



March 25, 2010

Michael Power
461 Roncesvalles Avenue, Unit B
Toronto, ON M6R 2N4

Dear Michael:

Re: 2010 PARTS Consultations

The National Privacy and Access to Information Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to participate in the consultations you are conducting for Industry Canada on the PIPEDA Privacy Awareness Raising Tools (PARTS). Industry Canada has tasked you to follow up on the recommendation from the House of Commons Committee on Access to Information, Privacy and Ethics:

The Committee recommends that the government consult with members of the health care sector, as well as the Privacy Commissioner of Canada, to determine the extent to which elements contained in the PIPEDA Awareness Raising Tools document may be set out in legislative form.

The CBA is a national association representing 37,000 jurists, including lawyers, notaries, professors of law and law students across Canada. The Association's mandate includes improvement in the law and in the administration of justice. The CBA Section comprises over 1325 lawyers with in-depth knowledge in the areas of privacy and access to information. The CBA Section is active in commenting on developments in privacy and access law and policy.

PARTS was developed in 2003 as a question-and-answer document to clarify the application of PIPEDA to the health care sector. You stated that your retainer includes soliciting the views of the CBA Section on the Parliamentary Committee's recommendation, and the continued relevance, effectiveness and ability of PARTS to assist the health care sector in understanding their obligations under PIPEDA as well as our general views on PARTS.

In a submission dated January 2008 to Industry Canada, the CBA Section offered the following:

The application of PIPEDA to the health sector has created uncertainties, particularly as it was not designed to apply and recognize the particular sensitivities and complexities of health information. The PARTS questions and answers appear intended to dispel some of these uncertainties.

However, the CBA Section believes it is neither simple nor advisable to merely append the PARTS questions and answers to PIPEDA. This could increase rather than decrease ambiguity, given that they were not drafted in legislative or regulatory language.

Instead, the CBA Section recommends that after further review by the Commissioner, the PARTS questions and answers guidelines be adopted as formal guidelines issued by that office, which would create more certainty as to its status. Industry Canada's web site currently references the PARTS document, indicating that the Commissioner was involved in the drafting process, but the document is not an official guideline on the Commissioner's own web site.

Developments since PARTS

There have been several significant developments since PARTS was first issued in 2003. Most importantly, several provinces have adopted specific health information legislation currently in force or soon to be in force.

Another significant development is the greater public and national discourse ¹ for an inter-operable and inter-provincial electronic health record (EHR) regime. It is arguable that PIPEDA, as a federal statute addressing inter-provincial disclosures of personal information for commercial purposes, has a role to play with the evolution of the EHR.

Simply revising or adding to PARTS to address the EHR is not sufficient. The CBA Section recommends that Industry Canada convene a multidiscipline group of stakeholders from the health, privacy, information technology/security and legal communities, as well as provincial and territorial privacy commissioners and the Canadian Institutes of Health Research, to address the EHR issue as part of the next mandated PIPEDA five year review. This would allow stakeholders to more fully investigate and assess the complexities of the issues, as the appropriate governance and consent model in an inter-provincial EHR. Key learnings in this quickly evolving area could be shared and reviewed from jurisdictions like British Columbia which has had e-health legislation since spring 2008.

Finally, the CBA Section recommends that, pending the recommended stakeholder meeting and the next PIPEDA five year review, Industry Canada should "date- stamp" the existing PARTS document and suggest in the preamble that users consider applicable legislation in their provincial or territorial jurisdiction.

Yours very truly,

(Original copy signed by David Fraser)

David Fraser
Chair, National Privacy and Access to Information Law Section

¹ See for example Speeches from the Throne in several jurisdictions and the fall 2009 Report of the Auditor General of Canada to the House of Commons, Chapter 4- (http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_04_e_33205.html) accessed March 5, 2010.