

**House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Nov. 27, 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:**

- Ms. Jennifer Stoddart, Privacy Commissioner, Office of the Privacy Commissioner of Canada,
- Ms. Heather H. Black, Assistant Commissioner (PIPEDA), Office of the Privacy Commissioner of Canada
- Ms. Melanie Millar-Chapman, Strategic Research and Policy Analyst, Office of the Privacy Commissioner of Canada

**Jennifer Stoddart, Commissioner (OPC):**

- PIPEDA is working reasonably well. There is a high level of compliance, but there are still gaps in the Act.
- I would like to come back at the end of the hearings to give further opinions.

**Questions and Answers (Not Verbatim)**

Comments and FAQs

- There was a continued focus on the meaning of work product and doctor's prescribing practices
- The Commissioner was sometimes inconsistent, suggesting that decisions made on a case by case would provide for the most flexibility
- The Commissioner is not interested in having any more enforcement powers – she argues that the only goal of PIPEDA is compliance, and as she begins to use the existing powers more effectively, she will not need any additional powers.
- Stoddart wants to include a duty to notify, but would like suggestions on how to formulate it.
- Questions about costs of implementation/compliance with PIPEDA to small businesses was brought up a few times.
- A few questions about RFIDs came up during the course of the meeting – definitely a good issue to address.
- When the Commissioner talks about order-making powers, she seems to mainly be contrasting Tribunals with the ombuds model. She doesn't generally address the question of the Commissioner, herself, having more powers.

Peterson: What type of amendments would you suggest to deal with the blood tribe decision?

Stoddart: An amendment relating to solicitor-client privilege. I envisage an objection to that.

Peterson: There might be an objection – it's the first time anyone has asked for that amendment. Would the privilege hamper you?

Stoddart: People could take an expansive view of privilege, and use it to shield themselves from liability.

Peterson: How many complaints have you had?

Stoddart: We have had 1400 complaints over 5 years, and over 5600 written or phone inquiries.

Peterson: Was there a particular type of complaint which dominates?

Stoddart: Use and disclosure, collection and access.

Peterson: How many times have you had to go to court over the years?

Stoddart: We've had 50 cases, 12 are active right now.

Peterson: How long to cases usually take?

Stoddart: Usually complaints take under a year, while a court case depends on a number of different factors.

Peterson: You don't want order-making power – are you happy using the courts?

Stoddart: This is not the time to making changes. PIPEDA was applied in less than ideal circumstances at the beginning – it is not clear which is the best model, and the federal court is a very strong power.

Peterson: Even though it's slow, cumbersome and costly?

Stoddart: I don't know that it's worse than tribunals – there aren't excessive delays. Most cases are settled out of court. All but one organization has complied when it was threatened with court action.

Lavallée: Right now, is there something in the law to deal with cross-border transactions? You have activities, meetings etc. with the EU. Do you want to go further and negotiate with them?

Stoddart: I would like some clarification...

Lavallée: In the case of a complaint, you would like to be able to talk to EU counterparts to make inquiries? I thought you were concerned about protecting information abroad...

Stoddart: Yes, I am concerned. The principle of responsibility encourages exporting enterprises to apply Canadian norms.

Lavallée: Are more legal measures needed?

Stoddart: We already have measures – the principle of responsibility.

Lavallée: It's a principle?

Stoddart: Yes – it's based on the CSA standards, it's integral to the Act.

Lavallée: Divulgence of information and notification. These are not in the law?

Stoddart: No, they're not in the law. Maybe it wasn't an issue back then. We want something about this in the law, but we're not sure how to articulate it. It's complex, we need to speak to lawyers about how to draft a notification clause.

Martin: In your document it says that in June/July, 50% of U.S. states passed laws for a duty to notify. What are your views? Do you recommend this?

Stoddart: Yes – we should have such a clause. With problems of ID theft, such a provision is necessary, but the exact wording is a challenge. There are many versions in the U.S.

Martin: Does it depend on the type of breach? The severity of a breach?

Stoddart: We could put in criteria like “significant” or “too costly” as a basis for the duty to notify.

Martin: But people have a right to know.

Assistant Commissioner: Credit cards – they keep track of these things. They pay. It’s hard to know what kind of breach is being talked about.

Martin: Discusses the Manitoba example. Is it even possible to have enough measures?

Stoddart: Several things can be done. The Manitoba government can issue guidelines including a scale of sensitivity<sup>7</sup>. In the public sector, there’s the responsibility principle: we encourage organizations to bind others with contracts which allow audits, damages etc.

Assistant Commissioner: CIBC Visa – they had done everything possible to protect their customers – they had taken all the appropriate steps, as required by law – they are ultimately responsible.

Tilson: I’m pleased to hear the Act is working well.

Discussion about work product ensues.

Tilson: Should the Commission be allowed to go beyond solicitor-client privilege?

Stoddart: We should be able to look at anything.

Discussion re: solicitor-client privilege ensues.

Tilson: Is PIPEDA doing enough to facilitate small businesses?

Stoddart: Most complaints are against large businesses. We are working on an interactive tool for implementation for small businesses.

Tilson: Can the legislation be changed to assist small businesses more?

Stoddart: The burdens fall on small businesses more – so we are trying to educate them.

Chair: Seeks clarification re: solicitor-client privilege.

Jennings: 1) Notification of breach – you have no way to penalize for not notifying. If you’re seeking authority to compel companies who hold information legally, which is then breached... does dealing with this properly not accord better with enforcement powers than the ombuds model? 2) Question re: work product. 3) The ombuds model – you have no executory powers, there are mixed models in existence. There is a way to build deadlines etc. for full and efficient ways of dealing with this.

Stoddart: With regards to the ombuds model – we forget that the Commissioner has powers because they were not used consistently from the beginning. None of the provincial commissioners can order damages.

Wallace: Questions re: work product.

Wallace: What are the costs to small businesses? Do you care?

Stoddart: Yes – I want PIPEDA to be easy to apply and practical. Privacy is a fundamental right. We chose a light and flexible system on purpose (unlike the British system which requires registration). Here we assume compliance.

Assistant Commissioner: PIPEDA is based on the CSA code. It’s not hard for small businesses to comply with the law. But we could help through education.

Wallace: Is there some extra money for this? When will it be available?

Stoddart: This winter.

Laforest: Does order-making power conflict with other powers? Why is this the wrong time to make changes?

Stoddart: Timing is important. There wasn't enough time to implement PIPEDA. There were lots of changes at the OPC over the years. All the organizations have changed except one. I can ask for damages before the court. The point of the law is not to make orders, but to get conformity – which is happening for the most part. Most tribunals can be complicated and slow.

Laforest: So, it's not just about timing?

Stoddart: That's right. The powers are strong enough. We just need more time to use them. We'll see in 5 years how it goes.

Question: I was terrified, as a small business owner, when PIPEDA came out. But you don't have a heavy hand, unless it's necessary.

Stoddart: We don't just say a complaint is well-founded and walk away. We're ready to go to court (and have been doing so for over a year now).

Question: But you need a complaint first? Couldn't we have better guidelines?

Stoddart: Yes – there was a sense of panic, partly because the office was in upheaval. Small businesses need education. Major players are more of an issue.

Question: do you have inspectors checking for compliance?

Stoddart: No. We can do audits on reasonable grounds. We have to such cases now.

Question: Are takeovers a big issue?

Stoddart: We require it be held to Canadian standards.

Question: But you have jurisdiction over outside corporations?

Stoddart: No – we have jurisdiction over Canadian corporations – real and substantial connection.

Martin: Canada is tied with Germany in terms of privacy laws, but I'm horrified about the next generation of privacy issues – especially RFIDs. What is the Office aware of?

