Letter to the Honourable Sheila Finestone on the Privacy Rights Charter, Bill S-27

January 24, 2001

The Honourable Sheila Finestone
The Senate of Canada
Room 600 - Victoria Building
Ottawa, Ontario
K1A 0A4

Dear Senator Finestone:

RE: *Privacy Rights Charter*, Bill S-27

It was a pleasure seeing you again at Montebello. Thank you for inviting me to comment on your bill, *An Act to Guarantee the Human Right to Privacy*, Bill S-27 (the *Privacy Rights Charter*).

The introduction of this Bill comes at a critical time. Public concern over privacy has risen significantly in recent years. Increasingly people feel vulnerable and powerless against pervasive and rapidly changing technology - video cameras in shopping malls, subways and intersections; the mapping of the human genome; cookies and Web bugs on the Internet; interception of wireless communications; satellite photographs of individual houses; automatic collection of point-of-purchase data and creation of detailed consumer profiles - the list could go on and on.

Nowhere have the privacy concerns of Canadians been more fully recognized than in the report of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities, which you chaired. The Committee's report *Privacy: Where Do We Draw the Line?* captured Canadians' sense of powerlessness and their concern over a widespread sense of defeatism and technological determinism.

Professor Ursula Franklin expressed the unease that, in today's society, where more and more of daily life is conducted via technology, there is the potential for the value of technology to overpower or displace fundamental human values such as fairness and respect for individuals. Like privacy commissioners around the world, I am gravely concerned that privacy is one of the fundamental human values that could be jeopardized by the use of technology without proper controls or regard for its societal impact.

During the time he was the federal Privacy Commissioner, John Grace noted that turning to privacy values is an instinctive human response to, and defence against, a prying, pervasive technology. Mr. Grace made these statements in his 1989-90 Annual Report. What was true then has only been dramatically reinforced and magnified with the growth of the Internet, genetic testing, and other technologies virtually unheard of by the average person at that time. This last decade - one of exciting technological change - has also been one where we have witnessed growing public concerns over privacy as a consequence of these changes.

People's fears about their privacy cannot be alleviated simply by regulating the appropriate uses of technology. Technology certainly has a critical role to play in protecting privacy. However, lasting solutions will only come when an understanding of privacy, as a core value, permeates all levels of our society.

Professor Colin Bennett observed that privacy is a notoriously vague, ambiguous, and controversial term. It is a highly subjective notion, interpretation of which changes over time and space. While this may be true, in Canada, there is a general sense that personal control over one's own information is central to conducting oneself as a self-determining and responsible person. The idea that information about oneself is one's own, to communicate to others as one determines, has been referred to by the Germans as "informational self-determination," and is a central tenet of Canadian data protection legislation, including Ontario's.

We can be proud of the work that has already been done in Canada regarding data protection. I am very pleased with the spread of data protection laws across Canada; the Canadian government's commitment to a

comprehensive review of the federal privacy legislation, which is to include public consultation; and the coming into force of the first phase of the *Personal Information Protection and Electronic Documents Act*. The recent introduction of the *Personal Health Information Privacy Act, 2000* and the promise of data protection legislation for the private sector in Ontario is also noteworthy.

However, I recognize that data protection legislation is not sufficient to address the full ambit of Canadians' privacy concerns. It does not cover bodily or territorial privacy - two areas of increasing concern in today's society. Perhaps the most important message that emerged from the Standing Committee on Human Rights and the Status of Persons with Disabilities' public consultation is that Canadians view privacy as more than just protection of their personal information. Canadians consider privacy to be a "core human right," essential to "the workings of a healthy, meaningful democracy," and a significant part of "our social or collective value system."

Such a view should come as no surprise to anyone given our long-standing support of human rights, and how we like to define ourselves as a society - fair, open, compassionate, respectful, equal, and just. While the reality may not always match the ideal, this is how we Canadians see our society. To my mind, privacy is an integral part of what Canadians value about our way of life.

