

# Three Years Under the PIPEDA: A Disappointing Beginning

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## Introduction

As of January 1, 2004, after a three-year phase-in period, the *Personal Information Protection and Electronic Documents Act*<sup>1</sup> (PIPEDA) came fully into force. Although considerable uncertainty currently prevails due to unanticipated events such as the resignation and replacement of Commissioner George Radwanski<sup>2</sup> and the late constitutional challenge by Quebec,<sup>3</sup> there is now sufficient experience with the legislation to begin to assess how the PIPEDA is working. It is also a timely juncture to do so with the extension of the legislation to the provincially regulated private sector.<sup>4</sup>

Several years ago I strongly criticized the oversight and enforcement approach that underpins the PIPEDA.<sup>5</sup> My criticisms were two-fold. First, I argued that the PIPEDA placed excessive reliance on complaint resolution as a means of protecting personal information, and that for a number of reasons, this might not be the most effective means of achieving regulatory compliance, particularly in a privacy context. Second, I suggested that the Privacy Commissioner and the Federal Court were particularly weak choices as the primary institutions responsible for oversight and enforcement: the former by nature an ombudsman limited to the power to make recommendations, and the latter a generalist body with no claim to privacy expertise. I argued that these shortcomings, along with the cost and delay inherent in the mandatory two-step process that requires complainants to go first to the Commissioner and then to the courts,<sup>6</sup> could undermine privacy protection by frustrating complainants and rewarding non-compliance.

The criticisms I advanced were based primarily on a critique of the policy process that produced the PIPEDA<sup>7</sup> and on the perceived shortcomings of the oversight and enforcement mechanisms that were selected.<sup>8</sup> At the time, there was little in the way of findings by the Commissioner and nothing from the Federal Court.<sup>9</sup> That is no longer the case; by the end of 2003, the Commissioner had concluded over 250 complaint investigations<sup>10</sup> and a number of complaints had proceeded to

the Federal Court level. There have also been public statements from the Commissioner's office with respect to policy directions and compliance issues, and the emergence of some critical commentary concerning oversight and enforcement issues.<sup>11</sup> Therefore, even allowing for the uncertainties already noted, there is now enough experience with administration of the legislation to permit a reassessment of my previous criticisms.

Unfortunately, developments thus far appear to confirm the concerns I expressed about the weaknesses of the PIPEDA's oversight and enforcement mechanisms. The PIPEDA's emphasis on complaint resolution has been clearly borne out in practice with little in the way of systemic and proactive approaches to privacy compliance. In addition, very few complaints have made it to the Federal Court, and those that have been filed have moved extremely slowly, the result being that there is very little sense of how the courts will shape the legislation. Not only does this create tremendous uncertainty, but it suggests that delay may become a fundamental aspect of the compliance environment, to the obvious detriment of complainants.

The experience over the first three years suggests that there are at least four fundamental problems with oversight and enforcement of the PIPEDA. First is the heavy emphasis on complaint resolution. Not only are there serious questions about the effectiveness of complaint investigations as a tool for promoting privacy compliance, but it appears that complaint resolution within the PIPEDA framework is making cost, delay, and uncertainty significant considerations for all parties. Second, the Privacy Commissioner's office has neglected to utilise those provisions in the PIPEDA that promote proactive and systemic approaches to privacy compliance, thereby failing to employ the entire "privacy toolkit".<sup>12</sup> Third, there has been a disturbing lack of transparency with respect to the Privacy Commissioner's compliance initiatives. This has been most evident with the all but categorical refusal to reveal the names of complaint respondents,<sup>13</sup> which has a number of unfortunate results. It greatly undercuts the instructive value that complaint investigations might have, it deprives compliant institu-

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tions of the recognition they deserve, it unjustly rewards non-compliant parties, it penalizes consumers who are unable to make informed privacy decisions, it prevents the market from rewarding or penalizing organizations based on the public's awareness of privacy practices, and it makes it extremely difficult to assess not only the extent of compliance with the PIPEDA, but also the effectiveness of the Commissioner's office in promoting compliance. Finally, uncertainty is becoming a central feature of oversight and enforcement of the PIPEDA. While this stems in part from unresolved issues such as Quebec's constitutional challenge, "substantially similar" determinations concerning provincial private-sector privacy statutes,<sup>14</sup> and the uncertainty about whether provinces such as Ontario will introduce their own private-sector privacy legislation,<sup>15</sup> it also derives from the Privacy Commissioner's compliance strategies. The pronounced emphasis on complaint resolution means that there will not be a full understanding of the nature of the PIPEDA regime until there has been a comprehensive treatment of the Act's provisions at the appellate level of the Federal Court. As a result, for quite some time, complainants will be unclear about their prospects for success, the Commissioner's office cannot be confident about the directions it has charted, and organizations will be confused about the nature and extent of their privacy obligations.

This article will consider these four problems in greater detail and will assess the extent to which they are primarily structural, in the sense that they are the result of previous legislative choices, or are more the product of compliance strategies adopted by the Commissioner's office.

To the extent that they result from the former, the possibilities for change are limited, aside from a full overhaul of the PIPEDA. However, if they are the product of policy choices in the Commissioner's office, one can be more sanguine. The appointment of a new Commissioner provides a distinct opportunity for a change in direction, signs of which are already clearly in evidence.<sup>16</sup> The enactment of provincial statutes that satisfy the PIPEDA's "substantially similar" test could also drive change at the federal level, and here, too, there have been hints that this could occur.<sup>17</sup> Whether the opportunities for change are realised will be pivotal if there is to be effective privacy protection throughout the private sector.

## Resolving Complaints — Promoting Compliance?

**C**olin Bennett has noted that the PIPEDA "gives the impression that the most important responsibilities of the Commissioner . . . relate to complaints investigation and redress."<sup>18</sup> In fact, it is clear that complaint resolution is at the heart of the PIPEDA's approach to oversight and enforcement. Whether this makes sense

from a compliance perspective is another matter. Not only are there significant problems associated with complaint-based enforcement systems in general,<sup>19</sup> but there is good reason to think that they may be exacerbated in a privacy setting. A brief consideration of these issues is helpful to understand more fully the implications of relying primarily on a complaint-based approach to privacy compliance.

It is not always fully appreciated that in complaint-based enforcement, complaint resolution becomes the primary vehicle through which the oversight agency develops policy. Agency policy arises from the accumulation of adjudicatory rules that are developed in the course of resolving specific disputes. This means that there are two aspects of complaint-based policy development that deserve attention. The first consideration is the nature of the process that produces the rules that coalesce into agency policy, and the second concern is the rules themselves and how they are communicated to the wider community.

From a process perspective, complaint resolution tends to be driven by the parties to the dispute rather than by the oversight agency. As a result, the agency's agenda and policy development become both reactive and dependent, dictated primarily by the nature of the complaints that are advanced. Moreover, there is a real danger that complaint-based systems of enforcement may not function at all if individuals fail to complain or if the complaints are of poor quality.<sup>20</sup> Second, the complaint resolution process will be confined largely to the parties to the dispute. In many instances, they will control how the issues are framed and what information is placed before the oversight agency. There is a strong likelihood that this will result in a narrowing of issues and information under consideration, which may not advance the interests of the regulated community at large.<sup>21</sup> Third, policy development that occurs by way of complaint resolution can be both costly and unfair to the wider community. It is costly because it results in retrospective rule changes that affect not just the immediate parties to the complaint, and it is unfair because most of the affected parties will not have had an opportunity to influence the outcome. And finally, even though lack of complaints can be an issue, complaint-based enforcement systems are also particularly susceptible to overload.<sup>22</sup> This can result in delay for complainants, uncertainty for the wider community, and resource allocation issues for the oversight agency.

Complaint-based enforcement can also be criticized in terms of the rules that it generates. First, the narrowing of issues that tends to occur in complaint-based systems arguably produces informational deficiencies that undercut the substantive foundation for complaint-based rules. Second, complaint-based rules are not always clearly stated, frequently buried in or qualified by the particular facts of the case. Third, agency policy as a whole often must be extracted from what is sometimes

dense jurisprudence that may be anything but accessible to the wider community. And when the rules change through complaint resolution, the result may be “wealth transfers”<sup>23</sup> affecting the losing party and the broader community as well. In short, complaint-based rules often make it difficult for many parties to plan their behaviour with a clear understanding of what their obligations may be.

The general criticisms of complaint-based enforcement systems apply with particular force to privacy compliance, several warranting special mention. First, there is good reason to think that the effectiveness of complaints as an enforcement mechanism is greatly undermined in a privacy context because many individuals who may be affected by problematic privacy practices never become aware of the misuse of their personal information. Most individuals will have no idea that information concerning them may have been improperly shared within or between organizations and, therefore, will never be in a position to make a complaint.<sup>24</sup> Where an improper use of personal information does come to an individual’s attention, it still may be difficult to identify the responsible party.<sup>25</sup> For example, problems arising from erroneous credit information may be difficult to trace back to the source. And in many instances where the impact of an improper privacy practice is in the nature of a minor annoyance rather than a serious, quantifiable harm, it may not seem worth the individual’s time and effort to file a formal complaint, even though the cumulative effect of the practice may be significant when numerous individuals are affected in a similar manner. All of these factors reduce the effectiveness of privacy complaints as a mechanism for advancing privacy compliance.

