

An Act Respecting the Protection of Personal Information in the Private Sector : Opening the Door on Privacy?

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*The ability to keep things secret is an essential power that all human beings possess in order to protect themselves. The process of secretly evaluating our life experiences is the way we learn about ourselves. It ultimately helps us form our self-identity. To have no capacity for secrecy is to be completely vulnerable to the way others see us.*¹

This quotation illustrates just how fundamental privacy is to our being. Legislation in this area will have a powerful impact on our lives : it is like opening a new door.

As most of you probably already know, Quebec brought into force, at the same time as its new Civil Code, privacy legislation extending to the private sector.

The term "privacy" legislation is a bit misleading since the *Act respecting the protection of personal information in the private sector*² not only imposes obligations of confidentiality in respect of personal information but creates a positive obligation on the part of a business to give the person concerned access to information held on the person and provides for a right of rectification where that information is erroneous.

It was the first legislation of its type in North America, and was inspired, to a certain extent, by the draft privacy directives of the European Union.

When first tabled, *Bill 68*, as the *Act* was then called, gave rise to a number of protests and representations from various interests groups, including the Canadian Bankers Association. While some amendments were made to the proposed legislation, and in particular a number at the behest of the CBCA which allow for the use and divulgation of personal information for the purpose of preventing, detecting or repressing criminal acts, the legislation as originally tabled, for the most part, remained intact.

To say that this created consternation within the business community would be a bit of an understatement. With some reason, many feared that it would increase the cost of doing business and would unduly restrict their right to use information obtained in the course of dealings with customers in order to cross-sell or offer new products to customers.

Many of you from other provinces may wonder why this Quebec statute should be of any interest to you at all.

1. J. Bradshaw, *Family Secrets*.

2. R.S.Q. c. P-39.1 [hereinafter *Act*].

There are several reasons. First, the legislation applies to all businesses, wherever located, serving customers in Quebec.³ Personal information obtained in Quebec on individuals cannot be sent outside the province unless the safeguards provided by the *Act* are ensured once the information leaves the jurisdiction.⁴

Second, you may wish to glance at the attached recommendations contained in the Report of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities entitled *Privacy: Where Do We Draw the Line?*⁵ which recommends that the Government of Canada enact a declaration of privacy rights to be called the Canadian Charter of Privacy Rights.

Third, and perhaps most important, I would suggest that this legislation is not simply another example of the adage "Québec sait faire", which I hear so often in a disparaging tone from lawyers and business persons outside our province.

Rather, there is an increasing body of evidence, gleaned not only from government studies, but from those of rather large Canadian corporations, which indicates that privacy strikes a raw nerve in many Canadians, and as one study has shown, for reasons one would never suspect.

Consequently, respecting and understanding privacy may just constitute good business.

Before discussing the *Act*, I would like to borrow a page from one such study conducted by the Royal Bank marketing department to illustrate the point.⁶

For some time now, financial institutions have known that Canadians differ significantly from their American neighbours when it comes to discussing money and their financial affairs. Americans tend to be much more open about how much wealth they have than Canadians. This has made the marketing of financial services an interesting challenge in Canada.

3. *Supra* note 2, Art. 1.

4. *Supra* note 2, Art. 17.

5. Report of the House of Commons Standing Committee on Human Rights and the Status of Persons with Disabilities, *Privacy: Where Do We Draw the Line?* (Ottawa: Supply and Services Canada, 1997).

6. I would like to express gratitude to the Royal Bank of Canada for accepting to share the results of this study, and in particular, to Mr. Hugh Oddie, for his insight on the topic of privacy.

In recent years however, these challenges have been brought to the foreground by the transformations taking place in the financial sector.

As is the case with many financial institutions, Royal Bank now constitutes a "financial group" capable of offering not only traditional banking services to its customers but those of a trust company, brokerage house, discount brokerage and some insurance services.

With the consolidation of these financial services under one umbrella, the potential for offering a more efficient and comprehensive package of financial advice and products seemed a real opportunity for the bank.

