

Transcript Episode 10 Teresa Scassa

Ron Kruzeniski:

It's my pleasure today to be talking to Professor Teresa Scassa, who is Canada Chair of Information and Policy at the University of Ottawa Faculty of Law. She's the author of a textbook, Canadian Trademark Law, also the author and co-author of other books and articles. She's also presented to the Federal Provincial Commissioners on access and privacy and this occurred at our monthly meeting in April. And she spoke about open banking, and I thought it was really important that people in Saskatchewan or anyone else listening to this podcast understand this topic. And I'm particularly interested as I talk to Professor Scassa as to the provincial implications. So welcome Teresa to this podcast today.

Teresa Scassa:

Thank you very much. It's a pleasure to be here.

Ron Kruzeniski:

So, I have to start with a curiosity question. How did you become interested in Information Law and Policy?

Teresa Scassa:

Well, yeah, it's been a long road for Information Law and Policy, but I started my career at Dalhousie University and early on founded with a colleague of mine, the Law and Technology Institute there. And this was really in the early days of the internet. And so, one thing followed another and what started with something that was a little bit internet law, a little bit intellectual property law kept expanding. And so now I call the area, I work in Information Law and Policy, and it covers a huge number of things and it keeps growing.

Ron Kruzeniski:

And then as part of that, how did you become interested in open banking?

Teresa Scassa:

Well, open banking is interesting to me. As you know, I spent a lot of time working on privacy and privacy law issues. And when I started seeing early news about open banking and the early steps in consultations on open banking in Canada, I became particularly interested because I think open banking is going to be Canada's test case with data mobility and data mobility is something that was introduced in Europe through the general Data Protection Regulation, the GDPR. It's a new approach to the protection of privacy or data protection for individuals, which gives individuals more control over their data. And so part of the idea is that with open banking is that individuals will be able to have more control over their banking data and decide who gets to have access to that data and for what purposes. And so I thought, well, if this is going to be the test case in Canada, then I want to study it in more detail and get a sense of what's being considered in the Canadian context.

Ron Kruzeniski:

Now, somebody listening is going to say, so what exactly is open banking?

Teresa Scassa:

Yeah, and that's a really good question. It's also called consumer directed finance. And so it really depends on who you're talking to. Which title gets used? The title consumer directed finance, I think puts more emphasis on this idea that the consumers will be in control over their personal data within this system and will be making choices. And so the idea behind open banking is in part in response already to technologies that are developing that allow individuals to have access to apps, for example, that help them plan their finances, budget, do interesting things with their finances. As you know, many people open bank accounts or get credit cards depending on the kinds of offers they receive. So it's entirely possible that somebody has a couple of credit cards with different companies or different banks, their accounts, certain accounts with one bank, some accounts with another bank, RESPs and RRSPs with different banks and so on.

And so for an individual who then wants to budget, plan, manage their finances, their information is scattered across a number of different institutions. And there are financial technology companies called FinTech for short that are developing all of these apps for consumers and for small businesses as well that let them plan their finances, budget, do these interesting things. But in order to do that, they have to have access to all of this information. And so without an open banking system, what's been happening in Canada, because many of these apps are available to Canadians, is that those companies are asking Canadians to provide them with their bank account, usernames and passwords so that they can go in and scrape the data that they need to provide their app services.

And as you know, that's not the most secure way of proceeding for consumers for a couple of reasons. One is it's just not a secure way of proceeding. And secondly, of course, providing passwords to other companies tends to violate terms of service that you have with your bank. And so that may expose you to much greater risk if there is a breach, much greater financial risks. So open banking is in part to enable consumers to have access to this broader range of FinTech apps and small businesses as well, but in part also to respond to the risks that are already being created by the growing interest in receiving these kinds of services.

Ron Kruzeniski:

As I said, we'll end talking about implications for provinces or territories, but starting with our world, what have other countries done in this area and where does Canada stand in terms of ranking as being progressive or not being progressive?

Teresa Scassa:

Yeah, that's an interesting question as well. So there are two broad categories of approaches to open banking. And so countries like the US, Japan, Singapore, India, are taking an approach where it's left up to the financial institutions and the FinTech companies to enter into agreements and develop their own APIs, which are basically the technology tools that allow for the exchange of information. And so you might end up then with clusters or partnerships within those industries. So it's essentially being left to development by the private sector.

