

House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Dec. 4, 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:

- Federally Regulated Employers - Transportation and Communication (FETCO):
 - Don V. Brazier, Executive Director.
 - Edith Cody-Rice, Senior Legal Counsel, Privacy Coordinator, Canadian Broadcasting Corporation.
 - Barbara Mittleman, Director, Employee Relations, Canadian Pacific Railway Company.
- Canadian Marketing Association:
 - John Gustavson, President and Chief Executive Officer;
 - Wally Hill, Vice President, Public Affairs and Communications;
 - Barbara Robins, Vice-President, Legal and Regulatory Affairs, Reader's Digest.

John Gustavson, President and CEO of the CMA:

- Called on Fed. gov't to pass privacy leg. in 1995
- Respect for personal info is good for business
- Want flexibility to allow economy and tech to grow
- Keep in mind – law only came into effect Jan 1 2004 for most sectors
- Code for marketers – best practices
- Code includes PIPEDA type features, as well as consent of parents re: kids' info
- CMA can't use spam to acquire new customers
- No contact program
- Detailed compliance guidelines
- PIPEDA – too early to consider substantial changes
- Appears to be working well – less complaints, more are resolved themselves
- Need for improvement with small and medium enterprises
- Not time for major changes
- Early adjustments should be technical, and only for clarification
- Ombuds – works well, orgs have been willing to follow the OPC
- Commissioners' powers are supported by naming names and fed court
- Notification of breach – when is there a duty to notify? CMA thinks orgs have a duty to notify. Challenge is to establish the threshold to trigger it – determining risk of harm. Don't want to bombard with innocuous breaches
- Need national guidelines for breach, which can be adjusted when we have more knowledge, and can form the basis for leg
- Cross border info flows – agree with OPC

- Consumers want more from businesses – collection, use, disclosure of personal info is central to this
- Good marketers know that respect for this is good business
- National consensus based on series of delicate compromises – PIPEDA
- Much at stake – 2001, marketers generate more than 107 billion\$ in sales, and a lot of jobs
- Fully supports the existing act, and should avoid making fundamental changes until a few more years of experience.

Don V. Brazier – Executive Director, FETCO

- All their members covered by PIPEDA
- Have 5 years perspective
- Talking about employee issues
- This looks like a piece of commercial legislation
- Think the act has suffered from the fact that not enough thought has gone into the labour issues
- Problems with the Act: two most important issues – def of personal info and dispute resolution process
- Def of personal info: fax numbers and email addresses belong to the employer, not the employee. So it's hard for us to understand why it's personal info. Increased tension between different types of employment legislation, so consideration should be given to whether employee consent should be treated differently than it is. He likes the approach from BC and Alta. Recommendations – email addresses and fax should not be personal info, and a new def should be developed. Act should be changed to allow employers to collect etc. without consent... like in Alta and BC
- Informal dispute resolution process – employers are required to investigate employee complaints, often without outside intervention. Can't resolve it until you know the facts. So, need to collect info. It's an integral part of the internal dispute resolution process. The definition is too restrictive, and should cover all aspects of the dispute resolution process. The integrity of the fact-finding process is harmed by the fact that they're not...
- Recommendations – dispute resolution process should be broadly defined – s. 9(3)(d)
- Info collected in investigating a breach of law should be exempt from the requirement for access.
- Provinces have benefited from PIPEDA experience – examine them, especially Alberta and B.C.

Questions and Answers

Comments and Frequently Asked Questions:

- Much of the focus of this meeting was on the employment-related provisions in PIPEDA. The witnesses wanted quite broad exclusions for the protection of personal information in the work context.

- The CMA was generally quite happy with how PIPEDA is currently working, and has a positive view of businesses willingness to comply.

Peterson: Do you agree with FETCO? In terms of employee consent, you recommend that we follow B.C. and Alta, how do they differ?

Mittleman: Where the personal info is employee-related, there would be no need for consent, as long as it's collected for business purposes. That would alleviate some of the pressure on employers

Peterson: I agree that fax #s and emails should not be personal info. Could make witnesses reluctant to come forward with info – could be subject to lawsuits. But, if I'm an employee being accused of a heinous act, and the employer has this in its records, shouldn't I have a right to this info? It could affect my entire working relationship.

Brazier: need balance – if no confidentiality, they won't come forward. Result – need some openness. But in the process of the investigation, collection should be confidential. FETCO is unionised, for most part – long established ways of conducting investigation which are built into the collective agreements. We recognise the need for this. Worried about chilling effect on people coming forward with, ex., sex harassment if you go straight to the accused and inform them.

