



**AN EXAMINATION OF QUÉBEC'S
RECENT BILL 86**
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PRIVACY ENVIRONMENT IN QUÉBEC

- The *Québec Charter of Human Rights and Freedoms*, which lays the quasi-constitutional rules with respect to rights and freedoms applicable to the public and private sectors in the province of Québec;
- The *Civil Code of Québec*, which comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it;



PRIVACY ENVIRONMENT IN QUÉBEC (cont'd)

- *Québec Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information*, which embodies in one statute the two aspects of Government transparency: access to Government information as well as the protection of personal information held by Government bodies;
- *Québec Act respecting the Protection of Personal Information in the Private Sector* (Québec Private Sector Act), which applies to the personal information collected, held, used or communicated by a private enterprise in or from the province of Québec;
- *Québec Act to establish a Legal Framework for Information Technology*, which establishes the legal parameters to maintain the legal value and integrity of documents transferred into electronic documents as well as the establishment of technological and legal infrastructures (such as Biometrics).



Similarities between the Federal and Québec Privacy Statutes

- Privacy Statutes are generally based on the following principles:
 - The statutes apply to personal information on individuals, not corporations (in Québec, all personal information are protected; PIPEDA, as far as employee information is concerned, applies only to a « federal work, undertaking or business »);
 - Any person or enterprise may collect personal information for a serious and legitimate reason;
 - Any person or enterprise collecting such personal information shall identify the object (“purpose”) of the collection and other use of the information;
 - The collection of personal information shall be limited to the information necessary for its object;



Similarities between the Federal and Québec Privacy Statutes (cont'd)

- The personal information shall be collected only from the individual concerned or with his/her consent (except as otherwise specified by the Act);
- The consent provision is key to all Privacy statutes with respect to the collection, use and communication of the information, and the exceptions to consent are limited and specifically determined by the Privacy statutes;
- Duty to protect the personal information (confidentiality);
- Rights of access and rectification (exceptions are limited and determined by the Privacy statutes).



THE AMENDMENTS TO THE QUÉBEC PRIVATE SECTOR ACT (BILL 86 OF JUNE 2006)

- The most important modifications to the Québec Private Sector Act include the following:
 - Balancing the security measures to be taken to ensure the confidentiality of personal information in light of certain circumstances [Section 10];
 - Before transferring personal information outside Québec, imposing on an enterprise the duty to determine whether (or not) the “receiving jurisdiction” presents the same type of protection for personal information as those requested by the Québec Private Sector Act and should the receiving jurisdiction not offer the same level of protection, imposing on the Chief Privacy Officer a prohibition to transfer such personal information [Section 17];



THE AMENDMENTS TO THE QUÉBEC PRIVATE SECTOR ACT (BILL 86 OF JUNE 2006) (cont'd)

- Limiting the exception related to the communication of personal information without consent of the individual concerned to a person to whom it is necessary to communicate the information under the law, to the necessary communications “under an Act applicable in Québec (...)” [Section 18(4)];
- The outsourcing of personal information can now be achieved, without the consent of the individual concerned, not only *via* an agency contract, but also under a contract for work or services [Section 20];
- Nominative lists now include the “technological addresses” (email) [Section 22];
- Reasonable accommodations must be made to enable handicapped individuals to exercise the right of access [Section 27];



THE AMENDMENTS TO THE QUÉBEC PRIVATE SECTOR ACT (BILL 86 OF JUNE 2006) (cont'd)

- Changing the “structure” of the *Commission d'accès à l'information* (“Commission”) [Sections 41.1 and 80]; and
- Changing the fines that could be imposed for a violation of Section 17 of the Québec Private Sector Act [Section 91].



BALANCING THE SECURITY MEASURES TO ENSURE THE CONFIDENTIALITY OF PERSONAL INFORMATION [SECTION 10]

- Before

10. Every person carrying on an enterprise who collects, holds, uses or communicates personal information about other persons must establish and apply such safety measures as are appropriate to ensure the confidentiality of the information.


- After

10. A person carrying on an enterprise must take the security measures necessary to ensure the protection of the personal information collected, used, communicated, kept or destroyed and that are reasonable given the sensitivity of the information, the purposes for which it is to be used, the quantity and distribution of the information and the medium on which it is stored.



