

Canada: Privacy Law Overview

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Canada: Privacy Law Overview

General

Privacy laws regulating the collection, use and disclosure of personal information in the public sector have been in place since 1977, when the federal government passed the *Canadian Human Rights Act* (CHRA). Certain sections of the CHRA that dealt with the protection of personal information were repealed in 1983 and replaced by the federal *Privacy Act*, which today continues to apply to the collection, use and disclosure of personal information by federal government institutions. In addition, there are a variety of statutes that regulate the protection and access of personal information held by provincial and territorial government departments and agencies. In Ontario, for example, the *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act* together legislate on the collection, use, retention and disclosure of personal information by government bodies.

The regulation of personal information in the private sector context, on the other hand, was a much later development in Canada. The impetus for the introduction of legislation regulating personal information in Canada is partially attributable to the growth of the Internet and the introduction of other technological advances that greatly facilitate the collection, retention, organization and dissemination of personal information, and partially attributable to the introduction of the European Union's "Privacy Directive" in 1995. At the provincial level, three provinces – Quebec, British Columbia and Alberta – have passed legislation dealing generally with the protection of personal information in the private sector. Further, six provinces – New Brunswick, Ontario, Manitoba, Saskatchewan, Alberta and Newfoundland and Labrador – have statutes that specifically address the privacy of personal health information in the private sector. At the federal level, Parliament has enacted the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which took effect on January 1, 2004 and is discussed below.

PIPEDA

Background

The Canadian government looked largely to the private sector for assistance in the creation of privacy legislation. The Canadian Standards Association had previously engaged industry, consumers, and government in a collaborative effort to create the *Model Code for the Protection of Personal Information*, which was designed to afford consumers some protection in their dealings with the private sector. The code was strictly voluntary, however, and there was no ability to enforce its provisions or encourage appropriate data management within Canada. To create the appropriate regulatory environment, the government essentially took the voluntary code that had been in place and formalized the measures into Part I of PIPEDA.

General

PIPEDA was brought into effect in three phases. The first implementation phase came into force on January 1, 2001, at which point the statute applied to the federally regulated private sector and to the disclosure of personal information for consideration across provincial borders. Federally regulated sectors include industries such as banking, airlines, broadcasters, shippers and telecommunications companies.

On January 1, 2002, PIPEDA was extended to apply to “personal health information”, which includes any information concerning the physical or mental health of an individual (living or deceased), any health services provided to an individual, information about donations of body parts or substances and any information collected in the course of, or incidentally to, the provision of health services to the individual.

The third and final implementation phase took place on January 1, 2004. Effective that date, PIPEDA applied to all personal information collected, used or disclosed in whole or in part within Canada in the course of “commercial activities” – defined as “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists”. This final phase expanded the application of PIPEDA’s privacy protections to all commercial transactions in Canada. Note that PIPEDA specifically permits the use and disclosure of personal information in order to facilitate a “prospective business transaction”, provided that certain safeguards are in place.

The Supreme Court of Canada has defined information privacy as being the right of the individual to determine when, how, and to what extent he or she will release personal information. Part I of PIPEDA provides legislative recognition of this right by giving individuals the ability to determine how an organization may use personal information in the course of commercial activities. PIPEDA regulates the collection, use and disclosure of personal information, such as an individual’s addresses, telephone numbers, email addresses, credit card information, social insurance numbers, financial information, health information, as well as consumer-specific spending history or personal habits. The legislation applies irrespective of whether the personal information was obtained directly from a consumer or indirectly from a third party.

Application

Canada has a federal structure with constitutionally defined areas of jurisdiction for the federal government and the respective provincial governments across the country. Section 92 of the *Constitution Act, 1867* gives the provincial governments in Canada exclusive jurisdiction over local trade, property and civil rights. Recognizing this division of powers, PIPEDA allows the federal cabinet to exempt businesses from the application of PIPEDA in a province that enacts privacy legislation found to be “substantially similar” to Part I of PIPEDA. Any such exemption applies only to collection, use, or disclosure of personal information that occurs within the

province. Extra-provincial or international aspects of data collection or usage continue to be subject to PIPEDA notwithstanding such an exemption order.

PIPEDA therefore applies in respect of personal information that is collected, used or disclosed in the course of commercial activities by federally regulated private sector organizations, and personal information that is collected, used or disclosed by other private sector organizations in the course of their commercial activities when it is transferred across Canadian or provincial borders or when it is collected, used or disclosed within a Canadian province that has not enacted legislation that is “substantially similar” to PIPEDA. To date, the federal government has recognized each of the Alberta *Personal Information Protection Act* (APIPA), British Columbia *Personal Information Protection Act* (BCPIPA) and Quebec’s *An Act respecting the protection of personal information in the private sector* (Quebec Private Sector Act) as being “substantially similar” to PIPEDA. Meanwhile, the *Personal Health Information Protection Act* (PHIPA) in Ontario and New Brunswick’s *Personal Health Information Privacy and Access Act* have been found to be “substantially similar” in regards to personal health information. Thus, PIPEDA continues to apply in Ontario and New Brunswick with respect to all other personal information. PIPEDA regulates the collection, disclosure and use of personal information in the private sector in all other provinces.

