



**14/EN
WP 219**

Opinion 7/2014 on the protection of personal data in Quebec

Adopted on 4 June 2014

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO-59 02/013.

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

The Working Party on the protection of individuals with regard to the processing of personal data

Having regard to Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and the free movement of such data, and in particular Article 29 and 30 paragraph 1 (b) thereof,

Having regard to the Rules of Procedure of the Working Party, and in particular Article 12 and 14 thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. INTRODUCTION AND BACKGROUND

The Quebec Act respecting the protection of personal information in the private sector entered into force in 1994 and was amended in 2000. On 19 November 2003, the Quebec Act respecting the protection of personal information in the private sector was recognized in Canada as similar to the PIPEDA.

Canadian federal law on data protection, the Personal Information Protection and Electronic Document Act (hereinafter: PIPEDA), was declared as providing an adequate level of protection by a decision of the European Commission on 20 December 2001. The scope of PIPEDA is limited to processing in the course of commercial activities.

On 15 April 2011 the Commission requested the Working Party to produce an opinion analyzing the extent to which Quebec regulatory system fulfills the requirements for the application of the personal data protection regulations set out in the Working Document “Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU data protection directive”, adopted by the Working Party on 24 July 1998 (hereinafter: WP12).¹

During the 81st plenary session on 31 May 2011, the Working Party appointed the CNIL as rapporteur on this adequacy study.

Following a first assessment presented to the WP29’s International Transfers Sub-group, the CNIL addressed a questionnaire on 21 May 2013 to the Commission d’Accès à l’Information du Québec (hereinafter: CAI) in order to obtain clarifications. The CAI provided its answers on 15 July 2013 and a conference call between the CAI and the CNIL was organized on 9 September 2013 in order to better understand several aspects of the Quebec’s legislation. Additional information from the CAI was received in written on 18th and 30th April 2014.

¹ Available at : http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf

2. DATA PROTECTION LEGISLATION IN CANADA AND QUEBEC

Quebec is a province in east-central Canada. It is the only Canadian province that has a predominantly French-speaking population, and the only to have French as its sole provincial official language. It is Canada's largest province by area and its second most populous province, after Ontario. Quebec is the only province in Canada to have a juridical legal system under which civil matters are regulated by French-heritage civil law. Public law, criminal law and other federal law operate according to Canadian common law.

The protection of personal data in Quebec is regulated by Articles 35 to 41 of the Quebec Civil Code and by the Act respecting the protection of personal information in the private sector which entered into force in 1994 and was amended in 2000.²

3. ASSESSMENT OF THE DATA PROTECTION LAW OF QUEBEC AS PROVIDING ADEQUATE PROTECTION OF PERSONAL DATA

The Working Party points out that its assessment of the adequacy of the data protection legislation into force in Quebec refers essentially to Articles 35 to 41 of the Quebec Civil Code and to the Act respecting the protection of personal information in the private sector as amended in 2000.

The provisions of the Quebec Civil Code and of the Quebec Act have been compared with the main provisions of the Directive, taking into account the Working Party 29's opinion WP12. This opinion lists a number of principles which constitute the "*minimum requirement for the protection to be considered adequate*".³

3.1. Definitions

The Quebec Act provides for definitions of personal data, processing of personal data, and consent (Section 2, Section 1, Section, 14).

Although certain definitions are not provided for (data controller, data processor, third party, recipient), all these concepts are used or deduced from the different sections of the Act.

The data controller is referred to as "any person carrying an enterprise" and it can be deduced from Section 8 that he is responsible for determining the purposes of the processing. In fact, he is the one responsible for informing the data subject of the use which will be made of the collected personal information.

The data processor is referred to as "person holding personal information on behalf of a person carrying on an enterprise" (Section 16)

² Available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_39_1/P39_1_A.h tml

³ WP12, *Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU data protection directive*, adopted on 24 July 1998 p. 5

3.2. Scope of the legislation

The Quebec Act applies to information whatever its nature or medium. The information can be computerized which implies that the scope of the Act covers automatic means. The Act does not apply to journalistic, historical or genealogical material collected, held, used or communicated for the legitimate information of the public. Nor does it apply to public bodies or individual acting on behalf of a public body.

