NYMITY

Privacy Interviews with Experts
November 2012

Toronto / Washington DC / Brussels
www.nymity.com

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Privacy Law in Quebec – Substantially Similar but Different?

The Province of Quebec was the first Canadian jurisdiction to pass a private-sector privacy law, *An Act Respecting the Protection of Personal Information in the Private Sector* (the "Privacy Act") in 1993, however, it is generally the least known and understood of all such private-sector laws. Eloïse Gratton of McMillan peels back the layers and sheds some additional light on the unique requirements of this law.

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Éloïse serves as a board member for the Canadian IT Law Association. She teaches e-commerce law at the masters program in e-commerce offered by the UofM and the HEC since 2009, as well as data protection and IT law at the UofM masters' program in IT law.

Nymity: What is the legal framework for privacy in Quebec? Which laws and/or regulations contain privacy obligations?

Gratton: In Quebec, privacy and data protection are governed by the following laws:

- Private sector organizations have to comply with the Quebec *Act Respecting the Protection of Personal Information in the Private Sector*,[1] (the "**Privacy Act**") which has been in effect since 1993: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_39_1/P39_1_A.html

- Public sector entities have to comply *with An Act respecting Access to documents held by public bodies and the Protection of personal information*[2]: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/A_2_1/A2_1_A.html

- Privacy in Quebec is also governed by the *Civil Code of Quebec* ("C.C.Q"), at articles 3, and 35 to 41 inclusively. More specifically, article 35 states a general principle under which every person has a right to the respect of his reputation and privacy, and that no one may invade the privacy of a person without the consent of such person unless authorized by law. Article 36 details the type of activities which may be considered as an invasion of privacy of a person. http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/CCQ_1991/CCQ1991_A.html

[1] R.S.Q., chapter P-39.1.

[2] chapter A-2.1.

- The Quebec Charter of Human Rights and Freedoms (*Charte des droits et libertés de la personne*), a statutory bill of rights adopted by the National Assembly of Quebec in 1975 which applies to private sector entities, states, at article 5, that "every person has a right to respect for his private life."[3] Under the terms of article 46 of the Charter, which recognizes the right to fair and reasonable working conditions, an employer is prohibited from consistently monitoring his employees by means of video surveillance.[4]
  http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_12/C12_A.html

- *An Act to Establish a Legal Framework for Information Technology*[5] also regulates privacy in Quebec. For instance, sections 25 and 26 regulate the security of technology-based documents containing confidential information. Section 43 regulates the location tracking of individuals while sections 44 and 45 regulate the collection, use or disclosure of biometric characteristics and measurements information.
  http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_1_1/C1_1_A.html

Nymity: What was the impetus for the enactment of Quebec's Privacy Act? When did this Act come into effect?

Gratton: The threat of loss of trade as a result of Directive 95/46/EC and its adequate protection requirements was a strong motivating factor for the Canadian Government's decision to enact PIPEDA.[6] Similar concerns were also at the core of the adoption of the Privacy Act in Quebec in 1993. The Quebec parliamentary debates which led to the adoption of the Privacy Act in 1993 discuss, on many occasions, the concern in ensuring that Quebec would have a data protection law which would be in line with the OECD Guidelines.[7] These debates also elaborate on the fact that Quebec needed to adopt a DPL in order to have a law in line with data protection efforts made at the international level, especially with efforts made in Europe.

Nymity: Are all organizations in Quebec covered by the Privacy Act? Are there any exceptions?

Gratton: The Privacy Act applies to a person which collects, holds, uses or communicates personal information to third persons in the course of carrying on an enterprise.[8] The terms "carrying on an enterprise" is defined as follows: "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".[9] The Quebec Privacy Act does not apply to data collected from or about legal entities and only applies to the collection, use and disclosure of personal information about natural persons.

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[3] Sections 7 and 8 of the Canadian Charter of Rights and Freedoms are also to the effect that privacy is a fundamental human and civil right that has constitutional dimensions.

[4] Article 46 states the following: "Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being."

[5] chapter C-1.1.

