

The New Federal Law on the Protection of Personal Information: To Whom does it Apply and as of When?

By François Charette and Raymond Doray



Scope of Application

Contrary to what many people think, the *Federal Information Protection Act* does not apply exclusively to companies within the legislative authority of Parliament, namely those which operate in sectors such as railways, telecommunications, aeronautics, banking, etc.

The scope of application of the *Federal Information Protection Act* is in fact much broader. The *Act* contemplates two quite distinct classes of personal information, i.e. personal information concerning the commercial activities of any organization, and information pertaining to the employees of a corporate entity under Federal jurisdiction.

Commercial Activities

The *Federal Information Protection Act* applies to any “organization” that collects, uses or discloses personal information in the course of its “commercial activities”.

The *Act* expressly states that the term “organization” applies to associations, partnerships, legal and physical persons and trade unions. The definition retained makes no mention of the legislative authority of Parliament, and therefore, in our view, the application of the *Act* is not restricted solely to organizations under federal jurisdiction.

On January 1, 2001, Part I of the Personal Information Protection and Electronic Documents Act¹ (the «Federal Information Protection Act») came into force without much fanfare. Part I provides a legal framework for the protection of personal information in the private sector².

There are two basic questions concerning the enactment of this legislation: who exactly is covered by the new federal statute and as of when does the *Act* apply? The present Bulletin deals solely with these two topics. The obligations imposed by the *Federal Information Protection Act* will be addressed in a later Bulletin.

¹ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

² The designated government bodies and departments that fall under the legislative authority of the federal government are subject to the *Privacy Act*, R.S.C. 1985, c. P-21.





François Charette has been a member of the Quebec Bar since 1991 and specializes in Access to Information and Privacy

Insofar as an organization carries on *commercial activities*, the personal information that it holds is covered by the new federal legislation. The term “*commercial activity*” is also defined in the Act as meaning “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character...”. This definition is very broad, and, in our opinion, envisages any transaction pertaining to the sale of goods or the performance of a service, regardless of the sector of activity involved.

In consequence, insurance companies, financial institutions, retail businesses, video clubs, credit bureaus, health clinics and drugstores are covered by the definition of an “organization” for the purposes of the Act. Such businesses clearly carry on commercial activities and are therefore covered by the *Federal Information Protection Act* when they engage in such activities.

Information pertaining to Employees

The new federal legislation also applies to corporate entities under Federal jurisdiction that hold information pertaining to their respective employees. The labour relations of such entities are governed by the *Canada Labour Code*.

It follows that information pertaining to the employees of entities governed by provincial labour laws is not subject to the new federal legislation. However, these entities are subject to the *Québec Act respecting the protection of personal information in the private sector*³ regarding the information that they collect, use, or disclose with respect to their employees.

The management of information concerning employees raises serious difficulties for a corporate entities under Federal jurisdiction with a place of business in Québec. They may actually be required to take into consideration both the federal and provincial legislation. For example, where information has been collected on a job applicant (through pre-employment forms, references, evaluations, etc.) who has not been hired, this information would apparently not be governed by the new federal legislation because a job applicant is not an employee of the enterprise. However, the *Québec Act respecting the protection of personal information in the private sector* would apply to such information.

Using the same reasoning, would information pertaining to former employees of a corporate entity under Federal jurisdiction be governed by provincial or federal law? We will have to wait until the issue comes before the Federal Privacy Commissioner and the Courts to have a clearer idea of the outcome. In the meantime, corporate entities under Federal jurisdiction would be well advised to act with caution and, insofar as possible, to comply with both statutes.

Certain Organizations or Activities may be Exempt

Oddly enough, the *Federal Information Protection Act* provides that the government may, by order, exclude an organization, a class of organizations, an activity or a class of activities from the application of Part I of the Act to the extent that provincial legislation “*that is substantially similar*” to the federal legislation is in force in the province covered by the order. However, the exemption would not apply with respect to information that is collected, used or disclosed outside that province. Therefore, corporate entities under Federal jurisdiction and entities engaged in extraprovincial activities would not be entitled to benefit from this exemption.

