

House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Dec. 11, 2006 (Chaired by Tom Wappel)

Notes taken by Tara Berish, CIPPIC Articling Student

**NB: This is not a transcript. We do not guarantee accuracy of these meeting notes. For a transcript of the meeting, see the Committee website.

Witnesses:

- Information Technology Association of Canada
 - Bernard A. Courtois, President and Chief Executive Officer
 - Ariane Siegel, Lawyer
- As an Individual
 - Ian Kerr, Canada Chair in Ethics, Law and Technology, University of Ottawa
- Canadian Bar Association
 - Brian Bowman, Chair, National Privacy and Access Law Section
 - Tamra L. Thomson, Director, Legislation and Law Reform

Bernard A. Courtois, President and CEO, ITAC:

- The CSA Model of PIPEDA is a mixed model. It's effective and we don't want changes to its fundamental structure
- Most clients don't have lawyers, so they can't use more complicated legislation

Ariane Siegel, Lawyer, ITAC

- Canada's privacy laws are top-ranking
- Disagrees with CIPPIC's stance on PIPEDA, and our conclusions
- Canadian privacy law is having a large impact on international compliance
- We think it's too soon to make significant changes
- Customers and employees are only now learning about how to exercise their rights
- PIPEDA
 - It's flexibility is beneficial – makes the process low-cost and accessible
 - The ombuds model is good – the Commissioner doesn't need increased powers
 - Oppose mandatory notification of breaches – no organization wants the extra liability, many organizations contact the OPC for guidance in such matters anyway. CIPPIC told us that the US has such requirements – that doesn't mean that they are better than us. We are leaders in the realm of privacy law. We are happy to help the OPC come up with guidelines to help control breaches.
 - Oppose restrictions on trans-border flows of information. It's going to happen. The accountability principles in PIPEDA are enough to take care of this. More restrictions will make us less competitive. The OPC's existing framework is very practical.
- PIPEDA is sound and balanced
- ITAC educates its members on privacy

Ian Kerr, Canada Chair in Ethics, Law and Technology, University of Ottawa

- See submissions

Tamra L. Thomson, Director, Legislation and Law Reform, CBA

- Objective – improvement of the law and the administration of justice
- They were involved when PIPEDA was developed
- Recommendations drafted by their privacy and access law section, which brings different interests to bear

Brian Bowman, Chair, National Privacy and Access Law Section, CBA

- Need to amend PIPEDA
- Prov. leg. has addressed deficiencies
- Principles: While respecting the balancing of interests, need to be vigilant in not eroding privacy. Fair information practices should be the standard, and practices across Canada should be harmonized
- PIPEDA – consent requirements related to litigation impede litigation. There should be a broad exclusion for information which would normally be available to a party during litigation.
- Law enforcement – needs clarification, and more consistency. There should be a single standard for collection, use and disclosure for law enforcement. Shouldn't need to use other investigative bodies to collect info from 3rd parties.
- PIPEDA enforcement should be more effective, but still respect principles of fundamental justice. Need order-making powers. Takes a year to receive a finding, and hiring counsel and costs bad for complainants. But, in this model, giving the Commissioner order making powers would violate the principles of fundamental justice (ombuds + order-making pwr = conflict of interest). Should be an informal, impartial tribunal.
- Breach notification – they have this in the US, and the EU is considering it. Our legislation doesn't have it. Recommend a balanced notification requirement, but only where it's not encrypted, and the information which has been compromised is sensitive personal info.
- Trans-border protections – the BC Commissioner's experience – should notify customers when info may be made available to foreign governments. Qc. legislation has such requirements. PIPEDA contains general rules about this, but nothing specifically aimed at info transferred outside Canada. It should have precautionary requirements in this area. Several alternatives in this area. CBA recommends that where info is to be stored or processed outside Can, we need extra protections, incl. contracts etc.

Questions and Answers

Comments and Frequently asked questions:

- As usual, the question of PIPEDA's effect on small businesses was brought to the fore
- There seems to be a clear division between people who are affected by the fairly scary examples of privacy invasions given by the witnesses, and those who seem to think it's an overreaction. Several MPs at this meeting were particularly dismissive of some of the arguments made regarding the need to better safeguard our privacy, even going so far as to say, "who cares"?

Dhaliwal: Nothing we do on our computers is protected – that's scary.

Kerr: I picked scary examples – not every contract is like this. But, what I'm trying to show is that the threshold for consent under PIPEDA is very low. The transactions happen very quickly, and nobody reads them. Even if you do, they're difficult often. The point is that they CAN circumvent PIPEDA. Deemed consent should not have the effect of undermining protections which should be there no matter what.

Dhaliwal: Are you aware of any privacy breaches which have happened in the last 3 years?

