

8-1-2002

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Recommended Citation

Teresa Scassa, Book Review: "The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide by William Charnetski, Patrick Flaherty and Jeremy Robinson (Toronto Canada Law Book Inc., 2001)" (2002) 1:3 CJLT.

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The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide

by William Charnetski, Patrick Flaherty and Jeremy Robinson (Toronto: Canada Law Book Inc., 2001)

Teresa Scassa†

The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide (the Guide) is the second book to be published in English in Canada dealing expressly with the *Personal Information Protection and Electronic Documents Act*¹ (PIPEDA). The Guide is different from the earlier work,² in that it is not a section by section discussion or annotation of the provisions of PIPEDA. Rather, it is organized into eight chapters, each addressing a distinct theme or topic. The Guide is also aimed at a more professional audience than the earlier work. In its introduction, and in its choice of content, it focuses more on specific problems and interpretive issues under PIPEDA, than on giving a general overview and explanation of the legislation.

The authors of the Guide reflect the more professional and practice oriented nature of the book. All three authors are lawyers whose areas of practice include varying aspects of privacy law. Their objective in preparing the work is clear; it is meant to identify legal issues of importance to lawyers and entrepreneurs. The brief introduction to the book refers to the legislation as “consumer protection for the digital economy”,³ and cautions that: “no business or other entity to which the Act potentially applies can afford either to ignore it or to attempt to comply with its provisions in an *ad hoc* fashion”.⁴

The Guide is a fairly short text. Although the book as a whole contains almost 300 pages, more than half that number are appendices. The appendices include PIPEDA and its regulations,⁵ the European Directive on the protection of personal data,⁶ the OECD guidelines,⁷ and the Office of the Privacy Commissioner’s Guide.⁸ At the very end of the book, three one-page appendices contain flow charts covering process issues, and the spectrum of consent under PIPEDA.

The style of the Guide is crisp and to the point. Chapter 2, dealing with “Sources”, for example, explores

the drafters’ legislative sources not from an anecdotal or historical point of view, but rather from the point of view of an interpreter of the legislation: “At a minimum, the sources explain the context in which the Act was promulgated and thus may help guide one’s view of achieving compliance”.⁹ The discussion of sources is more than descriptive; ways in which the sources can be used in dealing with interpretive issues under PIPEDA are also outlined. The information provided is succinct and well-footnoted.

Chapter 3 contains a brief overview of the protection of privacy prior to the enactment of PIPEDA. In keeping with the general tenor of the Guide, the chapter is economical with language, identifying sources of privacy protection other than PIPEDA, and honing in on key provisions. Far from being a dissertation on privacy protection in statute law and under the Canadian *Charter of Rights and Freedoms*, this chapter identifies, highlights, and provides citations for relevant sources of privacy protection. It is like a crisp memo setting out key legislation and case law, though it lacks any references to the significant academic literature available on this topic.

The fourth chapter, on the application of PIPEDA, deals primarily with issues such as the phasing in of coverage of the legislation and definitional issues. The discussion highlights some of the key interpretive problems in determining the scope of application of the legislation, particularly in relation to the issue of to whom or what the legislation will apply.

The longest chapter in the book addresses the interpretation of the provisions of the CSA Model Code that were incorporated into PIPEDA as the normative core for Part I of the Act. The approach of the authors is to address each of the 10 principles in order, with the greatest attention being given, for good reason, to the issue of consent. Although issues of consent are addressed in some detail, the section is still somewhat

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disappointing in its fairly descriptive account of the consent provisions. While offering some opinion as to the interpretation of adequate form and manner of consent in certain circumstances, a more expanded discussion of this key principle is warranted. The authors do provide a chart titled “Spectrum of Sensitivity: Possible Types and Forms of Consent”¹⁰ along with the *caveat* that “the particular conclusions offered therein do not constitute legal opinions”;¹¹ yet there is no real discussion of the way in which such assessments can be made. The chapter concludes with a discussion of “transaction issues”. This is a useful discussion of the particular issues faced by corporations who engage in transactions involving the transfer of personal information. While earlier segments of the Guide serve as very concise summaries of issues that have been covered elsewhere, this section on transactions is relatively new territory, and the authors’ coverage here suddenly becomes more detailed and original.

