



# DEVELOPMENTS IN INTELLECTUAL PROPERTY, TECH, AND PRIVACY LAW

**PAUL ARMITAGE, PARTNER\***  
*\*Law corporation*

**R. NELSON GODFREY, PARTNER**

November 3, 2020



# AGENDA

Topic	Speaker
Canadian IP Law – Legislation	Godfrey
Canadian IP Law – Case Law	Godfrey
Tech Contracts and Big Data – Case Law	Armitage
CASL Constitutionality – Case Law	Armitage
Privacy Law Update - Legislation	Armitage

# DEVELOPMENTS IN CANADIAN IP LAW

- **Legislation**

*Trademarks Act*

*Patent Act and Patent Rules*

*Changes to Come – USMCA / CUSMA / NAFTA 2.0*

- **Case law**

Decisions released in late 2019 and throughout 2020 across the spectrum of IP law.

# TRADEMARKS ACT – JUNE 2019

- Most significant amendments to the *TMA* in decades
- Changes include:
  - a) Adoption of Madrid filing system Nice classification and class-based filing fees;
  - b) Elimination of filing bases (use of the mark, proposed use, etc);
  - c) Adding “bad faith” as a ground of opposition and invalidation; and
  - d) Adding a ground of objection to TMs that Examiners consider “not inherently distinctive”
- Changes to come:
  - a) Case management and confidentiality in opposition and expungement proceedings
  - b) Costs in opposition proceedings

# TRADEMARKS ACT – JUNE 2019

- Practical effect has been significant delays at CIPO implementing new rules and because of a significant number of incoming Madrid applications
- Exacerbated by COVID pandemic
- Flurry of applications by “trademark squatters” in the months leading up to and institution of per-class filing fees, and in the months following
- CIPO has responded, treating many as bad faith filings and putting them into default, but many such applications are still on Register and could interfere with legitimate TM owners

# PATENT ACT – LATE 2018

- s. 53.1 – prosecution history estoppel
- Patent Office communications admissible in proceedings if prepared in respect of (i) the prosecution of the application for the patent, (ii) a disclaimer made in respect of the patent, or (iii) a request for re-examination, or a re-examination proceeding, in respect of the patent;
- Foreign patent office? Generally no, but...
- s. 56 – prior user defence significantly broadened
  - “if — before the claim date of a claim in a patent — a person, in good faith, committed an act that would otherwise constitute an infringement of the patent in respect of that claim, or made serious and effective preparations to commit such an act, it is not an infringement of the patent or any certificate of supplementary protection that sets out the patent, in respect of that claim, if the person commits the same act on or after that claim date”

# PATENT ACT AND PATENT RULES – OCTOBER 2019

- Implementation of *Patent Law Treaty*
- Changes include:
  - a) Shortened prosecution deadlines – request examination (5 yrs -> 4 yrs); Office Action and paying issue fee (6 mnths -> 4 mnths);
  - b) Correction of errors: Change from broad practice to new regime with deadlines for correcting only particular errors (1) errors in priority claims; (2) errors in the identity of inventors and applicants; (3) errors made by the Patent Office in the patent, spec., drawings; and (4) errors made by the patentee in name of patentee or inventor, spec. or drawings)
  - c) Restore priority (“unintentional” standard); reinstate from failure to pay main. fee (in spite of “due care” standard);
  - d) Change in post-allowance practice: prosecution can be re-opened upon request for withdrawal of the notice of allowance and payment of fee, unlike before when allow app. to go abandoned, then reinstate and amend;
  - e) Assignment – applicant or patentee need to file assignment doc, but transferee must file evidence;



# MORE CHANGES TO COME?

- USMCA / CUSMA / NAFTA 2.0
- Signature of replacement of *NAFTA*, in force July 2020





# MORE CHANGES TO COME? NEW *CUSMA* / *USMCA*

- Obligates Canada to modernize many aspects of IP laws
  1. Copyright term extension
  2. Criminal penalties for tampering with digital rights management information
  3. Restoration of patent term to compensate for administrative and regulatory delays
  4. Broader and longer protection for undisclosed testing data
  5. Additional powers for customs officials to seize and destroy infringing goods
  6. New civil and criminal remedies for the misappropriation of trade secrets
- Legislation to come to implement these changes

