

Redefining Bill 64

Bill 64, which seeks to enhance the protection of personal information has just celebrated its first spring. And yet, despite having completed a number of steps, the light at the end of the tunnel is increasingly difficult to discern. The recent amendments that were adopted attest to this situation: they reveal a certain inconsistency in the bill that disregards the reality of individuals and that of Québec organizations. It's time to take a pause in order to redefine the itinerary as well as the final destination.

Minister Éric Caire, we are professionals working in the field of data protection and privacy, in private practice or academia, with concerns about the practical application of the proposed amendments in Bill 64 that are currently in the review stage.

Summer 2020: The sun shines

On June 12, 2020, just before the parliamentary adjournment period, Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information*, was tabled before the Québec National Assembly. The purpose was clear: modernizing personal information protection laws – long overdue – by giving more control to individuals while increasing the accountability of organizations. Such an initiative was more than welcome.

The Bill, which is 60 pages long and amends 21 laws, is ambitious. It aims to go further, by passing new rules for private businesses, public bodies and political parties. It aims higher, by making organizations subject to quasi-systematic compliance and documentation requirements, such as for transferring data outside of Québec. It aims to be stronger, by introducing some of the strictest penalties in the world for non-compliance (e.g., \$25 million or 4% of global revenue). Despite having borrowed certain concepts from our European neighbours and the rest of Canada, Bill 64 admittedly adopts an approach that is decidedly unique and, at times, even stricter than the GDPR.

Fall 2020: The leaves fall

A few months after being tabled, the National Assembly's Committee on Institutions opened a special consultation period that ended on September 29, 2020. The process sparked a lot of interest, given that it involved 4 days of public sessions and that 49 briefs (totalling about 900 pages of analysis) were submitted from stakeholders from all spheres. It provided an opportunity to invite discussion and redefine (or readjust) the bill. The majority of the undersigned shared their insights and proposals.

Although no one questions the essence of the bill, its substance reveals a number of structural problems:

- First, the bill perpetuates the principle of consent being a stand-alone solution for collecting, using and communicating personal data at a time when its effectiveness is being challenged. As stated by the Privacy Commissioner of Canada, “[s]implify put, it is neither realistic nor reasonable to ask individuals to consent to all possible uses of their data in today’s complex information economy.” The employer-employee relationship, based inherently on a manager-subordinate relationship, illustrates other inadequacies of consent.
- Second, the recommended approach is distinct from European and international data protection standards, not to mention that it is not aligned with current Canadian legislation nor the federal Bill C-11.
- Third, the personal protection law could have been completely redrafted – as is the case with Bill C-11. Instead, the current version is very complicated because it integrates a number of foreign (*ergo* new) concepts to provisions that are largely outdated and, at times, without being properly aligned.

On October 20, 2020, the essence of Bill 64 (as currently drafted) was unanimously adopted by the members of the Québec National Assembly.

Winter 2021: The cold sets in

February 2, 2021 marked the start of a detailed review of the bill for the purpose of adopting, clause by clause, all of the provisions. The amendments were discussed and adopted in a relatively limited, piecemeal manner without any documentation in support of the planned amendments as well as regarding how the provisions will align with the applicable laws.

But more particularly, up to now, the amendments do not resolve certain key issues, and even introduce new ones. Consider the following examples:

- Individuals will have to systematically activate and/or change *all* privacy settings of a technological service before being able to use it, regardless of the type of service, data sensitivity or even the reasonable expectations of those individuals. Such a requirement seems counterproductive given that it may be more taxing (if not frustrating) to individuals rather than protecting them from improper uses or protecting the prohibited elements of their privacy.
- An evaluation of privacy factors – which requires a lot of time and resources – will *always* be undertaken before transferring any personal information outside of Québec. Such a process should not be systematic and risks losing its effectiveness as a result of being misused. More importantly, this approach (much more restrictive than its European counterpart) will complicate cross-border data transfers, at the expense of innovation and Québec's economy.
- Many undefined concepts under the existing laws, such as “generally accepted privacy principles (GAPP),” and issues regarding their alignment with other similar laws (in Canada or Europe) might increase the risk of confusion once the proposed amendments are implemented.

Spring 2021: The buds are late

The ‘season of hope’ is here and there is still time to make three simple wishes that could put Bill 64 on the right track. *More visibility*: adopting the amendments should be based on a comprehensive vision determined following discussions with all stakeholders, instead of a piecemeal approach without a consolidated text. *More receptive to feedback*: the comments submitted during the special consultations should not be brushed aside. *More analysis*: the proposed amendments should be based on concrete examples and take into consideration the practical implications to both individuals and organizations.

These three points will not only ensure the coherence of the applicable framework for protecting personal information (which concerns everyone), but, more specifically, will also ensure that Quebecers' expectations and needs concerning their privacy are not overlooked.

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