

DETAILED TABLE OF CONTENTS

<i>Summary Table of Contents</i>	iii
<i>Foreword</i>	v
<i>Acknowledgments</i>	vii
<i>About the Authors</i>	ix
<i>Table of Cases</i>	xvii
CHAPTER 1: INTRODUCTION: WHERE PRIVACY AND CLASS ACTIONS MEET	
1. Introduction	1
2. Right of Privacy as Originally Understood	2
(a) The European Understanding of Privacy: Human Right.....	3
(i) France.....	3
(ii) Germany.....	4
(b) The Anglo-American Understanding of Privacy: Property Right.....	5
(i) A Man's House is his Castle	5
(ii) Freedom of the Press	7
(iii) A Tort of Invasion of Privacy?.....	7
3. A Canadian Right of Privacy	8
(a) Privacy Before the Courts: Search and Seizure Provisions Interpreted	9
(b) The Right of Privacy as Corporeal and Limited	11
4. The Information Revolution.....	11
(a) Lost in (Cyber)space	12
(b) The Consolidation of Personal Information.....	13
(c) Active vs. Passive Duties	13
5. Privacy, Class Actions, and the Importance of Compensable Injury.....	14
6. Conclusion	15
CHAPTER 2: CANADIAN PRIVACY REGIMES	17
1. Introduction	17
2. The Evolution of Privacy and Fair Information Practices.....	17
3. Private Sector Data Protection Legislation	18
(a) The Legislation	18
(i) Object	19
(ii) Definition of Personal Information.....	20
(iii) Enforceability.....	20
(b) Key Fair Information Practices	21
(i) Consent.....	21
(ii) Restricted Practices	23

A.	Collection.....	23
B.	Use	23
C.	Disclosure	24
D.	Storage.....	24
E.	Exceptions.....	25
(iii)	Access	25
(c)	Breach Reporting	25
4.	Public Sector Data Protection Legislation	26
(a)	The Legislation	26
(i)	Differences Between Federal and Provincial Legislation	26
(ii)	Enforceability.....	27
(b)	Key Fair Information Practices	27
(i)	Transparency	27
(ii)	Access	28
(iii)	Purpose Limitation.....	29
(iv)	Disclosure	30
(v)	Accuracy	31
5.	Health Sector Data Protection Legislation.....	31
(a)	The Legislation	32
(i)	Definition of Personal Health Information	33
(ii)	Regulated Entities	33
(b)	Key Fair Information Practices	34
(i)	Accountability.....	34
(ii)	Consent.....	34
(iii)	Openness.....	35
(iv)	Safeguards and Breach Reporting.....	35
(c)	Genetic Testing	35
6.	Conclusion	36
CHAPTER 3: EUROPE'S GENERAL DATA PROTECTION REGULATION..... 37		
1.	Introduction	37
2.	<i>GDPR</i> Definitions.....	37
3.	Data Processing Principles.....	40
4.	Lawful Processing	40
(a)	Consent.....	40
(b)	Necessity	40
(c)	Exceptions.....	42
5.	Transparency and Corresponding Notice Obligations	42
6.	Data Subject's Right	44
7.	Other Obligations.....	45
8.	International Transfer of Data	46
(a)	Adequacy Status	46
(b)	Appropriate Safeguards.....	47

DETAILED TABLE OF CONTENTS

xiii

(c) Exceptions.....	47
9. Penalties and Enforcement	48
10. Conclusion	48
CHAPTER 4: AN OVERVIEW OF CLASS ACTIONS IN CANADA	49
1. Introduction.....	49
2. What is a Class Action?	49
3. Equitable Origins	50
(a) 1805: <i>Adair v. The New River Company</i>	51
(b) 1901: <i>Duke of Bedford v. Ellis</i>	52
(c) 1901: <i>Taff Vale Railway v. Amalgamated Society of Railway Servants</i>	53
(d) 1910: <i>Markt & Co. v. Knight Steamship Co.</i>	54
4. Class Actions in the United States.....	54
(a) 1853: <i>Smith et al. v. Swormstedt</i>	55
(b) 1921: <i>Supreme Tribe of Ben-Hur v. Cauble</i>	56
(c) 1940: <i>Hansberry v. Lee</i>	56
(d) Amended Rule 23 of the <i>Federal Rules of Civil Procedure</i>	57
5. Québec's Codification of the Class Action.....	59
(a) Québec <i>Code of Civil Procedure</i>	59
(b) Québec Case Law.....	61
(i) <i>Options consommateurs v. Infineon Technologies AG</i>	61
(ii) <i>Dell'Aniello c. Vivendi Canada inc.</i>	63
(iii) <i>Bank of Montreal v. Marcotte</i>	65
(iv) <i>Sibiga v. Fido Solutions inc.</i>	65
(v) <i>Asselin c. Desjardins Cabinet de services financiers inc.</i>	69
6. Common Law Canada	71
(a) <i>Naken v. General Motors of Canada Ltd.</i>	71
(b) Ontario Law Reform Commission of 1982	72
(c) <i>Ontario Class Proceedings Act</i>	73
(d) Supreme Court Trilogy.....	75
(e) Class Actions Since the Supreme Court Trilogy.....	77
7. Class Actions, Privacy and Data Protection — A New Frontier.....	78
8. Conclusion	78
CHAPTER 5: A CIVIL LAW PERSPECTIVE — LEGISLATION AND CASE LAW	79
1. Introduction.....	79
2. The Legislative Context.....	79
(a) The Québec <i>Charter</i> and the <i>Civil Code of Québec</i>	79
(b) Québec's Statutory Regime.....	80
(c) Compensatory and Punitive Damages	82
(d) Class Action Proceedings	83
3. The Case Law	84
(a) Notice of a Privacy or Data Breach	84
(b) Placing Personal Information at Unnecessary Risk.....	85

