

CORPORATE

BULLETIN

*A Report on Recent
Developments
in Corporate Law*

April 2002

PRIVACY - A CHALLENGE FOR EVERY BUSINESS

Privacy is an issue that should be on every business' radar screen. Within twelve months, comprehensive privacy legislation will force Canadian businesses large and small to examine how they deal with personal information.

When Ottawa introduced its privacy law last year, it was only a matter of time before provincial authorities followed suit. In fact, the provinces were given until January 2004 to enact privacy laws that were substantially similar to the federal law. If they do not, Ottawa's privacy law will automatically apply.

The action has now moved to the provinces. Quebec is in the lead with a privacy law that is almost a decade old. Ontario has recently announced that it will bring forward a privacy law by this summer. Consultation is being rushed, and the new law will be controversial. Expect it to come into force in the first half of 2003 - the government recognizes that it will require changes to business operations which cannot be rushed.

Alberta will likely be next. For the rest, few public statements have been made. Some smaller provinces will likely do nothing - their businesses will have to cope with Ottawa's law, the *Personal Information Protection and Electronic Documents Act*. But the most significant province from a business perspective is Ontario. From the early Ontario drafts we have seen, it looks like:

- Ontario's law will cover more sectors than the Federal law - not merely businesses but not-for-profit entities and charities.
- Since public sector organizations must already safeguard privacy under Ontario's information access laws, Ontario will require every enterprise, regardless of size or business focus to announce how it is protecting personal information. If your business has employees or customers, you have privacy issues. In other words, every entity.
- Special rules will apply to health information, because of its sensitivity.
- Ontario has spurred a major debate on how individuals should consent to businesses' use of their personal information. For example, should your consent be assumed when you don't exclude yourself when given the chance - known as "opt-out"? Or should you have to affirmatively respond to having your information collected and used by a business - known as "opt-in"? Ontario's current thinking is no use of personal information for marketing or market research unless consent has clearly been given.
- Ensuring consent is always key to privacy compliance, Ontario plans to require express consent for marketing purposes. This would require individuals, when they give consent to understand what consent means, and that it can be

withdrawn, appreciate the consequences of consent, and have enough background about the uses to which their personal information would be put.

- If you are in the marketing business, expect major headaches while you get consent. If you are the rest of us, expect to get deluged in mailings, flyers and broadcast e-mail, asking for consent.
- The new law will apply retroactively. So information currently in your files or databases will be covered too - it could be useless if consent was not previously received for the new purposes you use it for.

WHAT IS THE TIMETABLE?

At this point our best guess about where Ontario's going on privacy is:

April 2002 - June 2002	Government analyzes briefs on privacy and redrafts Privacy Bill
June 2002 - July 2002	First Reading Bill introduced in Legislature
July 2002 - September 2002	Public hearings and consultation. Government may make changes.
October 2002 - December 2002	Legislature considers and passes redrafted legislation. Government drafts Regulations.
January 2003 - July 2003	Transition phase to gear up for legislation coming into force.
January 2004	Federal privacy laws come into force across Canada, except for jurisdictions which have passed their own privacy laws, which are substantially similar to the federal law.

Remember that politics is inherently uncertain. Not that privacy is a partisan issue on which the three political parties will split. But a replacement of a Minister, a major public scandal, or an election could each do significant damage to this timetable. The ultimate deadline is January 2004. All of Ontario's work must be completed by then.

WHAT DOES YOUR BUSINESS NEED TO DO NOW: A COMPLIANCE CHECKLIST

Even if privacy legislation does not yet apply to your business, you can start now to get ready:

- **Select a Privacy Officer.** Pick a staff member who can assume responsibility for privacy. Give this privacy officer the resources needed to meet the new requirements (when the rules are clear). Recognize that this may be a big job for the next couple of years, but will settle down.
- **Develop a Privacy Policy.** Your new privacy officer should work over the next year to set policies and procedures for protecting privacy and addressing complaints, train staff to adhere to privacy policies and procedures, and develop your public positions on privacy.
- **Track Data Flow.** Track how personal information is collected. What information do you have? On customers? On employees? How is it circulated internally? What is personal information used for? Is it ever sent outside your business? You need to map data flow within your business to identify vulnerabilities.
- **Revise your Contracts.** The new law will require that privacy is protected when data leaves your business. In your agreements, you must ensure that other parties who receive or process personal information provide the same protection that you do and will not disclose this information to others.
- **Ensure Consent.** Do you ask for consent when you collect information? Is the consent sufficient to permit your business to use and disclose information to others? You should review all your consent provisions to ensure they meet the new law.
- **Make Consent Meaningful.** The form and manner of consent that is required will depend on the sensitivity of the information and the surrounding circumstances. In some cases, individuals may consent orally over the phone, by marking a check-off box on an application form or in a formal contract. In other cases, consent may be implied - if a customer orders something for delivery to his or her home,

there is implicit authorization for you to record that information and use it to deliver the item (but not to sell that information or add it to a mailing list).

- **Rules on Withdrawing Consent.** You will need to establish procedures for dealing with circumstances in which an individual withdraws consent. Make sure that if you have given the information to third parties, you let them know that consent has been withdrawn.
- **Keep Management in the Loop.** Breaches of individuals' privacy can become a public relations nightmare! Make sure your privacy officer keeps reporting to senior management and the board.
- **Dispose Information.** You will also need to develop and implement guidelines for retaining and disposing of personal information. Personal information may be held only for as long as necessary to meet the stated purpose.
- **Secure Systems.** Computer security is very important. Make sure personal information is secure, by keeping it physically and, where applicable, electronically protected. If you keep information on your computer system, check firewalls for vulnerability. Hire programmers to test your security system against hackers. Have your privacy officer review mass-mailing marketing plans to ensure only those whose consent is clear are included in the mailing lists.
- **Set Policies for Subsidiaries.** Develop a policy for making personal information available to subsidiaries and other related organizations.
- **Allow Access.** Establish procedures to allow individuals access to their personal information, and to correct or update information when appropriate.

EMPLOYEES

There are additional steps you can take with respect to employees.

As with other personal information, you will need to ensure that your personnel files are both physically and electronically secure. You will also need to safeguard health information about your employees and protect the identity of those who take advantage of employee assistance programs.

Ensure that your employees understand the importance of privacy. Develop clear written policies for your employees about how you, as their employer, will treat privacy issues.

In some cases, your company may feel that other concerns override employees' privacy. If, for example, your company reads employees' e-mails and monitors or restricts their internet use, your employees should know in advance.

WEBSITES

Don't forget about your company's website. Many businesses lack an adequate privacy policy on their websites.

Your policy should accurately describe what your website does, and does not do, with personal information. When drafting your policy, set out clearly what information is collected and how it is used - check with your tech people to make sure you've described it accurately and completely. Check with your privacy officer to ensure that you can put it into practice.

Even if you only collect aggregate, and not personal, information (for example, the number of times a page is viewed without identifying who accessed it), it's good business practice to let people know what your privacy policies and practices are. Canadian surfers will expect it.

For further information, please contact your McMillan Binch lawyer or one of the lawyers listed below:

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