

Is the Trade in Personal Information Beneficial to Consumers?

With liberalization of trade and technological advances, the question of protecting privacy and personal information is arousing increasing interest and concern among Canadians.

Due to its usefulness, especially for marketing purposes, personal information has acquired such value that it has led businesses to make it into a tradable commodity. The collection and sale of personal information is now a business activity equivalent to the sale of any other good or service and is now an integral part of the marketing and even the supply of certain goods or services.

The last twenty-five years have seen the advent of an increasing plethora of codes and standards aimed at overseeing the trade in personal information. Initially voluntary, these standards have, over the years, become mandatory in several countries owing to the magnitude this phenomenon has taken. While certain countries, such as the United States, have opted for voluntary oversight, others, including European countries and Canada, have chosen instead to legislate guidelines on the collection and use of personal information.

As consumers are increasingly confronted with clauses granting merchants the right to use their personal information for commercial purposes, and as methods enabling the collection and use of information without the consumer's knowledge spread, the time has come to examine whether the trade in personal information benefits consumers in any fashion and whether privacy laws adequately perform their intended role.

Our report examines the laws overseeing the protection of personal information at the federal and provincial levels, along with the context in which they were adopted, in order to determine their objectives. It also surveys the different information collection methods, including how they function and how information is subsequently used.

In concluding our analysis we look at the putative advantages and disadvantages for the consumer arising from the personal information trade, as well as the potential risks.

This overview of the trade in personal information highlights the preponderance of marketing and the effects of the explosive growth in Internet use. The development of new technologies has allowed businesses to gain access to more personal information, often without the knowledge of consumers, and to expand and optimize the collection and use of information.

Our analysis of the legal framework pertaining to this type of commercial activity brought to light certain gaps in the application of legislation as well as problems in defining what constitutes personal information or the determining of which businesses or activities are subject to its provisions.

The lack of harmonization between provincial and federal laws—notably regarding certain definitions and the powers accorded to the agencies charged with enforcing the law—raises concerns re differences in the degree of protection that may be accorded to consumer information, as said protection may vary in accordance with the applicable law, the province where the consumer resides or the type of business concerned. The fact that the rulings made by commissioners are only disclosed in the form of summaries can only contribute to

maintaining certain ambiguities, as this precludes the comprehensive presentation of the arguments that found said rulings.

Although the industry will argue that the collection, use and communication of personal information is in the consumer's interest since such activities make it possible for him to obtain discounts or to receive personalized advertising and offers, they may also have other purposes and may result in risks that the consumer has the right to know about and, which, moreover, he must have the opportunity to either accept or reject. However, increasingly, industry practices are giving short shrift to the issue of consent, which nevertheless constitutes the cornerstone of laws that aim to protect consumers' personal information. The absence of frank disclosure and of any request for prior consent to the collection, use and disclosure of personal information seems, unfortunately, to have become the norm. The same holds for the lack of transparency regarding such practices.

The primary goal of the standards imposed on the private sector was to ensure consumer confidence, and thus foster commerce. However, analysis seems to indicate that in practice basic principles are widely flouted. The medium term consequences of the cavalier practices of businesses are likely to be negative—and not just for the consumer, but for industry as well, as consumers are liable to become mistrustful of new technologies, even to the point of shunning them, if they come to realize how the personal information gathered by businesses is used or may be used.

The report concludes with recommendations for, amongst others, an harmonization of federal and provincial personal information protection laws, extended powers for the Privacy Commissioner and a vast information campaign aimed at consumers regarding their rights as well as the obligations and practices of the enterprises.

The report also recommends a better surveillance of the enterprises by the agencies charged with the enforcement of the personal information protection laws and the formation of a working group mandated to study the oversight that should exist under protection of personal information laws regarding the various types of information that businesses are able to collect and which, without constituting personal information in the strict sense, may be assembled in such a fashion as to generate profiles of individuals.