

AGING AND THE LAW SERIES

What Every Professional Needs to Know

PRIVACY & OLDER ADULTS

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Privacy – Why It Matters

1. Right to privacy
2. Rapid technological advancements & electronic storage
3. Growing societal concern

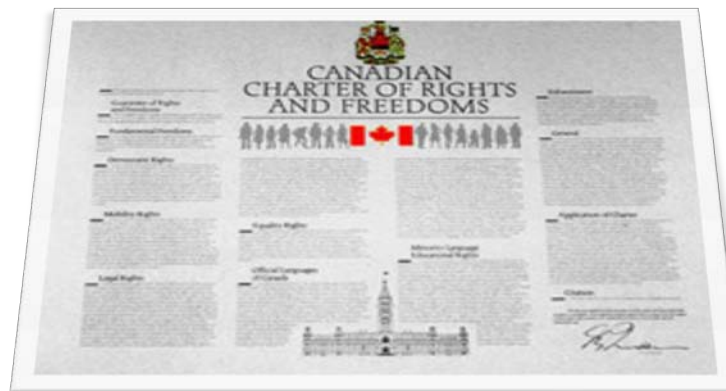


British Columbia Law Institute, Report on The Privacy Act of British Columbia
(BCLI Report No. 49), February 2008.

Facts



Did you know that in Canada, the right to privacy is enshrined in the ***Charter of Right and Freedoms*** but privacy *per se* is *not* guaranteed by the US Constitution?



Learning Goals

- Understanding the importance of privacy in relation to aging;
- Knowledge of relevant privacy legislation;
- Understanding privacy in context
Banking and “Granny Cams”



Legislation In Canada

Collection, use, distribution & disclosure of personal information by public and private bodies is regulated by:

- Federal legislation
- Provincial/Territorial legislation

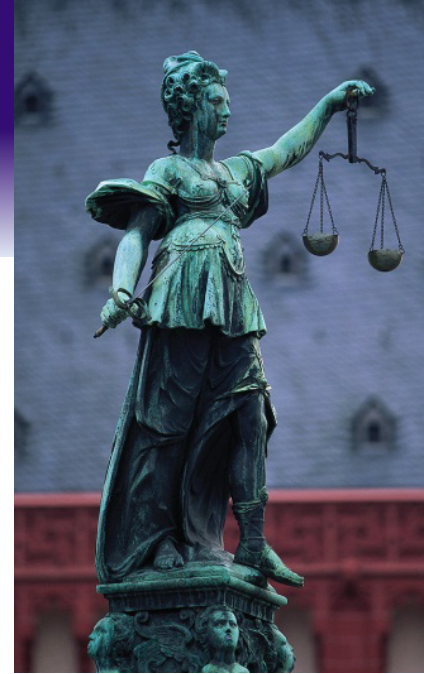


British Columbia Law Institute, Report on The Privacy Act of British Columbia
(BCLI Report No. 49), February 2008.

Federal Legislation

Two primary federal privacy statutes:

1. *Privacy Act*, R.S.C. 1985 (Canada)
2. *Personal Information Protection and Electronic Documents Act* (PIPEDA), R.S.C. 2000.



Office of the Privacy Commissioner of Canada, A Guide for Businesses and Organizations – Your Privacy Responsibilities – Canada's Personal Information Protection and Electronic Documents Act, online : http://www.priv.gc.ca/information/guide_e.cfm, [OPC – PIPEDA Guide] ; see also <http://laws.justice.gc.ca/en/P-8.6/>

Privacy Act

Federal privacy legislation

- Applies to personal information in federal *public sector*
- Rules for dealing with personal information in course of providing public services (ex. Employment Insurance)
- Right to view and correct personal information



Federal privacy legislation



- Applies to personal information in the *private sector*
- Sets ground rules to govern management of personal information in course of commercial activities
- Exemption for organizations and / or activities in provinces with legislation substantially similar to PIPEDA (BC, Alberta & Quebec)

What Is 'Personal Information'

- Name
- Opinions about the individual
- Birth date
- Income
- Physical description
- Medical history
- Gender
- Religion
- Address
- Political affiliations and beliefs
- Education and employment
- Visual images – photographs, videotape – where identifiable



What Is An 'Organization'?

- Defined differently in each law
- May or may not be incorporated
- May be an individual acting in a business capacity
- May be a non-profit association
- (Alberta's PIPA includes professional regulatory organizations, while BC covered in BC Freedom of Information and Protection of Privacy Act)
- Could be a court (BC)
- Could be an Aboriginal Government (Nisga'a)
- Could be a private trust

What Is An 'Individual'?

