

Transcript Episode 1 Patricia Kosseim

Ron Kruzeniski:

Welcome everybody. Welcome to our first podcast. We observed what they were doing in Ontario and the Ontario Commissioner has come out with a series of podcasts. And not to be competitive or anything, I thought it was important we not be left behind. So today is our first podcast and our first guest is oh, Patricia Kosseim, the Information and Privacy Commissioner of Ontario. So we are turning her instead of being an interviewer into an interviewee. And I would like to welcome Patricia. And if I can just give a brief summary of her professional career. For about a decade, she was Senior General Counsel and Director General with the Federal Privacy Commissioner. After that, she went into private practice and practiced at Osler, Hoskin's. And on July 1, 2020 she became the Information and Privacy Commissioner for Ontario. If you'd like to see her full bio, just go to the Ontario Commissioner's website and click on About the Commissioner. Welcome this morning, Patricia.

Patricia Kosseim:

Well, thank you Ron. And I'm honoured to be your inaugural guest. So thank you very much for the invitation.

Ron Kruzeniski:

So, Ontario has embarked upon a process of consulting and have issued a consultation paper and a white paper regarding legislation access and privacy legislation for the private sector. And that's going to be our topic today. And Patricia, for those who haven't been following this particular issue in Ontario, can you outline the processes that the Government of Ontario has sort of taken to get us to the stage that we're going to be talking about today?

Patricia Kosseim:

Sure. Well, just to be clear, there's no provincial bill to speak of yet, the government is still consulting on this issue. And in my view, they've taken a very thoughtful and deliberate approach to this. Last summer in 2020, they launched a first public consultation on whether Ontario should even introduce a made-in-Ontario private sector privacy law and asked for input on eight key themes. And basically, based on what they heard during this first round of input, the government then put together a white paper and held a second round of consultations this past summer on a number of very concrete proposals. The white paper actually, and in a quite novel way, includes some sample statutory language to describe very specifically what they're contemplating in certain key areas. And I thought that showed a lot of thought and progress in their thinking.

The white paper is very much based on the proposed federal bill, which was tabled a few several months ago now. But it's not exactly the same in all respects. And where the proposals in Ontario diverge, the paper actually explains why. So I think all told it's a very wise approach and the step-by-step sort of consultation process using very specific statutory language, I think really helps to engage public debate on the issue.

Ron Kruzeniski:

So Pat, as an independent officer of the Ontario Legislature, you can't speak for the Ontario Government, but for the purposes of this podcast, from what you've gleaned, what does it look like, the main reasons the Government of Ontario decided to explore the whole area of private sector legislation?

Patricia Kosseim:

Well, you're right, Ron, I can't know that for sure, I'm only speculating here. But I would imagine that this is part of the government's overarching digital and data strategy with very, very ambitious plans to build a world-leading digital economy. And I think to their credit, they recognize that for Ontarians to fully engage as digital citizens and really embrace technology, individuals have to be able to trust that their privacy rights will be protected and that their personal information will be kept safe and secure online. So, to be a world leader, the government also recognizes, I think, quite wisely that it has to take a broad cross-sectional approach to privacy protection, which includes regulating all of the integrated private sector components of a digital economy. Now, there is a federal law, the Personal Information Protection and Electronic Documents Act called PIPEDA that regulates commercial activity in provinces that don't have their own provincial private sector privacy law like Ontario and Saskatchewan.

But really there's near universal agreement that PIPEDA is not up to the task and has really lost relevance over the last 20 years or so. And some say it's not strong enough to mitigate the privacy and cybersecurity risks of modern technologies. Others say it doesn't enable or incentivize innovation. But whatever stance you take, I think it's fair to say that most are dissatisfied with PIPEDA and believe it no longer strikes the right balance. And this past year there was a bill introduced in parliament federally to reform PIPEDA, but it's lingered on for quite a while and eventually died on the Order Paper with the call of the last federal election. So Ron, it's maybe against this larger backdrop that the Ontario Government has begun to seriously consider whether it's time to introduce its own modern private sector privacy law.

Ron Kruzeniski:

So, Patricia, as an independent officer, we have the opportunity when government proposes things to support it, to be opposed to it, to support it with suggested changes. And generally, in your response and other interviews that you might do, are you generally supportive of the government's approach here to developing private sector legislation?

