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TO Standing Committee on Resource Stewardship
in relation to review of PIPA

May 29, 2024

FROM Canadian Association of Counsel for Employers (CACE)

We write pursuant to the Standing Committee on Resource Stewardship's invitation to make written submissions in relation to its review of the *Personal Information Protection Act* ("PIPA").

Established in 2004, the Canadian Association of Counsel to Employers ("CACE") is Canada's only national association of lawyers that regularly represent employers in labour and employment matters. Its membership includes over 1,850 lawyers across Canada, with 226 of them being in Alberta. CACE engages in legislation and law reform activities at the provincial, territorial and federal levels. Its objectives include providing governments, courts, labour boards and other administrative tribunals with input on policy and legislative reform from the perspective of lawyers acting on behalf of employers in Canada. CACE members include in-house and external counsel. It is fair to say that CACE members advise most Alberta public and private sector employers.

One of CACE's top priorities is presenting timely and substantive submissions on public policy matters of interest to its membership and constituency. It regularly monitors key developments in the legislative and regulatory arena, and draws upon the shared experience and expertise of its members to address legal issues affecting Canadian employers through various subcommittees including our Advocacy Committee and our Privacy Committee.

We understand the Standing Committee on Resource Stewardship is currently accepting written submission in relation to its review of PIPA. As an organization of management-side lawyers with a number of members in Alberta, the application of PIPA to the collection, use and disclosure of employee information is a topic of significant interest to CACE.

PIPA's current form recognizes the importance of balancing the privacy interests of employees with the legitimate need of employers to collect, use and disclose the personal information of employees (prospective, current and former) without having to obtain consent. It does so by requiring an employer to provide notice to employees of the purposes for which it will collect, use and disclose the personal information of employees, and by limiting the information it can collect, use and disclose without consent to only that information which is reasonably required for the purposes of establishing, managing or terminating the employment relationship, or managing the post-employment relationship. If the



personal information is information that is unrelated to the employment relationship, the usual rules with respect to consent apply.

It is the position of CACE that any amendments to PIPA must continue to recognize the legitimate need of employers to manage employees without imposing impractical or unworkable consent rules involving the collection, use or disclosure of personal information about employees. PIPA currently hits the appropriate balance by permitting employers to collect, use and disclose employee personal information for reasonable purposes, provided that the employee is provided with notice. The Committee should not change this framework, which is mirrored in British Columbia's *Personal Information Protection Act* and then was followed by the Federal Parliament's 2015 amendments to the *Personal Information Protection and Electronic Documents Act*.

In this regard, we note that one of the questions posed in the document, *Emerging Issues: The Personal Information Protection Act*, created by the Committee for the purposes of its review, is whether provisions should be added to PIPA specifically dealing with biometric information (Section 5.1.a Biometric Information). It is the view of CACE that no such provisions need to be added. Biometric information is already considered to be "personal information" and thus subject to PIPA's general rules. A significant number of employers regularly collect and use biometric information of employees in systems such as, but not limited to, fingerprint/handprint/voiceprint access systems and systems which record calls for quality control purposes. There is already a significant body of case law governing the use of these systems which is well-understood and balances employees' privacy rights with the legitimate need of employers. Adding provisions to PIPA which separately define and delineate obligations with respect to the use of biometric information will add complexity and uncertainty for organizations without adding any significant value with respect to the privacy rights of individuals.

Although not dealt with in the *Emerging Issues* document, CACE wishes to address another issue of significance to employers in Alberta. In a 2020 decision (*Weinrich Contracting Ltd.*, Order P2020-D-01), the Privacy Commissioner determined that a settlement agreement between parties which included (1) an agreement that a Complainant would withdraw a complaint made pursuant to PIPA against a Respondent (the "Complaint"), and (2) the signing of a release agreement pursuant to which the Complainant released the Respondent from any and all allegations relating to a breach of privacy, did not prevent the OIPC from proceeding to adjudicate the Complaint. In reaching this conclusion, the Privacy Commissioner interpreted section 4(7) of PIPA:

4(7) This Act applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under this act is against public policy and void.

The Privacy Commissioner concluded that even in the face of a provision (section 50(1)(c)) which prevents the Privacy Commissioner from proceeding with an inquiry if a matter is otherwise resolved,

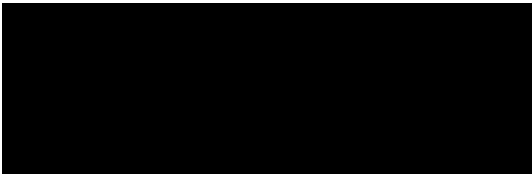


section 4(7) renders void any settlement which purports to waive the rights, benefits or protections provided under PIPA.

Recognizing that this is not the appropriate forum in which to argue about the reasonableness or correctness of this decision, it is the position of CACE that PIPA must recognize the rights of an organization and an individual to reach a binding settlement with respect to an alleged breach of the individual's privacy rights. To do otherwise ignores the public interest in allowing parties to resolve their own disputes and expect finality with respect to those resolutions, and raises concerns related to the efficient use of limited judicial resources. Further, privacy legislation such as PIPA which is focused on the rights of individuals with respect to the collection, use and disclosure of their own personal information is different from, and engages different interests than, privacy legislation such as the Freedom of Information and Protection of Privacy Act, which is intended to allow general access to information in the custody and control of public bodies and to ensure transparency of government action. While public policy concerns about government transparency might outweigh other interests in the case of access to information legislation, similar concerns do not, and should not apply to legislation which deals with the rights of individuals vis a vis private organizations. Should you be interested in hearing further from CACE with respect to this issue, we would be pleased to meet with you, or make further written submissions.

Thank you for the opportunity to make submissions. We would be happy to discuss these issues with you at your convenience.

Kind regards,



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Executive Member, CACE Privacy Committee

cc. Executive Director, CACE