Chapter 6 on enforcement issues reverts back to the thorough but pedestrian format of walking the reader through the various provisions and issues related to the enforcement of PIPEDA. The authors do provide their own views on such matters as the manner in which investigations are likely to be carried out under the legislation, and the standard of review to be applied on an application to the Federal Court for review of a decision of the Privacy Commissioner, although these sections too are relatively brief.

Chapter 7 on constitutional issues provides an overview of the oft-debated topic of whether PIPEDA actually falls within the constitutional authority of Parliament, at least to the extent that it regulates an area which is arguably within the authority of the provincial legislatures. The debate centres on whether the regulation of personal information privacy falls under subsection 92(13) of the *Constitution Act*¹² (property and civil rights in the province) or under some head of federal power, such as subsection 91(2) (trade and commerce), or perhaps even the peace order and good government power. Diverging somewhat from the extremely economical style of the preceding chapters, this chapter contains several pages of what can best be described as “division of powers 101”. Given that the intended audience for this book is so clearly a professional one, it is suprising that this amount of very basic introductory material is provided. One can assume that most lawyers would not need to be told that: “Legislative authority in Canada, as a federal state, is distributed between the central, federal Parliament and the provincial legislatures”.¹³ Parts of the remainder of the chapter read like a concise set of constitutional law course notes, although the chapter does also include several pages of analysis of the constitutionality of Part I of PIPEDA.¹⁴

The final chapter in the book deals in a cursory, and largely point form, manner with Parts 2 to 5 of PIPEDA. These Parts deal primarily with electronic documents,

and make consequential amendments to other pieces of federal legislation in relation to electronic alternatives to paper documents. Those who have been waiting for a detailed approach to the electronic documents component of PIPEDA must continue to wait. There is little here that would be of use or interest to those who already have some familiarity with this part of the legislation.

There are some other gaps in the coverage of this book that might have been addressed by the authors. Although they acknowledge that “the structure of the Act is relatively complex”,¹⁵ little attention is given to navigating the awkward legislative framework. Further, although the Guide does not pretend to be a scholarly analysis of the legislation, nor does it need to be to meet its objectives, it is nonetheless unfortunate that the authors did not see fit to include any references to the growing literature and commentary on the legislation. While there is not yet a proliferation of books and articles on PIPEDA, such scholarship does exist, and more complete references would be of use to those building interpretive arguments under the legislation. There are at least two recent books on Canadian privacy law that explicitly address PIPEDA,¹⁶ and there are loose leaf services that deal with the legislation as well.¹⁷ In addition, there are a number of journal articles that address PIPEDA topics.¹⁸

A legitimate concern with respect to the Guide is the extent to which it actually adds to the existing materials on PIPEDA. The coverage is slightly more extensive than some of the other sources with respect to, for example, issues of constitutionality, and it does provide some content that is distinct from existing materials. However, the coverage is not hugely different from that provided in the loose leaf services, for example, and the content is necessarily not as current as those sources. However the Guide is published in a much less expensive format than the loose leaf services, and is more precisely tailored to issues relating to PIPEDA. The coverage of a recent text on privacy law in Canada is at least as strong as the Guide on a number of points, including, for example, the definition of “commercial activity” and the definition of “personal information”.¹⁹ Like the loose leaf services, however, the privacy law text is not as precisely tailored to PIPEDA issues as is the Guide, and it does not contain the statutory material and regulations that are found in the appendices to the Guide.

