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Moving on From the Ombuds Model for Data Protection in Canada

Teresa Scassa *

Both the *Personal Information Protection and Electronic Documents Act* (PIPEDA)¹ and the *Privacy Act*² adopt an ombuds model when it comes to addressing complaints by members of the public. This model is also present in other data protection laws, including public sector data protection laws at the provincial level, as well as personal health information protection legislation. The focus of this short paper is the model adopted in PIPEDA and its ongoing suitability. PIPEDA was designed to apply across the full range of private sector actors and is increasingly under strain in the big data society. These factors may make it less well suited to the ombuds model than public sector and health sector data protection laws.

This paper argues that it is time to move on from the ombuds model for data protection in Canada. This will not simply require the addition of new enforcement powers for the Privacy Commissioner, but will also entail a more substantial reform of PIPEDA.

1. THE OMBUDS MODEL

An ombuds model is often contrasted with a regime in which there is more active enforcement and oversight. Typically, in an ombuds model, the ombud receives complaints and attempts to resolve them. This may involve investigation and interactions with both parties. An ombud usually operates in contexts where there is a significant imbalance of power, information, and resources. For example, an ombud may manage citizen complaints against government, or consumer complaints against a single business or against businesses operating in a particular sector. An ombud will typically not have enforcement or disciplinary powers.³ The goal of the ombuds model is to provide fairness and accountability, without the need for recourse to adversarial processes. An ombud can help citizens navigate a complex situation and can assist them in getting satisfactory responses from the party against whom they have complained.⁴

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¹ S.C. 2000, c. 5.

² R.S.C. 1985, c. P-21.

³ Carolyn Steiber, “57 Varieties: has the Ombudsman Concept become Diluted?” (2000) 16(1) *Negotiation Journal* 49 at 56.

⁴ Note that according to the 2017-2018 Annual Report of the Privacy Commissioner of Canada on PIPEDA, 66% of PIPEDA complaints within that time period were resolved

However, the flexible complaint resolution approach is best adapted to situations where the harm or issue to be addressed is relatively minor and where it is quite specific to a particular individual or set of facts. It is less helpful for addressing major systemic problems, for dealing with issues that have caused significant harm, or for bringing bad actors to account. An ombuds model is particularly ineffective against bad faith actors since, while the ombud can recommend a resolution or measures to correct problems, there is no obligation to comply.

2. POWERS OF THE COMMISSIONER UNDER PIPEDA

Under PIPEDA, the role of the Privacy Commissioner is multifaceted and is oriented toward improving overall compliance with the law by organizations, while at the same time investigating and attempting to resolve complaints filed by individuals. The Commissioner oversees PIPEDA, offers guidance, and provides information services to the public and to organizations. Through the Contributions Program, the Office of the Privacy Commissioner (OPC) also funds privacy research, often with the goal of supporting the development of privacy enhancing tools such as best practices guidance or educational materials.

The Commissioner's role in resolving complaints is consistent with an ombuds model. As Commissioner Jennifer Stoddart (as she then was) noted,

. . . under section 11 of PIPEDA, the Commissioner is mandated to launch investigations on receipt of complaints; she is also granted the power to initiate her own complaint where there are reasonable grounds to do so. Under section 12, the Commissioner is granted extensive powers to investigate complaints, including the authority to attempt to resolve complaints by means of dispute resolution mechanisms. Under section 13, she is mandated to prepare and deliver a report outlining her findings, recommendations, any settlement reached by the parties, or otherwise, and further recourse available to the complainant. Finally, under section 25, the Commissioner must report to the government and legislature on the activities of the Office.⁵

Where a complaint is filed with the OPC, the Commissioner's role is to investigate and to attempt to resolve the complaint. If this fails, the Commissioner produces a non-binding report of findings with

through early resolution. Office of the Privacy Commissioner of Canada, "2017—18 Annual Report to Parliament on the *Personal Information Protection and Electronic Documents Act* and the *Privacy Act*—Trust but verify: Rebuilding trust in the digital economy through independent, effective oversight" (September 2018) online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201718/ar_201718/>, [hereinafter "*Annual Report 2017-2018*"].