While a failure to complain may undermine the effectiveness of complaint-based privacy compliance, there is also the converse problem that the system may become overloaded by complaints that are idiosyncratic or frivolous. As a result, even though they do not raise issues of systemic interest, they still consume scarce administrative resources. A review of the complaint investigations completed under the PIPEDA through the first three years suggests that we may be seeing both of these factors at play. Although relatively few complaints raising serious systemic issues have been filed by individuals directly affected in a personal capacity,<sup>26</sup> there have been any number of complaints that appear relatively trivial and perhaps even vexatious in nature.<sup>27</sup>

It was suggested that complaint-based systems tend to confine both the issues and the information that are placed before the oversight agency. This is very much the case with privacy complaints. The personal nature of some of the issues certainly contributes to this, with issues frequently being framed narrowly to protect the complainant’s privacy. Often, complainants will want to focus on their particular circumstances, the respondent organisation will want to avoid broader scrutiny of its

information management practices (unless it believes that a practice that has been implicated is consistent with industry-wide standards),<sup>28</sup> and the oversight agency will want to manage the scope of the issues under review given the demand on its resources and the pressure to close files in a timely manner.

Some of the factors that force a narrowing of the issues under consideration in a privacy context also contribute to the lack of visibility that often attaches to the results of privacy investigations. For example, the Privacy Commissioner has relied almost exclusively on fully anonymized summaries of complaint-investigation results after initial indications that investigation results would not be released at all.<sup>29</sup> However, to the extent that complaint investigations are used by privacy commissioners as vehicles for establishing and communicating privacy rules, limiting their availability undermines their effectiveness, a point clearly recognised by British Columbia Commissioner David Loukidelis, who has already announced that he intends to make complaint investigation reports issued under the *Personal Information Protection Act* available in their entirety.<sup>30</sup>

Given both the general and the privacy-specific concerns with complaint-based enforcement, there have to be serious reservations about the extent to which oversight and enforcement of the PIPEDA relies on complaint resolution. Not only does the Act clearly revolve around the investigation and adjudication of complaints, but enforcement responsibilities were assigned to two bodies that were heavily complaint-oriented in focus: the Federal Court by design but the Privacy Commissioner by choice, long viewed by leading privacy advocates as a primarily reactive, complaint-driven body.<sup>31</sup> And under Commissioner Radwanski, the office’s complaint orientation intensified with an emphasis on “building numbers”<sup>32</sup> in order to support requests for resources, a concern that was reflected in the inflation of complaint numbers by including non-jurisdictional findings and relatively minor failures to comply with the 30-day time limit for responding to requests for personal information.<sup>33</sup>

Aside from the complaint orientation of both the statute and the oversight and enforcement bodies, the PIPEDA establishes an extremely unwieldy complaint process that requires individuals to proceed first to the Commissioner’s office, and then to Federal Court if dissatisfied with the outcome.

Given that the Commissioner can only make recommendations, even if satisfied that the legislation has been breached, and that remedial relief is confined to the court, the potential for cost and delay to complainants is significant. This is compounded by the fact that an application to the court involves essentially a rehearing on the merits. As was suggested by the Public Interest Advocacy Centre and the Consumer Association of Canada, “[o]rganizations wishing to push the limits of

the legislative regime can do so in the comfortable knowledge that only the most determined and financially able individuals will pursue them in court".<sup>34</sup> In addition to cost and delay to complainants, the PIPEDA's complaint process also undercuts the precedent value of Commissioner's findings, given that the Federal Court has ultimate responsibility for fleshing out the statute. And because of the protracted complaint process that is likely to discourage many complainants, it may be quite some time before we have a clear understanding of how the PIPEDA's provisions will be interpreted, a point that will be considered at greater length. Suffice it to say that the PIPEDA's complaint provisions invite prolonged uncertainty rather than providing necessary guidance to the wider community.

## Complaint Resolution — The Results Thus Far

Given the heavy reliance on complaint resolution, some comment is in order with respect to the complaint investigations concluded in the first three years. What is immediately apparent is that a full and fair assessment of the Commissioner's findings is not possible, given that the complete investigation results are not available. The Commissioner's office has chosen to release short investigation summaries and, in all but one case, the summaries have been anonymised. That being said, a review of the investigations concluded through 2003 indicates that in most cases, the conclusions are supported by the facts and there are few results that might be viewed as contentious.<sup>35</sup> However, there is very little substance to many of the summaries, and there are a number of significant findings that deserve far more attention than they appear to have received. As a case in point, a number of investigation summaries dealing with significant workplace privacy issues provide little sense of what considerations weighed most heavily in the outcome.<sup>36</sup> If complaints are to serve as a meaningful way of providing parties with direction and guidance, it is vitally important that this information be made available.

In assessing the PIPEDA's first year, Colin Bennett expressed disappointment with the overall quality of the complaints that had been initiated.<sup>37</sup> A review of the 255 summaries through 2003 suggests that this is still a real concern. There are relatively few complaints that raise major systemic issues, and a number of those that do have been filed by advocates intentionally challenging particular practices such as the use of personal information for secondary marketing purposes.<sup>38</sup> However, it may well be that in a complaint-focused system, this will be one of the few tools that can be employed to ensure that systemic issues are fully canvassed, there being the added advantage that the full investigation results may become available to the community at large.<sup>39</sup> The majority of complaints continue to be very narrow in focus and the conclusions one can draw are greatly lim-

ited by the removal of identifiers. For example, a particular organization might be the subject of a number of complaints that, considered separately, appear to be simply inadvertent mistakes. However, viewed together, the picture might change and more critical conclusions might be drawn with respect to the extent of the organization's concern for the careful management of personal information.<sup>40</sup>

It is both puzzling and frustrating that in a complaint-based system where precedent often plays a large role in deciding future cases and in informing the wider community, the Commissioner's office refuses to provide anything more than anonymised case summaries. The reliance on complaint summaries prevents parties from obtaining a detailed understanding of the approach taken by the Commissioner in individual cases, and the problem is exacerbated by the refusal to link investigation findings to other cases involving similar issues, including investigations involving the very same respondent.<sup>41</sup> This seems to be an attempt by the Commissioner's office to ensure that its position concerning the identification of complaint respondents is not undermined, an issue that will be considered at greater length. Unfortunately, the result is that investigation summaries are far less useful than they could be, a point that would be less important if complaint resolution was not viewed by the Commissioner's office as the primary vehicle for developing policy and promoting compliance.

The current emphasis on complaint resolution to administer the PIPEDA is clearly grounded in the legislation and in the decision to rely on oversight and enforcement bodies that were largely complaint-driven in outlook, but the Commissioner's enforcement strategies have reinforced complaint-resolution tendencies. At the same time, aspects of these strategies have ensured that complaint resolution is far less effective than it might be. A number of factors appear to be at work. The first is an overly cautious reading of the PIPEDA by the Commissioner's office in terms of what is permissible with respect to the identification of complaint respondents.<sup>42</sup> Second is an excessive concern that some leverage must be retained with respect to bad actors.<sup>43</sup> This clearly derives from the fundamental weakness of the ombudsman model; given that an ombudsman can only recommend, this places a premium on the power of publicity that the Commissioner's office has guarded as if it were a precious commodity. The danger is that in reserving it for the most serious cases, it ends up never being used. At the same time, some of the potential benefits of complaint investigations are lost. That being said, these are matters that can be revisited and there is already ample evidence that the new Commissioner is far more receptive to the concerns of the privacy community than was her predecessor. If so, there is the possibility that the present emphasis on complaint resolution could be reduced and the policies that undermine its effectiveness reconsidered.

## Using the Entire Privacy Toolbox

The oversight and enforcement thrust of the PIPEDA is clearly complaint-oriented, but that is by no means the only approach to privacy compliance contemplated by the legislation. Under section 24 of the Act, the Commissioner is provided with some very significant compliance tools, which include public education, research, and working with organizations to develop privacy codes and guidelines. In addition, section 18 authorises the Commissioner to conduct an audit of an organization's personal information practices where there are "reasonable grounds to believe" that the organization is not complying with the Act. Finally, the Commissioner has the power of publicity, not only as a part of the annual report to Parliament, but also pursuant to section 20, which allows for disclosure of an organization's personal information management practices where the Commissioner "considers that it is in the public interest to do so."

