

1-1-2002

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### **Recommended Citation**

Teresa Scassa, "Book Review: The Personal Information Protection and Electronic Documents Act: An Annotated Guide by Stephanie Perrin, Heather H. Black, David H. Flaherty and T. Murray Rankin, Q.C. (Concord, Ont.: Irwin Law, 2001)" (2002) 1:1 CJLT.

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**Book Review: The Personal Information Protection and Electronic Documents Act: An Annotated Guide, by Stephanie Perrin, Heather H. Black, David H. Flaherty and T. Murray Rankin, Q.C. (Concord, Ont.: Irwin Law, 2001).**

**Teresa Scassa\***

In April 2000, the *Personal Information Protection and Electronic Documents Act*<sup>1</sup> was passed by the House of Commons. The legislation dealt with both personal information privacy and the use and validity of electronic documents in areas governed by federal law. On January 1, 2001, the portion of the *Act* dealing with electronic documents took effect, as did the privacy provisions, to the extent that they related to the collection use or disclosure of personal information inter-provincially, or in connection with a federal work, undertaking or business.<sup>2</sup> The *Act* applied to personal health information as of January 1, 2002, and will finally extend to information collected, used and disclosed within any Canadian province on January 1, 2004.<sup>3</sup> Irwin Law's *The Personal Information Protection and Electronic Documents Act: An Annotated Guide*<sup>4</sup> is the first published attempt to provide a practical and systematic approach to understanding this legislation.

The authors of this book, Perrin, Black, Flaherty and Rankin have impressive credentials, especially as they relate to the privacy components of the legislation. Stephanie Perrin, now Chief Privacy Officer at Zero Knowledge Systems Inc., served as Director of Privacy Policy for Industry Canada's Electronic Commerce Task Force. As such, she was directly involved in the development of the privacy policy reflected in *PIPEDA*. Heather Black has served with both the Department of Justice attached to Legal Services at Industry Canada, and with the Office of the Privacy Commissioner of Canada. She too was involved in the development and drafting of the privacy components of *PIPEDA*. David Flaherty is the former Information and Privacy Commissioner of British Columbia, and served as a special adviser to the Deputy Minister of Industry Canada in the period leading up to the enactment of *PIPEDA*. Finally, T. Murray Rankin has been very much involved with freedom of information and privacy issues in British Columbia and at the national level.

Given the privacy credentials of the four authors of this work, it should come as no surprise that the bulk of the book is dedicated to exploring those provisions of *PIPEDA* contained in Part I of the *Act*, which deal with personal information privacy. Parts II to V of the *Act*, which deal with electronic documents and with consequential amendments to other federal statutes, are given only thirteen pages out of the book's total of three hundred and eight. Admittedly, the privacy provisions are likely to be the more complicated and controversial of those contained in the legislation; nevertheless, the title of the work is at best misleading, as it suggests an overview of the legislation as a whole, something which this book does not really deliver.

It is not just in the title that the book fails to be upfront about its orientation. The *Annotated Guide* begins with a brief introduction that charts some of the history, both nationally and internationally, leading to the enactment of *PIPEDA*, and, in particular, the privacy portions of that *Act*. The introduction is almost entirely silent as to the electronic documents portion of the legislation; in fact, the only reference to this portion is the observation that "[a]lthough its title focuses on electronic documents"<sup>5</sup>, Part I of the *Act* is about personal information protection in the private sector. It is clear from the content of the introduction, if from nothing more explicit, that the *Annotated Guide* to

the legislation is primarily a book about the privacy provisions in the *Act*. It would have been helpful to have the focus of the book made more explicit, if not in the title, than certainly in the introduction.

Chapter One, titled "Background to the Act", provides a more detailed account of the events leading to the enactment of *PIPEDA* than did the introduction, although very similar territory is covered by both the introduction and the first chapter. Chapter One contains some useful anecdotal information, and attempts to explain why the *Act* was drafted as it was, with the normative provisions consisting essentially of the *CSA Model Code* attached in a schedule to the *Act*. However, the authors' approach leaves them sounding quite clearly like apologists for the course of action taken by the federal government. Criticisms of this course of action are alluded to<sup>6</sup>, but references to the critiques are not provided.

The book's second chapter is devoted to reviewing the provisions of the *CSA Model Code*, which is incorporated into Schedule I of the *Act*. In the view of the authors, "[t]he code is the heart of the *Act*, and it is essential that it be read first to understand the operation of the provisions in the body of the legislation."<sup>7</sup> The introduction to the discussion of the *Code* continues to advance the explanations offered in the introduction and Chapter One as to why it made sense to incorporate the provisions of the *CSA Code* directly into the legislation. This serves to further emphasize the authors' role as apologists for the legislation, but does little to advance an understanding of the provisions of the law. The actual annotations to the provisions of the *Code* vary in usefulness. Some merely reiterate the content of the particular passage<sup>8</sup>, others provide more detail<sup>9</sup>.

