

Transcript Episode 11 Daniel Therrien

Ron Kruzeniski:

Today, I have the pleasure of having a conversation with Daniel Therrien, the Privacy Commissioner of Canada. He was appointed in 2014, and prior to that for three decades, he was a lawyer advising the government of Canada in various capacities. And it is my pleasure to do this podcast with him today. Daniel, your term is, I guess quickly coming to a close. You were appointed in 2014. How has the time gone? Has it gone quickly or slowly?

Daniel Therrien:

It has gone very, very quickly. You know that because you're in the business. So privacy is an area that is never boring, always fast moving. I've been really struck by the vast range of issues that we're dealing with as Privacy Commissioner, in my case, Information and Privacy Commissioner in yours and other colleagues. It's quite the world with the rapidity with which technology is evolving and with rapid evolution in technology, business models also, governments obviously a bit late, but later than businesses, but governments obviously want to profit from this technology to, in a good sense, deliver better services to the population. But of course, sometimes they do certain things that are a little bit risky from a privacy perspective. If I may, I'll just tell a little bit how I saw things since becoming Commissioner at a high level of generality.

I would say, when I came in, I came in with a certain vision of giving more control to Canadians over their personal information. This is not rocket science as a Privacy Commissioner, but I thought it was important to set that goal. And immediately thereafter, we started a process that you were a part of around early 2015, of putting some flesh around the bone of this general vision of improving privacy, improving control. So we set out four strategic priorities. I won't name them all just now, but it's just to say that in an area that is evolving as rapidly as technology and with the number, the innumerable privacy issues that this creates, you have to focus on certain things. You cannot do everything. You cannot look at every issue. But what I tried to do was to set certain priorities, which were for sure defined quite broadly. So one of them was government surveillance because that was the issue of the day in 2014 and the, let's call it the Snowden era.

So broadly defined priorities because you cannot do everything. And then we got going and did the work. We did the policy work. The priorities helped us focus in deciding which investigations to do. Of course, we have to undertake investigations when complaints are filed in our offices, but certainly I, and I think many colleagues across the country have the authority to initiate certain investigations. So in the area of Commissioner initiated investigations, the fact that we had defined certain priorities was helpful. Try to understand government surveillance, economics of privacy, the right to reputation the body as information. And based on that, we certainly found certain things in investigations and were able to understand certain deep patterns, cross-cutting issues. So again, you'll never be able to examine each and every issue or certainly practice of business for the government. But what I tried to do was to have a reasonably good grasp of the whole picture to identify these cross-cutting issues and try to propose solutions that made sense.

Ron Kruzeniski:

You may have touched on this, but in case you haven't, or in case there's other issues, in the eight years that you've been in office, what have you seen as the most significant changes in the privacy area?

Daniel Therrien:

So, one I've touched on, but I'll get on a few that I haven't. The one I think clear issue that is more prevalent, more clear today than it was 8 to 10 years ago, is the speed with which technology is evolving. Technology has always been fast moving, but I was going to say it seems. It doesn't seem, it is clear. It is factual that technology is constantly moving faster and faster. And we have seen this in Spain's with the pandemic where a lot of our activities that occurred in person are now occurring online with all of the benefits that this presents in terms of medical advice, the delivery of education services, for instance, that would not have been possible during the pandemic in person, but it means a whole lot of personal information is being collected about individuals, and this obviously raises a lot of issues.

So the speed with which technology is evolving and the extreme slowness at which laws evolve to try to regulate this fast-moving world is certainly one important thing. That said, there have been changes in legislation, fewer in Canada than elsewhere. So the reference nowadays is the European Union and the GDPR. But changes have not occurred only in Europe. One of my roles as a federal Commissioner is to attend a number of international conferences with other data protection authorities globally and have these meetings.

And of course in between these meetings and conversations with colleagues internationally, we can see that yes, Europe is ahead of others, but many other countries are adopting similar laws or certainly more modern laws, which simply underscores how Canada's, at least federally Canada's laws are behind. And it's not a question of keeping up with the Jones, it's a question of ensuring that Canadians have sufficient protection in this fast-moving world. And there are jurisdictions that are ahead of us, and it's obviously a shame from our perspective that we're not moving rapidly. So yes, technology is moving fast, but there are jurisdictions, I will not say that catch up with the speed of technological change, but many jurisdictions among Canada's trading partners that are much closer to the goal than Canada at this point.

A third and final phenomenon that I'll touch on in terms of the most significant changes is the focus about government surveillance, national security. This was the era internationally and in the US in particular of the Snowden revelations, which had a huge impact on the privacy discussion from, I don't know, 2012, let's say to 2016 or so. And we had certain terrorist events in Canada including on Parliament Hill that led to legislation. So the early part of my mandate was focusing a lot on government surveillance, but now it's much more about the use of personal information by companies, by private sector organizations, and to what extent this is occurring in a way that respects the privacy of individuals. Of course, people will know the expression surveillance capitalism. So early on it was government surveillance. Now, it's more surveillance capitalism.