What to do? Are you doing a study? Should we have one?

Assistant Commissioner: We did fund a university study at Dalhousie Law School.

Martin: What is its status?

Assistant Commissioner: Completed. We will give you a copy of the paper. There is fear about RFIDs and what they do. Right now there is limited use of them (ie in credit cards). Some people like the convenience. RFIDs in credit cards will probably bring security. We're working on RFID guidelines.

Chair: What's an RFID?

Dhaliwal: More questions about work product....

Chair: We want to know about work product.

Chair: Are you bound by the last Commissioner's ruling? And anyways, it's not binding on the court. But a definition in the Act would be.

Commissioner: That's right, but predictability is good. Technically, I could overrule the last Commissioner.

Tilson: Could you transfer a file to another jurisdiction?

Commissioner: No, I can't, I think. But some have said that the Commissioner should do what's in the public interest. But in the state of the world, I should be able to if necessary.

Tilson: Should this also be case by case? Don't we want a specific definition? Wouldn't you be breaking the law if you made these transfers?

Commissioner: It could be useful to sometimes transfer files, with consent, to other jurisdictions. Like police investigators do.

Tilson: But we're all proud of our sovereignty.

Stoddart: But this would only be in cases where I couldn't act.

Tilson: Electronic payment crimes are on the increase. Cyber-services task force – do you know what that is?

Chair: Do you want cooperation and to share personal information with other jurisdictions?

Stoddart: Yes

Jennings: Requested Commissioner to draft a carve-out for aggregated prescribing information. The CSA standard is light-handed, good. But the issue of consent and its definition... (she brings up the CIPPIC study again). This study recommended that consent should not be implied. (Brought up credit card company anecdote). What do you have to say about implied consent?

Stoddart: Tightening it up entails a definition for each context. That's hard. We've provided guidance, etc. it's not an issue for the law, but for compliance work. We have said clearly to organizations that when consumers say no, you have to respect their wishes.

Assistant Commissioner: You can object to any information not required to provide you with the service. They need to be reminded to listen to their customers.

Question: You got 5600 inquiries – in what sectors? Are car dealers overreacting? They want to database the colour of cars bought etc. Do they have to hire someone to database it?

Assistant Commissioner: They might be over-collecting.

Stoddart: Most complaints are against financial institutions. We each have 4-5 accounts. Then insurance companies. Both collect a lot of personal information about people. Then transportation and telecom companies.

Question: Is there a revers onus/burden of proof if I sing something, and then am not happy – is that my burden?

Assistant Commissioner: You have the right to withdraw consent.

Question: Sometimes you don't know what you've signed until it's too late.

Chair: Concerning the role of public education... Richard Rosenberg said, "I rarely found anyone who knows about PIPEDA etc." If you haven't heard of laws protecting you, how can you take advantage of them?

Stoddart: We got an increase in the budget for education.

Chair: How much feedback did you get from the private sector to your consultations?  
Stoddart: 50% or more.

Chair: You are the former Commissioner in Qc. That regime has order-making power. Why don't you want it now?

Commissioner: At this point, we need to make use of the powers we have. We would need to completely redraw the legislation otherwise. Tribunals have challenges – partly delays. Then you need to go to court for damages. It's a long, drawn-out process. You could have judicial review during the hearing. The Federal Court is a great advantage over administrative tribunals.

Peterson: How are the Q.C. and B.C. Acts working? Are they hampered by order-making powers?

Stoddart: No, because the law was set up that way. The ombuds model is the one used by many federal institutions. Changing it now would be detrimental.

Peterson: Have you ever had a case where you wanted these powers to get results?

Stoddart: No, not since we began bringing non-compliers to court. But most cases are settled.

Tilson: Are there areas where your Qc. experience could prove useful?

Stoddart: The laws are similar. Things are clearer in PIPEDA, B.C. and Alta. It's a different model.

Chair: You're in a unique position. We want your dual experience.