Personally and professionally, as a privacy commissioner, I strongly believe that privacy is a fundamental human right, though not absolute. It is essential to human dignity and autonomy and, in many ways, is an underlying component of other rights. Privacy allows us the freedom to be who and what we are. It enables us to exercise discretion in deciding how much of ourselves we wish to share with others. Accordingly, I believe it is critical that Canada accords proper protection to this right.

As you know, Canada played a pivotal role in the development of the *Universal Declaration of Human Rights*. Adopted by the United Nations General Assembly in 1948, the *Declaration* called for the recognition of fundamental freedoms for all individuals, and expressly recognized the right to privacy (Article 12). Privacy was also directly referenced in the United Nations' *International Covenant on Civil and Political Rights* (Article 17).

The fact that Canada is a party to both the *Declaration* and the *Covenant* is more than just window dressing on how we want to be perceived by the world. It speaks to the very essence of the type of society we want to have in Canada - one in which all human rights, including privacy, are recognized and protected. Indeed, the Supreme Court of Canada has argued that Canada's international human rights obligations should inform the interpretation of the content of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*).

However, the fact that the *Charter* does not explicitly establish a right to privacy is a significant omission. The Supreme Court of Canada has determined that the concept of privacy underlies several of the rights expressed in the *Charter*. Primarily the Supreme Court has used Section 8, the protection against unreasonable search and seizure, to advance the argument for a right of privacy for Canadians.

As significant as the Supreme Court's decisions are, without explicit inclusion in the *Charter*, we are left to stake our claim to a privacy right on a handful of cases. Given the importance of privacy, I believe this is too limited a foundation. My obvious preference would be to entrench the right to privacy in the *Charter*.

This is by no means a new or unique view. As Justice La Forest so eloquently stated in R. v. Dyment:

Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection ...

As you know all too well, in the past there have been numerous attempts and recommendations to include a right to privacy in the Constitution. The 1979 proposals made by the federal government itself suggested the inclusion of privacy in the *Charter*. In 1980, the then Justice Minister Jean Chrétien described privacy as an essential right deserving *Charter* inclusion. The following year, in the Special Joint Senate-House of Commons Committee on the Constitution, both David Crombie and Svend Robinson proposed amendments for the inclusion of a constitutional right to privacy. Their motions were defeated.

At the conclusion of its review of the federal *Privacy Act*, the Standing Committee on Justice and Solicitor

General released its findings in *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. The Committee began its conclusions with the statement:

First, the Committee would like to emphasize its awareness that Canadians do not as yet enjoy an explicit constitutional right to privacy under the *Canadian Charter of Rights and Freedoms*... The absence of a common-law and/or Charter-based right to personal privacy in Canada is a significant impediment to the protection of individual rights ...

The Committee went on to suggest that when the time comes to amend the *Charter*, serious consideration should be given to creating a simple constitutional right to personal privacy. Significantly, the Committee concluded:

Even though the Supreme Court of Canada has already begun to use privacy language in its interpretation of the *Charter*, which may lead to the gradual development of an acknowledged constitutional right to privacy, the idea of amending the *Charter* explicitly for this purpose has much to recommend it.

Many agreed, and when another opportunity arose in 1991 to speak to this issue, the then federal Privacy Commissioner, Bruce Phillips, argued that "until our*Charter* is amended to erase any doubt that privacy is a fundamental freedom, it will remain endangered, if not become extinct." While recognizing the scope limitations of the *Charter*, Mr. Phillips believed an explicit right to privacy would serve as "an ethical norm" for all of society. He concluded his insightful submission to the Special Joint Committee on a Renewed Canada by stating:

We now have an opportunity to entrench a simple, but unequivocal, constitutional right of privacy - one that is indispensable for safeguarding human dignity and for reinforcing our other constitutional rights. Without a strong and overriding statement of support for privacy, one of our most important freedoms stands largely unprotected. This may be our last chance for the foreseeable future.