Although the household activity exemption mentioned in Article 3 of Directive 95/46/EC is not specifically expressed in the Quebec Act, this notion can be inferred from the fact that the data controller is referred to as any person carrying on an enterprise.

As regards the territorial scope, the European commission's decision on the PIPEDA adequacy provides, inter alia, that "*where and whenever a province adopts legislation that is substantially similar, the organizations, classes of organizations or activities covered will be exempted from the application of the federal law for intra-provincial transactions; the federal law will continue to apply in all interprovincial and international, uses and disclosure of personal information as well as in all instances where provinces have not created similar legislation in whole or in part*". This position is similar as the one endorsed by the Office of the Privacy Commissioner in Canada.⁴

However, the CAI considers that in case of interprovincial and international transactions, both the PIPEDA and the Quebec Act apply. The CAI explains that in Canada the 1867 Constitutional Law organizes the sharing of competences between the federal and provincial governments and Article 92(13) states that "in each Province the Legislature may exclusively make Laws in relation to Matters coming within [...] property and Civil Rights in the Province". The CAI further considers that the notion of "property and Civil Rights in the Province" refers to any relationship between individuals and includes the right to the protection of privacy which encompasses the right to the protection of personal data. In fact, article 3 and Articles 35 to 41 of the Quebec Civil Code provides for rules on privacy and data protection.

Moreover, the Quebec Act states that its object is to establish "*particular rules with respect to personal information relating to other persons which collects, holds, uses or communicates to third persons in the course of carrying on an enterprise within the meaning of article 1525 of the Civil Code*" (Section1).

⁴ See for example on the website of the Privacy Commissioner in Canada : In general, PIPEDA applies to organizations' commercial activities in all provinces, except organizations that collect, use or disclose personal information entirely within [provinces that have their own privacy laws, which have been declared substantially similar to the federal law](#). In such cases, it is the substantially similar provincial law that will apply instead of PIPEDA, although PIPEDA continues to apply to federal works, undertakings or businesses and to interprovincial or international transfers of personal information. (http://www.priv.gc.ca/leg_c/leg_c_p_e.asp)

It should be specified that according to the CAI the notion of “carrying on an enterprise” shall be interpreted broadly.⁵ According to article 1525 of the Quebec Civil Code constitutes the carrying on of an enterprise “*the carrying on by one or more persons of an organized economic activity, whether or not it is commercial in nature, consisting of producing, administering or alienating property, or providing a service”.*

In conclusion, the federal and provincial positions on the scope of application of the Quebec Act do not coincide. If the Office of the Privacy Commissioner in Canada considers that the federal legislation applies to both interprovincial and international transfers of personal information, the CAI considers that the Quebec Act always applies in international situations. This divergence of interpretation between the Office of the Privacy Commissioner in Canada and the CAI is not new as in 2003, following the adoption of the PIPEDA, the CAI filed a case to the Quebec Court of Appeal asking whether the exclusive competence of the PIPEDA for federal is unconstitutional. To date the decision of the Quebec Court of Appeal is still pending.⁶

The Working Party therefore considers that it is necessary to clarify the territorial scope of the Quebec Act before any decision on its adequacy is taken by the European Commission.

3.3. Content principles

a) Basic principles

1) The purpose limitation principle

According to the “purpose limitation” principle enshrined in Article 6 of Directive 95/46/EC, data should be processed for a specific purpose and subsequently used or further communicated only insofar as this is not incompatible with the purpose of the transfer. The only exemptions to this rule would be those necessary in a democratic society on one of the grounds listed in Article 13 of the directive.⁷

The Working Party considers that Quebec implements the purpose limitation principle through Article 37 of the Quebec Civil Code which states that “*every person who establishes a file on another person [...] may gather only information which is relevant to the stated objective of the file and may not, without consent of the person concerned or authorization by law, communicate such information to third persons or use it for purpose that are inconsistent with the purposes for which the file was established*”.

