



THE CANADIAN  
BAR ASSOCIATION

# CBA ACCESS TO INFORMATION AND PRIVACY LAW SYMPOSIUM

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OCTOBER 19-20, 2018 | OTTAWA, ON

**FRIDAY, OCTOBER 19, 2018**

8:00–8:45      **REGISTRATION AND CONTINENTAL BREAKFAST**

8:45–9:00      **WELCOME AND INTRODUCTION**

**Co-Chairs:**      **David Elder**, Stikeman Elliott (*Ottawa, ON*)  
                         **Howard Simkevitz**, Ontario Institute for Cancer Research (*Toronto, ON*)

9:00–10:45      **INTERNATIONAL UPDATE**

This session kicks off the Symposium with an update on international developments in public and private sector privacy and access to information law. The focus will be on legislative developments and practical compliance issues as they may impact Canadian organizations operating in Europe and the U.S.

**Moderator:**      **Prof. Benjamin Goold, B.Ec., LL.B. (Tasmania), B.C.L. (Oxford), D.Phil. (Law) (Oxford)**,  
University of British Columbia (*Vancouver, BC*)

**Speakers:**      **Prof. Wolfgang Spoerr, Dr.jur.**, Hengeler Mueller (*Berlin, Germany*)

10:45 – 11:00      **REFRESHMENT BREAK**

11:00–12:30      **CANADIAN UPDATE**

The annual Canadian Update is an action-packed summary of the major privacy and access developments from the last 12 months at the federal and provincial/territorial levels. The panelists will provide their insights on the key changes in legislation, recent regulatory decisions and guidance and court decisions that you need to know about, including the rising interest and developments in the topic of privacy and political parties.

**Moderator:**      **Shaun Brown**, nNovation LLP (*Ottawa, ON*)

**Speakers:**      **Robert J.C. Deane**, Borden Ladner Gervais LLP (*Vancouver, BC*)  
                         **Éloïse Gratton**, Borden Ladner Gervais LLP (*Montreal, QC*)  
                         **Deirdre L. Wade, Q.C.**, Cox & Palmer LLP (*Saint John, NB*)

12:30–14:00      **LUNCH WITH KEYNOTE SPEAKER:**

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**METAPHORS MATTER: WHY DATA IS NOT THE NEW OIL**

It is increasingly popular to talk about data being the new oil. This metaphor emphasizes data as a commodity, the desirability of open marketplace of data, the need for tools to help consumers monetize their data, and ideas of “ownership” as central to determining data rights. Although this metaphor responds to very real and important commercial interests, it is deeply problematic. Data-as-a-natural-resource hides the social nature of much data, data that is about individuals and communities. The social life of data can show us that our ideas of data rights and data justice require a richer vocabulary and nuance than the language of commodification permits.

**Speaker:**      **Prof. Lisa Austin, Ph.D.**, University of Toronto (*Toronto, ON*)

## 14:00–14:45 CONCURRENT SESSIONS

### SESSION 1.1: SOLICITOR/CLIENT PRIVILEGE IN FOI

Access to information laws across the country allows government institutions to claim solicitor-client privilege when responding to access requests. As with other access exemptions, independent review to verify claims of privilege is necessary.

The Supreme Court's 2016 University of Calgary decision affirmed that legislatures can give information commissioners access to allegedly privileged records where that is necessary to independently adjudicate the issue. However, some observers yet argue that only the courts should be able to adjudicate privilege claims.

This panel will discuss various issues and perspectives on the tension between timely adjudication of access disputes and the need to protect solicitor-client privilege. Practical guidance will also be offered on how to approach a commissioner's review of your privilege claim, with expert tips for institutions and their counsel.

**Moderator:** David Loukidelis, Q.C., Alberta Law Enforcement Review Board (*Edmonton, AB*)

**Speakers:** Jill Clayton, Commissioner, Office of the Information and Privacy Commissioner of Alberta (*Calgary, AB*)  
Lorne Randa, Brownlee LLP (*Edmonton, AB*)

### SESSION 1.2: ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) is a rapidly growing presence in our lives, shaping the cities we live in, the products and services we buy and the news we see. AI combined with Big Data has the potential to deliver tremendous social and business benefits, but it also poses major challenges to privacy governance.