Those provinces which have not yet enacted legislation pertaining to the protection of personal information in the private sector will most likely try to do so in order to fully exercise their jurisdiction over intraprovincial commercial activities. As regards Québec, the Federal Minister for Industry has already stated that, in his opinion, the province’s *Act respecting the protection of personal information in the private sector* appears to provide protection similar to that provided by the federal legislation. Québec businesses could therefore eventually be exempted from the application of the federal legislation to the extent that, as noted earlier, the information is collected, used and disclosed solely within the province.

³ *Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1.

Raymond Doray is a partner with the firm of *Lavery, de Billy*. He has been a member of the Quebec Bar since 1982 and specializes in Access to Information and Privacy



Coming into Force of the Act

Technically, the federal legislation came into force on January 1, 2001. But to enable provincial legislatures to enact their own legislation on the protection personal information in the private sector, Parliament enacted transitional provisions that in fact suspend for three years (i.e. until January 1, 2004) the coming into force of the new legislative provisions regarding commercial activities which take place inside or outside a province. However, this moratorium does not apply to personal information disclosed outside a province for consideration, namely, for payment or exchange of services. Nor does it apply to corporate entities under Federal jurisdiction. In both situations, the new federal legislation applies as of January 1, 2001.

As noted earlier, the federal government may decide at the end of the three-year period that only provincial legislation will apply to information collected, used or disclosed within the province in question.

In the same vein, the federal legislation is suspended for one year as regards medical information held by an organization. This second moratorium is superimposed on the first, so that the new federal legislation will only apply as of January 1, 2002 to medical information held by corporate entities under Federal jurisdiction and to medical information disclosed outside a province for consideration. Other medical information will be protected under the Act starting January 1, 2004.

In summary, for companies which do business in Québec, the following dates should be kept in mind:

- as of **January 1, 2001**, the *Federal Information Protection Act* applies to corporate entities under Federal jurisdiction, both with respect to their commercial activities and to information pertaining to their employees (other than medical information);
- as of **January 1, 2001**, the *Federal Information Protection Act* applies to the commercial activities of Québec-based companies, regardless of whether or not they are under federal jurisdiction, where such companies disclose personal information (other than medical information) for consideration outside the province;
- beginning **January 1, 2002**, the *Federal Information Protection Act* shall apply to medical information collected, used or disclosed by a company under federal jurisdiction, whether it is in the context of its commercial activities or of its relations with employees;
- beginning **January 1, 2002**, the *Federal Information Protection Act* shall apply to medical information disclosed for consideration outside the province by an organization in the course of its commercial activities;
- beginning **January 1, 2004**, the *Federal Information Protection Act* shall apply to the commercial activities of all Québec-based companies, regardless of whether or not they are under federal jurisdiction;
- the Québec *Act respecting the protection of personal information in the private sector* continues to apply to intraprovincial commercial activities and shall continue to apply to such activities after **January 1, 2004** despite the coming into force of the federal legislation; and
- however, the Federal government may decide that its *Information Protection Act* will not apply to certain activities that take place within the province.

François Charette
Raymond Doray

You can contact any of the following members of the Access to Information and Privacy group in relation with this bulletin.

at our Montréal office

François Charette
Stéphane Desrochers
Raymond Doray
François Duprat
Raphaël H. Schachter, Q.C.

at our Laval office

Pierre Daviault

at our Québec City office

Jules Brière
Danielle Côté
Christian R. Drolet
Pierre-C. Gagnon
Pierre Gourdeau

Montréal

Suite 4000
1 Place Ville Marie
Montréal, Québec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City

Suite 500
925 chemin Saint-Louis
Québec, Québec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval

Suite 500
3080 boul. Le Carrefour
Laval, Québec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa

Suite 1810
360, Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Web Site

www.laverydebilly.com

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