Le 23 juin 2008 **[TRADUCTION]**

Madame Jane Hamilton
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Madame,

Objet : ***Loi sur la protection des renseignements personnels et les documents électroniques* (LPRPDE) – Répercussions sur le processus judiciaire civil**

La Section nationale du droit de la vie privée et de l'accès à l'information de l'Association du Barreau canadien (la Section de l'ABC) est heureuse de participer à la consultation permanente d'Industrie Canada sur la Réponse du gouvernement au quatrième rapport du Comité permanent de l'accès à l'information, de la protection des renseignements personnels et de l'éthique portant sur la *Loi sur la protection des renseignements personnels et les documents électroniques* (LPRPDE). La Section de l'ABC a déjà exprimé ses points de vue sur la révision de la LPRPDE à Industrie Canada, à la Commissaire à la protection de la vie privée du Canada et au Comité permanent.[1] Plusieurs de nos recommandations portant sur des changements législatifs ont été acceptées par le Comité permanent et appuyées dans la Réponse du gouvernement.

La Section de l'ABC a plus récemment présenté ses commentaires à Industrie Canada sur plusieurs questions qui ont été soulevées sur la LPRPDE (notre mémoire de janvier 2008).[2] Parmi celles-ci figuraient les répercussions de la loi sur le processus judiciaire, notamment les

[1] Section nationale du droit de la vie privée et de l'accès à l'information, *Preparing for the 2006 Review of the Personal Information Protection and Electronic Documents Act* (Ottawa : ABC, 2005); *Preparing for the 2006 Review of the Personal Information Protection and Electronic Documents Act – Case Examples* (Ottawa : ABC, 2005); Document de consultation LPRPDE (Ottawa : ABC, 2006); *Examen quinquennal de la Loi sur la protection des renseignements personnels et les documents électroniques* (Ottawa : ABC, 2006).

[2] Section nationale du droit de la vie privée et de l'accès à l'information, Mémoire sur la *Loi sur la protection des renseignements personnels et les documents électroniques* (*LPRPDE*) (Ottawa : ABC, 2008).

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enquêtes et les organismes d'enquêtes et les déclarations de témoins.[3] Au cours d'une réunion ultérieure, les représentants d'Industrie Canada ont demandé aux représentants de la Section des informations plus précises sur l'incidence de la LPRPDE sur le processus judiciaire.

Le tableau ci-joint (Annexe 1) répond à cette question et tente d'exposer en détail les répercussions de la LPRPDE sur les litiges au Canada. Il traite des diverses étapes d'un litige, à peu près par ordre chronologique.[4] Il décrit également (a) les besoins et activités des clients et des conseillers juridiques pendant les diverses étapes du litige, (b) les règles de litige établies qui traitent des considérations relatives à la protection de la vie privée, et (c) les questions soulevées dans le cadre de la LPRPDE dans le contexte du litige.[5]

Nous reconnaissons toutefois qu'un litige se déroule rarement de manière aussi prévisible que notre tableau le suggère. Les frais, les considérations pratiques, la nature accusatoire du litige et la grande variété d'options et de tactiques accessibles aux parties contribuent à la nature dynamique et imprévisible du processus. Les questions cernées peuvent se présenter à toute étape du litige. Par exemple, une partie peut recueillir des faits et questionner des témoins à l'appui de sa demande à la veille du procès, ainsi, les questions de la LPRPDE en relation à l'enquête sur les faits ne sont pas limitées à l'étape qui se déroule avant le litige dans le cadre d'une instance. Les parties peuvent aussi changer leur opinion sur une cause à mesure que celle-ci évolue et, par exemple, modifier leur plaidoyer pour soulever de nouvelles questions ou en laisser tomber d'autres. Cela a un effet sur l'étendue des renseignements se rapportant à une procédure à divers moments, et la LPRPDE peut influencer une partie à recueillir, utiliser ou divulguer les renseignements à divers moments.

