THE CANADIAN BAR ASSOCIATION
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March 19, 2020

Via email: Charles.Taillefer@Canada.ca

Mr. Charles Taillefer
Director, Strategy and Innovation Policy Sector
Innovation, Science and Economic Development Canada
235 Queen Street
Ottawa, ON K1A 0H5

Dear Mr. Taillefer:

Re: Proposed amendments to PIPEDA to address controller/processor obligations

I am writing as a follow-up to the Canadian Bar Association Privacy and Access Law Section's (CBA Section) December 2019 submission on *Strengthening Privacy for the Digital Age: Response to Proposals to Modernize PIPEDA* (attached for your ease of reference).

As a result of recent *Reports of Findings* by the Office of the Privacy Commissioner (OPC), the CBA Section urges the federal government to address transfers for processing in any future amendments to the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and, in particular, to address the distinction between controller and processor obligations.

Following the OPC's *Report of Findings #2019-001* on the Equifax data breach, the OPC held a consultation on whether transfers for processing required consent. After that consultation, the OPC temporarily reversed its original position that transfers for processing required individual consent. However, it appears that more recently, the OPC has again relied on an interpretation of PIPEDA for consent obligations and outsourcing that we believe would have significant negative consequences for the Canadian economy.

On November 26, 2019, the OPC and the Information and Privacy Commissioner for British Columbia released a joint report into AggregateIQ Data Services (AIQ) (*Report of Findings #2019-004*). AIQ is a data processing company working for political parties and campaigns that processes data to assist them to achieve their political or business objectives. Canadians and the international community have made legitimate criticisms about past work conducted by AIQ. Still, we believe that the OPC must avoid using its Reports to create results-based interpretations of PIPEDA that are likely to have materially detrimental effects if applied equally to ordinary commercial relationships.

In our experience, the prevailing interpretation of PIPEDA is that the organization in control of the personal information is accountable for ensuring that the processor of that information conducts itself such that the accountable organization may fulfill its obligations under the Act. If the activities of the accountable organization are not subject to PIPEDA, processing personal information does

not become subject to PIPEDA simply because an aspect of that processing has been outsourced. As the Federal Court concluded in *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*[1], if the primary activity is not subject to PIPEDA then the activity remains outside of PIPEDA even if third parties are retained to carry out that activity.

The OPC's interpretation of PIPEDA appears to contradict the *State Farm* case. For example, AIQ also worked for a mayoral campaign in Newfoundland and Labrador. No privacy law in that province applies to a mayoral campaign, but the OPC still found that AIQ needed consent to use information on behalf of the candidate. The campaign did not and would not need consent if it had done the processing itself but because it used a contractor, the OPC concluded that the campaign became subject to more laws and burdens than the provincial government had deemed necessary.

Similarly, the OPC concluded that PIPEDA required consent from voters for work by AIQ on behalf of US and UK campaigns. Though the laws regulating those campaigns did not require consent but allowed other lawful bases for processing, the OPC did not explain why Canadian law should supersede US and UK laws that governed the organizations accountable for the personal information.

The OPC's interpretation could put international trade at risk. As an example, organizations operating under the General Data Protection Regulation (GDPR) frequently process personal data based on "legitimate interest" and not consent. If the OPC interprets Canadian law as requiring consent where there is another lawful basis for processing personal information, it creates serious disincentives for European and other companies to use Canadian companies to safeguard and process data on their behalf. An international company would logically prefer to hire one of its own if hiring a Canadian company means disregarding its legitimate interest or other legal bases for processing and being subject to Canadian consent requirements.

The OPC's interpretation could also lead to odd results for the public sector, as suggesting that PIPEDA consent obligations apply when a private contractor carries out tasks for a government institution. Consent is not required under Canadian public sector privacy laws if the collection, use or disclosure is lawfully authorized and legitimate. The OPC's finding would impose PIPEDA's consent requirement on a commercial contractor for actions taken for its public sector client.

Finally, the OPC's decision interprets PIPEDA in a way that appears to exceed Parliament's legislative authority. The OPC's interpretation could mean, for example, that Parliament is indirectly regulating how employers process personal information in provinces or territories that have chosen not to legislate privacy rights for employees. Taken to its logical conclusion, the processor would be bound by PIPEDA to ensure the individual employee had consented even if the employer was not under any such duty. This would defeat Parliament's careful approach to PIPEDA's application to employee personal information in the case of federal works, undertakings and businesses. Parliament would also be interfering with provincial and territorial governmental bodies including municipalities' ability to outsource without meeting PIPEDA consent requirements. Further, the OPC's interpretation would give PIPEDA extraterritorial effects for the processing of personal information of individuals and organizations with no connection to Canada other than use of a Canadian service provider.

Finally, the OPC's interpretation is not grounded in the commercial reality of outsourcing relationships. It is unrealistic to expect that a Canadian processor will be able to confirm the quality of consent obtained from individuals by the outsourcing party.

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1 2010 FC 736, at para 106.

Given these likely ramifications, we recommend that any amendments to PIPEDA state that Canadian organizations can process personal information on behalf of third parties on the same basis and subject to the same legal regime (or lack thereof) as the original custodian or controller of that data. If properly written, this would address some of the gaps related to adequacy that have been experienced under GDPR for international transfers for processing.

Thank you for your attention to this matter.

Yours truly,

(original letter signed by Julie Terrien for Alexis Kerr)

Alexis Kerr
Chair, Privacy and Access Law Section

CC: Daniel Therrien, Privacy Commissioner of Canada, www.priv.gc.ca
Michael McEvoy, Information and Privacy Commissioner of British Columbia, www.oipc.bc.ca