

Issue in Focus

April 2014

Private Sector Privacy Legislation

Core Issue: On September 13, 2013, Manitoba joined Quebec, British Columbia and Alberta by enacting provincial private sector privacy legislation. This legislation governs the collection, use and disclosure of personal information, including that of employees, by organizations in the private sector. In November 2013, Alberta's legislation was ruled a violation of the *Charter* by the Supreme Court and a twelve month window was provided for the Alberta's government to correct their *Personal Information Privacy Act*. These two significant developments have sparked a conversation in Saskatchewan regarding whether private sector privacy legislation should be established here and how it should apply.

Introduction

Personal information privacy discussions are often connected to confidentiality and security. The increasing capacity for personal information to be collected, stored and digitized exposes individuals to a potential loss of privacy more than ever before. Allowing individuals to have control over who has access to their personal information protects their assets, their reputation and enables them to avoid sharing information with others who might use it against them.¹ In this context, the role of personal information privacy legislation is continually expanding.

Residents of Saskatchewan have their personal information protected by federal legislation, but other provinces have expanded the scope of privacy protection in their jurisdictions with their own provincial privacy legislation. After an initial round of legislation in 2004, privacy legislation remained relatively dormant in Canada until 2013 when Manitoba introduced the *Personal Information Protection and Identity Theft Prevention Act* and Alberta recently had its *Personal Information Privacy Act* deemed by the Supreme Court of Canada to be in violation of the *Canadian Charter of Rights and Freedoms*. Due to this renewed discussion nationally, now is an appropriate time for the Government of Saskatchewan to consider the merits of private sector privacy legislation.

Background

The federal government sets out privacy legislation in Canada through the *Personal Information Protection and Electronic Documents Act*, usually referred to as PIPEDA.² This law, which has

¹ Pritts, Joy L. The Importance and Value of Protecting the Privacy of Health Information: The Roles of the HIPAA Privacy Rule and the Common Rule in Health Research. 20 03 2014
<<http://www.iom.edu/~media/Files/Activity%20Files/Research/HIPAAandResearch/PrittsPrivacyFinalDraftweb.ash>>.

² Office of the Privacy Commissioner of Canada. OPC Guidance Documents: A Guide for Individuals Your Guide to PIPEDA. 04 2009. 20 03 2014 <http://www.priv.gc.ca/information/02_05_d_08_e.asp>.

been fully in force since 2004, applies to private enterprises across Canada, wherever substantially similar provincial legislation is not in place. This Act requires private sector organizations to collect, use or disclose personal information by fair and lawful means, with the consent of the individual, and only for purposes that are stated and reasonable.³ Personal information is defined in most privacy laws as information about an identifiable individual including a social insurance number (SIN), date of birth, home/personal telephone number and address, salary, performance appraisals and discipline records, medical information, etc.⁴ PIPEDA does not include a mandatory breach notification obligation, although voluntary notification of a privacy breach is recommended when it “is necessary in order to avoid or mitigate harm to an individual whose personal information has been inappropriately accessed, collected, used or disclosed.”⁵ Several attempts have been made to add a mandatory breach notification to PIPEDA, with the most recent amendment failing to pass in January 2014.⁶

Despite offering protection for personal information, employment-related information is exempted from the definition of personal information federally, with the exception of federally-regulated sectors.⁷ Information that relates to an employee’s position or that is collected, used and shared within a business or professional context is not considered to be personal information under the federal Act and does not, therefore, benefit from the protections granted by the Act.⁸

While the distinction between personal information and employment-related information is not always clear, employment-related information is generally considered to be any information an organization reasonably requires about an employee or a potential employee for the purposes of establishing, managing or terminating an employment relationship. It is also important to note that while “personal information may be personal employee information in one situation; this does not mean that the same piece of personal information is personal employee information in all situations. The information will be personal employee information only when it is reasonably required for the employment relationship.”⁹

This lack of protection for the personal information of employees has been addressed through provincial legislation in Alberta, British Columbia, Quebec and Manitoba. Alberta was the first province to establish provincial legislation, followed soon after by British Columbia, Quebec and most recently Manitoba.

