

Cooperation Among Canadian Data Protection Authorities

David Loukidelis
Information & Privacy Commissioner
for British Columbia
26th International Conference on
Privacy & Personal Data Protection
Wroclaw Poland
September 15, 2004

Objectives

- Discussion limited to cooperation within Canada
- Describe Canadian constitutional and legal context for cooperation
- Describe present and possible future cooperation initiatives
- Discuss legal and practical difficulties
- Suggest possible future direction
- Consider whether Canadian situation speaks to international challenges

Constitutional Framework

- Canada's constitution divides regulatory powers between the federal Parliament and provincial Legislatures
- Provinces can regulate local matters, including commercial conduct
- Federal government also has a limited (but perhaps growing) power to regulate commerce
- It can also regulate inter-provincial and international matters & federal bodies

Constitutional Framework

- Thus there is overlapping jurisdiction for personal information protection between the federal and provincial governments
- This means organizations may have to comply with more than one privacy law
- The overlap in regulatory powers and laws makes cooperation between provincial and federal privacy commissioners very important

Can We Harmonize Privacy?

- Legislative harmonization, if not uniformity, is desirable for both citizens and organizations
- Many of the harmonization challenges within Canada are encountered within Europe and internationally
- As seen below, Canada has taken several different yet very similar legislative approaches
- We have multiple regulatory agencies with differing yet very similar legislative mandates and powers

Canadian Privacy Laws

- Canada has different privacy laws for public and private sectors
- All Canadian provinces and territories, and the federal government, have public sector privacy laws
- Canadian laws are recent compared to EU laws
- Our federal public sector privacy law was passed in 1984 and provincial laws after that—e.g., Ontario in 1987, British Columbia in 1993

Canadian Privacy Laws

- Public and private sector privacy rules are enacted separately in Canada
- Private sector laws are much more recent—the first, Quebec's law, passed in 1994
- Federal law—*Personal Information Protection and Electronic Documents Act* (PIPEDA)—became effective January 1, 2001
- British Columbia and Alberta each passed a *Personal Information Protection Act* effective January 1, 2004



Canadian Privacy Laws

- Alberta and BC laws each cover the entire private sector in the province
- Alberta, Saskatchewan, Manitoba and (starting November 1, 2004) Ontario have private sector laws relating only to health information
- PIPEDA applied to federally regulated private sector enterprises starting January 1, 2001
- PIPEDA applied in the provinces effective January 1, 2004



Canadian Privacy Laws

- PIPEDA does not apply in any province that has a substantially similar private sector law as determined by the federal government
- The federal Cabinet has so far only declared Quebec's law substantially similar to PIPEDA (and Quebec has challenged PIPEDA's constitutionality)
- Substantial similarity determinations for Alberta and Ontario are still awaited—they are long overdue



Canada's Privacy Landscape

- To summarize, only three of ten Canadian provinces have plenary private sector privacy laws
- Only one of these laws has been approved by the federal government, leaving PIPEDA in force for now in Alberta and British Columbia
- Four provinces of ten have private sector health privacy laws and none have been approved, leaving PIPEDA in force along with these laws
- In the seven provinces with no laws, PIPEDA applies to the entire private sector (Ontario included)



Transborder Issues Within Canada

- Transborder data flows within and outside Canada can lead to multiple jurisdiction for the same matter
- Even in a province with a law declared to be substantially similar to PIPEDA, transfer of personal information to another province likely triggers PIPEDA's application



Transborder Issues

- Similarly, there is a federal role where personal information leaves Canada, which is obviously common
- With inter-provincial and international transfers, provincial commissioner is not necessarily excluded entirely
- Extent of federal commissioner's role in such cases is not clear
- One privacy law or the other will apply, though



Cooperation Among Commissioners

- So, what can Canadian commissioners do to harmonize standards and practices?
- In answering this, we must bear in mind the legal limits to the legitimate role of commissioners in fashioning standards
- Must also remember practical constraints related to their different powers and formal mandates



Canadian Cooperation to Date

- Alberta, Quebec and BC commissioners in May 2003 met to initiate cooperation measures for the three provincial privacy laws
- Present federal commissioner—formerly the Quebec commissioner—on appointment in late 2003 affirmed interest in cooperation
- Since the start of 2004, our three offices have agreed on the following initiatives



