December 6, 1999

The Honourable Michael Kirby, Senator
Chair
Standing Committee on Social Affairs, Science and Technology
Senate of Canada
Parliament Buildings
Wellington Street
Ottawa ON K1A 0A4

Dear Senator Kirby:

Re: Bill C-6, *Personal Information Protection and Electronic Documents Act*

On behalf of the Canadian Bar Association, I am honoured to provide you with the following comments, which I hope will be of assistance in your Committee's review of the subject matter of Bill C-6, the proposed *Personal Information Protection and Electronic Documents Act*.

In March 1999, then CBA President Barry Gorlick, Q.C. appeared with Mairi MacDonald and me (as members of the CBA Information Technology and Law Reform Committee) before the House of Commons Standing Committee on Industry, to explore certain concerns with Bill C-6 in its previous form as Bill C-54. A copy of the CBA brief prepared for that appearance is attached for your ease of reference.

The purpose of the present letter is to provide some comments concerning amendments to the proposed legislation since our March appearance. In doing so, we have followed the structure of the initial submission.

Introduction

The CBA continues to support the objectives of Bill C-6. Providing Canadians and organizations with certainty and comfort concerning the rules surrounding the collection, use and disclosure of personal information is of fundamental importance in Canadian society, and can also play an important role in the development of electronic commerce in Canada. The objectives of Parts 2 through 5 of Bill C-6 are also laudable: facilitating Canadians' electronic interaction with the federal government is both practical and necessary.

Although some of the specific issues raised in the original brief have been addressed by amendments to Bill C-54 and passed by the House of Commons as Bill C-6, the CBA remains concerned that the structural, procedural and constitutional questions raised by Part 1 of the Bill may undermine its effectiveness in achieving these objectives. The following charts summarize how the CBA recommendations have – and have not – been addressed in amended Bill.

One matter that we understand to have been the subject of considerable debate before your committee is the status under Bill C-6 of sectoral codes, such as the code developed by the Canadian Medical Association. In our appearance before the House of Commons Industry Committee, we suggested that the drafters of Bill C-54 look to a draft Bill prepared for the State of Victoria, Australia, as a model of how sectoral codes can be accorded status under an Act of general application such as Bill C-6.

Clauses 14 and 15 of the Victorian Data Protection Bill read as follows:

> **14. Process for approval of code of practice or code variation**
>
> (1) An organisation may seek approval of a code of practice, or of a variation on an approved code, by submitting the code or variation to the Privacy Commissioner.
>
> (2) The Governor in Council, on the recommendation of the Privacy Commissioner, may by notice published in the Government Gazette approve a code of practice or a variation of an approved code.
>
> (3) The Privacy Commissioner may recommend to the Governor in Council that a code of practice, or a variation of an approved code, be approved if in his or her opinion –
> (a) the code or variation would substantially achieve the privacy objectives of this Act in relation to the personal information to which the code applies; and
> (b) approving the code or variation is not contrary to the public interest.
>
> (4) Before deciding whether or not to recommend approval of a code of practice or of a variation of an approved code, the Privacy Commissioner –
> (a) if not also the Federal Privacy Commissioner, must consult that Commissioner; and
> (b) may consult any other person or body that the Privacy Commissioner considers it appropriate to consult; and
> (c) must be satisfied that members of the public have been given adequate opportunity to comment on the code or variation.

(5) A code of practice or variation comes into operation at the beginning of –

(a) the day on which the notice of approval is published in the Government Gazette; or

(b) such later day as is expressed in that notice as the day on which the code or variation comes into operation

15. Effect of approved code

If an approved code of practice is in operation –

(a) an act or practice that would otherwise contravene an Information Privacy Principle is , for the purposes of this Act, deemed not to be a contravention of that principle if the act or practice does not contravene the code; and

(b) an act or practice that contravenes the code, even though that act or practice would not otherwise contravene any Information Privacy Principle is, for the purposes of this Act, deemed to be a contravention of an Information Privacy Principle and may be dealt with as provided by that code and this Act

Once approved, a sectoral code or variation must be kept in a register by the Privacy Commissioner (clause 16) and its approval may be revoked (clause 17).

We suggest this model may be useful in dealing with situations where the standards required in a particular industry differ from the general norm set out in Schedule 1 to Bill C-6. Intervention of the Privacy Commissioner and the Governor in Council ensures that the proposed sectoral code or variation receives public scrutiny before approval.

An alternative to this suggestion is found in the CBA's submission to the House of Commons Industry Committee. At page 20**,** we propose an amendment that would make an organization's compliance with an applicable sectoral code a *prima facie* defence to an investigation or audit by the Privacy Commissioner.