Unfortunately, his recommendation was not acted upon, and his forecast has come true. Since 1991, there has not been any contemplation of amending the *Charter* to include an explicit right to privacy.

I believe it is important to remind ourselves of these efforts, along with our international commitments, in order to put Bill S-27 into its rightful historical context. Bill S-27 represents a new means of achieving an old end. Canada already has recognized privacy as a human right. At issue is how to appropriately define an overarching privacy right within Canada. The *Charter* remains the most logical instrument, but political realities seem to mitigate against any possibility of its amendment in the near future.

Recognizing this, in 1997, the Standing Committee on Human Rights and the Status of Persons with Disabilities' first recommendation was that:

... the Government of Canada recognise and act upon its responsibility to respect and protect privacy rights in Canada by enacting a declaration of privacy rights to be called the Canadian Charter of Privacy Rights. This Privacy Charter would apply within federal jurisdiction, take precedence over ordinary federal legislation and serve as a benchmark against which the reasonableness of privacy infringing practices and the adequacy of legislation and other regulatory measures would be assessed.

The Committee also made recommendations about the privacy rights and responsibilities that should be included in the Privacy Charter.

At that time, I wrote to the federal Minister of Justice to express my support of overarching umbrella legislation, as recommended by the Standing Committee, and to encourage the federal government to commit to enacting a Privacy Charter by the year 2000. I further indicated my support of the idea of a Privacy Charter to provincial inter-governmental officials.

At Bill S-27's second reading, you stated:

At the heart of the proposed privacy right charter is the recognition of privacy as a basic human right and a

fundamental human value, something Canada has committed itself to as a signatory to international human rights instruments. It is of fundamental interest to the public good and is essential to the exercise of many of the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*.

The privacy charter seeks to give effect to several principles: first, that privacy is essential to an individual's dignity, integrity, autonomy and freedom, and to the full and meaningful exercise of human rights and freedoms; second, that there is a legal right to privacy; and third, that an infringement of the right to privacy, to be lawful, must be reasonable and justifiable.

I support these sentiments and the objective of Bill S-27. In the absence of an amendment to the *Charter*, and while recognizing the limitations of the quasi-constitutional nature of Bill S-27, I believe your legislation, with its umbrella of principles, could provide a benchmark of privacy protection for both the public and private sector.

Bill S-27 already has an important symbolic and educational function, and this could be greatly expanded if the government championed it. If passed, this legislation would raise awareness of the need to protect privacy broadly, and would have a significant impact on all future legislation. As an overarching privacy rights framework for Canada, it could also serve as a catalyst for Ontario.

Former Chief Justice Brian Dickson noted that the *Charter* was an organic part of an ongoing process to define and protect rights and freedoms in Canada. He believed the *Charter* did not mark an abrupt departure from this country's basic values, but rather a codification of those values. It reflected a decision on the part of the government to subject itself to new responsibilities.

I believe that by supporting Bill S-27, the government would show a profound sensitivity to basic Canadian values, and a recognition of the need to develop laws consistent with those values. While not a substitute for an amendment to the *Charter*, nor for the updating of data protection legislation, Bill S-27 could play a critical role in improving the way in which we are governed.

Enacting the *Privacy Rights Charter* would enshrine the current sentiment of the court, but more importantly, it would serve as an extremely powerful symbol to our society. By creating broad legislation that protects our privacy, we are protecting a broad range of rights. We are cementing the foundations of our democracy, ensuring our autonomy and freedom, and protecting our individual and group rights.

Failing to enact an overarching privacy law risks diluting what has becoming a powerful movement to protect this right. The need to protect our privacy reaches into every corner of our lives, creating a *Privacy Rights Charter* would be a bold step toward a more equitable and just society, where our autonomy and human dignity is protected.

I applaud your efforts to establish statutory recognition of privacy as a basic human right and a fundamental value. Thank you for taking such an important step in advancing the privacy agenda in Canada.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner