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PRIVACY LAW

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## Federal Legislation Governing the Collection, Use and Dissemination of Personal Information to apply throughout Atlantic Canada as of January 1, 2004

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In the months leading up to January 1, 2004, businesses can anticipate a significant burden in becoming compliant with new federal privacy legislation. In 1999, the Federal Parliament passed a statute known as the *Personal Information Protection and Electronic Documents Act* or "PIPEDA" for short. As the title suggests, the statute addresses two discrete elements: (1) personal information protection and (2) electronic contracts. For businesses, the former element will require the most resources in the coming years.

At present, most companies are unrestricted in the manner in which they deal with personal information. Businesses are free to amass personal information on employees and customers regardless of how such information is collected. Personal information can be bought and sold or given away to affiliates or co-venturers. Businesses can even refuse service to consumers who decline to share their intimate personal information whether or not it is relevant to the service being provided. All this will radically change on January 1, 2004.

The public sector in each Canadian jurisdiction has had privacy-protecting legislation and policy for a long time, but private sector personal information practices have been largely unregulated. In light of the lack of legislation and the threat of government intervention, the private sector produced a model code for the collection, handling and dissemination of personal information, called the CSA Model Code. Even though the (voluntary) Model Code was favourably received, the Federal Parliament decided it was necessary to enshrine privacy in the private sector into law, so the Model Code was appended to PIPEDA as Schedule I.

Private sector privacy legislation is being phased in: Starting January 1, 2001, the dictates of PIPEDA applied to the federally-regulated private sector, which includes entities such as internet service providers, banks, airlines and telecommunications companies. On January 1, 2004, the statute will apply to the provincially-regulated private sector as well unless the individual province adopts substantially similar privacy legislation. At the moment, none of the Atlantic provinces have shown any interest in doing so.

PIPEDA defines "personal information" to mean information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of

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an organization. This definition is very broad and the requirements of the statute are onerous. PIPEDA requires businesses to adhere to the following ten privacy principles, taken from the CSA Model Code:

- 1. Accountability** - an organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the principles contained in the Canadian Standards Association model code for the protection of personal information.
- 2. Identifying Purposes** - the purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.
- 3. Consent** - the knowledge and consent of the individual are required for the collection, or disclosure of personal information, except where inappropriate.
- 4. Limiting Collection** - the collection of personal information shall be limited by that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.
- 5. Limiting Use, Disclosure, and Retention** - Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes.
- 6. Accuracy** - Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.
- 7. Safeguards** - Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
- 8. Openness** - An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.
- 9. Individual Access** - Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
- 10. Challenging Compliance** - An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

(It should be noted that the statute contains exceptions to almost all the above principles, so the CSA Model Code cannot be read in isolation from the rest of the Act.)

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What PIPEDA means to an individual business depends upon the industries in which it operates. All companies – large and small – will be required to appoint an individual who will be responsible for enforcing PIPEDA within the company and who will also be the point of contact for members of the public who have the right to object to and inquire about the company's information handling practices.

PIPEDA will radically alter how companies deal with personal information. Any time personal information is collected, it must be necessary for the provision of the goods and services. Consent must be given for information to be transmitted to any third party, and individuals are granted a right of access to any personal information on that individual maintained by a company.

The enforcement of the legislation is in the hands of the Federal Privacy Commissioner. Individuals who are not satisfied with the way a company has responded to a complaint may turn to the Privacy Commissioner, who has virtually unfettered powers in investigating the matter. The Privacy Commissioner does not have the power to make orders, but he is explicitly given the right to publicize any non-compliant information practices of companies and can also refer the matter to the Federal Court. The Court can order compliance and award damages.

Companies are urged to consider the legislation and begin a comprehensive "personal information audit" of all their business practices. This would begin with analyzing the past practices of the company as the legislation does not have any "grandfathering provisions" that allow the retention and use of previously collected personal information. Unless the information was originally collected in compliance with PIPEDA's principles, the company will be prohibited from retaining or using it following January 1, 2004. The audit has to carefully look at the manner in which information is collected, the reasons why such information is demanded and how the information is used within the organization. Of paramount concern from the perspective of personal information protection is how information is shared with third parties. All deficiencies must be identified and addressed before the deadline.

The deadline is rapidly approaching and the task ahead is formidable, particularly for businesses with considerable information holdings.

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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. If you have any questions, please contact any of the following:

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