Peterson: Suppose we say – we hear your complaint, but there's not enough proof to go forward, but the accused has this info on their file.

Cody-Rice: Law says you can only keep the info for as long as you need it.

Peterson: But how would the employee know that there was anything on file?

Cody-Rice: well, if we obey the law, then the information wouldn't stay on file longer than necessary. Also, only collect info when you need it.

Chair: Is your preference for BC and Alta to be – what do you like about them?

Brazier: The two issues we raised in our presentation. We can only assume that because they had the chance to look at the Fed.... the OPC said there were some problems with employee issues in the Act – maybe she passed these on to Alta and BC, and they acted on these.

Cody-Rice: fax # etc. – a memo could be considered personal information. Work product – personal information in BC Act does not include this. That solves the problem. Under PIPEDA if someone gives an opinion about a 2nd person, that is personal information about both people. In the Alta act, and fed privacy act, a personal opinion about a 3rd party is the 3rd party's info. Settles the question.

Laforest: What do you think about duty to notify?

Brazier: There are breaches and there are breaches. If you get into a major issue that might affect the public, you might need to notify. Is the public faced with some harm? Then the public should be notified. But for routine breaches, we shouldn't have to notify.

Laforest: Isn't frequent contravention just as problematic as a large, out of the ordinary situation?

Gustavson: OPC has some standards re: breach of the Act. She doesn't disclose names routinely, because she wants to preserve its power. She wants to resolve this, and keep it in reserve, because it's a strong power. If there are ongoing breaches or harm, she would release the name.

Lavallée: It's amazing that in other areas of the law, the public can know when someone broke the law, but it's not automatic here. That seems like a big privilege.

Cody-Rice: it's not a privilege; it's at the discretion of the OPC. PIPEDA is vague, and the OPC's decisions guide us on how to act. For example, until the Commissioner gave her decision on email and faxes, we thought one thing, now we changed our mind.

Lavallée: Just the fact that it's discretionary, and not automatic, is already amazing.

Gustavson: There's one other element here – disclosing a name could do so much harm to a company. So the commissioner usually gives people a chance to correct what they're doing first.

Question: Asking re: status of the do not call list.

Gustavson: Free service, and on our website

Question: Direct market side of things – the renting of lists – code of ethics. How common is the sharing of these lists?

Gustavson: Common. But, with the consent of individuals on it.

Question: At some point in time, everyone would have had to have signed a waiver?

Gustavson: No, different levels of consent for innocuous v. sensitive info. So, for a subscription, opt out consent would be ok (in a reasonable privacy policy). But, for a more sensitive subscription, might need higher consent.

Question: have you heard of lists created and sold along ethnic lines.

Gustavson: no, but I wouldn't be surprised.

Question: sequential dialling not allowed

Gustavson: Telemarketing community is not uniformly self-regulating. Some don't. But, sequential dialling is not appropriate – you don't know if you're going to hit the ICU.

Question: What in PIPEDA affects the ability to make these lists?

Gustavson: We have a code of ethics about this, so we weren't worried about PIPEDA. But, the act has the collection, use and disclosure and consent requirements.

Question: Personal health information would require the most stringent form of informed consent?

Gustavson: Yes. The principles were negotiated for 4 long years, by a bunch of group. We didn't make it media, tech or sector specific, because we wanted the principles to apply everywhere. So we're very supportive of these principles.

Tilson: Is the legislation doing enough to facilitate small business.

Gustavson: We did some research re: small and medium business and the main problem is the lack of awareness. Where there's a complaint, they'll fix it, but the main problem is lack of education.

Tilson: breaches – one penalty could be the disclosure of the name of a company. Are there other penalties... ex, if an item is kept on file for a specific purpose, and its not disposed of when it should be. Or what if a breach has a serious effect on the public. Cody – there's a power in the fed court to award damages. This has more teeth than the privacy act.

Tilson: Should the Privacy Commissioner have quasi-judicial powers?

Gustavson: We would have a problem with that because she's a privacy advocate, and there's bias – it would make her judge jury and executioner. A tribunal might be different, but she seems to be happy with her powers.

Tilson: Cyber security article re: transborder data flow. Peter Hillier says private sector should step up to the plate by adhering to PIPEDA. For security purposes, shouldn't you categorize information. Is there any conflict between information legislation and PIPEDA?

Cody-Rice: We have not found a conflict because when we get a request which claims personal info, then we won't release it, or we might sever information. Can you think of an example where there is a conflict that you've seen?

