] at paras 8-9.

<sup>5</sup> *Ibid* at para 11.

<sup>6</sup> *Ibid* at para 44.

<sup>7</sup> *Ibid* at para 63.

<sup>8</sup> *Ibid* at para 65.

<sup>9</sup> *Ibid* at paras 68-9.

<sup>10</sup> *Ibid* at para 71.

<sup>11</sup> *Ibid* at para 74.

<sup>12</sup> *Ibid* at para 83.

<sup>13</sup> *Ibid* at para 86.

<sup>14</sup> Thomson Reuters, *The Extra-Territorial Reach of PIPEDA: T. (A.) v. Globe24h.com*” (22 February 2017), *Practical Law* online <<http://ca.practicallaw.com/w-005-9407?q=#a000014>>.

the case itself. Moreover, it expanded its ability to enforce privacy globally.<sup>15</sup>

Christopher Berzins argues that it is possible that PIPEDA could directly apply to Google, much like Directive 95/46 did in *Google Spain*.<sup>16</sup> In examining the Privacy Commissioner's Office (OPC) investigation report preceding *Globe24h*, Berzins speculates that because Google (like Radulescu) is a business non-consensually using personal data, it may very well be subject to takedown requests in the future.<sup>17</sup> This would largely depend on whether Google can be considered a 'data controller' like in the CJEU case,<sup>18</sup> or if it is a 'data processor.'<sup>19</sup> A decision favoring the former would bring Canada directly in line with CJEU's right to be forgotten.

### 2.3. Equustek: More Questions than Solutions?

*Google Inc. v. Equustek Solutions Inc.* is a dispute about trade secrets. In the case, the plaintiffs claimed that the defendants (Datalink) "designed and sold counterfeit versions of their product."<sup>20</sup> They sued and obtained injunctions against the defendants based on claims of unlawful appropriation of trade secrets and trademark infringement. The defendants were ordered to cease their business. However, the defendants continued with their illicit business via websites indexed by Google. The plaintiffs thus obtained a worldwide injunction ordering Google to de-index the defendants' websites.

Google appealed, claiming that the "injunction was beyond the jurisdiction of the court, that it improperly operated against an innocent non-party to the litigation and that it had an impermissible extraterritorial reach." The British Columbia Court of Appeal dismissed the action. The decision held that the Court had territorial competence to issue the injunction, as its data-gathering and advertising constituted conducting business in British Columbia. It thus had *in personam* jurisdiction over the search engine. Despite Google being a non-party to the litigation, the Court ruled that it was "permissible to seek relief against" the company. Finally, the bench opined that the injunction against Google did not vio-

late the principles of comity.

In the Court of Appeal case, Google raised the issue of protecting the "openness of the World Wide Web, and the need to avoid unnecessary impediments to free speech."<sup>21</sup> The Court was unconvinced that the websites used for illegal enterprising constituted valuable expression.<sup>22</sup>

In appealing the decision, Google's factum to the Supreme Court opened with a dramatic statement: "At its core, this case is about the propriety of the Courts of British Columbia issuing a permanent, mandatory, worldwide injunction against Google Inc. ("Google") intended to *silence speech* regarding the existence of publicly accessible websites on the Internet."<sup>23</sup>

Google proceeded to argue that the "effect of the Worldwide Order is that only Google's speech is restricted, as it is now prohibited from truthfully informing the global public (including users inside and outside Canada) about the existence of publicly and readily accessible webpages."<sup>24</sup>

The Supreme Court handed down the final decision on June 28, 2017. Google was ordered to de-index the websites in question. Prior to this, the Canadian Internet Policy and Public Interest Clinic (CIPPIC) speculated that although *Equustek* concerns a "trade secrets dispute ... it is clear that this new takedown/censorship power is intended to be of general application and will be available in copyright disputes, defamation disputes, or any other lawsuits."<sup>25</sup> Indeed, it is possible that *Equustek* could open the door to a Canadian 'right to be forgotten,' as litigants could also bring takedown requests via

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<sup>15</sup> *Ibid.*

<sup>16</sup> Christopher Berzins, "The Right to be Forgotten after Google Spain: Is it Coming to Canada?" 28 Can J Admin L & Prac 267 at 284-6.

<sup>17</sup> *Ibid* at 285-8.

<sup>18</sup> *Ibid* at 284-6.

<sup>19</sup> I thank one of my anonymous reviewers from the 7th USENIX Workshop on Free and Open Communications on the Internet for pointing out this distinction.

