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Five Year Review of the Personal Information Protection and Electronic Documents Act (PIPEDA)

**NATIONAL PRIVACY & ACCESS LAW SECTION
CANADIAN BAR ASSOCIATION**

December 2006

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Privacy and Access Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Privacy and Access Law Section of the Canadian Bar Association.

Five Year Review of the Personal Information Protection and Electronic Documents Act (PIPEDA)

I. INTRODUCTION

The Canadian Bar Association Privacy and Access Law Section (CBA Section) appreciates the opportunity to appear before the House of Commons Committee on Access to Information, Privacy and Ethics in the course of its deliberations for the five year review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The CBA Section includes lawyers specializing in privacy and access to information law across the country who share an interest in the protection of privacy and personal information and the operations of PIPEDA.

In anticipation of the statutorily mandated review of PIPEDA, the CBA Section has made two previous submissions to Industry Canada and one to the Federal Privacy Commissioner¹ to suggest areas of the legislation that should be amended or supplemented. We have attached the Executive Summary of our most detailed submission to this letter.

The CBA Section wishes to highlight certain key themes among several that we addressed in our earlier submission to Industry Canada. These themes reflect particular areas of PIPEDA that six years of experience has demonstrated to be deficiencies with the law, or which represent emerging policy issues that were not adequately recognized when the law was enacted.

¹ National Privacy and Access Law Section, Letter from Section Chair to Privacy Commissioner on PIPEDA Review Discussion Document (Ottawa: CBA, 2006); National Privacy and Access Law Section, *Preparing for the 2006 Review of the Personal Information Protection and Electronic Documents Act* (Ottawa: CBA, 2005) and supplement (Ottawa: CBA, 2005).

After nearly six years of interpretation by the courts and the federal Privacy Commissioner's Office, we believe it is both prudent and necessary to consider amending Part 1 of PIPEDA, dealing with privacy in the private sector. Provincial privacy legislation has been enacted in British Columbia, Alberta and Ontario since PIPEDA came into force. These provincial developments respond to our experience with PIPEDA, and in some instances have addressed deficiencies in both drafting and interpretation. Certainly, the world has changed since PIPEDA was introduced, and Part 1 of PIPEDA should address those changes.

The CBA Section's recommendations for amendments to PIPEDA are shaped by certain core principles:

- While respecting the balance of interests in the collection, use and disclosure of personal information, vigilance is necessary in monitoring and opposing unnecessary erosions of privacy by both government and non-governmental organizations.
- The basis for protecting privacy in Canada should be fair information practices as they continue to evolve.
- Privacy legislation and practices across Canada should be harmonized to the extent possible.

II. PIPEDA SHOULD BE NEUTRAL IN REGARD TO THE LITIGATION PROCESS

PIPEDA contains a number of specific exceptions to the consent requirement that in our view require amendment. The current exceptions relating to litigation are too narrow and should, at a minimum, be broadened to ensure that well-established litigation procedures are not impeded. This narrowness is evident in the investigation exceptions (sections 7(1)(b), 7(2), 7(3)(d) and 7(3)(h)(ii)), the one-way disclosure (section 7(3)(a)), the collection and use of debt disclosure information (section 7(3)(b)), and the limitation on disclosures throughout the litigation process. The result is inadequate coverage of all aspects of the process; pleadings, oral discovery, mediation, private arbitration, settlements, solicitor communications and other non-court ordered exchanges of information (section 7(3)(c)). In our view, there should be a broad exclusion for information legally available to a party to a proceeding that would override specific exceptions currently found in PIPEDA.

Related to this concern, PIPEDA should be amended in its application to law enforcement. Specifically, the provisions for collection, use and disclosure of personal information without consent for legitimate law enforcement purposes should be clarified. The current provisions relating to investigations and enforcement of laws are confusing and internally inconsistent. A single standard should be applied for collection, use and disclosure relating to law enforcement.

Finally, the provisions respecting “investigative bodies” should be streamlined. For example, organizations should be permitted to carry out their own investigative activities without unnecessarily being required to use other investigative bodies to collect information from third parties.

RECOMMENDATION

The CBA Section recommends an amendment to create a broad exclusion for information available by law to a party in a proceeding to permit collection, use and disclosure without consent where reasonably required for an investigation.

