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The Law of Privacy in Canada

Barbara A. McIsaac, Rick Shields, Kris Klein (Thomson/Carswell, 2004 (Student Edition))

John D. Gregory†

Developments in technology over the past thirty or forty years have facilitated the collection and collation of information about people in our society, permitting the assembly of large databases containing remarkably detailed information about most of us. The same period has seen a related growth in concerns about protecting our privacy in the face of this technology. These concerns have led to the construction of legal rules about the collection, use, and disclosure of personal information.

The legal remedies were sought first of all in innovative applications of existing laws, notably at common law in the provinces where that law applied. These attempts were generally unsatisfactory, though there were occasional successes. More certain answers were prescribed by legislation, both by inclusion in broader texts, notably charters of rights (first in Quebec, later across Canada), and by specific statutes about privacy.

These statutes started by limiting the rights of governments to deal in personal information, since the early concerns were with the powers of Big Brother. Government collects a lot of information under compulsion of law, and it made sense to restrict its activities by a countervailing law.

Later, legislation turned its focus to the private sector, as technology combined with the increasing scale of businesses and more sophisticated marketing principles to make it advantageous for commerce, as well as to amass detailed information about customers, potential customers, or former customers. Some of this legislation focused on particularly sensitive information — notably about personal health — or on sectors that affected the transfer of information, such as telecommunications. More common today is broader-based private-sector pri-

vacancy legislation, covering all spheres of activity, sometimes where commercial motives are at play, sometimes across the board.

In short, the legal picture of privacy rights and restrictions has become crowded and complex in the past two or three decades. There are a lot of laws covering a lot of activities by a lot of people, and they can be hard to keep straight. This is true even though most of the laws derive their basic principles from “fair information practices” set out by the Organization for Economic Co-operation and Development (OECD) in 1980.

To help lawyers advise their clients on their rights and obligations in this complex and novel field, the various legal publishers have offered an array of guides and textbooks analyzing the law of privacy. Thomson/Carswell turned for its book to the national law firm of McCarthy Tétrault. Three McCarthy lawyers (Barbara McIsaac, Rick Shields, and Kris Klein) are listed as authors of *The Law of Privacy in Canada*, and several others have contributed significant parts of the text, and they have done a creditable job in pulling it all together. It seems to be the only thorough and up-to-date analysis of privacy rules for both the public and the private sector in Canada.

The Law of Privacy in Canada begins with an overview of the notion of privacy itself, and why people care about it. The authors note that different uses of personal information are seen to have different degrees of legitimacy, and the law tries to maintain core values of dignity and integrity of the individual while recognizing the need for flexibility in prescribing who can do what with personal information.

The book then turns to a description of some of the technologies that cause concerns about privacy, and as a kind of antidote, some of the technologies that can pro-

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tect or enhance privacy. (This part of the text is due to Barry Sookman.) The text reports the common conclusion of many countries, including Canada (but only partly the United States) that legal rules were needed to handle these concerns. It offers some thoughts on the constitutional challenges of regulating activities affecting privacy in Canada, where “privacy” is not mentioned in the Constitution. Defining the borders of the shared jurisdiction over these activities is not yet complete; the authors admit that the harder questions will need to find judicial answers.

From these “preliminaries”, the book proceeds to a more conventional and detailed analysis of legal rules affecting privacy. It does so in five main parts. It leads off with the “traditional” legal regimes — appropriately giving primacy to constitutional law, notably through the *Canadian Charter of Rights and Freedoms*, then turning to criminal law, tort, and employment law. It then describes the rules that protect privacy in the public sector, followed by an analysis of private-sector legislation. This it follows with a description of international regimes on privacy. It concludes with a review of sectoral legislation in telecommunications in Canada.

All this it does competently and thoroughly. Despite the detail and the case-by-case description, the authors make an effort to maintain perspective on where the law is trying to go. Given how rapidly changes occur in this field, the need to rely on principle, not just black-letter text, is very clear. Indeed, there are so many questions that simply do not have answers, the authors are inevitably thrown back on hypothesis from time to time.

The book appears in a professional edition as a loose-leaf text, subject to regular updates. This is clearly a benefit in this field. The reviewer worked with the “student edition”, a soft-bound volume representing the state of the pages at the time of publication (the preface is dated June 2004), without the statutes themselves that are part of the loose-leaf version.

One of the peculiarities of loose-leaf publishing is that one brings up to date the text where the developments occur, notably in the case law and the statutes. However, one more rarely has the opportunity to review other parts of the text that remain generally valid. This can lead to striking omissions, such as in the description of the technology of search engines, which fails to mention Google, or to suspense where none is due, such as in statements that inquiries have begun or that reports have been commissioned (now years ago), which contain no follow-ups on the matters. It might be advisable for authors of texts produced in this format to avoid the term “recent”. When a book purporting to be issued in 2004 — or to be kept current regularly — uses “recent” to refer to events of 1998 or 1999 — in this field at least — the reader may find the term puzzling. (The original version of the book appeared in 2000.) That said, both

the student edition and the loose-leaf version do have major developments up to date, notably the British Columbia and Alberta privacy legislation.