<sup>20</sup> *Equustek Solutions Inc. V. Jack* 2015 BCCA 265.

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<sup>21</sup> *Ibid* at para 108.

<sup>22</sup> *Ibid* at paras 91-2 and 108-10.

<sup>23</sup> *Google Inc. v. Equustek Solutions Inc.*, et al. [2016] SCC (Factum of the Appellant at para 1). My emphasis.

<sup>24</sup> *Ibid* at para 7.

<sup>25</sup> Canadian Internet Policy and Public Interest Clinic, "CIPPIC attempts to intervene in Appeal of Global Content Removal Order" (12 September 2014), *Digital Expression*, online:

<[https://cippic.ca/en/news/CIPPIC\\_attempts\\_to\\_intervene\\_in\\_global\\_injunction\\_appeal](https://cippic.ca/en/news/CIPPIC_attempts_to_intervene_in_global_injunction_appeal)>. See also Michael Geist, "Did a Canadian court just establish a new right to be forgotten online?" (6 February 2017), *The Globe and Mail*, online: <<https://www.theglobeandmail.com/report-on-business/rob-commentary/did-a-canadian-court-just-establish-a-new-right-to-be-forgotten-online/article33915916/>>.

torts like the intentional invasion of privacy, the tort of disclosure, and the appropriation of image.<sup>26</sup>

However, in its final decision to uphold the de-indexing injunction, the Court seemed to deliberately circumscribe the scope of its precedent, limiting the decision to the facts:<sup>27</sup> “The issue is whether Google can be ordered, pending a trial, to globally de-index D’s websites which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company.”<sup>28</sup> Further implications for other types of litigation went unmentioned.

Similarly, issues concerning the freedom of expression enjoyed little attention. In addressing Google’s argument that expressive freedoms ought to weigh against the injunction, the majority responded that “while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case.”<sup>29</sup> The Court subsequently deferred to Groberman J.A. of the British Columbia Court of Appeal, who assured that the injunction would not interfere with the expressive standards of other jurisdictions, as it is unlikely that “prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation.”<sup>30</sup> Importantly, the injunction was deemed a “very limited ancillary order designed to ensure that the plaintiffs’ core rights are respected.”<sup>31</sup> The majority suggested that if the order interfered with the expression laws of other nations, Google could apply to have the injunction changed.<sup>32</sup>

The core of expressive freedom, according to the majority, was not at stake: “This is not an order to remove

speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders.”<sup>33</sup> In other words, unlawful sales fell beyond the protective scope of the freedom of expression.<sup>34</sup> In the event that the injunction did, in fact, compromise expressive freedom, concerns of averting the “irreparable harm” of Datalink’s activities would eclipse the freedom of expression.<sup>35</sup> While the Court evaded questions of how this case might affect the right to be forgotten by delimiting the scope of its decision, it demonstrated a willingness to make global takedown orders against search engines.

Should a right to be forgotten case arise, it is likely that the Court would ask whether freedom of expression ‘values’ have been infringed, as it did (albeit briefly) in this case. The *Charter* does not only apply to government law, but has also been extended to evaluations of the common law. As the Supreme Court stated during its freedom of expression analysis in *Grant v. Torstar Corp.*: “The common law, though not directly subject to *Charter* scrutiny where disputes between private parties are concerned, may be modified to bring it into harmony with the *Charter*.”<sup>36</sup> Questions of expressive rights are thus applicable to potential emanations of the right to be forgotten from both PIPEDA as well as the common law.

In sum, recent developments in *Globe24h* and *Equustek* show that a right to be forgotten could possibly emerge in Canada. However, as Google—and other critics of the right—argue, the right to be forgotten could be at odds with the freedom of expression. The following sections grapple with this question, arguing otherwise.

### 3. The Core of Expressive Freedom

Although there are many aspects to the freedom of expression, they can be separated into the broader categories of self-actualization, truth, and democracy.<sup>37</sup> As stated in the landmark case *R. v. Sharpe*, the core values of the freedom of expression are “individual self-fulfillment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy.”<sup>38</sup> The closer to the core values, the more

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<sup>26</sup> Alec Angle, “The Invasion of Privacy at Common Law: Keeping up with *Jones v Tsige*” (B.C.L./LL.B. Term Paper, McGill University Faculty of Law, 2017) [unpublished].