III. PIPEDA ENFORCEMENT SHOULD BE MORE EFFECTIVE, WHILE CONTINUING TO REFLECT PRINCIPLES OF FUNDAMENTAL JUSTICE

The lack of order-making powers in PIPEDA significantly affects the likelihood of complainants bringing forward issues of non-compliance. Complainants must apply to the Federal Court to obtain a remedy or compensation, but they may only do so after the Commissioner has issued a finding. At present, it takes up to a year to receive a finding. Also, taking a matter to the Federal Court effectively requires hiring legal counsel, and places the complainant at risk of an adverse cost award. Further, there is no mechanism for the Commissioner to compensate an individual who has incurred significant expense or suffered loss in connection with the complaint.

However, under the current structure, conferring order-making powers on the Commissioner could result in a violation of principles of fundamental justice. As that role is currently structured, the Commissioner acts as an ombudsman who advocates protecting personal information in both the private and the public sectors. The Commissioner's office also investigates alleged violations of PIPEDA. We suggest that combining advocacy, investigative and decision-making roles may place the Commissioner in a conflict of interest and undermine the credibility of the office.

More effective enforcement could be achieved by assigning a separate office or body, functioning in a reasonably informal manner, decision-making authority. We have previously suggested an impartial tribunal with order-making powers and the ability to award damages, while the Office of the Privacy Commissioner would retain investigative powers and an advocacy role. The Commissioner could be required to issue a finding within six months which then would be referred to the tribunal.

RECOMMENDATION

The CBA Section recommends that an effective enforcement mechanism for PIPEDA be considered, such as the establishment of an impartial tribunal that would operate relatively informally, with power to make orders and award damages.

IV. ANY REQUIREMENT FOR NOTIFICATION OF BREACHES OF PRIVACY SHOULD BE BALANCED IN APPROACH

To date, federal and provincial privacy legislation has required public and private organizations to apply security safeguards when handling personal information. Several U.S. states have recently enacted additional legislation to require organizations to notify individuals in the event of a security breach involving improper disclosure of their personal

information. The European Union has also recently announced² that it may consider information security incident notification. In contrast, Canadian privacy legislation does not explicitly contain such a requirement, with the exception of Ontario's *Personal Health Information Protection Act, 2004*.³

RECOMMENDATION

The CBA Section recommends that a balanced privacy breach notification requirement be considered, such as a duty to notify only where:

- a) an organization is not covered by security mechanisms (e.g. encryption or de-identification), or has received notice that such protection mechanisms have been breached; and**
- b) the information that has been compromised is sensitive personal information.**

V. TRANS-BORDER INFORMATION INTENDED UNDER CANADIAN PRIVACY LAWS TO FLOW UNIMPEDED SHOULD BE SUBJECT TO APPROPRIATE PRECAUTIONARY REQUIREMENTS

The federal Privacy Commissioner has stated that the five-year legislative review of PIPEDA would be an opportunity for developing further privacy protection measures related to trans-border information-sharing by the private sector. One such measure is found in the Commissioner's submission to the British Columbia Privacy Commissioner⁴, concerning the impact of the U.S. *Patriot Act* on the personal health information of B.C. residents. The federal Commissioner recommended that Canadian companies that outsource information processing to organizations based abroad should notify their customers that the information may be available to the foreign government or its agencies under a lawful order made in that

2 See, Press Report, "Europe may mandate data breach notification" at: http://www.theregister.co.uk/2006/09/13/europe_data_breach_law
See also, EU Working Paper at:

http://europa.eu.int/information_society/policy/ecomms/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf

3 S.O. 2004, c. 3.

4 See: http://www.privcom.gc.ca/media/nr-c/2004/sub_usapa_040818_e.asp

country. A recent finding of the federal Privacy Commissioner has confirmed her support for this approach.⁵

Section 17 of Quebec's *Act respecting the Protection of Personal Information in the Private Sector*⁶ specifically addresses the issue of trans-border transfer of information. That section obliges people "communicating" information about Quebec residents to persons outside the province to take all reasonable care to ensure that such information is not disclosed to third parties without consent, except as provided in the legislation.