However, the marketing of this concept runs into some hurdles from customers who are reluctant to reveal enough information about themselves to allow the bank to evaluate which products and which advice best suits the needs of a particular customer.

So the bank decided to embark upon a study of the fundamental meaning of privacy under the direction of a team which included not only financial advisors but a psychologist and a social anthropologist.

The findings obtained through the focus groups participating in the study are revealing, and for many, were totally unexpected.

First it was discovered that the origin or source of strong feelings about privacy usually results from a negative childhood experience.

Those most reluctant to reveal facts about themselves and for whom privacy was a strong issue, almost without exception, had experienced as children some form of invasion of their privacy which could be grouped into one of three categories :

1. an invasion of their space : for example, a mother bursting in on her teenage child and finding the child in an intimate moment with a boyfriend or girlfriend;
2. an emotional invasion : for example, a parent finding and reading the child's diary; or most significantly,
3. a physical invasion : experiences of bodily invasion ranged from the seemingly benign experience of childhood hospitalisation (memories of hospital gowns which exposed the body to strangers, or of being poked with needles in embarrassing places) to outright sexual abuse.

It was perhaps the frequency of the mention of sexual abuse which most surprised the blue-suited bankers. While some estimates of childhood sexual abuse in Canada range from a low of 15%, more recent studies, which attempt to use legal definitions of sexual abuse, have put the figure at 50%.

One of the conclusions which can be drawn from this study is that if, for an important segment of the population, the first encounter with privacy is a strong negative invasion, this may explain why many Canadians have strong feelings about privacy : when they perceive that their privacy is invaded they are "hot wired" back to their first experience.

So when one is dealing with privacy the first thing to recognise is that one may elicit an emotional, or seemingly non rational response which is motivated by something other than the immediate incident raising a privacy issue.

This emotional response in a commercial setting may in fact work against the interests of the individual from whom it emanates. Indeed, it is fair to say that the ability of other people to have information on you is not always to your detriment, and often can be of great benefit when put to proper use.

For example, Bell Canada monitors long distance calling patterns. From this information it has developed and uses a program which offers subscribers a 40% discount on calls to most frequently used numbers or regions.

Similarly, organisations which have information on you in a certain context and which possess expertise can refer to you opportunities which they have discovered as a result of their expertise and which they would not otherwise be able to point out if access to your personal information by employees in other divisions or affiliates is restricted by privacy constraints.

Tracking chequing patterns or behaviour in order to recommend products and services which might enhance the way one does business is potentially beneficial to the customer. Why shouldn't a bank be allowed to make referrals to its trust or brokerage subsidiary if client transaction patterns indicate that particular clients would be better served by dealing with one of the subsidiaries?

Given what recent studies have shown however, the challenge is to help customers overcome their emotional responses to privacy and to begin to distinguish between those circumstances in which access to their personal information is beneficial, and those where it is not.

Privacy legislation should be framed so that organisations which hold information on their clients can use the information to prosper and grow with their clients while at the same time protecting the rights of these clients against improper use of such information.

Many have questioned whether Quebec privacy legislation strikes the proper balance between these two competing interests. Some feel the legislation is deficient. For example, it fails to recognize that there are circumstances where personal information may be used by businesses for a legitimate purpose even though that purpose is not the one for which the information was originally gathered.

To understand the debate, it is necessary to understand the manner in which the *Act* functions. In this regard there are three key concepts :

1. the definition of personal information;
2. the notion of the object of a file; and
3. the definition of consent.

I. THE PRIMARY TARGET : PERSONAL INFORMATION

The main aim of the *Act* is to protect and ensure the confidentiality of "personal information". The expression "personal information" is defined as any information which relates to a *natural* person and allows that person to be identified.⁷ Such information may include the name, sex, address, employer and social insurance number of the person concerned. Although the *Act* does not apply to information on companies, it is to be noted that articles 35 to 41 of the *Civil Code of Quebec* may be of more general application given that article 303 C.C.Q. confers, to the extent applicable, civil rights upon a corporation.⁸

II. THE OBJECT OF THE FILE IS A KEY MEANS OF CONTROL

The *Act* requires that a person have a legitimate and serious reason for establishing a file containing personal information. The *Act* further requires that the "object" of any file on a natural person containing personal information be clearly identified.

