

**House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Nov. 20, 2006 (Chaired by Tom Wappel)**

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\*\*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:**

- Michael M. Binder, Department of Industry, Assistant Deputy Minister, Spectrum, Information Technologies and Telecommunications;
- Richard Simpson, Director General, Electronic Commerce;
- Danièle Chatelois, Privacy Policy Analyst, E-Commerce Policy Directorate, Electronic Commerce Branch.
- Alexia Taschereau, Department of Justice, Senior Counsel, Industry Canada.

**Purpose of review:** To review both the administration and the provisions/operation of PIPEDA

**Michael Binder, ADM, Industry Canada:**

- Industry Canada is worried about digital economy, databases, and e-commerce...
  - They want reasonable, clear rules of engagement for the marketplace
  - That is why they originally introduced PIPEDA

**Richard Simpson, DG, Electronic Commerce, Industry Canada:**

- Overview of the Act itself via slides covered:
  - The protection of personal information online is key to the global economy
  - Legislative history of PIPEDA
  - Purpose: Balancing of 2 central considerations...
  - Key features: Personal information, commercial purposes
  - Built based on a private sector code: the CSA
  - Technological neutrality, industry neutrality
  - Non-criminal
  - Exemptions (ie – non-personal, non-commercial)
  - Ombudsperson model
  - Role of the Federal Court
  - Responsibility of Governor in Council (including regulatory powers)
  - Power to bind Crown corporations to the Act
  - Power to exempt for substantial similarity
  - Quebec raised constitutional challenge re: federal trade and commerce power v. provincial property and civil rights powers with respect to PIPEDA
    - This reference has been pending for 3 years (there was some confusion as to this point). An affidavit was filed in March 2005, Quebec filed its affidavit in July 2006, then Industry Canada filed

its application later in 2006. It has remained business as usual in Quebec. The Quebec government has recently asked for an extension.

- Modifications to PIPEDA since 2001: public safety (re: 9/11), Public Service Protection Act
- Consultations confirmed that the “privacy community” thinks the Act is working well (members of the privacy community cited: an e-commerce association as well as a bank association)
  - These consultations also revealed that some members of the Privacy Community would like the Commissioner to have more powers, but there is disagreement on what form these would take
- Continuing issues: transborder data flows, technology issues, definitional issues (especially re: “work product”), employee/employer relationship, mergers and acquisitions
- PIPEDA is well-liked internationally, especially by the business community
  - Privacy International ranked Canada and Germany at the top of this field

### **Questions and Answers (not verbatim)**

Questions that came up frequently:

- How is PIPEDA pronounced?
- Could Industry Canada please give us their opinion/recommendations? In fact, the Chair and most of the MPs asking questions seemed to have been getting quite frustrated by the witnesses’ refusal to offer up any suggestions or normative content to their suggestions and answers. The civil servants kept repeating that it was not their job to do so, and that only the Minister could make recommendations or give his opinion. In the end, the Committee said it would call the Minister as a witness, and warned the current witnesses that he should come equipped with recommendations.
- Questions regarding federal v. provincial jurisdiction in this area (this was most frequently raised by what appeared to be Quebec M.P.s)
- The meaning of “work product” and its place in the legislation

Chair: What is the department’s opinion regarding the issues just mentioned? Do you agree at all with the stakeholders and their suggestions?

Binder: Actual experience with PIPEDA is very recent...it had to do with operationalising, defining consent, the health sector – all of these are new. It is not our role to give recommendations – we came to the Review to hear what others had to say – for the Committee’s guidance and advice.

Chair: Well, it would make sense to tell us if you agree with any proposals people have made.

Dhaliwal: Asked a question regarding the inapplicability of substantially similar legislation

Simpson: The cross-border aspect of data protections still remains in the federal purview. There is close cooperation between the provincial Commissioners and the OPC. The substantial similarity requirement ensures there are no gaps in the legislation.

Binder: They wanted to make sure there weren't different rules all over the country. Europe has found our legislation acceptable, which is required for us to do business with them. So, we want national minimum standards, without actually telling the provinces what to do.

Dhaliwal: Asked a question relating to the uses of PIPEDA with respect to commercial v. research purposes (the rest of this exchange was fairly unclear, and related to PIPEDA's application to research, the definition of work product, and a court judgement which found that prescriptions were not considered personal information). Dhaliwal sought the witnesses' opinions with respect to the "prescription carve-out" and they declined to answer.

Simpson: Some of the definitions were left broad on purpose so as to allow the OPC maximum flexibility.

There were a few questions with respect to the definitions of artistic works and work product.

Question: How could PIPEDA apply to health when it is a matter of provincial jurisdiction?

Binder: Only when it is trans-border.

Question: Have you made any international comparative studies?

Simpson: Our protection is equal to that of Europeans. I haven't read all of the studies, only the one mentioned above, which says that we are high-ranking.

Question: With respect to these international comparative studies, have you noted elements that we can improve in our legislation?

Simpson: Not really, we have the same standards as the Europeans.

Binder: In Europe, each sector has different laws. Here we have one, which we think is better because there's more consistency.