³ Ibid.,

⁴ Canadian Internet Policy and Public Interest Clinic. Workplace Privacy. 2007. 24 03 2014 <https://www.cippic.ca/en/FAQ/workplace_privacy>.

⁵ Office of the Privacy Commissioner of Canada. Key Steps for Organizations in Responding to Privacy Breaches. 2007. 24 03 2014 <http://www.priv.gc.ca/information/guide/2007/g1_070801_02_e.asp>.

⁶ Parliament of Canada. LEGISinfo: Private Member's Bill C-475. 16 10 2013. 14 03 2014 <<http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?billId=6251848&Mode=1&Language=E>>.

⁷ Office of the Privacy Commissioner of Canada. Application of the Personal Information Protection and Electronic Documents Act to Employee Records. 18 05 2004. 14 03 2014 <http://www.priv.gc.ca/resource/fs-fi/02_05_d_18_e.ASP>.

⁸ Canadian Internet Policy and Public Interest Clinic. Workplace Privacy. 2007. 24 03 2014 <https://www.cippic.ca/en/FAQ/workplace_privacy>.

⁹ Personal Employee Information: Personal Information Protection Act. May 2010. 20 03 2014 <<http://servicealberta.ca/pipa/documents/InfoSheet5.pdf>>.

Current Situation

Provincial Comparison

Alberta's legislation is called the *Personal Information Privacy Act* (PIPA) and British Columbia's is called the *Personal Information Protection Act*. Contrary to the treatment of general personal information, in an employee-employer relationship the Alberta PIPA and B.C. PIPA permit an employer to collect, use and disclose personal information concerning an employee without consent for the reasonable purposes of establishing, managing or terminating the employment relationship.¹⁰

While significantly similar, there are a couple of key differences between the Alberta and British Columbia legislation. First, B.C.'s PIPA does not contain a mandatory privacy breach notification for the private sector. B.C.'s Act however, while subject to certain exceptions, incorporates a notification requirement; any person whose information has been disclosed must be notified that the business transaction has taken place and that their personal information has been disclosed.¹¹

Another difference between the two pieces of legislation relates to the application of the Acts. The B.C. Act applies in the same way to all organizations that are subject to it, whereas Alberta's *PIPA* Act has some exceptions. These exceptions include: a certain class of non-profit organizations (the *PIPA* still applies to their commercial activities), additionally the Act enables professional regulatory organizations to follow an approved privacy code in place of certain sections.¹²

Manitoba's *Personal Information Protection and Identity Theft Prevention Act* (PIPIPTA) is almost identical to Alberta's PIPA (2009 version), but the key differences are that the Alberta legislation takes a different approach on breach notification and on the role of a Privacy Commissioner.¹³ Alberta's *PIPA* requires notification be given to the Alberta Information and Privacy Commissioner in instances where a reasonable person would consider that a "real risk of significant harm to an individual exists," and the Privacy Commissioner makes the decisions as to whether the organization is required to notify individuals of the breach.¹⁴ Conversely, the Manitoba breach notification requirement applies in all instances except where the company "is satisfied that it is not reasonably possible for personal information to be used unlawfully or if a law enforcement agency is conducting an investigation of the breach and instructs an organization not to disclose."¹⁵ PIPITPA does not have a harm threshold and initial legal

¹⁰ Canadian Bar Association. Privacy law guidelines for law firms in Alberta. 18 03 2014 <www.cba.org/alberta/main/doc/PrivacyLawGuidelines.doc>.

¹¹ Hung, Roland and Andrea Gray. "Personal information and privacy issues in business transactions: part 1." 26 09 2013. McCarthy Tétrault LLP. 10 03 2014 <<http://www.lexology.com/library/detail.aspx?g=4ec5785e-5d70-43ca-a6b4-6d20fd07ae3d>>.