La Section de l'ABC croit que pour faire l'équilibre entre la protection de la vie privée et d'autres éléments dans le contexte de la bonne administration de la justice, il faut tenir compte de considérations différentes que lorsque la protection de la vie privée est contrastée à des besoins commerciaux ordinaires. Dans le contexte d'une procédure judiciaire, les tribunaux sont dans la meilleure position pour jauger les considérations relatives à la protection de la vie privée et le besoin d'une divulgation complète lors d'un litige, et les tribunaux ont joué ce rôle pendant plusieurs années, indépendamment des lois sur la protection des données. La cueillette, l'utilisation et la divulgation des renseignements personnels dans le cadre d'une procédure judiciaire devraient être régies par des règles de longue date conçues expressément pour ce contexte.[6]

Le rapport du Comité permanent a recommandé le modèle adopté dans la législation sur la protection de la vie privée de la Colombie-Britannique et de l'Alberta, et la Section de l'ABC a

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[3] *Ibid*. pp. 18 à 20 et 21 à 22.

[4] Le tableau ne traite pas des instances criminelles.

[5] Pour d'autres lectures sur la façon dont la LPRPDE peut influencer la législation, voir aussi Jeffrey A. Kaufman et J. Alexis Kerr, « Privacy in Action: The Impact of Private Sector Privacy Laws on Litigation in Canada » (2006) *Fasken Martineau DuMoulin s.r.l.*, en ligne : <http://www.fasken.com/publications/Detail.aspx?publication=2573>.

[6] Pour une discussion sur certains des moyens utilisés par les tribunaux pour mettre en œuvre les limites basées sur la protection de la vie privée, indépendamment de la loi sur la protection des données, voir Alex Cameron et Julie DesBrisay, « Existing and Emerging Privacy-based Limits in Litigation and Electronic Discovery » (2007) 12 C.P.L.R. 126.

elle aussi appuyé ce modèle dans ses mémoires antérieurs.[7] Nous continuons de faire valoir avec insistance qu'une approche similaire soit retenue pour la LPRPDE.

Nous apprécions cette occasion de participer aux améliorations permanentes à la LPRPDE et serons heureux de vous fournir un complément d'information au besoin.

Nous vous prions d'agréer, Madame, l'expression de nos sentiments distingués.

(copie originale signée par Gaylene Schellenberg pour David Young)

David Young
Président, Section nationale du droit de la vie privée et de l'accès à l'information

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[7] *Supra*, note 1.

Appendix 1

LITIGATION STAGE	NEEDS/ACTIVITES OF CLIENT/COUNSEL	ESTABLISHED RULES OF LITIGATION	ISSUES RAISED BY PIPEDA
PRE-LITIGATION			
Document retention and destruction	Client should implement a document retention policy. Client should implement a litigation hold mechanism to ensure preservation of documents in anticipated litigation.	Common law spoliation rules provide a sanction if parties' fail to preserve relevant evidence in litigation. [1]	Section 8(8) and Clause 4.5 contain retention and destruction rules for personal information.
Retaining legal counsel	Prospective clients must disclose information to retain counsel. Counsel must collect, use and possibly disclose information to conduct conflict check. Information needed for a conflict check may include personal information in connection with current prospective client matter and in connection with existing and past clients of the lawyer or firm.	Privilege, confidentiality and rules of professional conduct govern the use of client information, as well as the need to conduct conflict checks.	Section 7(3)(a) permits the client to disclose personal information to a lawyer who **is** representing the client. PIPEDA does not permit an organization to disclose personal information to a lawyer who **may** represent the organization. PIPEDA does not permit counsel to collect, use or disclose personal information to conduct a conflict check. Section 7(3)(b) may permit certain disclosures to potential counsel if the disclosures are "for the purpose of collecting a debt owed by the individual to the organization".
Fact Investigations	Clients and counsel must gather information from a variety of sources to understand and advocate for the client's legal rights and position. See also: Witness Statements.	Relevance is a defining concept in litigation. Improper fact investigations can result in information being inadmissible, or lead to sanctions such as costs, staying an action or removal of counsel.	See CBA Section January 2008 recommendation relating to investigations and investigative bodies. [2] PIPEDA fails to address agency issues, with ramifications for counsel and investigators. For counsel, although section 7(3)(a) permits clients to disclose personal information to their lawyer, there is no express exception for the lawyer to collect, use or disclose personal information and no exclusion for lawyers acting on behalf of their clients (the "Counsel Agency Problem"). This is a problem that recurs throughout the litigation process.