[6] See Steve Coughlan et al., "Global reach, Local Grasp: Constructing extraterritorial jurisdiction in the Age of Globalization", (2007) 6 CJLT 29, at 33.

[7] See *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 11 (February 23, 1993), at 2, 5, 12, 27, 57, 58, 66; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 12 (February 24, 1993), at 38, 41, 49; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 13 (March 1, 1993), at 2, 6 and 8; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 14 (March 2, 1993), at 6, 25, 36, 38, 40, 43 and 65; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 16 (March 4, 1993), at 35, 55; *Les travaux parlementaires*, 34th législature, 2nd session, Assemblée, cahier no 73 (March 16, 1993), at 2, 3, 9, 23, 27; *Les travaux parlementaires*, 34th législature, 2nd session, Assemblée, Motion, cahier no 73 (March 16, 1993), at 1 and 2; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 23 (May 13, 1993), at 9, 11, 14; *Les travaux parlementaires*, 34th législature, 2nd session, Assemblée, cahier no 112 (June 14, 1993), at 2; *Les travaux parlementaires*, 34th législature, 2nd session, Commission permanente de la culture, cahier no 32 (June 8, 1993), at 4, 12.

[8] Quebec Privacy Act, section 1.

[9] Civil Code of Quebec, section 1525.

Section 1 of the Privacy Act specifies that it does not apply to journalistic, historical or genealogical material collected, held, used or communicated for the legitimate information of the public and certain sections of the law (Divisions II and III of the Privacy Act) do not apply to personal information which by law is public. Section 3 specifies that the Privacy Act does not apply to a public body within the meaning of the *Act respecting Access to documents held by public bodies and the Protection of personal information*[10] and to information held on behalf of a public body by a person other than a public body.

Nymity: Does the Privacy Act apply to all types of personal information? (i.e., 'customer' and 'employee' information?)

Gratton: This Privacy Act applies to Quebec employees and to personal information whatever the nature of its medium and whatever the form in which it is accessible, whether written, graphic, taped, filmed, computerized, or other. While the definition of personal information does not exclude business contact information or employee information, there are a few decisions issued by the Commission d'accès à l'information ("CAI") which have excluded certain personal information of employees because they were acting in their capacity of "employees of an organization". Since an organization can only act through its employees or representatives, the name of employees acting in such capacity were not considered personal information in *Lavoie* c. *Pinkerton du Québec Ltée*, [1996] CAI 67. A similar approach was also followed in *Leblond* c. *Assurances générales des Caisses Desjardins* [2003] CAI 391 (appeal on other issues) J.E. 2004-2148 (C.Q.)), in which the CAI mentioned that the name, function, and work phone number of employees should not be considered "personal information" (although the CAI said that if these employees were acting in their personal capacity (vs. professional capacity) then this information should be considered personal information and be covered under the law).

Nymity: Is the Privacy Act based on the same principles as are found in PIPEDA, the federal private-sector privacy law?

Gratton: Yes, the Privacy Act is substantially similar to PIPEDA and is based on the same principles as are found in PIPEDA. Similar to PIPEDA, the Privacy Act provides a general privacy framework under which an organization that collects personal information from an individual must inform him/her of the use which will be made of the information, of the categories of persons who will have access to it within the enterprise, of the place where the file will be kept and of the rights of access and rectification.[11] These individuals must provide their consent to the collection, communication or use of their personal information and such consent must be manifest, free, and enlightened, must be given for specific purposes and will only be valid for the length of time needed to achieve the purposes for which it was requested.[12] This being said, the Privacy Act is not an ombudsman model such as PIPEDA. Under the Privacy Act, two types of penalties may apply for non-compliance:

Fines: Every organization who collects, holds, communicates to third persons or uses personal information on other persons otherwise than in accordance with the provisions of the Privacy Act is liable to a fine of $1,000 to $10,000 and, for a subsequent offence, to a fine of $10,000 to $20,000. For a contravention of section 17 (cross-border transfer), the fine is $5,000 to $50,000 and, for a subsequent offence, $10,000 to $100,000.[13]

D&O Liability. Where an offence under the Privacy Act is committed by a legal person, the administrator, director or representative of the legal person who ordered or authorized the act or omission constituting the offence, or who consented thereto, is a party to the offence and is liable to the prescribed penalty.[14]

Nymity: What types of consent are recognized within the Privacy Act? Is this generally consistent with the consent mechanisms found in other Canadian private-sector privacy laws?

