

House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Dec. 6, 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:

- Canadian Internet Policy and Public Interest Clinic
 - Philippa Lawson, Executive Director
- Public Interest Advocacy Centre
 - John Lawford, Counsel
 - Amanda Tait, Articling Student
- Marketing Research and Intelligence Association
 - Brendan Wycks, Executive Director
 - David Stark, MRIA Standards Chair

Philippa Lawson, Executive Director, CIPPIC

See Speaking Notes.

John Lawford, PIAC

- Consumer perspective on PIPEDA so far
- It's not working for consumers – it's a placebo. Consumers think they're being protected, and they're not
- Commissioner should be given order-making power
- Notification of breaches
- Consent
- Lack of enforcement is a problem
- Frustration of complainants that the Commissioner doesn't name names, and that the findings are too brief to be informative
- No incentive for businesses to change practices
- Commissioner doesn't want order-making power
- We think it will increase efficiency, because it will act as a stick for the carrot
- Need powers to back up the mediation efforts
- Order-making power is a natural complement to the auditing power
- Wide-spread non-compliance with PIPEDA – so order-making power is a necessity
- OPC too reluctant to use the powers she does have (s.20(2)) – has never named names
- At least names of respondents should be required
- Data breach – there should be a notification requirement. Identity theft is the consequence. Covering up the truth will not help people – they need to be able to deal with potential theft. Canada is not leading in this aspect of privacy protection – several U.S. states are. Parliament should not take a wait and see approach to this. Consumer and company need trust.

- Consent – main point of the Act. Englander case – Fed.C.A. Consent under PIPEDA is informed consent. Suggests that PIPEDA should be amended to reflect levels of consent, and opt-in consent should be the default, with opt-out only allowed with complete notice.

Brendan Wycks, Executive Director, MRIA

- Supportive of PIPEDA – was part of the CSA drafting committee
- MRIA credentials given – MRIA represents a lot of industries
- Researchers and public need a good relationship, which is protected through self-regulation
- Fed gov't is the largest user of survey research in Canada
- Advocates and champions of an enhanced privacy network in Canada
- PIPEDA is effective legislation which has brought about considerable change – wrinkles only appear when put to the test
- Recommendations:
 - PIPEDA should be amended to require notifications of breaches of unencrypted information. It's paradoxical not to. Market and research firms suffer from identity theft, because it makes the public less trusting.
 - Commissioner should be given order-making powers, including fines and reporting requirements, and naming names.
 - Should allow the transfer of personal information in the context of mergers, and the receiving party should be required to honour the terms of the transmitting party's privacy policy.
 - Mugging and sugging – Marketing and selling under the guise of research. Canadians sensitive about contributing to survey research because of unscrupulous use of research. MRIA conducts a survey about our attitudes toward survey research. Canadians value their role in society. They allow Canadians to provide feedback. Serves a useful purpose. Useful for gov't to understand what people think. But, this is undermined by mugging and sugging, pretending to do legitimate research which is actually an attempt to sell a product or service. PIPEDA makes it illegal to mug or sug. These have not diminished after the last 5 years.
 - Urges gov't of Can. to amend PIPEDA to give more order-making power.
 - Market survey research is important – legitimate researchers never try to sell anything, and it gives Canadians the ability to voice their opinions. PIPEDA went a long way to achieving what we need, but we still need more.

Chair: Why is mugging and sugging illegal under PIPEDA? Lack of informed consent?

Stark: It's because they're not being honest about their purposes for collecting information, which is required by PIPEDA. Purposes must be disclosed before or at the time of collection. And their use does not match the purposes given.

Telemarketers have some special statutes which are even more specific in this respect.

Peterson: Wycks – how do you feel about blanket consent? Do your members use them?

Stark: Usually it's a survey by phone

Peterson: Do you get consent to pass the info on?

Stark: It's opt-in consent. We don't pass on information for secondary purposes.

Peterson: But you do sell your data

Stark: No we don't. We said if one business wants to buy another, and there is personal information owned by the business, we want legislation in place to govern how the information transfer occurs

Peterson: So you don't believe in opt-out and blanket consents?

Stark: No

Peterson: What about CIPPIC and PIAC

Lawson and Lawford: We agree

Peterson: Order-making power? How many people have been named by the Commissioner for privacy breaches so far?

Lawford: One, or possibly zero

Peterson: How many cases have gone to court so far?

Lawson: Very few, and most which have been settled

Peterson: Commissioner is adamant she doesn't want the powers

Lawson: I have a problem with that – she has had time to implement other approaches such as naming names, but has chosen not to. Also, there are indications that she thinks she's not allowed to name names. We should clarify that she can and must name names.