LITIGATION STAGE	NEEDS/ACTIVITES OF CLIENT/COUNSEL	ESTABLISHED RULES OF LITIGATION	ISSUES RAISED BY PIPEDA
			Often a lawyer is simply the agent of the party, yet PIPEDA appears to treat lawyers as separate collectors of information. For example, in Case Summary #340, two law firms were found to have breached PIPEDA. The law firms were held to have engaged in commercial activities, in that they acted for their clients to obtain credit reports about an individual for the purpose of potential litigation. The opposing argument was that the clients, if subject to PIPEDA, were entitled to collect the information under section 7(1)(b), so their lawyers were simply acting as agents and not prohibited from collecting the information.[3] Subject to section 9 of PIPEDA, questions arise about when lawyers can or must respond to access requests regarding information held for their clients. The access exemption discussed in the context of Witness Statements should extend to information collected for an investigation or legal proceeding. For investigators, an investigative body is not clearly characterized as the agent of the organization. Clearly recognizing the agency relationship in this context would allow an organization to disclose information without consent to an investigative body or to a second organization that has retained the investigative body as its agent.[4] A party to a proceeding or anticipated proceeding may collect personal information without consent of the individual subject of the information under section 7(1)(b). If the person providing the information is a private individual, that person is not prevented from disclosing it to the collecting organization. However, if an organization or an individual on behalf of an organization is providing the information, PIPEDA only permits disclosure with the consent of the data subject by court order (section 7(3)(c)), or to an investigative body (section 7(3)(d)). In other words, the party may collect the

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			information from an individual, but not from another organization because the other organization may not disclose it unless one or more of these requirements is met.[5] Implied consent of an individual litigant (in respect of their own personal information) may be available once litigation is commenced. See *Ferenczy v. MCI Medical Clinics*.[6] There is a question as to whether a Canadian lawyer disclosing personal information to a U.S. law firm in connection with a potential claim in Canada is subject to the requirement to give notice to affected individuals that their personal information may be subject to mandatory disclosure to U.S. authorities.[7]
Correspondence	Clients or their counsel in many cases send a demand letter prior to commencing litigation. Correspondence may be extensive between parties prior to the commencement of litigation. Clients and counsel must identify and interview key witnesses.	Confidentiality, rules of professional conduct and other rules (e.g. privilege, defamation) may govern the disclosure of personal information in correspondence. Relevance is a defining concept in litigation. Counsel are subject to rules of professional conduct in interviewing witnesses, including rules against contacting represented parties. Improper witness interviews can result in information being inadmissible, or lead to sanctions such as costs or removal of counsel.	Except in the narrow circumstance listed under section7(3)(b), PIPEDA does not permit clients or their counsel to disclose personal information in demand letters and other forms of pre-litigation correspondence with potential parties and others. Such disclosures are not required by law, even though they may be important to advancing a client's case. See also: Witness Statements, Pleadings and the Counsel Agency Problem. Clients can disclose personal information to their lawyer, but there is no provision in PIPEDA (except in collecting a debt) permitting disclosure to others potentially involved in the litigation process, such as witnesses, forensic accountants, private investigators, third parties, other lawyers, or expert witnesses. There is also no exception for such parties to further disclose the information, for example, in an expert report.[8] PIPEDA prevents an entity or individual (the witness) from disclosing relevant information about an incident to the extent that the information is about an individual (the subject) and the entity or witness was engaged in a commercial activity. For example, courts applying

