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# DOES THE NEW PRIVACY LAW APPLY TO MY ORGANIZATION?

## A BRIEF GUIDE TO DECIPHERING THE APPLICATION OF PIPEDA

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Many people have heard about Canada's new privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Many of them know that it generally governs the collection, use and disclosure of personal information, as that term is defined in the law. Fewer people, however, are sure about how it is being implemented and whether it even applies to them. Many in the non-profit sector assume – incorrectly – that it does not apply to them. Unfortunately, there is not always a clear answer and, in the absence of specific advice, many organizations will make assumptions that will cause problems later on.

PIPEDA (also known as Bill C-6), was passed by the Federal Parliament in 2000. On January 1, 2001, it began to apply to the collection, use or disclosure of personal information in connection with the operation of a "federal work, undertaking or business". At the same time, it also applied to transfers of personal information across provincial borders. The legislation was designed to allow individual provinces the opportunity to enact substantially similar legislation before PIPEDA would also apply to provincially-regulated organizations. As of January 1, 2004, PIPEDA will apply to such organizations in all four Atlantic provinces.<sup>1</sup>

Section 4 of PIPEDA sets out the two circumstances where the statute will apply. First, it applies to commercial activities and, second, it applies to employee information collected, used or disclosed in connection with the operation of a "federal work, undertaking or business".

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<sup>1</sup> The McInnes Cooper Privacy Working Group has queried each of the governments of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador. None have shown any interest in enacting private-sector privacy legislation. Quebec has had privacy legislation in place since 1994. Alberta and British Columbia expect to have legislation in place by the 2004 deadline.

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## Commercial Activities

On its face, it may seem straightforward to say that PIPEDA applies to personal information that an organization collects, uses and discloses in the course of commercial activities. Whether PIPEDA applies to your organization depends on whether your organization is engaged in "commercial activities", which is interestingly defined in the legislation:

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

Whether the Act applies does not depend upon the "business" you are in. Instead, each individual transaction involving personal information must be scrutinized. In addition, exchanges of donor information among non-profit organizations are explicitly caught in the Act's purview. These may come as a surprise to hospitals, universities and other entities that think of themselves as non-commercial.

The Canadian Institutes of Health Research (CIHR) has recommended that, at least in the health research context, "commercial activities" be interpreted to mean a for-profit transaction.

For greater certainty, personal information is collected, used or disclosed "in the course of commercial activities" within the meaning of paragraph 4(1)(a) of the Act, when the organization's activities are aimed primarily at making a pecuniary gain for the personal benefit of its members, as opposed to recovering its costs or promoting its philanthropic, charitable, scientific, health or other like objects.<sup>2</sup>

CIHR's position may have a legal foundation grounded in some judicial interpretations of the term "commercial activities". It remains to be seen whether the Office of the Privacy Commissioner will follow this line of reasoning and unfortunately there are no published decisions from the Privacy Commissioner on this issue to provide guidance.

Organizations in the educational, health or other non-profit sectors need to take PIPEDA very seriously, beginning with an examination of all facets of their operations. Embedded "for-profit" enterprises — such as book-stores and cafeterias — present clear PIPEDA risks. Transfer of alumni and donor lists are also encompassed in the definition of "commercial activity", demanding PIPEDA compliance every step of the way. In short, for an otherwise non-profit entity, any personal information that may — at any time — be the subject of a commercial transaction must be handled in compliance with the law.

<sup>2</sup> Canadian Institutes of Health Research. *Recommendations for the Interpretation and Application of the Personal Information Protection and Electronic Documents Act (S.C.2000, c.5) in the Health Research Context* (Ottawa, 2001). Available online at [http://www.cihr-irsc.gc.ca/publications/ethics/privacy/recommendations\\_e.pdf](http://www.cihr-irsc.gc.ca/publications/ethics/privacy/recommendations_e.pdf).

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## Employee Information for Federally-regulated organizations

Section 4(1)(b) explicitly includes within the purview of PIPEDA all personal information related to an organization's employees if that organization is a "federal work, undertaking or business", which is defined in Section 2 of PIPEDA:

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament. It includes

- (a) a work, undertaking or business that is operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;
- (b) a railway, canal, telegraph or other work or undertaking that connects a province with another province, or that extends beyond the limits of a province;
- (c) a line of ships that connects a province with another province, or that extends beyond the limits of a province;
- (d) a ferry between a province and another province or between a province and a country other than Canada;
- (e) aerodromes, aircraft or a line of air transportation;
- (f) a radio broadcasting station;
- (g) a bank;
- (h) a work that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces;
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; and
- (j) a work, undertaking or business to which federal laws, within the meaning of section 2 of the Oceans Act, apply under section 20 of that Act and any regulations made under paragraph 26(1)(k) of that Act.

It is important to note that this list is not exhaustive. Personal information holdings vary by company and by industry. One element that is constant is that all organizations that have employees collect and use the personal information of their workers. The imposition of PIPEDA's principles for employee information represents a very onerous obligation and it leaves organizations vulnerable to complaints by unhappy employees. In light of the risks inherent in being federally regulated, organizations are urged to definitively determine whether they are a federal work, undertaking or business.

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## Exclusions

Section 4(2) of PIPEDA carves out a number of exceptions to the application of the Act. The first, at Section 4(2)(a), excludes any federal institution to which the *Privacy Act* (Canada) applies.<sup>3</sup> The collection, use and disclosure of personal information that is solely for personal or domestic purposes or for journalistic, artistic or literary purposes is similarly excluded from the purview of the Act. For example, in Case Summary #89,<sup>4</sup> the Privacy Commissioner considered a complaint by an airline passenger who objected to having his picture taken by the pilot of the aircraft. It was the last time the pilot was to be flying that type of aircraft and he took the pictures around the cabin, photographing the complainant in the process. The Commissioner dismissed the complaint, saying that as personal mementos, the photos were for a personal or domestic purpose and this collection of personal information was excluded from the Act.

## Conclusion

PIPEDA is being phased in gradually: federal works, undertakings and businesses have been subject to the law since 2001; provincially-regulated organizations are subject to the law with respect to commercial activities. In addition, the collection, use and disclosure of employee information is regulated for employees of federal works, undertakings and businesses. Whether an organization is federally regulated dramatically affects that organization's privacy law compliance obligations. Likewise, if a "transaction, act or conduct or regular course of conduct" is of a commercial character, associated personal information will be subject to the new law. Embedded commercial activities within otherwise non-commercial organizations may pose hidden risks.

Unfortunately, the lines between organizations and activities that may or may not be regulated by the new federal law are not very clearly drawn. All organizations that deal with personal information should carefully examine their operations in light of PIPEDA to determine the extent of their privacy obligations.

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<sup>3</sup> Organizations may find themselves subject to both PIPEDA and provincial public sector privacy legislation, depending upon the interpretation of the provincial Acts. Organizations should not assume that, because they are subject to existing provincial legislation, they will be exempt in some way from PIPEDA.

<sup>4</sup> Available online at [http://www.privcom.gc.ca/cf-dc/cf-dc\\_021112\\_1\\_e.asp](http://www.privcom.gc.ca/cf-dc/cf-dc_021112_1_e.asp).

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## The McInnes Cooper PIPEDA Team

McInnes Cooper has assembled a Privacy Working Group, comprised of lawyers with expertise in advising business on PIPEDA, including whether and to what extent individual organizations are subject to the new law. If you have any questions, please contact any of the following:

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