Patricia Kosseim:

Absolutely. My office is strongly in favour of a made-in-Ontario private sector privacy law, and for several reasons. First of all, we're generally supportive, very supportive of the government's proposals to date. We think they're good proposals. We called for a principles-based, fair, well-balanced, pragmatic, flexible approach. And we think their proposals are definitely on the right track. There is enormous benefit we think, to a more comprehensive approach that fills the gaps of the federal law. And we've said that we need a provincial approach that leaves no Ontarian behind and one that aligns with local values, realities and culture.

We also are very supportive of providing regulatory certainty and support to businesses. Particularly, as the province works to recover from the pandemic and refuel the economy. And most importantly, one that gives the public the confidence it needs to embrace technology rather than shy away from it. Now, three provinces have already done this, British Columbia, Alberta and Quebec and have proven the advantages of a provincial approach. In the case of Quebec, in fact, they just adopted a whole new reform bill. And really in our view, there's no reason why Ontario's Canada's largest province shouldn't do the same.

Ron Kruzeniski:

So, my next question might overlap slightly with what you were talking about but giving you an opportunity to elaborate. We saw the federal government introduced C-11, and then we saw the call of

the election. I guess for a while all of us didn't know whether C-11 would get passed and thus changes to PIPEDA. And now we don't know whether a revised C-11 will come into play. What's your thoughts on Ontario proceeding in the direction of private sector legislation, whether there is or is not changes in C-11 or changes in the federal legislation? And maybe put another way, what benefits do you see in your province and possibly every other province having its own legislation?

Patricia Kosseim:

Well, I think a provincial private sector privacy law could be more comprehensive, it could be more relevant, and it could be more effective. And I say that for several reasons. First Ron are basic constitutional reasons. So even if PIPEDA is eventually reformed and becomes the best, the most modern private sector privacy law in the world, there will always be major gaps that fall outside the federal jurisdiction and that the federal government, quite frankly will never be able to fill for constitutional reasons. And some of those gaps are pretty big ones like employees of provincially regulated companies. That is very worrisome when we consider the rise of workplace surveillance, particularly, as we move towards a virtual workplace. These raise deeply concerning issues. And to think that employees of provincially regulated companies have no statutory privacy protection at all is a huge gap that I think needs to be filled.

There's also non-commercial activities of not-for-profit organizations, professional associations, unions, provincial political parties, all areas that up to now I think have been underestimated in terms of the risks that they pose. Particularly, considering the huge volumes of personal information they've amassed and that they use and that they, like everybody else, are victims to cyber-attack. And when we think that all of those non-commercial activities as well are not covered by the federal privacy law, I think that's another important gap to fill.

Youth and children is another area where I think the federal government may be hesitant to venture at least too far into. And yet we know that children and youth are among the most vulnerable citizens when it comes to online threats. So, a provincial approach I think would be a great opportunity to delve further into this area by defining rules, for instance, for substitute decision-making and developing regulations, codes of practice that are better integrated with the education and child and youth sectors, which are entirely in provincial jurisdiction.

There's also the possibility for gaining operational efficiencies, particularly, vis-a-vis small and medium-sized enterprises, that we know constitute 98% of Ontario's business sector and 30% of the province's overall GDP. Now, I don't know what it represents in Saskatchewan, but I would imagine the figures are quite high as well. A federal private sector privacy law, which now don't get me wrong, is definitely needed, is better suited in my view to the big players like federally regulated banks, telecommunications companies, airlines, global internet giants like the Googles or Facebooks of the world. And it was probably with these players in mind that the draught federal bill that came out last year proposed quite a heavy two-tiered system of oversight with the Commissioner as the first level of review and then a specialized tribunal to hear appeals. And that kind of enforcement regime may be fine for very large organizations with deep pockets, but I think it's much less apt for SMEs that would benefit more, quite frankly, I think from a streamlined enforcement regime coupled with supportive compliance approach, including educational and advisory services of a local regulator.

And it's a sheer matter of numbers and geography. A local regulator is closer to the ground with the eyes and ears tuned into the realities of the sector and aligned with local culture and values. And that's the classic argument for local governments that have stood the test of time forever.

Another strong argument, Ron, in favour of provincial private sector privacy law is the opportunity to take a more coherent and comprehensive approach to cross-sectoral initiatives. Now there's hardly a

government program or public institution these days that doesn't involve some private sector involvement. You think of third-party service providers like cloud services or digital platforms or any kind of information processing service. And that's true across the government sector, the education sector, when you think of virtual healthcare services, smart cities. And when something inevitably happens because it will like a data breach somewhere along that information processing chain, it's really hard for us as regulators to assign responsibility among all of the actors and all of the component pieces when you're straddling different laws, different regulators and different jurisdictions.

