

Introduction

This is Part 2 of a two-part Advisory that summarizes some of the most significant changes introduced by Québec's Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information* ("Bill 64"). To view Part 1, please click [here](#).

Due to the substantial and far-reaching nature of the amendments, organizations will be affected by the new legislation if they conduct business in Québec or collect personal information belonging to Québec residents, whether or not the organizations are located in Québec.

Background

On September 21, 2021, the National Assembly of Québec adopted Bill 64, making significant changes to Québec's private sector and public sector privacy legislation. Specifically, a number of important amendments to Québec's *Act respecting the protection of personal information in the private sector* (the "Québec Act") will be incorporated. All references to the Québec Act in this Advisory refer to the new version of the Act as amended by Bill 64.

The Québec Act applies to personal information whether the organization "keeps the information itself or through the agency of a third person, whatever the nature of its medium and whatever the form in which it is accessible, whether written, graphic, taped, filmed, computerized, or other".

Divisions II and III of the Québec Act do not apply to personal information that is public by law. Divisions II and III also do not apply to "personal information concerning the performance of duties within an enterprise by the person concerned, such as the person's name, title and duties, as well as the address, email address and telephone number of the person's place of work".

This Part 2 will cover the following topics:

- A. data profiling;
- B. de-identification and anonymization of personal information;
- C. artificial intelligence and automated processing; and
- D. the new enforcement regime and the penalties that apply.

Part 1 (available [here](#)) covered the following topics:

- A. the treatment of personal information;
- B. the new right of erasure;
- C. geolocation; and
- D. other new obligations for private sector organizations.

In addition, the federal Bill C-11, the *Digital Charter Implementation Act, 2020* ("Bill C-11") underwent its first reading before Parliament was prorogued for the September 2021 election. In order to best prepare your organization for the anticipated changes, we have provided a brief



update on relevant changes to federal privacy legislation under Bill C-11 after each topic discussed in this Advisory.

Bill 64 received Royal Assent on September 22, 2021. The provisions discussed in this Advisory will enter into force on September 22, 2023.

A. Data Profiling (Coming into Force September 22, 2023)

Part 1 of this Advisory (available [here](#)) discussed the enhanced collection and consent requirements introduced by Section 8 of the Québec Act.

Section 8.1 of the Québec Act specifies that in addition to the Section 8 requirements, organizations that collect personal information “using technology that includes functions allowing the person concerned to be identified, located or profiled” must first inform the person of:

- the use of such technology; and
- the means available, to activate the functions that allow a person to be identified, located or profiled.

Section 8.1 of the Québec Act defines “profiling” as:

“the collection and use of personal information to assess certain characteristics of a natural person, in particular for the purpose of analyzing that person’s work performance, economic situation, health, personal preferences, interests or behaviour”.

Steps to Take:

Organizations should review their current policies and practices regarding the collection and processing of personal information to determine if these data profiling requirements apply (i.e., if they are using technology that includes functions allowing persons to be identified, located or profiled).

If these requirements apply, organizations must ensure that their default profiling functions are deactivated and that they properly inform individuals of the use of data profiling technology. Organizations must also provide instructions on how to activate the profiling functions in accordance with these new requirements.

Comparison with Bill C-11

Bill C-11 does not introduce explicit data profiling requirements. However, Bill C-11 will introduce new requirements on organizations to promote greater transparency regarding automated decision making, third party data transfers, and cross-border data flows.

For more information on the amendments proposed by Bill C-11, please see our previous commentary [here](#) and [here](#).



B. De-identification and Anonymization of Personal Information (Coming into Force September 22, 2023)

Bill 64 introduces new terms and obligations on organizations to “de-identify” or “anonymize” personal information in certain circumstances.

i) De-identification of Personal Information

Under Section 12 of the Québec Act, personal information is “de-identified” if it “no longer allows the person concerned to be directly identified”.

Organizations may use personal information for purposes other than those for which the information was collected without the consent of the person concerned if the information is de-identified and the use is necessary for study or research purposes or for the production of statistics.

Section 12 also requires organizations using de-identified information to take “reasonable steps to reduce the risk of anyone identifying a natural person using de-identified information”.

ii) Anonymization of Personal Information

Under Section 23 of the Québec Act, once the purposes for which the personal information was collected or used are achieved, organizations must “destroy or anonymize the information in order to use it for a serious and legitimate purpose, subject to any preservation period provided for by an Act”.

Information concerning a natural person is considered “anonymized” under the Québec Act when it is “at all times reasonable to expect in the circumstances that it irreversibly no longer allows the person to be identified directly or indirectly”.

The Québec Act does not explicitly require organizations to obtain consent from individuals to destroy or anonymize their personal information in order to use it for a serious and legitimate purpose. However, Section 23 of the Québec Act requires organizations to anonymize information according to “generally accepted best practices and in accordance with criteria and procedures prescribed by regulation”.