The definition and inscription of the object of a file is no mere formality. In fact, the wording of the object of a file is extremely important, since the *Act* provides that only personal information which is *necessary* for the object of the file may be recorded,⁹ thus prohibiting the use of information *that is merely relevant* to the object, unless the customer consents to the use of such information.¹⁰

Once the object of the file has been achieved, the information contained in the file may only be used with the consent of the person concerned and subject to the time

7. *Supra* note 2, Art. 2.

8. See also *Jardins du Mont Inc. v. Provigo Distribution Inc.* (1994), J.E. 94-1341 (Sup. Ct.); *3108406 Canada Inc. v. Kem-a-Trix (Lubricants) Inc.* 97BE-414.

9. *Supra* note 2, Art. 5.

10. Compare the wording of Art. 5 of the *Act* with the wording of Art. 37 of the *Civil Code of Quebec*. While Art. 37 refers to personal information which is "pertinent" to the object of the file, Art. 5 of the *Act* is arguably narrower since it refers to personal information "necessary" to the object of the file.

limit prescribed by law or a retention schedule which may be established by government regulation.¹¹

Absent such consent, it would not be possible to use the information contained in a file whose object is "car loan" for a subsequent mortgage loan application nor would it be possible for a bank manager to use information in customer credit files to introduce customers with a certain profile to financial products offered by a brokerage or trust subsidiary.

This constraint also makes it difficult for a business, in some circumstances, to study, over-time, behavioural patterns of a customer which may help develop new products or services or assist in determining the best package of services or products to be offered to the customer.

By limiting information to what information is "necessary" for the object of the file as opposed to what is relevant or useful, the *Act* fails to strike a healthy balance between the legitimate interest of a business to offer new or better products or services and the equally legitimate interest of the customer's right to privacy.

One would hope that the *Act* would be revised to permit the use of personal information for "related purposes" where it is in the interest of the person concerned, without the necessity of obtaining the latter's consent.

III. CONSENT : PROTECTING THE CONFIDENTIALITY OF PERSONAL INFORMATION

As seen above, the *Act* prohibits the use of personal information for purposes not necessary to the object of the file, except with the consent of the person concerned. It also prohibits communication of personal information to third parties without the consent of the person concerned.¹²

Consent to the communication or use of personal information must be manifest, free and enlightened and must be given for specific purposes, failing which the consent is without effect.¹³ Although it is not necessary for such consent to be given in writing, it must be *specific*.

Therefore, it is not permissible simply to rely on a standard form worded in general terms and signed at the outset of a transaction authorising an enterprise¹⁴ or

11. *Supra* note 2, Art. 12.

12. *Supra* note 2, Art. 13.

13. *Supra* note 2, Art. 14.

14. Definition of "enterprise" in Art. 1525 C.C.Q. : "The carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service, constitutes the carrying on of an enterprise".

business to communicate the information contained in the file to affiliated companies or to personal information agencies. This does necessarily mean that a standard form could not be prepared in such a way as to cover specific cases where the customer consents to the communication of personal information to third parties. Rather, it means that care must be taken to ensure that those cases are *specifically* described and that the information is communicated only in those circumstances for which a valid (and therefore specific) consent has been obtained.

While one can understand the abuses at which this provision of the *Act* is levelled, customers who regularly refuse consent to the sharing of their personal information with credit bureaus should understand the consequences of their refusal. This will often make access to credit more difficult, or at the very least slow down the process of approval.

The prohibition against communicating personal information to third persons without the customer's express consent suffers several exceptions *including* :¹⁵

1. communication of information to one's attorney;
2. communication of information to persons responsible for prevention, detection or repression of crime or statutory offences or to a detective or security agency;
3. communication to a public body having the power to compel communication of the information, such as the courts;
4. communication to a person to whom it is necessary to communicate the information under the law or a collective agreement and who requires it in the performance of his or her duties;
5. communication to persons who are authorized by law to recover debts on behalf of others (collection agencies);
6. communication to a third party of a nominative list for purposes of commercial or philanthropic prospection, provided the persons concerned are given a valid opportunity to refuse use for such purposes of information concerning them and provided the communication of such information does not constitute an invasion of the privacy of the persons concerned;¹⁶ and
7. communication of information by one enterprise to another where there are reasonable grounds for believing that the person concerned has committed or is about to commit a crime or statutory offence against either enterprise.

