

House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) - Meeting, Nov. 22, 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:

- Richard Rosenberg, President of B.C. Freedom of Information and Privacy Association
- Colin J. Bennett, Political Science Professor, University of Victoria.

Committee Members Present:

- Jean-Yves Laforest
- Carole Lavallée
- Hon. Jim Peterson
- Bruce Stanton
- David Tilson
- Mike Wallace
- Tom Wappel (Chair)
- Acting Members present:
 - Hon. Marlene Jennings for Paul Zed
 - Hon. Gurbax Malhi for Sukh Dhaliwal.
- Associate Members present:
 - Harold Albrecht.

Richard Rosenberg, President, FIPA:

- Supports the protection of privacy through PIPEDA, but still has critiques
- The current ombudsman model should be replaced, and the commissioner should be given order-making power
- Gave a brief overview of the surveillance society to come, mentioned that Britain has some of the most heavy surveillance in the world
- Purpose of privacy law: government and corporation should be responsible and questioned
- Concerns:
 - 1) Publicizing complaints
 - 2) More effective education function for the Commissioner – people don't know the law exists, or their rights or responsibilities under it
 - 3) Response of companies to security breaches – ID theft is a big concern
 - 4) Trans-border data flows of Personal Information, especially information held by the FBI under the U.S. Patriot Act
 - 5) Workplace privacy issues – not all workers are covered by PIPEDA
 - 6) The development of Electronic Medical Records and its privacy implications

- 7) Privacy-threatening technologies such as RFIDs
- 8) Unclear consent requirements
- 9) Most Importantly - OPC is committed to the Ombudsman model of mediation, but the provinces have order-making powers.

Colin J. Bennett, Poli. Sci. Prof., University of Victoria:

- Looked at PIPEDA's broader international context
- The point of PIPEDA is to let individuals control their personal information. Public opinion supports this, and this is not different from other Western countries.
- Other European countries' legislation has influenced us – Canada was late in legislating for the private sector. There was a lot of pressure from the EU for us to adopt this kind of legislation.
- Talked about the private sector activity before PIPEDA.
- He has mixed feelings about the ombudsman model
- He was also made a complaint to the Commissioner re: a mail survey which was not in compliance with PIPEDA. He was concerned about the opt-out consent, the nature of the survey, and the fact that there was no phone number to make a complaint. He didn't want redress, he just wanted change. The OPC agreed with him, but there continued to be lots of negotiation and stalling which was only resolved after another complaint was filed.
- This model doesn't provoke compliance, and therefore, it doesn't meet its own goals.
- Some discussion of the usefulness of the CSA standards
- Is PIPEDA working? He broke down its successfulness into three categories:
 - large businesses who were leaders in its implementation,
 - free riders who got exposed and lost business, and
 - the vast majority who are in the middle, and don't really know anything about PIPEDA.
- Our legislation is quite light compared to France and Germany
- This system is better than a top-down, command and enforcement model, but it still could use some help
- Recommendations: The Commissioner should actually use the enforcement mechanisms she has, especially with respect to registering the CSA

Questions and Answers (Not verbatim)

Comments and FAQs

- Continued concern about the definition of “work product” and its place in PIPEDA, as well as health-related issues like medical records.
- Quite a lot of questioning about the protection of employees' information
- Quite a lot of questioning about everything surrounding enforcement regimes, including one question about what a stronger enforcement regime would look like. Similarly, there were a few questions about whether it would be better to have an independent Tribunal which could have these order-making powers. There was also a question relating to what potential penalties would look like.

- There were also a lot of calls for comparisons between PIPEDA and other regimes (privacy-related or otherwise). Nobody really seemed to know anything about the Qc. regime, beyond the fact that it motivated the federal government to legislate, so talking about the Quebec regime could be really useful.
- There was also a lot of concern about whether or not the public is educated about privacy issues.
- Tilson will always ask questions about how privacy law interacts with security, and the costs of stronger privacy laws/enforcement for businesses.
- A lot of people, witnesses and committee members, bring up personal anecdotes during the discussions. I think that's a good sign because it shows that they feel like they have a personal connection to the issues being discussed here.

Jennings: Is the weakness of the legislation on the Commissioner's side? The ombudsman model? No one is aware of the legislation's intersection between executive powers and publicity – is this missing?

Bennett: The Commissioner has powers of education. Naming names is difficult in the ombuds model. Order-making powers would change the office, bring it into conflict with others, but could be good. It could give the legislation teeth, foster jurisprudence.

Jennings: There are other areas [regimes] where there are these powers. A key factor [in these regimes] is that, if the parties agree to it, information needs to be completely confidential up until the judicial part of the process. More discussion of the definition of work product and its place under PIPEDA.

Bennett: The situation is unclear...careful drafting with respect to this question is necessary, though, because it could have significant effects on employee privacy.

Laforest: Do you think that the B.C. population is well-enough informed about privacy issues, and the dangers out there?

Rosenberg: No. The Internet is a mystery to most people. People don't know what cookies are. Spam and Google gather information about people. All of these entities argue that this information gathering is for our benefit. How do people get informed about this? Privacy policies are useless, especially because the U.S. companies we do business with have no such requirements. The OPC (and provincial bodies) should do more public education, and should be able to name names.

Bennett: Most Canadians know nothing about the legislative protections, but most Canadians are very concerned, and most have experienced privacy invasions. They understand these issues instinctively, although attitudes vary according to demographics. The law is only one instrument among many to deal with these issues.