Consent is one of the key provisions in the legislation. Because of this, it provides a good focus point for assessing the usefulness of the annotations provided. The annotations for the clause dealing with consent span ten pages. Although they do highlight many of the relevant issues relating to consent as set out in the Schedule, and provide some insight into why certain options were chosen over others<sup>10</sup>, the discussion of these provisions is largely uncritical. As they do elsewhere throughout the book, the authors leave one with the impression that the best drafting choices possible were made; that the provisions effectively cover the necessary bases; that they are sufficiently strong and detailed, and that they provide an effective means of privacy protection.

In discussing the so-called "refusal to deal clause"<sup>11</sup>, which relates to whether an organization can refuse to provide goods or services if an individual does not consent "to the collection, use or disclosure of information beyond that required to fulfil the explicitly specified, and legitimate purposes", the authors describe this provision as "clear and quite strong"<sup>12</sup>. They state that "The message is clear: if you are planning to deny a service to someone for failure to provide information, the information must be necessary to fulfil a legitimate and specific purpose, not an overly broad or inflated one."<sup>13</sup> However, in spite of the explanations of the authors, it is still not clear that a consumer could not be denied access to a product or service for failure to provide specified personal information. The comparable provision in Quebec's *Act respecting the protection of personal information in the private sector*<sup>14</sup> appears much more strongly worded<sup>15</sup>. It is disappointing that this annotation contains no references to any specific criticisms of this provision, nor does it offer comparisons with the wording of similar legislation in other jurisdictions. A more lawyerly annotation might probe at the weaknesses in the drafting, possible deficiencies or loopholes, as well as the strengths of the legislation. This annotation (and it is typical of the annotations throughout the book), reads more like a booster for the wording chosen. Criticisms of the drafting of *PIPEDA*, when they appear, are relatively minor, such as the observation that, in light of comments made by the authors regarding Clause 4.3.3, "clause 4.3.5 would have followed more logically at this point".<sup>16</sup>

Chapter 3 of the book moves the reader from an annotation of Schedule I of the *Act* to an annotation of Part I of the legislation. Included in this chapter are discussions of the various definitions contained in the *Act*. Some of these definitions, such as that of "commercial activity", are central to the scope of application of the legislation, and receive considerable attention in the annotations. In fact, the annotation for "commercial activity" even contains a rare reference to case law.<sup>17</sup>

Many of the provisions of Part I of the *Act* are difficult to understand on their own because of the way in which the legislation was drafted, with the bulk of the normative provisions located in Schedule I. The annotations for these provisions are quite good, and assist in clarifying the legislation. Although they continue the authors' approach of speaking authoritatively and conclusively about matters that will surely be the subject of much interpretative debate in years to come, they do provide a useful guide to how the law might be interpreted. Short fact scenarios are used to explain how particular provisions may apply, and these provide useful illustrations.

It is worth noting that annotations are only provided for Part I of the *Act*. Parts II to V are dealt with in a single short chapter. As Part II is generally non-prescriptive, it is not essential that the format used for Part I of the *Act* be duplicated here. However, amendments to other pieces of legislation such as the *Canada Evidence Act*<sup>18</sup> contained in Parts III to V are given a fairly cursory discussion. Chapter Four provides a concise descriptive overview of these parts of the *Act*, but does little more.

Chapter 5 of the book, titled "Critical Privacy Issues" provides a snapshot of some of the more difficult privacy issues raised by the legislation. These include the definition of personal information, anonymity, publicly available information, regulation making powers under the *Act*, information used in research, and medical information. These sections identify, albeit in brief form, what some of the key issues and concerns are. This is a useful overview, although again, there are no references to additional resource material for those interested in further exploration of these issues.

The book concludes with a sixth chapter entitled "Frequently Asked Questions". This chapter gives a clear indication that the book is not primarily oriented towards a legally trained audience. Both in content and format, the questions appear to be those most likely to be asked by lay persons or those in small or medium sized businesses. Significantly, none of these FAQ's relate to the electronic documents portion of the *Act*. The *Annotated Guide* also contains one hundred and twenty five pages of appendices, which include the full text of *PIPEDA* and Schedule I of the *Act*, the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data*, the European Directive on *The Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data*, registry offices for the Federal Court of Canada, information on privacy impact assessments, and three examples of privacy codes, including a fictionalised sample of a code for a small enterprise, the *Telus Privacy Code*, and the *Air Miles Reward Program Privacy Commitment to the Protection of Customer Information*. Although there is a short table of cases provided at the end of the book, there is no bibliography or other table of source material.