In cases 3, 5 and 6, such communication must be noted in the file. Had it not been for the insertion of the last exception at the express request of the Canadian Bankers'

15. *Supra* note 2, Art. 18.

16. *Supra* note 2, Art. 22.

Association, security officers in financial institutions would have been seriously hampered in their efforts to combat fraud, money-laundering and other similar offences.

The *Act* allows access to information without the consent of the person concerned not only by authorized employees of the enterprise but also by its authorized *mandataries or agents*, if the information is needed for the performance of their duties or the execution of their mandate.¹⁷ However, these mandataries and agents are also subject to the provisions of the *Act* and where information is sent to third parties outside the province, including subcontractors, there is an obligation on the part of the business sending the personal information to ensure they comply with certain basic provisions of the *Act*.¹⁸

Finally, it is worth noting that an enterprise which uses personal information to make decisions in relation to a natural person must take the necessary steps to ensure that the information is accurate at the time of making the decision. This is not an obligation of result but an obligation to take reasonable measures to ensure the accuracy of the information in question.¹⁹

IV. ADVISING THE PERSON CONCERNED OF THE EXISTENCE OF THE FILE

When an enterprise establishes a file on a natural person, it has a duty to inform the person concerned of the object of the file, the use that will be made of the information, the categories of persons within the enterprise who will have access to it and the place where the file will be kept. The person concerned must also be told about rights of access and rectification under the *Act*.²⁰ The application of this provision of the *Act* has given rise to numerous practical difficulties, sometimes leading to the absurd.

Consider the person who fills out a subscription form for the *Maclean's Magazine*. Must *Maclean's* write back to advise the person that it now has a file and inform that person of his or her right to rectification and access?

Consider further the obligations of CBCA companies pursuant to sections 50 and 138 of the CBCA²¹ as regards information to be recorded in shareholder registers, or brokers complying with National Policy No-41. Do shareholders need to be advised of the existence of a "file" on them or of their rights of access and rectification? Do they need to be so advised when they fill out a form containing personal information necessary for the automatic deposit of dividends into their account?

Again, we would suggest that the *Act* be clarified by removing this requirement where it is obvious from the circumstances that the person concerned is aware of the existence of the "file" and consented to its creation.

17. *Supra* note 2, Art. 20.

18. *Supra* note 2, Art. 17.

19. *Supra* note 2, Art. 11.

20. *Supra* note 2, Art. 8.

21. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

V. RESTRICTIONS ON THE COLLECTION OF PERSONAL INFORMATION

In general, the information must be collected from the person concerned and may not be obtained from third parties except with the consent of the person concerned, unless explicitly authorized by law. There are two important exceptions to this rule :

1. when collection from a third party is necessary to ensure the accuracy of the information; or
2. when it is collected in the interest of the person concerned and cannot be collected from that person in due time.²²

The first exception relates to verification of the accuracy of the information, such as verifying the person's salary with his or her employer. This first exception raises certain problems of interpretation. For example, credit bureaus are often used by lending institutions as a means of verifying information. However, they are only a secondary source of information. Consequently, one may wonder whether it is possible to verify the *accuracy* of information with a secondary source such as a credit bureau (known now as a "personal information agent"), notwithstanding article 71 of the *Act* which obliges personal information agents to ensure that the personal information on file is accurate and up to date.

Certain provisions of the *Act* governing the collection of personal information are surprising because they encroach on long-established legal traditions such as freedom of contract. For example, the *Act* stipulates that no person may refuse to respond to a request for goods or services (e.g., a request for a loan or for credit in relation to the purchase of consumer goods) or refuse a request relating to employment for the sole reason that the person concerned refuses to disclose personal information, unless :

1. collection of the information is necessary for the conclusion or performance of the contract;
2. collection of the information is authorized by law;
3. there are reasonable grounds to believe that the request is not lawful.

