How Canadians Can Protect Their *Charter* Rights From the Dangers of Digital ID

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INTRODUCTION

"I'm afraid, based on my own experience, that fascism will come to America in the name of national security."[1]

— Jim Garrison (1967)

'*Trust makes everything simple*'[2]. As China's Digital ID system platform "Alipay" iterates, with the unfolding of a new decade comes a new way of making traveling, shopping, and banking easier: Digital ID systems.

Imagine: you enter your favourite coffee shop and before ordering your signature latte, realize you left your wallet at home. Before panic mode settles in, you remember something: you just signed up for MyCanadaID, the new Canadian Digital ID system which allows you to access your credit card - and almost everything else about you. You don't even have to tell the barista your name, which is fortunate, because they always get it wrong anyway.

The ease of the transaction peaks your curiosity: pretty soon, you're using MyCanada for booking doctor's appointments, buying groceries, and paying your taxes. But one day, a government official shows up at your door. He's concerned about a political rally you attended the day before and wants to ask you some questions. Wait a minute, you think. How did he even know you were there? Is this Canada, or China?

While the above scenario might seem like an exaggerated tale, it is an encroaching plausibility when evaluating the trend of worldwide movement towards Digital ID systems. Many of the

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[1] "A Quote by Jim Garrison." n.d. Www.goodreads.com. Accessed November 16, 2022. https://www.goodreads.com/quotes/8697341-i-m-afraid-based-on-my-own-experience-that-fascism-will.

[2] WIRED Staff. 2017. "In China, a Three-Digit Score Could Dictate Your Place in Society." WIRED. December 14, 2017. https://www.wired.com/story/age-of-social-credit/.

nations implementing Digital ID herald Estonia as their model, where 98% of the population has a Digital ID and use it to access 99% of all public services[3]. Canada's particular system seems to be modeled after China, where it's used for everything from encouraging citizens into more eco-friendly living to penalizing those who spread online rumours about the Chinese Communist Party[4].

A digital ID, simply put, is a mechanism which consolidates information about individuals into a single online identity. Governments and businesses can utilize this identity to simplify services such as tax payments, renewal of passports or licenses, voting, travel, or making any kind of payment. They are championed to the consumer as a way to streamline cumbersome tasks, and reduce the opportunity cost of time. In Canada, such technology has already been put to ample use in the form of vaccine passports, which provided access (or the lack thereof) to millions of Canadians to gyms, restaurants, and a host of other public spaces.

Not only was the COVID-19 pandemic utilized to justify extreme usage of private data, but now recovery is being propagated as contingent on Digital ID. The Digital Government Exchange (DGX) Digital Identity Working Group has recommended that Digital ID be used to "facilitate economic recovery from COVID-19, for example to support the opening of domestic and international borders".[5] There seems to be no apparent limit to the Canadian government's thirst for data collection. Without swift action, there is historical reason to believe the infringement of privacy rights will become increasingly invasive: China, whose

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[3]Runde, Daniel F., Romina Bandura, and Sundar R. Ramanujam. 2021. "Annex 2: Case Studies of Digital ID Systems: Estonia and India." *Enhancing Financial Inclusion through Digital ID*. Center for Strategic and International Studies (CSIS). http://www.jstor.org/stable/resrep32890.12.

[4]Hvistendahl, M. 2017. *In China, a three-digit score could dictate your place in society*, *Wired*. Conde Nast. Available at: https://www.wired.com/story/age-of-social-credit/.

[5]"Digital ID – What Is It, Why Is It Needed, and Are Governments Developing It?" n.d. Accessed November 9, 2022. https://www.globalgovernmentforum.com/digital-id-what-is-it-why-is-it-needed-and-how-are-governments-developing-it/.

system Canada's model closely resembles, was found to be monitoring women's menstrual cycles in order to achieve population control.[6] Where will Canada draw *its* line?

To harness the most personal, sensitive information of individuals is to make a population vulnerable, thereby holding ultimate power over them. In an increasingly digitized, post-COVID world, where the most basic of liberties has been re-examined and challenged, this paper seeks to examine the ways in which Canadians can protect their Charter rights. It presents the respective legislative measures needed to protect digital privacy, and reveals practical steps Canadians can take to ensure their protection, even when governments don't.