In the first three years under the PIPEDA, these tools were scarcely employed. In terms of the Commissioner's powers under section 24, education was limited for the most part to high-level speeches by Commissioner Radwanski with little in the way of concrete direction; as Interim Commissioner Marleau acknowledged, the office was "reluctant to issue guidelines" even though it recognised an appetite for this within the regulated community.<sup>44</sup> And, until very recently,<sup>45</sup> there was little emphasis on PIPEDA-specific research; certainly nothing that was made publicly available. Perhaps of most importance, there is no evidence of any concerted effort to actively engage the regulated community with respect to the development of guidelines or codes of practice. This point is made abundantly clear by Case Summary #167, an important complaint dealing with consent to disclose personal information for marketing purposes. After making a number of specific recommendations to improve the respondent organization's consent procedures, the Commissioner then recommended that the respondent present those same recommendations to the Canadian Marketing Association and "*convey his expectation that all CMA members will quickly adopt them*" (emphasis added).<sup>46</sup> One might have expected that the Commissioner would have been quick to seize a chance to interact directly with the broader community on an issue of significant import. Instead, the opportunity was passed up, and in a manner that could only serve to alienate rather than enlist the support of the CMA.<sup>47</sup>

With respect to the Commissioner's section 18 audit powers, they have not yet been used, the view being that, as yet, there have not been sufficient grounds to do so.<sup>48</sup> Given some of the investigations that have been concluded, especially in 2003, there have to be some concerns about what it may take to trigger an audit. It is now apparent that there are repeat "offenders" including one case in which the Commissioner expressed concern that previous recommendations were

not acted upon.<sup>49</sup> This would certainly appear to provide sufficient basis for proceeding under section 18.<sup>50</sup> However, it may mean that as with the power to publicize a respondent's identity, the power to audit becomes one that is held in abeyance. If so, this would be unfortunate given the value assigned to privacy audits by a number of privacy experts, Bennett and Flaherty in particular.<sup>51</sup>

Finally, as should be clear by now, the power to publicize has, with one exception, simply not been exercised either in the context of the annual reports or in the reporting of individual complaint investigation findings. And given that the audit power has not yet been employed, there has been no issue of publicity in this context.

There are at least three significant concerns with respect to the Privacy Commissioner's seeming reluctance to employ any compliance tools much apart from complaint resolution. First, the Commissioner's office is short-changing itself because there is good reason to think that successful oversight and enforcement, particularly in a privacy context, depends upon utilising effectively all of the available administrative tools. Second, the price of overemphasizing complaint investigations is a neglect of proactive and systemic approaches that are likely to be far more effective in terms of building in privacy from the "bottom up".<sup>52</sup> Third, the Commissioner's office is depriving itself of the opportunity to engage the community, a step that is vitally important in terms of engendering a vested interest in making the legislation work. These three concerns overlap and interrelate, but each merits special attention.

With respect to the failure to utilise all the oversight and enforcement mechanisms the legislation provides, Colin Bennett has noted that "it is not entirely clear that the OPC fully recognises that successful privacy protection depends on using the entire repertoire of possible policy instruments for the protection of privacy."<sup>53</sup> Bennett has always been a strong proponent of using the "entire toolbox", especially some of the "softer" privacy tools such as education, given its importance in producing "organizational change and learning".<sup>54</sup> There are other privacy commissioners who share Bennett's views. For example, Ontario's Information and Privacy Commissioner, Ann Cavoukian, has actively encouraged a variety of education and research initiatives involving other commissioners, other jurisdictions, and private-sector organizations.<sup>55</sup> She has also been an enthusiastic advocate of innovative tools such as privacy-enhancing technologies. And British Columbia's Commissioner, David Loukidelis, has clearly advanced a strong case for using a wide range of tools, such as guidelines and advance rulings to assist and educate the community.<sup>56</sup>

Although the Privacy Commissioner's office has demonstrated little interest in many of the compliance instruments that might complement complaint resolution, there have been some recent signs that this may change. For instance, Interim Commissioner Marleau

indicated that there was greater willingness to consider the development of guidelines, a shift that appears to be fully supported by Commissioner Stoddart.<sup>57</sup> Another particularly positive indication of change in the Commissioner's office is the announcement of the formation of an advisory panel of outside experts.<sup>58</sup> The mere fact that it includes David Flaherty is significant, given his views on the importance of tools such as site visits and his critical reservations concerning the value of complaint investigations.<sup>59</sup> There is also the recently announced *Contributions* program,<sup>60</sup> designed to promote privacy-focused research. Finally, Commissioner Stoddart's demonstrated willingness to engage and collaborate with the privacy community provides a strong indication that her office may be prepared to be more creative with respect to the means by which it promotes compliance with the PIPEDA.

In addition to failing to draw on all of the compliance tools that are at the Privacy Commissioner's disposal, the reliance on complaint resolution also means that there is a neglect of proactive and systemic approaches to privacy compliance. As discussed already, complaint investigations are inherently reactive, which has an impact on how an oversight body can develop policy. Although there may be some latitude to expand the scope of a complaint investigation, this will be limited by other considerations; in particular, statutory time limits.<sup>61</sup> And even though a complaint investigation may be widened, there is still a dependence on the actual complaints that are brought forward. Without "quality" complaints, the oversight body may have no opportunity to explore systemic concerns, even if it is inclined to do so.

As noted, the PIPEDA does provide the Commissioner with a number of tools that involve approaches that are proactive, systemic, or both. The two most important are assisting organizations to develop privacy codes or guidelines and the power to conduct section 18 audits. The former is clearly a tool that is both proactive and systemic in outlook. The latter is systemic in nature, although it is triggered largely by reactive considerations in that the Commissioner must have some basis for believing that the legislation is not being complied with, a determination that as a practical matter is most likely to arise from complaint investigation findings. As indicated already, neither of these tools has been employed by the Commissioner's office to date.

With respect to the development of codes or guidelines, there is already an extremely solid foundation for proceeding further, given the extent to which voluntary codes have taken root in Canada. Bennett, who has long emphasized the general importance of the Canadian code-building experience,<sup>62</sup> has suggested in the context of the PIPEDA that:

... there is clearly a need for greater collaboration with those associations who have already developed codes of practice. It seems rather counterproductive for rules about direct-marketing, for example, to emerge slowly and pragmatically

from the accumulation of findings in response to complaints. Surely, the staff of the Commissioner's office and the Direct Marketing Association (DMA) can get together to figure out a consistent interpretation of the rules for notification, consent, access and so on.<sup>63</sup>

The use of collaborative processes to produce "rules" to guide the wider community is an approach with considerable merit,<sup>64</sup> but there are reasons that can disincline some agencies from proceeding in this manner. First is cost, particularly as one moves towards more full-blown consultative processes. Second, even though proponents often laud the benefits of consultation-based guidelines, it can be difficult to demonstrate clearly the benefits. In fact, there may even be a perverse disincentive at work. From a narrow, short-term perspective, it may be in an agency's interest to focus on complaints. They are far more measurable and can be used to demonstrate both effectiveness and the need for resources. Conversely, if proactive initiatives are too successful and, as a result, reduce the number of complaints filed, this may serve to undercut the agency's position. Finally, there is an issue of style; participative processes depend on open, constructive dialogue, and where this is absent, the likelihood of engaging the community is reduced.<sup>65</sup>

Nonetheless, there are indications that a number of commissioners are receptive to collaborative approaches. David Loukidelis is probably in the forefront in terms of advocating persuasively for the use of guidelines and rulings informed by community participation.<sup>66</sup> And, as noted, Ann Cavoukian's office has worked with a number of private-sector parties on initiatives designed to provide guidance and assistance to the community, the best example being its recent collaborative effort with the CMA on the application of fair information principles to customer relationship management (CRM).<sup>67</sup> Finally, there are suggestions that that the federal Privacy Commissioner could move in this direction as well. As noted earlier, there now appears to be a recognition that the community wants direction and guidance from the Commissioner's office, and there are indications that this may be forthcoming. Of particular note is Commissioner Stoddart's recent speech to the CMA in which she referred explicitly to working as "partners" to "eliminate practices that do not respect fair information principles".<sup>68</sup> On its own, this might not seem especially noteworthy, but compared with the approach of Commissioner Radwanski evidenced in Case Summary #167, discussed earlier, it does signify an important change in tone and direction.

