

QUEBEC'S NEW PRIVACY LAW COVERING PRIVATE SECTOR OPERATIONAL IN 1994

Quebec leads North America in becoming the first jurisdiction to adopt and implement a privacy law covering both the public and private sectors. The Protection of Personal Information Act was adopted unanimously by Quebec's National Assembly in June 1993 and enters into force on 1st January, 1994. Paul-André Comeau, President of Quebec's Commission d'Accès à l'information du Québec, explains.

Although it did not make the headlines, Quebec has taken a historical step. None of the remaining nine Canadian provinces, nor the 50 states of the USA has passed such legislation. Why was such a bill passed, what does it contain, and what might be the effect of the bill on the daily life of the average Quebecer and on business?

The Story behind Bill 68

Some observers were stunned when they heard, in December 1992, that Bill 68 on the Protection of Personal Information had been tabled in Quebec's National Assembly (PL&B October '91 p.21, October '92 p.23). Another strange move by la Belle Province, some dared to say. Others, more deferential, simply asked why the Quebec government had to tackle this question. Of course, there were mixed reactions. Consumer representatives stressed the fact that the bill did not contain enough compulsory measures. The business community paid lip service to the nice principles the bill was built upon, but pressed the government to get rid of it.

This bill was first submitted to the National Assembly in December 1992. In February 1993, the Assembly conducted public hearings lasting more than three weeks. The Act itself has been greatly improved thanks to these hearings and to the role played by both consumer representatives and a large and well-organised business lobby. What has emerged is

a fairly good law which draws its principles from the OECD guidelines and legislation enacted in other countries.

Revolution in protection of personal data - the last ten years

Two sets of events led to the adoption of the new legislation. First, the enactment by the National Assembly, in December 1991, of a new Civil Code. Second, the largely positive lessons drawn from the implementation, ten years ago, of an Act Respecting Access to Documents held by Public Bodies, and Protecting Personal Information.

Quebec adopted this piece of legislation almost at the same time as the Canadian federal government voted similar legislation. But, with a single act covering freedom of information and the protection of personal data, the Quebec move was, at that time, considered unusual, if not bizarre. In addition, one single agency - the Access to Information Commission - was appointed to monitor and implement the Act itself. Over the years, things have changed. Ontario, British Columbia, Saskatchewan and, more recently, Alberta have followed a similar path.

This Act proved to be fairly successful. After ten years, we may say without any doubt that we have witnessed a kind of revolution as far as the protection of personal data is concerned. This is one of the main conclusions the Commission arrived at in its second extensive report - tabled in the National Assembly, in December 1992. Such a report must be drafted every five years

Privacy has no frontiers

Privacy is now firmly entrenched in the daily workings of the whole public sector. The experience gained by the Commission d'Accès à l'Information du Québec underlines a very simple fact: there is no such thing as a frontier, as far as privacy is concerned, between private and public sectors.

For example, last autumn, the Commission sent a team of investigators to Montreal. A television crew was shooting some episodes of

a very popular series called ...SCOOP. A lot of files had been gathered in order to make the news room of the fictional daily L'Express look like a real one. Many of these files were full of very sensitive information, like cases of incest. We were able to sort out five large boxes of this highly sensitive material, but we were unable to do anything at all about some 20 or 25 other boxes also full of personal data - such as medical claims and even records.

Every citizen has the right, both in theory and in practice, to consult his own medical record when it is held by a hospital or any other public care centre. This results from the act passed ten years ago. But, at times, that same person will have problems consulting his own file if and when it is held by a doctor or a surgeon in his private office. What is the rationale behind this fact? If you are able to develop a strong and coherent argument along that line, please let me know!

The citizen's view - two rules of privacy?

A few years ago, the government agreed that the Société de l'Assurance Automobile - Quebec's agency in charge of both licensing and insuring vehicles - could pass along personal files to the investigative branch of the Canadian Underwriters Association. When held by the public agency, these files were protected by the law. Upon their transfer to a private company, the same personal data would lose that protection.

Hence the questions, which remained unanswered:

1. Is privacy only addressed by the public sector?
2. Is privacy a basic right, guaranteed by Quebec's Bill of Rights?
3. Does privacy, as applied to personal data, stop short of being a fundamental right when this data is held outside the public sector?
4. Could there be two different kinds of privacy?

Over the years, the Commission's staff has developed real expertise, giving information

and advice, receiving complaints and grievances. Most citizens do not care whether their problem is with the public sector or not. Their main goal is to find a remedy for what they feel is an intrusion into their privacy or a denial of their fundamental rights. We have to consider privacy as a whole. There cannot be two different rights or sets of rules governing the protection of personal data.

The new Civil Code

Starting January 1, 1994, the new Civil Code allows any Quebecer to obtain access to his or her file, and to have personal data corrected, if necessary, whether this file is held by a public body or a private enterprise.

In order to get acquainted with this new Civil Code, all Quebec lawyers and judges have to attend 90 hours of lectures. Among the new things they have to familiarise themselves with are four fundamental paragraphs about the larger issue of privacy. Under the new Civil Code:

- Every citizen has the right to know the kind of personal information which has been gathered about him or herself,
- All Quebecers are also entitled to have access to the file containing that piece of information and even to have this information corrected if there is an error,
- The setting up of a file on another person is subject to one important condition: there must be a serious and legitimate reason for doing so,
- The exchange of personal data may not take place without the consent of the person concerned.

An overview of the Protection of Personal Information Act

Should the citizen ask the court to protect his rights? This means the usual system of courts or tribunals, a long and expensive process. The new law has one main goal - to give a clear and precise answer to a very simple question: how will a decision (or the lack of a decision) in this field be reviewed?

