


McINNES COOPER

McINNES COOPER

Infonex 2005:

Privacy and Investigations


David T.S. Fraser
McInnes Cooper
david.fraser@mcinnescooper.com
(902) 424-1347



McINNES COOPER

What is Privacy?

- **Has been characterised as the right to be left alone, to be secure in one's home and free from unwanted interference**
- **In the context of the new law, privacy means having control over one's personal information**
 - Choice of whether to disclose information at all
 - Control over with whom it is shared
 - Control over how it is used
 - Don't lose control once you've released your information "into the wild"



Privacy law fundamentals

- **What is privacy?**
- **What is this new privacy law?**
- **What does it say?**
- **Does it apply?**
- **How does it affect investigations?**

PIPEDA – Purpose

3. **The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.**

Privacy - PIPEDA

- **Phased in application**
 - 1 January 2001 - Federal Private Sector
 - Telecommunications, railways, air travel, shipping, credit bureaus, banks
 - 1 January 2004 - Provincial Private Sector
 - The rest of the economy
- **Exemption if provincial government steps in and passes legislation that is declared to be “substantially similar”.**

No such legislation in Atlantic Canada –
none anticipated

5

Privacy - PIPEDA

- **Addresses “personal information” – information about an identifiable individual:**
 - **NOT** name, title, business address or telephone number of an employee of an organization
 - Would include name, address, income, health information, demographics, preferences, birth date, SIN, customer numbers, unique identifiers
- **Also includes information that may be traced back to an individual**

6

Privacy Principles

- **Based on the principles of the Canadian Standards Association Model Code for the Protection of Personal Information:**
 1. **Accountability**
 2. **Identifying purposes**
 3. **Consent**
 4. **Limiting collection**
 5. **Limiting use, disclosure and retention**
 6. **Accuracy**
 7. **Safeguards**
 8. **Openness**
 9. **Individual access**
 10. **Challenging compliance**

7

Does it apply to you?

- **PIPEDA, s. 4(1):**

“... applies to every organization in respect of personal information that

 - (a) the organization collects, uses or discloses in the course of commercial activities; or
 - (b) is about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.”

8

What about employees?

- PIPEDA only applies generally to employee information in the federally-regulated private sector
- Employee information is only covered in the provincially-regulated private sector if it is used in a commercial way
- But, even employers who are not subject to the law are experiencing a “privacy chill”
- Employees *believe* they have rights

9

Consequences

- **Individual (not just customer!) can make a written complaint to the Privacy Commissioner (s. 11).**
 - Commissioner may initiate a complaint of his own accord.
 - Commissioner investigates the complaint
 - Powers in s. 12(1): Compel evidence, administer oaths, accept any evidence whether ordinarily admissible (or not), **enter any premises** other than a dwelling, review documents, etc.
- **Commissioner’s Report**
 - To contain findings and recommendations, whether there was a settlement
 - Commissioner can decline to issue a report if the complainant has other recourse available

10

Consequences

- **Court hearing**
 - A complainant (*not the organization*), after receiving the Commissioner's report, may apply to the Federal Court – Trial Division for a hearing.
- **Court's remedies include:**
 - Order the organization to correct its practices in order to comply with ss. 5-10 of the Act;
 - Order the organization to publish a notice of actions taken to correct its practices; and
 - Award damages, including damages for humiliation the complainant may have suffered.

11

Employers need to know

- **PIPEDA creates a number of offences about which employers must be aware. It is unlawful to**
 - discipline or retaliate against an employee or independent contractor who
 - "Whistleblows" to the Commissioner about the employer's privacy practices;
 - Refuses to do something contrary to Part I of the Act;
 - Acts to prevent a contravention of Part I of the Act;
 - destroy personal information before a complainant has exhausted his/her recourse against the organization


12

McINNES COOPER

McINNES COOPER

Privacy Law and Investigations


Have the rules changed?



McINNES COOPER

How PIPEDA is invoked

- **PIPEDA's general enforcement scheme is to complain to the Commissioner and then seek recourse at the Federal Court.**
- **PIPEDA is being used by lawyers to prevent the admission of evidence in court**
 - "This evidence was collected in violation of PIPEDA and should be excluded."
- **So far, none have been successful in the formal investigation stage. But what about more routine collection that may lead to an investigation?**



14

Employment Issues

- **Video surveillance in the workplace**
 - Before PIPEDA, labour arbitrators had arrived at a test of reasonableness
 - Largely adopted by the Privacy Commissioner
 - **Decision 114 – Employee objects to company’s use of digital video surveillance cameras**
 - Railroad company placed unmonitored cameras on its premises to counter theft and vandalism. (This was in addition to cameras in place for operational purposes.)
 - Informed employees of the cameras and their locations. Told employees they were not to be used for tracking employees or their productivity.
 - To ensure compliance with the intent of section 5(3) (*limited to reasonable collection*), Commissioner asked the following questions:
 - Is the measure demonstrably necessary to meet a specific need?
 - Is it likely to be effective in meeting that need?
 - Is the loss of privacy proportional to the benefit gained?
 - Is there a less privacy-invasive way of achieving the same end?
 - Concluded that the use of the cameras was not reasonable in the circumstances.
 - Federal court reversed this decision, but followed the general four-point test.