⁵ Jennifer Stoddart, "Cherry Picking Among Apples and Oranges: Refocusing Current Debate About the Merits of the Ombuds-Model Under PIPEDA" (October 2005), online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2005/omb_051021/> .

recommendations for any corrective action. An individual who seeks a binding order or compensation for a breach of PIPEDA must apply to Federal Court, but may only do so *after* going through the complaints process with the OPC. A hearing before the Federal Court is *de novo*. This means that parties may introduce new evidence and argument, and no deference is given to the findings of the Commissioner. While a hearing *de novo* is consistent with the ombuds model (showing deference to the findings of the Commissioner might discourage the parties from fully co-operating or from making any concessions toward a resolution of the complaint), it can be inefficient, duplicative, and does not benefit from the Commissioner's expertise.

In addition to the complaints mechanism, the Commissioner has some additional compliance tools which include audit powers (s. 18) and the relatively recently added ability to enter into compliance agreements (art. 17.1). The Commissioner also has new responsibilities with respect to the data security breach notification regime which came into effect on November 1, 2018. Under this regime, the Commissioner must be notified of breaches that reach a certain threshold of severity and can levy fines of up to \$100,000 for non-compliance with the reporting requirements. The newer powers of the Commissioner are an indication that more is needed on the enforcement side and, as will be discussed below, this may signal a need to replace the ombuds model.

3. THE ADVANTAGES OF THE OMBUDS MODEL

Proponents of the ombuds model highlight the fact that it provides a simple mechanism for complaint resolution that is easy for individuals to pursue and that is cost-free to them. Essentially, the ombud and his or her staff bear the cost and burden of investigating complaints. By contrast, the option under s. 14 of PIPEDA for complainants to seek an order or compensation from the Federal Court is at their own initiative and they must bear the cost and burden. In the vast majority of s. 14 applications that have been brought to Federal Court, the applicant has been self-represented and in many of these cases the court has noted that the applicant has not provided sufficient or appropriate evidence to establish the damages they claim.⁶ Awards of damages in Federal Court have been relatively low; in such circumstances, an ombuds approach would seem much more effective for resolving complaints while sheltering individuals from the costs and burdens of litigation.

⁶ See, e.g.: *Townsend v. Sun Life Financial*, 2012 FC 550, 2012 CF 550, 2012 CarswellNat 2083, 2012 CarswellNat 3028, [2012] F.C.J. No. 77, 103 C.P.R. (4th) 424, 217 A.C.Q.S. (3d) 516, 408 F.T.R. 279 (F.C.); *Migliaro v. Royal Bank of Canada*, 2018 FC 525, 2018 CF 525, 2018 CarswellNat 2703, 2018 CarswellNat 3189, 293 A.C.W.S. (3d) 176 (F.D.); *Girao v. Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070, 2011 CF 1070, 2011 CarswellNat 3670, 2011 CarswellNat 4460, [2011] F.C.J. No. 1310, 207 A.C.W.S. (3d) 350, 338 D.L.R. (4th) 262, 397 F.T.R. 108, 96 C.P.R. (4th) 220 (F.C.); *Montalbo v. Royal Bank of Canada*, 2018 FC 1155, 2018 CF 1155, 2018 CarswellNat 7067, 2018 CarswellNat 8099, 299 A.C.W.S. (3d) 199 (F.C.).

Another advantage of the ombuds model, certainly as practised by the Privacy Commissioner of Canada under PIPEDA, is that it is meant not only to resolve a particular complaint, but to identify lessons to be learned more broadly. Thus, while the report of findings emerging from a particular complaint is related specifically to its resolution, the Commissioner may draw on the situation for broader lessons that can be learned and applied in other contexts and by other organizations. In 2005, former Commissioner Stoddart observed that the fact that the Commissioner's findings were non-binding and carried no precedential weight was entirely consistent with the ombuds model. She wrote:

. . . *stare decisis* would obviate some of the essential underpinnings of an effective ombuds-model. In order for this latter model to work, parties must come to the process secure in the knowledge that their individual circumstances will be addressed and confident that they can participate in, and help drive the outcome towards their own negotiated resolution.⁷