- Not defined
- A 'natural person'
- Does not have to be a citizen
- Could be a guardian of another person
- Could be an attorney – power of attorney
- Not necessarily an adult

What is a 'Commercial Activity'?

- Defined in PIPEDA (and in some other provincial legislation – but not BC – no necessary distinction between commercial and non-profit under their law)
- Some non-profits may have commercial aspects (selling, bartering, leasing of lists)



PIPEDA

Aims for a “balance of rights”

Individual’s right to privacy
vs.
Legitimate business purposes



Does PIPEDA Apply Throughout Canada?

- NWT, Yukon and Nunavut are covered
- Does not apply to provincially-regulated organizations within Quebec, Alberta or BC as the provincial laws have been deemed “substantially similar” to PIPEDA
- Applies to all “Federal Works, Undertakings or Businesses” – (FWUBs) in Canada
- Applies to inter-provincial and international transactions involving personal information in the course of commercial duties



If Your Organization Is A “FWUB”...

- Comply only with PIPEDA
- Banks
- Radio and TV stations
- Interprovincial trucking
- Airports and airlines
- Navigation and shipping by water
- Telecommunication companies
- Railways, canals, pipelines, ferries etc. crossing borders

How Do I Know... What Private Sector Privacy Law Applies To My Organization?

Step 1: Where Am I?

- If not a FWUB and operated internally in a province with “substantially similar” privacy legislation (BC, AB, QC) then use the provincial law
- If your province does not have private sector privacy legislation, PIPEDA applies...except to ‘provincially regulated organizations’ employee information
- If in more than one province, you may have to comply with more than one statute

How Do I Know... What Private Sector Privacy Law Applies To My Organization?

Step 2: What Am I?

➤ “organization”

look at the definition in your province to see if it applies to you

➤ “application”


does the statute apply to you?

Trans-border Data Flow

- Trans-border information flows in a commercial context are covered by PIPEDA
e.g. – selling a mailing list from one province to another
- Using a national credit reporting bureau based in another province to run a credit check on a client
- Sending customer loyalty data to another jurisdiction



PIPEDA Does Not Apply If...

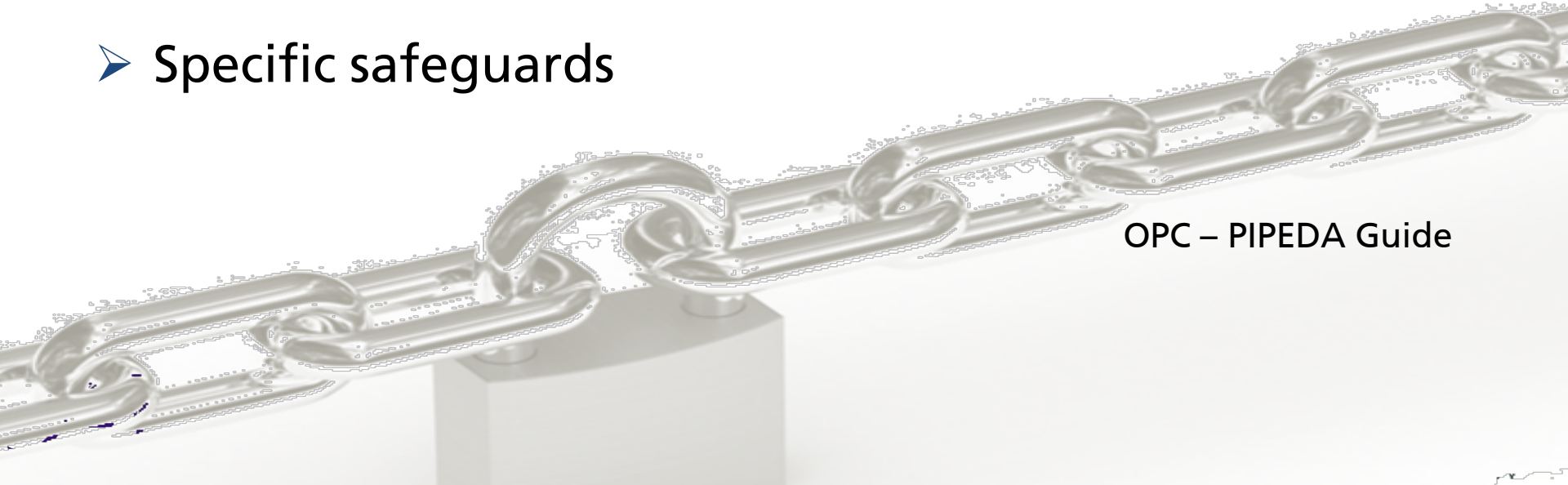
- You operate in a province with substantially similar privacy law (BC, AB, QC) 
- Your operations are not commercial
- Your organization is not a FWUB and the personal information gathered relates only to employees

PIPEDA

Summary:

- Consent required;
- Right to access and request correction of personal information held by organization
- Used ONLY for specific purposes for which it was collected
- Specific safeguards

OPC – PIPEDA Guide



Who Oversees The Legislation?