Gratton: Section 14 of the Privacy Act regulates consent and states:

[10] (chapter A-2.1)

[11] Quebec Private Sector Act, section 8.

[12] Quebec Private Sector Act, section 14.

[13] Quebec Private Sector Act, section 91.

[14] Quebec Private Sector Act, section 93.

> "Consent to the collection, communication or use of personal information must be **manifest**, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested."

The Privacy Act specifies one type of consent (manifest) and does not specifically distinguish between express, implied, and deemed or opt-out consent nor establish clear criteria for each, such as there is under other Canadian data protection laws. This being said, certain provisions of the Privacy Act (see section 22 and following) pertaining to the transfer (sale) or use of nominative list (list of names, telephone numbers, geographical addresses and email addresses) seem to imply an opt-out type of consent in specific situations. More specifically, under section 22(2) of the Privacy Act, a person carrying on an enterprise may, without the consent of the persons concerned, communicate a nominative list to a third person, if prior to the communication, the persons concerned are given a valid opportunity to refuse that the information be used by a third person for purposes of commercial or philanthropic prospection. Similarly, under section 23, a person carrying on an enterprise may, without the consent of the persons concerned, use, for purposes of commercial or philanthropic prospection, a nominative list of his clients, members or employees, although every person using such a list for such purposes must grant the persons concerned a valid opportunity to refuse that the information concerning them be used for such purposes.

Nymity: Is there any special considerations for obtaining consent within the employment context?

Gratton: Employers may only collect and use employees' personal information which are necessary and linked to their employment. More specifically, according to section 5 of the Privacy Act, "Any person collecting personal information to establish a file on another person or to record personal information in such a file may collect only the information *necessary* for the object of the file." Also, under section 9 of the Privacy Act, an organization may not refuse to respond to a request relating to employment by reason of the applicant's refusal to disclose personal information except where the collection of that information is *necessary* for the conclusion or performance of a contract, it is authorized by law, or there are reasonable grounds to believe that the request is not lawful. In case of doubt, personal information is deemed to be non-necessary.

Nymity: Does the Privacy Act contain any exemptions allowing for disclosure without consent? Under what circumstances may organizations discloser personal information without such consent?

Gratton: Under the Privacy Act, authorized employees, mandataries or agents or any party to a contract for work or services may have access to personal information without the consent of the person concerned but only if the information is needed for the performance of their duties or the carrying out of their mandates or contracts (section 20).

The Privacy Act further regulates the communication of personal information to third persons without the individual's consent under sections 18 to 26. These include the communication of personal information contained in a file an organizations holds on an individual to his attorney (section 18 (1)); to the Director of Criminal and Penal Prosecutions if the information is required for the purposes of the prosecution of an offence under an Act applicable in Québec (section 18 (2)); to a body responsible, by law, for the prevention, detection or repression of crime or statutory offences who requires it in the performance of his duties, if the information is needed for the prosecution of an offence under an Act applicable in Québec (section 18 (3)); to a person to whom it is necessary to communicate the information under an Act applicable in Québec or under a collective agreement (section 18 (4)); to a public body within the meaning of the *Act respecting Access to documents held by public bodies and the Protection of personal information*[15] which, through a representative, collects such information in the exercise of its functions or the implementation of a program under its management (section 18 (5)); to a person or body having the power to compel communication of the information if he or it requires it in the exercise of his or its duties or functions (section 18 (6)); to a person to whom the information must be communicated by reason of the urgency of a situation that threatens the life, health or safety of the person concerned (section 18 (7)); to a person who is authorized to use the information for study, research or statistical purposes in accordance with the law (sections 18 (8), 21 and 21.1); to a person who is authorized by law to recover debts on behalf of others and who requires it for that purpose in the performance of his duties (section 18 (9)); to a person if the information is needed for the recovery of a claim of the enterprise (section 18 (9.1)); and to a third party in the case of a nominative list (sections 18 (10) and 22).