<sup>27</sup> As predicted by Jordan Levesque, “The Right to be Forgotten: No Solution to the Challenges of the Digital Environment” (Master of Laws Thesis, University of British Columbia Faculty of Graduate and Postdoctoral Studies, 2016) [unpublished] at 111. He suggested that the unlawful (thus low value) nature of the expression would allow for the injunction.

<sup>28</sup> *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34.

<sup>29</sup> *Ibid* at para 45.

<sup>30</sup> *Ibid* qtd at para 45.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* at para 46.

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<sup>33</sup> *Ibid* at para 48.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid* at para 49.

<sup>36</sup> *Grant v. Torstar Corp.* 2009 SCC 61, [2009] 3 SCR 640 at para 44.

<sup>37</sup> Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 8.

<sup>38</sup> *R. v. Sharpe* 2001 SCC 2, [2001] 1 SCR 45 at para 23.

protection speech enjoys. The following is a brief summary of these philosophies.

### 3.1. Truth and the Marketplace of Ideas

J.S. Mill is the most famous proponent of the ‘truth’ justification. In *On Liberty*, Mill writes that the public ought to have access to all ideas, irrespective of their value.<sup>39</sup> Censorship is unacceptable inasmuch as a censor may mistakenly—or purposefully—suppress truth.<sup>40</sup> False ideas are necessary because even they may have an element of truth to them.<sup>41</sup> Moreover, the contrast between false and true ideas will make the latter rise to the top of debate.<sup>42</sup>

Mill thus puts forward a utilitarian ‘marketplace’ theory of expression, whereby the importance of expressive rights stems from bringing us closer to the truth.<sup>43</sup> Objections about whether all speech indeed leads to the truth have been raised, but they are beyond the scope of this paper. Despite some of its shortcomings, this theory correctly observes that expression is generally a conduit for individuals in the search for truth. The Supreme Court has upheld this philosophy:

Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.<sup>44</sup>

### 3.2. Democracy and Self-Government

Alexander Meiklejohn is the foremost advocate of the idea that protected expression is a prerequisite for democracy.<sup>45</sup> In order to govern themselves, individuals must have access to all information on questions of public importance.<sup>46</sup> In the absence of information, the promotion of the public good is left hollow with improvidence.<sup>47</sup> This account emphasizes the right to access ideas, rather than the right to promote them.<sup>48</sup>

However, Richard Moon notes that if an account focuses solely on the “registration and aggregation of the political preference of individual members of the community, all that would be required for its operation would be regular election, interim polling, and commu-

nication from competing candidate to the electorate concerning policy alternatives.”<sup>49</sup> Expression also enables the flourishing of an engaged and community-oriented citizenry.<sup>50</sup> Through democratic discussion, people develop the capacity to understand and empathize with others, ultimately cultivating consideration that goes beyond self-interest and embraces community well-being.<sup>51</sup> In sum, the freedom of expression not only fosters democratic debate, but also shapes engaged citizens who care about the public good.

In pronouncing that “free expression is essential to the proper functioning of democratic governance,”<sup>52</sup> the Supreme Court has endorsed this core value.

### 3.3. Autonomy and Self-Actualization

Arguments focusing on autonomy and self-actualization often suggest that to restrict an individual’s access to different ideas is to offend their autonomy, as this inhibits their decision-making processes.<sup>53</sup> Others argue that hearing and deliberating upon others’ opinions enables people to use their ability to reason.<sup>54</sup>

Kent Greenwald proposes that by virtue of the fact that individual thinking and emotion are inextricably entwined with expression, the link between autonomy and expression is exceptional.<sup>55</sup> Moon explains that individuals manifest their inner selves via conversation. Expression cannot be reduced to a mere vessel of data delivery, but is a means to project one’s ideas, emotions, and identity.<sup>56</sup> If drawing on the latter definition, the freedom of expression is central to individual exploration, growth, and flourishing more broadly.

The Supreme Court has noted that expression is invaluable to self-actualization.<sup>57</sup> In *Irwin Toy*, the majority of the Supreme Court affirmed that the “diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.”<sup>58</sup>

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<sup>39</sup> *Supra* 37 at 9.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid* at 10.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Supra* 36 at 49.

<sup>45</sup> *Supra* 37 at 14.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 15.

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<sup>49</sup> *Ibid* at 18.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Supra* 36 at 48.

<sup>53</sup> *Supra* 37 at 19.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid* at 20.

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

<sup>57</sup> *Supra* 36 at 50.

<sup>58</sup> *Ibid* at 50 quoting *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927 at 976.

## 4. Forgetting for Expression

During the Web 1.0 era—the period building up to the burst of the dot-com bubble—individuals primarily used the Internet in order to communicate with each other and to navigate websites.<sup>59</sup> The dawn of Web 2.0 heralded new Internet dynamics whereby people began creating and sharing content.<sup>60</sup> A 2007 Pew Research survey shows that two thirds of young people are producing content online.<sup>61</sup> Individuals are now using the Internet to engage in debate, and to explore and express their identities.

Today, everything is on the record. Viktor Mayer-Schönberger observes that, until recently, “forgetting has been the norm and remembering the exception.”<sup>62</sup> However, the status quo has shifted to remembering, with the help of technologies such as Google.<sup>63</sup> In light of the Internet’s enduring memory, how might the right to be forgotten promote the expressive values of democracy, the search for truth, and self-actualization?

### 4.1. Democracy and the Search for Truth

For the purposes of my analysis, the search for truth and the promotion of self-government are considered together. Conceptually, they are similar in terms of their focus on the benefits of open discussion and the exploration of ideas. Both emphasize the importance of individuals being able to frankly express their views, be it for debate or for dissent. This section thus focuses on how digital permanence affects our ability to have candid discussions in the pursuit of governing ourselves and searching for truth.

Neil Richards explains that privacy is essential to the freedom of expression, discussing what he calls ‘intellectual privacy’: the “protection from surveillance or unwanted interference by others when we are engaged in the processes of generating ideas and forming beliefs...”<sup>64</sup> He observes that intellectual privacy is central to the promotion of truth-seeking and democracy.<sup>65</sup> To guard the search for truth, we must protect idea gen-

eration by shielding it from surveillance.<sup>66</sup> Similarly, as democracy is grounded in decision-making, citizens must be able to deliberate in privacy.<sup>67</sup> Mayer-Schönberger, who advocates for an information expiry date in the digital age, makes similar arguments, though not explicitly framed within the purposive framework of self-expression.

In his work, he draws an analogy between the digital persistence of remembering and Jeremy Bentham’s panopticon:<sup>68</sup> a prison design where prisoners could never tell whether or not they were being watched by guards.<sup>69</sup> As a result, inmates would behave as though always under a watchful eye. Michel Foucault subsequently described the panopticon as an instrument of psychological domination, suggesting that many aspects of social control were based on a similar model.<sup>70</sup> Oscar Gandy then connected this theory to increasing levels of surveillance.<sup>71</sup> Mayer-Schönberger summarizes the behavioural effects of the panopticon: “I act as if I am watched even if I am not.”<sup>72</sup>

Because all of our activity is ‘on the record,’ our behaviour is influenced by the fact that it will inevitably be judged by someone in the future.<sup>73</sup> The specter of the future thus imposes a “chilling effect” on what we say in the moment.<sup>74</sup> The surveillance of this panopticon cuts across temporal dimensions.<sup>75</sup>

Echoing Richards on the topic of expressive freedom, Daniel Solove writes that privacy enables the fruition of conversation on important social topics.<sup>76</sup> He observes that democratic debate is at its best when within the protection of privacy:

Political discussions often take place between two people or in small groups rather than at public rallies or nationwide television broadcasts. More discourse about politics occurs in personal conversations than on soapboxes or street corners. Without privacy, many people might not

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<sup>59</sup> Viktor Mayer-Schönberger, *Delete: the Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009) at 3.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid* at 2.

<sup>63</sup> *Ibid.*

<sup>64</sup> Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (New York: Oxford University Press, 2014) at 95.

<sup>65</sup> *Ibid* at 99. Autonomy is dealt with in the following section.

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<sup>66</sup> *Ibid* at 100.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Supra* 59 at 11.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

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

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

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007) at 131.

feel comfortable having these candid conversations.<sup>77</sup>

Deprived of privacy, people are unable to voice controversial opinions for fear of opprobrium.<sup>78</sup> According to Eric Barendt, privacy is integral to the freedom of expression.<sup>79</sup> When individuals are aware that they are being monitored, they are unlikely to candidly express themselves.<sup>80</sup> The salience of these remarks cannot be overstated within the context of the Internet.<sup>81</sup>

If everything is recorded to digital history, will young people speak out on political issues despite the fact that this may harm their prospect of employment ten years down the line?<sup>82</sup> Will a potential civil servant criticize their government? Who will advocate for the environment, bearing in mind that this may cause future business deals to flounder?<sup>83</sup> Will I tweet in support of a social movement, knowing that history may not be kind to my cause? How can I express a contentious thought, knowing that it will become part of my eternal ‘digital footprint’? It is safer to hold one’s tongue. All of a sudden, the costs of criticizing power become insurmountably high.<sup>84</sup>