This topical panel of experts explores the latest developments in AI and their impact on privacy. Using practical examples, the panel will discuss how AI can be accommodated in current privacy governance frameworks as well as where the gaps and stresses are occurring. The panel will also explore whether changes are needed in privacy governance to strike an ongoing balance between maximizing the benefits of AI and protecting privacy.

**Moderator:** Sinziana Gutiu, Dolden Wallace Folick, LLP, (*Vancouver, BC*)

**Speakers:** Chelsey Colbert, Fasken Martineau DuMoulin LLP (*Toronto, ON*)  
Prof. Ian Kerr, Ph.D., University of Ottawa (*Ottawa, ON*)  
Sylvia Kingsmill, KPMG LLP (*Toronto, ON*)

## 14:45–15:15 REFRESHMENT BREAK

## 15:15–16:00 CONCURRENT SESSIONS

### SESSION 2.1: APPLICATION OF FOI LAWS TO QUANGOS, NEWER INFORMATION TECHNOLOGIES

Due to the definitions of what constitutes a public body in access to information legislation, quasi-autonomous non-governmental organization (QUANGOS) – including government corporation, for-profit

corporations to non-profit organizations – are often captured by such legislation. As a result, even though these entities may have truly private interests, due to government funding and other legislative obligations, they are subject to stricter access and privacy obligations than similar private corporations or organizations.

This panel will explore the challenges that QUANGOS have with the competing interests of being both a public body and a privacy organization, from dealing with access to information, privacy obligations, confidentiality of corporate information and implementations with information technologies.

**Moderator:** Lorne Randa, Brownlee LLP (*Edmonton, AB*)

**Speakers:** Lauren MacLeod, Revera Inc. (*Mississauga, ON*)  
Amanda Maltby, Canada Post (*Ottawa, ON*)

## SESSION 2.2: CYBER INSURANCE

Are you wondering what cyber insurance is really all about, and whether it's right for your organization? This session will explore cyber insurance considerations, including what the cyber insurance market typically covers, what the insurance application entails and how cyber insurance could respond during a privacy/data security incident. The panel will also discuss first-hand examples of breaches and provide practical takeaways for businesses and public bodies.

**Moderator:** Patrick Bourk, HUB International (*Toronto, ON*)

**Speakers:** Sinziana Gutiu, Dolden Wallace Folick LLP (*Vancouver, BC*)  
Terri Mason, CNA Canada  
Daniel Tobok, Cytelligence (*Toronto, ON*)

16:00–16:45

## CONCURRENT SESSIONS

### SESSION 3.1: FOI AND FREEDOM OF EXPRESSION

In the *Toronto Star*, the Ontario Superior Court ruled that the FOI personal privacy exemption unreasonably blocks access to adjudicative records of tribunals, contrary to the “open court” principle and the Charter right to freedom of expression. In essence, the court found that the lack of access to tribunal records substantially impedes meaningful discussion on matters of public interest.

This decision builds on previous cases addressing the intersection of FOI with freedom of expression, including the 2010 SCC decision in *Criminal Lawyers' Association* (relating to allegations of police and Crown Attorney misconduct) and the 2017 Ontario Superior Court decision in *ARPA* (dealing with abortion records).

This panel will discuss the implications of the *Toronto Star* decision, including what it means for transparency of tribunals, and the continuing tension between FOI exemptions and freedom of expression under the Charter.

**Moderator:** David Goodis, Office of the Information & Privacy Commissioner of Ontario (*Toronto, ON*)

**Speakers:** Paul Schabas, Blakes LLP (*Toronto, ON*)  
Margaret Leighton, Social Justice Tribunals Ontario (*Toronto, ON*)  
Emma Phillips, Goldblatt Partners LLP (*Toronto, ON*)

## SESSION 3.2: RIGHT TO BE FORGOTTEN

In its Draft Position Paper on Online Reputation, the Office of the Privacy Commissioner asserts that PIPEDA contains a right to have search engines to de-index online content and search results damaging to an individual's reputation. The OPC's view would establish a variation of the European "right to be forgotten", and would have significant implications for Canadian privacy law. However, there are significant differences of opinion among experts as to whether PIPEDA does include such a right, or whether such a right should exist at all. This session will present the competing arguments and discuss recent and on-going cases that may provide guidance.