Finally, there is the issue of engaging the broader community in the sense of enlisting its support in ensuring that the legislation works. It has been said of James Landis, perhaps the leading proponent of the effectiveness of the administrative process<sup>69</sup> and one of its most successful architects and administrators, that he fully appreciated the importance of using all available tools to ensure that all parties had a vested interest in making the legislation work. As Thomas McCraw has

noted "... Landis persistently emphasized the necessity of using all the incentives potentially inherent in the industry [securities regulation] to give every person involved — executive, accountant, broker, banker — a stake in helping to enforce the law".<sup>70</sup>

There are positive signs that a number of privacy commissioners appreciate the need to engage the community in collaborative compliance-related initiatives. For example, Commissioner Loukidelis has said, "... it is crucial to the law's success that the oversight body be constantly in touch with and open to approaches by all affected constituencies. Regulators, after all, do not have a monopoly on expertise or wisdom, so ongoing input from those involved is a good thing".<sup>71</sup>

An excellent example of enlisting community participation in support of the compliance undertaking is the collaboration between the CMA and Ontario's Information and Privacy Commissioner with respect to customer relationship management. As the joint CMA-IPC paper concludes:

Businesses should view privacy as a tool for ensuring that CRM initiatives succeed. This can be achieved by building fair information practices into CRM, with a particular emphasis on being open and transparent with customers. In short, privacy is good for CRM and can help companies to gain a competitive advantage in the marketplace by building strong customer relationships based on a foundation of trust.<sup>72</sup>

And a similar theme was expressed by Commissioner Stoddart when she urged the CMA to work with her to eliminate marketing practices that harmed the CMA and its members because they did not adhere to recognised privacy principles.<sup>73</sup>

In short, there now seems to be a much a greater appreciation of the need for privacy commissioners to rely on all of the privacy tools that are at their disposal, to place more emphasis on approaches to compliance that build in privacy at the front end from the bottom up, and to engage the broader community by convincing key participants that they have a vested interest in making the legislation work. The most encouraging developments are at the federal level where previously just the opposite had been the case. That being said, one must be cautiously optimistic because there are some still some issues where change is not yet evident. A good example is the identification of complaint respondents, to which we now turn.

## Naming Names

Until recently, many of the Privacy Commissioner's activities with respect to enforcement of the PIPEDA were not as transparent as they might be. From the outset, the Commissioner's office all but refused to disclose the names of complaint respondents and would only release complaint investigation summaries, having contemplated initially not releasing any investigation details. In addition, the office was less than forthcoming

with respect to disclosure of compliance-related data.<sup>74</sup> However, with Commissioner Radwanski's departure, matters appear to be changing and there is clear evidence that a more far more open environment has emerged.<sup>75</sup> That being said, on the issue of identifying complainant respondents, there has been no movement, even though Commissioner Stoddart has been strongly urged to reconsider the refusal to do so.<sup>76</sup>

The Commissioner's office appears to have three main objections to the suggestion that complaint respondents should be named. First, the Commissioner's office has resisted naming names because it does not feel that it should be in the business of "punishing" organizations.<sup>77</sup> Second, it has argued that the power of publicity needs to be reserved for the most serious cases of non-compliance.<sup>78</sup> Third, it has claimed that the wording of section 20 of the PIPEDA does not allow for the identification of organizations in all cases and that the determination of the "public interest in disclosure" must be done on a complaint-by-complaint basis.<sup>79</sup> Before considering the case that can be made for identifying complaint respondents, several comments are in order with respect to the reasons advanced by the Commissioner's office for limited disclosure.

First, the notion that publicity can be equated with punishment is highly questionable. It only makes sense if the starting assumption is that identities should normally be protected, with disclosure the exception. However, there has been no principled argument advanced to support that proposition.<sup>80</sup> Aside from that, the direct correlation between publicity and punishment is not sustainable. Properly speaking, publicity is more about informing the wider community and this, of course, may have consequences, both positive and negative, for affected organizations. Subsequent consumer choices may have an adverse impact, but characterizing this as punishment misstates the issue. Moreover, as should be readily apparent, in many cases, publicity will be to an organization's benefit where its compliance efforts are praised by the Commissioner.<sup>81</sup>

With respect to the suggestion that the power of publicity must be reserved for the most serious cases of non-compliant behaviour, this is really little more than a candid admission that an ombudsman is severely constrained in terms of the leverage it can assert with respect to non-compliant actors. Rationing the use of a scarce asset to address this shortcoming may actually be counterproductive in the long-run, aside from the other costs it entails. Between a policy of publicizing a respondent's identity in most situations and one holding out the mere possibility of disclosure if the conduct is sufficiently egregious, it is not hard to decide which would have the greater deterrent effect.<sup>82</sup> The choice becomes even more one-sided when one factors in general community awareness that, in practice, the standard for disclosure has almost never been met.

Finally, the suggestion that a broader disclosure policy is simply not mandated by the language of the PIPEDA is not compelling. There appears to be a leap in logic where the Commissioner's office reads the public interest standard in section 20 to require a case-by-case consideration. Quite simply, this seems to be an unnecessarily constricted view of the scope of the section 20 powers. One may grant that the wording of section 20 contemplates something less than disclosure in every case, but that does not mean that the public interest must be read to mean only in the most exceptional circumstances — which is definitely the result under current practice. In that respect, it is extremely difficult to understand how the public interest test for identifying complaint respondents could only be satisfied in one out of the 255 case summaries issued for the first three years. In addition, the Commissioner's office does not appear to have made any attempt to develop criteria to flesh out the public interest test,<sup>83</sup> and here there is considerable room for movement given that some of those pushing for greater disclosure recognise that identifying complaint respondents in every instance is not essential.<sup>84</sup> A certain number of complaints simply do not raise issues of particular concern to the broader community, and publicizing in these circumstances would produce minimal returns. There might also be situations in which disclosure of the organization's identity might compromise a complainant's privacy rights. After that, however, there are a number of situations in which disclosure would be very much in the public interest. Examples include complaints having broad systemic implications (e.g., opt-out policies), complaints involving repeat offenders, including failures to respond to previous recommendations, and investigations that reveal "exemplary"<sup>85</sup> practices on the part of respondent organizations. More preferable would be a general acknowledgment that the public interest favours greater disclosure, especially in the context of a new regime where the community is looking for guidance, but there is considerable room to develop a set of public interest criteria that would permit much broader disclosure than occurs presently. This takes us to the positive case for disclosure.

The argument for greater disclosure of the identity of complaint respondents has a number of strands that can be grouped around four main themes: fairness, market efficiency, promoting compliance, and accountability and oversight. Some of these arguments overlap and it is possible to frame an issue in a variety of ways. For instance, access to information can be considered as an issue of fairness, as a market efficiency question, as a compliance concern, and as a matter of oversight and accountability.

From a fairness perspective, there are several propositions that can be advanced. First, as a matter of fairness, consumers should be entitled to make well-informed decisions on matters affecting them, which means giving them as much relevant information as pos-

sible. Second, it is only fair that organizations that are complying with the legislation have their efforts recognised.<sup>86</sup> Third, it is unfair to allow non-compliant organizations to shield themselves behind anonymized reports.

With respect to market efficiency, it has always been argued that markets function best when consumers are fully informed. When they lack critical information, they cannot make informed choices. Linked to this is the idea that informed choices will reward organizations that invest in privacy protection. This in turn will encourage other organizations to make similar investments. Conversely, non-compliant organizations will be penalized to the extent that informed consumers elect to shift their business to organizations that have privacy-friendly practices.

Anonymized reports also undermine compliance efforts. On one hand, they discourage compliance because non-compliant firms are able to avoid critical scrutiny. When experience shows that organizations are almost never identified, the most intransigent can carry on reasonably secure in the knowledge that the public will remain unaware that their privacy practices are deficient. Perhaps just as troubling is that in grey areas, anonymity may encourage some organizations to take privacy-invasive risks rather than erring on the side of privacy protection. The converse problem is that the public does not have access to valuable information about exemplary practices. Aside from the benefits that ought to accrue to such organizations, other organizations are being denied an opportunity to study and apply what are recognised to be best practices. This is especially important if the oversight agency itself is reluctant to provide specific guidance to the community.

Finally, it is almost impossible to make informed assessments about how the system is functioning when investigation findings are anonymised. For example, even though there are now over 100 investigations involving banks, we have no idea how the different banks compare. We do not know to what extent the complaints are distributed evenly across the banking sector, or whether there are some particularly poor performers with numerous complaints. One senses that the latter may be the case, but confirmation is lacking.<sup>87</sup> One can only expect this to become more of a problem as complaint findings with respect to the provincially regulated private sector begin to appear. Anonymised reports also prevent one from making fully informed assessments of the Commissioner's findings. For example, where an organization's privacy policies are in issue, knowing which organization is involved would give others a much better sense of the basis for the Commissioner's findings. This in turn would allow for a more informed critique of the Commissioner's handling of complaints, something that at this point is hampered by anonymity on one hand and summarised findings on the other.



In short, the Privacy Commissioner's policy with respect to the identification of complaint respondents lacks a strong, principled underpinning, and arguments advanced in support of it do not stand up to scrutiny. Moreover, there are a number of compelling arguments that favour much greater disclosure, even if that does not lead to the identification of the respondent in every case. However, the indications from the Commissioner's office thus far suggest that if there is to be any movement in this area, it is unlikely to be dramatic.<sup>88</sup> But at the same time, one also senses that Commissioner Stoddart is cognizant of the limitations arising from the statutory framework, both in terms of the language of section 20 and with respect to the reliance on a ombudsman model for oversight and enforcement, and this may well be addressed in the report she will make in 2006 as part of the five-year review of the legislation.<sup>89</sup> However, there will be a great deal of water under the bridge by then, and one senses that if there is not more significant movement on this issue, it will become all too apparent that the legislation has little bite.