# CASE LAW : CANMAR V. TA FOODS

- September 2019: *Canmar Foods Ltd v TA Foods Ltd*, 2019 FC 1253
- Decision considered the new file history estoppel provisions of the *Patent Act*
- Motion for summary dismissal brought by Defendant in patent infringement case
- Patent claimed a method for roasting oil seed. TA Foods argued that its roasting process differed from the patented method because it did not heat its flax seeds in a “stream of air” or maintain the seeds in an “insulated roasting chamber or tower”.
- Defendant argued because these two elements were added intentionally during the Canadian patent prosecution, they became essential elements of the claims

# CANMAR V. TA FOODS

- Court found that with new section 53.1, claim construction in Canada now has three prongs: (1) the claims; (2) the disclosure; and (3) the prosecution history. Court observed that while ordinarily only Canadian prosecution history is admissible for claim construction, under “extraordinary” circumstances, foreign prosecution histories may also be admissible
- Canmar had specifically referenced the corresponding US application and acknowledged its amendments to the Canadian claims were to overcome novelty and obviousness concerns in the US prosecution
- Court held this was an appropriate “extraordinary” case, the US prosecution history admissible, added elements essential, and summary dismissal granted

# CANMAR V. TA FOODS

- First case where prosecution history applied, and Court decided patent matter on summary basis without expert evidence
- Traditionally, Canadian Courts have been reluctant to undertake construction on a summary basis, particularly without expert evidence. 2014 SCC – *Hryniak v. Mauldin* – “culture shift” needed in favour of summary resolution
- Trend of decisions where Cdn Federal Courts have decided construction issues on summary basis. Increasingly towards U.S. system, where construction issues may be decided on a summary basis – may see increasing adoption of *Markman* style construction hearings
- Decision appealed. Hearing scheduled for today!

# CASE LAW : *ENERGIZER V. GILLETTE*

- February 2020: *Energizer Brands LLC v The Gillette Company*, 2020 FCA 49
- Law of comparative advertising, rarely litigated subject in Canadian law
- Case concerns two leading battery brands, DURACELL and ENERGIZER. Energizer Bunny is well known, subject of multiple TM registrations



- In 2014, Duracell started using stickers on packaging of its DURACELL brand batteries with claims that they were “Up to 15% longer lasting vs. the next leading competitive brand” and “Up to 20% LONGER LASTING vs. the bunny brand”
- Energizer filed an action for depreciation of goodwill and other relief, relying upon its registered TMs

# *ENERGIZER V. GILLETTE*

- Decision in February by FCA relates to defendant's motion to strike the plaintiff's claim
- At first instance, the Federal Court refused to strike portions of the claim relating to use of “the bunny brand”, finding that the “somewhat-hurried consumer would certainly make a mental association ... between the words ‘the bunny brand’ that Duracell used on its battery packages and the ENERGIZER Bunny Trade-marks.”
- FC agreed to strike the portions of Energizer's claim relating to use of “the next leading competitive brand.” Concluded no reasonable cause of action.



# ENERGIZER V. GILLETTE

- FCA allowed the appeal and dismissed the motion for summary judgment relating to the claim based on use of “the next leading competitive brand.” In doing so, it found that summary judgment should not have been granted and that the Federal Court erred in depriving Energizer of the opportunity to make its case

Notwithstanding no reference to Energizer by name, the Energizer Bunny, or any other mark

- Court’s decision confirms that the scope of section 22 of the *Trademarks Act* extends beyond a company’s identical registered trademark (confirming SCC law)
- Advertisers should take care with comparative advertising. Fact that FCA refused to strike the claim leaves open the possibility that even oblique reference to competitors in comparative advertising may be considered to depreciate goodwill
- Merits still to be resolved. Case ongoing, one to watch in 2021

# CASE LAW : WISEAU STUDIO V. HARPER

- April 2020: *Wiseau Studio, LLC et al v Harper et al*, 2020 ONSC 2504



# WISEAU STUDIO V. HARPER

- Cinephiles will no doubt be familiar with Tommy Wiseau's film *The Room*, considered by many to be the worst film of all time
- *The Disaster Artist* was nominated for and won several awards for its dramatization of making of the film. Released screeners and festivals May – Nov. 2017, wide release December 2017
- In 2016, the defendants completed *Room Full of Spoons*, a documentary examining *The Room*, its fans and its creator