⁵ According to the CAI, a controller can be considered as carrying out an economic activity when it has a legal activity and its actions are taken in order to provide a service in response to a specific need (i.e. to coordinate et supervise the fight against doping).

⁶ Décret 1368-2003 concernant un renvoi à la Cour d’appel relatif à la Loi sur la protection des renseignements personnels et les documents électroniques, 17 décembre 2003

⁷ WP12, *Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU data protection directive*, adopted on 24 July 1998

Sections 4, 5 and 13 of the Quebec Act provide for the same principles, i.e. the fact the object of the file must be informed and that the collected information may not be communicated or used for other purposes than the one for which they were collected.

2) The data quality and proportionality principle

According to the “data quality and proportionality” principle, data should be accurate and, where necessary, kept up to date. The data should be adequate, relevant and not excessive in relation to the purposes for which they are transferred or further processed.⁸ In addition, Article 6 of the Directive 95/46/EC requires that data shall be processed fairly and lawfully, that they shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

The Working Party considers that the Quebec Act expressly includes the data quality principle:

- The data must be collected by lawful means (Section 5)
- Every person who establishes a file on another person shall have a serious and legitimate reason for doing so (Section 4)
- The object of the file must be informed (Section 4)
- Collected information may not be communicated or used for other purposes than the one for which they were collected. (Section 13)
- Any file held on another person shall be up to date and accurate (Section 11)
- Once the object of a file has been achieved, no information contained in it may be used otherwise than with the consent of the person concerned (Section 14)
- Consent is valid only for the length of time needed to achieve the purposes for which it was requested (Section 14)
- Retention is prescribed by law or government regulation (Section 12)

Moreover, concerning the proportionality principle, the Quebec act provides that “any person collecting personal information to establish a file on another person or to record personal information in such a file may collect only the information necessary for the object of the file” (Section 5).

3) The transparency principle

According to the “transparency” principle enshrined in Articles 10 and 11 of the Directive, individuals should be provided with information as to the purpose of the processing and the identity of the data controller in the third country, and other information insofar as this is necessary to ensure fairness. The only exemptions permitted should be in line with Articles 11(2) and 13 of the directive.⁹

⁸ Ibidem
⁹ Ibidem

The Quebec Act states that the person who collects personal information must provide the following information to the person concerned:

- Information on the object of the file (Section 8(1))
- Information on the use which will be made of the information (Section 8(2))
- Information on who will access to the information collected within the enterprise (Section 8(2))
- Information on the place where the file is kept (Section 8(3))
- Information on the rights of access and rectification (Section 8(3))

When data are collected from a third person, the Quebec Act provides that a person concerned must consent to the collection of personal information about him from third persons. If the third person is a data controller (person carrying out an enterprise), the source of the information must be indicated and is part of the file.

However, the Quebec act does not impose the identification of the “person carrying on an enterprise” or the identification of a person responsible for the access and the protection of the personal information. The Working Party recommends that the contact details of the “person carrying on an enterprise” should always be made available to the person concerned.

Aware of this situation, the CAI recommended in its 2011 quinquennial rapport that the Quebec act should be modified in order to introduce the function of “access and protection manager” which would allow the data subject to have a contact point within the enterprise.

Concerning credit information, the transparency appears to be stricter. A person who collects such information is called a “personal information agent” and must be registered with the Commission. This register is fully available, free of charge, to any person who so requests. Moreover, the information agent must inform the data subject of his/her right to access and rectification (Section 19).

4) The security principle

According to the “security” principle enshrined in Article 17 of the Directive, technical and organizational security measures should be taken by the data controller that are appropriate to the risks presented by the processing. Any person acting under the authority of the data controller, including a processor, must not process data except on instructions from the controller.¹⁰

The Quebec Act provides for a security principle, adapted to the sensitivity of the information. Section 10 states that *“a person carrying on an enterprise must take the security measures necessary to ensure the protection of the personal information collected, used, communicated, kept or destroyed and that are reasonable given the sensitivity of the information, the purposes for which it is to be used, the quantity and distribution of the information and the medium on which it is stored”*

¹⁰ Ibidem

Any processor will have to apply the security principle as the Quebec Act applies to “any person carrying on an enterprise” that “collects, holds, uses or communicates” personal information (Section 1).