I. THE *CHARTER* RIGHT TO PRIVACY

Before any discussion may proceed of how citizens can protect their privacy rights, a clarification must first be made about what rights already exist. Canada's *Charter* does not have specific legislation related to cybersecurity; indeed, the word "privacy" does not appear once in the Charter, nor does any mention of digital threat to security. The *Charter* does, however, guarantee general rights to liberty and security in Section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[7]

According to the Government of Canada's own explanation of Section 7 provisions, "The Supreme Court has not yet fully explored or developed the contours of a distinct privacy protection under section 7, other than to accept that privacy can be a protected component of

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[6]Bennett, Colin J., and Grant, Rebecca, eds. 2000. Visions of Privacy : Policy Choices for the Digital Age. Toronto: University of Toronto Press. Accessed November 16, 2022. ProQuest Ebook Central.

[7]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 7 – Life, Liberty and Security of the Person." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html.

the "liberty" and "security of the person" interests."[8] Section 8 further protects citizens from "unreasonable search or seizure", which is defined as any state activity that interferes with a reasonable expectation of privacy.[9] The burden of proof is on the government to justify data collections from citizens as reasonable.

2. LEGISLATIVE THREATS

Such reasonability has been called into question in the past few years, as the Canadian government has been caught breaching citizen privacy in a number of ways: forcing Canadians to disclose private medical information to access essential services; requiring Canadians entering the country to input vaccination history into the ArriveCan app; surveilling and logging the location of 33 million mobile devices throughout the pandemic; secretly using biometric facial scanning software; and as recently discovered, implementing the Known Traveler Digital Identity (KTDI) program, a WEF initiative which "enables consortium partners to access verifiable claims of a traveller's identity data so they can assess their credibility, optimize passenger processing and reduce risk"[10]. Thus, there is a pressing need for Digital ID to be governed by dedicated legislation which extensively protects these threats to security.

Currently, Canada has two major pieces of legislation specifically regarding privacy: the *Privacy Act* , which deals with personal data held by the federal government, and the newly-enacted *Consumer Privacy Protection Act* (CPPA), which lays the ground rules for private

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[8]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 7 – Life, Liberty and Security of the Person." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html.
[9] Government of Canada, Department of Justice, Charterpedia. 2010. "Charterpedia - Section 8 – Search and Seizure." Justice.gc.ca. 2010. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html.
[10] "KTDI." n.d. Ktdi.org. https://ktdi.org/.

organizations' data collection.[11] Both laws require consent prior to data collection, but provide broad exceptions, such as the conducting of internal research.

When possible, Canadians should deny consent to data collection. Both the *Privacy Act* and the CPPA make consent a prerequisite for data gathering: "The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate."[12] If challenged, the burden of proof falls on the government to prove that their collection of data does not require consent; i.e. it would be inappropriate for the government to obtain consent. Note that while the exemption to the requirement of obtaining consent is broad and opposition to utilization of the exemption may not be accepted, it is worth indicating to the government one's resistance to data collection. Canadians can equip themselves by becoming knowledgeable on their rights when it comes to consent, which must be acquired at or before the time of collection. If collected inappropriately, individuals can sue for up to two years.[13]

In order to protect citizens' privacy, legislators ought to amend both the *Privacy Act* and the CPPA to disable governments from utilizing data without users' consent without broad exception. In the absence of consent, clear boundaries must be drawn to prevent governments from acting under these umbrella exceptions and collecting personal data.

Canadians can work to enact protective legislation through two main channels: the direct targeting of legislators and special interest groups, and resistance to the current legislation. It

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[11] Government of Canada, Department of Justice. 2017. "Proposed Legislation - Canada's System of Justice." Www.justice.gc.ca. February 10, 2017. https://www.justice.gc.ca/eng/csj-sjc/pa-lprp/pa-lprp.html.

[12] Office of the Privacy Commissioner of Canada. 2019. "PIPEDA Fair Information Principles - Office of the Privacy Commissioner of Canada." Priv.gc.ca. 2019. https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/.

[13] "Canada's New Privacy Law: The Consumer Privacy Protection Act (CPPA)." 2021. Cookie Law Info. April 5, 2021. https://www.cookielawinfo.com/canadas-consumer-privacy-act-cppa/#:~:text=Note%20that%20the%20Consumer%20Privacy%20Protection%20Act%20%28CPPA%29.

is not only critical to take action, but to do so quickly and cooperatively with other groups and individuals.

