

About The Author

Karl Delwaide is a partner with Fasken Martineau, and a founder and current leader of the firm's National Practice Group on Privacy and Information Protection. With extensive experience and successes in complex litigation, he is widely recognized as one of the few Québec lawyers with broad and significant knowledge of the courts and tribunals in the privacy and information protection area.

Karl was commissioned by Jennifer Stoddart, Canada's Federal Privacy Commissioner, to co-author a book on 10 years of case law entitled 'Learning from a decade of experience: Québec's Private Sector Privacy Act', published in August 2005. Mr. Delwaide represents private enterprises and public organizations in regard to all issues dealing with privacy, the protection of information and freedom of access to information. Mr. Delwaide also devotes a significant amount of his practice to administrative and regulatory law, including successfully arguing judicial revisions before the courts.

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Data transfers rules in Quebec (Canada)

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25th May 2010

The Quebec privacy statutes applicable to public bodies (An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information) and to private organizations (An Act Respecting the Protection of Personal Information in the Private Sector) prevent the transfer of personal information outside of Quebec, unless certain conditions are met.

These statutes raise concerns regarding the outsourcing of personal information from Quebec to other provinces in Canada or to the US, especially in light of the so-called US Patriot Act, or to any other country which has not yet adopted equivalent legislation on the protection of personal information.

In relation to legislation applicable to the private sector, the relevant provisions are contained in sections 17 and 20 of the Quebec Privacy Act:

'17. Every person carrying on an enterprise in Québec who communicates personal information outside of 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 individuals concerned, except in cases similar to those described in sections 18 and 23; and

(2) in the case of nominative lists, that the individuals concerned have a valid opportunity to refuse that personal information concerning them be used for purposes of commercial or philanthropic prospects 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 of Québec with the task of holding, using or communicating it on behalf of the person carrying on the enterprise.

20. In the carrying on of an enterprise, 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 only if the information is needed for the performance of their duties or the carrying out of their mandates or contracts.'

DEFINITION OF OUTSOURCING

The key element of an outsourcing transaction is a long-term service contract in which the service provider accomplishes the work that its customer formerly provided internally. In fact, the service provider acts on behalf of the organization.

In the private sector, the Canadian federal statute - the Personal Information Protection and Electronic Documents Act (PIPEDA) - and the Alberta Personal

Information Protection Act approach outsourcing as a mere 'usage' of the information transferred from the organization to the service provider. The British Columbia Personal Information Protection Act and the Quebec Privacy Act consider outsourcing as a communication or disclosure to a third party, while creating an exception to the consent requirements.

THE SITUATION IN CANADA

Many Canadian organizations have divisions in various provinces of Canada, or are affiliates of US corporations. It has become common for organizations to regroup their data processing systems in one location, often in the US. Other organizations have sheltered their data processing systems in other countries, therefore raising concerns of Canadians over the security issues of their personal information. For example, many Canadians have concerns that the US Patriot Act allow US intelligence to have access to their personal information with minimal procedural hurdles, and others see the transfer of personal information to far away countries as a real threat to their privacy, including with respect to identity theft.

THE CASE LAW SO FAR

The Office of the Privacy Commissioner of Canada (OPCC) has so far published case summaries on the issue of international outsourcing, such as case summaries number 313, 333, 365 and 394.

The findings of the OPCC can be summarized as follows:

- a) PIPEDA does not prohibit organizations from outsourcing their operations across international borders.
- b) It is important for organizations to assess the risks that could jeopardize the security and confidentiality of customer personal information (PI) when it is transferred to foreign-based third-party service providers. The measures by which PI is protected must be formalized by using contractual or other means.
- c) No contractual provision can override the laws of a country to which the information could be subject once it has been transferred. With respect to the US Patriot Act, the OPCC went as far as stating that Canadian laws would be equivalent with respect to granting to public bodies the right to access personal information for statutorily covered investigational purposes.
- d) Organizations must be transparent about their PI handling practices. A company in Canada which outsources personal information processing to a company that operates in another country should notify its customers that the information may be available to the government of that country or its agencies under a lawful order made in that country.
- e) With regard to the issue of customer consent, the OPCC has taken the position that the sharing of information with a third-party service provider constitutes a "use" for the purposes of PIPEDA. The original consent to use the PI will therefore, in principle, apply to the subcontractors' use of the PI.