The working party considers that Quebec legislation should clearly define the notion of “*sensitive information*” in order to render the security principle more efficient.

5) The right of access, rectification and opposition

The data subject should have right to obtain a copy of all data relating to him/her that are processed, and a right to rectification of those data where they are shown to be inaccurate. In certain situations he/she should also be able to object to the processing of the data relating to him/her. The only exemptions to these rights should be in line with Article 13 of the directive.¹¹

Article 38 of the Quebec Civil Code provides that any person may examine and cause the rectification of a file kept on him by another person with a view to making a decision in his regard or to informing a third person. Such access shall be free of charge. Moreover, a copy of the file shall be made at reasonable cost. The information contained in the file shall be made accessible in an intelligible transcript.

Article 39 specifies that access and rectification cannot be refused by the data controller unless he has a serious and legitimate reason for doing so or unless the information is of a nature that may seriously prejudice a third person. It should be noted that Article 13 of the Directive 95/46/EC does not enable any limitation of the right of access on the basis of the legitimate interest of the data controller.

Finally, Article 40 of the Quebec Civil Code states that “every person may cause information which is contained in a file concerning him and which is inaccurate, incomplete or equivocal to be rectified; he may also cause obsolete information or information not justified by the purpose of the file to be deleted, or deposit his written comments in the file”.

The Quebec Act provides further elements. It requires data controllers to confirm, at the request of the person concerned, the existence of a file and communicate any personal information concerning him (Section 27). The data subject is also entitled to obtain that any personal information collected otherwise than according to law to be deleted (Section 28).

Requests for access shall be made in writing and shall be free of charge (Section 30 and Section 33). When making such a request, the data subject shall prove that he is the person concerned or the representative, heir or successor of that person.

Pursuant to a request, the data controller has 30 days to respond. In case of refusal, he must inform the person concerned by writing, giving the reasons and informing him the recourses open to him (Section 34).

¹¹ Ibidem

Finally, similarly to the Directive the Quebec act provides for situations where access can be restricted (Sections 39, 40, 41):

- If it hinders an inquiry the purpose of which is the prevention, detection or repression of crime or statutory offences (Section 39)
- If it affects judicial proceedings in which either person has an interest (Section 39)
- If it is likely to reveal personal information about a third person or the existence of such information and the disclosure may seriously harm that third person (Section 40)

Concerning the right of opposition, Section 23 provides that a data subject may refuse that her/his information is used for purposes of commercial or philanthropic prospection. Moreover, Section 13 states that once collected the data cannot be sent to a third party and/or used for other purposes unless the data subject gives a valid consent or such communication and use is provided by law.

6) Restriction on onward transfers

According to the “restriction on onward transfers” principle, further transfers of the personal data by the recipient of the original data transfer should be permitted only where the following recipients (i.e. the recipient of the onward transfer) are also subject to rules affording an adequate level of protection. The only exceptions permitted should be in line with Article 26(1) of the directive.¹²

The Quebec Act only provides that the data controller shall take all reasonable steps to ensure that the information will not be used for purposes not relevant to the object of the file or communicated to third persons without the consent of the persons concerned (Section 17). However, the Quebec Act does not specify the means to this end. Although the CAI recommends to use contractual means it is not a mandatory requirement. To date the CAI cannot provide any example of contracts for transfers outside Quebec.¹³

In comparison, PIPEDA provides that an organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing, and that it must use contractual or other means to provide a comparable level of protection while the information is being processed by a third party. In this regard, it is worth recalling that in its opinion on the adequacy of the Canadian Personal Information and Electronic Documents Act, the Working Party indicated that “*transfer of data outside Canada would require the use of contractual or other binding provisions able to provide a comparable level of protection and encourages the Canadian authorities to issue guidance to this effect*”.¹⁴

According to the CAI, in international situations both the PIPEDA and the Quebec act will have to be complied with. In other words the Quebec act makes it clear that the data controller

¹² Ibidem

¹³ Second Questionnaire of the CAI, April 2014

¹⁴ Opinion 2/2001 on the adequacy of the Canadian Personal Information and Electronic Documents Act - WP 39, p. 6

is responsible as he has to take all reasonable steps to ensure that the information will not be misused and the PIPEDA specifies that contractual links can be the mean to guarantee the protection.