Peterson: Can we compare the practices of the three provinces, and their effectiveness?

Lawson: We have thought about that, but it would be difficult to do.

Peterson: Your recommendations are excellent, esp. re: consent. Data breach notification: gave figures. Expand on the types of notice which would help those have been compromised.

Lawson: How notice should be delivered? Our recommendation is it should be by mail, but there should be flexibility where apt. – i.e., email. It's a business cost which is worth incurring, and it will act as an incentive to keep down the breaches

Peterson: Should it be by registered mail?

Lawson: Could be considered

Peterson: Would a notice have to be worked out through the OPC each time?

Lawford: We support her being involved, but not her having control over whether it happens or not.

Laforest: Since the beginning of this process, a few questions keep coming up: consent, order-making power. Re: order-making power, Alta has a model... The commissioner said that it works well there, but it's not necessary for the fed. law. But, many witnesses have said it would be important. What's your perspective on this debate?

Lawford: In our experience, we've seen cases where the org hasn't followed the commissioner's orders, and when you don't see the name of the organization, you can't choose not to do business with them. Also, in B.C., they don't use order-

making powers all the time, they use it for companies who are reticent to make changes.

Lawson: We have trouble understanding why there's such reluctance to adopt it here, when it works so well in the 3 provinces. BC and Alta were made AFTER PIPEDA, and had the benefit of experience. Order-making power has proven to be a complementary tool with ombuds powers in the provinces.

Laforest: Consent – one witness said it's not necessarily a problem of lack of clarity, but it's more about making people aware of the issue. What do you think the issue is?

Lawson: Are you talking about the businesses understanding or consumers?

Laforest: The consumers

Lawson: It's about informed consent. I think it's not clear enough in the legislation, or in the privacy policies of businesses. The Act needs to communicate better to the organizations.

Laforest: Is the language too legal for consumers to understand?

Lawson: We did scientific readability test of privacy policies, and they were all way above the standard consumer level. They're not communicating in plain language to individuals, and the Act requires that. Even the law students did not understand the language.

Chair: Each of you has recommended order-making powers. But the BC commissioner rarely uses his, and supports the absence of order-making powers federally. The Fed commissioner had them in Qc, and now doesn't want them. Ponder this.

Tilson: Are small businesses adequately looked after by PIPEDA? Could be just one individual or two. These people can't afford to do all that stuff, to respond to some of the issues you're talking about, or what PIPEDA requires. Other witnesses have said, no, we could do a lot more. Could you all comment on this?

Lawson: More could be done in terms of education. But I think there's a perception that it's way more onerous than it is – not everyone needs a separate privacy officer.

Tilson: But they won't know what we're talking about, re: consent.

Lawson: But it probably won't affect them.

Tilson: Well, they all collect info.

Lawson: But why are they collecting the information? Once they engage in secondary uses, they need to account for it.

Lawford: To the extent it does affect a small business, we think it's good business. If something happened later, it would affect their business. They should think about it – it's not that onerous.

Tilson: I know what you mean, but my local dry cleaner says that PIPEDA is killing him. People know about fed. requirements. I'm just saying, we're all talking about big telemarketers, but not the little guy.

Stark: I share your frustration – a convenience store won't have a privacy policy. But trade associations should be helping. Our association produced a handbook, and we also represent small businesses. Our handbook helps them to comply without incurring significant costs.

Tilson: Most Canadians haven't the slightest idea what their rights are. The Privacy Commissioner thinks we need to educate Canadians. The Commissioner has a 16million budget – that's a lot. Who should be educating?

Lawford: I like the suggestion that there might be alternative routes to getting it out there

Tilson: you think it should be a combination with the Commissioner. How should businesses do it?

Lawford: We would be happy to participate if it would help

Chair: It's only been around fully for 2 years. So why do you say 5?

Lawson: 6 years – and they were given 3 years grace period to implement it – that was the time to get ready for it. Then they were subject to it later. It's been around for six years now, and people knew about it.

Chair: you said respondents' names should be published? What about requesters with frivolous requests – should they be published?

Lawson: No privacy is about individual privacy, not corporate privacy.

Chair: Even if it's vexatious?

Lawford: We don't think there are a lot of those complaints, so you shouldn't publish.

Chair: Naming names – this Commissioner is reluctant to use her powers. What makes you think she'll be less reluctant to use order-making powers?

Lawford: If it's persistent, and there's no response, the Commissioner will want to get an order out there, for repeat offences. She will see the value.

Chair: If there have only been 0-1 named names, how do you know the businesses are ignoring the Commissioner?

Lawford: Through very careful reading of the cases, we have two cases of banks.