Part 1

Sec.	CBA Recommendation	Addressed in Bill C-6?
2	Amend definition of personal information to exclude publicly-available info.; stating that such info will be outlined in regulations is "an acceptable compromise"	Definition, as amended, does not fully address this concern; however, addition of ss. 7(1)(d), 7(2)(c.1) and 7(3)(h.1) accords with CBA recommendation to the extent of the "acceptable compromise" identified.
2	Amend definition of "use" to remove "include the transfer of personal information within an organization"	Definition was removed in its entirety. Accords with CBA recommendation.

Sec.	CBA Recommendation	Addressed in Bill C-6?
2	Define "commercial activity"	Defined, but in a way that does not illuminate what is meant by "commerce"; does permit individual commercial transactions by organizations not normally involved in commerce to be caught by the Bill. This issue remains outstanding and is of concern, particularly because of disagreement within medical community as to applicability to medicine- related activities.
2	Link definition of "federal work, undertaking or business" to Canada Labour Code	This amendment has not been made. However, clause 30 has been clarified to specify application to federal works, etc. As a result, the definition now clearly has to refer to all federal undertakings and is probably correct.
3	Amend to acknowledge balance of privacy and commercial objectives	New purpose clause removes restriction to Canadians (CBA supported this) and attempts to introduce notion of balancing; however, drafting is awkward and mis-places the "reasonable person" test in the purpose clause. We also question why this test is repeated in new clause 5(3).
4	Clarify whether this is intended to apply to professional organizations / activities	Definition of "commercial activity" helps somewhat, but this remains ambiguous.
4	Delete clause 4(1)(b)	Deleted; accords with CBA recommendation.
5	Structural issues: CBA proposed two alternatives: (1) write the obligations of the CSA Standard directly into law, with the recommendations and commentary in a separate schedule; (2) state principles in the legislation and make compliance with CSA Standard a *prima facie* defence to a complaint.	Not addressed. New clause 5(3) seems intended to establish a standard of "reasonable" behaviour. However, we question why the repetition from s. 3, and whether the "reasonable person" test has any meaning in this context. Is the person an individual or organization? If the intention of the new clause is to propose that adherence to a sectoral code is *prima facie* evidence of "reasonable" behaviour, it should do so explicitly or otherwise explicitly locate such codes, for example by permitting the Privacy Commissioner to examine and identify them as acceptable.
7	Add controls and practical reporting requirements or notice provisions to ensure that the exercise of powers to collect, use or disclose information in the course of law enforcement activities is subject to reasonable limits	Not addressed, despite the addition of language restricting collection and use of personal information without consent to law enforcement activities (see s. 7(1)(b), 7(2)(c) and 7(3)(c.1)). We do note and approve the requirement for colour of right in connection with disclosure (lawful authority to obtain information) in s. 7(3)(c.1).
7	Restrict ambit of 7(3)(a) and (b) or introduce controls and reporting requirements (notaries, govt. lawyers, persons collecting a debt)	Not addressed.
7	Clarify time period over which consent is considered to operate: Article 4.3.8 of the Standard (Schedule I) suggests that consent is perpetual unless specifically withdrawn at any time.	Not amended.
7	Clarify if blanket consent can be given, or just consent to explicitly stated uses	Not amended.
7	Define "research" in 7(2)(c)	Not addressed specifically.

Sec.	CBA Recommendation	Addressed in Bill C-6?
7	Amend research disclosure provisions to mirror federal *Privacy Act* (disclosure only permitted if research cannot be conducted without identifying information)	Amendment of ss. 7(2)(c) and 7(3)(f) appears to address CBA's concern.
7	Retain opt-out option for individual whose information is being used for research, etc.	Not addressed.
9	Protect data processing outsourcers by clarifying that outsourcers are not required to provide access to personal information they hold. This is because permitting such access likely violates contractual and practical limitations on access to the data processed by a third party. CBA suggested adding a new clause 9(3)(f) to specify this restriction.	Not addressed.
9	Clarify what qualifies as a "formal dispute resolution process" in s. 9(3)(e) (now s. 9(3)(d))	Not addressed.
Div. 2	Introduce possibility of compensation to an organization for frivolous or bad faith claim against it	Not addressed.
12	Define mediation, conciliation; ensure that disclosures made in the course of such processes are confidential; ensure that mediators are neutral, not parties (i.e. Privacy Commissioner or delegate); permit parties voluntarily to select mediation, rather than the process being mandated by the PC	Not addressed.
13	Add time limit for Privacy Commissioner's preparation of report	Time limit of one year was added to s. 13(1). Although this period may still be rather long, it does address the CBA's concern.
13	Modify to require the Commissioner to notify the organization, as well as the complainant, that no report is being prepared	S. 13(2) modified; accords with CBA recommendation.
14/15	Clarify to ensure that judicial review is available with respect to Commissioner's findings (statement that Act does not exclude rights of judicial review)	Not addressed.
18	Restrict audit power to where PC has reasonable grounds to believe that an obligation (not merely a recommendation) is not being met	Not addressed. The effect is that there is effectively no difference in the legislation between obligations and recommendations . This effect does not accord with the likely intentions of the parties who developed the CSA Standard.
30	Observed (p. 15-16) that effect of cl. 30 was to enable the federal government to expand its power to regulate trade and commerce by saying that it applies after 3 years if a province has not acted to fill the void.	Amendment addresses this in part by excluding federal works and undertakings from the exclusion. However, the basic objection is not met.