This means that both de-identification and anonymization are described as processes that no longer allow the individual concerned to be *directly* identified. However, anonymization goes beyond de-identification, as the anonymization process also no longer allows the individual concerned to be *indirectly* identified.

Steps to Take:

Organizations should identify the types of personal information collected and whether it can be categorized as de-identified or anonymized information.

Organizations should also update or replace their policies and procedures that outline when and how information will be de-identified, destroyed, or anonymized, in accordance with these amendments.



The phrase “generally accepted best practices” for anonymization has not yet been further defined. Organizations should therefore continue to monitor for the release of additional guidance or interpretation.

Comparison with Bill C-11

Bill C-11 similarly proposes new rules around the use and protection of de-identified information. Under Bill C-11, an organization:

- may use an individual’s personal information without their knowledge or consent to de-identify the information, which may in turn be used for internal research and development purposes;
- cannot use de-identified information or combine it with other information to identify an individual; and
- must ensure that any technical and administrative measures applied to de-identified information are proportionate to the sensitivity of the information and the purpose for which it is de-identified.

Bill C-11 does not explicitly define anonymization or introduce requirements to anonymize personal information.

For more information, please see our previous commentary on Bill C-11 [here](#).

C. Artificial Intelligence and Automated Processing (Coming into Force September 22, 2023)

Bill 64 does not explicitly mention artificial intelligence (AI) or impose consent requirements on organizations using personal information to train AI systems.

Nonetheless, Section 12.1 of the Québec Act will require organizations that use personal information to “render a decision based exclusively on an automated processing of such information” to inform concerned individuals of such processing when (or prior to the time) it informs the individual of the decision.

Upon the individual’s request, the organization must also inform the individual of:

- the personal information used to render the decision;
- the reasons and the principal factors and parameters that led to the decision; and
- the right of the person concerned to have the personal information used to render the decision corrected.

Lastly, the individual concerned must be given the opportunity to “submit observations to a member of the personnel of the enterprise who is in a position to review the decision”.

Steps to Take:

Although Bill 64 does not explicitly address AI, organizations should continue to monitor for



the release of additional guidance or interpretation, as the Privacy Commissioner has published recommendations for federal policy reform regarding the regulation of AI.

Organizations should review their current processes and determine if any decisions made are based exclusively on the automated processing of personal information.

Organizations should also ensure appropriate policies and practices are or will be in place to allow them to respond appropriately to information requests from any individuals concerned.

Lastly, organizations should be prepared to provide concerned individuals with the contact information of the person responsible for reviewing such decisions.

Comparison with Bill C-11

Bill C-11 similarly introduces a new right for an individual to request that an organization provide an explanation about the automated decision system used to arrive at a prediction, recommendation, or decision affecting them and how the personal information was used.

Bill C-11 defines an “automated decision system” as “any technology that assists or replaces the judgement of human decision-makers using techniques such as rules-based systems, regression analysis, predictive analytics, machine learning, deep learning and neural nets”.

The organization must, on request by the affected individual, provide an explanation about the process. An organization would also have to provide, in plain language, a general account of its use of any automated decision system that could have significant impacts on individuals.

For more information, please see our previous commentary [here](#) and [here](#).

D. New Enforcement Regime and Penalties (Coming into Force September 22, 2023)

Bill 64 introduces a new enforcement regime and substantial penalties for natural persons and organizations that are in contravention of certain provisions of the Québec Act. In this section, we discuss:

- monetary administrative penalties;
- penal offences; and
- the private right of action.

i) Monetary Administrative Penalties

Section 90.1 of the Québec Act states that a monetary administrative penalty may be imposed “by a person designated by the [Commission d’accès à l’information], but who is not a member of any of its divisions”.

Key grounds on which the Commission d’accès à l’information (CAI) may impose such a penalty include:



- failing to inform the persons concerned of the source of the information upon request, in accordance with Section 7 of the Québec Act;
- failing to inform the persons concerned of the purposes for and means by which the information is collected, the rights of access and rectification, and the right to withdraw consent, in accordance with Section 8 of the Québec Act (as discussed in Part 1 of this Advisory, available [here](#));
- collecting, using, communicating, holding, or destroying personal information in contravention of the provisions of the Québec Act;
- failing to report, where required to do so, a confidentiality incident to the CAI or to the persons concerned;
- failing to take appropriate security measures to protect personal information 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, in accordance with Section 10 of the Québec Act; and
- failing to inform the person concerned by a decision based exclusively on an automated process or failing to give the person an opportunity to submit observations, in contravention of Section 12.1 of the Québec Act (as discussed in the “Artificial Intelligence and Automated Processing” topic above).