BALANCING THE SECURITY MEASURES TO ENSURE THE CONFIDENTIALITY OF PERSONAL INFORMATION [SECTION 10]

- Following the amendments enacted by Bill 86, the security measures imposed on an enterprise to ensure the confidentiality of personal information can now be “tailored” according to the circumstances;
- In fact, such confidentiality measures must be reasonable considering the sensitivity of the information, the purposes for which it is to be used, the quantity and the distribution of the information and the medium on which it is stored;




BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17]

- Before:

17. Every person carrying on an enterprise in Québec who communicates, outside Québec, information relating to persons residing in Québec or entrusts a person outside Québec with the task of holding, using or communicating such information on his behalf must 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 persons concerned, except in cases similar to those described in sections 18 and 23;

- After:


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



BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17] (cont’d)

2) in the case of nominative lists, that the persons concerned have a valid opportunity to refuse that personal information concerning them be used for purposes of commercial or philanthropic prospection and, if need be, to have such information deleted from the list.

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**BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE
QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO
DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING
JURISDICTION” TO PERSONAL INFORMATION [SECTION 17]
(cont’d)**

Nil.


(our emphasis)

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 Québec with the task of holding, using or communicating it on behalf of the person carrying on the enterprise. (our emphasis)




BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17] (cont’d)

- The first amendment to Section 17 has been to withdraw from the first paragraph the requirements that the personal information be related to Québec residents;
- The Parliamentary debates show that the preoccupation of the Québec National Assembly was to avoid that the Province of Québec become a transit jurisdiction for personal information on residents of other provinces or of other countries;
- The second amendment, which has added the last paragraph of Section 17, requires from the enterprise (practically speaking, from its Chief Privacy Officer) to make an evaluation of the privacy situation in the receiving jurisdiction in order to determine whether or not the privacy situation in the receiving jurisdiction allows the enterprise to transfer the personal information.




BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17] (cont’d)

- This raises many questions:
 - Did the Quebec National Assembly want to prohibit the transfer of personal information outside Quebec, in the situation in which the enterprises considers that the information will not receive the protection afforded under subparagraphs 1 and 2 of Section 17, after having carefully examined the scope of the laws of the receiving jurisdiction, and having determined whether (or not) they afford the same extent of protection as Québec laws afford?
 - Is outsourcing to the U.S.A still possible with the appropriate contractual protections agreed to by the U.S. organization, even in light of the *U.S.A. Patriot Act*?
 - Should a consent be obtained from the individuals concerned before transferring personal information outside Québec?
 - Does Section 17 also apply to an enterprise sharing personal information with its other divisions elsewhere in Canada?



BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17] (cont’d)

- The effect of this paragraph is not clear.
 - One interpretation, supported by our Firm, is that contractual protections in a receiving jurisdiction are deemed sufficient to abide with the requirements of Section 17 and to allow the transfer to take place, as long as the receiving jurisdiction undertakes to apply, or applies, similar protections to those available in Québec. This must be done through a written contract (see pages 22-23).
 - Similar protections would then mean that exceptions provided by the local laws would be enforceable, because the Québec Private Sector Act recognizes exceptions when provided by law.
 - The second interpretation, more restrictive, is to the effect that the foreign jurisdiction’s laws must be examined in detail in order to verify if the statutory protection is sufficient in comparison with that provided by the Québec Private Sector Act before any transfer can be made.



BEFORE TRANSFERRING PERSONAL INFORMATION OUTSIDE QUÉBEC, IMPOSING ON AN ENTERPRISE THE DUTY TO DETERMINE THE PROTECTION AFFORDED BY THE “RECEIVING JURISDICTION” TO PERSONAL INFORMATION [SECTION 17] (cont’d)

- With respect to obtaining a consent by the individuals concerned before outsourcing their personal information, a law firm has underlined that it is the route to be taken in order to allow the transfer of personal information outside Québec in such circumstances.
- Although it is certainly preferable to obtain such a consent, in light of previous decisions on the Québec Private Sector Act¹, it is not clear that such a consent will allow an enterprise to go beyond and around the prohibition to transfer personal information outside Québec.
- Finally, another law firm has also indicated that it is unlikely that Section 17 applies to an enterprise which proceeds to communicate personal information to a Canadian subdivision (for example, in Ontario), when such communication occurs within the same legal entity.
- No decision, ruling or directive has yet been issued on these questions by the Commission.

¹ For example, *Laval (Ville de Laval) vs X.*, [2003] IIIJ Can. 44085 (C.Q.)



