

House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Feb. 6, 2007 (Chaired by David Tilson)

Notes taken by Tara Berish, CIPPIC Articling Student

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Witnesses

Insurance Bureau of Canada

- Randy J. Bundus, Vice-President, General Counsel and Corporate Secretary
- Mark Yakabuski, Vice-President, Federal Affairs and Ontario

Murray Long & Associates

- Murray Long, President

Dominion of Canada General Insurance Company

- Ann MacKenzie, Privacy Officer
- Vivian Bercovici, Counsel

Mark Yakabuski Vice-President, Federal Affairs and Ontario, Insurance Bureau of Canada

- 3 points:
 - 1) Work product information – 2 different components –
 - 1) PIPEDA- talks about identifiable information, but doesn't address work product information – information created by a company and its employees in the course of its business activities – should be amended to formally recognise it. In a competitive economy, this is essential – for innovation and competition. For insurance, for ex. Need to be able analyse quality, durability and effectiveness of things insurance industry pays for.
 - 2) Information in an insurance claims file – contains personal info about a complainant, and info about the handling of a claim which is generated by the company itself – which should not be considered personal information. Shouldn't be left to an interpretation of PIPEDA – recommend BC's approach.

Randy J. Bundus, Vice-President, General Counsel and Corporate Secretary, Insurance Bureau of Canada

- Can you make an access to info request while you are suing in court? Relationship between 3rd party and insurer is often adversarial. These requests are not being made for PIPEDA purposes of correcting information, but being used in lawsuits, which prejudices insurers by not allowing them to defend themselves.
- Investigation of events from an accident involves collecting information from a witness, etc. A witness statement could confirm or cast doubts about the nature of the event. Should be able to collect info quickly. Witness statements are not addressed, and should be. Whose personal information is being given? Should consider the witness's testimony to be their own personal information. PIPEDA should also

provide that an organization may collect, use or disclose a witness statement without the insured's consent.

Murray Long, President, Murray Long & Associates

- Privacy expert – not a lawyer
- Important legislation – establishes fundamental right to privacy – balance
- By and large, it's a good law
- Founded on broad, solid concepts
- It's not too soon to hold the review – there are problems that need fixing right now: ID theft problems, and we have the Alta and BC precedents
- 7 issues (only talking about 3):
 - 1) Breach notification – ID theft is a major problem, affects entire marketplace – costs borne throughout it, leads to more expensive goods and services. If you leave it up to companies, responsible. ones will act responsibly. But, the world is not made up of responsible companies.
 - 4 point model –
 - 1) duty to notify which would apply to all types of sensitive info (not just financial data),
 - 2) organizations should have some discretion to determine when they should notify the public – based on an objective standard like the reasonable one,
 - 3) must notify privacy commissioner, quickly, when reasonability test is met,
 - 4) if they decide not to notify, must explain why they choose not to. basically, we need to have enforcement tools, and it should be an offence under the act to fail to notify when it should have. Whistleblower rights should specifically apply to this.
 - 2) Requirement for employment consent – unreasonable complications. Alta and BC foresaw this problem, and did away with consent, and moved to an identifying, reasonable purposes requirement. This works well, and privacy rights are not trampled.
 - 3) *Public Safety Act, 2002*, allows organizations to collect info for security reasons – these amendments put PIPEDA in a different sphere for commercial agencies. Because they enable a business to collect new info about people, there's a great risk that Charter rights would be offended.

Ann MacKenzie, Privacy Officer, Dominion of Canada General Insurance Company

- Solicitor-client privilege and blood tribe
- Right of respondent to appeal decision under PIPEDA

Vivian Bercovici, Counsel, Dominion of Canada General Insurance Company

- Blood tribe decision – solicitor/client privilege is so important. The Blood Tribe case is about the Commissioner's scope of power. Must consider intent of Parliament in enacting PIPEDA. Where Parliament intends to have an ombuds structure, it does that. If privilege should not operate, then Parliament says so. It did not do so, and

that's not a matter of oversight. Malone, J. says that express language is required to compel privileged docs. Para. 22 – in short, the reason express language is required to abrogate privilege, is that it's presumptively respected

- Importance of privilege...
- Often complainants ask for documents that are otherwise privileged... It's highly unlikely that PIPEDA wanted to circumvent privilege. What if the commissioner finds they're not privileged?