With respect to personal information of employees, PIPEDA only governs the collection, use, and disclosure of the personal information of those persons employed by federal works or undertakings (i.e. employers in areas such as aviation, telecommunications, broadcasting and banking). Consequently, even if employee information is transferred across provincial borders, PIPEDA will not apply unless the business is federally regulated. APIPA, BCPIPA and the Quebec Private Sector Act regulate personal information of employees in the private sector (including volunteers in some cases) in those provinces.

Obligations under PIPEDA

Under PIPEDA, individuals must be provided with the ability to exercise informed consent regarding the collection, use and disclosure of their personal information. PIPEDA establishes rules governing the collection, use, and disclosure of personal information, and requires organizations to establish and enforce formal policies regarding the handling of personal data. Policies must strive to respect an individual’s privacy rights, while permitting the valid gathering and use of personal information by organizations. Generally, PIPEDA requires organizations to comply with the following ten privacy principles set out in Schedule I of PIPEDA, originally set out in the Canadian Standards Association’s *Model Code for the Protection of Personal Information*:

- **Accountability:** Each organization is responsible for the personal information it collects and is required to appoint an individual who is accountable for the organization’s compliance with the ten PIPEDA principles. Each organization

must protect personal information it provides to third party service providers using contractual and other protections (such as encrypting personal information or providing anonymous information where possible), and must implement internal privacy policies and practices with respect to personal information in its control. Audit and compliance mechanisms should be implemented and regularly reviewed to ensure that they reflect the organization's evolving requirements.

- **Identifying Purpose:** The purpose for which personal information is collected must be identified at or before the time it is collected.
- **Consent:** Knowledge and consent are required for the collection, use and disclosure of personal information, except where inappropriate. Consent may be express or implied, depending on the context. Each organization must ensure that the individuals whose personal information is collected know of the purpose for which it is being collected, used or disclosed.
- **Limiting Collection:** The collection of personal information shall be limited to what is necessary in accordance with the identified purposes. There must be a clear link between the personal information collected and the identified purposes. Procedures must be developed to ensure that personal information that has already been collected is not used or disclosed for a purpose that has not been identified to the subject individual without first obtaining consent to use it for the new purpose.
- **Limiting Use, Disclosure and Retention:** Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law, and shall be retained only as long as necessary for the identified purposes.
- **Accuracy:** Personal information must be as accurate, complete and current as is necessary for the identified purpose.
- **Safeguards:** Personal information must be securely protected from unauthorized access. Employees must be advised of the need to maintain the confidentiality of the personal information.
- **Openness:** Organizations must be transparent and open about their management of personal information.
- **Individual Access:** On request, individuals must be provided with access to and the ability to correct their personal information, and a list of third parties to whom such information has been disclosed must be made available on request.
- **Challenging Compliance:** Individuals must be able to challenge an organization's compliance with privacy principles. Each organization must implement procedures to receive and respond to complaints or inquiries about its policies and practices with respect to personal information.

Remedies

Individuals have the right to complain to the Privacy Commissioner of Canada and, in certain circumstances, to the courts. PIPEDA gives the Privacy Commissioner of Canada broad investigative and audit powers to resolve disputes and establish effective systems of compliance. In addition, the Privacy Commissioner has the ability to publicly disclose all information relating to the personal information management practices of an organization if it considers such disclosure in the public's interest. The legislation also provides "whistle blowing" protections for employees who report violations, provided the reports are made in good faith and upon reasonable belief. If an organization fails to comply with PIPEDA, it may be ordered to correct its practices and to publish a notice of such action. Damages may also be awarded to the complainant, including damages for humiliation. In 2010, for example, the Federal Court awarded a complainant \$5,000 for humiliation resulting from the provision of inaccurate credit information by a credit reporting agency. In addition, failure to comply with certain provisions of PIPEDA may result in an organization, director, officer or employee being fined up to \$100,000.

Provincial Legislation

As mentioned above, only Quebec, British Columbia and Alberta have enacted general private sector privacy legislation recognized as being "substantially similar" to PIPEDA. Privacy protection legislation varies significantly from province to province, and despite the requirement that provincial legislation be "substantially similar" to PIPEDA, certain protections are nonetheless available in some provinces while not in others.

Quebec

The *Quebec Private Sector Act* regulates the collection, storage, and communication of personal information about individuals by private enterprises operating in the province. The rules established by the *Quebec Private Sector Act* serve to supplement the privacy provisions contained in Quebec's *Civil Code* and also address issues respecting the transfer of personal information outside of the province.