Google’s refusal to allow society to forget strikes at the freedom of expression by promoting a “climate of self-censorship through the perception of panoptic control that constrains robust and open debate—the hallmarks of democratic government—not simply in the present but long into the future.”<sup>85</sup>

Moreover, the acerbic climate of the Internet may cause individuals to think twice before speaking their minds. Once expression has been put out there, it cannot be taken back. In her discussion of online shaming, Emily Laidlaw advocates for a social conception of privacy: the “freedom to participate *within* the public gaze.”<sup>86</sup> Shame can be characterized as a “form of social con-

trol.”<sup>87</sup> Laidlaw cites Eric Posner, who explains that shaming happens when a community reacts to an individual’s social transgression through denunciation and shunning.<sup>88</sup> When played out online, the effects of shaming are exacerbated—sanctions are global, instantaneous, disproportionate, and wrought by nameless and numerous individuals.<sup>89</sup> Most importantly, they are forever “memorialized in Google search results.”<sup>90</sup> In its harshest form, shaming can manifest itself in abuse leading to mental health issues and self-isolation.<sup>91</sup>

Individuals should feel that the Internet is a space in which they can comfortably participate.<sup>92</sup> Generally, those hounded by online shaming do not want to have to retreat from the Internet. They merely want to engage in the online community without abuse.<sup>93</sup> An individual would be much more inclined to share their opinions if they knew that—hypothetically—were they to become the subject of online ire, they could hit the ‘reset’ button. The power to be forgotten could enable victims of online shaming to re-integrate into the expressive arena of the Internet.

More generally, forgetting would allow individuals to have frank discussions without the specter of discursive baggage. It would empower the ‘freedom to participate’—in other words, the freedom of expression. In sum, the right to be forgotten is integral to self-government as well as the search for truth.

Thus far, my discussion has integrated Mayer-Schönberger’s arguments for forgetting and his observations on the chilling effects of digital remembrance, and scholarship on the symbiotic relationship between privacy and the tenets of expressive freedom. In other words, I have situated Mayer-Schönberger’s observations on Google within the broader framework of privacy’s role in upholding the freedom of expression. More specifically, I have explicitly inserted the right to be forgotten into the legal schema of expressive rights in Canada.

#### 4.2. Autonomy and Self-Actualization

Undeniably, the Internet promotes the freedom of expression. It serves as a forum for self-actualization and autonomy, where individuals may express their person-

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at 130.

<sup>79</sup> Ritu Khullar & Vanessa Cosco, “Conceptualizing the Right to Privacy in Canada” (Paper delivered at Canada Bar Association Administrative Law, Labour & Employment Law and Privacy and Access Law PD Conference, 26-7 November 2010) at 7-8.

<sup>80</sup> *Ibid* at 8.

<sup>81</sup> See Chapter 2 of *supra* 27.

<sup>82</sup> *Supra* 59 at 111.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* at 112.

<sup>85</sup> *Ibid.*

<sup>86</sup> Emily Laidlaw, “Online Shaming and the Right to Privacy” (2017) 6:3 *Laws* at 11.

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<sup>87</sup> *Ibid* at 2.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* at 3.

<sup>91</sup> *Ibid* at 2.

<sup>92</sup> *Ibid* at 18.

<sup>93</sup> *Ibid* at 21.

alities and experiment with their identities.<sup>94</sup> John Palfrey and Urs Gasser write that growing up in the digital era has drastically changed how individuals cultivate and control their identities.<sup>95</sup> Individuals are sharing personal information on the Internet at an unprecedented rate.<sup>96</sup> Such “digital contributions to identity” are a conduit to identity formation.<sup>97</sup>

In the context of Web 2.0, people create and share content in order to convey who they are. For digital natives—those who have grown up with the Internet—one’s online identity is inextricably linked to one’s offline identity. Such individuals concurrently convey who they are on the Internet and offline.<sup>98</sup> The online/offline dichotomy is dissolving, as—per contemporary Internet practices contrary to 1990s usage—individuals use the Internet to communicate with others from ‘real life.’<sup>99</sup> Moreover, the ubiquity of technologies such as smartphones make social media a constant presence in ‘offline’ life.<sup>100</sup> Generally, although individuals use different social media platforms, they consistently use the same personal information to convey who they are.<sup>101</sup>