To date no decisions on the implementation of Article 17 of the Quebec Act exists as the CAI did not start any inquiry at its own initiative and did not receive any individual complaint.

In conclusion, the Working party reiterates the same position as in WP39 and considers that as a rule onward transfers should require the use of contractual or other binding provisions in order to provide a comparable level of protection. A comparable level of protection refers to *all* data protection principles, and is not limited to the purposes of processing and the requirement of consent for further communication of the personal data.

Finally, consent should not be promoted as the general legal basis for onward transfers as the recipient then does not commit to take any action to ensure an adequate level of protection; this situation should thus remain an exception.

b) Additional principles

1) Sensitive data

Where ‘sensitive’ categories of data are involved (those listed in Article 8 of the directive), additional safeguards should be in place, such as a requirement that the data subject gives his/her explicit consent for the processing.¹⁵

The Quebec Act does not prohibit the collection of sensitive data. However, sensitivity has to be taken into account in taking the necessary measures to ensure the protection of the information collected (Sections 10 and 14).

The absence of a specific definition of sensitive data and of the notion of sensitivity is shared with the PIPEDA.

Moreover, it should be recalled that according to the Quebec Act, consent is, as a rule, required before data may be processed.

Therefore, the Working Party would welcome the systematic use of a highest level of protection when sensitive data is processed and encouraged the Quebec authorities and the CAI to work towards this goal. This higher level of protection should not be limited to security measures and could include adequate safeguards such as the requirement of the explicit consent of the data subject for the processing.

¹⁵ WP12, *Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU data protection directive*, adopted on 24 July 1998

2) Direct marketing

Where data are transferred for the purposes of direct marketing, the data subject should be able to ‘opt-out’ from having his/her data used for such purposes at any stage.¹⁶

The Quebec Act refers to Nominative list. This concept is similar to the one of direct marketing used in the Directive. It is defined as a “*list of names, telephone numbers, geographical addresses of natural persons or technological addresses where a natural person may receive communication of technological documents or information*” (Section 22).

According to the Quebec Act, such list can be communicated by a person carrying on an enterprise (the data controller) without the consent of the person concerned if the communication is made pursuant to a contract that prohibits the third party from using or communicating the list or the information for purposes other than commercial or philanthropic prospecting and if the communication does not infringe upon the privacy of the persons concerned (Section 22).¹⁷ Section 23 adds that “every person using such a list for such purposes must grant the persons concerned a valid opportunity to refuse that the information concerning them be used for such purposes”.

Finally, section 25 explicitly provides for a possibility to ‘opt-out’ from nominative lists : “*any person wishing to have personal information concerning him deleted from an nominative list may, at any time, by means of a request made orally or in writing to any person holding or using the list, obtain that information be deleted*”.

3) Automated individual decisions

Where the purpose of the transfer is the taking of an automated decision in the sense of Article 15 of the directive, the individual should have the right to know the logic involved in this decision, and other measures should be taken to safeguard the individual’s legitimate interest.

The Quebec legislation does not provide for any specific rules on automated individual decisions but rather for general rules on decision whether automated or not. According to Article 38 of the Quebec Civil Code “*any person may (...) examine and cause the rectification of a file kept on him by another person with a view to making a decision in his regard or to informing a third person.*”

Moreover, the Quebec Act provides for specific rules concerning the communication of credit reports, reputation, and solvency. A person who, on a commercial basis, personally or through a representative, establishes files on other persons and prepares and communicates to third parties credit reports bearing on the character, reputation, or solvency of the persons to whom the information contained in such files relates is a personal information agent (Section 70).