Mackenzie

- There is no right of appeal for the respondent
- S. 14 allows the applicant to appeal, not the respondent – this should be corrected in statutory review – inconsistent with common law standards of fairness
- Current practice of officer – doesn't always disclose the identity of the complainant to the respondent – should

Comments and Frequently Asked Questions:

- There was a long discussion of work product, which did not really seem to address PIPEDA concerns. An insurer's right to access information about, for example, a garage, in order to better understand how an accident victim's car is repaired, is not really a question for PIPEDA. Nor is it PIPEDA's concern whether statistics and figures about a given business or industry are available to competitors – although some witnesses suggested this type of information falls under the concept of work product, and thus should be excluded from the purview of PIPEDA.
- It is also unclear how PIPEDA affects an insurance company's right to question witnesses at an accident scene, which was raised as a major concern.
- Also of concern was the question of lawyer-client privilege. It would appear that this question has been settled (at least for now) by the Federal Court of Appeal in *Blood Tribe*.
- Mr. Long brought up *Charter* concerns raised by amendments to the *Public Safety Act, 2002*. This had not yet been brought up in the Committee meetings.
- There was also a focus on how access to information requests are being used inappropriately in the context of litigation. Some witnesses felt that access requests were only intended to allow an individual to correct names and addresses.

Questions and Answers

Question: Want respondent to also have the right to appeal. How, who would do that?

Mackenzie: We would like to have an opportunity to appeal the commissioner's process – to go to the fed. crt.

Lavallée: When there's a violation of the law, there's a duty to notify (or, there should be) – we give a lot of important info to our insurers. So, a duty to notify is the least you can do. But once you notify, what can the client do with that? To protect themselves?

Bundus: Have to distinguish between personal info and work product...

Yakabuski: Should check all their records, pursue the companies that had the breach occur to assist them in checking. We're very careful to not have this happen, but if it does, it behooves us to help.

Long: In my view, it should be higher on the companies – they collected the info. I think the duty should be higher, to insure that no harm comes from the breach, to make whole what has been lost. That includes things like credit watch services – the company should pay for those kinds of services.

Lavallée: When there's an accident, the claimants... you have to ask the claimants before you can interview witnesses? Is this the situation?

Yakabuski: We want the law to be clearly amended so that you don't have to do this. We want clarification.

Lavallée: Is it just not clear, or is it not allowed, or is it obligatory to get the permission of the victim?

Yakabuski: Right now it's fluid, we just need clarification

Lavallée: Does this law stop you now?

Bundus...

Lavallée: Do you have examples, or are you just worried about this

Mackenzie: Yes, we do have examples – it's happened in litigation

Martin: Duty of notification – of great interest to Canadians after the CIBC incident. In the context of that news, I think we don't realize there's like 30 million breaches in the US a year. We don't have figures here. No duty to notify. Credit card companies are catching breaches, fixing them, and not telling the client. That might change the way I do business. 32 states in the US have the duty. Do you recommend Canada have this?

Long: I think we should – I don't necessarily recommend the US approach – it's very binary, encryption issues, could lead to tons of disclosure notices going out, and they start losing impact. There should be some discretion re: notification – reasonable person standard.

Martin: Health information has just recently been added to the obligations under PIPEDA. A lot of us reading PIPEDA feels it was hastily thrown together to comply with the European demand – comparable legislation required. In Manitoba, the province sold info, which got sold to Texas, then Denver – is there any comparable American protection which would protect my data when it goes to the US?

Long: I checked into that, and was assured that your health info never left the province. But there are strong sectoral laws in the US – health, kids stuff, but there are no broad, overarching laws.

Martin: How do they trade with the EU?

Long: They entered into a safe harbour agreement – if you say you comply and you don't, the FTC can investigate you

Mackenzie: There are stringent guidelines on outsourcing.

Question: Blood Tribe – went to federal court, and it overruled the province on that, right?

Bercovici: Federal Court Trial Division was quite inconsistent with the common law and SCC, then the Federal Court of Appeal... OPC has sought leave to appeal this to the SCC. This is the law that now stands. It is a terribly important issue.

Question: So based on the decision, privilege is protected?

Bercovici: Yes

Question: I'll give you a shot on notification

MacKenzie: You can set out generally the steps you want to follow in the case of breach, but you can't be too prescriptive about it, or you won't address the concern. Insurers already have a duty of utmost good faith that guides them. But there has to be a threshold, reasonableness, and to the client.

Question: Respondent's right of appeal to the court?

Long: It's already happened. I have no difficulty with it. I think there are situations where organizations feel strongly enough that their position has not been fairly dealt with. These are just recommendations, not binding decisions. It will create balance, and it will be rarely used.

