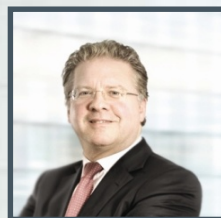


*September 19, 2017*

**PRIVACY, PROTECTION OF PERSONAL INFORMATION,  
NEW INFORMATION TECHNOLOGIES AND BIG DATA**

**ACI-NA ANNUAL CONFERENCE  
DALLAS-FORT WORTH**



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- ▶ Specific Acts that apply to Airport Authorities in Canada, such authorities being usually considered to be private entities:
  - > *Personal Information Protection and Electronic Documents Act (PIPEDA)* (Federal)
  - > *An Act respecting the Protection of personal information in the private sector* (Quebec) and similar legislations adopted by Provincial Legislators
  - > *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating certain Activities that Discourage Reliance Means of Carrying out Commercial Activities* (Anti Spam Act) (Federal)
- ▶ For the purpose of today's panel and discussion, I will exclusively talk about PIPEDA and the *Anti Spam Act*

## The federal regime

- ▶ the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”)
  - > applicable as a general rule to every organization carrying on a business in Canada (even a foreign work, undertaking or business) regarding the personal information it collects, uses or discloses in the course of its commercial activities, in Canada or abroad
  - > a “commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character (including the selling or leasing of goods and services, promotional activities, marketing, etc.)
  - > regarding works, undertakings or businesses under exclusive federal jurisdiction, PIPEDA also applies to personal information concerning an employee
  - > Applicable to internet communications

## The notion of “personal information” under PIPEDA

- ▶ personal information is defined as “information about an identifiable individual, but does not include the name, title or business address and telephone number of an employee of an organization”. According to the federal Privacy Commissioner, a business email address personal information.
  
- ▶ personal information includes:
  - > Any information that can be related to an identified or identifiable individual
  - > private communications
    - ▶ telephone or other conversations
    - ▶ Correspondence
    - ▶ Internet communications (user’s IP address, browser type, identification strings, technical parameters, websites visited, search terms, etc.)
    - ▶ Information pertaining to the individual’s behaviour
    - ▶ Information concerning consumer’s habits, location, activities, etc.
    - ▶ Cookies (behavioural advertising)
    - ▶ Active and passive fingerprinting
    - ▶ Cookie-like fingerprinting

## Collection of personal information under PIPEDA

- ▶ an organization is responsible for personal information under its control, including personal information that has been transferred to a third party for processing (Principle 1)
- ▶ the organization must draft explanatory documents, intended for the public, to provide information about its policies and procedures regarding protection of personal information
- ▶ the purposes for which personal information is collected shall be determined by the organization at or before the time the information is collected (Principle 2)
- ▶ the reasons why the personal information is collected shall be brought to the attention of the individual at the time of collection (Principle 2) and shall be documented (via an autonomous window on the website, for example)
- ▶ an organization may collect personal information only for purposes that a reasonable person would consider acceptable in the circumstances (PIPEDA, s.5(3))
- ▶ the consent of the person concerned is required for the collection of personal information unless the law allows collection without consent (Principle 3 and PIPEDA, s. 7)

## Collection of personal information under PIPEDA (continued)

- ▶ an organization may not require a person to consent to collection if the personal information is unnecessary
- ▶ a person may consent to collection of unnecessary personal information (this rule is not a matter of public order in the federal Act)
- ▶ the collection consent form, for example, must indicate which information is personal information and which is not
- ▶ the information must be collected from the person concerned except if:
  - > the collection is clearly in the interests of the individual and consent cannot be obtained from the individual in a timely manner
  - > the collection with the knowledge and consent of the individual would compromise the accuracy of the personal information and the collection is reasonable for the purposes related to investigating a breach of an agreement or a contravention of the law
  - > the collection is solely for journalistic, artistic or literary purposes
  - > the collection is made for the purpose of making a disclosure to a federal institution in matters related to national security, defense or international affairs
  - > the information is collected in the course of an investigation by an accredited investigative body
  - > the collection is required by law

## The communication of personal information under PIPEDA

- ▶ the organization may not communicate personal information to third parties without the consent of the person concerned unless the PIPEDA provides otherwise (Principle 3)
- ▶ the form of consent may vary according to the circumstances or the sensitivity of the information
- ▶ the communication of personal information to affiliates may be authorized, for example, by the organization's privacy policy or under a contract of adhesion, provided that reasonable measures are taken to inform the individual concerned
- ▶ an organization shall not require a consent to the disclosure of personal information beyond that required to fulfill the explicitly specified and legitimate purposes (Principle 4.3.3)

## The main exceptions to consent under PIPEDA

- ▶ Communication of personal information requires the consent of the person concerned except, notably, in the following cases (APPIPS, s.7(3)) :
  - > to comply with a subpoena, warrant or order
  - > if the disclosure is made to a federal institution in matters related to national security, defense or international affairs
  - > if the disclosure necessary for the enforcement of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
  - > if the disclosure is reasonable for the purposes related to investigating a breach of an agreement or a contravention of the law
  - > if the disclosure is required by law



## Security Measures under PIPEDA

- ▶ Principle 7 of the PIPEDA is to the same effect. The security measures should include:
  - > physical measures
  - > administrative measures
  - > technological measures
  
- ▶ In the matter of *TJX - Winners*, the federal Privacy Commissioner concluded that organizations must not only establish several layers of protection for their computer systems but must also follow technological progress to ensure that these measures are not obsolete or easy to bypass

- ▶ Tracking consumer's online activities and across sites in order to deliver advertisements targeted to their inferred interests, tailoring of advertisements based on an individual browsing activities (including purchasing patterns and search queries) is personal information
- ▶ PIPEDA requires an individual's knowledge and consent for the collection, use and disclosure of such personal information
- ▶ PIPEDA does recognize however that the form of consent can vary (express, opt-in, opt-out) depending of the sensitivity of the information
- ▶ Opt-out consent for online behavioural advertising could be considered reasonable providing that:
  - > Individuals are made aware of the purposes for the practice in a manner that is clear and understandable - the purposes must be made obvious and cannot be buried in a privacy policy. Organizations should be transparent about their practices and consider how to effectively inform individuals of their online behavioural advertising practices, by using a variety of communication methods, such as online banners, layered approaches, and interactive tools;

- > Individuals are informed of these purposes at or before the time of collection and provided with information about the various parties involved in online behavioural advertising;
- > Individuals are able to easily opt-out of the practice - ideally at or before the time the information is collected;
- > The opt-out takes effect immediately and is persistent;
- > The information collected and used is limited, to the extent practicable, to non-sensitive information (avoiding sensitive information such as medical or health information); and
- > Information collected and used is destroyed as soon as possible or effectively de-identified
- > Any collection or use of an individual's web browsing activity must be done with that person's knowledge and consent. Therefore, if an individual is not able to decline the tracking and targeting using an opt-out mechanism because there is no viable possibility for them to exert control over the technology used, or if doing so renders a service unusable, then organizations should not be employing that type of technology for online behavioural advertising purposes.

## Exception to the Rule Requiring Consent

- > According to the Anti Spam Act (section 8(8)), a person is considered to expressly consent to the installation of a cookie or similar program if his or her conduct is such that it is reasonable to believe that he or she has consented to this installation
- > There is no case law on the meaning and interpretation of this recent exception. However, we believe that it exclusively applies to cookies installed and used by the company with which the consumer has a commercial relationship. Conversely, it is not reasonable to presume that the consumer has consented to the sharing of information regarding his or her habits and preferences with third parties.

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