LITIGATION STAGE	NEEDS/ACTIVITES OF CLIENT/COUNSEL	ESTABLISHED RULES OF LITIGATION	ISSUES RAISED BY PIPEDA
			PIPEDA have held that either the subject's consent or a court order is required before personal information can be disclosed by a witness to events giving rise to the claim.[9] Clients can disclose personal information to their lawyer, but there is no provision in PIPEDA (except in collecting a debt) permitting disclosure to others potentially involved in the litigation process, such as witnesses, forensic accountants, private investigators, third parties, other lawyers, or expert witnesses. There is also no exception for such parties to further disclose the information, for example, in an expert report.[10]
			PIPEDA prevents an entity or individual (the witness) from disclosing relevant information about an incident to the extent that the information is about an individual (the subject) and the entity or witness was engaged in a commercial activity. For example, courts applying PIPEDA have held that either the subject's consent or a court order is required before personal information can be disclosed by a witness to events giving rise to the claim.[11] Witnesses not wishing to assume the risk of liability for violating PIPEDA may not wish to disclose information unless ordered to do so. This often adds acrimony and procedural hurdles, and necessitates unnecessary motions before the courts. For parties without financial means to bring motions, the effect can be to prevent disclosure of relevant information in proceedings. PIPEDA also permits individuals to access witness statements that contain their personal information. Access to witness statements may identify the witness, reveal documents subject to litigation privilege and circumvent longstanding rules of civil procedure and discovery. Similar concerns may arise in relation to experts. (See: Experts). Individuals have even used PIPEDA to access information held by another party to attempt to change the information (through PIPEDA's accuracy rules) for the purpose of strengthening a claim or

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			potential claim.[12] See also: the Counsel Agency Problem.
Experts	On advice from counsel, a client may need to retain an expert on any number of issues in litigation. The collection, use and disclosure of personal information may be involved in the expert's retainer.	Privilege rules, rules of professional conduct and rules of court relate to retaining experts and expert reports.	Clients can disclose personal information to their lawyer, but nothing in PIPEDA (except in collecting a debt) permits disclosure to others potentially involved in the litigation process, such as witnesses, forensic accountants, private investigators, third parties, other lawyers, or expert witnesses. There is also no exception for such parties to further disclose the information, for example, in an expert report. See also: the Counsel Agency Problem. Similar to the access concerns raised in connection with Witness Statements, individuals can request access to their personal information held by experts. See: *Wyndowe v. Rousseau*.[13]
PLEADINGS			
Pleadings	Pleadings must contain concise statements of material facts and any points of law on which the claim or defence is based.	Rules of court and common law rules govern pleadings. Parties can request confidentiality orders (sealing orders) to safeguard personal or other confidential information in certain circumstances. For example, parties might be identified by initials only. Pleadings define issues and scope of relevance in litigation and thus define the proper scope of privacy protection in the litigation. See: *M. (A.) v. Ryan*.[14]	PIPEDA affects lawyers' ability to effectively draft pleadings, many of which disclose the personal information of individuals without their knowledge or consent. Although PIPEDA permits the disclosure of personal information without knowledge or consent where required by law (section 7(3)(i)), it is unclear if this exception would extend to including personal information in pleadings. See also: the Counsel Agency Problem.[15] Until clarification is provided, lawyers and clients must determine if including certain facts containing personal information in their pleadings justify the threat of a potential privacy complaint. Similar concerns arise in connection with correspondence. See: Correspondence.
Amending pleadings and striking	Pleadings can be amended on consent or by court order. New facts, claims or defences	See: Pleadings.	See: Pleadings.