# WISEAU STUDIO V. HARPER

- In June 2017, shortly before the release of *Room Full of Spoons* in Canada, Plaintiffs brought *ex parte* motion in the ON SCJ for an interlocutory injunction, without notice
- Plaintiff was awarded interlocutory injunctive relief prohibiting distribution of the film. Defendants were unable to release the documentary to coincide with the release of *The Disaster Artist*
- October 2017, the injunction was lifted. In its decision lifting the injunction, the Court found that the disclosure provided by the plaintiffs fell seriously short of the “full and frank” standard required for an *ex parte* injunction
- This ON SCJ case released in April 2020 related to Wiseau’s substantive claim for copyright infringement and moral rights infringement

# WISEAU STUDIO V. HARPER

- Seven minutes of clips of *The Room* included in *Room Full of Spoons*. Court agreed with Plaintiffs that the seven minutes reproduced was a “substantial part” of Plaintiff’s work
- Fair dealing = “user’s right” under CR law, that allows parties to reproduce works for research, private study, news reporting, criticism, parody
- Justice Schabas found that the use of clips from *The Room* was for the allowable purpose of criticism or review, given the documentary’s discussion and analysis of the movie. Schabas J also found that the clips were used for the allowable purpose of news reporting, given the cultural phenomenon surrounding the movie and its creator
- Considering all the circumstances, the Court found the dealing with “fair”. Claim for CR infringement dismissed.

# *WISEAU STUDIO V. HARPER*

- Court also awarded the defendants \$550,000 USD in damages resulting from injunction that prevented the release of the documentary at a commercially critical time
- Court also awarded \$200,000 CDN in punitive damages, in view of the plaintiffs' bad faith negotiations with the defendants, the misleading and incomplete evidence presented on the motion to obtain an injunction, the misrepresentations made to third parties about the illegality of screening the documentary, and repeated attempts to delay the trial



# CASE LAW : *TFI FOODS V. EVERY GREEN*

- August 2020: *TFI Foods Ltd v Every Green International Inc*, 2020 FC 808
- “Grey goods” imports
- Trademark infringement action brought by the Plaintiff TM owner of I-MEI Trademarks used in association with food products, and, TFI, exclusive Cdn distributor
- Products offered for sale by Every Green in Canada which featured the I-MEI Trademarks along with a label that stated that Every Green is the “Exclusive Distributor of Canada”. Every Green had never been authorized to distribute I-MEI products in Canada
- Motion for interlocutory injunction

# *TFI FOODS V. EVERY GREEN*

- Grey market or parallel imports = genuine goods manufactured by I-MEI but which had entered the Canadian market without the approval of I-MEI
- Sale in Canada of grey market goods does not in and of itself infringe a registered trademark or constitute passing off
- Court : Every Green's false label stating that it is "exclusive distributor" was deceptive to retailers and public. Harm to the reputation and goodwill in the I-MEI Trademarks as a result of the presence of the false labels on I-MEI products in the marketplace and inaccuracies in the ingredient list and nutrition facts of the Every Green labels

# *TFI FOODS V. EVERY GREEN*

- Court ordered Every Green to cease offering for sale, selling or labelling products bearing the I-MEI Trademarks with labels that falsely identified Every Green as the exclusive distributor of Canada, and to immediately recall all products bearing the offending labels from the marketplace
- While recognizing that “grey goods” sales are not inherently objectionable, this decision gives brand owners additional options for restraining these kinds of sales

# CASE LAW : *CHOUEIFATY V. CANADA*

- August 2020: *ChouEIFaty v. Canada*, 2020 FC 837
- Potentially landscape altering decision, for software patents in particular
- On appeal from commissioner's decision rejecting patent application
- Method claim directed to a computer implementation of a new method for selecting and weighing investment portfolio assets that minimizes risk without impacting returns

# CHOUEIFATY V. CANADA

- **Claim 1**

*A computer-implemented method for providing an anti-benchmark portfolio, the method comprising:*