Overall, and in spite of its shortcomings, this book fulfills a useful purpose for lawyers whose practice touches upon issues of personal information privacy in Canada. Its virtues are that it is concise, clearly written, and well-footnoted, at least insofar as references to primary materials are concerned. Although it does not contribute a great deal that is new to the literature on the topic, it is, as it stands, a useful and relatively inexpensive desktop reference for legal professionals and entrepreneurs.

Notes:

- ¹ S.C. 2000, c. 5.
- ² 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. For a review of this earlier work, see online: <http://cjlt.dal.ca/vol1_no1/articles/01_01_Scassa_protec_fset.html>
- ³ William Charnetski, Patrick Flaherty, and Jeremy Robinson, *The Personal Information Protection and Electronic Documents Act: A Comprehensive Guide*. Toronto: Canada Law Book Inc., 2001, at 2.
- ⁴ *Ibid.*, at 3.
- ⁵ Regulations Specifying Investigative Bodies, SOR/2001-6; Regulations Specifying Publicly Available Information, SOR/2001-7; and Order Binding Certain Agents of Her Majesty for the Purposes of Part 1 of the *Personal Information Protection and Electronic Documents Act*, SOR/2001-8.
- ⁶ Directive 95/4/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Official Journal L 281, 23/11/1995 at 0031-0050.
- ⁷ OECD, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, adopted September 23, 1980. Online: Organization for Economic Co-operation and Development <<http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>>
- ⁸ Privacy Commissioner of Canada, “Your Privacy Responsibilities: Guide for Businesses and Organizations to Canada’s Personal Information Protection and Electronic Documents Act”. Online: <http://www.privcom.gc.ca/information/guide_e.asp>.
- ⁹ Guide, *supra* note 2, at 5.
- ¹⁰ Guide, *supra* note 2, Appendix F, at 257.
- ¹¹ *Ibid.*, at 47.
- ¹² *Constitution Act, 1867*. U.K. 30 & 31 Victoria, c. 3.
- ¹³ Guide, *supra* note 2, at 90.
- ¹⁴ A good discussion of the constitutionality of PIPEDA is also provided in: Colin H.H. McNairn & Alexander K. Scott, *Privacy Law in Canada*, (Markham, Ont: Butterworths Canada Ltd., 2001), at 97-101.
- ¹⁵ *Ibid.* at 5.
- ¹⁶ See, for example, Perrin, *et al.*, *supra* note 2; McNairn & Scott, *supra* note 14.
- ¹⁷ See, for example: Barbara McIsaac, Rick Shields, Kris Klein, *The Law of Privacy in Canada*. Thomson Canada Ltd., 2000, chapter 4; Barry S. Sookman, *Computer, Internet and Electronic Commerce Law*. Carswell, Inc., 1994, chapter 8. Both these loose leaf services offer general coverage of privacy law issues in Canada, as well as specific coverage of PIPEDA issues.
- ¹⁸ See, for example: Christopher Berzins, “Protecting personal information in Canada’s private sector: the price of consensus building”, (2002) 27 Queen’s L.J. 609; F. Buono, P. Strauss, S. Podey, “Understanding the new Canadian privacy law”, (2002) 48 The Practical Lawyer 11; J. Klosek, W. Krzastek, “The impact of Canadian privacy legislation on US organizations”, (2001) 18 Computer and Internet Lawyer 1; S. Morin, M. Long, “Canada’s new private sector privacy law”, (2001) 7 Journal of Internet Law 11; T. Scassa, “Text and context: making sense of Canada’s new personal information protection legislation”, (2000/2001) 32 Ottawa Law Review 1; A. Macdonald, “The arrival of Bill C-6: what lawyers should know about the Personal Information Protection and Electronic Documents Act”, (2000) 58 The Advocate 867.
- ¹⁹ See McNairn & Scott, *supra* note 14, at 104–113. This work is, however, less current in some respects, and less detailed in its discussion of the 10 principles incorporated into PIPEDA.