- Privacy Commissioner of Canada oversees both federal statutes.
- Authority to receive & investigate complaints
- Promotes awareness of and research of privacy matters

Jennifer Stoddart was appointed Canada's Privacy Commissioner by the Governor in Council, effective December 1, 2003, on unanimous resolutions adopted by both the House of Commons and the Senate, for a seven-year term.



Provincial / Territorial Legislation

- Exists in every province / territory
- Independent commissioner or ombudsperson
- Right to access and correct personal information



Provincial / Territorial Legislation

Alberta :

- *Freedom of Information and Protection of Privacy Act*
- *Health Information Act*
- *Personal Information Protection Act (PIPA)*

B.C.

- *Freedom of Information and Protection of Privacy Act*
- *Personal Information Protection Act (PIPA)*

Quebec

- *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*
- *Act Respecting the Protection of Personal Information in the Private Sector*

Provincial / Territorial Legislation

Manitoba

- *Freedom of Information and Protection of Privacy Act*
- *Personal Health Information Act (PHIA)*

New Brunswick

- *Protection of Personal Information Act*

Newfoundland and Labrador

- *Access to Information and Protection of Privacy Act*

Northwest Territories

- *Access to Information and Protection of Privacy Act*

Provincial / Territorial Legislation

Nova Scotia

- *Freedom of Information and Protection of Privacy Act*

Nunavut

- *Access to Information and Protection of Privacy Act*

Ontario

- *Freedom of Information and Protection of privacy Act*
- *Municipal Freedom of Information and Protection of Privacy Act*
- *Personal Health Information Protection Act, 2004*

Provincial / Territorial Legislation

Prince Edward Island

- *Freedom of Information and Protection of Privacy Act*

Saskatchewan

- *Freedom of Information and Protection of Privacy Act*
- *Local Freedom of Information and Protection of Privacy Act*
- *Health Information Protection Act*

Yukon

- *Access to Information and Protection of Privacy Act*

Provincial Legislation

- B.C., Alberta and Quebec have privacy legislation “substantially similar” to PIPEDA



- Ontario privacy legislation protects personal health information



PIPEDA and the PIPAs

- Personal Information Protection Acts (PIPAs) – *B.C. & Alberta*
- PIPAs apply to provincially regulated *private sector* organizations
- PIPEDA & PIPAs govern how private sector organizations handle personal information
- “Organization” defined differently in each statute

Other : Sector-Specific Privacy Legislation

- Federal legislation
- Protection of personal information – federally regulated financial institutions (ex. *Federal Bank Act*)
- Provincial legislation:
 - Protection of personal *health* information
 - Consumer credit reporting legislation
 - Confidentiality provisions for professionals

Office of the Privacy Commissioner of Canada, Privacy Legislation in Canada, online :
http://www.priv.gc.ca/fs-fi/02_05_d_15_e.cfm

Privacy In Context

A woman with dark hair is shown from the chest up, wearing a light blue top. She is holding a white mobile phone to her ear with her left hand and a gold credit card in her right hand. The background is a bright, out-of-focus indoor setting.

➤ BANKING

➤ INSTITUTIONS / INSTITUTIONAL CARE

Privacy In Context – Banking, Financial Abuse & PIPEDA

Financial abuse of older adults a significant concern

- Banks concerned about inability to respond to suspected cases of elder financial abuse
- Section 7(3) of PIPEDA –
no exceptions for bankers



Department of Justice Canada, online :
<http://laws.justice.gc.ca/en/ShowDoc/cs/P-8.6//20090818/en?page=1>

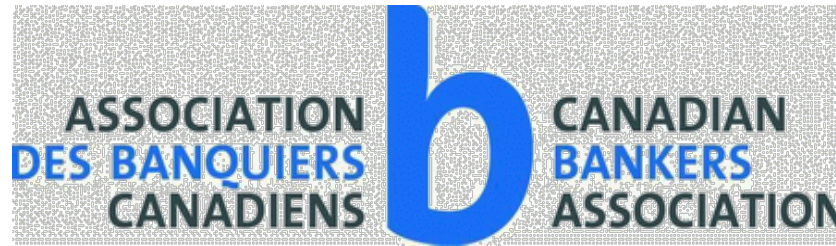
Privacy In Context – Banking, Financial Abuse & PIPEDA