- acquiring, using a computer system, data regarding a first group of securities in a first portfolio, wherein the computer system comprises a computer processor and memory coupled to said processor; identifying, using a computer system, a second group of securities to be included in a second portfolio based on said data and on risk characteristics of said second group of securities; and*
- providing, using a computer system, the individual weightings for each of the securities in said second portfolio according to one or more portfolio optimization procedures that maximizes the anti-benchmark ratio for the second portfolio wherein the anti-benchmark ratio is represented by the quotient of:*
  - a numerator comprising an inner product of a row vector of holdings in said second portfolio and a column vector of a risk characteristic of return associated with said holdings in said second portfolio; and*
  - a denominator comprising the square root of a scalar formed by an inner product of said row vector of said holdings in said second portfolio and a product of a covariance matrix and a column vector of said holdings of said second portfolio*

# CHOUEIFATY V. CANADA

- For many years, notwithstanding the teachings of the SCC, Examiners have applied the problem-solution test (AKA ‘contribution approach’)
- In this approach, the essential elements of a claim are those that the Examiner considers necessary to achieve the disclosed solution to an identified problem. That (incorrect) approach is currently set out in MOPOP, which dictates how Examiners will approach construction of these kinds of patent claims
- Zinn J found that using the problem-solution approach to claims construction is akin to using the “substance of the invention” approach discredited by the Supreme Court of Canada in *Free World Trust*. Court found that the Commissioner erred in determining the essential elements of the claimed invention by using the problem-solution approach



# CHOUEIFATY V. CANADA

- Zinn J found that using the problem-solution approach to claims construction is akin to using the “substance of the invention” approach discredited by the Supreme Court of Canada in *Free World Trust*. Court found that the Commissioner erred in determining the essential elements of the claimed invention by using the problem-solution approach
- Zinn : “It is evident on a reading of the MOPOP that the Commissioner, notwithstanding stating that the patent claims are to be construed in a purposive manner, **does not intend or direct patent examiners to follow the teachings of [the SCC] in Free World Trust and Whirlpool.**”
- Similar to what occurred following the decision in *Amazon*, CIPO has put all software-related cases on “hold” while they figure out how to deal with the decision
- Not appealed. Implications for 1000s of pending and future cases ...

# ***77M LIMITED V ORDNANCE SURVEY LIMITED [2019]***

## **EWHC 3007 (CH)**

- **Big data case**
- **Aggregation and combination of data from diverse sources to create a new service**
- **Meaning of “internal business use”**
- **Website scraping**
- **Licensed uses**

# **77M LIMITED V ORDNANCE SURVEY LIMITED**

- **77m created a dataset called “Matrix” of geospatial coordinates of all residential and non-residential addresses in Great Britain**
- **Matrix was created by accessing at least 18 datasets:**
  - Some publicly available under online terms
  - Some available under bespoke, negotiated licenses
  - Some available for free, some for fee
- **Matrix included data that derived from Ordnance Survey Limited (OS) datasets (OS is the national mapping agency for GB)**

# 77M LIMITED V ORDNANCE SURVEY LIMITED

## “Internal business use”

### Her Majesty’s Land Registry (HMLR) download terms for free INSPIRE geospatial data BUT:

Therefore you should contact Ordnance Survey for the relevant licence conditions if you need to:

1. Use the polygons (including the associated geometry, namely x,y co-ordinates) for a purpose other than personal, non-commercial use or commercial or non-commercial use within your organization;  
or
2. sub-license, distribute, sell or make available the polygons (including the associated geometry, namely x,y coordinates) to third parties.