Question: I'm alarmed about questions I have been receiving about the duty to notify in the case of a breach. Recently somebody told me that VISA has 3 million security breaches/year in Canada alone, and they don't notify people of them. Would you recommend a duty to notify?

Binder: Seems to have misunderstood the question, and keeps talking about Commissioner's power to name names.

Chair: Asks for Binder's opinion. Question: Would non-notification be a breach for which you can file a complaint with the OPC?

Simpson: You can complain right now, even if it was purely accidental, or with intent. Because CSA principles require organizations to take proper steps to secure info, negligence is not a justification. In the U.S. some states have adopted duties to notify; it's state-by-state, and fragmented. It's not black and white that there's no recourse, there's just no obligation to notify *in a public way*.

Question relating to the Public Safety Act: I'm concerned about the possibility of the government getting the private sector to collect information for them. This happened in Manitoba, and it was sold to a U.S. firm. Is there a duty to follow this information outside of the country?

Simpson: OPC will investigate from the point of view of a Canadian organization. That organization has to protect your information via contract with another organization. Under PIPEDA, the party who has your information must make sure that third parties it outsources to will protect the information.

Question: We're looking to you for advice – can we have a list of recommended amendments?

Binder: Only the Minister is authorised to make recommendations.

There was a question about carve-outs related to VIA or CBC with respect to Bill C-2, a little bit of confusion, and the answer settled on was that Bill C-2 is only going to cover Enterprise Cape Breton.

Question: Does the OPC have sufficient resources to do what she has to? (There was also some mention of 6 million being spent on consultants, with the insinuation that it was a waste of money. It is not clear what was the object of the consultation, or who hired the consultants)

Answer: You will have to ask her.

Question: Should the OPC be quasi-judicial?

Answer: I thought it was (he refused to discuss whether or not the Commissioner had adequate powers).

Question: How is your relationship with the OPC?

Binder: We are the policy side, not the administrative side.

Simpson: We have a formal and informal relationship with the OPC. We work together a lot on international issues. There's cooperation on cross-border laws.

Chair: We will be calling the Minister, and we want him to give us his opinion.

Question: Have you heard from any parties that the OPC should not have order-making power?

Answer: Yes

Question: If PIPEDA was working so well, why would the provinces need to legislate? Isn't this duplication of the worst kind?

Answer: No it strengthens it. PIPEDA doesn't protect all elements because of jurisdictional issues.

Question: Why does provincial law cover commercial issues?

Simpson: Some provinces want to tailor it, some won't enact legislation.

Question: What's happening in the U.S.?

Answer: There's no national law, it's complicated.

Question: It's complex for foreigners to do business here.

Chair: There are 20 witnesses to be heard. Simpson should provide a list of further possible witnesses.

Question: Looking for a clarification with regards to prescription information.

Answer: What we're discussing is whether a doctor's name on a prescription constitutes "work product" or personal information – we're not discussing the patient's personal information.

Question: There's lots of Internet crime, especially with respect to sexual exploitation and human trafficking. Are there aspects of PIPEDA that are restricting such investigations?

Answer: There is a specific carve-out for this stuff. Any time there was a deficiency, it was amended under the Terrorism law.

Question: The OPC's powers are only enforced through the Federal Courts. What other options exist? Can you give examples of different enforcement abilities under different regimes?

Binder: It would be a fundamental change to make these amendments.

Simpson: There is a big question as to whether we need a tribunal so there will be judicial independence.

Chair: Let's say there's a father abusing a kid online and the server doesn't want to give up his name. Would this fall under PIPEDA or the Privacy Act?

Answer: It's about the definition of lawful authority – it's an operational requirement.

Laforest: If there wasn't substantial similarity between PIPEDA and the Qc. Act, would the Qc. law not have applied to Qc.? Also, aren't you making presumptions by using the words "the reference will confirm that...?"

Binder: We meant "clarify"

Simpson: It's more a question of whether the Federal law exempts organizations than whether the Quebec law would continue to apply (it would).

Binder: It's a hypothetical question – we designed this based on Qc. law, but if Qc. didn't deal with consent, it wouldn't have been enough.

Question: More chastisement about not giving recommendations/opinions in the form of "what do you think a better process would have looked like?"

Question: The Commissioner has also said that it isn't her role to make recommendations either.

Question: Is it possible to get a review of the provincial legislation? Should we adopt anything or get out of their way?

Simpson: Provincial Acts have addressed work product issues, and they are good to address these issues, and they will be here.

Chair: Actually, 3 out of 4 Provincial Commissioners declined to come.

Question: There were two issues at the 2<sup>nd</sup> reading of the bill – one relating to the definition of “work product”, another relating to the definition of consent. According to a study done at the University of Ottawa, not all companies actually have a privacy protocol in place. My hair was raised by the results. (The questioner wanted recommendations with respect to both of these issues).

Simpson: That study was not only about consent, but also about awareness of organisation of their responsibilities. The Commissioner might talk about public education.

More questions about jurisdictional issues.

Question: What kind of amendments are people asking for in terms of protection of information during Mergers and Acquisitions?

Answer: Some people want access to the documents without consent to facilitate the process.

END OF MEETING