Comments Concerning Additional Amendments to Part 1

Sec.	Change Introduced in Bill C-6	CBA Comments
4(3)	Addition of provision ensuring priority over subsequent federal enactments unless specifically excluded from operation of this Act	Although this adds to the clarity of the Bill, it does not address the outstanding issue of whether the Act is intended to apply to existing data collected without consent, or purely prospectively.
7(3) 9(2.1)	Additional disclosure to law enforcement bodies, including on suspicion that information relates to national security; corresponding limits on release of such information on request to an organization for access to information held about an individual	Please see original comments re: addition of controls, reporting requirements, etc. to ensure that law enforcement-related infringements are justifiable as being only those necessary (*Charter of Rights and Freedoms*-compliant)
15	Restriction of the Commissioner's right to apply to the Federal Court – Trial Division for a hearing to circumstances in which the Commissioner did not initiate the original complaint (i.e. only where complaint originated with a complainant)	The CBA does not believe this amendment improves the Bill. If the remedy of a court order is to be available for a complaint, we do not understand the rationale for restricting it to individual-initiated complaints.
16(2)	Removal of the damages cap of $20,000	No comment.
17(2)	Addition of precautions to safeguard the confidentiality of information considered by the Court	The CBA would be concerned that this provision might infringe the Charter right to freedom of expression or be inconsistent to the exception for journalistic purposes found at cl. 7, although we do recognize the principle that if information is consistently treated as confidential, the mere fact of its relevance to court proceedings may not justify its disclosure.
25	Removed the section permitting the Commissioner, with the approval of the GIC, to delegate duties and powers to provincial counterparts	
27 / 27.1	Addition of provisions to protect whistle-blowers	
30	Reworded; two exceptions to exclusion added: 1), in connection with the operation of a federal work, undertaking or business; or 2), the organization discloses the information outside the province *for consideration.*	First exception meets a request for clarification made by the CBA with respect to application to federal works, undertakings and businesses (see above re: definition of this phrase), and appears to be correct. The second exception (addition of "for consideration") adds some clarity as to what might be considered "commercial activity" within the meaning of that term in the Bill.

Correspondence Between CBA Submission and Bill C-6: Part 2

With respect to Part 2 of Bill C-54, the CBA recommended that the legislation be amended to clarify that parties other than the federal government may use "electronic affidavits" and have access to the federal electronic signature verification system. No change has been made to this Part of Bill C-6 that would suggest this recommendation has been accepted.

Correspondence Between CBA Submission and Bill C-6: Part 3

- First, amend the proposed s. 31.2(2) to remove the requirement that a printout has been "manifestly and consistently" relied upon;

- Second, there appears to be an inconsistency in the treatment of printouts, on the one hand, and electronic documents, on the other. With respect to printouts, they are treated as having evidentiary weight if they are "manifestly and consistently" acted upon. Electronic documents, by contrast, have such weight only if, in addition, there is proof of the integrity of the document or of the system on which it was created. In view of the minimal technical distinction between the two forms, the CBA questioned why this inconsistency of treatment is established by the proposed legislation. Bill C-6 does not address this issue.

- Finally, the CBA recommended that the proposed s. 31.7 be amended to refer to the admissibility of "evidence", not "documents". This change has been made in Bill C-6.

Correspondence Between CBA Submission and Bill C-6: Part 5

Concerned that access to justice could be compromised by a decision to cease to publish the Statutes and Regulations of Canada in printed, as well as electronic, form, the CBA requested that Parliament consider amending s. 71 to require the Minister and Governor in Council, respectively, to continue to make printed version of these consolidations and of the Canada Gazette available. Although no amendment has been made to clarify this point, it is clear from the testimony of the Minister of Justice that the government's intention is to raise the authority of an electronic version of these documents to be equal to that of the printed version, rather than to supplant the printed version.

Although amendment to Bill C-6 is likely not required, the CBA commends to your attention the important issue of ensuring continued accessibility of Canada's legislation and regulations. It is important to recognize that although they are increasingly widely available, electronic means of communication and transaction are by no means ubiquitous in Canada. There is potential to disenfranchise some of Canada's more economically disadvantaged citizens by relying too heavily on electronic transactions to the exclusion of less expensive or complex ways of interacting with governments.

All of which is respectfully submitted.

W. Laird Hunter
Chair
Information Technology and Law Reform Steering Committee