**Moderator:** Jennifer Stoddart, McGill University (*Montreal, QC*)

**Speakers:** David Fraser, McInnes Cooper LLP (*Halifax, NS*)  
Mark Phillips, Borden Ladner Gervais LLP (*Montreal, QC*)  
Prof. Teresa Scassa, University of Ottawa (*Ottawa, ON*)

16:45 – 18:00 **RECEPTION**  
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## SATURDAY, OCTOBER 20, 2018

8:30–9:00 **CONTINENTAL BREAKFAST**

9:00–9:45 **CONCURRENT SESSIONS**

### SESSION 4.1: GDPR AND ADEQUACY – WHAT DOES CANADA HAVE TO DO?

As a consequence of the 2015 *Schrems* decision, in which the European Court of Justice ruled invalid the EU-US "Safe Harbor" regime, stating that the privacy of Europeans is undermined by national security practices in foreign countries, elements of the EU's existing adequacy decisions were amended, including Canada's. The EU must now monitor existing adequacy decisions to determine if there have been developments in a country that could affect the continued validity of the country's adequacy status.

In this session, we will hear from international experts and Canada's representative on the front line of negotiations with the EU on a number of key areas related to ensuring that Canada maintains its adequacy status under the recently in-force GDPR. A key area is addressing reform of existing laws – to ensure both compliance with the GDPR and that the privacy of Canadians is not eroded by government surveillance and data sharing. The session will examine the work that is being conducted at the federal level as well as the current engagement with the EU.

**Moderator:** Barbara McIsaacs, Barbara McIsaac Law (*Ottawa, ON*)

**Speakers:** Prof. Benjamin Goold, B.Ec., LL.B. (Tasmania), B.C.L. (Oxford), D.Phil. (Law) (Oxford),  
University of British Columbia (*Vancouver, BC*)  
Charles Taillefer, Innovation, Science and Economic Development, Government of  
Canada (*Ottawa, ON*)

## **SESSION 4.2: BLOCKCHAIN – IMPLICATIONS AND OPPORTUNITIES FOR PRIVACY**

Blockchain is viewed as a game-changing technology which has been employed in various contexts including cryptocurrency. What is perhaps less well-known is blockchain's role as a privacy enhancing technology. This panel will explore blockchain's privacy potential and how it may be used to support privacy practices such as consent and identity management.

**Moderator:**      **Howard Simkevitz**, Ontario Institute for Cancer Research (*Toronto, ON*)

**Speakers:**      **Gordon Ackroyd**, SecureKey (*Toronto, ON*)  
                         **Dr. Mehdi Benchoufi**, Hôpital Hôtel Dieu (*Paris, France*)

9:45–10:00      **REFRESHMENT BREAK**

10:00–11:45      **THE REGULATORS' PERSPECTIVE**

A hallmark of each symposium, this panel will be a moderated discussion with regulators from across the nation, touching on key privacy and access issues.

**Moderator:**      **Suzanne Morin**, Sun Life Canada (*Montreal, QC*)

**Speakers:**      **Jill Clayton**, Commissioner, Office of the Information and Privacy Commissioner of Alberta (*Calgary, AB*)  
                         **Brent Homan**, Deputy Commissioner, Office of the Privacy Commissioner of Canada (*Gatineau, QC*)  
                         **Caroline Maynard**, Commissioner, Office of the Information Commissioner of Canada (*Ottawa, ON*)  
                         **Michael McEvoy**, Commissioner, Office of the Information & Privacy Commissioner (*Victoria, BC*)  
                         **Donovan Molloy, Q.C.**, Commissioner, Office of the Information and Privacy Commissioner (*St. John's, NL*)  
                         **Catherine Tully**, Commissioner, Office of the Information & Privacy Commissioner (*Halifax, NS*)

11:45–12:00      **CLOSING PLENARY & WRAP-UP**

The incoming National Chair will review the year that has passed and the year ahead.

The Conference Co-Chairs will close the Symposium with brief observations on key issues and themes that emerged.

**Section Chair:**    **Lorne Randa**, Brownlee LLP (*Edmonton, AB*)

**Co-Chairs:**      **David Elder**, Stikeman Elliott (*Ottawa, ON*)  
                         **Howard Simkevitz**, Ontario Institute for Cancer Research (*Toronto, ON*)