An organization may also communicate personal information without the consent of the persons concerned in order to prevent an act of violence, including a suicide, where there is reasonable cause to believe that there is an imminent danger of death or serious bodily injury to a person or an identifiable group of persons (section 18.1), or to an archival agency, if the archival agency is a person carrying

[15] (chapter A-2.1)

on an enterprise whose object is the acquisition, preservation and distribution of documents for their general informational value and if the information is communicated as part of the transfer or deposit of the archives of the enterprise (section 18.2). Additional exceptions include the communication of personal information for study, research or statistical purposes (section 21) or under certain conditions.

Nymity: Are there any obligations for organizations disclosing personal information outside of Quebec? Are these obligations the same regardless if information is being disclosed within Canada or outside of Canada?

Gratton: According to section 17 of the Privacy Act:

> **"17.** Every person carrying on an enterprise in Québec who communicates personal information outside Québec or entrusts a person outside Québec with the task of holding, using or communicating such information on his behalf must first take all reasonable steps to ensure (1) that the information will not be used for purposes not relevant to the object of the file or communicated to third persons without the consent of the persons concerned, except in cases similar to those described in sections 18 and 23; (2) in the case of nominative lists, that the persons concerned have a valid opportunity to refuse that personal information concerning them be used for purposes of commercial or philanthropic prospection and, if need be, to have such information deleted from the list.
> If the person carrying on an enterprise considers that the information referred to in the first paragraph will not receive the protection afforded under subparagraphs 1 and 2, the person must refuse to communicate the information or refuse to entrust a person or a body outside Québec with the task of holding, using or communicating it on behalf of the person carrying on the enterprise."The wording "all reasonable steps" usually means to have the organization enter into a contract with the third party receiving the information which will provide for the appropriate security obligations. While there is no case law confirming this interpretation, there is definitely an argument to be made that such contract would be unnecessary upon this information being transferred to other Canadian jurisdictions (versus outside of Canada) given that these jurisdictions all have data protection laws in force which are substantially similar and which provide for similar to the Privacy Act security obligations.

The CAI has not yet issued guidelines or policies or issued a decision on the consequences of the last paragraph of section 17. Certain authors suggest that there are therefore two possible interpretations.[16] Under the first interpretation, they suggest that the contractual protections provided in the jurisdiction of origin would be sufficient to ensure compliance with the requirements of section 17 and allow for the transfer, provided that the recipient applies or agrees to apply, of protections similar to those in effect in Québec. This would be accomplished through a written contract and similar protections would mean that the exceptions provided for by local laws would apply, since the Privacy Act recognizes the exceptions provided for under the laws applicable in Québec. Under the second and more restrictive interpretation, the laws of the other jurisdiction must be studied in detail in order determine whether the legislative protection is adequate (or in fact equivalent) compared to the protection provided for under the Privacy Act.

Nymity: Does the Privacy Act include a breach notification requirement? If not, are there any other guidelines etc that call for voluntary notification in the event an organization has experienced a breach of personal information?

Gratton: The Privacy Act does not yet include a breach notification requirement, but the CAI 2011 Report entitled "Protection of Personal Information in the Digital Age" recommends (see recommendation 7) that the Privacy Act (as well as the public sector act) be amended by the addition of an obligation to report to the CAI on security breaches that occur in public bodies and businesses and that involve personal information. See also Recommendations 8 and 9 on the same issue. Until this obligation is mandatory and included in the law, the CAI has issued guidelines pertaining to what organizations should do and when they should notify individuals and the CAI upon a security breach taking place. This guide entitled "Que faire en cas de perte ou de vol de renseignements personnels"? (2009) is available on the CAI's website (in French only).