[underlining added]

# **77M LIMITED V ORDNANCE SURVEY LIMITED**

## **“Internal business use”**

- **77m used the INSPIRE polygons to create Matrix and therefore for commercial purposes, but the Matrix service did not supply the polygons outside of 77m**
- **77m did not obtain a license from OS to use the INSPIRE polygons for Matrix**

**Poll Question: did 77m breach the INSPIRE download terms?**

# ***77M LIMITED V ORDNANCE SURVEY LIMITED***

## **“Internal business use”**

- **Court: INSPIRE download terms did not prevent use of the polygons to develop a service for sale to customers (so long as the polygons themselves are not supplied to the customer)**
- **In other words, “commercial use within your organization” includes developing a competing service**

# ***77M LIMITED V ORDNANCE SURVEY LIMITED***

## **“Internal business use”**

### **Key learnings:**

- **It is a question of overall interpretation of the agreement how “internal business use” type restrictions will be interpreted**
- **Simply saying “internal business use” may not be enough if the licensed service could be used to create another service derived from the licensed service**
- **Consider using more prescriptive terms if that is the intent, e.g., “not use the licensed service to create a competitive product or service”**



# ***77M LIMITED V ORDNANCE SURVEY LIMITED***

## **Website scraping**

- **77m found to have scraped (using an automated tool) 3.5m records from HMLR “Find a Property” (FAP) public, online service**
- **77m never accepted the FAP terms, which prohibited scraping, because it could scrape what it needed without having to click acceptance (clicking was required to purchase data, but 77m could scrape what it needed without purchasing records) (there was also a dispute about which terms applied)**

# ***77M LIMITED V ORDNANCE SURVEY LIMITED***

## **Website scraping**

- **Court: 77m breached the prohibition on scraping since a reasonable user would conclude that the FAP license would apply to use of the entire FAP service, even prior to accepting the license**

## **Key learnings:**

- **For publicly available datasets, always check the terms that apply (even if you don't accept the terms)**
- **Liability can arise even if the terms are not accepted, or restrict how data can be accessed**

# ***77M LIMITED V ORDNANCE SURVEY LIMITED***

## **Licensed uses**

### **Negotiated license for Registers of Scotland land values data:**

The Data will be provided to you to allow you to develop a web service containing house sale information on the following website: <http://www.77m.co.uk/>. This website will be offering a one stop information service that aggregates many datasets together. The aim is to provide a comprehensive overview for any location. House price and house type information from the RoS Data will be made available via this website. Other parts of the Data will only be used for internal modelling purposes.

# **77M LIMITED V ORDNANCE SURVEY LIMITED**

## **Licensed uses**

- **77m used the data not for the house price and type information, but to obtain the centroid/geolocation data for the addresses in Matrix**
- **Court: 77m's use not permitted by the license, since the centroid/geolocation data could only be used for "internal modelling purposes"**

## **Key learnings:**

- **When negotiating a license, make sure it gives the rights the organization needs**

# ***3510395 CANADA INC. V CANADA (ATTORNEY GENERAL) 2020 FCA 103 (COMPUFINDER)***

- **Constitutionality of CASL**
- **Interpretation of key CASL concepts**
  - “Business to business” exemption
  - Implied consent for conspicuous publication
  - Unsubscribe mechanism

# COMPUFINDER

## Facts:

- **CompuFinder: professional training course company; primary means of business development was email marketing**
- **2014: 3 email campaigns sending 317 CEMs**
  - No consent
  - Some with two unsubscribe links, one of which didn't work
- **Notice of violation issued for \$1.1m**
- **Reduced on CRTC hearing to \$200G**
- **CompuFinder appealed to Federal Court**

# COMPUFINDER

## Constitutionality of CASL

- **CASL is *intra vires* federal trade and commerce power**
  - Pith and substance of the CEM regulatory scheme is to protect Canada's e-economy against the threats of unsolicited CEMs
    - Combat spam and associated threats to privacy and security
    - CEM regulation under CASL (consent, unsubscribe, sender identification) is directly tied to achieving this purpose
  - CEM regulatory scheme is concerned with trade as a whole (not a specific industry, such as the securities industry as in the *Securities Reference*)
  - CEM regulation is national in scope (could not be effectively regulated at the Provincial level)



# COMPUFINDER

## Constitutionality of CASL

- **CASL infringes freedom of expression, but is a justified limitation**
  - Definition of “CEM” not vague but delineate a “zone of risk”
  - Objective of promoting efficiency of Canadian economy is sufficiently important
  - CASL’s complex regulation (consent, implied consent, exemptions, etc.) of CEMs is rationally tailored to its objective
  - CASL’s approach is a reasonable solution to the problem
    - US CAN-SPAM opt-out approach insufficient
    - Australian approach of a closed definition of CEM and broader concept of inferred consent could not be said to impair expression less than CASL
  - Commercial expression not as strongly protected under the Constitution
  - CASL’s benefits in reducing spam are large, and data shows that spam has been reduced in Canada under CASL

