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Data-protection bill needs to be on parliamentary agenda this session, says privacy-law expert

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‘People have also been clam-ouring for significant penalties, which don’t ex-ist in Canada,’ says David Fraser. ‘But one thing that was clear with C-11 is that it didn’t make anyone happy.’

During the 2019 federal elec-tion cam-paign, the gov-erning Liberals commit-ted to implementing Canada’s newly launched Digital Charter and its 10 prin-ciples that include assur10 principles that include assuring Canadians of “the integrity, authenticity, and security” of the digital services that they use, and that Canadians would have control over the data they share; and both know who is using it and “for what purposes” while protecting the privacy of online activity.

The pledge was half-fulfilled.

Last November, then-innovation, sci-ence, and industry minister Navdeep Bains tabled before the House of Com-mons the Digital Charter Implementa-tion Act, or Bill C-11. But by the time this year’s election was called, the bill had only passed first reading.

Now with a third consecutive governing mandate following the Liberals’ second consecutive minority win in Septem-ber’s national vote, it’s time for Prime Minister Justin Trudeau’s (Papineau, Que.) government to reintroduce—and Parliament to enact— legislation that would provide a digital update to a law passed more than two decades ago that governed how companies collect, use, and disclose personal information, ac-cording to internet, technology, and pri-vacy lawyer David Fraser.

“I don’t think it would be politically ten-able to go through the next session of Parliament without a reintroduction of privacy law-reform legislation,” he said. “The question will be whether it will look like C-11.”

Mr. Fraser, a partner with Atlantic Cana-dian law firm McInnes Cooper, said that many have called for a revamped C-11 to more closely follow the European Union’s General Data Protection Regu-lation (GDPR) that would, in part, im-pose tough penalties on companies that fail to protect personal data and anonymize data collected to protect user’s privacy.

Federal Privacy Commissioner Daniel Therrien was one of those unhappy with Bill C-11. The Hill Times photograph by Andrew Meade

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“People have also been clamouring for significant penalties, which don’t exist in Canada,” he explained.

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Federal Privacy Commissioner Daniel Therrien was one of those unhappy with the digital-protection bill.

In an op-ed that appeared in this news-paper in late September, Mr. Therrien argued that C-11“would not have cre-ated the trust required for a sustainable digital economy.”

“What is needed is not more self-reg-ulation, providing additional flexibility to companies that have not always acted responsibly, but rather true regulation, meaning objective and knowable stan-dards adopted democratically, enforced by democratically appointed and prop-erly empowered institutions like the Of-fice of the Privacy Commissioner,” he wrote.

"Some industry representatives are concerned that a rights-based legislation might be overly prescriptive, compared to the principles-based and flexible law we now have. In reality, a rights-based framework would be equally flexible and adaptable to new technologies and business models."

Bill C-11 had two primary objectives. It would have enacted the Consumer Privacy Protection Act "to protect the personal information of individuals while recognizing the need of organizations to collect, use or disclose personal information in the course of commercial activities," the first major refresh of privacy legislation since the Personal Information Protection and Electronic Documents Act (PIPEDA) was passed in 2000.

C-11 would have also put into force the Personal Information and Data Protection Tribunal Act, which would have established an administrative tribunal to hear appeals of certain decisions made by the privacy commissioner under the Consumer Privacy Protection Act and impose penalties for the contravention of certain provisions of that legislation.

Mr. Fraser supported the establishment of a tribunal, which would have had the power to impose a monetary penalty on an organization found by the privacy commissioner to have violated rules regarding the protection of personal information. "That process would have introduced greater fairness and independence" from the commissioner, according to Mr. Fraser, who noted that others found creating a tribunal would just have added another bureaucratic layer to an already "cumbersome" process of regulating digital privacy.

"A large number of people were unhappy with something that was almost taken directly from the GDPR, which is dispensing with consent in certain circumstances," he said, adding that PIPEDA was created to comply with the EU's Data Protection Directive that was enacted in October 1995 and which prohibits the transfer of personal data to any jurisdiction without adequate privacy protection.

"Many people don't realize that our privacy law is based almost entirely on notice and consent from the individual, whereas in Europe, consent is only one part of it. The majority of personal data that's collected and used by businesses and organizations in Europe is done on the basis of legitimate purposes or something like to fulfil a contract," said Mr. Fraser.

"C-11 introduced those sorts of things, so a business could collect, use and disclose personal information without knowledge or consent where necessary for business operations, and also where it was impracticable to get consent from an individual directly."

University of Ottawa law professor Michael Geist, who holds the Canada Research Chair in Internet and E-commerce Law at the university, said he believes that "privacy reform should be the No. 1 digital-policy issue for this government."

"At the end of the day, data and protection of privacy is one of the core elements that raises questions when it comes to Big Tech," he said. "The government's decision to introduce C-11 and then allow it to languish and die is difficult to reconcile with a forward-looking digital-policy framework."

"If you don't have a modernized privacy law–and we do not–there's little doubt we will find ourselves left behind from a broader digital-policy approach internationally."