¹⁶ Ibidem

¹⁷ A guide on direct marketing is available on the CAI’s website:
http://www.cai.gouv.qc.ca/documents/CAI_FI_marketing_direct_obligation_ent_eng.pdf

Such persons are subject to extensive rules and must be registered with the CAI (Sections 71-79).

The CAI must maintain a register of personal information agents containing contact details as well as any relevant decisions. The register must be available to the public. The CAI must furnish, free of charge, to any person who so requests any extract from the register concerning a personal information agent. The CAI must publish annually, in a newspaper having general circulation, a list of the personal information agents.

Every personal information agent must establish, apply within his enterprise and circulate rules of conduct that will allow any person concerned by a file held by him to have access to that file according to a procedure that ensures the protection of the information contained in the file, either by allowing the person concerned to have access, free of charge, by telephone consultation or at a place in the region of the domicile of the person concerned during the regular business hours of the personal information agent's business establishment, or by transmitting a reproduction, transcription or copy of the file to him by mail or courier on payment of a reasonable charge.

Every personal information agent must, every two years, inform the public, by means of a notice published in a newspaper having general circulation in each region of Quebec in which he does business, of:

(1) the fact that he holds files on other persons, that he gives communication of credit reports bearing on the character, reputation or solvency of the persons to whom the information in the files relates to persons with whom he is bound by contract, and that he receives from the latter personal information relating to other persons;

(2) the rights of consultation and rectification that may be exercised according to law, by persons to whom the information relates, in respect of the files he holds;

(3) the name, address and telephone number of the person, in each region, to whom the persons to whom the information relates may apply to consult their file, and the procedure for consultation.

Every person carrying on an enterprise having as its object the lending of money, who consults credit reports or recommendations as to the solvency of natural persons prepared by a personal information agent, must inform such persons of their right of access and rectification in relation to the file held by the agent and indicate to them the manner in which and the place where they may have access to the reports or recommendations and cause them to be rectified, where necessary. The person carrying on such an enterprise must communicate to a natural person, on request, the content of any credit report or recommendation he has consulted for the purpose of making a decision concerning the person.

c) Procedural/enforcement mechanisms

1) To deliver of a good level of compliance with the rules

According to WP12, the first objective of the foreign system should be to deliver a good level of compliance with the rules. Although no system can guarantee 100% compliance, some systems are likely to provide better compliance than others depending on their general and specific features.

A good system is generally characterised by a high degree of awareness among data controllers of their obligations, and among data subjects of their rights and the means of exercising them. The existence of effective and dissuasive sanctions can play an important in ensuring respect for rules, as of course can systems of direct verification by authorities, auditors, or independent data protection officials.¹⁸

i. Awareness among data controllers and individuals

First of all, any person collecting information in Quebec must be registered with the CAI. The register is available for public consultation. The CAI also keeps a public register of the personal information agents who on a commercial basis, establishes sensitive files on other person and prepares and communicates to third parties credit reports bearing on the character, reputation or solvency of the persons (Section 70 Act for private sector).

The controller has an obligation to answer to every request from a data subject on the existence of a file and shall communicate to this person any personal information he has collected on her/him (Sections 27 and 28).

At the creation of the personal file, the controller shall inform the data subject on the object of the file, of the use of the data and of the place where the file will be kept. Moreover, if the controller obtains some personal information on a data subject thanks to a third party, the controller shall indicate on this file the source of the data (Sections 7 and 8 Act for private sector).

The Website of the CAI contains useful information which clarifies the legislation on rights and duties of legal and natural persons and the “news” section is regularly updated. However, the Working Party would welcome the addition of a section on transfers and onward transfers in order to clarify for data subjects and enterprises the rules and practices that apply.