In 2003, the federal government recognized the *Quebec Private Sector Act* to be "substantially similar" to Part I of PIPEDA and, therefore, most non-federally regulated businesses operating in Quebec are exempt from that part of the federal legislation. Accordingly, the Quebec legislation will apply within the province of Quebec to the exclusion of PIPEDA, as long as all of the actions of the commercial enterprise occur within the province. Where the collection, use or disclosure of personal information occurs across Quebec's borders, conceivably both PIPEDA and the *Quebec Private Sector Act* could apply.

Ontario

Currently, only PIPEDA regulates personal information practices in the Ontario private sector. In February 2002, the provincial Ministry of Consumer and Business Services released draft legislation entitled the *Privacy of Personal Information Act, 2002*, which was to serve as the foundation for Ontario's private sector privacy legislation, but in the end no bill emerged.

British Columbia

BCPIPA, which governs the collection, use and disclosure of personal information by organizations in the province, came into force on January 1, 2004. The legislation was declared substantially similar to PIPEDA and, therefore, non-federally regulated businesses operating in British Columbia are exempt from the application of Part I of PIPEDA.

Alberta

APIPA came into force on January 1, 2004 and has been declared substantially similar to PIPEDA. The legislation was amended in 2010 to impose additional obligations, some of which diverge from provisions commonly found in other privacy legislation. Among these additional obligations is a provision that applies to organizations that either transfer personal information to service providers outside of Canada or that use service providers outside of Canada to collect personal information. In either of these cases, APIPA requires such organizations to notify individuals of how they can access the organization's policies with respect to service providers outside Canada and to specify a contact who can answer questions. Additionally, the policies themselves must disclose the countries to which personal information will flow and the purposes for which international service providers have been authorized to handle personal information. The amendments also authorize the Alberta Information and Privacy Commissioner to order organizations that suffer a privacy breach to notify the individuals to whom there is a real risk of significant harm resulting from the breach.

Comparing PIPEDA and the Provincial Privacy Laws

When comparing PIPEDA and provincial privacy legislation, one matter that needs to be highlighted is the issue of consent. PIPEDA requires express (opt-in) consent when the personal information collected, used or disclosed is sensitive (such as in the case of a person's health or financial information). Implied (opt-out) consent is permissible under PIPEDA where the personal information is not sensitive (e.g. a person's mailing address in the case of a mainstream magazine subscription). Both BCPIPA and APIPA, on the other hand, allow for implied consent for all types of personal information, provided certain reasonableness criteria are met. In Quebec, consent must be manifest, free and enlightened, and must be given for a specific

purpose. Another issue of importance when comparing federal and provincial private sector privacy law has to do with the purchase or sale of a business. Like PIPEDA, both BCPIPA and APIPA have an exemption from the consent requirement for the collection, use and disclosure of personal information by an organization in the course of a “business transaction”, which by definition includes a purchase, sale or lease, merger or amalgamation involving that organization. However, where the sale or purchase of a business falls under the Quebec legislation, the consent of the relevant customers as well as employees will be required before any personal information may be disclosed to potential purchasers.

Finally, it must be noted that while provincial privacy commissioners have the power to issue binding orders regarding the organizations under its jurisdiction, the Privacy Commissioner of Canada has no such authority. The Commissioner, however, can investigate complaints and is vested with a number of powers to facilitate such investigations. For example, the Commissioner may summon individuals and compel them to give evidence, and enter premises occupied by an organization. The Commissioner may also apply to a court of competent jurisdiction for a hearing.

Health Privacy Legislation

There are a multitude of laws that apply to the privacy of personal health information in the private sector. PIPEDA applies to the collection, use and disclosure of personal health information generally, and six provinces – Ontario, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador and New Brunswick – have enacted specific legislation concerning personal health information.

Since the Ontario’s *Personal Health Information Protection Act, 2004* and New Brunswick’s *Personal Health Information Privacy and Access Act* have been deemed to be “substantially similar” to PIPEDA with respect to personal health information, PIPEDA does not apply in those provinces with respect to such information. Persons dealing with personal health information in Saskatchewan, Manitoba and Newfoundland and Labrador, the PHIPAs of which have not yet been declared “substantially similar” with PIPEDA, must comply both with their respective provincial statute, and with PIPEDA. The situation in Alberta is unclear: while the general provincial private sector privacy legislation has been deemed to be substantially similar to PIPEDA, the health sector specific statute has not and so PIPEDA could still possibly apply to certain personal health information issues. In B.C. and Quebec, the legislation governing personal information in the private sector also covers personal health information; therefore PIPEDA presumably does not apply to the collection, use and disclosure of personal health information occurring solely within either of these two respective provinces. PIPEDA continues to govern in all provinces where personal health information crosses provincial or national borders.

About the Firm

When Heward Stikeman and Fraser Elliott first opened the firm's doors in 1952, they were united in their pledge to do things differently to help clients meet their business objectives.

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