15

Monitoring E-mail and Internet Use

- **Common concern - Collection of personal information**
- **Privacy Commissioner has taken a negative view of the practice**
- **General principles depend on the reasonable expectations of the employee**
 - Is there notice of rules of use?
 - Is there knowledge of the monitoring?
 - Are the restrictions reasonable?
- **Baseline reasonableness requirement in s. 5(3)**
 - Commissioner will probably use the same four point test for reasonableness.

16

PIPEDA in the Unionized Workplace

- **Intersection of PIPEDA and the collective agreement**
- **Many collective agreements deal with employee records**
 - What can go in the record
 - Who has access
 - Employee access
 - Right to make corrections
- **Will need to know your collective agreement in the investigation context. Collective agreement may prevail over PIPEDA's requirements.**

17

McINNES COOPER

**Consent & Its
Exceptions**

**Deciphering
Principle 3 and s.
7**

The General Rule

4.3 Principle 3 -- Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, *except where inappropriate.*

Consent Exceptions

- **Section 7 of PIPEDA sets out the allowed exceptions to the general consent rule**
- **Warning:**
 - Not very easy to follow.
 - May not allow you to do what you want.
 - Adult supervision required!

Consent Exceptions – s. 7

- S. 7(1) – Allows some collection
- S. 7(2) – Allows some use
- S. 7(3) – Allows some disclosure

- Be careful that allowed collection may not lead to allowed use → at least not according to the statute.

Consent Exceptions

- **Consent exceptions are very dangerous**
- **Virtually all circumstances are fraught with risk:**
 - Clearly in interests of individual and consent cannot be obtained in a timely way.
 - **Investigation**
 - Journalistic or artistic purposes / scholarly purposes
 - Publicly available information
 - Emergency
 - To a lawyer
 - Collecting a debt
 - Subpoena
 - To government institution for national security, defense of Canada, etc.
 - Investigative body, government institution
- **Permissive exceptions, not mandatory**
 - S. 7 allows you to do things that would otherwise be unlawful under PIPEDA ... does not force you to do so.

Consent Exceptions

- S. 7(1)(b) – “it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.”
 - Can be collected and used
 - Has been used and upheld by bank in the course of fraud investigation
 - The employment “contract” is an agreement. A legitimate investigation is likely an investigation of a breach of that agreement or of a legal violation.
 - Professional codes of practice may fall within this section.

23

Consent Exceptions

- S. 7(3)(c) – “may disclose information ... if required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records”
 - Allows disclosure to a body that can compel the documents.

24

Consent Exceptions

- S. 7(3)(d) – “made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization
 - (i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or
 - (ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;”
 - Allows disclosure to police, investigative bodies
 - Made on the initiative of the organization
 - “Investigative body” is defined in the regulations.

Investigative Bodies

- Many professional regulators think they need to be an “investigative body” to continue to do their investigative work.
- Not so....
- For many, IB status doesn’t help in a meaningful way.
- Section 7(3)(b) allows someone to disclose to an IB on their own initiative. There is no authority to collect without consent, except within the confines of the law.

What to do?

- Investigators need to be mindful of privacy at every stage
- Minimize the information collected about uninvolved third parties
- If possible, get consent

27

Ask yourself ...

- Can we accomplish this without collecting personal information?
- Is the collection reasonable?
- Is there a less privacy-invasive way of collecting necessary information?
- What are we investigating? Breach of law/agreement?

28

About the Author

David T.S. Fraser
Direct Dial 902 424 1347
Fax 902 425 6350
Email david.fraser@mcinnescooper.com



David is the chair of McInnes Cooper's Privacy Practice Group, working with large and small clients to implement compliance programs for the *Personal Information Protection and Electronic Documents Act* (PIPEDA). He regularly provides opinions related to Canadian privacy law for Canadian and foreign corporations and is a frequently invited speaker on this topic. In addition, David is the Vice Chair of the Privacy Law Subsection of the Canadian Bar Association – Nova Scotia.

David is also the principal legal advisor to National Privacy Services Inc. (<http://www.privlaw.com>), where he designs privacy compliance and training programs, and supports the company's contract privacy officers. He is the author of the *Physician's Privacy Manual*, a publication of NPSi, and "PIPEDA and Canadian Privacy Law", an online privacy blog at <http://pipeda.blogspot.com>.

In 2002, David was invited to be an associate of the Institute of Law and Technology. He is a member of the faculty of Dalhousie Law School, where he teaches Internet and Media Law, Law and Technology, and Law and Policy for Electronic Commerce. He is on the editorial board of the *Canadian Journal of Law and Technology*. Active in the Halifax technology community, David is secretary and director of advocacy for the Information Technology Industry Alliance of Nova Scotia (ITANS).