The website also contains the deliberations and the consultations of the CAI and explains the process for the investigation and inspections. Furthermore, the CAI keeps available a

¹⁸ Article 29 WP, WP12, 24 July 1998

document with all the registered personal information agents¹⁹. In March 2013, the website has a monthly average of 23 361 visits²⁰.

ii. The “Commission d’Accès du Québec”

Structural independence

The provisions on the nomination of the members of the CAI are to be found in the Act respecting access to documents held by public bodies and the protection of personal information.²¹

The Commission consists of two divisions: the oversight division and the adjudication division. The members are appointed, on a motion of the Prime Minister, by a resolution of the National Assembly approved by not less than two-thirds of its members. This mode of designation aims at ensuring that the Commission is independent of the executive.

The members of the Commission are chosen beforehand according to the procedure for selecting persons qualified for appointment as members of the Commission established by regulation of the Office of the National Assembly. The regulation may, in particular,

- (1) determine the manner in which a person may seek office as a member;
- (2) establish a selection committee to assess the qualifications of candidates for the office of member and give an opinion on the candidates to the Office;
- (3) determine the composition of the committee and the method of appointing the committee members;
- (4) determine the selection criteria to be taken into account by the committee; and
- (5) determine the information that the committee may require of a candidate and the consultations it may carry out.

According to the Regulation, the selection criteria to be taken into account by the committee in determining whether a candidate is qualified are:

- (1) the candidate's personal and intellectual qualities and experience and knowledge in and interest for the field of access to documents held by public bodies or the protection of personal information;
- (2) the candidate's judgment, listening skills, perceptiveness, level-headedness, decision-making abilities and expressive abilities; and

¹⁹ <http://www.cai.gouv.qc.ca/citoyens/>

²⁰ RAPPORT ANNUEL DE GESTION 2012-2013
http://www.cai.gouv.qc.ca/documents/CAI_RAG_2012-2013.pdf p. 29

²¹ Available at: <http://www.canlii.org/en/qc/laws/stat/rsq-c-a-2.1/latest/rsq-c-a-2.1.html>

(3) the candidate's perception of the functions of a member of the Commission.²²

The term of office of the members of the Commission is of fixed duration not exceeding five years.

The Code of Ethics of the members of the CAI²³ provides for the independency of the members of the CAI. Indeed, the members shall exercise their work independently without any interference. They have to be impartial and objective (Section II, points 3 and 4). Moreover, they are subject to a prohibition of a situation in which they could be in a conflict of interest (Section III, point 11) for example politics mandates.

The members shall in addition keep up date and improve their knowledge and skills to perform their function. According to points 8 and 9, the members have an obligation of confidentiality of judicial deliberations and shall keep all information obtained during their function confidential.

Financial independence

The budget of the CAI is awarded by the Ministère des Relations avec les Citoyens et de l'Immigration. However, in order to be completely financially independent, the CAI made the following proposal in its 2002 quinquennial report: the budget of the CAI should be awarded by the national Assembly. This proposal was not adopted but will be discussed when a reform of the Quebec Act will take place.

iii. Enforcement means and mechanisms

The CAI may appoint inspectors, who are empowered to enter premises at any reasonable time, request the production of documents and information and examine and make copies of such documents. Persons acting as inspectors must, on request, identify themselves and produce a certificate of authority. They cannot be prosecuted for an act performed in good faith in the exercise of their duties (Section 80).

The CAI may, on its own initiative or in response to a complaint, inquire into any matter relating to the protection of personal information as well as into the practices of a data controller who processes personal data (Section 81). Following such inquiry, the CAI may order the application of such remedial measures as are appropriate to ensure the protection of the personal information and fix time limits for the implementation of such measures it (Section 83).

The CAI, its members and any person entrusted by it with making an inquiry for the purposes of this Act, are vested for the inquiry with the powers and immunity provided for in the Act

²² Available at <http://www.canlii.org/en/qc/laws/regu/rrq-c-a-2.1-r-5/latest/rrq-c-a-2.1-r-5.html>

²³

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=3&file=/A_2_1/A2_1R1.HTM

respecting public inquiry commissions (chapter C-37)²⁴ except the power to order imprisonment (Section 85).