CAN THE OPCC DECISIONS BE TRANSPOSED IN THEIR ENTIRETY TO QUEBEC? CAN THE SAME APPROACH APPLY UNDER QUEBEC PRIVACY LEGISLATION IN BOTH THE PUBLIC AND PRIVATE SECTORS?

Using the private sector as an example, we must keep in mind the provisions of Section 17 and 20 of the Quebec Privacy Act.

Firstly, while PIPEDA qualifies the outsourcing of services as a "use" of PI in respect of which the consent of the individual concerned was obtained, Quebec law sees this instead as a communication or disclosure of information. But this communication does enjoy one exemption from the principle of consent under Section 20 of the Quebec Privacy Act.

The Commission D'accès à L'information, which is the public body which supervises compliance with the Quebec privacy statutes, made some significant comments in an enquiry report in Deschênes vs Groupe Jean Coutu (2000) CAI 210, that reinforce Section 20 of the Quebec Privacy Act. The decision specifies that mandataries or agents may access individuals' PI without their consent if the following requirements are met:

- a) The contract between the enterprise and the mandatary is in writing; and
- b) the contract specifies the scope of the mandate, the purposes for which the mandatary (agent) will use the information, and the categories of individuals who will have access to the information.

These requirements, which were added to Section 20 of the Quebec Privacy Act following the Groupe Jean Coutu decision, should apply to contracts of enterprise or for services.

With respect to Section 17 of the Quebec Privacy Act, the consequences of this "amended" section are not clear.

If these provisions are interpreted narrowly, before the disclosure of PI outside Quebec can be authorized (the goal here being not only to prevent the communication of this data to foreign countries, but to cover the communication of data to other Canadian provinces, where many Quebec enterprises routinely do business), the question is whether the laws of the foreign territory must be examined to determine if the legislative protection is sufficient compared to that afforded under Section 17 of the Quebec Privacy Act.

Another interpretation, to which we have already subscribed in the past maintains that the contractual protections set out in an agreement reached between a principal and its subcontractors may be deemed sufficient to ensure compliance with the requirements of Section 17 of the Quebec Privacy Act. This consequently authorizes the communication of PI abroad, provided that the receiving organization or foreign body applies, or agrees to apply, protections similar to those prevalent in Quebec. This should be done in writing in all cases.

It is to be noted that contractual protections cannot take precedence over the legislative provisions of foreign jurisdictions. This, however, is a legal and practical reality that has been recognized in the past by the OPCC in its case summaries numbers 313, 333, 365 and 394. Although the OPCC's rulings do not bind the Commission D'accès à L'information, in the absence of further particulars from the Commission, it appears that the same degree of legal and practical realism should apply where the Quebec legislation is concerned. Section 17 of the Quebec Privacy Act surely was not intended to prevent Quebec enterprises or bodies from outsourcing their services (even if that includes communicating PI outside of Quebec), provided that clear and open measures are taken to ensure the protection of the PI entrusted to subcontractors, subject to the application of foreign legislation.

CONCLUSION

The OPCC's findings and rulings stress that it is important for organizations to

assess the risks that could jeopardize the security and confidentiality of customers' PI when this data is transferred to foreign-based third-party service suppliers established abroad.

This appears to be the true intent of Section 17 of the Quebec Privacy Act. Since it is not the intent of Section 17 to prohibit or prevent Quebec enterprises from outsourcing PI, we assume that the Commission D'accès à L'information will modulate the requirements of Section 17 by following the same principles and rationale supported by the OPCC's case summaries numbers 313, 333, 365 and 394.

As an example, the communication of PI to Ontario or the US, within the framework of specific contractual undertakings, should not be treated in the same manner as PI communicated to jurisdictions where the legal system is somewhat more questionable and where it would be more difficult, if not impossible, to obtain appropriate remedies to ensure the compliance and sanction of contractual undertakings.

In other words, we believe that appropriate contractual provisions should be sufficient to enable the outsourcing of PI from Quebec enterprises to foreign jurisdictions, but the same legal and practical realisms call for precautions to be taken if the outsourcing is made to countries where the legal system may not present the same level of protection with respect to contractual provisions.