Siegel: Yes, but the question is whether the breaches are serious, and what the companies do about them. They usually ask the OPC what to do. Plus, most of them are accidental and insignificant – sending an email and accidentally exposing someone else's email address. PIPEDA says what a reasonable form of consent. And every company puts together different standards of consent based on the different levels of sensitivity. Issue of consent is already settled – nobody's too worried about it anymore.

Dhaliwal: Some amendments can be made, what do you think?

Siegel: We don't think amendments are necessary under PIPEDA re: trans-border flows. There are meticulous guidelines, and routine non-disclosure agreements in contracts. The common law of agency protects this – you don't need more in PIPEDA.

Courtois – BC's attempts to fix trans-border stuff made a big mess. Consent – knowledge and consent, meaningful consent – it's in the law, its just about interpreting it properly.

Lavallée: For CBA – is there another law that protects the identity of delinquents, people who break the law? Is there another law which doesn't name names?

Courtois: The law doesn't protect their identity – the Commissioner does.

Lavallée: is there another law that does this, though?

Bowman: I'm not aware of any provincial statutes that would prohibit this disclosure.

Lavallée: We know that according to the law, the Commissioner could name names, but we also know that it doesn't happen automatically. Are there other laws where delinquent's names aren't automatically public?

Bowman: No, I'm not aware of any.

Lavallée: Industry Canada said that there's a constitutional case happening right now. Can you comment on this?

Bowman – no, I can't comment. I'm waiting to see what unfolds – we haven't looked into this.

Kerr: I would also disclaim any expertise on this. It's a constitutional issue. I don't have any enlightening comments.

Courtois: We have nothing to say either.

Lavallée: Solicitor-client privilege – Commissioner said it gets in her way. Comments?

Bowman: We haven't turned our mind to this. We can't comment on this point.

Kerr: I would be quite surprised if this privilege operated differently for her than for anyone else. I wasn't clear on what was being sought, but I don't think she should have different powers than anyone else.

Bowman: I can't comment, but there's no reason she should have special powers.

Tilson: Solicitor-client privilege – don't lawyers get excited about this? She's recommended it change.

Siegel: I can't imagine why anything would be different for the Commissioner than for anyone else. Esp. since she's an ombudsperson, and likes it, and doesn't want extra power.

Tilson: Order-making powers – it's 2:1 against Ms. Segal. Commissioner has said this is on a case by case basis. There's no way to compensate loss. And what about violations? That stuff has happened. There are going to be all kinds of examples where we don't even know – the passing around of lists. The Commissioner hasn't imposed this rule of notifying the public of violations. If it's going to have any teeth, will it need order-making powers?

Siegel: I can only turn to my own experience. We need to separate order-making powers from duty to notify. The first will not enhance privacy protection. It would really change the Commissioner's role from ombuds to tribunal. You don't want to see this for privacy issues. When you're involved in this mediation of a dispute, companies put on the table their most complicated business processes – you don't want a tribunal to get businesses to change their processes – they don't have that expertise.

Tilson: Will client have to rely on tort or contract law?

Siegel: That's what happens when you suffer a loss. When they have suffered damages, they can go to federal court and seek damages – we don't need a separate system for this. The commissioner sees she has all the powers you need. Findings show that she has little difficulty in getting organizations to change their practices. The threat of naming names is plenty.

Tilson: But she's only done it a couple of times

Bowman - CBA: Once.

Tilson: What about a non-appealable order-making power

Bowman – we looked at this – we want investigations and advocacy to be left how they are, but also have a tribunal. The naming of names is a stick, but not a big one.

Kerr: Only 9 cases out of 1400 have gone to court... other statistics given. Part of the impetus behind PIPEDA was recognition that the private law isn't good enough.

Wappel: Quotes Commissioner's decision in blood tribe, re: solicitor-client privilege. I'm reading that she's worried that solicitor-client privilege is being misused. Would you

have any problem if there were an independent way of verifying this? I see you think that would be reasonable.

Peterson: I imagine going to fed court is costly, time-consuming and intimidating. So, what about a tribunal? Give the commissioner order-making power, and have an informal tribunal?

Courtois: I have a problem with that – this isn't broken, and doesn't need more regulation.

Kerr: There's more than one way to interpret statistics.

Peterson: People would have to have a lawyer to go to a tribunal, no?

Courtois: What's wrong with that?

Bowman: I'm not looking for more work.

Peterson: What about having a less awesome tribunal?

Bowman: That is not our suggestion

Peterson: What did you learn about where the best privacy law is?

Bowman: There was preference for Alta and BC. RE: business transactions – that's a good example of where the provinces have learned from PIPEDA, esp. re due diligence, clarity

Peterson: These are the areas we want better definitions

Bowman: Right now, a lot of things are unclear, and Alta really spells it out, which is way more business friendly.

Wallace: Can you talk to me about the order-making powers in BC – is that a problem?

Courtois: There's no indication that where there's order-making power, there's better protection. The ombuds model is working. More work for lawyers, I suppose.