I wouldn't say that everything is fine in terms of government surveillance. We certainly have better oversight now than we had around 2014, but we see that with phenomena like homegrown extremism. I'll say the national security and law enforcement apparatus is looking to enhance its authorities to be able to deal with phenomena like this. So I think that there will be another round of discussion around, yes, they may well need new authorities to deal with new phenomena, but we need to consider obviously privacy of Canadians and how that is achieved. Yes.

I said that would be my third and final point. I'll add another one. I think, but I don't want to overstate this, but I do think that the population is more aware today of the importance of privacy than it was say 10 years ago. That understanding or awareness may not be crystal clear. It may be a little bit diffuse, but I think there's a growing awareness in the population of the importance of privacy. To caricature, and it's to make a point, that's not to say that this was the case 10 years ago, but certainly a number of years ago, privacy was seen by some, probably certainly in government as something for geeks and techies, people who were interested in privacy in the digital era were speaking about privacy policies, terms and

conditions, which are still discussed, but in a fairly technical way that I'm going to say did not necessarily appeal to larger swaths of the population as something that they should care about.

With Snowden, with surveillance capitalism, with Cambridge Analytica, et cetera, et cetera, with data breaches that occur very, very frequently, I think there's a greater awareness in the population of the importance of not having adequate protection of their personal information. Again, I don't want to overdo it because I'm sure that discussions at the dinner table rarely turn around privacy, but there is a greater awareness, and obviously that's good for a number of reasons. People who are more aware obviously, are more likely to be cautious to take certain measures, but if the population is more aware, they're more likely to ask their politicians to do something about it.

Ron Kruzeniski:

So, in your last annual report in your Commissioner's message, and it was a very good one, and I commend it to our listeners to go to the Privacy Commissioner of Canada's website and check the annual report. But is there anything in there that you particularly thought it was important to highlight in terms of giving that message to, well, parliamentarians but also Canadians?

Daniel Therrien:

In the last report, but frankly in the last three or so reports, we've talked at length at the OPC about the need for law reform. So the last annual report does that, and it seeks... So our thinking has crystallized over the years. We started with the priorities that I mentioned a few minutes ago. We did investigations, we did policy work say on the consent model that led us around 2018, '19 to start to make strong recommendations for law reform. And last year we, I think, crystallized our position. I guess to summarize our position in a few words, our report seeks law reform that enables responsible innovation. So we're not saying that privacy overtakes any and all other interests. There are other public interests, so enable responsible innovation, but within a rights-based framework that ensures that there's increased corporate accountability that ensures that there are more common rules between the privacy legislation governing the public and private sectors.

Data does not know borders geographically, but also between the private and public sectors. Data moves around from the private to the public sector and vice versa. If data moves around, it should be subject if not to exactly the same rules. And perhaps there is an argument for the rules may not be exactly the same because the context is not exactly the same, but at least there should be similar rules as between the public and private sectors. And of course, laws need to include quick and effective remedies including order making for data protection authorities, and meaningful sanctions to incentivize regulated entities to comply with the law.

So we are known to have made forceful law reform recommendations. I think they are clearly needed because it's not only risks to privacy that we're talking about. We have demonstrated over the past few years that there are real harms out there to democracy, to equality rights, to privacy rights. So there needs to be a much more strengthened legal framework, but that does not mean at all data should not be used to provide good services either by the private sector, the public sector that is necessary. That is the way of the future, that the value of data will be extracted for economical and better services by governments. But that needs to be regulated under a rigorous framework, which starts with protecting privacy as a human right.

Ron Kruzeniski:

So, casting back over the eight years, what do you feel your greatest contribution has been?

Daniel Therrien:

I'll mention two, one that I touched on a bit a few minutes ago, which is I think we have played a role in building awareness among Canadians or the importance of privacy beyond, again, technical rules around consent, privacy policies and the like to demonstrating the link between privacy and the exercise of many other fundamental rights, democracy and Cambridge Analytica equality rights. At the end of the day, freedom, there is no freedom unless privacy is adequately protected. So I think we have through our investigations, through our policy work, through what I hope are a pretty consistent and coherent set of recommendations that sought to be realistic and balanced. Again, we are not against the use of personal data for economic reasons or for better delivery of government services, but through what I hope to be a coherent set of recommendations, we have tried to address issues that we have identified over the past few years.