LIMITING THE EXCEPTION RELATED TO THE COMMUNICATION OF PERSONAL INFORMATION WITHOUT CONSENT OF THE INDIVIDUAL CONCERNED [SECTION 18(4)]

- Before:

18. A person carrying on an enterprise may, without the consent of the person concerned, communicate personal information contained in a file he holds on that person (...)
- (4) to a person to whom it is necessary to communicate the information under the law or a collective agreement (...);

- After:

18. A person carrying on an enterprise may, without the consent of the person concerned, communicate personal information contained in a file he holds on that person (...)
 - (4) to a person to whom it is necessary to communicate the information under an Act applicable in Québec, or under a collective agreement;
- (...) (our emphasis)



LIMITING THE EXCEPTION RELATED TO THE COMMUNICATION OF PERSONAL INFORMATION WITHOUT CONSENT OF THE INDIVIDUAL CONCERNED [SECTION 18(4)] (cont'd)

- Being coherent in its preoccupations *vis-à-vis* the *U.S.A. Patriot Act*, the Québec National Assembly wanted to limit the potential exception to communication of personal information without consent when required by a piece of legislation, to the situation where it is necessary to do so under an Act applicable in Québec.




THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20]

- Before:

- 20.** In the carrying on of an enterprise, authorized employees, mandataries or agents 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 execution of their mandates.


- After:

- 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.




THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- Section 20 of the Act created an exception to consent, allowing an enterprise to outsource the personal information it is managing only to a mandatary (agent), when needed for the performance or the carrying out of their mandates.
- This engendered some difficulties because very often, outsourcing is done through a “contract for services”, where the subcontractor is not the agent of the principal.
- This has been modified to allow an enterprise to benefit from the exception to the consent requirements and outsource to a subcontractor, through a contract for work or services, in order for the latter to manage on behalf of the enterprise the personal information it holds and uses.



THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- An important decision by the C.A.I. (*Deschesnes v. Groupe Jean Coutu*, [2000] C.A.I. 210) adds to the wording of section 20 of the Québec Private Sector Act. It indicates that mandataries (agents) may have access to the personal information without the consent of the person concerned once the following requirements are fulfilled:
 - the contract between the enterprise and the mandatary is in writing;
 - the contract must specify:
 - o the scope of the mandate;
 - o the purposes for which the mandatary (agent) would use the information (re: the object of the file);
 - o the category of individuals which would have access to the information; and
 - o the obligation imposed on the agent to take appropriate confidentiality and security measures.



THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- These requirements, added to the text of section 20 by the *Groupe Jean Coutu* decision, should be transposed and applied *mutatis mutandis* to a contract for work or services.
- In its February 2006 report entitled “Public-Sector Outsourcing and Risks to Privacy”, the Office of the Information and Privacy Commissioner of Alberta suggests the following provisions to be included in the outsourcing contract:
 - A prohibition on assignment or subcontracting of the outsourcing contract without written consent;
 - A requirement for notification by the outsourcers in the event of notice of creditor’s remedies or Court applications for bankruptcy or protection from creditors;




THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- A requirement of notice on any demand for access to or disclosure of personal information received by the outsourcer;
- A requirement of notice of any loss of or unauthorized access to personal information by the outsourcer or its employees;
- Right to audit, not only for compliance with the contract but with compliance with any legislation stipulated to be applicable to the contract;
- In addition to the right to audit, the outsourcers may be required to have in place a system which monitors or audits the outsourcers' use and disclosure of the personal information. The outsourcing entity may require access to those logs on certain conditions;
- Stipulate consequences for breach. In addition to right of termination and damages, provision should be made for: return of personal information and any copies of it; assistance and recovering loss or otherwise disclose personal information (p. 34).



THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- Can a Québec-based enterprise/organization outsource the personal information it holds to a third party service provider for data processing and management outside Québec?
- Under what conditions?
 - This requires the “joint” application of Section 20 and Section 17 of the Québec Private Sector Act;
 - This also requires the application, by analogy, of Rulings #313 and #333 of the Office of the Federal Privacy Commissioner;
 - Should an organization consider other strategies, such as anonymization of the personal information transferred abroad?



THE OUTSOURCING OF PERSONAL INFORMATION VIA AN AGENCY CONTRACT, BUT ALSO UNDER A CONTRACT FOR WORK OR SERVICES [SECTION 20] (cont'd)

- Does a Canadian organization need to obtain consent from its customers before outsourcing its data processing to the US?
 - No;
 - The Office of the Privacy Commissioner has taken the position that companies are not required to provide customers with the choice of opting out where the third-party service provider is offering services directly related to the primary purposes for which the personal information was collected;
 - Is this finding applicable under Section 17 of the Québec Private Sector Act?