Lawson: Through our own repeat complaints.

Wallace: Remove the reasonable grounds requirement for audits? Should it be unreasonable grounds?

Lawson: Reasonable grounds are good, but there's a place for spot audits as well. The Commissioner is being taken to court for not having reasonable grounds, when there were complaints. It's a big waste of resources, when she wouldn't audit without reasonable grounds anyway.

Wallace: Do you need more money for additional auditing?

Lawson: I can't judge that.

Wallace: If the commissioner can resolve the problems without publicity, why name names? Isn't the point protecting privacy?

Lawson: Individual disputes don't require publicity, but there are many more complaints relating to widespread policies affecting thousands of consumers, and you can't mediate this. They are violating the law, and it needs to be addressed.

Wallace: should names be released before finding of guilt?

Lawson: no

Wallace: Education – it was in place for a while, there was time to get ready for it... but would you agree that the Commissioner has not done a great job in educating people? They've come to us for money for this. This is the first time I've heard of it.

Lawford: not enough outreach has been done

Wallace: So, isn't this premature? I'm listening to the Commissioner because she's dealing with this on a daily basis. Why can't we listen to her?

Lawson: It's not incompatible. You need both education and enforcement.

Lavallée: Should the law have an explicit formula for consent?

Lawford: PIAC wants the Qc. formula. PIPEDA has it, but it's not explicit.

Lavallée: Naming names of delinquent enterprises. Consumers are missing info, but on the other hand, when businesses are delinquent, we don't publish their name. I don't know of another law that's like that. I don't understand that PIPEDA is special.

Lawford: No, we agree with you. We think they should be naming names. At least with repeat offenders. And also the names of other companies when appropriate.

Lawson: We have been calling for this for years.

Lavallée: Are there other laws similar to this re: naming names?

Lawson: Competition Act

Lavallée: I was surprised at this.

Stark: I think abusers should have their names published, it would shame them into compliance, there would be media coverage, and that would raise awareness and help consumers understand their rights and the law. Name names.

Lawford: We read the law differently than the Commissioner - we think that the public interest allows naming names.

Van Kesteren: Going to follow Mr. Tilson's line. I'm getting a little nervous about the bureaucracy. I was a car dealer. When this came about... the documentation that you collect has to be approved when you sell a car. When you have a smaller dealership, you have to hire someone. I don't want to throw the baby out with the bathwater – some suggestions are good. My wife likes to fill out surveys. Do we need to make new legislation? I was happy listening to the Commissioner who wasn't zeroing in on small businesses with no ill intent. I'm worried about the reign of terror – the persecution of small businesses.

Lawford: I assume that businesses care about their customers. Most small businesses are not using the info in secondary ways, so it's not an issue.

Van Kesteren: Can't they police themselves?

Lawson: Yes, they can – the legislation is based on a voluntary code. Good people with good practices won't violate – the problem is those that don't subscribe to voluntary codes. Big data brokers are the ones that need to be careful. Most of it's just common sense. We're in an environment where info is easily shared and abused, we need to be careful about protecting our info, all of us, and we need to be careful about especially secondary purposes of information.

Peterson: Compliance study – disposal of info to third parties, not affiliates. 78% use opt-out methods. Comment?

Lawson: Opt-out consent is the standard, and it's allowed under PIPEDA

Peterson: Should it be allowed?

Lawson: It can be done well, if you give people proper notice. I think opt-in is a better approach if you can use it.

Peterson: Commissioner says you don't have to name people, the threat is enough

Lawson: Doesn't seem to be working. Businesses see a policy of not naming names, so they're comfortable that they won't be named

Peterson: you think there are widespread breaches right now?

Lawson: Yes

Peterson: We'll have to talk to the commissioner about it. What's the cost of a court case if the commissioner doesn't come through?

Lawford: Englander, another case who had to abandon because costs too high. Like any other court case – high costs – thousands.

Lawson: Tens of thousands.

Peterson: If I had an order and no compliance I'd still have to go to court.

Lawford: But you'd have the order.

Keddy: Everyone knows someone who's identity has been stolen. It's incredible that when info is compromised, there's no duty on the company to let the person know.

This is not rocket science – this can be fixed easily. Have you tried to do this?

Lawson: We've been calling for this for a couple of years now. Ontario has put in the requirement in the health law. That's the only one in Canada now. And I agree it would be easy, although there are details re: threshold etc. to be worked out. But I think there's widespread recognition that this is needed.

Keddy: Personal information transfers on sale of company. If I were selling cars, I would need info in case of a recall. But, ability to sell customer lists should come back to the customer. How is that addressed now?