[16] See Karl Delwaide and Antoine Aylwin, "Learning From a Decade of Experience: Quebec's Private sector Privacy Act", Privacy Commissioner of Canada.

Nymity: Who enforces the Privacy Act? What enforcement powers are held by such a regulatory body?

Gratton: Since 1982, the mission of the Quebec Commission d'accès à l'information (or the CAI) has been to favour access to documents held by public bodies and the protection of personal information and ensure its supervision. The CAI is the public body mainly responsible for the enforcement of two Acts: The Privacy Act (*Act respecting the protection of personal information in the private sector*) as well as an *Act respecting access to documents held by public bodies and the Protection of personal information*. More specifically, under the Privacy Act, the CAI is vested with the powers to issue recommendations (following an inquiry) of such remedial measures as are appropriate to ensure the protection of the personal information. The Privacy Act does not grant the CAI specific power to award damages for a violation of a duty imposed on an organization with respect to the protection of the personal information.

Nymity: Do individuals have a privacy right of action in Quebec? If so, under what circumstances is such a right available?

Gratton: Under the civil law regime, an organization may become liable in damages should it collect, retain, use or disclose personal information in violation of the Privacy Act. Such remedy should be sought before the appropriate court of justice. Under the civil law principles, an organization will be liable for damages if a plaintiff demonstrates that the organization acted wrongfully, that the action resulted in damages to the plaintiff, and that there is a causal relationship between the damages suffered and the wrongful action.

Nymity: Can you provide examples of any recent court cases or orders by the enforcement authority that have developed case law regarding privacy in Quebec?

Gratton: While damages have been awarded in certain cases relating to breaches of the Privacy Act, they are usually relatively limited. For instance, upon communicating personal information without obtaining prior consent, damages which have been awarded by Quebec courts range from $500 to $7000 and are summarized as follows:

- After a plaintiff asked a bank to cease giving information about her account to her ex-husband, the bank failed to do so. The CAI ruled in a first judgment that the bank failed to comply with section 13 of the Privacy Act. The plaintiff then sued the bank for damages related to the disclosure (because her ex-husband ceased to pay her pension and since she had to negotiate with a new bank to switch her accounts). The Quebec Court awarded **$1,000** in damages.[17]

- A plaintiff sued GMAC because it communicated personal information to credit companies (Équifax and Trans-Union) that resulted in credit card companies refusing the plaintiff's applications for the issuance of a credit card. The Quebec Court ruled that GMAC transferred the information to Équifax and Trans-Union without a valid consent (in breach of section 13 of the Quebec Privacy Act) and awarded **$500** in damages.[18]

- A business disclosed confidential personal information, in violation of section 13 of the Privacy Act. The Quebec Court took the position that the violation constituted a fault under civil law and awarded **$2,500** in moral damages, **$2,000** in punitive damages and **$1,000** for trouble and inconveniences (total of $5,500).[19]

- More recently, a former employer and his representative were ordered to pay **$5,000** in moral damages and **$2,000** in punitive damages by the Quebec Superior Court for disclosing to third parties confidential information about the applicant's state of health, and for making other false statements regarding his integrity (total of $7,000).[20]

Similar damages were awarded for other types of breaches of the Privacy Act by organizations, which range from $500 to $12,000.[21]

[17] *Demers* v. *Banque Nationale du Canada*, B.E. 97BE-330 (C.Q.).

[18] *Basque* v. *GMAC Location Limitée*, 2002 IIJCan 36125 (C.Q.).

[19] *Roy* v. *Société sylvicole d'Arthabaska-Drummond*, J.E. 2005-279 (C.Q.).

[20] *St-Amant* v. *Meubles Morigeau ltée*, J.E. 2006-1079 (S.C.).

[21] See : *Chartrand* v. *Corp. du Club de l'amitié de Plaisance*, B.E. 97BE-878 (C.Q.), *Boulerice* v. *Acrofax inc.*, [2001] R.L. 621 (C.Q.) et *Stacey* v. *Sauvé Plymouth Chrysler (1991) inc.*, J.E. 2002-1147 (C.Q.).