¹² Office of the Privacy Commissioner of Canada. Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia's Personal Information Protection Acts. 05 11 2004. 07 03 2014 <http://www.priv.gc.ca/resource/fs-fi/02_05_d_26_e.asp>.

¹³ Glover, Daniel G.C., Roland Hung and Shannel Rajan. Manitoba Joins the Ranks of Other Provinces in Enacting its own Private Sector Privacy Legislation. 04 10 2013. 14 03 2014 <http://www.mccarthy.ca/article_detail.aspx?id=6467>.

¹⁴ *Ibid.*,

¹⁵ Davis LLP. Manitoba Passes Private Sector Privacy Legislation. 05 09 2013. 10 03 2014 <<http://www.davis.ca/en/publication/manitoba-passes-privacy-information-protection-and-identity-theft-prevention-act/>>.

opinions seem to suggest that this could mean all breaches can trigger notification.¹⁶ Further, Manitoba organizations must report the breach directly to the individual as opposed to the regulator.¹⁷

Quebec's private-sector privacy legislation, an Act respecting the protection of personal information in the private sector (*Quebec Privacy Act*) differs quite significantly from other private sector privacy laws in Canada. The Quebec Act is most closely similar to the PIPEDA, but there are important differences in the details. The *Quebec Privacy Act* applies to all private-sector organizations with respect to the collection, use and disclosure of personal information (not just with respect to commercial activities) and also to employee information. It also applies to private-sector collection, use and disclosure of personal health information."¹⁸

With regard to the specifics of the legislation, anecdotal evidence from other Chambers of Commerce's indicates that private sector privacy legislation has a low impact on the day-to-day operations of businesses after the initial phase-in period. In other regions, successful compliance, which includes the development of appropriate disclaimers, consent processes, and information management practices, has been contingent on the provision of provincial resources to ensure education and awareness of consequences.

Supreme Court Ruling

In November 2013, the Supreme Court of Canada struck down Alberta's PIPA. After reviewing a case focused on freedom of political expression which involved a union that took photographs and video of people crossing a picket line during a strike in 2006, the court decided that the collective right to freedom of expression in a lawful strike situation trumps an individual's right to control their information in a public setting.

The specific issues identified by the court with PIPA were:

- a) It covers all personal information, and provides no functional definition of that term.
- b) It contains no general exception for information that is personal, but not at all private.
- c) The definition of "publicly available information" is artificially narrow.
- d) There is no general exemption for information collected and used for free expression.
- e) There is no exemption allowing organizations to reasonably use personal information that is reasonably required in the legitimate operation of their businesses.¹⁹

¹⁶ Glover, Daniel G.C., Roland Hung and Shannel Rajan. Manitoba Joins the Ranks of Other Provinces in Enacting its Own Private Sector Privacy Legislation. 04 10 2013. 14 03 2014 <<http://www.canadiantechlawblog.com/2013/10/04/manitoba-joins-the-ranks-of-other-provinces-in-enacting-its-own-private-sector-privacy-legislation/>>.

¹⁷ Broad, Paul E. and Daniel J. Michaluk. New Privacy Legislation in Manitoba. 30 09 2013. 10 03 2014 <http://www.hicksmorley.com/index.php?name=News&file=article&sid=1961&catid=6>.

¹⁸ Gowlings. Doing Business in Canada: Privacy Law. 09 2012. 08 03 2014

<http://www.smithlyons.ca/knowledgeCentre/publicationPDFs/Gowlings_Doing_Business_in_Canada_Privacy_Law.pdf>.

¹⁹ Sookman, Barry, Daniel G.C. Glover and Roland Hung. "SCC Strikes Down Alberta Privacy Legislation on Speech Grounds." 15 11 2013. snIP/ITs. 26 03 2014 <<http://www.canadiantechlawblog.com/2013/11/15/scc-strikes-down-alberta-privacy-legislation-on-speech-grounds/>>.