Currently, PIPEDA contains general rules requiring parties holding information or outsourcing information to ensure its protection, but does not contain any rule specifically directed at protection of information transferred outside of Canada. Under PIPEDA, each organization remains responsible for the personal information in its custody or control, including information transferred across a border.

PIPEDA should contain appropriate precautionary requirements to protect information when it is transferred across borders. We have previously considered a number of alternatives to achieve this objective⁷, such as a requirement that organizations transferring information to foreign entities enter into written agreements which would ensure security and protection of information against unauthorized access or disclosure in accordance with Canadian law. Another alternative is the more generalized approach of protecting information transferred outside of the jurisdiction found in Quebec's privacy law.

In its earlier submission, the CBA Section also analyzed options for a notification or consent requirement for information transferred across a border. Each of these options would involve some form of notice be provided to, or consent be obtained from, the individuals whose information would be transferred outside of Canada. Amending PIPEDA to implement either a notice or consent requirement to cross-border transfer of information requires careful consideration of the potential advantages and disadvantages of the approach.

5 Case summary 313.

6 An Act respecting the Protection of Personal Information in the Private Sector, R.S.Q. 2003, c. P-39.1.

7 See the Section's comprehensive 2005 submission, *supra*, note 1 at 44-50.

RECOMMENDATION

The CBA Section recommends that, where personal information is to be stored or processed in a jurisdiction outside Canada, PIPEDA require additional provisions to enhance security of the personal information and ensure conformity to Canadian law, such as contracts between organizations and entities storing or processing personal information.

VI. CONCLUSION

The CBA Section appreciates the opportunity to share its views with the Committee during its review of PIPEDA. We believe that our suggestions will provide some assistance in amending PIPEDA to address any deficiencies and concerns that have become apparent since its enactment. Our goal is to improve the legislation for the benefit of Canadians consistent with PIPEDA's purpose of establishing rules that recognize both individual privacy rights and organizations' needs to collect and use information in an appropriate and reasonable manner.

VII. SUMMARY OF RECOMMENDATIONS

- 1. The CBA Section recommends an amendment to create a broad exclusion for information available by law to a party in a proceeding to permit collection, use and disclosure without consent where reasonably required for an investigation.**
- 2. The CBA Section recommends that an effective enforcement mechanism for PIPEDA be considered, such as the establishment of an impartial tribunal that would operate relatively informally, with power to make orders and award damages.**
- 3. The CBA Section recommends that a balanced privacy breach notification requirement be considered, such as a duty to notify only where:**
 - a) an organization is not covered by security mechanisms (e.g. encryption or de-identification), or has received notice that such protection mechanisms have been breached; and**

- b) the information that has been compromised is sensitive personal information.**

- 4. The CBA Section recommends that, where personal information is to be stored or processed in a jurisdiction outside Canada, PIPEDA require additional provisions to enhance security of the personal information and ensure conformity to Canadian law, such as contracts between organizations and entities storing or processing personal information.**

APPENDIX: PREPARING FOR THE 2006 REVIEW OF PIPEDA – EXECUTIVE SUMMARY⁸

The Canadian Bar Association Privacy and Access Law Section (CBA Section) welcomes the opportunity to provide input to Industry Canada for the 2006 Committee Review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA).⁹

Our views are guided by the CBA's August 2004 resolution entitled "Privacy Rights in Canada." The resolution (attached as Appendix A) encourages vigilance in monitoring and opposing unnecessary erosions of privacy by both government and non-governmental organizations. It supports fair information practices as set out in the CSA's Model Code (Schedule 1 to PIPEDA). More specifically, it urges that all collection, use and disclosure of personal information without consent be conducted only in a manner that is reasonable and necessary and in accordance with consent or clearly stated exceptions to the consent requirement. It encourages the harmonized development of privacy legislation and practices across Canada. Our views are also consistent with those set out in the CBA's 1999 submission on Bill C-54, *Personal Information Protection and Electronic Documents Act*.¹⁰

We have recommended that the government refine several of the current provisions of PIPEDA to,

- i. clarify the internal working of the statute, and
- ii. amend the legislation by adding certain provisions to achieve more consistency between federal and provincial privacy laws.

Many provinces have, in fact, drafted legislation to address uncertainties in PIPEDA that have become apparent. We believe that the amendments we suggest will provide much needed clarity to enhance organizational compliance, as well as the public's awareness and ability to exercise its privacy rights.