This soft-compliance model may also be more conducive to encourage organizations to modify and improve their practices. If there is no threat of stiff monetary penalties, prosecution, or even naming of names in the report of findings, organizations may be more willing to admit their errors or to agree to change their policies and procedures.⁸ They may also be more willing to seek advice from the Commissioner. Former Commissioner Stoddart saw the ombuds model as promoting transformation and not just resolving individual disputes. She wrote of the importance of the development of a lasting culture of privacy sensitivity among the parties through their willing and active involvement in the process itself,⁹ and observed that “[i]n order to achieve these twin goals, the process must necessarily be flexible, participative and individuated in its approach.”⁹

4. DISADVANTAGES OF THE OMBUDS MODEL FOR PRIVACY PROTECTION

In spite of its advantages, the ombuds model has some significant drawbacks and these are becoming more acute as personal information increases in value and importance in the big data economy. As former Commissioner Stoddart has noted, PIPEDA represents a ‘novel’ application of the ombuds model in some

⁷ *Ibid.*

⁸ See, e.g.: *Broutzas v. Rouge Valley Health System*, 2018 CarswellOnt 17809, 2018 ONSC 6317, 299 A.C.W.S. (3d) 26 (Ont. S.C.), where the court discussed the value of the ombuds approach (in this case, under Ontario's *Personal Health Information Protection Act*, R.S.O. 1990, c. S.5.)

in encouraging organizations to admit their errors and to improve their internal handling of personal information.

⁹ Stoddart, *supra* note 5.

key respects. In the first place, it is created by the government for oversight of private sector activity. Stoddart observed:

. . . unlike the use made of the ombuds-model by private sector organizations to regulate themselves individually or collectively by industry, the ombudsman role envisaged by PIPEDA extends to all private commercial activity, across a wide variety of sectors and industries.¹⁰

The scope and breadth of application is significant — and the growing importance of data in the big data economy creates extraordinary demand on the soft-resolution approach to addressing complaints. The current Privacy Commissioner has called for the power to be more selective about which complaints are investigated, as a means of more effectively managing scarce resources and targeting more systemic issues.¹¹ This is not consistent with an ombuds model, yet it may be necessary in the changing privacy context. In addition, the growing volume of issues that affect a significant number of individuals and that create privacy harms that are not unique to specific complainants, also pose challenges to the ombuds model.

Writing in 2005, Commissioner Stoddart noted that the adoption of the ombuds model under PIPEDA created misunderstandings “rooted in a fundamental mismatch between the conceptual nature and characteristics of the ombudsman role and the regulatory-type controls governments are expected to wield over ‘nefarious’ private sector activity.”¹² This mismatch has become even more acute over time. The ombuds model is even less well suited to the types of complex problems raised by the processing of personal information for big data analytics and artificial intelligence (AI). It may also be ill-adapted to the large-scale collection of data, its repurposing, and its widespread sharing. In 2018, current Commissioner Daniel Therrien noted that “we have reached a critical tipping point upon which privacy rights and democratic values are at stake”.¹³

As noted earlier, the ombuds model is designed to work in contexts where there is an imbalance of power. This is often the case when dealing with companies engaged in large-scale collection and trading of personal information. There is also a deepening lack of transparency around data collection and processing. However, it is not clear that an ombuds model is best suited to address the problems that arise in these contexts. First, where the problems are major and systemic, they will potentially affect a vast number of people, making

¹⁰ *Ibid.*

¹¹ Privacy Commissioner of Canada, “Submission to Innovation, Science and Economic Development Canada (23 November 2018) online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_ised_181123/> [hereinafter “Submission”].

¹² Stoddart, *supra* note 5.

¹³ OPC, “Submission,” *supra* note 1.

individual complaint resolution ineffectual. Further, companies may be unwilling to change lucrative business practices without hard obligations to comply. In some cases, significant monetary penalties may be necessary not just to compel compliance, but to deter future breaches of the law. This is why Europe's General Data Protection Regulation (GDPR) has prescribed much more rigorous and extensive enforcement powers.