## Interpreting PIPEDA — How Long Will it Take?

With any new legislative regime, some time will be required for the agency entrusted with oversight and enforcement to flesh out the statutory language. It may accomplish this primarily through the adjudication of complaints, or in conjunction with development of guidelines and rules, if the legislation permits. In most instances, primary responsibility for interpreting the legislation's core provisions resides with the agency, subject of course to judicial review, the scope of which will depend on the extent of privative protection that has been extended to the agency's decisions. However, until the statutory language has been applied to specific situations, regulated parties will be uncertain about the scope of their obligations and may delay investing resources in compliance until the extent of those obligations is clear.

Under the PIPEDA, the element of uncertainty that results from the inevitable delay in resolving such fundamental issues is exacerbated tremendously by a number of factors. First is the very general nature of many of the PIPEDA's provisions, in particular the fair information practices that have been imported as part of the Canadian Standards Association's Model Code. Second, even though the Privacy Commissioner is the primary oversight body on an ongoing basis, responsibility for defining the statutory language resides essentially with the Federal Court,<sup>90</sup> which will be involved, at most, infrequently. Third, the PIPEDA puts in place a mandatory two-step complaint process that requires the complainant to obtain a report from the Commissioner before being able to proceed to Federal Court. By increasing cost<sup>91</sup> and delay, the process is likely to discourage complainants, thereby reducing the occasions in

which the Federal Court will have an opportunity to consider the legislation. In addition, the Federal Court process itself invites delay, especially since definitive rulings on the PIPEDA's provisions will undoubtedly require a determination by the Federal Court of Appeal. Taken together, these factors ensure that for quite some time there will be considerable uncertainty about the precise nature of the obligations that regulated parties have under the Act. Several additional comments about each of these points is necessary.

With respect to the general nature of many of the PIPEDA's provisions, there has always been debate about the extent to which legislatures can and should define standards more clearly.<sup>92</sup> That being said, the decision to rely on the CSA Model Code with respect to many of the PIPEDA's substantive requirements means that the language used is more general and open-ended than would often be the case. This takes on greater significance if the primary means for fleshing out these standards is by way of complaint adjudication. Not only will this be time-consuming, but it will be haphazard, being dependent on the nature and the number of complaints that are received. If the complaints are few and the issues narrow, this will greatly circumscribe the Commissioner's ability to generate useful jurisprudence. But even if complaints do provide the Commissioner with the opportunity to flesh out the statutory obligations, the directions charted will remain highly uncertain until the Federal Court has weighed in.<sup>93</sup> This takes us to the second point, which is the unusual manner in which the PIPEDA has assigned responsibility for interpreting the Act's provisions.

As noted already, the Privacy Commissioner is given primary responsibility for most activities relating to oversight and enforcement of the legislation. This includes public education, research, and working with organizations to develop codes and guidelines that promote compliance with the Act. Implicit in this is that the Commissioner's office will be the repository of significant privacy expertise. However, when it comes to defining the meaning of the Act's core provisions, the Commissioner is relegated essentially to the sidelines. Although a complainant must first go to the Commissioner, enforcement, like interpretation of the legislation, is ultimately with the Federal Court. In fact, an application to the court involves a full review on the merits with no special significance being attached to the Commissioner's investigation findings.<sup>94</sup>

Even in a regime where responsibility for interpretation is given to the oversight agency and the courts purport to defer to the agency's expertise, there is considerable room for intrusive judicial review to reshape the contours of the legislation.<sup>95</sup> Under the PIPEDA, this is magnified many times over, given that there a complete separation between the accumulation of privacy-related expertise and the interpretation of the legislative standards. Although the former ought to guide the latter, the PIPEDA undercuts this connection. The courts may

choose to defer to some extent to the Commissioner's investigation findings, but this is not required and is by no means a given.<sup>96</sup> The result is that decisions emanating from the Federal Court could easily undermine the Commissioner both in terms of complaint resolution and broader compliance-focused initiatives. This leads to uncertainty all around, for complainants, for the Commissioner's office, and for the regulated community.

Finally, the mandatory two-step complaint process aggravates matters by increasing the likelihood of cost and delay for complainants. The Commissioner has up to one year in which to issue a report dealing with a complaint. If at that point the complainant is not satisfied with the outcome or if the respondent refuses to implement the Commissioner's recommendations, the complainant can make an application to Federal Court. However, as indicated already, this involves a full examination on the merits with the possibility of an appeal to the Federal Court of Appeal. In practice, this means that most complaints will not be resolved by the Federal Court in anything less than two years. A good example is provided by Case Summary #114, an important complaint by a member of the Canadian Auto Workers (C.A.W.) about Canadian Pacific Railway's use of electronic surveillance in the workplace. A complaint was filed with the Commissioner's office in January 2002, and the Commissioner's report was released in January 2003.<sup>97</sup> Although the complaint was upheld, the Commissioner's recommendations were not implemented and in February 2003, an application was made to Federal Court for a hearing on the matter. The application was argued in April 2004, 14 months after the proceeding was initiated, and a decision denying the application was issued in June 2004. Even with the benefit of union counsel, it still took over two years to get the matter heard in Federal Court and an appeal would have prolonged matters even further.<sup>98</sup> While the C.A.W. may have both the resources and the interest in pursuing such a case, for most complainants this would be a daunting prospect.

Not surprisingly, at this point, there have been relatively few applications to Federal Court and only three cases decided on the merits.<sup>99</sup> At this rate, it could be years before we have a good sense of how the legislation will be shaped by the Federal Court. This does not bode well from a compliance perspective. Those organizations that are not committed to complying with the legislation will have ample opportunity to delay and discourage complainants. And, as indicated, the result is that fewer complaints will get decided by the Federal Court, thereby further delaying the interpretive process. Of

course, the Commissioner's office has no choice but to move ahead with its compliance initiatives. The problem is that it cannot do so in confidence with the result that its authority over non-compliant parties and its leadership with respect to the wider community are severely undermined.

## Conclusion

From the very outset, the approach to oversight and enforcement of the PIPEDA has been complaint-focused. This was clear from the thrust of the statute and from the existing orientation of institutions charged with oversight and enforcement. The emphasis on complaint resolution was entrenched even further by strategic choices made by the Privacy Commissioner's office, while statutory provisions providing proactive, systemic compliance tools were scarcely employed. The result is that compliance has been driven by an approach that many privacy experts question, while methods that are considered far more effective have been largely ignored. In addition, the value of complaint resolution has been further undermined by the decision to protect the identity of complaint respondents.

As a result of a number of factors, cost and delay have now become significant considerations for complainants in particular, and uncertainty has become critically important for all parties. Although the initial decisions about oversight and enforcement impose structural limits on the possibilities for change, there is considerable room for movement with respect to the emphasis the Commissioner's office decides to place on systemic and proactive approaches to compliance. In this respect, there are very strong signals that the Commissioner's office will be placing far greater emphasis on education, guidance, and collaborative undertakings with provincial counterparts and with the wider community.<sup>100</sup> That being said, there is more that can be done, particularly to increase transparency with respect to the investigation of complaints and the identification of organizations that deserve to be criticized or emulated. Even so, there is still a fundamental issue with the pervasive uncertainty that flows from the decision to give ultimate responsibility for interpretation and enforcement to the Federal Court. If matters do not improve, this should be a central point of concern in the review of the legislation that takes place two years hence. Revisiting this decision could begin to address the PIPEDA's critical oversight and enforcement shortcomings — flaws that have become all too apparent.

## Notes:

<sup>1</sup> S.C. 2000, c.5.