From the House of Commons Statutory Review of PIPEDA, Canadian Banker Association (CBA):

An example of such a situation in the banking context is where a banker suspects financial abuse, particularly with seniors, and when a customer is withdrawing money from his or her account and it appears that the customer may be under pressure from the person accompanying him or her, or the withdrawal is uncharacteristic of that person. Prior to PIPEDA, under common law, banks were able to disclose their suspicions about abuse to the authorities, to the vulnerable customer's family, or to another responsible person who might be able to investigate and stop any abuse...Under the current legislation, though, while branch employees want to help, they are not allowed to because there are no exceptions that cover such situations (see section 7(3) of PIPEDA).

Online : <http://cmte.parl.gc.ca/Content/HOC/committee/391/ethi/reports/rp2891060/ethirp04/ethirp04-e.pdf>

Privacy In Context : PIPEDA, Banking, and Financial Abuse



RECOMMENDATION:

The Canadian Bankers Association ("CBA") recommends an exemption for disclosure without consent when it is in the public interest and that section 7(3) of PIPEDA be amended to permit disclosure of personal information to appropriate authorities.

Privacy In Context

Institutional Care & "Granny Cams"



Norma Stenson
87 year old woman

- Abused, shaken, burned
- Family put in a hidden camera
- Abuse clearly shown on tape
- W-Five report
- Action taken and charges
- Unclear in law...

Privacy In Context

Institutional Care & “Granny Cams”

What is a “granny cam”?



Web cameras installed in bedrooms of residents
in long-term residential care facilities

Privacy In Context

Institutional Care & “Granny Cams”

Why have “granny cams”?

- An attempt to combat institutional elder abuse
- Ensure quality care
- Provide a feeling of security

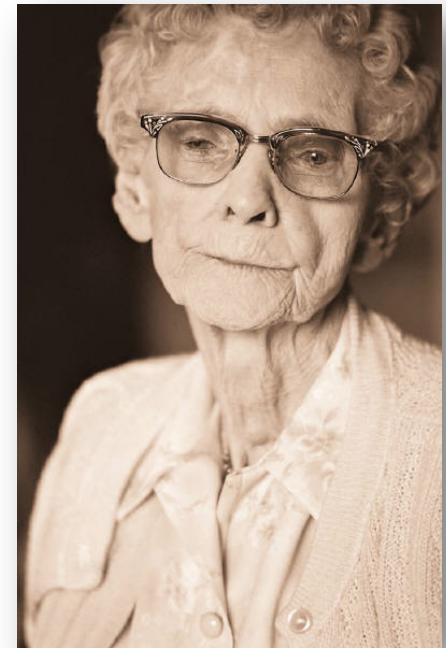


Privacy In Context : Institutional Care & "Granny Cams"

What is institutional abuse?

Institutional abuse might include any of the following types of abuse:

- Physical abuse
- Sexual abuse
- Verbal abuse
- Psychological and emotional abuse
- Spiritual abuse
- Financial abuse
- Neglect
- Discriminatory abuse



Granny Cams



Many facilities in the United States are using “granny cams” – What should Canada do?

"Granny Cams": Privacy Issues & Concerns

Right to privacy:



- "Granny cams" a violation of privacy
- Loss of dignity and autonomy
- Who decides?
- Ensuring quality institutional care?:

Poor training

understaffing

Surveillance: Potential Liability

PIPEDA

- Consent required
- Only for purposes that a *reasonable* person would consider appropriate in the circumstances