In case of doubt, the personal information is considered to be non-necessary.²³

The last of these exceptions was included in the *Act* at the request of the Canadian Bankers' Association so that lenders who, for example, suspect a money-laundering transaction can refuse to enter into a contract without risk of otherwise contravening the provisions the *Act*. In such circumstances, a financial institution would be justified in requiring that the customer provide personal information that is not strictly "necessary" for the conclusion of the contract to ensure that the proposed transaction has a lawful object.

22. *Supra* note 2, Art. 6.

23. *Supra* note 2, Art. 9.

Thus, a person who frequently purchases money orders or bank drafts for large amounts may be required to supply, not only "necessary" information, such as the amount of the draft, the name of the beneficiary and the manner in which he or she intends to make payment, but also information that is not strictly necessary, such as the purpose of the transaction, how the cash for the transaction was obtained or the identity of the other contracting party.

Likewise, a financial institution would be justified in simply refusing the transaction where, notwithstanding such information, it reasonably suspected the purpose to be unlawful.

VI. OBLIGATION OF THE ENTERPRISE TO COMMUNICATE CERTAIN INFORMATION TO ITS CUSTOMERS

Another innovation in the *Act* is that it creates positive obligations to communicate certain information to customers.

For example, where an enterprise which is in the business of lending money receives credit reports or recommendations regarding the solvency of natural persons prepared by a personal information agent (the new expression for a credit bureau), it must, *whether or not the customer so requests*, not only communicate to the customer the content of the reports when it uses them to make a decision but also inform the customer of his or her right of access to the reports and the right to rectify the information contained in the file held by the agent from whom the reports were received. It must indicate how and where the customer can have access to such reports or recommendations, and have them rectified if necessary.²⁴

In addition, any person who carries on an enterprise must, upon request, confirm the existence of any file it holds with respect to any person concerned and communicate to the latter the personal information recorded therein.²⁵

Does this mean that a business must disclose all the information contained in a file, including opinions expressed, conclusions drawn or decisions made by superiors or by those having given a recommendation to a candidate for employment? Will managers or referees be able to fully express their opinions if access to this information is automatic? Unlike the *Act*, the *Civil Code of Quebec* provides that an enterprise may refuse access to personal information where there exists a serious and legitimate interest for doing so.²⁶ The subjective content of a file is often the fruit of the work performed by employees of the enterprise and in many cases the enterprise has a legitimate and serious interest in protecting the confidentiality of such information. Otherwise the representatives of the enterprise would feel unduly constrained in the performance of their duties knowing that the opinions and conclusions that they are frequently asked to provide would be made

24. *Supra* note 2, Art. 19.

25. *Supra* note 2, Art. 27.

26. Art. 39 C.C.Q.

available to the person concerned. In this regard it is interesting to compare the provisions of the *Act* with those of the *Act respecting access to documents held by public bodies and the protection of personal information*²⁷ which applies to public bodies. That statute, which is similar in some respects to certain provisions of the *Act*, exempts from release, under some circumstances, opinions and recommendations²⁸ or studies prepared in connection with recommendations.²⁹ Since the *Act* contains no such specific exemptions, one might conclude that the legislator did not intend to exempt such information from release in the private sector. Such a conclusion however ignores the right to privacy of the individual who has expressed the opinion or made the subjective assessment. Privacy legislation should, in our opinion, take this into account.

VII. REMEDIES AVAILABLE TO THE PERSON CONCERNED

The *Act* makes available to the person concerned a whole range of remedies and gives the *Commission d'accès à l'information* the task of acting as a watchdog with respect to disagreements relating to personal information.³⁰

In addition to the right of access, free of charge, to a file containing personal information, the person concerned may have the personal information reproduced, upon payment of a reasonable charge,³¹ and may ask for rectification of inaccurate, incomplete or equivocal information, have obsolete information or information not justified by the purpose of the file deleted, or deposit his or her written comments in the file.³²

An enterprise which receives a request for access or rectification must respond thereto within thirty days after the date of the request, otherwise it is deemed to have refused to grant the request.³³ Any refusal must be in writing, must give the reasons for refusal and must inform the person concerned of the recourses open to him.³⁴

What happens if the parties cannot agree when a request for access or rectification of personal information is made? The *Act* provides that the *Commission d'accès à l'information* shall rule on any disagreement relating to such requests. Thus, the

27. R.S.Q. C. A-2.1 [hereinafter *Act respecting access*].

28. *Supra* note 27, Arts. 37-38.