Under the Quebec Act, an order issued by the CAI following an inquiry becomes enforceable. Any person having a direct interest may appeal an order issued following an inquiry.

2) To provide support and help to individual data subjects in the exercise of their rights

According to WP12, the second objective of the foreign system should be to provide support and help to individual data subjects in the exercise of their rights. The individual must be able to enforce his/her rights rapidly and effectively, and without prohibitive cost. To do so there must be some sort of institutional mechanism allowing independent investigation of complaints.

According to Section 42 of the Quebec Act, any interested person may submit an application to the CAI for the examination of a disagreement relating to the application of a legislative provision concerning access to or the rectification of personal information. However, the Commission cannot award damages.

The Quebec Act provides for sanctions for processing personal data other than in accordance with the Act, or hampering an inquiry or inspection by communicating false or inaccurate information, consisting of fines between \$1,000 to \$10,000 for a first offence and \$10,000 to \$20,000 for a subsequent offence. For a contravention of the provisions relating to transfers outside Quebec, the fines are from \$5,000 to \$50,000 and from \$10,000 to \$100,000 respectively. The penalties on information agents are slightly higher. Where an offence is committed by a legal person, the natural person who ordered or authorized the act or omission constituting the offence, or who consented to it, is liable to the prescribed penalty (Section 91-93).

3) To provide appropriate redress to the injured party where rules are not complied with

According to WP12, the third objective of the foreign system should be to provide appropriate redress to the injured party where rules are not complied with. This is a key element which must involve a system of independent adjudication or arbitration which allows compensation to be paid and sanctions imposed where appropriate.²⁵

The Quebec Acts includes various mechanisms designed to comply with this objective. In particular:

²⁴ Available at http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_37/C37_A.htm

²⁵ WP12, *Transfers of Personal Data to Third Countries: Applying Article 25 and 26 of the EU data protection directive*, adopted on 24 July 1998

- The Commission receives complaints by interested persons in order to settle disagreements
- Mediation
- The Commission may, on its own initiative inquire into any matter relating to the protection of personal data.

4. **RESULT OF THE ASSESSMENT**

In the light of the issues raised and of the information obtained, the Working Party draws the attention of the Commission and the Art. 31 Committee to the following points:

- Firstly, the Working Party stresses that the territorial scope of the Quebec Act in relation to the PIPEDA should be clearly defined before any decision on its adequacy is taken by the European Commission.
- Secondly, concerning the transparency principle, the Working Party recommends that the contact details of the “person carrying on an enterprise” should always be made available to the person concerned.
- Thirdly, concerning the right of access, the Working Party recalls that Directive 95/46/EC, although allowing for some restrictions under certain circumstances foreseen in its Article 13, does not allow for any limitation of this right on the basis of the legitimate interest of the data controller.
- Fourthly, the Working Party considers necessary any initiative, such as a legislation change or a Court ruling, offering a clear definition of the notion of “sensitive information”. In addition, the Working Party would welcome the systematic use of a highest level of protection when sensitive data is processed and encouraged the Quebec authorities and the CAI to work towards this goal. This higher level of protection should not be limited to security measures and could include adequate safeguards, such as the requirement of the explicit consent of the data subject for the processing.
- Fifthly, the Working Party considers that the onward transfer principle needs to be clarified in Quebec’s law. In fact, any onward transfer should require the use of contractual or other binding provisions in order to provide a comparable level of protection with the protection awarded by EU law. A comparable level of protection refers to all data protection principles, and is not limited to the purposes of processing and the requirement of consent for further communication of the personal data. Consent should not be promoted as the general legal basis for onward transfers as the recipient then does not commit to take any action to ensure an adequate level of protection; this situation should thus remain an exception.
- Sixthly, the Working Party would welcome the addition of a transfers section on the CAI Website which could provide more details concerning rules and practices for transfers and onward transfers outside Quebec.

- Finally, it should be specified that any decision on the level of adequacy of Quebec is limited to the scope of the Quebec Act respecting the protection of personal information in the private sector.