While such behaviour may be spontaneous and non-reflexive, it is often a calculated form of self-representation. Sharing information about personal relationships, for example, is a method of “impression management” shaping public perceptions of one’s self.<sup>102</sup> Erika Pearson observes that the “mediated nature of [online] spaces means that most information about the virtual self and its place in the network is giv-

en through deliberate construction of signs, linking back to this sense of online self-consciousness.”<sup>103</sup>

Individuals use various signifiers such as videos, pictures, monikers, and music to represent themselves.<sup>104</sup> Social networking platforms and other Internet forums force users to make choices about how to present their identities.<sup>105</sup> These decisions range from deciding which photos to upload on Facebook and what to Tweet, to deciding on a messenger nickname or email address.<sup>106</sup> Marwick notes that this is akin to that of adopting offline signals like fashion and media.<sup>107</sup> On Facebook, one may choose to display preferences for select media: film, television, literature, music.<sup>108</sup> These selections are “taste performances” conveying one’s identity.<sup>109</sup> All choices inevitably express who an individual is.<sup>110</sup>

J.C. Buitelaar observes a narrative quality inherent in the curation of identity, as individuals play the authors of their digital biographies.<sup>111</sup> Narrative imbues experiences with significance and enables the formulation of identity.<sup>112</sup> Indeed, the line between one’s identity and one’s narrative blurs.<sup>113</sup>

Relatedly, scholars have taken note of the “narrative force of search results.”<sup>114</sup> Google has profound control over the personal narratives of individuals. Its algorithms may choose to privilege invasive and humiliating information about an individual without giving the whole story.<sup>115</sup> A search may yield results about an individual’s criminal charges, but will not rank information concerning their dismissal.<sup>116</sup>

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<sup>94</sup> I would like to thank my term paper supervisor Professor Richard Janda for inspiring the topic of online identities—or, in his words, our digital ‘simulacra.’

<sup>95</sup> John Palfrey Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (accessed 6 April 2017) Books24x7 online:

<<http://common.books24x7.com.proxy3.library.mcgill.ca/toc.aspx?bookid=106953>>.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> Alice E. Marwick, “Online Identity” in J. Hartley, J. Burgess, & A. Burns (eds), *Companion to New Media Dynamics* (Malden: Blackwell, 2013) at 6.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Supra* 95.

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<sup>103</sup> Erika Pearson, “All the World Wide Web’s a Stage: the Performance of Identity in Online Social Networks” (2009) *First Monday* J 14:3.

<sup>104</sup> *Supra* 99 at 6.

<sup>105</sup> *Ibid* at 1.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid* at 6.

<sup>108</sup> *Ibid* at 7.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* at 1.

<sup>111</sup> J.C. Buitelaar, “Privacy and Narrativity in the Internet Era” (2014) 30:4 266 at 266.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Emily Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge: Cambridge University Press, 2015) at 186.

<sup>115</sup> *Ibid* at 185.

<sup>116</sup> *Ibid.*



Jeffrey Rosen highlights that privacy prevents individual narratives from being taken out of context and misrepresented in a digital climate with little factual certainty.<sup>117</sup> Laidlaw quotes the words of Justine Sacco, a victim of online shaming: “If I don’t start making steps to reclaim my identity and remind myself of who I am on a daily basis, then I might lose myself.”<sup>118</sup> Identity is deeply entwined with narrative—an autobiography requiring careful tending and constant revision—which lends significance to our experiences.<sup>119</sup> Unfortunately, as Mayer-Schönberger reminds us, the loss of control over personal data sets barriers to identity formation.<sup>120</sup> Thus a measure of informational privacy—the ability to control information about one’s self—is of profound importance in the pursuit of self-actualization. The right to be forgotten gives individuals a measure of control over their narratives, and thus their identities.

Traditionally, identity was conceived of as an inflexible “body unity grounded in a self.”<sup>121</sup> Nowadays, sociologists recognize that identity is flexible and contingent on context and audience.<sup>122</sup> Our identities change based on where we are, and who we are with.<sup>123</sup> Theorists such as Stuart Hall and Angela McRobbie write that identity is flexible and subject to change: a “*pluralist* subject.”<sup>124</sup> Postmodern theorists such as Anthony Giddens describe the formation of identity in terms of being a “project.”<sup>125</sup> As noted above, individuals construct their identities via adopting signifiers conveying who they are.<sup>126</sup> As identity is not inherent or static, it is essential to self-actualization that individuals be afforded the ability to experiment and evolve. Does the Internet currently allow for this?

