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FEDERAL COURT FINDS THAT *PIPEDA* DOES NOT APPLY TO AGENTS

On July 9, 2010, the Federal Court issued a very significant judgment on the scope of the application of the *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”). In *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736 (CanLII), the Court held that *PIPEDA* does not apply to a collection, use or disclosure of personal information merely because it is collected, used or disclosed by an agent or third party on behalf of a principal with whom the agent is in a commercial relationship. Rather, the determining factor is the nature of the underlying activity.

THE THIRD PARTY AGENT DILEMMA

The question of the application of *PIPEDA* to third party agents arises as a result of the categories of personal information covered by *PIPEDA*. *PIPEDA* applies to personal information that is “collected, used or disclosed in the course of commercial activity”. It also applies to the personal information of employees in connection with federally regulated operations. However, *PIPEDA* explicitly excludes personal information if it is used by an individual for “personal or domestic purposes”. It has also been held not to apply to personal information of employees in relation to provincially regulated operations.

This web of exclusions and inclusions has given rise to some confusion with respect to the full scope of the application of *PIPEDA*. In particular, third party agents who provide services to provincially regulated employers have often questioned the application of *PIPEDA* when handling employer information. Such agents include private investigators, payroll processing agents, benefit administrators and others.

Viewed from one perspective, the personal information about employees of provincially regulated employers is outside the scope of the *PIPEDA*. However, some third parties consider themselves as engaging in “commercial activity” since they are paid by employers to handle employee information on their behalf. This would suggest the third party service providers could be covered by *PIPEDA* even if the principal was not covered if engaging in the same activity directly. This has the effect of allowing *PIPEDA* to apply indirectly to personal information that falls outside of its direct scope of application, a result that seems to stretch *PIPEDA* beyond its legitimate boundaries.

THE STATE FARM CASE

The facts of the *State Farm* case illustrate the dilemma perfectly. An individual had been involved in a motor vehicle accident and was sued by the Plaintiff. The Defendant had an insurance policy with State Farm. State Farm retained a private investigator, who conducted video surveillance on the Plaintiff. The Plaintiff sought access to the surveillance footage under *PIPEDA*.

When access was refused, the plaintiff initiated a complaint with the federal Privacy Commissioner under *PIPEDA*. The Privacy Commissioner issued a notice assuming jurisdiction over the complaint notwithstanding the objection of State Farm. Implicit in Privacy Commissioner’s letter was the conclusion that *PIPEDA* applied to the surveillance footage.

THE COURT’S FINDING

The Federal Court held that *PIPEDA* did not apply, stating:

I conclude that, on a proper construction of *PIPEDA*, **if the primary activity or conduct at hand, in this case the collection of evidence on a plaintiff by an individual defendant in order to mount a defence to a civil tort action, is not a commercial activity contemplated by *PIPEDA*, then that activity or conduct remains exempt from *PIPEDA* even if third parties are retained by an individual to carry out that activity or conduct on his or her behalf.** The primary characterization of the activity or conduct under *PIPEDA* is thus the dominant factor in assessing the commercial character of that activity or conduct under *PIPEDA*, not the incidental relationship between the one who seeks to carry out the activity or conduct and third parties. In this case, the insurer-insured and attorney-client relationships are simply incidental to the primary non-commercial activity or conduct at issue, namely the collection of evidence by the defendant...in order to defend herself in the civil tort action brought against her by [the Plaintiff] (emphasis added).

This is a broad and principled finding on the scope of *PIPEDA*'s application. It is not limited to any particular kind of agency relationship and will no doubt cause lawyers, insurers and provincially regulated employers to be pleased.

It is interesting to note that State Farm had brought an alternative argument that, if *PIPEDA* was found to apply as proposed by the Plaintiff, it would be unconstitutional and beyond the scope of the federal government's authority over trade and commerce. There has been a significant amount of discussion and debate as to the constitutionality of an expanded scope of *PIPEDA*, and, again, the State Farm situation provided a good example of the tension as an expansive interpretation of *PIPEDA*'s application would have had a far-reaching effect on the rules governing civil litigation (which fall within exclusive provincial jurisdiction).

CONCLUSION

While the finding of the Federal Court in *State Farm* is helpful to employers, it is a first-level court decision and may yet be subject to appeal or challenge. However, should it become the dominant interpretation of the scope of *PIPEDA*'s application, it will keep *PIPEDA* within its appropriate limits, and not permit the indirect expansion of its scope to provincially regulated employment matters.

If you have any questions about this article, please contact Scott Williams at 416.864.7325 or your regular Hicks Morley lawyer.

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