



February 26, 2016

Delivered via Fax: 780-427-5688

c/o Jody Rempel, Committee Clerk
3rd Floor, 9820 – 107 Street NW
Edmonton, AB T5K 1E7

Attention: Standing Committee on Alberta's Economic Future

Dear Sirs/Mesdames:

Re: The *Personal Information Protection Act* Review (29th Legislature)

This is the written submission of the Canadian Association of Counsel to Employers ("CACE") to the Standing Committee on Alberta's Economic Future ("Standing Committee") with respect to its review of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA").

By way of background, CACE is an association of management-side labour and employment lawyers across Canada. CACE promotes excellence in the specialized field of labour and employment law, and engages in legislation and law reform activities at the provincial and federal level. Created in 2004 by a Founders' Committee of labour lawyers across Canada, CACE now has over 950 members, including leading labour and employment counsel, corporate counsel and affiliate members from the United States.

CACE has reviewed the Standing Committee's Discussion Guide. In light of the limited time available to respond, we have restricted our comments to the following questions posed by the Standing Committee:

- 2. Should PIPA include additional exceptions to consent that would permit other kinds of organizations (i.e., other than trade unions) to collect, use or disclose personal information of individuals for purposes of free expression without those individuals' consent? If so, which kinds of organizations and for what types of free expression purposes?
- 12. Are the exemption provisions for refusing access to an individual's own personal information appropriate? Please explain why or why not and provide suggestions.
- 18. Should the Commissioner's powers be changed or expanded? Please explain why or why not and provide suggestions.
- 22. Do you have any other suggestions or comments regarding PIPA? Please comment on any topic relevant to PIPA not addressed by this discussion guide.

Should PIPA include additional exceptions to consent that would permit other kinds of organizations (i.e., other than trade unions) to collect, use or disclose personal information of individuals for purposes of free expression without those individuals' consent? If so, which kinds of organizations and for what types of free expression purposes?

As the Standing Committee is aware, PIPA was amended in December 2014 in response to the Supreme Court of Canada's decision in *Alberta v. UFCW*, 2013 SCC 62 to clarify that a trade union could collect, use and disclose personal information without consent in limited

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circumstances concerning a matter of significant public interest or importance relating to a labour relations dispute. Sections 14.1, 17.1 and 20.1 were added to PIPA as a result. It is the position of CACE that employers, along with other organizations that are impacted in a labour relations dispute (allies, etc.), should be included in sections 14.1, 17.1 and 20.1, so that the right of freedom of expression of an employer, along with other organizations that are impacted in a labour relations dispute (allies, etc.) is recognized in the same manner as the recognition given to trade unions. The labour relations regime in Alberta strikes a delicate balance between the interests of trade unions and employers. To preserve this balance, the right recognized by the Supreme Court of Canada should be applied equally to trade unions and employers. As such, employers should have equal ability to collect, use and disclose personal information without consent in limited circumstances concerning a matter of significant public interest or importance relating to a labour relations dispute.

Are the exemption provisions for refusing access to an individual's own personal information appropriate? Please explain why or why not and provide suggestions.

CACE agrees with the exemption for refusing access to an individual's own personal information in the case of information that was collected for an investigation or legal proceeding (section 24(2)(c)). Employers should have the ability to refuse to provide access to investigation interview notes, investigation reports, etc. when an employee makes an access request. Although there are other exemptions which might allow the employer to refuse to provide access to some of the documents (e.g., if the investigation was conducted for the purposes of obtaining legal advice, or if the disclosure would disclose personal information about or disclose the identity of a third party who provided information in confidence), those other exemptions may not apply in all circumstances or will require the employer to go through and redact the documents on a line by line basis rather than simply being able to withhold the documents completely. Witnesses in investigations are often told that their information will be kept confidential to the greatest extent possible and the removal of the "investigations" exemption might make it more difficult to do so or have the unintended consequence of preventing witnesses from participating openly in investigations.

Should the Commissioner's powers be changed or expanded? Please explain why or why not and provide suggestions.

The Standing Committee should consider whether the adjudication and investigation functions of the Privacy Commissioner should be separated (similar to the separation in other legislative schemes that impact the workplace, such as occupational health and safety, employment standards, human rights and labour relations). Currently, PIPA establishes a unique scheme whereby the Privacy Commissioner investigates complaints and ultimately conducts an inquiry into complaints that are not resolved.

For instance, an occupational health and safety issue is dealt with by Alberta Occupational Health and Safety Officers and if the matter is appealed it is adjudicated by an arm's length and independent tribunal called the Occupational Health and Safety Council. The tribunal does not conduct the investigation or anything related to the gathering of facts, etc. If there is a dispute, the employee and the employer both have the opportunity to retain counsel to appear at a hearing. The investigating Occupational Health and Safety Officer is available as a resource, but is there in a supporting role and has no involvement in the adjudication.

Likewise, in the human rights arena, the Alberta Human Rights Commission investigates the complaint and is separate from the Tribunal, which deals with the adjudication of an unresolved complaint.

And, with regard to employment standards, the Alberta Employment Standards Branch investigates employment standards complaints and is separate from the ultimate adjudicator, the Umpire (which is a Provincial Court Judge sitting in this independent capacity). The Employment Standards Branch will present the case to the Umpire, but the adjudication by the Umpire is independent.

Finally, under the *Alberta Labour Relations Code*, investigations conducted by a Labour Relations Board Officer are independent from any matter that ends up in a contested fashion before the Labour Relations Board.

The above bodies long ago separated the investigation aspects of their respective statutes from the adjudicative aspects. These steps were taken in order to avoid legal challenges about the independence of the adjudicator. The Standing Committee should consider whether the like situation should apply to the Office of the Information and Privacy Commissioner of Alberta.

In addition, the Standing Committee should consider whether the Privacy Commissioner, under PIPA, should have the ability to review documents for which a claim of solicitor-client privilege has been made (this issue is currently before the Supreme Court of Canada, with respect to the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25).

Do you have any other suggestions or comments regarding PIPA?

In addition to the comments above, CACE wishes to comment on disclosure of personal information by employers to trade unions. At present, employers are required to disclose personal information only in limited circumstances (for example, contact information of members to a certified bargaining agent in accordance with the provisions of a collective agreement, after a grievance has been filed). The current provisions of PIPA applicable to the collection, use and disclosure of personal information to trade unions are effective and appropriate for the purposes for which that information is required by trade unions, and is consistent with the legislation in other provinces and arbitral and board case law. Such provisions should not be broadened.

Should the Standing Committee wish to seek further comments from CACE, we would be happy to assist the Standing Committee. Please direct any inquiries to the Executive Director of CACE, Tracy Scanks, by email at [redacted] or by phone at [redacted].

Sincerely,

[redacted signature]

On behalf of: Canadian Association of Counsel to Employers