Prof. Geist has some theories as to why the government did not push C-11 through Parliament.

One reason was a ministerial change. He said that while C-11 was a priority for Mr. Bains, it did not appear to be one for his successor in the industry portfolio, François-Philippe Champagne (Saint-Maurice—Champlain, Que.).

"The government may have also looked at this piece of legislation and wondered where the political wind was going to be," Prof. Geist said. "It garnered criticism across the board from those looking for privacy reform to those who oppose it, including the privacy commissioner.

"It was a piece of legislation that required real hard work, and it may well be that the government decided it would need more political capital than it was worth."

Still, he said he believes that C-11 was a good starting point to advance privacy-law reform.

"We're operating now in a globalized environment when it comes to privacy," said Prof. Geist. "We need to be cognizant of what's been taking place in Europe. With the GDPR, there's going to be a lot of pressure to up our game."

"We've seen the United States move toward stronger privacy protection—and the provinces are moving forward, including Quebec, which has now passed privacy legislation," he said.

"Several of the provinces have taken the position that they're done waiting for the federal government and are moving ahead with their own initiatives. I think many in the business community will be of the view that the federal government has failed its obligation to help set up national standards when it comes to privacy protection and have ceded the issue, in some ways, to the provinces and that may hurt the innovative economy in Canada."

"And I think that there are many Canadians that would ask the question why Canadians in one province should have better privacy rights than Canadians in other provinces."

In whichever way the federal government chooses to implement digital-privacy legislation, the law would need to include penalties and orders, Mr. Fraser said.

"If the government does that, it needs to ensure that there's due process and procedural fairness," he explained. The tribunal proposed in C-11 would meet that objective in Mr. Fraser's opinion.

"It would mean that the privacy commissioner would be the cop and the prosecutor, and not the judge, jury, and executioner," he said. "The privacy commissioner is an advocate for consumer privacy, and cannot be an impartial and fair decision-maker."

One vestige of C-11 that Mr.

Fraser would not like to see return is a proposed amendment to PIPEDA that would have allowed for the disclosure of personal information in a business transaction. For instance, under that planned change, with the pending sale of a federally regulated company, the seller could disclose to the buyer employee details, such as retirement dates, but only with worker consent–rendering it "unmanageable" in Mr. Fraser's opinion.

However, Mr. Fraser cautioned that the next incarnation of a federal digital privacy and security bill should not be overly prescriptive.

"The best legislation, particularly when it relates to technology, should be technologically neutral," he said. "PIPEDA, which came into effect two decades ago, has been pretty resilient because it didn't prescribe specific technologies. In 2001, we didn't have social media and online banking like we have today."

"If you constantly micromanage things like that, you will be constantly outpaced by technological change and have to play catch up. It's a whole lot better, in my view, to have a rule that says you need to take reasonable safeguards and precautions to protect the security and confidentiality of personal information, and those safeguards need to be proportionate to the sensitivity of the information," explained Mr. Fraser, who added that cybersecurity legislative feature should follow international standards.

He said that the C-11 successor bill will also need a strong ministerial advocate to shape its scope and guide its path through Parliament.

In Mr. Fraser's view, the last cabinet took the most "anti-big tech companies ever" approach to digital regulation.

He cited such measures as Bill C-10, which would have amended the Broadcasting Act to compel foreign streaming services to face the same Canadian Radio-television and Telecommunications Commission regulatory obligations as Canadian television networks but which had a delayed path through the House and got stalled in the Senate before the federal election. Also included is the proposed legislative and regulatory framework to address harmful online content to be led by two new regulatory bodies and an advisory board, as advanced by Canadian Heritage.

"Look at the rhetoric from certain cabinet ministers about bringing big tech to heel," said Mr. Fraser. "It suggests that the government wasn't doing these things because it thought it was the right thing to do, but that it had a mindset that big tech companies are bad."

Prof. Geist said that handing digital policy to the Heritage department was both "surprising and somewhat unusual," especially with an issue such as online harm that also captures the departmental mandates of Public Safety, Innovation, Science, and Economic Development, and Justice.

"Canadian Heritage didn't even bother to consult the privacy commissioner's office on its harmful content online consultation," he added, noting that the department also plans to not release the submissions received.

Christopher Guly is a freelance reporter and writer for The Hill Times, and a member of the Parliamentary Press Gallery.

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Figure:

Whichever way the federal government chooses to implement digital-privacy legislation, the law would need to include penalties and orders, says David Fraser. Photograph courtesy of David Fraser

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As the Liberals set up their agenda, now is the time for Prime Minister Justin Trudeau's government to reintroduce—and Parliament to enact— legislation that would provide a digital update to a law passed more than two decades ago that governed how companies collect, use, and disclose personal information. The Hill Times photograph by Sam Garcia

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Former innovation minister Navdeep Bains introduced Bill C-11 on Nov. 17, 2020. The Hill Times photograph by Andrew Meade

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