Tilson: Someone in gov't releasing info... question whether the gov't can categorize individuals. The access to info act forbids the categorization...

Peterson: Won't accept a request that's frivolous or vexatious. But how do you know?

Brazier: If it's not a fishing expedition. This is not an unusual provision in law.

Peterson: So, if I was your employee, and I send in a request for all information was held by the company. And you say it's frivolous, my remedy is to go the OPC.

Brazier: Need some parameters – employers can't go through everything.

Peterson: Wouldn't it be in my interest to, at least once a year, ask the employer to disclose everything they have on me once a year? Or if I don't get promoted?

Cody-Rice: That wouldn't be frivolous – but if you ask 6 times a year, that would be.

Peterson: Recommendation #13 – if the employee sued the company, couldn't the company use any info on hand, without my consent? Why would they need to obtain my consent?

Mittleman: We've had situations where an employee files a human rights complaint. The comp. can't give over the info, and the employer can't defend himself. The information can eventually be obtained, but there are difficulties.

Chair: I can't see how that would happen, that the info wouldn't be available in the course of an action.

Stanton: In your recommendations, you talk about allowing employers... is this not allowing a wide berth for businesses to decide what is frivolous and vexatious? Would it allow these lists of employees to be given to third parties for marketing purposes?

Mittleman: This provision is not about selling employee information.

Brazier: All examples related to labour relations – nobody is suggesting this be used for purposes other than managing the employee-employer relationship. Every statute has the words vexatious etc. It's subject to debate.

Stanton: PIPEDA represents an amalgamation of interests and compromises. One witness suggested that this is a weakness. Comment?

Gustavson: It's a remarkable national consensus. Privacy advocates are not about shutting down business, and business cares about privacy.

Robins: I agree. Our law is going to be adopted by Singapore, and it's being looked at by South Africa. It's a balance.

Laforest: How do we make sure employers aren't making subjective responses?

Mittleman: Sometimes the information doesn't exist – the employee will file a complaint and the OPC will investigate. So there's a subjective call, but with supervision.

Cody-Rice: There's a point where things just are vexatious.

Lavallée: Employees and personal information – in what context could an employee consent to the use of his or her personal information?

Brazier: The context is only management of Human Resources. This is not for marketing. Example: An employee refuses to give his employee number to a hotel where he is staying for business. The hotel can't charge the employer. The employer should be able to provide it.

Lavallée: I thought this type of consent was to establish the relationship.

Cody-Rice: We have a consent form in the job application. But what does it do? Why have the consent? We should just have notice.

Wallace: Maybe we're too early looking at this – most have no recommendations for change. Are we on the right track with regards to timing?

Brazier: Someone must have decided five years is enough. We have enough experience, but we don't think enough thought went into the design of the employee provisions five years ago. All employment statutes bump up against PIPEDA, and we have other obligations and we just think the laws should intersect.

Gustavson: There may be changes needed regarding meaning and intent in areas we don't know about.

Wallace: FETCO's recommendations are a bit off the wall. How much would they cost for small businesses?

Cody-Rice: The CBC has large exemptions (for personal information relating to the arts and news), so for us, PIPEDA is all about employees. It's hard to put a figure on it, but there's at least 1/3 of the time of a senior person, 1/2 the time of a more junior person and 1/4 of my time put into this.

Mittleman: I can't be precise, but a lot of time and energy is expended in trying to contort yourself into a law not made to apply in our situations.

Chair: A five year review makes sense because of elections and possibly they expected faster implementation of the Act.

Question: Is there a possibility we may create a reign of terror? Are there any safeguards in place to keep the Commissioner from going overboard?

Gustavson: She has no law-making powers, or enforcement powers. Changes can only be made by coming back to Parliament.

Cody-Rice: It's really a records-management problem. Finding the records is your major problem.

Gustavson: The Commissioner can initiate an investigation, but all she can do is go to court.

Robins: Plus, she needs to have reasonable grounds.

Chair: The Commissioner doesn't have to issue a report if the complaint is vexatious etc. Should we change the Act to allow employers to get a ruling on whether a request is vexatious?

Answer: That could be useful.

Peterson: Anything we should adopt from the provincial legislation?

Robins: What happens with the sale of business – this is perfect for provincial legislation. But these provisions may not be constitutional in the federal Act.

Brazier: We believe that the Alberta and B.C. legislation is a new generation, and more workable and are working out ok.

Hill: I support the Commissioner's comments that the Act is working well. It needs no major changes.

End of Meeting