

## PIPEDA SIX MONTHS LATER: NOT AS REVOLUTIONARY AS EXPECTED

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The use of personal information in Canadian commercial activities is now protected by federal legislation under the Personal Information Protection and Electronic Documents Act ("PIPEDA"). Heralded as a response to increased public concern over the regulation of personal information, many commentators have held that the new data protection legislation would change the regulatory landscape for every organization that collects, uses or discloses personal information in the course of commercial activity. In force as of January 1, 2004, a review of the recent case law interpreting the rights and obligations under PIPEDA suggests otherwise. Privacy remains an important value in society, but recent court decisions made during the first six months of PIPEDA's application seems to indicate that privacy legislation has had much less impact than first expected.

### ***INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS v. BCT TELUS COMMUNICATIONS***

In *International Brotherhood* the court looked at the use of PIPEDA as a defence to an application for the production of documents. Telus claimed that the production of documents would violate its obligation to maintain confidentiality of customer information under PIPEDA. The court rejected the defence on the grounds that an obligation to protect private information under PIPEDA cannot be used

as a defence to other actions where the information sought is not itself private. The information sought in this case was not the production of customer records, but records of improper access to customer records. As such, private information was involved and any customer information could easily be removed to allow production in this case.

### ***FERENCZY v. MCI MEDICAL CLINICS***

This case involved the issue of whether the use of video surveillance gathered by a private investigator falls within the definition of 'private information collected in the course of commercial activities' under PIPEDA requiring consent from the individual in the video. The court utilized an agency analysis to find this case falls outside the scope of PIPEDA and within the personal use exception. Instead of finding the defendant was collecting personal information in the course of commercial activity, the court held that the investigator was actually an agent of the defendant who was using the information for their personal use (i.e. in this case, responding to the claim). Even more, the court argued that implied consent would apply in this case since the video was taken in a public place and the collection, use and disclosure of personal information without knowledge or consent under Section 7 of PIPEDA would nonetheless apply.

***ERWIN EASTMOND v. CPR***

CPR installed six on-site video cameras with the intent to protect against theft, vandalism, unauthorized personnel and related incidents. An employee claimed this violates his right to privacy as the system could be used for monitoring conduct and work performance. While the Privacy Commissioner agreed with the employee by finding the collection of this information without consent was not reasonable in this case, the court used the same test to come to the opposite conclusion. The court found the use of cameras in this case was reasonable on the basis that the collection of information was not surreptitious, not continuous, not limited to employees and the images were kept under lock and key; there was legitimate need for cameras in this case; the loss of privacy was minimal in this case since CPR only viewed the tape if an incident was reported; and CPR considered other alternatives. As a result, the use of cameras was reasonable and CPR could collect information without consent.

***ENGLANDER v. TELUS COMMUNICATIONS INC.***

This case involved the validity of telephone company practice that require costumers to pay a monthly fee for unlisted numbers, and that automatically include customers in public directories unless they have an unlisted number. The court dismissed the claim on the grounds that consent is not required in this case since customers have a reasonable expectation that unless they have an unlisted number their information will be published in a phone directory, and charging a small fee for an unlisted number is simply a balance between the importance of directories and the importance of privacy.

***BMG***

This case involved the recording industry seeking disclosure from internet service providers of the names associated with certain IP addresses that have allegedly violated copyright law. The court dismissed this application holding that the plaintiffs failed to make out a prima facie case since the evidence lacked the required reliability to justify invading the privacy of Internet users. The plaintiffs failed to prove a link between internet pseudonym and IP addresses to the person responsible for the downloading, failed to establish ISPs are the only source of the information, and failed to establish public interest of disclosure outweighs privacy concern.

**CONCLUSION**

As can be seen from the above cases, it would appear that to date the court has taken a narrow view of PIPEDA. While PIPEDA will still have an significant impact on how organizations collect, use or disclose personal information in the course of commercial activity, it does not appear to be the revolutionary change that many early commentators believed it would have. While the future of PIPEDA may be unknown, if the legal course of its past is any indication it is likely to be applied in a narrow and circumscribed manner by the courts.

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