# COMPUFINDER

## Constitutionality of CASL

- **CASL's enforcement regime is not criminal and thus does not violate the presumption of innocence or security of the person**
- **CASL's investigator powers not an unreasonable search and seizure, since deal with business records, document production (not premises search), and relevant records**

# COMPUFINDER

## Key CASL concepts (standard of palpable and overriding error)

- **“Business to business” exemption**
  - Merely paying for employees to attend training in the past did not create a “relationship” for the B2B exemption
  - Since the B2B exemption would permit CEMs to be sent to anyone in the organization, finding a “relationship” requires a high standard
  - Relevance of CEMs to the recipient is not limited to core business activities – other relevant activities can be considered

# COMPUFINDER

## Key CASL concepts

- **Implied consent for conspicuous publication**
  - Can't presume from a job title that a CEM will be relevant to the recipient's "business, role, functions or duties"
  - Relevance must be assessed on a case-by-case basis

# COMPUFINDER

## Key CASL concepts

- **Unsubscribe mechanism**
  - Presence of a non-working link, even if there is also a working link, meant the unsubscribe mechanism can't be “readily performed” since confusing and frustrating to unsubscribe

# PRIVACY LAW UPDATE - TOPICS

- **Freedom of Information and Protection of Privacy Act (BC) (BC FIPPA)**
  - 2019 amendments re: in-Canada storage and access
  - COVID-19 order
- **Competition Bureau - deceptive privacy practices enforcement**
- **Privacy law reform initiatives underway in Canada:**
  - PIPEDA
  - Quebec
  - Ontario
  - BC

# BC FIPPA

## 2019 amendments re: in-Canada storage and access

- **Existing prohibition**

FIPPA, s. 30.1

A BC public body must ensure that personal information in its custody or control is stored and accessed only in Canada, unless:

- (a) individual consent,
- (b) allowed under FIPPA exception, or
- (c) ministerial order



# BC FIPPA

## 2019 amendments re: in-Canada storage and access

- **Added two new exceptions to s. 33.1**

(p.1)

Permits automated processing of personal information outside of Canada but without storage outside of Canada (other than metadata), provided that:

- Access is only by a machine (i.e., not an individual); and
- Access outside of Canada is temporary

## 2019 amendments re: in-Canada storage and access

(p.2)

Electronically generated metadata about use of an electronic system can be disclosed outside of Canada, provided that:

- Personally identifiable information “if practical” is removed; and
- If disclosed to a service provider, there is no other use (i.e., secondary to performance of the contract) of the personally identifiable information

# BC FIPPA

## 2019 amendments re: in-Canada storage and access

- **Targeted changes to keep-up with modern technology.**
  - Basic office productivity tools which have specific functions that require temporary processing outside of Canada, e.g.
    - email services
    - spam filters
    - web analytics service to understand a users' interaction with a webpage
    - word processing program that tracks metadata for when a document is accessed, etc.
- **Reflective of incremental approach to expanding outside Canada storage and access, as opposed to broad exemptions**

## COVID-19 order – Minister of Citizens’ Services – in effect until Dec. 31, 2020 (unless further extended)

Health care body may disclose personal information inside or outside Canada if necessary to:

- Communicate with individuals respecting COVID-19
- Support a public health response to COVID-19
- Coordinate care during COVID-19

Public body may disclose personal information inside or outside Canada through the use of software tools and apps related to minimizing transmission of COVID-19 [e.g., contact tracing app or app to enable communication or collaboration] provided that:

- Minimum time necessary
- Public body retains control

# COMPETITION BUREAU - DECEPTIVE PRIVACY PRACTICES ENFORCEMENT

## Competition Bureau 2020-2024 Strategic Vision

- **Police privacy laws as breaches of the *Competition Act***
- **“Truth in advertising” for privacy law practices, e.g., false or misleading claims about:**
  - Type of data collected
  - Why data is collected
  - How the company will use, maintain and erase data