Common Law – Tort and Contract

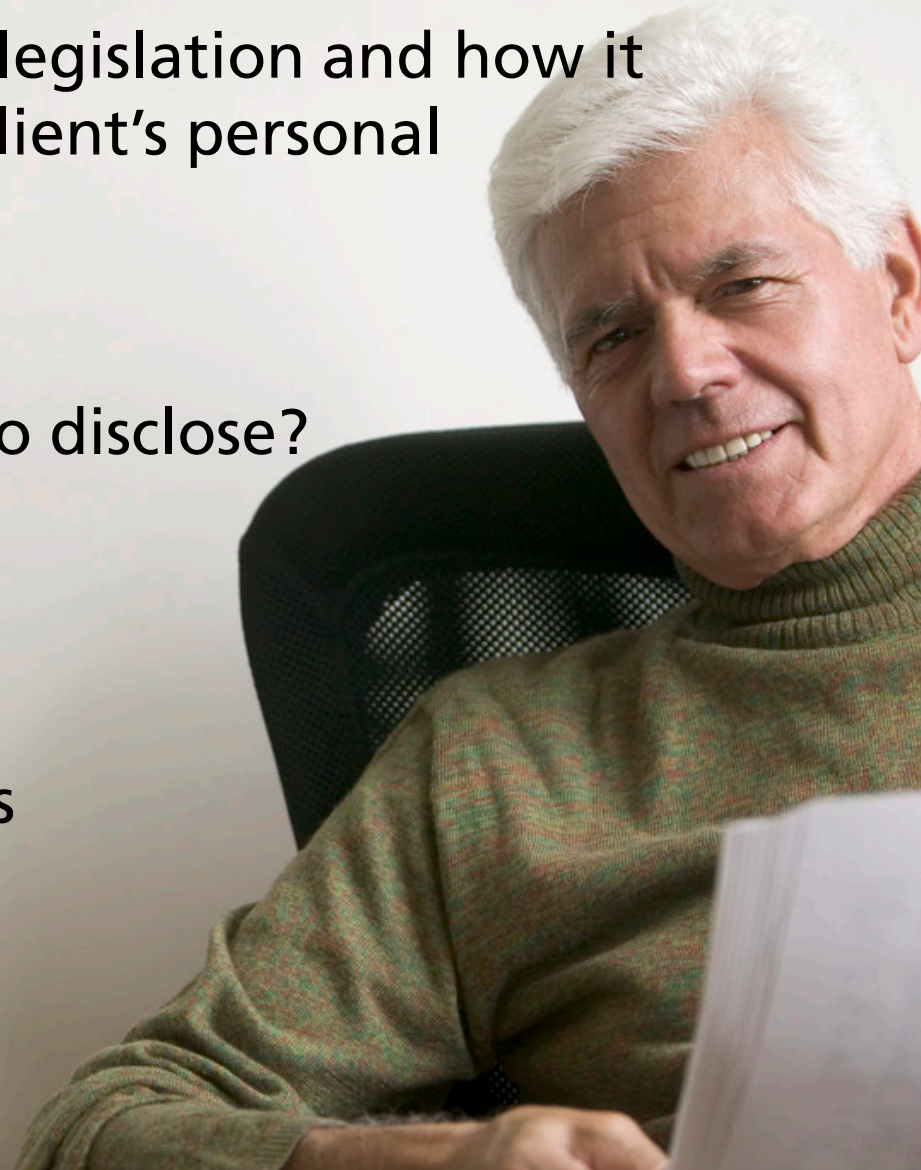
- Nuisance and invasion of privacy
- Breach of contract terms



Advising Your Client

Be aware of applicable privacy legislation and how it affects the protection of your client's personal information

- Is there consent to disclose?
 - Is there capacity to consent to disclose?
 - Who is your client?
 - Who can you disclose to?
-
- Strategies and considerations
 - What questions to ask



References and Resources

British Columbia Law Institute, *Report on The Privacy Act of British Columbia* (BCLI Report No. 49), February 2008.

Office of the Privacy Commissioner of Canada, *A Guide for Businesses and Organizations – Your Privacy Responsibilities –*

Canada's Personal Information Protection and Electronic Documents Act, online :

http://www.priv.gc.ca/information/guide_e.cfm

Office of the Privacy Commissioner of Canada, *Fact Sheet : Privacy Legislation in Canada and Fact Sheet : Questions and Answers regarding application of PIPEDA, Alberta and British Columbia's Personal Information Protection Acts*, online :

http://www.priv.gc.ca/fs-fi/index_e.cfm

House of Commons Canada, “Statutory Review of the Personal Information Protection and Electronic Documents Act (PIPEDA), Fourth report of the Standing Committee on Access to Information, Privacy and Ethics, May 2007, 39th Parliament, 1st session [HOC 2007].

Lisa Minuk, “Why Privacy Still Matters : The Case Against Prophylactic Video Surveillance in For-Profit Long Term Care Homes” (2006), 32 Queen's L.J. 224-277.

Additional Resources

For information about how you can become a Certified Professional Consultant on Aging (CPCA) visit us at our website www.agefriendlybusiness.com

For information about the Canadian Centre for Elder Law visit us at our website www.bcli.org

THANK YOU!

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