The ombuds model favours soft resolution, meaning that the Commissioner does not issue binding decisions and has no order-making powers. This has several adverse effects that may be becoming more acute. First, individuals or the Commissioner are required to take additional actions in court to obtain binding orders, which adds a further layer of effort and delay. Second, the Commissioner's non-binding recommendations do not create a body of useful precedent that can be applied. Instead, precedent is developed in those few cases brought to the Federal Court by particularly aggrieved yet un-represented individuals. The specialized expertise of the Commissioner is drowned out in these court decisions that are based on *de novo* proceedings involving un-represented claimants.

A sense that there is a growing disrespect or disregard for data protection rules among many organizations (particularly in the tech sector) is not helped by soft compliance measures which provide no real incentive for companies to comply. If non-compliance with the legislation carries few actual costs, it may be seen as preferable to compliance.

As the risks and harms from privacy breaches grow, soft compliance may be seen as inadequate and insufficient, and may be entirely unsatisfactory to complainants. The sharp rise in privacy class action law suits may support the general lack of satisfaction with PIPEDA-based recourses.

In 2005, former Commissioner Stoddart linked the success of the ombud's model to the flexible normative provisions found in the *CSA Model Code* that has been incorporated into PIPEDA. She wrote:

. . . the inherent flexibility of the CSA Code in PIPEDA enables individuals and private sector organizations to resolve potential conflicts themselves through the application of general fair information principles to specific fact situations. Through its principles, PIPEDA offers the necessary tools and guidance of a self-correcting scheme.¹⁴

This link between the drafting of the statute and the ombuds model is important since it is not just the ombuds model that is currently being challenged by those seeking reform of PIPEDA, but also the nature and wording of the normative provisions.

Commissioner Stoddart suggested that the incorporation of the *CSA Model Code* into PIPEDA provided the flexibility and generality that supported an ombuds-type approach to privacy complaint resolution. However, there have been repeated calls for reform of PIPEDA to tighten up its obligations,

¹⁴ *Ibid.*

particularly in light of the impact of big data analytics. Commissioner Stoddart wrote: “Calls for greater specificity of language and more prescriptive requirements seem to be at complete odds with a scheme based on the ombuds approach to resolving disputes.”¹⁵ This conflict between demands for reform of the normative provisions of PIPEDA and the ombuds role of the Commissioner suggests that the ombuds model may no longer be appropriate in our rapidly evolving technological context.

5. THE ARGUMENT FOR GREATER ENFORCEMENT POWERS

In recent years there have been a growing number of calls for reform of PIPEDA. These calls for reform touch on some of the key aspects of the ombuds model, thus suggesting that there is momentum behind demands for a major shift in approach in this area. For example, in a 2010 study commissioned by the OPC, Houle and Sossin reported: “Our research leads us to believe that there is a shift toward ensuring greater protection of consumers, which will need to be addressed by granting other specific powers to the OPC.”¹⁶ The authors also raised the issue of whether the challenges presented by the platform-based digital environment of the time were suitable for resolution using the ombuds model. Since 2010, technology has continued to evolve and the same concerns can be raised even more forcefully regarding the suitability of the ombuds model for addressing the abuses of personal information that are now rampant in the big data environment.

Houle and Sossin found that there were significant issues with PIPEDA compliance. They wrote: “notwithstanding the important successes of the OPC, compliance levels with PIPEDA arguably remain too low, and the risk that consumers face with their personal information in the hands of small and medium-sized businesses in Canada arguably is too high”.¹⁷ Interestingly, the authors found that the ombuds model was more effective with large businesses than with small and medium-sized businesses; it was for this latter category of enterprises that the authors found a need for more compliance tools. In the big data era, stronger compliance tools may be needed for large enterprises as well — at least for those companies for which personal data is the stock-in-trade. In the fall of 2018, Commissioner Therrien called for legislative reform. He wrote:

The reality is that our principles-based law is quite permissive and gives companies wide latitude to use personal information for their own benefit. While our law should probably continue to be principles-based

¹⁵ Stoddart, *supra* note 5.

¹⁶ France Houle & Lorne Sossin, “Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectiveness Study,” Office of the Privacy Commissioner of Canada (August 2010) online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/pipeda_h_s/> .

