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## • A QUÉBEC PERSPECTIVE ON THE “RIGHT TO BE FORGOTTEN” AND THE REMOVAL OF PERSONAL INFORMATION ONLINE •

Marc-André Boucher, Associate, and Antoine Guilmain, Associate,  
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**Marc-André Boucher**



**Antoine Guilmain**

*“The past is a river we can never travel up again.”*  
Henry Bataille (1872-1922)

At present, the “right to be forgotten” is a concept that is not yet part of the legal landscape in Québec. It is referred to in the recent decision of Québec’s Commission d’accès à l’information, *C.L. v. BCF Avocats d’affaires*, 2016 QCCAI 114, but in a novel way, in which the Commission provided an interesting perspective. Essentially, it stated that an individual’s right to have inaccurate, incomplete or ambiguous information in a file concerning him or her corrected is not in the nature of the “right to be forgotten”. More specifically, it is still an open question as to whether the right to be forgotten can be imported into, or at least transposed to, Québec and Canada.

### FACTS OF THE CASE

The circumstances of the case are not earth-shaking. A legal assistant (the “applicant”) left her employment with a law firm (the “firm”); she asked that her profile, which was posted on the firm’s website, be erased in its entirety (name, photograph and job title). The firm then removed all information concerning her, “as is usual practice in these circumstances”. In this respect, uncontroverted evidence was given by the firm’s Information Technology Director and an expert

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Please address all editorial inquiries to:

### General Editor

Professor Michael A. Geist  
 Canada Research Chair in Internet and E-Commerce Law  
 University of Ottawa, Faculty of Law  
 E-mail: mgeist@uottawa.ca

### LexisNexis Canada Inc.

Tel. (905) 479-2665  
 Fax (905) 479-2826  
 E-mail: cplr@lexisnexis.ca  
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in information security showing that everything necessary to delete the applicant's information had been done (physical server, social media, memory cache). In spite of everything, when the various components of the applicant's name were entered into several search engines (Google, Yahoo, Bing, etc.), there was always a result with a reference to the "People" page of the firm's website. The applicant considered that situation to be damaging to her job search process, "because the employers to whom she applied obviously do Internet searches and they find that there is a connection with a firm that, she believes, will give bad references". The applicant then applied to the Commission d'accès à l'information (the "Commission") for a correction, so that her name would no longer be connected with the firm's website.

## LEGAL ISSUE

Can the applicant exercise her right of correction under the *Private Sector Act*, even though the firm had done everything necessary to remove the information at issue? From a somewhat different angle, is the duty to erase the links connecting the applicant to the firm's website an obligation "of means" or "of result"? Spoiler alert: the Commission chose to take the most measured approach; the firm had to use all reasonable means to correct/erase the applicant's information (internally, on its website), but that did not amount to a duty to de-index (externally, on the rest of the Web). In other words, the concept of the "right to be forgotten", about which much ink continues to be spilled on the other side of the Atlantic, is neither a synonym for, nor a subcomponent of, the right of correction. That finding stems from a number of concepts/instruments (well known to the legal profession), which we will break down as follows: (a) the legal nexus, (b) the analogy approach, (c) comparative law, and ... (d) "common sense"!

## THE LEGAL NEXUS

The Commission first stressed the multi-faceted nature of the case. The firm had properly erased the

applicant's information from its website, but it was still "searchable" on the Web. For one, the Wayback Machine website preserves web pages at various moments in time; it is a kind of "digital archives" system. In this case, the applicant's profile as it stood at the time she was employed with the firm (May 17, 2013), is therefore always traceable and accessible. On the other hand, search engines, like Google, index information preserved by the Wayback Machine website. In this respect, the evidence disclosed a number of factors that, while technical, were nonetheless decisive. The applicant's weak digital footprint would encourage search engines to dig deeper and ultimately display the archiving sites among the first search results, frequently repeating the same search using the applicant's name would influence the positioning of the results, and the firm's website would be well indexed with a significant digital weighting. Ultimately, the damage alleged by the applicant was really the doing of third parties — the Wayback Machine (archiving) and search engines (indexing) — and not of the firm, which had, for its part, erased all the information. The problem here, then, is the legal nexus. In fact, that is the way that many academics, Professor Trudel being one, have long framed the problem inherent in cyberspace: "determining the liability of the other actors in the information transmission chain". At this point, we can posit a number of questions that will surely be a focus of attention in the future: should the firm (systematically) approach the various third parties involved to support its former employees' right of correction? If so, how, and to what degree, should it do so? In this case, a request form was submitted by the firm to Google; was that really necessary? What legal and ethical role and limitations do we want to assign to archiving sites like Wayback Machine, in particular when it comes to privacy? Should the Commission have broader powers, for instance, to make de-indexing/de-listing orders?

