



March 4, 2003

Mr. Richard Simpson,
Director General
Electronic Commerce Branch
Industry Canada
300 Slater Street
Ottawa, ON K1A 0C8

Dear Mr. Simpson,

Re: *Personal Information Protection and Electronic Documents Act*

We are writing on behalf of the National Working Group on Privacy Law of the Canadian Bar Association (the CBA Working Group) concerning a potential problem with the wording of paragraph 26(2)(b) of the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

The CBA Working Group is comprised of representatives of a number of CBA Sections whose areas of interest are affected by Canada's evolving privacy laws, including PIPEDA.

Paragraph 26(2)(b) allows the Governor in Council to make an order exempting an organization, activity or class from the application of PIPEDA. The Governor in Council must first be satisfied that legislation of the province where the organization, class of organizations, activity or class of activity in question is located is substantially similar to PIPEDA "in respect of the collection, use or disclosure of personal information that occurs within that province" [*our emphasis*].

An unintended effect of this wording may be that an exempting order could not cover information collected in one province and used or disclosed in another province. In other words, no exemption would be possible with respect to personal information "exported" from one province and "imported" into another, even if both jurisdictions had legislation recognized as "substantially similar" to PIPEDA and the personal information would therefore be protected by appropriate privacy legislation notwithstanding the interprovincial transfer.

Organizations that operate in two or more such provinces would have to comply with the personal information laws of each province, as well as with PIPEDA. On the one hand, the organizations would need to comply with the personal information laws of the "exporting" province for the "collection" of the personal information and its "disclosure" (assuming that the inter-provincial transfer is not made within the same organization). On the other hand, it would also have to comply with the personal information laws of each "importing" province insofar as any "use" or "disclosure" of the personal

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information in that province was concerned. Finally, the organization would also have to comply with PIPEDA.

We believe that this scenario would result in duplicative over-regulation, particularly as the personal information laws in the “exporting” province are likely to impose at least some requirements on “exports”. For example, section 17 of *An Act Respecting the Protection of Personal Information in the Private Sector* (Quebec) imposes obligations on enterprises communicating information outside Quebec relating to persons residing in Quebec. Similarly, sections 27 and 28 of the discussion draft of the *Privacy of Personal Information Act, 2002* (released by the Ontario Government in February 2002) dealt with use and disclosure outside Ontario of personal information collected in Ontario.

In situations where an organization will be complying with the laws of two provinces, and the individual concerned will have recourse to both independent oversight bodies, we suggest that it is not necessary to require the organization to comply also with PIPEDA, or to give the individual concerned recourse to the Privacy Commissioner of Canada.

It is possible that the words “collection, use or disclosure” in paragraph 26(2)(b) could be read disjunctively. Doing so would permit an exempting order to extend to any one of those three activities that takes place in an “importing” province, even when one or more of the activities in respect of the same information also takes place in the “exporting” province. In other words, if separate orders have been made for each province, then “collection” in the “exporting” province would be exempt, and “use” and “disclosure” in the “importing” province would also be exempt.

We are concerned, however, that the provision may not be interpreted that way. We note that the Privacy Commissioner of Canada (to whom we are copying this letter) does not appear to adopt this interpretation. The Guide for Businesses and Organizations posted on the Privacy Commissioner’s website, in describing the application of PIPEDA after January 1, 2004, says that:

The Act will also apply to all personal information in all interprovincial and international transactions by all organizations subject to the Act in the course of their commercial activities.

In his remarks on October 30, 2002 to the Regulatory Affairs Symposium of the Insurance Bureau of Canada, the Privacy Commissioner said that after January 1, 2004 PIPEDA:

will also continue to apply to personal information when it's collected, used, or disclosed across interprovincial or international boundaries.

Accordingly, the CBA Working Group urges you to consider whether it would be appropriate to make a limited technical amendment to PIPEDA to cover this point. We would suggest that this could be done by adding to the end of the paragraph:

whether or not the same personal information has also been collected, used or disclosed within another province.

We hope you agree that this proposed change will clarify the intent of the legislation and will help to avoid subjecting organizations to unnecessary overlap in compliance and oversight.

We should emphasize that PIPEDA would still apply if personal information were transferred outside Canada, or if it were transferred from an “exempt” province to a “non-exempt” province.

While we believe that a legislative solution would be preferable, we would suggest that in the meantime, exempting orders should include wording to clarify that the exempt activities “within a province ” include: 1) collecting personal information from another province in respect of which an exempting order has been made, and 2) transferring personal information to another province in respect of which an exempting order has been made.

If the exempting order applies only to particular classes of organization or activity, appropriate changes could be made. For example, if a general exempting order had been made for all Ontario organizations, but for Alberta the exempting order applied only to the collection, use and disclosure of personal health information, the combined effect of the orders would be to exempt the transfer of personal health information between organizations in Ontario and Alberta; the transfer of other kinds of information would be subject to PIPEDA.

Thank you for your attention to this matter. We would be pleased to discuss our recommendation with you at greater length.

Yours truly,

“original signed per Wendy Parkes”

Roger McConchie
Co-Chair

“original signed per Wendy Parkes”

David Young
Co-Chair

cc: George Radwanski
Privacy Commissioner of Canada