Canadians must work to elect representatives which understand and acknowledge the risks of Digital ID and fight for privacy rights. Such members include MP Leslyn Lewis, who is a vocal advocate of removing all Digital IDs, and who was the first MP to launch an inquiry into the Known Traveller Identity Program[14]. Canadians can pressure politicians by writing letters, calling their representatives, or if possible, arranging in-person meetings with them. Provincial governments ought to be targeted as well, as they have the ability to enact provincial privacy legislation. The National Citizen Coalition provided an online tool for Canadians before the passage of Bill C-11, enabling them to send a message of disapproval to every Canadian senator.[15] Utilizing such platforms maximizes the individual's voice and encourages other less engaged citizens to act.

In addition, individuals should encourage and support civil liberty groups such as the Canadian Civil Liberties Association, the Justice Centre for Constitutional Freedoms, The Democracy Fund, and other groups seeking to educate citizens regarding data privacy. In a nation where political engagement is low, it is critical for citizens to form communities and groups from which to lobby government officials and take legal action against unlawful data collection.

In the absence of legal change, however, Canadians are nevertheless able to protect their right to privacy by simply disengaging in programs which infringe upon it. An effective example of

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[14] "INQUIRY of MINISTRY DEMANDE de RENSEIGNEMENT AU GOUVERNEMENT." n.d. Accessed November 8, 2022. https://leslynlewismp.ca/wp-content/uploads/sites/28/2022/10/Q-634-2022-09-20-Known-Traveller-Digital-ID.pdf?fbclid=IwAR2gmphvJxgf9QRVVFTDN4crs3OyAO42msfhqdVCgFUiPc18KlLY3FYN_qE.

[15] "Get Involved: Help Stop C-11." n.d. National Citizens Coalition. Accessed November 16, 2022. https://www.nationalcitizens.ca/stop_c11.

this is many Canadians' refusal to download the ArriveCan app when entering Canada. The government sought to utilize this Digital ID system to prevent citizens from entering the country, in direct violation with Section 6(2) of the *Charter*: "Every citizen of Canada has the right to enter, remain in and leave Canada."[16] Many Canadians, such as Lindsay McDonald, were fined for failing to download the app but have since been acquitted.[17]

II. CYBERSECURITY THREATS

An additional incurred risk of Canada's Digital ID system is the reality that centralized data is less secure and more vulnerable to hackers. Currently, Canadians' data is diversified, meaning health information is kept in a separate database than tax records, and so on. This system is universally known to prevent hackers from being able to access more than one identifier of an individual at a time and deter cyberattacks.

In 2016, 31 percent of Canadian organizations reported an estimated loss of $1,000 to $66,000 as a result of cyber attacks, with 5 percent reporting estimated losses of between $5 million and one hundred million dollars. Additionally, police-reported cyberattacks have increased every year since 2014.[18] The unstable nature of storing digital information nationally, much less globally, at a time where digital security is not guaranteed or even expected, presents a threat to both liberty and privacy.

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[16]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 6 – Mobility Rights." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art6.html.

[17]P, J. 2022. "Crown Drops Two ArriveCAN Tickets after Letter from Justice Centre Lawyer." Justice Centre for Constitutional Freedoms. October 26, 2022. https://www.jccf.ca/crown-drops-two-arrivecan-tickets-after-letter-from-justice-centre-lawyer/.

[18]"Topic: Cyber Crime in Canada." n.d. Statista. https://www.statista.com/topics/4574/cyber-crime-in-canada/#dossierKeyfigures.

Recommendations for legislators regarding cybersecurity threats include amending the *Privacy Act* and the CPPA to require governments to give timely notice to consumers when personal data is stolen from databases. Such legislation protects citizens not only by giving them the ability to take necessary measures to cancel credit cards, change passwords, etc., but to incentivize governments and companies to enhance security protocols.

Canadians can take personal protective action by utilizing internet service platforms that protect their data from the possibility of government surveillance. End-to-end encrypted messaging platforms such as Signal, Telegram, and Wire, ensure that no government official or private company can access one's messages. Additionally, Canadians can utilize VPNs to hide their internet service provider, creating a secret tunnel that hides all their online activity. Reclaim The Net has compiled a list of secure platforms for private search engines, VPNs, social media and messaging platforms, and private email providers, giving Canadians access to a myriad of ways to prevent unlawful government interference.[19]

An additional cybersecurity concern comes from an unlikely culprit: Canadian banks. Almost every major Canadian bank and credit union has signed on to become a partner of the Digital ID and Authentication Council of Canada (DIACC), the council overseeing the implementation of digital identification in the country. Their goals align with UN and WEF objectives to create a global Digital ID system, meaning Canadians' data would not just be at risk of being exposed nationally, but across the globe.

