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SUPPLEMENTARY SUBMISSION TO THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

May 4, 2017

Review of the *Personal Information Protection and Electronic Documents Act*

Further comments regarding the enforcement model – possible privacy breach offence

This supplementary submission is directed to clarifying my comments regarding the enforcement model under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") as expressed to the Committee in my written Submission (April, 2017) and in response to members' questions during my appearance before the Committee on April 4, 2017. I hope that these additional comments will assist the Committee in its consideration of the nature of any new offence for contravention of PIPEDA and, specifically, the degree of "fault" required.

In my evidence to the Committee, I suggested that, if deemed appropriate, an offence for breach of the substantive provisions of PIPEDA, punishable by fines and prosecuted by the appropriate law enforcement authority (the Attorney General of Canada) could be considered and would not be inconsistent with the current PIPEDA ombudsperson model. Such an offence, I suggested, should require some significant degree of fault. The example I provided was an intentional, overt, breach of the law, involving complete failure to meet due diligence requirements.

I cited the example of Alberta's private sector law[1] which includes an offence for collecting, using or disclosing personal information in contravention of the privacy protection provisions of that Act, and characterized that offence as requiring intention. The actual language of that statute does not use the word intention, or intent, but provides a defence if a person who is alleged to have contravened the rules "acted reasonably in the circumstances".[2] I characterized the offence as one of "intentional breach"; however a more precise description would be "an unreasonable act of breaching the privacy rules", which may not be the same as an intentional breach.

My objective in citing the Alberta statute as an example for an offence punishable by a fine was to suggest that simple breach (which could be inadvertent) should not be sufficient; there must be a level of fault. There are several levels of fault that could be ascribed.

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[1] *Personal Information Protection Act*, S.A. 2003 c.P-6.5

[2] Sections 59(1)(a),(4)

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In the absence of any statutory defence, an offence for breach of a privacy statute in its simple terms likely would be characterized as one of strict liability. Strict liability offences are those which the courts have interpreted as not requiring proof of criminal intent or "*mens rea*", but merely a failure to exercise due diligence. Such "regulatory" offences are found in environmental and occupational health and safety legislation and included the former misleading advertising prohibitions under the *Competition Act* prior to its amendment dividing such prohibitions into reviewable matters (not involving criminal penalties) and criminal offences for *knowingly or recklessly* making false or misleading representations.

The common law due diligence defence has been described as available if the defendant took all reasonable steps to avoid committing the offence. This characterization has been interpreted in cases to mean a failure to exercise reasonable care to avoid foreseeable risks of contravention[3], which in effect is a negligence standard. In other words, the offence becomes one of negligence. Sometimes a due diligence defence is expressly provided in a statute. However if the statute contains strict liability offences, this express stipulation of due diligence defence is not required.

The Alberta statutory defence of failing to act in a reasonable manner may be equivalent to a statutory due diligence defence. If it is, my characterization of the Alberta rule as requiring intent likely overstated the fault requirement. My purpose was to indicate that if an offence punishable by a fine (and potentially a significant fine) is to be instituted, a significant level of fault should be required. The example that I provided for such an offence, as set out above, contains some or all of the descriptions that might be stipulated. Others may argue that a lesser degree of fault should be required.

Prescribing a regulatory offence *without qualifying it in the statute* either by stipulating a specific degree of fault or by providing defences such as due diligence or acting reasonably (as in the Alberta law), would mean that the offence likely would be characterized as one of "strict liability" for which a due diligence defence is available at common law.

Reference to the Alberta rule is instructive; it is an example of a regulatory offence that by virtue of its acting reasonably requirement is in effect qualified by a degree of fault. As I suggested in response to a Committee member's question, simply requiring "intention" to breach the law, without additional characterization, could result in a low level of fault, since it could be argued that a person may intentionally conduct themselves in a manner that is in breach of the law, believing that their actions are compliant when they in fact are not A requirement that they did not act reasonably in the circumstances may - or may not - indicate a level of fault higher than a due diligence standard.[4]

[3] *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299; *R. v. MacMillan Bloedel Ltd*., [2002] B.C.J. No. 2083

[4] In response to another question from Committee member Mr. Daniel Blaikie, I suggested that negligence was not sufficient to commit an offence for noncompliance but that at least gross negligence should be required. My

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Summary

If it is determined that additional enforcement powers for the Privacy Commissioner are needed and that a provision for imposing monetary penalties for breach should be included, I have suggested that an offence for breach, punishable by fines as in the Alberta private sector law, would be an appropriate approach. Such an approach would maintain the integrity of the ombudsperson model which I believe has served the enforcement of our privacy laws well. If it is contemplated that significant fines may be imposed for such an offence, I submit that a level of fault commensurate with such penalties should be required.

comments in this regard were not correct if the offence is one of strict liability since for those offences, as I have indicated here, negligence (or a failure of due diligence) is sufficient.

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