#### THE ANALOGY APPROACH

Counsel for the firm argued that erasing information online should be compared to erasing notices of

appointment published in the print press, which is obviously impossible. This "analogy" argument, which the Commission considered, is very popular in the digital context, and essentially aims at "understanding and experiencing one kind of thing in terms of another". This conservative approach, however, has a number of inherent limitations. First, in technical terms, understanding and regulating information technologies by associating them with traditional forms of communication can lead to misleading illusions. As Ethan Katsh has shown, digital technologies change various aspects of the game, whether it be quantity, speed of transmission, accessibility or the speed with which information can be changed. For our purposes, appointment notices published in a newspaper are more or less similar to a profile on a website, at least in terms of accessibility. Second, in legal terms, the analogy approach seems too circular: it essentially amounts to saying "it was impossible yesterday, so it is impossible tomorrow". The past is omnipotent (and no longer merely a predictor) when it comes to the future. It may also be better to exchange the analogy approach for a "functional" one: what is the purpose of an appointment notice, and is that purpose well served by information technologies? In addition to its instructional value, this reasoning, referred to as "functional equivalence", produces more concrete and, most importantly, better-tailored results.

#### COMPARATIVE LAW

The Commission was well aware that this case in fact brought one of the hot topics in Europe, namely the "right to be forgotten" or the "right to oblivion", into relief. That right stems from a May 2014 decision in which the European Court of Justice held that search engines had to allow all Europeans to request that search results referring to information about them that are "inadequate, irrelevant or no longer relevant" be removed. It will be understood, here, that a distinction must be made between the right of removal (or right of correction), which relates to the organization that collects and processes the information, and the right

to delisting (or right to be forgotten), which relates to the organizations that relay and index the information. That distinction did not escape the Commission, which held that “an individual’s right to have inaccurate, incomplete or ambiguous information in a file concerning him or her corrected is not in the nature of the ‘right to be forgotten’, the purpose of which is to erase information from public spaces.” The right of correction that is provided for in the *Civil Code of Québec* and the *Private Sector Act* therefore does not imply any right to delisting. The Commission goes even further when it suggests that it is not even “certain that this right, which is recognized in Europe, is applicable in Québec.” This is therefore still an open question, but most importantly a hotly debated one. The Office of the Privacy Commissioner of Canada has made reputation and privacy one of its “strategic priorities”, and also launched a consultation that includes the question “Can the right to be forgotten find application in the Canadian context and, if so, how?” (2016).

#### “COMMON SENSE”

The courts continue to hammer home the message that “no one is required to do the impossible. Common sense must always prevail.” In the matter at hand, while we must acknowledge that this case offers an excellent opportunity to debate fine points of the law, the problem is striking in its simplicity: the (uncontested) evidence was that the firm did everything necessary to remove the applicant’s information online; the firm fulfilled all of its legal obligations. Finding the firm liable for violating an unattainable obligation — delisting/de-indexing the applicant’s information on the Web — could therefore not be seriously contemplated. The application for examination of a disagreement was

therefore dismissed. That is the story in its simplified, not simplistic, telling.

#### CONCLUSION

This decision is the first sighting on the Québec scene of the “right to be forgotten”. The idea has been considered, examined and understood, but has not been agreed to. Outside the courtroom walls, the societal component of the right to be forgotten certainly did not escape the Commission; it encompasses a “certain vision of society”, a choice about the future and the need to find a permanent balance between the collective interest (and in particular the duty of remembrance) and private interests (the right to informational self-determination, for example). Now, more than ever, the legal community will have to take the right to be forgotten seriously. Was this right truly appropriate in the Canadian and Québec contexts? What are the constitutional limits, or what might they be, particularly in respect of freedom of expression? Can we rethink a “right to be forgotten” and formulate it in a way that is tailored to reflect the legal systems across Canada? That is the challenge that the Office of the Privacy Commissioner of Canada issued in January.

*[Antoine Guilmain is an associate at Fasken Martineau’s Montreal office and a Ph.D. candidate in Information Technology Law. He is particularly interested in privacy and personal information protection, as well as electronic evidence, information security and intellectual property. He has published several works in these fields.]*

*[Marc-André Boucher is an associate at Fasken Martineau’s Montreal office. He practices in the area of privacy and information protection, administrative, labour and constitutional law.]*

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