Stark: PIPEDA doesn't address this, but B.C. and Alta. do.

Keddy: Do we need clarification on whether there should be contact for secondary uses?

Lawford: it's covered, but we haven't seen a case yet.

Keddy: BC and Alt – specific examples of their improvements?

Lawson: Business transactions are one, also distinguish between 3 different kinds of consent. There are criteria, and it's much clearer, although I think PIPEDA intended this.

Tilson: How do you know if there's been a breach of the legislation? What if they choose not to tell you?

Lawson: Then you don't know

Lawford: the act is set up for complaints – so if nobody complains, you don't find out

Lawson: That is why it's important to let watchdog groups like us research and make complaints, because the breaches are so hidden

Tilson: order-making powers. Are you suggesting this commissioner have these powers, or a separate tribunal?

Lawford: the commissioner herself, like BC and Alta – the tribunals are cumbersome

Tilson: What would the cost be for the powers?

Lawford: I don't see the difference between writing a finding and an order. They're doing it anyway, make it effective.

Tilson: So, if she found there was a violation, there would need to be a process to defend themselves.

Lawford: We would welcome a slightly more formalised process – BC and Alta have done it.

Tilson: If someone doesn't like the Commissioner's decision... it's like being judge and prosecutor at the same time.

Lawson: agree that ombuds model is good, order-making power is for when it doesn't work

Tilson: Could you appeal the orders – that would cost... Small claims are not appealable, could you categorise some of these offences that way?

Lawford: We haven't thought about it in depth, but there are probably some situations where that would work.

Lawson: Commissioner orders are final in BC and Alta

Tilson: Always?

Lawson: There's always the possibility for judicial review. There are also Federal Court rules for simplified procedures, and a lot of cases could fall under that.

Keddy: BC and Alta – we don't want to create an omnipotent bureaucracy, all by itself. I would fear that. In BC and Alta, because they had the benefit of hindsight, how is the incidence of litigation.

Lawson: You'd have to ask them.

Keddy: We should really have that info.

Lawford: We would love to know too

Lawson: Both statutes are being, or about to be, reviewed

Keddy: BC commissioner doesn't support notification requirement like in US. But he's saying PIPEDA should look over the security measures they should take.

Lawson: BC Commissioner had an experience with a particular breach with a mental health org...there were a lot of questions about whether the patients would be further traumatised etc. That particular case has given him pause, but I would ask him directly.

Keddy: Are there different levels of business? If I'm a bank, I need encryption and safety measures. If I'm delivering door to door and have an address and a phone number, I need a different level.

Lawford: Privacy Commissioner recognises there are different levels.

Van Kesteren: As a smaller business – one of the foremost concerns of the industry committee is that they're so laden down by bureaucracy. Is this all necessary? Would the CSA code make this simpler?

Lawson: PIPEDA is the CSA code. PIPEDA is just legislating good business practices. When we were coming up with our recommendations, we were taking this into account. We want to make it more effective in an efficient way. It will require expenses for businesses that are not in shape yet.

Van Kesteren: Public education – isn't that enough?

Lawford: It's part of the solution.

Lawson: A lot of what's required is simple transparency. It's what a lot of businesses who have thought about it would do.

Tilson: Order-making capabilities. The only power she has now is to identify the company, which she hasn't really done. What happens if there's been an identity theft because of some action of the corporation or an individual. When you say order-making power, are there any suggestions about what other penalties there should be?

Lawson: We think it should be treated as an offence, and there should be a penalty. The offences section should be expanded.

Tilson: You think it would be ok if there are no appeals for that?

Lawson: No, offences are another category, prosecuted by A.G.

Tilson: If we decide to continue with the ombuds model, what should we do?

Lawson: Recommendations 3-11. Make it easier for complainants to go to court, protect them from adverse cost awards, make them eligible for solicitor client costs if they win, there should be punitive damages available, publication of names, permission for class action –this is important because often what we're talking about are violations which affect thousands of individuals. The Commissioner is good with reporting, but there's room for improvement, and it shouldn't be discretionary. Audits, expanding the offences section. None of these recommendations need order making power.

Keddy: It would seem to me that the request to appear here and have recommendations – I'm surprised it hasn't been done yet. I'm repeating these points which deserve to be on the record. Reports stats from compliance study. Why aren't people up in arms here?

Lawford: There's too much wiggle room in the Act re: purposes/use of information.

Keddy: There's a whole economy that works around information, but if 78% depend on opt-out, that seems like a flagrant misuse of the law.

Lawson: It would be fine if they're getting proper consent via opt-out, but they're not.

Chair: time to close up.

Keddy: I have a friend who had her identity stolen...

End of meeting