And then there's another group of countries that are taking a regulated approach or a regulatory approach. So it's the government that is creating a regulatory system in which the different actors, the banks, FinTechs will participate and they'll participate according to the rules and the regulatory framework. And Canada fits into the regulatory model. That's the approach that Canada's taking along with countries like the United Kingdom, countries within the European Union, Australia and so on. And so we'll be looking at that regulatory approach. In terms of where Canada is, the UK, Australia, the EU, they're already ahead of Canada. The United States with its different model is also ahead of Canada. And

so this has been a matter of concern for FinTech companies in Canada. They feel that they are big innovators, but they're losing out because we don't have the framework yet in place in Canada. There is some pressure on Canada to move more quickly in this area so that Canadian companies are not left behind.

Ron Kruzeniski:

And is there a concern that if we're behind, it will hurt our economy generally?

Teresa Scassa:

Well, I think that the federal government, as well as many provincial governments are counting on the high-tech sector, innovation in the high-tech sector and finance and so on is to be important parts of our economy. And so there is a concern that if we've got high-tech innovators who are doing interesting things in the FinTech sector but can't get any traction here, that this will be a loss for Canada or if, for example, Canadians start to gravitate towards apps and services that are being provided by suppliers from other countries. And that will also be a problem.

Ron Kruzeniski:

So, what would it take, and particularly legislatively for Canada to make sure that well, we're in the game?

Teresa Scassa:

Yeah, well, the federal government has just appointed a director for open banking and their advisory committee issued their final report on open banking. And so the wheels are starting to move. And I think there is a timeline for launch of open banking in Canada for the fall of 2023. So a little bit in the future still. And of course there can be all kinds of delays and setbacks between now and 2023. I think it may be an ambitious timeline, but there's already work going on behind the scenes. So the idea would be that there'd be the structure in place, and there are going to be a number of different pieces. One of the things that's going to be important, and that has been very slow as you know, is reform of the federal private sector data protection law. So currently we refer to it as PIPEDA.

It'll probably have a new name. And we had a bill in November, 2020 introduced in Parliament to reform it, but that bill died on the order paper with the election. And no new bill has been introduced to this point, although we're expecting one maybe this year, hopefully this year, to reform that law. So one of the things that needs to happen in the reform of that law is the addition of a provision that will allow for this kind of data mobility framework to be created. And there was such a provision in Bill C-11, I expect we'll see it again in whatever new bill is introduced in Parliament, but that's one of the pieces, and that's been slow to get in place. Other pieces will include that piece that existed in Bill C-11 also provided for the creation of regulatory frameworks for that data mobility that it was enabling.

And so there would need to be regulations that provided some structure to the kind of data sharing that would have to take place for open banking, and there would likely have to be some certification program for FinTech companies. So the idea would be that not just anyone is allowed to play in this environment that gets created, that you want to protect individuals. So, you want to ensure that any FinTech companies that are going to be given access to people's data have the appropriate security in place and safeguards in place and policies and practices so that the data that is shared through this open banking framework is protected and safe.

Ron Kruzeniski:

So, you said in Bill C-11, there was a provision that allowed for, now that would allow banks to do it, nothing in there that says they shall do it or that they shall do it in a certain way?

Teresa Scassa:

Well, the piece in C-11 was dealing with the rules around data and data protection rules. And so that had to be addressed, but the Department of Finance federally has been leading the charge on open banking. And so there's going to be a lot of the other infrastructure that's necessary for open banking that is going to be developed through the Department of Finance at the federal level.

Ron Kruzeniski:

So, as we move it to the provinces or the territories, what can the provinces do if anything, if the things that you referred to come to pass federally? And I'm thinking there credit unions, for example.

Teresa Scassa:

And so that's been an interesting issue for open banking in Canada right from the start. The federal government has jurisdiction over banking generally, so it makes it easy for the federal government to say, "Okay, let's do open banking and let's work within this area of our jurisdiction." But credit unions are under provincial jurisdiction, and so the federal government doesn't have control over credit unions and can't dictate to them what they need to do or how they have to change. They have been working with credit unions and engaged in discussions with credit unions. And my understanding is the framework or the system that's created is one that will allow credit unions to opt in. And that will be important for credit unions because it will be very challenging for them. For example, if you have a situation where consumers that bank with federally regulated banks have access to all of these cool apps to help them manage and plan their finances, but if they're with a credit union, they don't get to participate in that, and that would be a huge disadvantage.

