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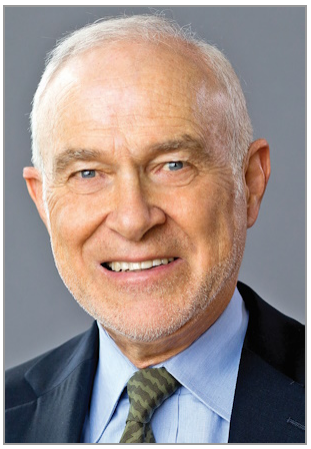
Privacy reform update: Focus on Bill C-27

By **David Young**

Law360 Canada (November 22, 2024, 11:00 AM EST) -- Initiatives to reform privacy laws in Canada have progressed significantly. However, they remain, at the national level at least, an unfulfilled promise. The most significant (and potentially impactful) reform now in place is found within Quebec's revised private sector law, *Law 25*, which, as of this past September, is fully in force. On the other hand, the major overhaul of the current federal private sector law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), is stalled in Committee and is not likely to be in force, even if passed, before the next election.



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The federal government first introduced its proposed successor to the current law — the *Consumer Privacy Protection Act* (CPPA) — in November 2020. With an election and responses that were critical of the proposed legislation in a number of respects, the then Bill C-11 failed to progress. The CPPA was reintroduced within new Bill C-27 in June 2022, but only received second reading in June 2023, with a detailed review at the Parliamentary Standing Committee on Industry and Technology (INDU Committee) commencing in the fall of last year. Committee hearings have progressed slowly, with expert witnesses and then clause-by-clause review (and amendments) reaching only the preliminary portions of the Bill this past May.

With the minority Parliament now risking an election at any time, it is not clear whether the Bill C-27 instance of federal privacy reform will come to fruition. However, it is likely that the major outlines of the proposed CPPA, including the amendments that have been adopted by the Committee to date, will find their way into an amended federal law. While that may be some time into the future, it is instructive for stakeholders to take note and align their privacy compliance status with the themes likely to be reflected in the ultimately reformed law.

Some key amendments have been made to the CPPA within the INDU Committee, all or most of which, it may be surmised, will be reflected in the final version of a reformed law, whenever it is passed.

The most impactful amendment to date is the recognition of privacy as a fundamental right. While the Bill as originally tabled did not include it, Innovation, Science and Industry Minister François-

Philippe Champagne proposed an amendment at Committee to include such a reference within the preamble to the Bill. However, witnesses at Committee advocated for a clearer statement with the result that substantially all of the recitals to the Bill, including statement of the fundamental right, were moved to become the preamble specific to the CPPA, as opposed to the Bill.

The primary significance of adopting the precept of privacy as a fundamental right is that where any ambiguity exists regarding the respective rights of individuals and organizations, the interpretation should favour the former. Advocates argue that privacy rights of individuals should prevail over commercial interests and not be "balanced" against them, and, as a fundamental right, it is not appropriate to "balance" privacy against commercial interests.

In a significant further amendment to the Bill, the Committee added a recital to the effect that the processing of children's information must respect their privacy and best interests. Such a stipulation has implications for compliance — resolving to the guiding precept that all collection and use of children's information must be in their best interest, not the best interest of the data collector.

Related to its consideration of children's privacy, the Committee adopted an amendment defining the term "minor" — to mean an individual under the age of 18. This age definition will impact the provisions of the CPPA that stipulate special protections for children and other minors, such as the requirement to recognize their best interests, as noted, and the CPPA's stipulation that the personal information of minors must be considered sensitive.

A further not insignificant amendment to the Bill made at Committee was an adjustment of the original wording of the defined term, "anonymize" to provide that de-identification processes must respond to the criterion of "no reasonably foreseeable risk in the circumstances" of re-identification, in place of the ostensibly less precise criterion of "in accordance with generally accepted best practices," which was the wording in the Bill as originally tabled.

The government, at Committee, had proposed an alternative clarification that would have aligned the CPPA provision with the parallel Quebec *Law 25* provision. The *Law 25* provision in effect stipulates what the generally accepted best practices are — specifically those set out in regulations to the law.

While provision as adopted by the Committee no longer aligns with the *Law 25* provision providing the clear guidance of a regulation, the "no reasonable risk" criterion has been interpreted in cases to establish a threshold minimal risk of re-identification that is understood to mean that, under defined circumstances, there is no reasonable risk of an individual being identified.

Other amendments made in the Committee to date include adding a definition of sensitive information — of a general principle plus a non-exhaustive list of specific categories, extending the definition of "personal information" to include expressly inferred information, and adopting a definition of profiling, largely tracking the same term in Quebec's *Law 25*.

In sum, the most significant reform now in place in Canada is found within Quebec's revised *Private Privacy Sector Law*, *Law 25* — arguably the new "bright line" for privacy. While likely several years away from coming into force elsewhere in Canada, the currently stalled initiative to amend the federal private sector law, the proposed *Consumer Privacy Protection Act*, part of Bill C-27, contains many of the precepts found in the Quebec law and should be used as the relevant point of reference for organizations' privacy compliance programs going forward.

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