¹⁷ *Ibid.*

and technologically neutral, it must be right-based and drafted not as an industry code of conduct but as a statute that confers rights, while allowing for responsible innovation.¹⁸

The call for stronger compliance is also rooted in the global nature of the information economy. As other comparable jurisdictions (most notably those in the EU) move to both stronger normative protection for privacy and stricter compliance mechanisms, Canada is increasingly an outlier. While an ombuds model may be well suited for a single large corporation or a well-defined sector of industry, it may simply not be workable across a broad range of sectors in a rapidly expanding big data economy and in relation to information that flows freely across borders. The scale of the trade in personal data and the potential for its use, reuse, and abuse may simply require a different normative model, with more substantive enforcement mechanisms. Where there are enormous profits to be made and non-compliance with legislation carries no real cost, then non-compliance becomes a business option.

The current federal Privacy Commissioner has been outspoken in his belief that PIPEDA must move away from the ombuds model. In his 2016-2017 *Annual Report to Parliament* he identified the many challenges to privacy in the digital age and stated “we are convinced the combination of proactive enforcement and demonstrable accountability is far more likely to achieve compliance with PIPEDA and respect for privacy rights than the current ombudsman model.”¹⁹ More recently, the House of Commons Committee on ETHI recommended, in its review of PIPEDA, that “the *Personal Information Protection and Electronic Documents Act* be amended to give the Privacy Commissioner enforcement powers, including the power to make orders and impose fines for non-compliance”.²⁰ They also recommended amending PIPEDA to include significant additional substantive privacy rights, including rights of data portability and erasure, and a right to withdraw consent.

Former Commissioner Stoddart, in her explanation of the advantages of the ombuds model and its consistency with other features of PIPEDA, appears to strongly defend the ombuds model. Yet, her argument is more properly characterized as maintaining that multiple features of PIPEDA are specifically designed for the ombuds model and that greater enforcement powers may require

¹⁸ Privacy Commissioner of Canada, “Submission,” *supra* note 11. The Commissioner also called for stronger enforcement powers.

¹⁹ Office of the Privacy Commissioner of Canada, “2016-17 Annual Report to Parliament on the Personal Information Protection and Electronic Documents Act and the Privacy Act — Real fears, real solutions

A plan for restoring confidence in Canada’s privacy regime” (September 2017) online: < https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201617/ar_201617/ > .

²⁰ Bob Zimmer, “Towards Privacy By Design: Review Of The Personal Information Protection And Electronic Documents Act — Report of the Standing Committee on Access to Information, Privacy and Ethics” (February 2018) online: < <http://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9690701/ethirp12/ethirp12-e.pdf> > at 3.

more substantive reforms. It follows as well that more recent calls for reform of the normative provisions of PIPEDA may also entail a move away from the ombuds model. As Commissioner Stoddart wrote:

. . . the ombudsman model has its own set of attributes and benefits inherent in its underlying philosophy. We should be examining whether that model in its integrity continues to meet Canadians' needs for privacy protection. If not, we should be thinking outside the box towards other more innovative and appropriate approaches – not cherry picking among the essential features that made the ombuds-model attractive in the first place, choosing to completely ignore some of them while imposing other aspired attributes that would be wholly inconsistent with its fundamental purpose.²¹

Current Commissioner Therrien clearly seeks to move beyond the ombuds model. In the OPC's *2017—2018 Annual Report to Parliament* he wrote: “Canadians need stronger privacy laws that will protect them when organizations fail to do so. Respect for those laws must be enforced by a regulator, independent from industry and the government, with sufficient powers to ensure compliance.”²²

CONCLUSION

Changes in the value and importance of data within the big data economy, and the resultant changes in the nature of the harms to be addressed by improper collection, use, and disclosure of personal information make it increasingly important for Canada to update PIPEDA, its private sector data protection law.

Calls to change the ombuds model to one in which the Commissioner has greater order-making and enforcement powers reflect this desire for new ways to hold organizations accountable. However, the legislative deficiencies are not limited to enforcement powers. There are clearly two necessary parts to a move away from the ombuds model — a reinvigorated set of legal norms and new enforcement powers.

²¹ Stoddart, *supra* note 5.

²² OPC, *Annual Report 2017—2018*, *supra* note 4.