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pleadings.	can be added and others may be deleted.	Modifying the facts, claims or defences in pleadings through amendment can expand of narrow the scope of information that is relevant in litigation, or alter the purposes for which the information is collected, used or disclosed.	The possibility that pleadings may be amended to add new claims or defences or to remove others can complicate the uncertainly faced by lawyers and clients in determining whether to include personal information in a pleading.
DISCOVERY			
Document discovery	Client must search records for documents to be disclosed, including electronic records. Parties must disclose all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power.	Rules of court, the implied undertaking rule and privilege rules address the proper scope of discovery as well as the use to which discovered information may be put. Sealing orders are also possible.	Section 7(3)(c) permits disclosure without consent to comply with rules of court relating to the production of records. See also: the Counsel Agency Problem.
Examination for discovery	Each party may examine one representative of any other party adverse in interest. Examining counsel must gather and review information to prepare for discovery. Counsel for party to be examined must gather and review information to prepare the representative to be examined.	Rules of court, the implied undertaking rule and privilege rules address the proper scope of discovery as well as the use to which discovered information may be put. Sealing orders are also possible.	There is no exemption in PIPEDA for oral disclosures made during discovery or court proceedings. The specific exception contained in section 7(3)(c) refers to "production of records". While a party may refuse material questions by arguing that an answer may involve information where disclosure is prohibited by PIPEDA, such a refusal can be overturned by a court order on motion. Recourse to the courts, however, results in not only increased legal costs between the parties, but further strains the legal system as a whole by a proliferation of otherwise unnecessary motions. The Alberta and BC PIPAs expressly resolved this issue by using the phrase "production of information". See also: the Counsel Agency Problem.[16] See e.g. *Clustercraft Jewellery Manufacturing Co. Ltd. v. Wygee Holdings Ltd.*[17]
Discovery of non-parties	Client and counsel must identify and obtain potentially relevant or valuable information that may be held by third parties.	Common law *Norwich* order compels a third party to provide information where an applicant believes it has been wronged and needs the third party's assistance to determine the circumstances of the wrongdoing and allow the	Unless another exception applies, PIPEDA permits non-parties to disclose personal information to a private litigant only with the subject's consent or pursuant to a court order.[19] There is some question as to whether disclosure could be made by a consent order. [20] See also: the Counsel Agency Problem.

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		applicant to pursue its legal remedies.[18] Rules of court also permit courts to order non-parties to produce relevant information.	
APPLICATIONS AND MOTIONS			
Applications and Motions (Affidavits, cross examinations and argument)	Parties typically must submit affidavit evidence in support of an application to court. Affidavits and the exhibits attached may contain personal information. Preparation for and the conduct of cross-examination on affidavits may involve the collection, use and disclosure of personal information. Oral and written argument (sometimes in the form of a notice of motion) may involve the disclosure of personal information.	Rules of court, common law, sealing orders.	Except as narrowly permitted under section 7(3)(b), as in the case of pleadings and other non-mandatory and non-court-ordered disclosures of information in litigation, it is unclear whether an affiant may disclose personal information in an affidavit, on cross-examination or whether counsel or a party may disclose personal information in the course of cross-examination or written or oral argument. See also: Pleadings, Fact Investigations and the Counsel Agency Problem.
Preservation orders	Parties may wish to seek an order for preservation of evidence in litigation.	*Anton Piller* orders may permit the seizure and preservation of relevant evidence. Common law and privilege rules govern this procedure.	PIPEDA permits the collection, use and disclosure of personal information as required by court order.
ALTERNATIVE DISPUTE RESOLUTION			
Mediation, arbitration and settlement.	In Ontario, for example, mediation is required in some cities.	Parties may be able to define rules and procedures relating to privacy to some degree. For example, parties may agree to keep an entire mediation, arbitration or settlement confidential.	PIPEDA contains no exception for personal information collected, used or disclosed in the context of mediations, arbitrations and settlements. This hampers parties' abilities to prepare for and engage in meaningful alternative dispute resolution. The exception to the access rule for information generated in the course of a formal dispute resolution process should extend to information generated in mediations and settlement processes.[21] See also: the Counsel Agency Problem.

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TRIAL AND APPEAL			
Pre-trial conference, witnesses, evidence, argument, hearings at trial and appeal.	Pre-trial conferences and the conduct of a trial can involve many forms of collection, use and disclosure of personal information as previously described. Despite extensive discovery procedures, new facts and issues may come to light for the first time in the course of a trial. Counsel must have sufficient information on hand to advocate for their client.	The general rule in litigation is the open court principle. However, rules of court, common law, privilege and other rules govern the use and disclosure of information at trial. For example, parties can obtain sealing orders. See: Pleadings, Applications and Motions.	See: Pleadings, Applications and Motions, the Counsel Agency Problem. Given the dynamic and "live" nature of a trial and appeals, it is important for counsel and clients to be able to collect, use and disclose personal information prior to trial to the greatest extent possible under established litigation rules. PIPEDA can interfere with this process in a number of ways as previously described. As above in the Applications and Motions section, it is unclear how far parties and counsel can go in disclosing personal information during trial hearings in the form of oral evidence, documentary evidence, questions and answers, and argument. Since disclosure at trial or on appeal is not required "to comply with rules of court relating to the production of records", but rather is needed to advance a client's case, it is unclear whether PIPEDA permits such disclosures (except perhaps in certain narrow disclosures under section7(3)(b)).