In the early stages of the Internet, online and offline identities were decoupled: online interactions largely took place through text and photos and were not readily available to the public.<sup>127</sup> This fostered an environment in which individuals could experiment with identity.<sup>128</sup> However, the potential of the Internet as an “identity workshop” did not last a long time.<sup>129</sup> By and large,

individuals opt to represent their offline selves online. As stated above, social networking platforms have pushed for individuals using one identity both on and off the Internet.<sup>130</sup> Facebook does not permit users to sign up for a username such as ‘PlantEnthusiast92,’ but instead forces users to use their legal name.<sup>131</sup> These policies are largely driven by commercial incentives, as many online platforms function on a data-mining business model.<sup>132</sup>

Yet despite the fact that people cannot invent completely detached online personalities, they can still develop their offline personalities online. Given that online and offline are now one and the same, the stakes are even higher for the protection of online self-actualization. Palfrey and Gasser observe that the “Internet is a virtual laboratory for experiments in identity development.”<sup>133</sup> The identities of digital natives are constantly in flux. Like getting a new hairstyle, a digital native may update their Facebook photo, add or delete ‘friends,’ post on a blog, or make a video for their YouTube channel.<sup>134</sup> The forum of the Internet provides a space for “greater exploration in identity formation [and] offers terrific possibilities in terms of personal development.”<sup>135</sup>

However, Palfrey and Gasser note that, although an individual may change in person, it will be difficult to change their “social identity” online. While the Internet facilitates experimentation, it also ties one down to a “unitary identity.”<sup>136</sup> Upon Googling someone, a single image arises. Suppose an individual has changed profoundly within the past ten years. The digital memory of the Internet does not capture such nuance. If MySpace does not cooperate, my digital identity may forever be that of an angsty teenager. Unfortunately, past and present selves are presented as one.

Mayer-Schönberger remarks that “societal forgetting gives individuals a second chance.”<sup>137</sup> People start new relationships, bankruptcies are forgiven, and criminal records are cleared.<sup>138</sup> By allowing forgetting, “our society accepts that human beings evolve over time, that we have the capacity to learn from past experiences and

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<sup>117</sup> *Supra* 114 at 11.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Supra* 59 at 108.

<sup>121</sup> *Supra* 99 at 2.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at 4.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at 5.

<sup>133</sup> *Supra* 95.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Supra* 59 at 13.

<sup>138</sup> *Ibid*; Dominic McGoldrick, “Developments in the Right to be Forgotten” (2013) 13:4 HRL Rev 761 also gives criminal records as an example at 4.

adjust our behaviour.”<sup>139</sup> Meg Leta Ambrose, Nicole Friess, and Jill Van Matre point out that the Internet’s inability to forgive means that citizens are forced to carry the weight of their “scarlet letters” for life.<sup>140</sup> With the futility of the past bearing down on us, we will have little incentive to mature, improve, and evolve.<sup>141</sup> Writing on the right to be forgotten, Dominic McGoldrick contends that one’s past should not put a freeze on individual autonomy by fully prohibiting change in identity.<sup>142</sup> Ambrose, Friess, and Van Matre argue that forgetting is integral to forgiveness and new beginnings:

Today, those who have made mistakes, no matter the degree of innocence, carry that information around with them - Google attaches it to their names... Information associated with an individual can limit his or her professional pursuits, the interest of potential social ties, the ability to grow, and perceptions of self. The threat of an easily accessible permanent record may scare people away from pushing the boundaries of socially acceptable norms, stunting experimentation and creativity. In order to protect and foster autonomy, we must consider the impact of restricting individuals’ abilities to move beyond their pasts, free from old information.<sup>143</sup>

Richards argues that intellectual privacy is integral to autonomy so individuals can cultivate their personality “to generate new ideas and new forms of identity and expression.”<sup>144</sup> Sean Scott remarks that autonomy is protected by both the First Amendment and privacy rights.<sup>145</sup> Solove elaborates that individual autonomy and growth risk being undercut when private information is subject to exposure.<sup>146</sup> He cites Julie Cohen, who observes that the absence of privacy can discourage unorthodox personalities from expressing themselves.<sup>147</sup> With the potential of disclosure looming,

individuals will hesitate to explore socially taboo interests that could cost them social acceptance.<sup>148</sup>

The importance of privacy to autonomy and self-actualization has not gone unnoticed. In this section, I hone in on how the right to be forgotten is essential to understanding expressive self-actualization in the digital age. Like in the prior portion, I contextualize the ideas of Mayer-Schönberger and others within an analysis of the core purposes of expressive freedoms. My discussion further situates these questions within the framework of Web 2.0, where content creation is essential to self-actualization. The Internet allows individuals to express their identities via signifiers and narratives. However, signifiers and narratives may become inaccurate and outdated over time. The right to be forgotten not only empowers Internet users to correct misrepresentations, but also to change, grow, and flourish. The right to be forgotten is thus integral to autonomy and self-actualization—one of the core aspects of self-expression in Canada’s *Charter* jurisprudence.