Nominative lists include technological addresses [Sect. 22]

- Before

22. A person carrying on an enterprise may, without the consent of the persons concerned, communicate a nominative list or any information used to establish such a list to a third person, if
- (1) the communication is made pursuant to a contract that includes a stipulation prohibiting the third person from using or communicating the list or the information for purposes other than commercial or philanthropic prospection;

- After

22. A person carrying on an enterprise may, without the consent of the persons concerned, communicate a nominative list or any information used to establish such a list to a third person, if
- (1) the communication is made pursuant to a contract that includes a stipulation prohibiting the third person from using or communicating the list or the information for purposes other than commercial or philanthropic prospection;



Nominative lists include technological addresses [Sect. 22]

- (2) prior to the communication, in cases where the list is a nominative list of the person's clients, members or employees, the persons concerned are given a valid opportunity to refuse that the information be used by a third person for purposes of commercial or philanthropic prospection; and
- (3) the communication does not infringe upon the privacy of the persons concerned.

Definition.

A nominative list is a list of the names, addresses or telephone numbers of natural persons.

- (2) prior to the communication, in cases where the list is a nominative list of the person's clients, members or employees, the persons concerned are given a valid opportunity to refuse that the information be used by a third person for purposes of commercial or philanthropic prospection; and
- (3) the communication does not infringe upon the privacy of the persons concerned.

Definition.

A nominative list is a list of the names, telephone numbers, geographical addresses of natural persons or technological addresses where a natural person may receive communication of technological documents or information.



Reasonable accommodation to handicapped individuals [Section 27]

- Before:

27. Every person carrying on an enterprise who holds a file on another person must, at the request of the person concerned, confirm the existence of the file and communicate to the person any personal information concerning him.

- After:

27. Every person carrying on an enterprise who holds a file on another person must, at the request of the person concerned, confirm the existence of the file and communicate to the person any personal information concerning him.

Handicapped person

If the person concerned is handicapped, reasonable accommodation must be provided on request to enable the person to exercise the right of access provided for in this division.



CHANGING THE “STRUCTURE” OF THE COMMISSION [SECTIONS 41.1 AND 80]

- Before:

41.1 *Nil*

- After:

41.1 The functions and powers of the Commission that are provided for in this division are exercised by the chair and the members assigned to the adjudicative division.

80. The functions and powers provided for in sections 21 and 21.1, Division VI and this division are exercised by the chair and the members assigned to the oversight division.



CHANGING THE “STRUCTURE” OF THE COMMISSION [SECTIONS 41.1 AND 80] (cont’d)

- Criticisms were addressed to the previous system where all members of the Commission may be called to act as adjudicators as well as in the execution of the oversight (inspection/inquiry) powers of the commission.
- Amendments were passed by Bill 86 to divide the Commission into two sections:
 - firstly, the Oversight Division (vested with the function of overseeing the carrying out of the Act); and
 - secondly, the Adjudication Division (vested with the powers to decide on the disputes relating to the application of a legislation provision concerning access to or rectification of personal information.
- Moreover, with respect to the inspection/inquiry powers, the Act has also been amended to allow the Commission to authorize a member of its personnel, or any other person that it appoints to do so, to act as inspector for the Commission.



CHANGING THE FINES THAT COULD BE IMPOSED FOR A VIOLATION OF SECTION 17 OF THE *QUÉBEC PRIVATE SECTOR ACT* [SECTION 91]

- Before:

91. Every person who collects, holds, communicates to third persons or uses personal information on other persons otherwise than in accordance with the provisions of Divisions II, III and IV of this Act is liable to a fine of of \$1,000 to \$10,000 and, for a subsequent offence, to a fine \$10,000 to \$20,000.

- After:

91. Every person who collects, holds, communicates to third persons or uses personal information on other persons otherwise than in accordance with the provisions of Divisions II, III and IV of this Act is liable to a fine of \$1,000 to \$10,000 and, for a subsequent offence, to a fine of \$10,000 to \$20,000.

However, for a contravention of section 17, the fine is \$5,000 to \$50,000 and, for a subsequent offence, \$10,000 to \$100,000. (our emphasis)



CHANGING THE FINES THAT COULD BE IMPOSED FOR A VIOLATION OF SECTION 17 OF THE *QUÉBEC PRIVATE SECTOR ACT* [SECTION 91] (cont'd)

- With respect to the amendments to Section 17, a special amendment has been brought to the penal provisions.
- A contravention of Section 17 may bring a fine of \$5,000 to \$50,000 for the first infraction and, for a subsequent offence, \$10,000 to \$100,000.
- One must not forget that Section 93 of the Act states that “where an offence under this Act is committed by a legal person, the administrator, director or representative of the legal person who ordered or authorized the Act or omission constituting the offence, or who consented thereto, is a party to the offence and is liable to the prescribed penalty”.

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