At the same time, anyone who's going to participate in this open banking framework is going to have to change their system for data. They're going to have to produce data according to standards that will be established by the open data framework, which will make the data interoperable between the FinTechs and the banks and different institutions. And it costs a lot of money to change how you've always recorded your data or stored your data and processed your data. So these changes are more easily absorbed by very large financial institutions than they are by smaller credit unions. And so there is a bit of a challenge for credit unions in terms of their ability to participate. So there are some issues around credit unions, even though I think there will be efforts to include them within the open banking framework. The other thing at the provincial level, for those provinces that have private sector data protection laws like Quebec, Alberta and BC, those laws apply to the collection, use and disclosure of personal information in the private sector.

And the Commissioners have, in those provinces have over the last number of years shown a tendency towards concurrent jurisdiction with the federal legislation, the PIPEDA, the Personal Information Protection and Electronic Documents Act, which has led to a lot of collaboration. They've had joint investigations and so on. But it does raise the question of if there is a complaint of a privacy breach or some kind of privacy issue with a bank or a FinTech company by somebody in one of those provinces, whether you're going to have a doubling up of jurisdiction over those and whether the different scheme that's being created for open banking to what extent it displaces or should be taken into account or how that's, and there is a cooperative framework in place that the Commissioners do cooperate. There should be ways of working that out, but there may be conflicts at that level.

Ron Kruzeniski:

So, my next question, and maybe you partly answered it, but if we divide the provinces and territories into those that have private sector legislation and those like Saskatchewan who do not, what should access and privacy Commissioners be doing in this area? Just sitting back and watching, advocating for certain protections? Any thoughts as to what these two different categories of Commissioners should do?

Teresa Scassa:

Yeah, well, I think that's an interesting, I think all Commissioners should be watching this with interest because for the same reason that I got interested in the first place because it is a test case for data mobility. And I think that data mobility may come to us first in the context of open banking, but it's likely to come in other sectors and other contexts as well. And so for example, there's been an amendment to the Personal Health Information Protection Act in Ontario that provides for, it's not in effect yet, but it will provide for a certain amount of data mobility within the healthcare sector, which is under provincial jurisdiction between healthcare providers and private sector companies that are going to help individuals manage their personal health data, for example. So data mobility is coming and it will come to sectors under provincial jurisdiction as well as under federal jurisdiction eventually.

And so that's something that all Commissioners should be looking at to see how it works, what the pitfalls are, what the challenges are, what things we have to think about, how it impacts consumers, how interested they are in these sorts of services. So that's one thing. The other thing is we're at the beginning of, I think a great deal of change in terms of the governance of data generally, whether it's through open banking regimes or through data sharing frameworks that are set up, whether in federally regulated sectors or provincially regulated sectors to allow for greater sharing of data for different research or innovation purposes. And we're starting to see provincial government interest in some of these frameworks as well for provincially held data. And because of that, there's the potential for these frameworks to be developed. I guess what I'm trying to say is that there's going to be an interesting relationship between the information and privacy Commissioner in the province and provincial governments on how these frameworks develop, how they're implemented, and the extent to which the information and privacy Commissioners retain independent oversight of privacy issues with respect to those frameworks.

And so again, it's a side issue, but the kind of innovation we're talking about in open banking, I think we're going to see different versions of it in different contexts. And so it'll be really important for information and privacy commissioners to serve the public by ensuring that those frameworks as they are developed, are in the best interests of residents of the province in terms of their privacy interests, but that they also not only consult with the privacy Commissioners, but that there's also a role, an independent oversight role for privacy Commissioners with respect to the privacy issues that will arise in those contexts. And I think that will be really important as well as our privacy landscape changes, I think we really do need to have that independent oversight.

Ron Kruzeniski:

So, I next want to talk a bit about digital IDs and facial recognition. And this may be unconnected, but since at the end of April I had to pay my income tax and as I went to do it, one of the choices I was, I could log into CRA basically through my banking ID. And I thought this is interesting, the interconnectedness that is coming. So the Commissioners have just issued a joint statement on facial recognition pertaining to police forces. But I see the connection when it comes to digital ID and our

picture and our other information. How do you see it all, I was going to say linking, but it's more so intertwining together when it comes to open banking?