<sup>2</sup> Not only did the circumstances surrounding Commissioner Radwanski's resignation provide an unnecessary distraction with respect to the office's compliance initiatives, but it raised questions about the extent to which

policy directions might change under his eventual successor. Murray Long has noted: "Certainly the law will be interpreted differently under Ms. Stoddart and Ms. Black [the Assistant Commissioner], eroding the value of some earlier findings as guidance". ("Interesting Times Ahead in the

- World of Privacy Law" (2004) 1:4 *Can. Privacy L. Rev.* 40 [Interesting Times].)
- <sup>3</sup> As Murray Long has pointed out: "While the previous Parti Quebecois government was adamantly opposed to PIPEDA and saw the Act as eroding Quebec powers, it is a bit of a surprise that the Liberal government has taken the same view — and left it until December 2003 to launch such a challenge". (Interesting Times, *supra*, note 2 at 41.) And, as Simon Chester has noted, "The uncertainty will also cast a pall on businesses which are only now starting to gear up for compliance with a law that may well be struck down". ("PIPEDA Reference Raises Vital Constitutional Questions" (2004) 1:5 *Can. Privacy L. Rev.* 55.)
- <sup>4</sup> As of January 1, 2004, the PIPEDA applied to the provincially regulated private sector unless a province had enacted legislation that was determined to be "substantially similar" to the PIPEDA (s. 26(2)(b)).
- <sup>5</sup> See "Protecting Personal Information in Canada's Private Sector: The Price of Consensus Building" (2002) 27 *Queen's L.J.* 609.
- <sup>6</sup> Section 14(1) provides that a complainant may apply to Federal Court "after receiving the Commissioner's report".
- <sup>7</sup> The argument was that the weaknesses of the oversight and enforcement mechanisms were the result of several factors. First, the government's policy objectives were vague and open-ended. Second, there was a failure to ask penetrating questions at key points in the process and a lack of empirical and comparative analysis on some critical issues. Finally, the government was committed to a light version of oversight and enforcement out of a concern that key organizations be kept inside.
- <sup>8</sup> The argument with respect to the Privacy Commissioner was two-fold. First, an ombudsman is an inherently weak model to base oversight and enforcement on, given that it is confined to making recommendations that may be ignored. Second, the Privacy Commissioner's office was already viewed as a reactive, complaint-focused body which was a concern if one did not view complaint resolution as the most significant tool for promoting compliance. With respect to the Federal Court, the argument was that it was a generalist body that had no claim to privacy expertise and its track record with respect to the handling of closely related access to information issues gave cause for concern in terms of the development of consistent, privacy-sensitive jurisprudence.
- <sup>9</sup> The paper was completed in mid-2001 when there were very few case summaries issued by the Privacy Commissioner.
- <sup>10</sup> There were 255 case summaries issued through the end of 2003, although several involved re-issued factual findings.
- <sup>11</sup> See, for example, Colin Bennett's address to a privacy conference in Vancouver in March 2002 entitled "The First Year of the *Personal Information Protection and Electronic Documents Act*: Was This the Way it Was Supposed to Be?", available online at <http://web.uvic.ca/~polisci/bennett/research>. As well, Michael Geist has written a number of critical pieces in *The Toronto Star*. See, for example, "Name Names, or Privacy Law Toothless" (November 17, 2003) [Name Names] and "Weak Enforcement Undermines Privacy Laws" (April 19, 2004).
- <sup>12</sup> The notion of a privacy toolkit is a predominant theme in Colin Bennett's work, as is the emphasis on employing all of the privacy tools that are available. Bennett has also suggested that "The recognition of the complementarity of these privacy solutions is perhaps stronger in Canada than in most other societies". ("Adequate Data Protection by the Year 2000: The Prospects for Privacy in Canada" (1997) 11 *Int'l. Rev. L. Comp. & Tech.* 79, at 86.)
- <sup>13</sup> The only instance in which the Privacy Commissioner's office identified a complainant respondent was in Case Summary #42 (Air Canada). However, other complainant respondents have been identified by complainants (e.g., Public Interest Advocacy Centre) or as a result of complaints proceeding to Federal Court.
- <sup>14</sup> Commissioner Radwanski contributed significantly to the uncertainty with respect to the "substantially similar" issue by announcing very publicly that, in his view, neither Alberta's nor British Columbia's draft private-sector privacy bills would satisfy the test. After that, matters changed considerably and Industry Canada indicated that both pieces of legislation would meet the test with proposed exemption notes published in the *Canada Gazette* on April 10, 2004 (volume 138, no. 15).
- <sup>15</sup> See Michael Geist's article "Waffling Ontario Coming up Short on Privacy Law" in *The Toronto Star*, December 18, 2003.
- <sup>16</sup> Two early and very significant indicators of change were the Commissioner's announcement on February 13, 2004 of the creation of an external advisory committee to "provide expert advice on strategic directions" and her letter to Commissioners David Loukidelis and Frank Work, which confirmed earlier discussions aimed at harmonizing enforcement approaches. Both of these announcements reflect a willingness to engage the broader privacy community in a constructive manner, something that was notably absent during Mr. Radwanski's tenure. Both announcements are available on the Commissioner's Web site (<http://www.privcom.gc.ca>).
- <sup>17</sup> For example, British Columbia's Commissioner, David Loukidelis, announced late in 2003 that he would be releasing privacy investigation reports issued under the *Personal Information Protection Act* in their entirety and would be identifying complaint respondents. This type of development could begin to exert pressure on the federal Commissioner. At the very least it will force the Commissioner's office to be clearer about the basis for refusing to provide more details with respect to complaint investigation outcomes. See "Thoughts on Private Sector Privacy Regulation", a speech given at a privacy conference in Vancouver on November 24, 2003. It is available on the Commissioner's Web site (<http://www.oipcbc.org>).
- <sup>18</sup> *Supra*, note 11, at 3.
- <sup>19</sup> I have discussed these issues at length in an earlier article. See "Policy Development by Labour Relations Boards in Canada: Is There a Case for Rulemaking?" (2000) 25 *Queen's L.J.* 479, in particular at 487-507.
- <sup>20</sup> Alasdair Roberts has referred to this as a "failure in co-production". See "New Strategies for Enforcement of the Access to Information Act" (2002) 27 *Queen's L.J.* 647, at 668.
- <sup>21</sup> James Landis strongly advanced this view in *The Administrative Process* (New Haven: Yale University Press, 1951). As he put it: "The ultimate test of the administrative [process] is the policy it formulates, not the fairness as between the parties of the disposition of a controversy on a record of their own making" (at 39).
- <sup>22</sup> Roberts, *supra*, note 20, at 671.
- <sup>23</sup> See R.S. Kauffman, "Politicization of NLRB Doctrine: Costs Imposed by Institutional Alternatives in the Administration of the NLRA" (1987) 4 *J.L. & Pol.* 123 at 138.
- <sup>24</sup> From the perspective of someone who has extensive experience administering privacy obligations within an institution, it seems that there are very few formal complaints largely because individuals simply won't know how information concerning them is being used. It is interesting to note that Ontario's Information and Privacy Commissioner has established an expectation that institutions notify it when they become aware that a privacy breach may have occurred. (See *What to Do When a Privacy Breach Occurs: Guidelines for Government Organizations*) There is no doubt that this makes sense in terms of ensuring that problematic practices do come to light, but there are two significant concerns. First, the policy has no statutory underpinning and relies on a good faith application by institutions. Second, the IPC's practice on receiving a notification that a privacy breach may have occurred is to open an investigation file that is characterized as an IPC-initiated complaint. One has to wonder whether this practice won't discourage the reporting of potential privacy issues, given that investigation results will frequently appear on the IPC's Web site.
- <sup>25</sup> As Daniel Solove has noted: "A person who begins receiving unsolicited marketing mail and email may have a clue that some entity has disclosed her personal information, but that person often will not be able to discover what entity was the culprit." See *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, (2001) 53 *Stan. L. Rev.* 1393, at 1444.
- <sup>26</sup> For example, eight major complaints involving issues of systemic importance were filed by the Public Interest Advocacy Centre. Although the Case Summaries were anonymised, PIAC made the entire complaint investigation findings available on its Web site at <http://www.piac.ca> (under "Privacy"). The PIAC complaints are reported by the Privacy Commissioner as Case Summaries #77-83 and #85.
- <sup>27</sup> See, for example, Case Summaries #75, #113, and #136.
- <sup>28</sup> See, for example, Case Summary #39, dealing with a bank's credit scoring model that reflected industry practice, and Case Summary #167, where it was argued that the organization's practices were consistent with industry standards and with the Canadian Marketing Association's privacy code, even though the respondent acknowledged that the latter "lacked clarity".
- <sup>29</sup> As Colin Bennett has pointed out: "Initial press reports on how the new commissioner would handle complaints under the PIPEDA suggested that he would not, as a matter of practice, publish the findings of his investigations. This prompted an open letter from a group of privacy lawyers and advocates lamenting this decision and arguing that the nascent field of privacy law poses such novel and complex questions that the

benefits of disclosure clearly outweigh confidentiality concerns. Whether this pressure worked or whether initial reports were inaccurate, the office did begin a practice of publishing a summary of its findings with respect to complaints and placing them on its web site." See "The Privacy Commissioner of Canada: Multiple Roles, Diverse Expectations and Structural Dilemmas" (2003) 46 *Can. Pub. Admin.* 218, at 233.

<sup>30</sup> *Supra*, note 17.

<sup>31</sup> In previous interviews with the author, both Colin Bennett (March 22, 1999) and David Flaherty (March 19, 1999) expressed this view.

