



9 May 2007

Richard Simpson  
Director-General,  
Electronic Commerce Branch, Industry Canada  
300 Slater Street  
Ottawa, Ontario K1A 0C8

BY EMAIL and MAIL

Dear Mr. Simpson,

Re: ETHI Committee Report on PIPEDA Review

I understand that your branch is responsible for advising the Minister on matters related to federal data protection legislation, specifically the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The purpose of this letter is to advise you of two concerns we have with the recent report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics ("ETHI Committee") following their review of PIPEDA. These are not the only concerns we have with the report, but we feel that they warrant comment at this time.

Failure to address the compliance problem

As you know, we submitted a brief to the Committee and testified before it late last year. The major thrust of our submission and testimony was that, while there are a number of substantive matters deserving attention in the Act, a much more serious problem is the absence of any effective incentive for businesses to comply with the legislation. As a result, there is widespread non-compliance with the Act, as demonstrated by our study last year of 64 online retailers. (Copies of our report, "Compliance with Canadian Data Protection Laws", were sent to you and can be downloaded from our website.)

We made a number of recommendations to the Committee designed to beef up PIPEDA's currently weak enforcement regime. Only one of these recommendations was to give the Commissioner order-making powers. Others include allowing for class actions, providing for punitive damages, and removing financial risk obstacles to individual applications under s.14 of the Act. None of these alternative recommendations were addressed in the Committee's report.

We strongly believe that some measures are needed in order to give the legislation the "teeth" it currently lacks. Should this government wish to take action in response to the

Committee's report, we urge you to consider Recommendations 3-6 in our Submission to the Committee, available on our website at <http://www.cippic.ca/en/projects-cases/privacy/submissions/> and reproduced in an attachment to this letter.

Overly broad expansion of lawful access, through an inappropriate vehicle

While a number of the Committee's recommendations are encouraging (e.g., recommendations 4, 14, 15, 21, 23-25), a few raise concerns from the perspective of civil society. We are especially disturbed by Recommendation 12, and in particular by the recommendation to turn a permissive exception for disclosure to government agencies in subs.7(3)(c.1) into a mandatory requirement for disclosure upon request, without warrant, by law enforcement agencies.

It is our understanding that no party, not even law enforcement agencies, requested such an amendment. This is not surprising, given that it makes no sense in the context of a data protection statute. Moreover, such an amendment would be unlikely to pass *Charter* scrutiny as it completely removes the due process established under Canadian law for searches and seizures. Even the proposed *Modernization of Investigative Techniques Act* (currently Bill C-416) does not go so far as this amendment would; it would limit mandatory disclosure in response to warrantless requests from law enforcement agencies to subscriber name, IP address, and contact information.

We suspect that this recommendation was made without full consideration of its implications, and trust that it will not be acted upon without such consideration.

We would be pleased to meet with you or your staff to discuss the Committee's report or any other matter related to PIPEDA.

Yours truly,

*Original signed*

Philippa Lawson

Cc: Privacy Commissioner of Canada

## **Excerpts from CIPPIC Recommendations to ETHI Committee re; PIPEDA Review**

### Recommendation #3:

[If PIPEDA is amended to give the Commissioner order-making powers, include a statutory right of action for damages for successful complainant via an expedited procedure in Federal Court (or Tribunal), under which applicants are insulated from adverse costs orders and are entitled to solicitor-client costs should they succeed in obtaining damages.]

If the current redress/enforcement regime is retained, amend s.14 of PIPEDA to protect bona fide applicants from adverse cost awards in Federal Court, and provide for solicitor-client costs in the event of successful applications.

Whether or not the redress/enforcement regime is changed, protect individual applicants for judicial review of Commissioner decisions from adverse cost awards other than in exceptional circumstances.

### Recommendation #4:

Protect complainant privacy by requiring the Federal Court (or Tribunal) not to publish any identifying information about complainants in applications for damages, enforcement, judicial review, or otherwise.

### Recommendation #5:

Provide for punitive as well as compensatory damages under s.16 of PIPEDA.

### Recommendation #6:

Permit class actions under s.14 of the current model or under a new statutory right of action, if adopted. Further amend s.14 to permit Federal Court applications by similarly affected individuals, not just those complainants who lodged the complaint in question.