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## **OPT-IN VERSUS OPT-OUT? FEDERAL PRIVACY COMMISSIONER COMMENTS ON CONSENT**

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*By Sepal Bonni and Terrance S. Carter\**

### **A. INTRODUCTION**

On April 7, 2015, the Office of the Privacy Commissioner of Canada (“OPC”) released PIPEDA Report of Findings #2015-001 “Results of Commissioner Initiated Investigation into Bell’s Relevant Ads Program.”<sup>1</sup> This report provides findings from an investigation initiated by the OPC of Bell’s advertising program after the OPC received “an unprecedented number of public complaints” shortly after Bell announced, in August 2013, that it would use customers’ personal information to enable targeted ads. The main issue on which the investigation focused was whether Bell should be able to use opt-out consent in which individuals are included in the advertising program unless they specifically opt-out, or if express opt-in consent should be used. In this regard, the finding is noteworthy for its extensive discussion of the factors used to determine whether an organization can rely on opt-in or opt-out consent when it collects, uses, or discloses its individuals’ personal information. Charities and not-for-profits must be aware of these factors in situations when they engage in commercial activity, such as the selling, bartering, or leasing of donor, membership, or other fundraising lists. This *Charity Law Bulletin* briefly describes PIPEDA’s consent requirements and outline what the new Bell report has added to the OPC’s understanding of consent, underscoring the importance for charities and not-for-

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<sup>1</sup> *PIPEDA Report of Findings #2015-001*, “Results of Commissioner Initiated Investigation into Bell’s Relevant Ads Program” (7 April 2015), online: Office of the Privacy Commissioner <[https://www.priv.gc.ca/cf-dc/2015/2015\\_001\\_0407\\_e.asp](https://www.priv.gc.ca/cf-dc/2015/2015_001_0407_e.asp)>.

profits which collect, use and disclosure sensitive personal information to adopt an opt-in consent approach.

## B. CONSENT TO USE INDIVIDUALS' PERSONAL INFORMATION

### 1. PIPEDA

Under Schedule 1, Principle 3 in the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) organizations must obtain “knowledge and consent of the individual [...] for the collection, use, or disclosure of personal information, except where appropriate.”<sup>2</sup> Consent can be either opt-in, where an individual must provide a positive agreement to a stated purpose, or opt-out, where an organization can assume consent unless the individual opts-out.

PIPEDA applies to “every organization in respect of personal information that (a) the organization collects, uses or discloses in the course of commercial activities.”<sup>3</sup> This statement would initially appear to remove charities and not-for-profits from the reach of PIPEDA. However, under section 2(1), “commercial activity” is defined as:

any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists (emphasis added).<sup>4</sup>

It is important for charities and not-for-profits to understand that the above noted definition is very broad. The language referring to “any particular transaction” and activity that “is of a commercial character” is relevant to charities. This phrasing means that it is likely that “non-profit or charitable organizations that engage in limited commercial activities that are ancillary to their primary functions would nevertheless be subject to the Act.”<sup>5</sup> The “selling, bartering or leasing of donor, membership or other fundraising lists,” which is specifically included in the above noted PIPEDA definition of

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<sup>2</sup> SC 2000, c 5.

<sup>3</sup> *Ibid*, s. 4(1).

<sup>4</sup> *Ibid*.

<sup>5</sup> Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector – An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002) page PIP-7.

commercial activity, is the primary example of when charities and not-for-profits will need to consider the consent provisions.<sup>6</sup>

## 2. Previous OPC Findings

In past findings, the OPC has generally preferred opt-in consent, stating that “opt-in consent is the most appropriate and respectful form for organizations to use.”<sup>7</sup> For example, in 2002, almost immediately following the introduction of PIPEDA, the Privacy Commissioner of Canada, in what appears to be the earliest finding considering the appropriate form of consent, commented that:

I have a very low opinion of opt-out consent, which I consider to be a weak form of consent reflecting at best a mere token observance of what is perhaps the most fundamental principle of privacy protection. Opt-out consent is in effect the presumption of consent - the individual is presumed to give consent unless he or she takes action to negate it. I share the view that such presumption tends to put the responsibility on the wrong party. I am also of the view that inviting people to opt in to a thing, as opposed to putting them into the position of having to opt out of it or suffer the consequences, is simply a matter of basic human decency.<sup>8</sup>

The OPC has also confirmed its preference for opt-in consent in its Fact Sheet on how to determine the appropriate form of consent. The Fact Sheet states that opt-in consent “is the strongest form of consent, and is keeping with the spirit of PIPEDA.”<sup>9</sup> It also states that:

An organization is encouraged to use this form of consent wherever appropriate, taking into consideration the reasonable expectations of the individual. This form of consent is least likely to give rise to misunderstandings and complaints.<sup>10</sup>

In order for an organization to take the opposite approach and properly rely on opt-out consent, it must consider both the sensitivity of the information at issue and the reasonable expectations of the organization’s customers.<sup>11</sup> Both of these factors are equally important. Additionally, organizations

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<sup>6</sup> *Ibid* at s. 2(1).

<sup>7</sup> *PIPEDA Case Summary #2003-192* “Bank does not obtain the meaningful consent of customers for disclosure of personal information” (1 April 2004), online: Office of the Privacy Commissioner <[https://www.priv.gc.ca/cf-dc/2003/cf-dc\\_030723\\_01\\_e.asp](https://www.priv.gc.ca/cf-dc/2003/cf-dc_030723_01_e.asp)> [#2003-192].