So a big advantage of a provincial private sector privacy law is to design an approach that meshes with the province's other privacy laws in the public health and child and youth sectors, for example, by making it very clear which law prevails over the other in what circumstances. And setting up essentially a more streamlined, coherent regulatory regime under a single one-stop shop regulator. So those are some of the advantages that we've put forward. And there is inevitably those data flows that will cross borders and trigger the federal regime. But I think you can handle that by designing a provincial privacy law that's largely harmonized with the federal law and that of other substantially similar laws like the ones in BC, Alberta, and Quebec as I mentioned. And harmonization works very well as a practical matter without necessarily meaning that the laws have to be the same in all aspects.

And I know as you know, that there are real allergic reactions, particularly among businesses when they think of, "Oh gosh, yet another provincial law to comply with." But I really think those are largely exaggerated. Having advised clients when I was in private practice, particularly, those who wanted to roll out a new product or service in Canada. Once you basically know the slight differences between the regulatory regimes, you can advise them accordingly. The easiest advice is to follow the most protective regime as the minimum floor and adopt a consistent approach across the country. Or if they have to do something a little bit different in Quebec for instance, why not? If Quebecers have decided what's best for their people, their province, why not respect that? So, I think there are ways of harmonizing laws and facilitating inter-jurisdictional cooperation and information exchange, for instance, between regulators to really streamline enforcement. And those already exist and frankly, they work very well. So those are some of the reasons why I think Ontario or other provinces that are contemplating a provincial approach should give it some serious thought whether or not federal reform ever happens.

Ron Kruzeniski:

Well, thanks for that and that is a good list of the benefits to provincial access and privacy legislation for the private sector. And as you were speaking, I was thinking about your response document and you've covered many of those points in the response document. You also go on in that document to pinpoint seven areas where you go into more detail and get much more technical. And probably not the purpose of this podcast today to sort of go through those seven, but is there anything in those seven that you think sort of reasonable to flag today or do you just encourage people to go read your response paper, which we'll talk about in a moment where they can find both the white paper and the response document? But anything out of the seven that you would want to highlight or just encourage people to read it?

Patricia Kosseim:

Well, I would encourage people who are interested to read it, but I do want to leave a couple of parting thoughts, I guess. There are important benefits to provincial approach to regulating privacy as I just laid out. But I want to emphasize that those benefits also exist for businesses themselves. It's easy to fall into the trap of thinking the less regulation, the better. When the reality is that regulation, particularly, smart regulation, brings certainty and predictability that helps build consumer trust and support

innovation. There's a heck of a lot of innovation that's not happening for reasons that people call reticence risk because organizations just don't know what they can or can't do. And I think the opportunity that lies before us is not to fight against regulation, but really to put our heads collectively together and think deeply about how can we best design a modern, a streamlined, comprehensive, a relevant, coherent approach that makes the most sense for everybody.

So as you said, in the end, the decision is certainly not in my hands as the regulator, but I'm very hopeful that the government will listen to all stakeholders and perspectives from all sides and make the best decision that's right for Ontarians.

Ron Kruzeniski:

So where can those that want to pursue this find the white paper and in particular find your response and suggestions regarding the white paper.

Patricia Kosseim:

So, there are links to the white paper and links to our submission that we filed in response. They're on our website at ipc.on.ca and you'll find them under the resources tab. And we welcome comments, we welcome any views, feel free to drop us a line, tell us whether you agree or not. But most importantly, let your views be known to the government who really are holding the pen on this initiative and are encouraging real public debate on these issues, which I certainly support and I commend them for doing that.

Ron Kruzeniski:

Well, I'd like to thank you very much for taking part in this first podcast. And you do well as an interviewer and an interviewee. I don't know which one you prefer, but both have worked out well. So thank you. I understand Patricia, you have a very busy day at your end. And we hope that the rest of your day and tomorrow goes smoothly.

Patricia Kosseim:

Thank you, Ron.

Ron Kruzeniski:

If I can just finish off, if you've enjoyed this podcast, let us know. Let you know the next one we're going to do is with Diane Poitras, she is the Commissioner in Quebec. And as Patricia mentioned, they just have a new bill there, Bill 64, and we'll be talking to her about the positive aspects and features of that particular bill. So all of you, thanks for listening and hope you have a good day.