Federal/Provincial Initiatives

- One (obvious) measure is creation of clear communication channels among all three offices
- All offices have designated staff as points of first contact for all matters
- A formal inter-office forum has been established, with designated representatives for each office
- Forum conference calls occur on a fixed schedule



Federal/Provincial Initiatives

- Forum can identify issues of interpretation of similar or differing statutory rules
- Also deals level procedural policy issues relating to handling of complaints where more than one office has jurisdiction
- Addresses how to decide which office should assume jurisdiction where more than one may have that right
- Forum can trouble-shoot specific issues as they arise if they are not just one-off, *i.e.*, they have broader implications



Federal/Provincial Initiatives

- Forum generates advice for commissioners on issues for their individual or joint action
- Have also created a joint triage tool and FAQs for the public
- These guide decisions, inside and outside the offices, on who has jurisdiction over a complaint
- Less formally, there are now more frequent meetings and communications among the three commissioners



Federal/Provincial Initiatives

- Have agreed on transfer of complaints where considered appropriate according to joint triage tool
- Have agreed on sharing of complaint-specific information for this purpose
- Developing common statistical methods to facilitate harmonized reporting as appropriate
- BC and Alberta commissioners are awaiting legislative amendments to further facilitate cooperation



Federal/Provincial Initiatives

- One possibility is a joint decision on a matter with regional or national implications
- Alberta commissioner, for example, could appoint BC and federal commissioners to hear an Alberta complaint and jointly decide the case
- This assumes symbolic value to joint decision merits the effort



Federal/Provincial Initiatives

- BC will attempt to harmonize guidance for the public (e.g., federal guidance on use of social insurance number will influence BC's work)
- Similar but differing substantive rules, however, pose a challenge to all our efforts
- Core principles are very close, with consent issues presenting greatest challenge
- BC view is that similarities should be emphasized and differences can be minimized, though not ignored



Federal/Provincial Initiatives

- Differences in legal powers are a challenge
- Federal commissioner has Ombudsman role, with recommendation power
- Alberta and BC commissioners mediate cases, but ultimately have power to issue binding orders, subject to judicial review
- All offices try to mediate resolution of complaints and focus on this aspect of our roles can promote harmonized enforcement



Federal/Provincial Initiatives

- Whether to publish full decisions is another challenge
- Under public sector laws Alberta and BC publish full decisions
- Federal commissioner's office has not done this, Ombudsman role apparently being a key consideration
- Publication of joint guidance tools could promote harmonized development of common principles and alleviate need to for publication of full federal decisions



BC/Alberta Cooperation

- Alberta and BC private sector privacy laws were jointly drafted, though differences emerged late in the process
- Their close similarities ease cooperation between commissioners
- Alberta shared its web-based guidance for the private sector
- This enabled BC to produce very similar guidance, avoiding duplication and promoting consistency in the law



BC/Alberta Cooperation

- BC is sharing its employment privacy guidelines with Alberta, again to promote efficiency and consistency
- As noted above, commissioners also are considering possible joint hearings where significant, common issue is raised
- Joint investigations short of formal hearing are also being considered



BC/Alberta Cooperation

- BC and Alberta commissioners are committed to respect each other's decisions, considering them authoritative, if not technically binding, wherever relevant
- The same respect is due to applicable federal decisions under PIPEDA—again noting differences in PIPEDA and the two PIPAs



Broader Canadian Cooperation

- Saskatchewan commissioner has created and is hosting a list-serve for staff of offices across Canada to share information and help each other
- Commissioners also will have this resource
- Complements interest in more frequent and more formal contacts than annual commissioners meetings
- Challenge is to formalize yet remain flexible



Broader Canadian Cooperation

- There is a need to respond jointly to many issues
- For example, many post-9/11 legislative initiatives are federal, yet affect citizens in each province
- Provincial and federal commissioners have worked jointly on such issues in the past, *ad hoc*, but greater coordination is warranted, as joint positions are more powerful



Conclusion

- Canadian experience in some respects mirrors challenges within Europe and between Europe and other jurisdictions
- It's trite, but commercial globalization and the free flow of data continue—over twenty years after the OECD's work—to bedevil privacy commissioners everywhere
- This group has taken important steps toward greater cooperation and my office vigorously supports further cooperation, and harmonization, where feasible



OIPC Website

www.oipc.bc.ca