Ten years ago, when the Bill on Freedom of Information and Protection of Personal Information in the Public Sector was enacted, the National Assembly created the Commission d'Accès à l'Information - Quebec's Access to Information Commission - a quasi-judicial tribunal. Over the years, the Commission has proved to be an effective and inexpensive tool for reviewing, for instance, decisions not to grant access to personal files. The new law will follow a similar path. If and when a person feels he has been denied a right granted under the new Civil Code, he will be able to ask this same Commission to intervene and, if necessary, to review the case. This type of administrative justice will be less cumbersome, less expensive and faster.

The scope of the new law

The scope of the act is quite wide and covers: all pieces of personal information collected, held, used or distributed by another person. Personal information is quite easy to identify: any list of names and particulars drawn either from material already gathered or from individuals themselves. Examples are credit files, employee's files or lists compiled for and used by direct marketing companies. Accordingly, the wording of the Act addresses the various formats used to store this personal information, regardless of whether they are written, graphic, taped, filmed, or, of course, computerised.

Collection of data based on consent

The collection of personal data is subject to a general and important principle: this information shall be gathered from, and with the consent of, the person concerned. Accordingly, this data shall not be communicated, sold, leased or traded to anybody else without the consent of that person. The underlying principle is that he or she is the owner of this data. Not to respect this self-evident principle amounts to a denial of the very concept of privacy. Of course, the new act identifies reasons and circumstances under which this consent can be waived.

This Act applies, in principle, to anyone who is gathering personal information about other people. The scope is very broad indeed. There are two main exceptions:

1. It is not intended to restrict such a practice when carried out for personal reasons. A list of addresses and telephone numbers, drawn up for personal or family purposes, shall remain personal.
2. The object of the Act is ~~not by any means to restrict freedom of information, namely, the freedom of the press.~~ This second and very important exception is clearly spelled out in the very first paragraph of the act.

The Act uses the commercial notion of enterprise to specify to whom it applies. According to the Civil Code: "the carrying on by one or more persons of an organised economic activity, whether or not it is commercial in nature, consisting of producing, administering or selling property, or providing a service, constitutes the carrying on of an enterprise." Even if I am not a lawyer, I gather this is a very comprehensive definition of what an enterprise is.

Registration for personal information agents and direct marketing only

~~The Act singles out two specific types of enterprises: personal information agents and direct marketing companies.~~ The vast majority of these personal information agents are credit bureaux and other types of similar businesses. These credit bureaux ~~will have to register with the Commission.~~ This is indeed the only case of compulsory registration.

In that respect, it is much less cumbersome than most of the European laws which deal with data protection. It also goes along with one of the main recommendations of the Swedish commission, which submitted its report to Sweden's legislature in the first half of 1993.

Legal procedures available if necessary

When and if a disagreement occurs over any of the rights granted by the Civil Code and spelled out in the Act, a person will be able to submit his case to the Commission. It will review the problem according to the procedures set up over the years, with due respect to the fundamental principle of "the right to a fair hearing." ~~Decisions rendered in writing by the Commission, shall be binding, as is the case now, exactly like a judgement of the Superior Court. Any such decision may be the subject of an appeal to the Court of Quebec, with permission from a judge of that court.~~

But the act aims at avoiding these legal procedures. That is why the Commission, upon receiving a complaint about a disagreement, will be able to entrust it to a person it designates to act as a mediator and seek an agreement between the parties. This is the clearest sign given by the legislators that this process is to be kept within sensible bounds.

Quebec aims to be adequate for transborder data flow from EC

Finally, the Act addresses the issue of transborder data flow in a very subtle way. This clause has been drafted quite cautiously in order not to infringe the federal sphere of jurisdiction as far as foreign policy is concerned. But the overall result is, I think, in accordance with the proposed EC directive. In that respect, ~~Quebec is, for the time being, the only political entity in North America to offer adequate or equivalent protection to personal data.~~

The main results for business

This Act, as far as privacy is concerned, will put the final touch to the process launched by the National Assembly when, back in 1975, it enacted Quebec's Bill of Rights. This is an achievement in itself, which does not mean that the goal of guaranteeing a citizen's privacy will never require any other legislative measures. It could lead to the modification, at least to a certain degree, of the culture of an enterprise,

and even to changes in some of the enterprise's commercial practices.

But according to the points made by the main business lobbies during the hearings by the National Assembly last February, enactment of this bill will not mean a dramatic departure from current practices. Many firms have and comply with their own code of conduct, which deals, at least partly, with privacy. The existence of these codes means that the burden on business is not as heavy as it might at first appear. The role of the Commission will not be that important: most of the disagreements between an enterprise and a citizen will be settled under the former's code of ethics or conduct.

The Commission receives complaints every day from various parts of the province. A large number of these complaints are related to medical records, and files held by credit bureaux. The representatives of both the major credit bureaux and the medical profession have put their case strongly: they say that they can solve these problems by themselves.

Quebec and the EC Directive

Quebec's enterprises under this new Act will have no problems exchanging personal data with companies in the twelve countries of the EC, under the directive currently being considered in Brussels.

Privacy an essential element of democracy

The most important outcome of this new Act will be achieved when privacy will be enshrined not only in a legal text, but also in the minds of the people. Privacy is an important element of a developed civil or democratic culture. As far as the protection of personal data is concerned, this is the ultimate goal of the new step taken by Quebec's National Assembly.

This report is based on a presentation in June 1993 at the Privacy Laws & Business 6th Annual Conference by M. Paul-André Comeau, President of Quebec's Commission d'Accès à l'information du Québec.