<sup>32</sup> Assistant Commissioner Heather Black acknowledged this in an interview with Murray Long on August 27, 2003 and again in an interview with him on March 25, 2004. Interim Commissioner Marleau was also present at the first interview and Commissioner Stoddart, Assistant Commissioner Raymond D'Aoust, and Director of Communications Anne-Marie Hayden were in attendance at the second interview. Reported in *PrivacyScan*, March 25, 2004.

<sup>33</sup> For example, six non-jurisdictional findings were reported in the period while Commissioner Radwanski held office; none were reported after his departure. See Case Summaries #17, #89, #98, #109, #123, and #164. Within that same period there were a number of complaints that dealt solely with the failure to comply with the obligation to respond to a request for information within 30 days. In particular, see Case Summary #112, where the respondent was but four days late in responding to the request.

<sup>34</sup> Submissions to the Standing Committee on Industry, December 8, 1998.

<sup>35</sup> As Murray Long has suggested "Many of these findings are irrefutable — that is, the findings are based squarely on facts and there is no doubt about how PIPEDA was interpreted" (*supra*, note 2, at 40). That being said, there have been a few findings that have generated critical comment. Michael Geist was extremely critical of the result reported in Case Summary #251, where a complaint that a supervisor had continued to read a confidential fax after being asked to stop was determined to be not well-founded. See "Weak Enforcement . . .", *supra*, note 11. Murray Long was equally critical of the finding in Case Summary #237 where it was concluded that an employee had impliedly consented to the disclosure of medical information to co-workers who had accompanied her to a medical appointment. See *PrivacyScan*, May 12, 2004. The author agrees with the criticisms expressed in each case.

<sup>36</sup> See for example Case Summary #153, an important complaint about the use of data to monitor workplace performance, which was dismissed with little consideration of the issues raised. Case Summary #220, which raised similar issues, also is notably deficient in analysis of what are very important workplace privacy issues.

<sup>37</sup> *Supra*, note 11, at 5.

<sup>38</sup> For example, see the group of eight complaints filed by the Public Interest Advocacy Centre. *Supra*, note 26.

<sup>39</sup> PIAC made the findings with respect to the complaints it filed publicly immediately available, which proved to be extremely valuable. This provided information concerning the identity of the complaint respondent, the length of time it took to complete the investigations, and the detailed findings, all of which was otherwise unavailable.

<sup>40</sup> This is similar to the notion of "surface bargaining" in labour law. It is possible that a pattern of conduct may reveal a failure to bargain in good faith even though none of the specific incidents viewed in isolation would involve a breach of the good faith obligation.

<sup>41</sup> See, for example, Case Summary #176.

<sup>42</sup> This seems apparent from Murray Long's interview with the Commissioner and the Assistant Commissioners on March 25, 2004, where there was an insistence that the statute prevented the naming of names. When asked "So there will still be findings issued that do not have names in them?", Assistant Commissioner Black responded "We can't do that. The law doesn't allow us to do that. The law has built in a public interest test" (*supra*, note 32). With respect, that greatly overstates the limitations that arguably may be imposed by section 20.

<sup>43</sup> The author contacted the Privacy Commissioner's office in March 2003 with respect to its policy on the identification of complaint respondents and two rationales were given for the limited disclosure of names. First, it was claimed that the Commissioner was not in the business of "punishing" organizations. Second, it was suggested that the power to publicize needed to be reserved for the most serious cases of non-compliance.

<sup>44</sup> Mr. Marleau acknowledged this in an interview with Terry McQuay, the President of Nymity, in September 2003. The interview was posted on Nymity's Web site (<http://www.nymity.com/newsletter/sept/robertmarleau.htm>).

<sup>45</sup> On June 1, 2004, the Commissioner's office announced the launch of a privacy research program to "... support research into, as well as the promotion of, the protection of personal information". See "Privacy Commissioner launches \$200,000 contributions program", available on the Commissioner's Web site (<http://www.privcom.gc.ca>).

<sup>46</sup> It should be noted that it was the respondent who had first suggested bringing the Commissioner's recommendations to the CMA for discussion, to which the Commissioner responded that the recommendations were "not for negotiation but rather for adoption".

<sup>47</sup> Contrast Commissioner Radwanski's approach in Case Summary #167 to that of Commissioner Stoddart in a recent speech to the CMA where she expressed a desire to work with the CMA as "partners". Her address to the CMA's 2004 National Convention & Trade Show on May 4, 2004 is available on the Commissioner's Web site (<http://www.privcom.gc.ca>).

<sup>48</sup> The author confirmed this point with the Commissioner's office on May 12, 2004. It was the office's view that as yet there had not been sufficient grounds to conduct an audit.

<sup>49</sup> See Case Summary #176.

<sup>50</sup> One would think that cases involving significant issues, repeat offenders, and previous recommendations not followed would provide a more than sufficient basis for proceeding with an audit. However it appears that the Privacy Commissioner's office thinks that it is necessary to have a complaint that itself raises systemic issues. (This view was expressed by the Commissioner's office (*supra*, note 48).) Given that one of the weaknesses of complaints is that they tend to be narrow, the result may be that complaints are unlikely to provide the foundation for an audit. However, if complaints do not work as the trigger, what basis will there be for concluding that an organization's practices are not in compliance with the Act?

<sup>51</sup> Both Bennett and Flaherty have been strong proponents of the value of audits and expressed this in interviews with the author. *Supra*, note 31.

<sup>52</sup> This is an approach repeatedly emphasized by Colin Bennett, who has stressed that "compliance has to emerge as much from the bottom-up, as from the top-down" (*supra*, note 11, at 2).

<sup>53</sup> *Ibid.* at 4.

<sup>54</sup> *Ibid.* at 3.

<sup>55</sup> Most of these initiatives have resulted in papers that are available on the IPC's Web site. A recent initiative of particular note is the joint report by the IPC and the Canadian Marketing Association entitled "Incorporating Privacy into Marketing and Customer Relationship Management", released in May, 2004 and also available on the IPC's Web site (<http://www.ipc.on.ca>).

<sup>56</sup> See "Thoughts on Private Sector Privacy Regulation", *supra*, note 17. See, as well, "Enforcing Private Sector Privacy — One Regulator's Perspective", a speech given to a privacy conference in Victoria on February 14, 2003. Both are available on the Commissioner's Web site (<http://www.oipcbc.org>).

<sup>57</sup> This was clear from Murray Long's interview with the Commissioner's office on March 25, 2004 (*supra*, note 32) and it is reflected as well in the various fact sheets that are now being put out by the Commissioner's office.

<sup>58</sup> *Supra*, note 16.

<sup>59</sup> With respect to the value of site visits, see Flaherty's paper, "How to do a Privacy and Freedom of Information Act Site Visit", available on the B.C. Commissioner's Web site (<http://www.oipcbc.org>). Concerning Flaherty's reservations about the value of complaints, see "Controlling Surveillance: Can Privacy Protection be Made Effective?" in P. Agre & M. Rotenberg, eds., *Technology and Privacy: The New Landscape* (Cambridge: MIT Press, 1998) 167 at 185.

<sup>60</sup> *Supra*, note 45.

<sup>61</sup> Subsection 13(1) of the PIPEDA requires the Commissioner to prepare an investigation report within a year of the complaint being filed.

<sup>62</sup> Bennett has suggested that "... Canada has become the only country in the advanced industrial world that has begun seriously the process of promoting privacy protection from the bottom up ... There are probably more privacy codes in Canada than in any other society, especially from sectoral trade associations ... Codes of practice are, and will continue to be, a feature of privacy protection policy in Canada" (*supra*, note 12, at 87).

<sup>63</sup> *Supra*, note 11, at 4.