[19]"Reclaim the Net - Restore Individual Liberty Online." n.d. Reclaim the Net. Accessed November 16, 2022. https://reclaimthenet.org/.

The intrinsic threat of this partnership played out in February 2022, when over 200 Canadian bank accounts with a cumulative $7.8 million were frozen. The RCMP turned over personal information of protestors to their banking institutions, who cooperatively shut down access to their finances.

With no harness on this sweeping financial power so far, one way Canadians can protect their rights is to diversify their funds across banks not part of the DIACC., even if this means holding funds overseas. Although less liquid, an even more secure measure is investing in tangible assets such as gold and silver. While governments may increasingly seek to discipline citizens by encroaching upon civil liberties, Canadians can make that road a long and painful one.

CONCLUSION

"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure…when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."[20]

—Thurgood Marshall (1989)

Canadians' data privacy is under threat from its own government, a regime which has stripped citizens of some of its most basic rights under the *Charter of Rights and Freedoms*. The age of COVID-19 has left some accepting the new normal, but others wondering: how do we fight back?

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[20]"A Quote by Thurgood Marshall." n.d. Www.goodreads.com. Accessed November 16, 2022. https://www.goodreads.com/quotes/490409-history-teaches-that-grave-threats-to-liberty-often-come-in.

For legislators, the answer is to amend both the *Privacy Act* and the CPPA to make consent a prerequisite for data gathering without exception, and to give timely notice to consumers when personal data is stolen from databases. These measures will, respectively, help prevent governments from unchecked authority to conduct widespread surveillance, and incentivize government protection of data privacy. These changes won't be brought about without significant citizen input, and Canadians ought to pressure legislators as individuals and organizations.

In the case of failure to legislate protection of Charter rights, Canadians can ensure protection themselves by refusing to participate in the sharing of personal information, as many citizens did with the ArriveCan app. A refusal to disclose information and subsequent legal action if challenged may help deter governments from unlawful collection of data. Additionally, Canadians can take personal protective measures against government surveillance by utilizing end-to-end encrypted messaging devices, VPNs, and private networks and clouds.

As we watch nations around the world restrict purchases, movements, and even the number of children they allow their citizens to have, it is incumbent on Canadians to act now to prevent our government from doing the same. Knowing one's *Charter* rights is key to protecting them, for it empowers the pushback against unlawful government measures, and inspires others to do the same.

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[2]WIRED Staff. 2017. "In China, a Three-Digit Score Could Dictate Your Place in Society." WIRED. December 14, 2017. https://www.wired.com/story/age-of-social-credit/.

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[6]Bennett, Colin J., and Grant, Rebecca, eds. 2000. Visions of Privacy : Policy Choices for the Digital Age. Toronto: University of Toronto Press. Accessed November 16, 2022. ProQuest Ebook Central.

[7]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 7 – Life, Liberty and Security of the Person." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html.

[8]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 7 – Life, Liberty and Security of the Person." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html.

[9] Government of Canada, Department of Justice, Charterpedia. 2010. "Charterpedia - Section 8 – Search and Seizure." Justice.gc.ca. 2010. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html.

[10]"KTDI." n.d. Ktdi.org. https://ktdi.org/.

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[14] "INQUIRY of MINISTRY DEMANDE de RENSEIGNEMENT AU GOUVERNEMENT." n.d. Accessed November 8, 2022. https://leslynlewismp.ca/wp-content/uploads/sites/28/2022/10/Q-634-2022-09-20-Known-Traveller-Digital-ID.pdf?fbclid=IwAR2gmphvJxgf9QRVVFTDN4crs3OyAO42msfhqdVCgFUiPc18KlLY3FYN_qE.

[15]"Get Involved: Help Stop C-11." n.d. National Citizens Coalition. Accessed November 16, 2022. https://www.nationalcitizens.ca/stop_c11.

[16]Government of Canada, Department of Justice. 1999. "Charterpedia - Section 6 – Mobility Rights." Justice.gc.ca. November 9, 1999. https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art6.html.

[17]P, J. 2022. “Crown Drops Two ArriveCAN Tickets after Letter from Justice Centre Lawyer.” Justice Centre for Constitutional Freedoms. October 26, 2022. https://www.jccf.ca/crown-drops-two-arrivecan-tickets-after-letter-from-justice-centre-lawyer/.

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[20]“A Quote by Thurgood Marshall.” n.d. Www.goodreads.com. Accessed November 16, 2022. https://www.goodreads.com/quotes/490409-history-teaches-that-grave-threats-to-liberty-often-come-in.