Wallace: Requests from people who are suing companies, and making access to info requests. Does that happen a lot?

Yakabuski: They can do that, through the litigation process – there are procedures for this. PIPEDA is overriding these procedures.

Wallace: Is it happening?

Mackenzie: It is. We have no problem giving them the info – we just think that if it's privileged, it should stay that way. We don't think the privacy commissioner should be deciding whether something is privileged or not.

Tilson (chair): Agree with Bercovici on the withering away of solicitor-client privilege. But the statement of witnesses – it's almost as if you're suggesting that insurance companies be privileged. Are you suggesting that those statements not be subject to subpoena?

Mackenzie: We're not saying that – we just don't want to be stopped from collecting them.

Bundus: Two different issues – the law is not clear on this stuff here. We shouldn't be encumbered by one party that they have to get that person's consent to get permission to ask questions of a witness.

Stanton: On the area of work product – inhibitor of innovation, research, etc. OPC's comments on that – if we go for a complete blanket exemption, then it raises the spectre of video surveillance in the workplace. That's one issue. Can you address that? Also, is there an ability to draw a line as to when the info is personal, and when it's work product info?

Yakabuski: We're just saying it's worked very well in the BC legislation, and that is all we're talking about. We're not talking about personal employee info, just statistics etc about companies, generated by them, which need to be accessible – otherwise we're creating oligopolies in the country – it's fundamental that info about business processes etc. be accessible.

Long: I think you can draw a line between work output and processes. They don't involve video surveillance. If you work with the BC definition, it doesn't include things like video surveillance – you can make that distinction fairly clearly.

Stanton: You raise the *Public Safety Act*, threat to *Charter* rights. Can you cite some examples of where that threat exists.

Long: Act currently authorizes businesses to use info collected in the course of activities. Public safety act has expanded – it allows businesses to collect info, with the purpose of later disclosing it – on their own, of their own volition. Creates a situation where they could easily violate charter rights. Could do a locker search of employees... secondly, if the RCMP came to a business and asked to collect info, they're making the business an agent of the state. I can't say if this has occurred, but it's a troublesome area of the law.

Vincent: Work product info – do you have to identify sources when you're collecting info from witnesses? Can you go to the doctor, ask him for all the prescriptions anyone had in their life, and because it's work product, she has to give them to you?

Bundus: You can't mix these things up. When we're talking about witness statements, we just want to make sure that a witness can talk to you directly in the case of an accident, and it's their personal info they're giving you. Also, obviously we think that your personal info is sacred – we just want to say that there are some things which are not personal information, they're just work product. When we use PIPEDA, we just want to make sure not to kill the economy.

Van Kesteren: This has been a very interesting, informative session. We see the complexity of this bill. I met Stoddart when I was first elected. Most of us have never heard of this bill. I really believe that the insurance and banking industry could write the book on privacy – I think you do a good job. The average guy on the street – if I got a brief like that talking about privacy, I would be scared. The bill is just getting way over our heads. I like the recommendation – leave things the way they are – is there a way we can get around this? Can industries deal with this and leave us alone? Or do we have to get dragged along with this?

Long: Hopefully, the changes made here would make it easier for small business. Education – this hasn't happened yet, need to make more effort to educate small business in the fundamentals. It can be easy to understand and apply, but there hasn't been enough education yet to explain them.

Van Kesteren: You say hopefully...

Mackenzie: In terms of customers – I'm also the ombudsman, so every complaint comes to me. And they don't articulate their complaints in leg style.

Bercovici: I think that if we have an omnibus statute like this that applies to a bunch of different industries – this is a statement of principle, about ownership of info. It may be a good idea to leave this as a statement of principle, and regulate particular industries/sectors. It is being done in various sectors.

Martin: Bill C31 – amendments to the elections act – requiring greater information of voters – will change the permanent voters list – it will now have your name, address, phone number and date of birth – you give the info to volunteers – do you see this as a problem, spreading this around – especially for id theft?

Long: I was surprised when I saw that – especially date of birth, which is more sensitive. I would not support that being included on lists.

Martin: Qc. legislation – transborder transfer of info – is it a recommendation of yours that Canada should have comparable mention in PIPEDA?

Bercovici: Within Canada, or outside?

Martin: Outside

Bercovici: Within Canada, just as a business practice, we put our standards to the highest – it's different in different provisions.