Persons or organizations that contravene Section 90.1 may, at any time, enter into an undertaking with the CAI to “take the necessary measures to remedy the contravention or mitigate its consequences”.

The undertaking must set out the relevant provisions and the acts or omissions that constituted a default. The undertaking may include additional conditions that the CAI “considers necessary” and may include an obligation to pay a sum of money.

If the CAI accepts the undertaking and it is complied with, the person or organization will not be subject to a monetary administrative penalty in respect of the acts or omissions covered in the undertaking.

Section 90.12 states that the maximum amount of the monetary administrative penalty is:

- \$50,000 CAD in the case of a natural person; and
- the greater of \$10 million CAD or the amount corresponding to 2% of worldwide turnover for the preceding fiscal year in all other cases.

It appears that the term “worldwide turnover” may be construed as “worldwide annual revenue”.

ii) Penal Offences

Section 91 of the Québec Act introduces new penal provisions and substantial fines.

Key offences listed under Section 91 include:

- collecting, using, holding, communicating, or destroying personal information in contravention of the Québec Act;
- failing to report, where required to do so, a confidentiality incident to the CAI or to the persons concerned;



- identifying or attempting to identify a natural person using de-identified information without the authorization of the person holding the information or using anonymized information;
- failing to take appropriate security measures to ensure the protection of personal information 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, in accordance with Section 10;
- impeding the progress of an inquiry or inspection of the CAI or the hearing of an application by the CAI by providing it with false or inaccurate information, by omitting to provide information it requires or otherwise; and
- failing to comply with an order of the CAI.

Those who commit an offence under Section 91 may be liable to a fine of:

- \$5,000 to \$100,000 CAD in the case of a natural person; and
- the greater of \$15,000 to \$25 million CAD or the amount corresponding to 4% of worldwide turnover for the preceding fiscal year in all other cases.

Under Section 92.1, these fines are doubled in the case of a subsequent offence.

The CAI may, in accordance with article 10 of the Code of Penal Procedure (chapter C-25.1), institute penal proceedings for an offence under Section 92. All penal proceedings must be instituted within five years of the commission of the offence.

iii) Private Right of Action

Presently, a private right of action exists in Québec under the Civil Code for any act that is a violation of another Act, or that is otherwise recognized at law as wrongful. Bill 64 amends the Québec Act to make it clear that the private right of action under the Civil Code is applicable to violations of the Québec Act.

Section 93.1 of the Québec Act states:

“Where an unlawful infringement of a right conferred by this Act or by sections 35 to 40 of the Civil Code causes an injury and the infringement is intentional or results from gross negligence, the court shall award punitive damages of not less than \$1,000 [CAD].”

Steps to Take:

Organizations should be aware of the new enforcement regime and increased penalties for non-compliance.

Organizations should also be aware that the administrative and the penal regimes are not mutually exclusive. For example, an organization that receives a monetary administrative penalty under Section 90.1 and continues to violate their obligations may subsequently be fined under Section 91.

Organizations should begin reviewing their obligations under the Québec Act, prepare their policies and practices accordingly, and implement such policies and practices, ideally before



these amendments to come into force.

Comparison with Bill C-11

Bill C-11 also introduces a private right of action, whereby an individual may bring an action against an organization for damages for loss or injury under certain circumstances.

Similar to Bill 64, Bill C-11 introduces substantial penalties for contravention of privacy legislation. The maximum penalty is the higher of \$10 million CAD and 3% of the organization's gross global revenue in the financial year previous to that in which the penalty is imposed.

Bill C-11 imposes additional penalties on organizations that knowingly contravene specific obligations. Organizations may be subject to a fine up to the greater of:

- \$20 million CAD or 4% of the organization's gross global revenue if the matter is treated as a summary offence; or
- \$25 million CAD or 5% of the organization's gross global revenue if the matter is treated as an indictable offence.

For more information on the enforcement regime and penalties for non-compliance set out in Bill C-11, please see our previous commentary [here](#).

Concluding Comments

The substantial changes introduced by Bill 64 to modernize Québec's privacy laws include:

- new requirements regarding the collection of personal information (Part 1);
- introduction of the right of erasure (Part 1);
- geolocation provisions (Part 1);
- introduction of additional obligations on organizations (Part 1);
- data profiling provisions (Part 2);
- new requirements regarding the de-identification and anonymization of personal information (Part 2);
- new requirements regarding artificial intelligence and automated processing (Part 2); and
- a new enforcement regime and penalties that apply (Part 2).

The obligations imposed by Bill 64 will set some of the most stringent privacy protection standards in the country. On that basis, it would be prudent for your organization to prepare to implement privacy changes in accordance with the amendments brought on by Bill 64. Doing so will protect your organization if you handle personal information of end-users from Québec and will best prepare your organization for compliance with future federal or provincial amendments to privacy legislation.