The second theme that I'd like to mention here is collaboration with other jurisdictions, and particularly, with our provincial and territorial colleagues in Canada. This was important to me. So, we have conducted joint investigations with provincial and mostly provincial Commissioners. We have issued joint statements, policy statements with provincial and territorial Commissioners on national security. In the early years, there was a joint statement on the need for law reform in national security, I think in 2014, if I'm not mistaken. More recently with the pandemic, we have issued a number of joint statements with provincial and territorial Commissioners on the processing of personal data in the context of a pandemic broadly than with regard to the tracing application with respect to vaccine mandates. So again, data does not know borders, so it's important that we act coherently as between jurisdictions, particularly here in Canada. I think this cooperation makes us more effective. The whole is more effective than any of its constituent parts. So as data protection authorities were more effective that way.

And by the way, this also has advantages for regulated entities, for companies, for instance, knowing that even though they may be subject to in the private sector side for jurisdictions, federal and a number of provincial jurisdictions, these jurisdictions work together. So the companies will receive normally one set of conclusions at the end of an investigation, one set of recommendations, which is to the benefit of companies in this case. And to the extent that there is cooperation in the public sector government departments. So that is clearly something that was an objective for me. And I'm quite proud of the, not to say that there was no cooperation before the beginning of my mandate, but I made it a point to increase that collaboration, and I'm fairly proud of that part of what we did.

Ron Kruzeniski:

Now, I might be able to guess at the answer to this, but what did you not achieve that you really would've liked to have achieved?

Daniel Therrien:

So, without surprise, law reform, I'll say so. We were known to have made recommendations for a number of years now about law reform. Again, I think these reforms are overdue. They're really necessary. There was an attempt by the federal government to introduce a bill in the fall of 2020. Then the election was called, and the Innovation Minister Champagne is promising a law in 2022. So I think that's good, but it is overdue. I'll say this though. So even though we have made a lot of comments about the need for law reform, I don't want to be seen as somebody who thinks that law reform is going to be a panacea. I think law reform is not sufficient. It is necessary, but it is not sufficient. It needs to come with powers, resources, means broadly speaking for data protection authorities to actually implement and enforce this legislation.

And by enforcing, it does not mean only to issue million dollar fines. It means working with companies, working with government departments to understand what they want to do, what their objectives are, how they propose to use personal information, and work with them proactively at the front end of program definition so that these objectives that the government or that companies have are implemented in a way that protects privacy. So we need means not only to issue fines, but also to work with regulated entities upfront, but based on a clear set of legislative provisions so that progress can be made.

In Canada, there are a number of people who say that if Canada federally, let's say, had GDPR like legislation, that would not be progress. And they argue that despite the GDPR in Europe, there are still many practices that are not privacy protective. So in a word, the GDPR provides a good superficial protection, but not real protection. There's no question that the enforcement of a privacy law in the environment that I've described, fast moving technology moves rapidly. Business models change rapidly with the evolution of technology.

There's no question that enforcement is difficult. It's hard. It's very hard. And the fact that the Europeans have not stopped all adverse practices that would have an adverse effect on privacy, one, is not surprising. Two, is not evidence that rigorous laws are not necessary and should not be pursued. Again, better laws similar to the GDPR, probably with adaptations for Canada, certainly laws like those that we've advocated in Canada are absolutely necessary, but they are not sufficient. They need to come with means. They need to come with regulators that are balanced in their approach. But it has to start with legislation. Legislation is not sufficient, but it is absolutely necessary.

Ron Kruzeniski:

Well, maybe the minister will introduce the replacement to C-11 before your term is up, maybe?

Daniel Therrien:

There's not much time left, but one can dream.

Ron Kruzeniski:

One can dream. So as your term comes to the close, any plans for the future, fishing, golfing, travelling the world, or anything more exciting?

Daniel Therrien:

I live by a lake, so I'll start by that. Being around the lake and doing things that one does on water. Travelling will certainly be part of it. Maybe not this year, but shortly thereafter. And I also want to keep busy, so I will not work full-time. At least that's not my intention. But I will be certainly available and open to interesting projects and mandates, so as to get the juices flowing a little bit between my years, but not on a full-time basis.

Ron Kruzeniski:

Well, Daniel, thank you very much for doing this today. I really appreciate you taking the time and the thought you've put into the answers here. And I want to thank you for your contributions to Canadians and as you mentioned, your work with the federal provincial territorial Commissioners in us getting a number of jointly issued documents and guidelines out there. I think your leadership in that area is greatly appreciated, and I hope we, as federal provincial commissioners, get some way of recognizing that.

Daniel Therrien:

I've not done this alone. And Ron, you've been a big player in this, bringing a voice of reason and collaboration at these tables. So I want to thank you in return.

Ron Kruzeniski:

Well, thank you very much there Daniel, and enjoy that work around the lake and the part-time involvement in something.

Daniel Therrien:

Thank you very much.