The reader looking for detail will not be disappointed. The authors leave few if any stones unturned in going through all the varied applications of rules for specific cases. For example, the description of constitutional protections for privacy in Chapter 2 sets out the arguments for finding protection in section 7 of the Charter on the protection of life and liberty — still in early development — then go through the various accepted applications of section 8 on unreasonable search: various kinds of business documents, border searches, school searches, investigations of public servants, searches of visitors to prisons, and emergency powers.

All of these, though, are set in the context of what might constitute a “reasonable expectation of privacy”. The text describes how this concept arose in the early case law and how it has been used since. As noted earlier, the black-letter is given an historical and principled context that makes it easier to extrapolate from cases not yet subject to jurisprudence.

Likewise, the description of the public-sector privacy rules in Chapter 3 is principled and detailed. It deals with each jurisdiction in turn, starting with the federal government and going west to east through all the provinces. (It has the territories before Prince Edward Island, because PEI’s privacy statute is more recent than the organization of the contents of the book!) The level of detail depends largely on the law available. As a result, the longest part of the public-sector chapter deals with Ontario, which has had an active Commission dealing with the government of the most populous province. These descriptions deal with the statutes governing municipal privacy as well as provincial, if there is a difference. It must be said that Quebec gets a fairly short treatment, despite its being what the text calls “a legislative pioneer” in this field. For the Quebec chapter, the authors turn the pen over to colleagues who practise there. For the others, there is no express change of author, though no doubt the remarks were checked for accuracy.

The private-sector chapter focuses largely on the federal statute, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), whose extension to all commercial activity in the country on January 1, 2004 has done so much to raise the consciousness of lawyers and their clients to the privacy issue. Much of the discussion is based on an analysis of the text of the statute here, rather than on rulings of commissioners and courts, as with the public-sector chapter. There has been little or no time for case law. The federal Privacy Commissioner has been actively publishing guides and comments, though, and now has a couple of years of experience in

applying the Act to federally regulated operations. All of these sources are referred to in the text.

The three other provinces with private-sector laws (British Columbia, Alberta, and Quebec) each get briefer attention. The western provinces have of course very little experience in practice, though what there is is noted. The case of Quebec is different, since its law has had a decade in operation. As a result, one finds judicial interpretation as well as statutory analysis at work for that province.

The federal statute will make room in Quebec for the operation of its provincial equivalent, for matters within the province, in light of the declaration that the latter is “substantially similar” to the former. (The parallel declaration for the western statutes came after the publication of this text.) The authors note but do not speculate at length on the practical inter-operation of the two statutes under this “harmonization” provision. They do note that it is subject to litigation on the initiative of Quebec.

The international chapter deals with the European Union Directive that had so much to do with getting the topic on the Canadian agenda. It then gives a brief overview of what has become of the Directive in the EU member states, and gives the main contact point for further information. It concludes with an examination of the law in the United States, pointing out the lack of comprehensive national regulation of privacy, but noting the impact of some sectoral statutes (children’s information, financial institutions’ and health providers’ use of personal information) and the commercial regulatory powers of the Federal Trade Commission. It also goes through the headings of the “Safe Harbor” agreement between the EU and the U.S. in a way that will be of

interest to multinational corporations or even to possibly envious Canadian corporations trying to figure out the full regulatory regime here.

The book concludes with a “sectoral rules” chapter that is confined to telecom regulation, for the moment. One might also have expected a description of provincial legislation on health information, which has been in place in the western provinces for some years and which has just come into force in Ontario. At present, the term “health” does not appear in the index. No doubt that will change over time.

The Law of Privacy in Canada strikes a constructive balance between discussion of theory or principle and an examination of the law in action. Indeed, its combination of the levels of discussion is unmatched among the current offerings in the field. It is also relatively plainly written, and its organizational structure is both logical and very clearly stated, so that readers do not lose their way.

While one wonders if student readers of the “student edition” would find the whole volume overwhelming, they would have to refer to specialist reports or publications of the privacy commissioners to get the thoroughness of the overview found here, and then they would have to go elsewhere for the application material. The practitioner who seldom reads a whole book, but rather just the parts useful for the client at hand, will certainly find it a rewarding reference, though less focused on a section-by-section analysis of the statutes than some annotation services. Both student and practitioner will get a full review of how complex this novel field of law has become in what — for the law — is a very short time.