<sup>8</sup> *PIPEDA Case Summary #2002-042: Air Canada allows 1% of Aeroplan membership to ‘opt-out’ of information sharing practices* (17 January 2005), online: Office of the Privacy Commissioner <[https://www.priv.gc.ca/cf-dc/2002/cf-dc\\_020320\\_e.asp](https://www.priv.gc.ca/cf-dc/2002/cf-dc_020320_e.asp)>.

<sup>9</sup> “Determining the appropriate form of consent under the Personal Information Protection and Electronic Documents Act” (28 September 2004), online: Office of the Privacy Commissioner <[https://www.priv.gc.ca/resource/fs-fi/02\\_05\\_d\\_24\\_e.asp](https://www.priv.gc.ca/resource/fs-fi/02_05_d_24_e.asp)>.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Supra* note 2. See Principles 4.3.4 and 4.3.5.

must consider not only these factors, but also the fact that the OPC has set out four further conditions, all of which must be satisfied, before relying on opt-out consent:

- 1) The personal information must be demonstrably non-sensitive in nature and context.
- 2) The information-sharing situation must be limited and well defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.
- 3) The organization's purposes must be limited and well-defined, stated in a reasonably clear and understandable manner, and brought to the individual's attention at the time the personal information is collected.
- 4) The organization must establish a convenient procedure for easily, inexpensively, and immediately opting out of, or withdrawing consent to, secondary purposes and must notify the individual of the procedure at the time the personal information is collected.<sup>12</sup>

If all of the above conditions are not satisfied, the organization cannot rely on opt-out consent and must instead obtain express opt-in consent.

### 3. The OPC's Comments in the Bell Investigation

The OPC's recent finding in its investigation of Bell follows its previously indicated preference towards opt-in consent. The OPC found that Bell's opt-out mechanism was inadequate, particularly because it failed to give customers an express (opt-in) choice to participate in the advertising program. In this most recent finding, the OPC confirmed that opt-in consent is required based primarily on two key factors, as provided by PIPEDA:

- 1) the degree of sensitivity of the personal information involved, and
- 2) the reasonable expectations of the individuals.<sup>13</sup>

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<sup>12</sup> #2003-192, *Supra* note 4.

<sup>13</sup> See footnote 11 and Principles 4.3.4 and 4.3.5.

Regarding the second factor, the Bell decision appears to be the first OPC finding to provide a clear description of how “reasonable expectations” is to be considered in this context. It states that:

Reasonable expectations is an objective standard which requires that our Office consider all of the relevant contextual factors surrounding the practice in question, including the type of services the organization offers, and the nature of the relationship between the organization and its customers. These contextual factors must not be considered in isolation but rather, evaluated as a whole.<sup>14</sup>

It is also interesting to note that the OPC assessed Bell’s infrastructure and the “nature and breadth of its services” when considering the sensitivity of the information that Bell had access to.<sup>15</sup> While Bell maintained that the breadth of the information it used in its advertising program did not “render it, in aggregate, more sensitive than its constituent elements,” the OPC disagreed and found that the breadth of information retained by Bell as a whole was more sensitive than the individual elements of the information.<sup>16</sup>

Overall, the OPC concluded that Bell’s survey mechanism for opt-out consent “lacked validity and contained questions that were unduly complex or leading”<sup>17</sup> and because of the degree of sensitivity of the personal information collected, and the reasonable expectations of the individuals, opt-in consent to the advertising program must be obtained.

## C. APPLICATION TO CHARITIES AND NOT-FOR-PROFITS

The broad concepts and additional commentary that this finding provides are useful for all organizations, including charities and not-for-profits, to apply when considering what the appropriate form of consent is in their particular context.

For charities and not-for-profits that are involved in the selling, leasing, or bartering of donor, membership or other fundraising lists, it is important that they remember that such activity is considered “commercial activity” under PIPEDA, and, therefore, PIPEDA’s consent provisions will apply in such

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<sup>14</sup> *Supra* note 1 at para 78.

<sup>15</sup> *Ibid* at para 73.

<sup>16</sup> *Ibid* at paras 74-75.

<sup>17</sup> *News Release*, “Bell advertising program raises privacy concerns” (7 April 2015), online: Office of the Privacy Commissioner <[https://www.priv.gc.ca/media/nr-c/2015/nr-c\\_150407\\_e.asp](https://www.priv.gc.ca/media/nr-c/2015/nr-c_150407_e.asp)>.

contexts. Further, the disclosure of personal information with third parties could form the basis of an alleged privacy breach as is the case with the \$750M class-action lawsuit filed against Bell this month.<sup>18</sup>

As the Bell finding reiterates, opt-in consent is the recommended and most unequivocal form of consent. Therefore, in order to avoid an investigation from the OPC or potential lawsuits, organizations choosing to use opt-out consent should carefully review the context in which they do so in order to ensure that they are satisfying all of the conditions laid out by the OPC and are complying with PIPEDA's consent provisions.



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<sup>18</sup> “Bell faces \$750M lawsuit over allegedly selling customer data” (17 April 2015), online: CBC News <<http://www.cbc.ca/news/canada/windsor/bell-faces-750m-lawsuit-over-allegedly-selling-customer-data-1.3037545>>.