# ***COMPETITION BUREAU - DECEPTIVE PRIVACY PRACTICES ENFORCEMENT***

- **Competition Bureau can levy large administrative penalties against companies:**
  - Up to \$10m for first offence
  - Up to \$15m for subsequent offences
- **Reminiscent of FTC enforcement in the United States**

# COMPETITION BUREAU - DECEPTIVE PRIVACY PRACTICES ENFORCEMENT

- **Competition Bureau: lengthy and complex privacy policies are not enough. Rather, companies must clearly state:**
  - Whether and what kinds of data will be collected
  - Frequency and duration of data collection
  - Underlying purpose for which data is collected
  - Whether data will be sold or otherwise shared with third parties
  - Level of control consumers have in relation to storage and destruction of data



# PRIVACY LAW REFORM INITIATIVES UNDERWAY IN CANADA

## PIPEDA

### Federal Privacy Commissioner (OPC) 2019-2020 Annual Report

- **PIPEDA is outdated and does not sufficiently deal with the digital environment to ensure appropriate regulation of new technologies**
- **Proposes major new remedial powers for OPC, including to adjudicate disputes and award monetary penalties:**
  - Shift from OPC's ombudsperson role of investigate, resolve and report, with major power being to "name and shame"
- **Seems a major overhaul of PIPEDA is likely in the future**
  - May 2019: federal government announced plans to modernize PIPEDA as part of the Digital Charter

# PRIVACY LAW REFORM INITIATIVES UNDERWAY IN CANADA

## QUEBEC

### Bill 64

- **Also driven by feeling that data protection laws are out of date; complete overhaul proposed**
  - More robust consent requirements - "clear, free and informed"
  - "Right to be forgotten"
  - "Privacy by design"
  - Governance policies and practices to protect personal information, which must be published on the enterprise's website
  - Outside Quebec communication of personal information only where equivalent protection is available and specific contractual protections are in place
  - Must inform individuals if technology is used for individuals to be "identified, located or profiled" (e.g., profiling, or online targeted advertising) and the means available, if any, to deactivate the function

# PRIVACY LAW REFORM INITIATIVES UNDERWAY IN CANADA

## QUEBEC

### Bill 64 (cont'd)

- Must inform individuals if automated processing (e.g., AI) used to make a decision, and permit the decision to be corrected
  - Mandatory breach reporting where the incident "presents a risk of serious injury".
  - *Commission d'accès à l'information* (CAI) administrative monetary penalties (AMPs) for certain violations of up to \$10,000,000 or, 2% of worldwide turnover, whichever is greater
  - Increased fines ranging from \$15,000 to \$25,000,000, or 4% of worldwide turnover, whichever is greater
  - Private right of action
  - Minimum punitive damages of \$1,000 where intentional or gross fault"
- **Submissions on proposed changes available on Quebec government website**

# PRIVACY LAW REFORM INITIATIVES UNDERWAY IN CANADA

## Ontario

- **“Improving private sector privacy for Ontarians in a digital age”**
- **August, 2020: Ontario government launched a consultation to consider creating an Ontario private-sector privacy law (Ontario currently governed by PIPEDA)**
  - New consent model similar to GDPR, with opt-in consent for “secondary purposes”
  - GDPR-type rights (“right to be forgotten”, “data portability”)
  - Fill gaps in PIPEDA (e.g., non-profits, charities, non-federal works and undertaking employees)
  - Regulation of de-identified and derived data
  - “Data trusts” – rules for sharing information to drive innovation
  - Privacy commissioner ability to levy fines

# ***PRIVACY LAW REFORM INITIATIVES UNDERWAY IN CANADA***

## **BC**

- **Legislature committee review of the *Personal Information Protection Act* (as mandated every 6 years)**
- **Submissions on proposed changes available on BC government website**
- **Report slated for release February 2021**


# QUESTIONS?



## PAUL ARMITAGE

*Partner*  
*Head of Vancouver Technology Group*

 paul.armitage@gowlingwlg.com

 +1 604 891 2779

---



## NELSON GODFREY

*Partner*  
*Patent and Trademark Agent*

 nelson.godfrey@gowlingwlg.com

 +1 604 891 2799

---



**GOWLING WLG**