

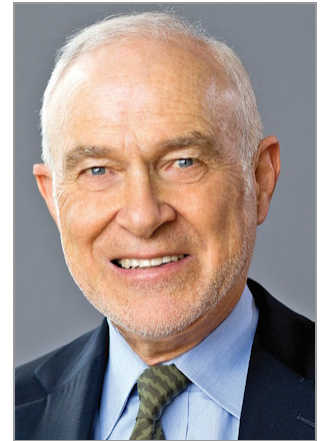


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## Privacy wrap 2023: Legislative reform 2.0, AI and more

By **David Young**

Law360 Canada (January 3, 2024, 11:17 AM EST) -- Legislative reform impacting privacy and AI continued during the past year. For privacy, the major thrust was Quebec's *Law 25* amending its *Private Sector Privacy Law*, key elements of which came into force in September. At the federal level, with Bill C-27, the government is seeking to replace the existing private sector law, *Personal Information Protection and Electronic Documents Act* (PIPEDA), with a new law, at the same time as introducing an oversight regime for high-impact artificial intelligence. Parliamentary committee hearings took place over the fall. The government's proposed *Artificial Intelligence and Data Act* (AIDA) was only one of several developments in the constantly evolving AI space. In addition, a few significant cases were reported.



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### Quebec's Law 25

New rules under Quebec's *Law 25* address requirements for enhanced consent and transparency procedures — now more in line with PIPEDA and Bill C-27. As well, there are requirements for comprehensive privacy policies, impact assessments for new data processing projects and cross-border transfers and transparency in any automated data processing. Other new rules also bring Quebec's law more in line with the EU's *General Data Protection Regulation* (GDPR).

A key challenge for marketers will be the new transparency and user friendliness rules related to the collection of personal information. At the end of October, the Commission d'accès à l'information (CAI) issued its *Guidelines for Valid Consent* which provide the CAI's interpretation of the new rules. Of note, they address the law's requirement to obtain consent separately for different purposes.

### INDU Committee hearings on Bill C-27

On June 16, 2022, the federal government introduced Bill C-27, the *Digital Charter Implementation Act, 2022*, enacting both the proposed *Consumer Privacy Protection Act* (CPPA), to replace PIPEDA and its proposed AI oversight law, the AIDA.

The bill only received second reading in June 2023 and hearings at the parliamentary Standing Committee on Industry and Technology (INDU Committee) did not begin until late September. The Committee heard evidence from witnesses across the spectrum, including Innovation, Science and Economic Development Canada (the bill's proponent), the federal privacy commissioner, academics, privacy lawyers, industry associations, public interest advocacy groups and other interested stakeholders.

Many witnesses indicated support for the proposed privacy reform reflected in the bill. A consistent theme was that the principle of privacy protection and the goal of innovation throughout the economy should not be conflicting. However, various witnesses indicated amendments to the bill addressing what they considered improvements, including making privacy a fundamental right, enhanced protections for children, more clear rules regarding de-identification and anonymization, strengthening consent exceptions, enhanced accountability through privacy impact assessments, and expanding the powers of the commissioner.

Early in the hearings, Minister of Innovation, Science and Industry, François-Philippe Champagne

tabled his own, limited proposed amendments, which included privacy as a fundamental right, additional protections for children and increased flexibility for compliance agreements.

## **Regulation of AI**

The federal government's initiative to regulate certain AI systems under the AIDA was only one of several significant AI developments over the past year. The drive for these initiatives likely can be attributed in large part to the onset of the "ChatGPT" phenomenon in the fall of 2022. The recent upheavals at OpenAI, the developer of ChatGPT, present in a microcosm the policy issues and challenges facing regulators — should AI be constrained to ensure that it performs ethically and "for good," or should it be allowed to develop with little or no restraint in order to maximize its potential and encourage innovation?

Many of the criticisms of the AIDA focused on the apparent haste with which the government was moving — by coming forward with only a skeletal framework and yet focusing on a narrow scope — "high impact" AI systems. The ChatGPT phenomenon was not clearly addressed in the bill, but as seen over the past year, has become potentially the most impactful instance of the technology. At the end of November, minister Champagne tabled extensive proposed amendments to the AIDA addressing a number of the criticisms.

Going forward, it is not clear whether the minister's amendments will permit the INDU Committee to proceed with both the CPPA and the AIDA or whether the AI legislation still requires substantial further consideration and should be withdrawn or addressed separately subsequent to completing a review of the CPPA. How this issue plays out may well determine the course of privacy reform in 2024.

Separately from the proposed regulatory oversight of high impact AI systems under the AIDA, the government sought to establish ethical guidelines to address the ChatGPT phenomenon through its *Voluntary Code of Conduct on the responsible Development and Management of Generative AI Systems*. The signatories of the Code undertake to address six key outcomes, specifically: accountability, safety, fairness and equity, transparency, human oversight and monitoring, and validity and robustness. Initial signatories include a number of industry parties active in AI but to date, none of the "Big Tech" players.

The voluntary code does not purport to address the "elephant in the room:" the copyright implications of the technology.

As a final AI-related development for the year, the federal, provincial and territorial information and privacy commissioners published (Dec. 7) a guidance document, *Principles for responsible, trustworthy and privacy-protective generative technologies*, focusing on the privacy implications of generative AI.

## **OPC provides rules for non-personal data**

In its investigation into the collection and use by the Public Health Agency of Canada (PHAC) of mobile location data during the COVID-19 pandemic, the Office of the Privacy Commissioner provided important guidance for organizations seeking to collect and use information about individuals that is anonymized so that it is no longer personal information and therefore outside the privacy laws.

The OPC's report examined whether mobile device data collected and used by PHAC contained personal information. Specifically, it considered whether PHAC and its data providers implemented sufficient de-identification techniques and safeguards to reduce the risk of an individual being identified below the threshold of a "serious possibility" — the rule articulated by the courts.

The OPC concluded that the threshold of serious possibility was not met and therefore the data as collected by PHAC was non-personal and outside the *Privacy Act*.

## **Facebook not required to change its privacy practices**

In the federal court, the OPC's application to order Meta (formerly Facebook) to change its privacy policies and procedures that had led to the Cambridge Analytica data breach was denied. The case

arose out of its joint investigation with the B.C. Information and Privacy Commissioner into the Facebook/Cambridge Analytica scandal, focusing on the unauthorized collection and sharing of the personal information of more than 50 million users worldwide, including over 600,000 in Canada, for the purposes of targeting political messages.

The court's decision contains some problematic determinations regarding interpretation of PIPEDA, as well as the nature of evidence required on a court application to compel compliance with the commissioner's findings.

The OPC's investigation had been highly critical of Facebook's policies and procedures.

The court determined that, notwithstanding the evidence of the policies and procedures that was before the court, such evidence was not sufficient for it to rule that individuals would not have understood the nature, purpose and consequences of Facebook's collection, use and disclosure of their personal information. By implication, the court criticized the OPC's investigation, suggesting that it did not have sufficient basis for its determination that Facebook had breached PIPEDA.

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