Due to these considerations, the Supreme Court held that PIPA was overly broad and the infringement on freedom of expression was not saved by Section 1 of the Charter, as the infringement was not a reasonable limit prescribed by law.²⁰ As a result, the whole of PIPA was declared invalid. This declaration was suspended for a period of 12 months however, to give the government time to decide how best to make the legislation constitutional.²¹

The Government of Alberta has indicated their intent to pass amendments to PIPA in the fall 2014 session to comply with the Supreme Court's ruling.²² These amendments will be focused on the specifics of the Supreme Court's case, relating to unions and picketing. There will not be a general review of the legislation because a complete review would likely not allow the government to adhere to the Court's timeline. The Alberta Privacy Commissioner has recommended that the government include in its amendments a date on which a comprehensive review of its privacy legislation will begin.²³

The provisions in the British Columbia, Manitoba, and Quebec legislation in regard to the definition of personal information, the broad application of the Act, and the limited exemptions, are substantively similar to the Alberta PIPA, and therefore the Supreme Court's decision will impact the interpretation of those Acts.²⁴ As such, amendments are likely forthcoming. The federal PIPEDA will likely also be impacted by the decision. Although PIPEDA only applies to activities undertaken for commercial purposes, it still uses a broad definition of personal information and a limited definition of publicly available information, which does not include information collected in a public place.²⁵

Conclusion

The Saskatchewan Chamber of Commerce appreciates the value of the ongoing development of clear privacy legislation. Adapting information protection for the digital age is the responsibility of the business community and one that the province cannot afford to fall significantly behind on. Nevertheless, due to the Supreme Court's decision, duplicating the approach of other jurisdictions and copying Alberta's PISA are no longer a viable option. Two approaches are therefore presented for Saskatchewan; the province can either continue to defer to the federal government for the privacy protection offered to individuals through PIPEDA, or the Government of Saskatchewan can develop a unique approach to private sector privacy legislation

²⁰ Glover, Daniel G.C., Roland Hung and Shannel Rajan. Manitoba Joins the Ranks of Other Provinces in Enacting its own Private Sector Privacy Legislation. 04 10 2013. 14 03 2014 <http://www.mccarthy.ca/article_detail.aspx?id=6467>.

²¹ Thurston, Colin J. "Alberta Privacy Legislation Found Unconstitutional by SCC." 27 11 2013. Carters Professional Corporation. 07 03 2014 <<http://www.carters.ca/pub/bulletin/charity/2013/chylb326.htm>>.

²² Cotter, John. "Alberta to amend privacy law this fall to comply with Supreme Court." 29 01 2014. Calgary Herald. 26 03 2014 <<http://www.calgaryherald.com/news/national/Alberta+amend+main+privacy+this+fall+comply+with+Supreme/9444780/story.html>>.

²³ Cotter, John. "Alberta to amend its main privacy law in fall." 29 01 2014. MetroNews. 26 03 2014 <<http://metronews.ca/news/canada/925296/alberta-to-amend-its-main-privacy-law-in-fall/>>.

²⁴ Morgan, Charles and Cristel Chabot-Lapointe. "2013 Technology Law Year in Review." 31 01 2014. snIP/ITs. 26 03 2014 <<http://www.canadiantechlawblog.com/2014/01/31/2013-technology-law-year-in-review/>>.

²⁵ Sookman, Barry, Daniel G.C. Glover and Roland Hung. "SCC Strikes Down Alberta Privacy Legislation on Speech Grounds." 15 11 2013. snIP/ITs. 26 03 2014 <<http://www.canadiantechlawblog.com/2013/11/15/scc-strikes-down-alberta-privacy-legislation-on-speech-grounds/>>.

and be the first jurisdiction to fully address the Supreme Court of Canada's concerns. At the present time the Saskatchewan Chamber of Commerce believes the government of Saskatchewan should refrain from establishing a legislative framework in regard to private sector privacy legislation until the legal and constitutional issues surrounding the existing private sector privacy legislation in Canada have been successfully resolved.

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