Bundus: All insurance companies that are federally incorporated, there are strict restrictions on transfer of information. This is a national business – a very large portion of the capital is provided from outside of Canada, so there has to be some transfer, and it's regulated – and it should be regulated by the superintendent of businesses, and that's where it should be.

Long: PIPEDA covers more than just financial transaction – you have an obligation, when transferring data, to put in place safeguards.

Dhaliwal: you have made a strong statement about the work product...what do you mean by that?

Bundus: It's clearly info which relates to an identifiable individual. But there's a lot of information which doesn't do that. It's important for businesses to be able to say, we see this many patients in the system, getting this many services, in this area. This is more important than ever for small businesses. We don't want work product info in a file to be given out during an access to info request.

Dhaliwal: Do you see any negative impacts on businesses, on individuals?

Bundus: There will be a negative impact on some, not on others.

Dhaliwal: What are reasonable fees for access to info?

Yakabuski: Minimal fee means you put a less qualified person in to get you the response, a reasonable fee means you get a qualified person preparing the response.

Stanton: Work product – I do agree that people need these stats. But how do we achieve this balance? In the case of vehicle repairs – how is it that PIPEDA would prevent that info from being disclosed now?

Bundus: If there wasn't a clear distinction between work product and personal info... what if that garage said, I don't want to give my competitors that info, it's personal... millions of people would be losing out.

Stanton: Wouldn't that be more the choice of the company itself?

Bundus: You give info every day of the week. If you say, btw, that's personal info, and I don't want it released to anyone, you shut this down.

Stanton: OPC says that while personal info is broad, it doesn't encompass all info about a person – so there's agreement there. Where do we need to make this more ironclad.

Bundus: Well, each commissioner has a different idea of work product, and I think everyone should be able to access work product info...

Lavallée: Duty to notify – this is just good business practice – we don't need a law on it. You know that if we just depend on good business practice, not everything would get protected. I think that if you have more info, even if it's good business practice, you should have a higher duty, and it should be in the law. Also, I don't understand why we don't name names. So, not only should the company inform their clients, they should repair the damage. Shouldn't be so vague. The person who receives the notice should know what info was taken and what to do about it.

Bundus: Insurance companies know that personal information needs to be protected. We are all subject to good faith law. It's absolutely sacred. The SCC has already said that when it violates good faith, it costs millions of dollars. We should legislate, but not too much. There's so much legislation already in place – we shouldn't do more.

Long: You don't pass privacy laws because you have good companies. You do it because there are bad ones. There were 3 companies which put all their files in the dumpster, and the info was being sold by id thieves. I'm sure insurance companies would do the right thing, but others might hide the fact that they broke the law. So there is a requirement to have some kind of disclosure requirement.

Dhaliwal: Many have told me that they don't have access to technologies. Is this a work product issue?

Bundus: No – we've had discussions... that's all part of the to and fro of a good vibrant economy.

Dhaliwal: Reasonable and minimum fees – there might be some individuals who could not afford reasonable fees. How would you address that?

Yakabuski: You'd be asking the business to subsidize the access request. It could be more cost effective to pay the claim off than fulfill the request – so this is partly about not having complainants use pipeda as a sword in litigation.

Mackenzie: There are times when the requests are abusive. The more expensive you make the delivery of the system, the more expensive the product is going to be. I think it's fair to ask for fees, they do it in the court system.

Long: I have a concern that if you move to a sliding system like reasonable fees, they become deterrent fees. There are mechanisms in place for people who are making requests in bad faith, or frivolous or vexatious, in BC. You might want to put that into the act. I don't think the individual should have to bear the burden of doing some research on what we have on you. The individual should not have to bear the burden of a cost for information collected to help the company do business.

Chair: your suggestion that if the notification isn't complied with, there should be a penalty. Who should have jurisdiction over that? Have you thought of a minimum penalty? Would the requirement apply to foreign companies that have subs in Canada?

Long: if there are subs in the country, they're subject to our law. RE: offence, s. 28 already outlines some, and the fines range from 10,000-20,000. Generally, the A.G. would take care of that. In the case of breach disclosure – any org. which knowingly withheld info, without regard to the public interest, I think that should be considered an offence under the act. It's a serious issue and should be treated as such.

Bercovici: Tab 4 of our materials. We don't disagree that there should be a duty to notify. The problem is the threshold. When you're dealing with a principle-based statutes with the breadth of PIPEDA, it's almost impossible to craft it. Commissioner agrees. She says there should be notification, but the exact wording is a challenge. We think there should be a principle in PIPEDA, but the details should be left to our governing statutes, and those who understand our industries.