Tilson: People don't seem too concerned about security at airports, security cameras etc. because they're worried about their safety. Can you go too far either way?

Bennett: People are concerned about privacy when they don't see a legitimate public purpose to these things. Concerns rise as people understand the technology better, and what will happen to the information. PIPEDA doesn't say, "don't collect information", it says, "collect appropriately".

Tilson: What will the costs of protection be? Should we care?

Rosenberg: There's a difference between public and private surveillance. When I'm in a bank, I'm on its property. But cameras on streets are different.

Tilson: Let's get back to costs

Bennett: The costs of a bad reputation in the marketplace far outweigh the other kind. Companies perceive privacy to be good value.

Tilson: Where did you get this?

Chair: Can you please provide us with empirical proof of this statement?

Jennings: Another question re: work product. Also, do you agree with powers to make orders immediately executory? Do you have a preference between the different privacy models in Canada? Which one should we use as guidance?

Bennett: Look at OPC's paper re: work product.

Rosenberg: Alta and B.C. legislation are similar. I'm not familiar with the Quebec legislation. Discussion re: different types of privacy invasions for employees.

Stanton: Publicizing of complaints – is this a more effective means of compliance?

Rosenberg: If you make a complaint, and the OPC supports it, then what? Not every case would be seen as having a strong public interest – sometimes persuasion would be better, but we need to figure out how to improve things.

Bennett: The OPC has interpreted confidentiality as overriding publicity. Some complainants, such as CIPPIC, will automatically publicize all of their complaints. But not everyone will do this. So, there is inconsistency about which complaints will get publicized, and which won't. Plus, anonymising businesses makes it hard to understand the context of a complaint – you have to know about a business's practices.

Lavallée: I'm new to all of this. How does security interact with employee surveillance?

Bennett: The test is one of reasonable purpose. These purposes have to be explained at the time of collection – unless it falls under an exception.

Lavallée: Can an employer use the cameras which were set up for legitimate purposes for illegitimate purposes (such as monitoring employee productivity?)

Rosenberg: Yes. If I sit at my desk and use by computer to harass someone, my employer could be liable. So, an employer has the right to monitor what's going on on your computer. But stuff like monitoring productivity, or cameras in washrooms are open questions.

Wallace: Is this review premature? Shouldn't we educate ourselves first?

Bennett: No. But it's hard to tell whether the problems are with the statute, or its interpretation by the OPC, or the post 9/11 era we live in. Businesses get the issues.

They want clear advice on how to comply.

Rosenberg: It's not premature. A lot of technology issues are coming up with medical records. The order-making power would be a significant change.

Jennings: The new move to electronic medical documents raises a lot of questions. Why not use existing legislation to inform us on how to deal with these things?

Rosenberg: There should be a uniform system, so information is accessible. But, there are still questions related to rules of access – information will need to be structured

according to levels of sensitivity... These issues are in discussions... we should look at all the other legislation in Canada for guidance.

Bennett: The principles are pretty uniform, but implementation is different.

Jennings: The results of [CIPPIC]'s study on consent appalled me. Partially because this has already been debated – consent needs to be strengthened and clarified. Also, you can consent, but there are issues of sharing information. For example, I tried to get a credit card, but when I tried to write on the form that I didn't want the company to share my information, they sent the form back to me three times. How can we clarify consent? Implied consent shouldn't exist.

Rosenberg: What bothers me are when there are parallel opt-in and opt-out boxes which are already filled in. The choice is already made for you. There should be no implicit consent.

Bennett: Knowledge is more important than consent. The consent rules in the CSA are clear, the problem is with education.

Tilson: What should the Act say with respect to cross-border transmissions of information?

Rosenberg: After the U.S. accessed B.C. health records, they tried to deal with this in B.C. At the end of the day, it's not clear whether the rules worked. They made people sign contracts saying they wouldn't use the info inappropriately. It's getting worse because we keep outsourcing information.

Tilson: Should the OPC be quasi-judicial? Who's going to enforce the penalties with respect to cross-border transactions?

Rosenberg: You have to go to the limit of the law in pursuing these companies.

Tilson: Should you keep records of security breaches? Because if you don't, they could do it again later.

Bennett: Things don't work so well in the U.S. Notification should be to the Commissioner.

Chair: Another question re: definition of work product in B.C. Also - Should we take order-making powers completely out of the OPCs hands so she can just do education? What about a specialized tribunal with order-making powers?

Rosenberg: There may be good arguments for having a tribunal, but there's no reason the OPC can't do it. The OPC has the expertise – maybe it just needs more money.

Bennett: Discussed the U.K. situation. Tribunals just led to delays. I would prefer specific order-making powers for the OPC.

Wallace: Can you give us examples of possible penalties and enforcement?

Bennett: The power to enjoin. Penalties are tricky – the most effective remedies have to do with reputation, not money.

Lavallée: Cell phone and Blackberry conversations aren't secure. Do you think they should be?

Rosenberg: Yes. There's a problem because we're expecting people to have their own expectations of privacy, and they don't know what they should expect.

Tilson: Can you provide us with a list of recommendations based on the B.C. and Alta. Acts?

Bennett: Yes

Chair: The Qc. model has order-making powers. Why was the Qc. model rejected?

Bennett: For consistency with the Privacy Act (which also needs updating), but also because the ombuds model had worked well as the culture of the office. And there are advantages, but also clear disadvantages in a private sector context where mediation may not be the best approach.

Chair: Are the B.C. and Alta. Acts working well?

No real answer provided.

END OF MEETING