29. *Supra* note 27, Art. 39.

30. *Supra* note 2, Art. 42.

31. *Supra* note 2, Art. 33.

32. Art. 40 C.C.Q.

33. *Supra* note 2, Art. 32.

34. *Supra* note 2, Art. 34.

Commission can require the production of personal information and order an enterprise to rectify or communicate personal information or refrain from doing so.³⁵

The fact that the Commission's decisions on any question of fact are final and binding underlines the importance of the Commission's role.³⁶ There is, however, a limited right of appeal on any question of law to the Court of Quebec, with leave of a judge of that court.³⁷ In fact, it has been the experience of the members of our firm who have been called to plead before the Commission that the Court of Quebec does not hesitate to intervene, particularly where it considers the question to be of interest under either the *Act* or the *Act respecting access*.

Where personal information is rectified either by mutual consent or following a decision of the Commission, the enterprise must send a copy of the rectification to the person concerned and to any person who received such personal information in the preceding six months.³⁸

The Commission has another important role. It can, on its own initiative or following a complaint by an interested person, inquire into any matter relating to the protection of personal information or the practices of a person who collects, holds, uses or communicates personal information to third persons.³⁹ Again, the powers of the Commission are broad; it can require entry to the facilities of the enterprise and examine and make copies of any personal information. Following its investigation, the Commission may, *inter alia*, order the enterprise to apply any appropriate remedial measure to ensure the protection of personal information.⁴⁰ A decision resulting from such an investigation is subject to appeal.⁴¹ If the Commission considers that an enterprise has not taken appropriate measures in response to an order, it may even publish, in the manner it determines, a notice to inform the public thereof!⁴²

35. *Supra* note 2, Arts. 42, 55.

36. *Supra* note 2, Art. 59.

37. *Supra* note 2, Art. 61.

38. Art. 40 of the C.C.Q.

39. *Supra* note 2, Art. 81.

40. *Supra* note 2, Art. 83.

41. *Supra* note 2, Art. 87.

42. *Supra* note 2, Art. 84.

VIII. PENAL PROVISIONS

It is worth noting that any person who communicates or uses personal information otherwise than in accordance with the *Act* is liable to a fine of \$1,000 to \$10,000 and, in the case of a subsequent offence, of \$10,000 to \$20,000.⁴³ In addition, the administrator, director or representative of a company who authorized or consented to any such act or omission is a party to the offence and liable to the prescribed penalty.⁴⁴

CONCLUSION

It is clear from the foregoing that the *Act* has had a significant impact on the manner in which business is conducted in Quebec. The requirements of the *Act* have increased the cost of doing business, sometimes unnecessarily and at the expense of the interests of the consumer. It is to be hoped that certain provisions of the *Act* will be amended to provide the flexibility needed to ensure that businesses can serve their clients in the most advantageous and efficient manner.

While the Quebec legislation is not perfect, it does provide some models from which other legislation can be built.

However, it would be worthwhile, when designing and applying privacy legislation to do so from the context of what we are learning about privacy itself. Without privacy, we cannot self actualise as human beings. Moreover, attempts to invade our privacy often provoke strong reactions based from childhood experiences.

Yet, at the same time, many institutions, companies and even other individuals can help us to grow and prosper by using the information we share with them. We should not legislate so far as to inhibit that growth.

Privacy is like a door; we need legislation that allows the individual to open and close the door. We need to allow individuals to be able to open the door on opportunity and growth and yet, at the same time, close it to protect themselves.

43. *Supra* note 2, Art. 91.

44. *Supra* note 2, Art. 93.