Teresa Scassa:

And I think those are really interesting and important questions. Digital ID is different. Provincial governments and the federal government are working on digital ID systems. Digital ID will be important. And I think it's becoming inevitable for providing people with a form of identification that cuts across the traditional boundaries or silos. So right now you might have a health card that you use for access to some services and a driver's license that's asked for all sorts of government ID purposes, and you have a passport that's asked for another context to identify you. And so people carry all these different identity documents and you need different passwords to get into different government databases or access different government services. And so there's a lot of passwords. And so the concept of a digital ID is all in one place digital ID that can be used both online and offline.

And proponents of digital ID will say it's more secure than all of these different pieces of ID and that it's more privacy protective because whoever you're using it with only gets access to the information they need as opposed to all of the information that's on the identity document. But there are concerns and risks with digital ID as well. And I thought it was interesting you gave the my CRA example, and I think it's a good one because you can go in through your banks and that raises some interesting questions. You can also go in directly through my CRA, but the first time you sign up, especially if you leave it to the last minute and you go to sign up to file all your taxes and you discover that they don't validate your account until after they've mailed you a code, which can take 10 days and you can't get in until you get this code in the mail, and you're thinking, why is Canada Post involved in my online signing up for some kind of service?

And it's an attempt to create this secure verification of identity that, again, digital ID is supposed to allow us to overcome so that things can move more quickly and more seamlessly. So digital ID is something to keep an eye on. One of the challenges in Canada will be harmonization because there is a real risk that you're going to have different digital ID systems for your provincial government and services and a different one at the federal level. So that instead of one seamless access, you're going to have different access, different routes of access. And again, if you move from one province to another, then you need a whole different digital ID system for the new province. And so we risk recreating these things that we've had in the past, and I think so that's going to be something to watch, and it will be interesting to see how that evolves.

You mentioned facial recognition technology, and there's certainly in some of these identification schemes, a facial recognition element, although it's a bit different from what they're talking about when they're talking about policing or the use of facial recognition in surveillance, it's more a question of being able to verify that you are the person in your ID. And so it's a one-to-one verification. You will scan the photograph from your passport and do a face scan and the system will match and determine whether you are the person in that photograph or not. And then there's no need to store those images beyond that point. It's a match or it's not. So there may be that form of facial recognition technology that's involved in it as well.

Ron Kruzeniski:

But it strikes me, and I just returned from San Francisco, that they've scanned my passport and my picture so many times that either the airlines or the federal government have such a massive data bank of photographs of us citizens that becomes like a major collection that can be called for appropriate and inappropriate purposes.

Teresa Scassa:

Yeah, absolutely. And I think that's why the guidance that you and the other Commissioners issued this week is so important because we are in a context where there's enormous potential for the use of facial recognition in a whole variety of contexts. And there's no governance for it, or at least there's insufficient governance for it. We've got bits and pieces of governance. And again, I think that was something important that you and the other Commissioners did with this in that you carefully built guidance from the laws as they currently exist from what we have. You build something that can provide useful guidance while at the same time flagging that there's some big gaps and holes that need to be addressed and filled so that where it is possible to benefit from the use of facial recognition technology, we can as a society benefit from it, but that we're also at the same time protected from abuse, exploitation, discrimination, undue surveillance, and of course the risks that could come from poor cybersecurity and breaches and so on. So there's a lot that needs to be attended to.

Ron Kruzeniski:

Well, a fascinating discussion, and I think your position over the next few years will be most interesting, and so will mine. I think we're going to see a lot of developments. So thank you for taking the time to do this today and really appreciate it. And thank you for taking the time to speak to all the federal provincial Commissioners in April. I know that was greatly appreciated.

Teresa Scassa:

Oh, it's my pleasure. And yeah, like you, I think we have no shortage of interesting things to think about and work on. Sometimes that's a burden, and at least, it's an interesting one.

Ron Kruzeniski:

So, I've been talking to Teresa. I greatly appreciate the time she's taken to talk about open banking. Thank you, Teresa.

Teresa Scassa:

Thank you so much.