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[1] See generally Alex Cameron, "Electronic Discovery: Anticipating Litigation? Knowing What to Preserve and Preserving it Properly" (Paper presented to 2nd Annual e-Discovery: Equip Your Legal, Records, and IT Teams with Practical and Technical Solutions When Facing Litigation (Toronto, June 21, 2007) and Craig Jones, "The Spoliation Doctrine and Expert Evidence in Civil Trials" (1998) 32 U.B.C. L. Rev. 293.

[2] (Ottawa: CBA, 2008) at 16-17 and 18-19.

[3] *Ibid.* at 20.

[4] *Ibid.* at 19.

[5] *Ibid.* at 18-19.

[6] 2004 CanLII 12555 (ON S.C.) at para 31. See also *Shred-Tech Corp. v. Viveen*, 2006 CanLII 41004 (ON S.C.) at para 27-29.

[7] For further reading on how PIPEDA can impact on litigation, see also Jeffrey A. Kaufman and J. Alexis Kerr, "Privacy in Action: The Impact of Private Sector Privacy Laws on Litigation in Canada" (2006) *Fasken Martineau DuMoulin LLP*, available at: <http://www.fasken.com/publications/Detail.aspx?publication=2573>.

[8] S*upra* note 2 at 20.

[9] *BMG Canada Inc. v. Doe*, 2005 FCA 193 (CanLII) ("Pursuant to PIPEDA, ISPs are not entitled to 'voluntarily' disclose personal information such as the identities requested except with the customer's consent or pursuant to a court order." at para. 37).

[10] S*upra* note 2 at 20.

[11] *BMG Canada Inc. v. Doe*, 2005 FCA 193 (CanLII) ("Pursuant to PIPEDA, ISPs are not entitled to 'voluntarily' disclose personal information such as the identities requested except with the customer's consent or pursuant to a court order." at para. 37).

[12] See, Insurance Bureau of Canada, "Submission to the House of Commons Standing Committee on Access to Information, Privacy and Ethics on the review of the Personal Information Protection and Electronic Documents Act" (November 24, 2006) at 8.

[13] 2008 FCA 39 (CanLII) (handwritten notes of a doctor performing an independent medical examination of an insured person on behalf of, and paid by, an insurance company could constitute both the personal information of the individual examined as well as the personal information of the doctor).

[14] 1996 CanLII 5646 (S.C.C.). This case is discussed in the Section's January 2008 Submission, *supra* note 2.

[15] *Ibid.* at 20

[16] *Ibid.* at 20.

[17] 2004 CanLII 1647 (ON S.C.) (a party had to make an application to court to compel answers on discovery that had been initially refused to be answered on grounds of PIPEDA).

[18] See e.g. *Isofoton S.A. v. Toronto Dominion Bank*, 2007 CanLII 14626 (ON S.C.); *Enbridge Gas Distribution Inc. v. Toronto Dominion Bank (TD Canada Trust)*, 2008 CanLII 13363 (ON S.C.); *BMG Canada Inc. v. Doe*, *supra* note 9.

[19] *BMG Canada Inc. v. Doe*, *ibid.* ("Pursuant to PIPEDA, ISPs are not entitled to "voluntarily" disclose personal information such as the identities requested except with the customer's consent or pursuant to a court order," at para 37).

[20] See Kaufman & Kerr, "Privacy in Action", *supra* note 7 at 23.

[21] S*upra* note 2 at 21.