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Privacy Opinions

A typical transaction will include an opinion on compliance with laws, e.g. "The Vendor is not bound by any ... statutory laws or regulations which is contravened or breached by the execution and delivery or performance by it of the Agreements." In addition most transactions include an enforceability opinion.

The compliance with laws opinion would include compliance with privacy legislation, including PIPEDA. In addition, it is at least theoretically possible that a failure to comply with PIPEDA could affect the enforceability of an obligation to transfer personal information and thus impact the enforceability opinion. But see [*Ferenczy v. MCI Medical Clinics and Weinstein*](#) (2004), 70 O.R. (3d) 277 (Ont. S.C.), which suggests not.

An opinion regarding a party's compliance with privacy legislation is, in most cases, difficult to give due to the particular vagueness of the legislation, the difficulty in determining all of the necessary facts and the difficulty of determining whether an adequate consent has been obtained. Given these difficulties it will almost always be appropriate to express no opinion on the transaction's compliance with PIPEDA.

However, in each transaction the parties should consider how significant the "personal information" that may be transferred is to the purpose of the transaction. Is it a significant asset or are there non-financial risks associated with non-compliance with privacy legislation (reputational risk)? In a few transactions there may be documented clear consent to the disclosure, use and collection contemplated by the transaction and so an opinion could be given that the form of the consent is

sufficient to comply with PIPEDA's consent requirement, with appropriate assumptions regarding enforceability of the consent against the individuals. However, in such circumstances it would still be appropriate to include the general "no-opinion" qualification for compliance with PIPEDA (excepting the particular paragraph on the form of the consent).

In most transactions it will not be possible to opine with any certainty on the form of consent, if there is one at all. Whether or not any consent might be effective is more appropriately the subject matter of a reasoned opinion to be given to your own client rather than included in a third party opinion.

While the issue of compliance with privacy legislation is most evident in asset acquisition transactions, it also could apply in share purchase transactions and in securitization transactions. There is also concern that it may impact the realization remedies of the lender in a secured financing transaction and so would be an appropriate qualification to the opinion on the validity of the security interest and enforceability of the security agreement. Accordingly, in most such transactions it would be appropriate to include the qualification on compliance with PIPEDA.

An acceptable form of qualification with respect to both a no violation of laws and an enforceability opinion would be:

We express no opinion as to compliance with PIPEDA or any other privacy laws.