## 5. Conclusions

Google ‘digital footprint’ and you will uncover society’s anxieties about digital permanence: ‘Your Digital Footprint Matters,’<sup>149</sup> ‘10 steps to erase your digital footprint,’<sup>150</sup> ‘Clean Up Your Digital Footprint,’<sup>151</sup> ‘Managing your digital footprint,’<sup>152</sup> ‘Leave No Trace: How to Eliminate Your Digital Footprint,’<sup>153</sup> ‘How to delete your digital life’<sup>154</sup> are just a few examples. Ac-

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<sup>139</sup> *Supra* 59 at 13.

<sup>140</sup> Meg Leta Ambrose, Nicole Friess & Jill Van Matre, “Seeking Digital Redemption: the Future of Forgiveness in the Internet Age” (2012) 29 Santa Clara Computer & High Tech L J 99 at 101.

<sup>141</sup> *Supra* 59 at 125.

<sup>142</sup> *Supra* 138 at 4.

<sup>143</sup> *Supra* 140 at 102.

<sup>144</sup> *Supra* 64 at 10.

<sup>145</sup> *Supra* 76 at 130.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

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<sup>148</sup> *Ibid.* See also Levesque’s discussion of privacy and autonomy *supra* 27 at 19-20.

<sup>149</sup> Internet Society, “Your Digital Footprint Matters” online: <<https://www.internetsociety.org/your-digital-footprint-matters>>.

<sup>150</sup> ZDNet, “10 steps to erase your digital footprint” online: <<http://www.zdnet.com/pictures/10-steps-to-erase-your-digital-footprint/>>.

<sup>151</sup> Family Online Safety Institute, “Clean Up Your Digital Footprint” online: <<https://www.fosi.org/good-digital-parenting/clean-your-digital-footprint/>>.

<sup>152</sup> The University of Edinburgh, “Managing your digital footprint” (5 November 2015) online: <<http://www.ed.ac.uk/institute-academic-development/about-us/projects/digital-footprint>>.

<sup>153</sup> Peter Daisyme, “Leave No Trace: How to Eliminate Your Digital Footprint” (22 February 2017) *Business.com* online: <<https://www.business.com/articles/leave-no-trace-how-to-eliminate-your-digital-footprint/>>.

<sup>154</sup> Charles Arthur, “How to delete your digital life” (April 4 2013) *The Guardian* online:

ording to a 2013 Pew Research Center survey, 86% of individuals have tried to “remove or mask their digital footprints.”<sup>155</sup> Evidently, digital permanence is not merely an academic concern.

In this paper, I have challenged the notion that the right to be forgotten is incompatible with the freedom of expression. I first provided an overview of *Google Spain*, and proceeded to examine its potential Canadian counterparts: *Globe24h* and *Equustek*. In light of the expressive issues that these cases raise, I discuss how the right to be forgotten can actually bolster the three core purposes grounding the freedom of expression: democracy and self-government, the search for truth and the marketplace of ideas, and individual autonomy and self-actualization.

The possibility of forgetting enables individuals to debate and dissent online. Moreover, forgetting allows people to express, experiment with, and develop their identities and themselves. The Supreme Court of Canada has accepted these three justifications as the core purposes underpinning the freedom of expression as protected in section 2(b) of the *Canadian Charter of Rights and Freedoms*. While the current state of the right to be forgotten in Canada is unclear, I hope that when the time comes, the courts will further nuance their interpretation of the freedom of expression with an understanding of how digital permanence affects contemporary expression.

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<<https://www.theguardian.com/technology/2013/apr/04/delete-your-digital-life-advice>>.

<sup>155</sup> Lee Rainie, Sara Kiesler, Ruogu Kang & Mary Madden, “September 5, 2013 Anonymity, Privacy, and Security Online” (5 September 2013) *Pew Research Center* online:

<<http://www.pewinternet.org/2013/09/05/anonymity-privacy-and-security-online/>>.