Wallace: Who are your members?

Courtois: 70% small, 30% large, Canadian and multi-national. Involved in computers, tech, mobile, software, consulting etc.

Wallace: Did your members face increased costs re: PIPEDA?

Courtois: Yes, but they don't begrudge that. Except that once you go through a whole process of education, then you don't want changes that keep mixing them up – tech is already changing so much.

Wallace: Standard form issue really deals with consent, yes? Is there anything we don't have in front of us re: consent, which you haven't told us? Let's use the Hilton example. When is it my responsibility?

Kerr: It's your responsibility to read it. Contract is clear on that. But, the point is not just about reading, knowing and understanding them. But, in this age where there's no choice – yes, or you don't get to participate – there's no bargaining power.

Wallace: Isn't that the great thing about Canada? We have choices – when does the government stop telling us what to do?

Kerr: in my recommendations, I'm clear that where the privacy legislation itself has an elevated standard of protection... courts will set aside contracts when they're illegal or against public order. So when PIPEDA is there, no one should force you to contract something which is illegal.

Siegel: The law requires you to highlight important parts of those terms and conditions. Also, in the case of a collection of personal info which is too broad, PIPEDA addresses

that – you can only collect and use when it's reasonable. So, the redress recommendation is provided. Companies are absolutely terrified of the Commissioner – they don't want to be air Canada – and that's her best tool. Privacy protections in the US are no better – getting a dozen notifications in a week waters them down. We need guidelines made by industry and the OPC.

Plamondon:

Kerr: I said something about order-making powers, but I didn't suggest she has that power.

Plamondon: I was surprised, because I thought she didn't have them.

Kerr: I've been following these proceedings. I think I heard the Commissioner differently. She said that AT the MOMENT she doesn't want more powers, and she said this isn't the right time for it. She alluded to the difficult transition. Loukidelis also said the powers were powers of last resort – this is important. It's the most important. So, I would be careful to draw conclusions based on her Qc. experience. I think she recognises that the office has been in a lot of turmoil over the years, and it's too soon for the powers.

Lavallée: Consumer consent – Hilton's abuse. The population doesn't really know much about these laws. So, when there is a delinquent, it doesn't help us understand the law better. We learn the law by reading newspapers, and hearing how other's messed up.

Kerr: I share consumer protection concerns. I don't think my recommendations require a major overhaul. I'm just saying that we should clarify the act to make sure that illegal contracts are unenforceable.

Courtois: We think the current consent model is fine. That being said, the Hilton's of the world our out there, and they're getting away with this, that's why we're focusing on enforcement powers.

Courtois: People change their behaviours when there's a finding, we don't need further powers.

Van Kesteren: Why do hotels and organizations have these types of contracts?

Siegel: Hilton has to have balance – they probably don't want to own the information. But, they need to protect themselves. What happens if a client is accessing illegal stuff? They have to comply with all kinds of obligations – not only privacy. I bet if you asked them, they won't really keep it.

Van Kesteren: Couldn't you just enact something about email?

Kerr: You could, but it goes against what many of the witnesses have said about technological neutrality.

Van Kesteren: Who cares if someone is listening to me?

Kerr: That is the fundamental misunderstanding of the public, and why we're doing this in the first place. If you understood what gets collected etc., what secondary uses there are... It's about everything being capable of observation.

Peterson: Should there be an obligation to consult with the Commissioner if you're not going to have a duty to notify?

Siegel: Many are already doing that.

Bowman: Our submission says that if there's a duty to notify, it should be a balanced approach. You need recognition about the sensitivity of the breach, but the current reality is not very good.

Tilson: My constituents – small business owners – know there was a scandal, and they're worried about ID theft, but they don't know much else about this. I've had small business people who don't have a clue about this. Do you have any recommendations to assist them?

Siegel: Changing the Act won't help. We need more education, more guidelines, maybe working groups with precedents and new technologies to help them.

Courtois: We have a big gap in the use of technology by small businesses.

Kerr: I think tightening up consent will help with all that. I agree with everything just said. It's early days in terms of the educational mandate, and the Commissioner has been committed to education.

Bowman: We don't think radical overhauls will help small businesses, and neither will leaving it in its current confusing state. That should be a concern to everyone – our suggestions are modest, and based on the BC and Alta. Models.

Van Kesteren: I'm concerned about our lack of responsibility.

Kerr: There's a case called *Rogers v. Kanitz* which took your position. It asked whether you could change the terms of a contract after the fact. It said it's up to individuals to check the websites to see if there were any changes in their contracts. You just can't keep up. The responsibility flows both ways.

Siegel: It's a Constitutional question. PIPEDA doesn't occur in a vacuum. The Ontario Consumer Protection Act deals with what Mr. Kerr was saying. PIPEDA has to be general to let provinces legislate in these areas.

Peterson: Do you know of any horror stories that could have been avoided with order-making power?

End of Meeting