In fact, it is a significant flaw in this book that such a paucity of source material is referenced throughout. Neither the introduction nor the first chapter, which provide accounts of the events leading to the enactment of *PIPEDA*, are rich in source material or footnotes. The annotations make virtually no references to sources outside the *Act*. While there is admittedly no case law directly interpreting this legislation as the statute is so recent, there are, nonetheless, other cases, articles or materials that might shed some light on interpreting the legislation. For example, Quebec has seven years of experience with its own personal information protection legislation, some references to the case law under the federal *Privacy Act* may be appropriate, and there is certainly already a body of writing and commentary on *PIPEDA* itself, some of it quite critical. The absence of critical voices is particularly noticeable from any of the few actual references. Quite apart from the lack of references within the annotations, this book contains no bibliography, which again diminishes its usefulness as a resource tool. It also provides no guidance for further reading or research on any of the topics discussed.

While this overall assessment of the book may seem fairly critical of the final product, I do wish to emphasize that the *Annotated Guide* has some real strengths. It constitutes the first detailed guide to this complex and important piece of legislation, and it does provide some useful information and annotations. The key to assessing the worth of the book may lie in defining the audience to which it is directed. It is written in a clear, direct and straightforward manner, making it a useful guide for the lay person concerned about their privacy rights. It is likely also to be of use or interest to small or even medium size enterprises grappling with the drafting of privacy policies. Although perhaps useful as a departure point for lawyers or legal academics who seek to interpret, analyse, challenge

or critique the legislation, it is most likely to fall short of expectations for this group of readers.

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<sup>1</sup> [Back](#) S.C. 2000, c. 5 [hereinafter *PIPEDA*].

<sup>2</sup> [Back](#) *Ibid.*, s. 30.

<sup>3</sup> [Back](#) *Ibid.* This application to the provinces is subject to the exception in s. 26(2)(b) of the *Act*, which allows the Governor in Council to declare an exemption from the application of *PIPEDA* where there is "substantially similar" provincial legislation in effect.

<sup>4</sup> [Back](#) Stephanie Perrin, Heather H. Black, David H. Flaherty and T. Murray Rankin, Q.C., *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (Concord, Ont.: Irwin Law, 2001), [hereinafter, the *Annotated Guide*].

<sup>5</sup> [Back](#) *Ibid.* at xi.

<sup>6</sup> [Back](#) The authors note that although industry was supportive of the incorporation of the CSA standard, its inclusion as the normative heart of the legislation occurred "to the great bewilderment of privacy experts and legal scholars everywhere". *Supra*, note 4 at 11.

<sup>7</sup> [Back](#) *Ibid.*, at 13.

<sup>8</sup> [Back](#) For example, para 4.1.2 states: "The identity of the individual(s) designated by the organization to oversee the organization's compliance with the principles shall be made known upon request." The annotation reads: "The name and coordinates of that designated individual must be available on request." (*Supra*, note 4 at 16).

<sup>9</sup> [Back](#) The discussion of clause 4.1.3 gives some detail as to the reasons why particular wording was chosen (*supra*, note 4 at 16). The discussion of Clause 4.2 provides some background on the drafting of the clause, and offers a comparison with an equivalent provision in Quebec's private sector data protection legislation (*supra*, note 4 at 18-21).

<sup>10</sup> [Back](#) For example, there is an explanation as to why no differentiation was made between sensitive data and other forms of data. (*Supra*, note 4 at 23.)

<sup>11</sup> [Back](#) See clause 4.3.3 of Schedule I, which reads: "An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use, or disclosure of information beyond that required to fulfil the explicitly specified, and legitimate purposes."

<sup>12</sup> [Back](#) *Ibid.*, at 26.

<sup>13</sup> [Back](#) *Ibid.*

<sup>14</sup> [Back](#) R.S.Q., c. P-39.1.

<sup>15</sup> [Back](#) The comparable provision in the Quebec legislation reads: "No person may refuse to respond to a request for goods or services or to a request relating to employment by reason of the applicant's refusal to disclose personal information except where (1) collection of that information is necessary for the conclusion or performance of a contract; (2) collection of that information is authorized by law; or (3) there are reasonable grounds to believe that the request is not lawful. In case of doubt, personal information is considered to be non-necessary". (*Ibid.*, s. 9; compare with the wording set out *supra*, in footnote 11.)

<sup>16</sup> [Back](#) *Supra*, note 4 at 26.

<sup>17</sup> [Back](#) *Ibid.* at 49. Note, however, that in referring to particular cases, the authors express the view that they are not particularly helpful in understanding the scope of the term used.

<sup>18</sup> [Back](#) R.S.C. 1985, c. C-5.