8 From: National Privacy and Access Law Section, *Preparing for the 2006 Review of the Personal Information Protection and Electronic Documents Act* (Ottawa: CBA, 2005).

9 SC. 2000, c. 5. Available online at: http://www.privcom.gc.ca/legislation/02_06_01_01_e.asp.

10 CBA Resolution 04-05-A; Submission on Bill C-54 (99-11), *Personal Information Protection and Electronic Documents Act* (Ottawa: CBA, 1999).

One of the most commonly expressed concerns about PIPEDA is the structure of the statute, that is, the Act plus a Schedule format. A number of the principles set out in the Schedule are expressly negated or modified by the provisions of the Act. For individuals without legal training, this makes understanding and exercising their rights under the Act especially difficult. Smaller organizations that wish to comply with the Act but cannot afford legal counsel are similarly challenged.

Optimally, all requirements should be in the statute itself, making it easier to understand and assisting in the harmonization of federal law with provincial statutes. In the event that Industry Canada decides not to restructure the statute to this extent, we have recommended specific, targeted refinements consistent with the guiding criteria of our 2004 resolution.

We address both specific provisions of the Act and general issues pertinent to several sections of the Act. While our analysis results in some repetition, it highlights how the various provisions are inextricably linked, and accordingly, the importance of consistent drafting throughout the legislation. Four key issues serve as examples: the treatment of employee information, business transactions, impacts on the litigation process and law enforcement.

Our discussion of employee information addresses to whom the Act applies, that is the need to clarify the scope of employee information that is not governed by PIPEDA. We consider the appropriate consent requirements for certain activities involving employee information under PIPEDA, and recommend following British Columbia and Alberta's *Personal Information Protection Acts*' (PIPA) treatment of employee information.

Similarly, we consider "business transactions" in the context of difficulties in complying with PIPEDA's consent requirements for activities such as due diligence in mergers and acquisitions, and outsourcing of business processes, including investigations within and outside of Canada. In addition to examining how individual consent may operate in these transactions, we consider the relationship between an organization and third party processors, agents and investigative bodies. The pros and cons of several options are

discussed in light of concerns about disclosure of the personal information of Canadians outside of the country.

PIPEDA should be neutral in regard to the litigation process by specifically excluding personal information collected, used or disclosed in relation to litigation. The current exceptions relating to litigation are too narrow and should, at a minimum, be broadened to ensure that well-established litigation procedures are not impeded. There should be a broad exclusion for information legally available to a party to a proceeding that would override specific exceptions currently found in PIPEDA.

Related to this concern, PIPEDA should be amended in the way it applies for law enforcement purposes, specifically in the provisions for collection, use and disclosure of personal information without consent for legitimate law enforcement purposes.¹¹ The current provisions relating to investigations and enforcement of laws are overly narrow, confusing and internally inconsistent. A single standard should be applied for collection, use and disclosure relating to law enforcement, and the provisions respecting “investigative bodies” should be clarified. Organizations should be permitted to carry out their own investigative activities without unnecessarily being required to use other investigative bodies to collect information from third parties.

Clarifying key definitions such as “commercial activity”, “personal information” and “identifiable”, and including new definitions for “collect”, “use” and “disclose”, would improve all areas of the Act. With our discussion on clarifying the scope of the application of PIPEDA, we recommend clarifying both which organizations and what types of information are subject to the Act. We also discuss expanding the powers of the Commissioner’s Office, as well as notification of loss and remedies for privacy breaches.

In summary, we hope that our input will help to ensure that a review of PIPEDA will achieve improvements to make it more workable and more consistent with other privacy

11 See also CBA Resolution, *supra*, note 2, which urged governments to “better preserve, promote and respect privacy, and specifically to ensure that the needs of government to collect, use and disclose personal information in relation to national security and law enforcement are subject to reasonable and attainable objectives and respect the privacy of individual Canadians to the maximum extent possible, having due regard to the right of individual Canadians to security of the person and to the benefit of the rule of law.”

legislation in Canada. Clarifying the legislation would benefit both Canadian citizens and organizations, and be consistent with the purposes of PIPEDA:

...to establish... rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.