(c) Failing to Meet Internal Security Requirements.....	85
(d) The Need for Compensable Harm.....	86
(e) Transient Embarrassment and Inconveniences Are Not Enough	86
(f) Potential Harm is Not Enough.....	89
(g) Timing and Causation.....	90
4. Conclusion	90
CHAPTER 6: PRIVACY CLASS ACTIONS IN COMMON LAW CANADA.....	
1. Introduction.....	91
2. Privacy is a Quasi-Constitutional Right.....	91
3. <i>PIPEDA</i> and Substantially Similar Statutes Are Not a Complete Code	93
4. Comprehensive Privacy Statutes	95
5. Intrusion Upon Seclusion: An “Evolving” Canadian Common Law Tort	96
6. Other Non-Statutory Causes of Action.....	99
(a) Negligence and Breach of Confidence.....	99
(b) Vicarious Liability.....	103
(c) Beach of Contract and Warranty	103
(d) Waiver of Tort/Disgorgement of Profits	105
7. Conclusion	106
CHAPTER 7: MITIGATING THE EFFECTS OF A PRIVACY CLASS ACTION	
1. Introduction.....	107
2. Pre-Breach Measures: Providing Appropriate Data Security	108
(a) Cybersecurity	108
(b) Physical Security	109
(c) Security.....	110
3. Post-Breach Measures: Responding Effectively to the Breach	111
(a) Incident Identification/Investigation	111
(b) Immediate Containment	113
(c) Notification.....	113
(d) Breach Recording.....	114
(e) Other Services	114
4. Conclusion	114
CHAPTER 8: THE MURKY ROAD FORWARD — EXPECTED CHANGES TO CANADIAN PRIVACY LEGISLATION	
1. Introduction.....	115
2. Canada	116
(a) Consent.....	116
(b) Data Mobility	117
(c) Online Reputation.....	117
(d) Structure	118

DETAILED TABLE OF CONTENTS

xv

(e)	Enforcement.....	118
(f)	Innovation	119
	(i) Data Trusts.....	119
	(ii) Standards and Codes.....	119
(g)	Conclusion	119
3.	Québec.....	120
	(a) EU-Inspired Changes	121
	(b) Changes Reflecting Existing Canadian Practices	122
	(c) Conceptual Ambiguities	122
	(d) Outstanding Questions	123
	(e) Conclusion	124
CHAPTER 9: CONCLUSION: PERSONAL INFORMATION AS PROPERTY?.....		125
1.	Introduction.....	125
2.	Should Personal Information Always be Considered Private?	125
3.	Where Do We Go?.....	126
4.	Conclusion	127
APPENDIX I: TABLE OF PRIVACY LAWS APPLICABLE IN CANADA.....		129
APPENDIX II: TABLE OF EXCEPTIONS TO PRIVATE SECTOR DATA PROTECTION LAWS		135
APPENDIX III: TABLE OF DATA PROTECTION AS IT PERTAINS TO CERTAIN ACTIVITIES		151
APPENDIX IV: TABLE OF CLASS ACTION CERTIFICATION CRITERIA IN CANADA		165
APPENDIX V: DATA REGISTER EXAMPLE		177
APPENDIX VI: BILL 64: <i>AN ACT TO MODERNIZE LEGISLATIVE PROVISIONS AS REGARDS THE PROTECTION OF PERSONAL INFORMATION</i>		179
<i>Index.....</i>		229