- <sup>64</sup> The author is a strong proponent of the value of rulemaking and has discussed this in the context of labour relations (*supra*, note 19) and privacy protection (*supra*, note 5).
- <sup>65</sup> James Dorsey discussed this issue in an interview with the author with respect to the applicability of rulemaking in a labour relations context (July 22, 1999).
- <sup>66</sup> *Supra*, notes 17 and 55. See, as well, the bulletin issued by Commissioner Loukidelis entitled "Commissioner seeks input on new private sector privacy rules to come into effect January 1, 2004". Available on the Commissioner's Web site (<http://www.oipcbc.org>).
- <sup>67</sup> *Supra*, note 55.
- <sup>68</sup> *Supra*, note 47.
- <sup>69</sup> Landis's *The Administrative Process* (*supra*, note 21), first developed as a series of lectures at the Harvard Law School in 1938, is considered to be the classic articulation of the administrative perspective.
- <sup>70</sup> See *Prophets of Regulation* (Cambridge: Harvard University Press, 1984) at 172.
- <sup>71</sup> *Supra*, note 56, at 5.
- <sup>72</sup> *Supra*, note 55.
- <sup>73</sup> *Supra*, note 47.
- <sup>74</sup> In March 2003, the author called the Privacy Commissioner's office to obtain compliance-related information. Not only were the responses to my questions concerning the identification of complaint respondents guarded but there was a flat refusal to provide any information about whether the audit power had been used at that point.
- <sup>75</sup> In May 2004, I contacted the Commissioner's office to ask about the use of the audit power and received a prompt response confirming that it had not been used to date including a candid explanation about why that was the case. That being said, there are still transparency issues. Aside from the issue of whether complaint respondents should be identified, the Commissioner's office refuses to disclose the date when a complaint was filed. Of course this prevents the community from obtaining a full understanding of how the complaint process is working. From the available evidence, there have to be concerns because it is clear that a number of complaints that we do have information on have taken a full year to investigate. This includes the group of PIAC complaints, Case Summary #112, discussed subsequently, and Case Summary #66 (*Nancy Carter v. Internet Inc*).
- <sup>76</sup> Michael Geist has written a number of articles dealing with the issue (*supra*, note 11) and the Public Interest Advocacy Centre also wrote to Commissioner Stoddart in December 2003 urging her to identify complaint respondents. The PIAC letter and the Commissioner's response are available on the PIAC Web site (<http://www.piac.ca>). The author also wrote to the Commissioner in January about the issue and received a detailed response from Assistant Commissioner Black.
- <sup>77</sup> This was a repeated theme in speeches by former Commissioner Bruce Phillips and it was embraced by Commissioner Radwanski as well.
- <sup>78</sup> *Supra*, note 43.
- <sup>79</sup> In the interview with Murray Long on March 25, 2004 (*supra*, note 32), Assistant Commissioner Black, when asked whether "internal criteria" would be developed to guide the exercise of discretion with respect to disclosure, responded: "I don't know if we'll develop a guideline where we have meet all of the tests in each case. From a legal perspective, we have to look at each case and say 'What is the public interest here?' That is the test". However she did leave open the possibility that eventually there could be a "generic set of criteria".
- <sup>80</sup> In the United States there has been serious consideration of the principles at stake with respect to the use of publicity in an enforcement context. See, for example, Ernest Gellhorn's article "Adverse Publicity by Administrative Agencies" (1973) 86 *Harv. L. Rev.* 1380. See, as well, Michael Lemov's article "Administrative Agency News Releases: Public Information Versus Private Injury" (1968) 37 *Geo. W.L. Rev.* 63.
- <sup>81</sup> See, for example, Case Summaries #82, #168, #207, and #223.
- <sup>82</sup> In Marver Bernstein's classic, *Regulating Business by Independent Commission*, he put the matter succinctly: "Those who discover that violations go undetected and unpunished will have little respect for the commission and will violate regulations with impunity if it is to their financial or commercial advantage". (Westport, Connecticut: Greenwood Press Publishers, 1955 at 224.)
- <sup>83</sup> *Supra*, note 79. Bernstein suggested that defining the public interest is one of the critical functions a regulatory agency needs to perform. As he put it: "... a regulatory agency must play the creative role of formulating major regulatory policies. It must define the content of the public interest and seek to develop it in the cases that come before it." *Ibid.*, at 262.
- <sup>84</sup> The PIAC letter urging the Commissioner to consider naming respondents clearly accepted that in some instances there would be no value in identifying the complaint respondent (*supra*, note 76).
- <sup>85</sup> See Case Summary #82 (Bank of Nova Scotia).
- <sup>86</sup> Michael Geist has argued that withholding names denies some organizations the "reputational benefit" that should flow from having good privacy practices (Name Names, *supra*, note 11). The author also discussed this and other reasons for naming names at a Federated Press Financial Services Privacy Conference in Toronto on April 30–May 1, 2003 ("Two Years Under the PIPEDA: The Experience Thus Far and the Challenges Ahead").
- <sup>87</sup> For example, we know from PIAC's disclosure that it was the Bank of Nova Scotia that was commended in Case Summary #82 and that might give one reason to think its general privacy practices would be privacy sensitive. We also know that the Royal Bank's former Chief Privacy Officer Peter Cullen was very well-regarded and as a result we might also expect a strong privacy orientation within that institution.
- <sup>88</sup> The interview with Murray Long on March 25, 2004 strongly suggests that if the Commissioner's office insists on a case-by-case approach to the public interest issue, even though there are now over 260 completed investigations, change will be very slow in coming (*supra*, notes 32 and 79).
- <sup>89</sup> In the March 25, 2004 interview with Murray Long, Commissioner Stoddart noted "One of the things that we will of course be looking at in the course of the next two years is how efficient an ombudsman framework is for applying personal information protection principles in the commercial sector" (*supra*, note 32).
- <sup>90</sup> The recent decision in *Eastmond v. Canadian Pacific Railway* (2004 FC 852) [*Eastmond*] made it clear that an application to the Federal Court resulted in a *de novo* hearing in which new evidence could be introduced. As Murray Long has noted "... the Federal Court is the only venue where true legal clarity on PIPEDA interpretation is likely to emerge and the only venue where significant breaches of PIPEDA can be addressed ... Despite the risk and burden of going to Court, the reality is that it is the only venue where privacy rights under PIPEDA can ultimately be enforced" (*PrivacyScan*, July 26, 2004, at 2-3).
- <sup>91</sup> It has become clear that cost will be a very significant factor influencing the number and the types of cases that proceed to Federal Court. In *Englander v. Telus* (2003 FC 705) [*Englander*], the costs awarded against the unsuccessful applicant were \$11,906.41 and the applicant had argued his own case, thereby reducing the costs that most other applicants would have incurred. As Murray Long has suggested, "... every individual who files an application with the Federal Court should prepare to accept what could be very daunting legal fees, especially if they lose. Thus, it is only ever likely to be those cases involving provable, significant and egregious harm to an individual's privacy interests and where companies are intransigent that will likely ever be pursued by an individual at the Federal Court. This may be exactly what the lawmakers intended. The result, however, is that, by default, the Office of the Privacy Commissioner becomes the only venue where public policy issues concerning PIPEDA are ever likely to get a hearing" ("*Englander v. Telus* — the Cost Award" in *PrivacyScan*, July 11, 2004).
- <sup>92</sup> For example, Henry Friendly in a prominent series of articles in the *Harvard Law Review* issued a plea for clearer standard-setting by Congress. See "The Federal Administrative Agencies: The Need For Better Definition of Standards", Parts I, II, and III, (1962) 75 *Harv. L. Rev.* 863, 1055, and 1263. However, Kenneth Culp Davis was dubious that clearer standards were possible and argued for the use of agencies' rulemaking powers to flesh out general standards. See *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).
- <sup>93</sup> This is made clear by the recent decision in *Eastmond* (*supra*, note 90) where the Court dismissed an application that was based on a successful complaint to the Privacy Commissioner.
- <sup>94</sup> In *Eastmond*, Justice Lemieux stated that "I do not accord any deference to the Commissioner's findings of fact because I am satisfied the evidence before me is considerably different than that gathered by the Privacy Commissioner's investigation" (*supra*, note 90, at para 123).
- <sup>95</sup> I have discussed this issue at length in the context of Ontario's freedom of information process. See "Deference in Name Only: Judicial Review of Ontario's Information and Privacy Commissioner" (1998) 20 *Adv. Q.* 304 and "Judicial Deference and Ontario's Information and Privacy Commissioner: In Search of 'Reasonableness'" (2004) 28 *Adv. Q.* 1

<sup>96</sup> In *Englander* (*supra*, note 91), the Court did suggest that the Commissioner's report was entitled to "some deference" but did not elaborate. (At para 39.) More recently, in *Eastmond*, (*supra*, note 90), the Court was prepared to "... accord the Privacy Commissioner some deference in the area of his expertise which would include appropriate recognition to the factors he took into account in balancing the privacy interests of the applicant and CP's legitimate interest in protecting its employees and property". (At para 122.) Unfortunately, neither decision discusses in any detail the nature of the Commissioner's expertise which would attract judicial deference.

<sup>97</sup> I am grateful to C.A.W. counsel Lewis Gottheil, who supplied this information and also provided a very helpful discussion of some of the issues that were argued, including the standard of review that is appropriate for the Commissioner's decisions and the question of whether this type of

complaint should be addressed through the grievance procedure, as was held in *L'Ecuyer v. Aeroports de Montreal* (2003 FC 573).

<sup>98</sup> As of late August, 2004, an appeal had not been filed.

<sup>99</sup> The three decisions to date are *Englander v. Telus* (*supra*, note 91), *L'Ecuyer v. Aeroports de Montreal* (*supra*, note 97), and *Eastmond v. Canadian Pacific Railway* (*supra*, note 90).

<sup>100</sup> On May 18, 2004, Commissioner Stoddart spoke at a privacy session in Toronto put on jointly by the Ontario and Canadian Bar Associations and stressed that public education, working with her provincial counterparts and other affected organizations, and eliciting feedback from the affected community would be some of the major areas of focus for her office in the months ahead.