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THE CANADIAN BAR ASSOCIATION
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April 8, 2015

Via email: INDU@parl.gc.ca

Mr. David Sweet, M.P.
Chair, Industry, Science and Technology Committee
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Sweet:

Re: Bill S-4, the *Digital Privacy Act*

The Canadian Bar Association appeared before the Industry, Science and Technology Committee on February 19 to provide input on Bill S-4, the *Digital Privacy Act.* Following the hearing, Ms. Charmaine Borg, M.P. asked that we respond in writing to additional questions she did not have an opportunity to ask. On behalf of the Privacy and Access Law Section and Canadian Corporate Counsel Association (the CBA Sections), we are pleased to provide this information, supplementing our testimony and written submission on Bill S-4:

1. At the last committee meeting, we heard testimony from both the Canadian Marketing Association and the Canadian Chamber of Commerce that the new "valid consent" clauses in Bill S-4 were unnecessary and overly-broad. However, during the last review of PIPEDA before the Ethics Committee, you recommended including clarification about consent related to minors. Does the proposed clause 5 satisfy your concerns?

CBA SECTIONS' RESPONSE:

Clause 5 introduces a new valid consent obligation that is unnecessary and may cause confusion rather than addressing concerns. Our view is that consent is already adequately addressed in Schedule 1 of PIPEDA, as discussed in our February 2015 written submission to the Committee:

> *The consent regime under PIPEDA has functioned well and proven to be adaptive to evolving individual expectations and business practices and technologies. Bill C-12, the predecessor to Bill S-4, proposed a new "valid consent" provision that we understand was intended to help protect the personal information and privacy of minors. Clause 5 of Bill S-4 includes a revised 'valid consent' provision (PIPEDA, s. 6.1), much improved by shifting from a problematic subjective standard to a more appropriate objective standard.*

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél. : 613.237.2925 | **toll free/sans frais :** 1.800.267.8860 | **fax/téléc. :** 613.237.0185 | www.cba.org
Membership/Adhésion : memberservice@cba.org | **PD/DP :** pd@cba.org | **Sections :** cba.sections@cba.org | **General/Générale :** info@cba.org

> *The CBA understands the concerns underlying this proposed amendment to the consent regime under PIPEDA. However, we question whether there is a strong and compelling case for the change, particularly in light of the confusion it may cause. The current requirement to obtain consent in PIPEDA contains a clear statement, in s. 4.3.2 of Schedule 1, that the principle includes "knowledge and consent":*
>
> > *The principle requires "knowledge and consent". Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.*
>
> *PIPEDA currently requires that consent be reasonably understandable by the individual. The proposed amendment is mostly redundant in light of this, and risks causing confusion by essentially making the same statement in two different ways.*

Since the last review of PIPEDA, the Office of the Privacy Commissioner of Canada (OPC) has exercised its mandate to provide additional guidance on consent related to minors. The OPC guidance document *Guidance for Online Consent,*[1] last updated in May 2014, states:

> *Meaningful consent is an essential element of Canadian private sector privacy legislation. Under privacy laws, organizations are required to obtain meaningful consent for the collection, use and disclosure of personal information. Consent is considered meaningful when individuals understand what organizations are doing with their information.*
>
> *…*
>
> *Privacy laws require individuals to understand what they are consenting to. In order for consent to be considered valid, or meaningful, organizations have to inform individuals of their privacy practices in a comprehensive and understandable manner. Being informed about and understanding an organization's policies and practices allow individuals to provide meaningful consent. Individuals should be able to understand the risks and benefits of sharing their personal information with the organization and be in a position to freely decide whether to do so.*
>
> *…*
>
> *Organizations should recognize and adapt to special considerations in managing the personal information of children and youth.*
>
> - *Children's information is considered sensitive and merits special*
>
> - *Organizations should implement innovative ways of presenting privacy*

In our view, the proposed valid consent obligation is not needed and is more likely to result in confusion than clarity.

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[1] Office of the Privacy Commissioner of Canada, *Guidelines for Online Consent*, www.priv.gc.ca/information/guide/2014/gl_oc_201405_e.asp, 2015.

2. You also recommended that "lawful authority" and "government institution" be clarified, neither of which is addressed in this bill. Does this bill go far enough in protecting Canadians' data collected by private companies?

CBA SECTIONS' RESPONSE:

Prior bills to S-4 attempted to clarify the meaning of "lawful authority" because of perceived uncertainty, in part due to an earlier line of contradictory court decisions. Since then, the Supreme Court of Canada has provided guidance on the meaning of "lawful authority" and the reasonable expectation of privacy in specific circumstances. We expect the jurisprudence will continue to evolve to reflect the reasonable expectation of privacy of individuals in varying contexts based on the facts before the courts.

In the CBA submission on Bill S-4, we express specific concerns on the breadth of permitted disclosure without consent by private companies and recommend amendments to narrow the scope of related provisions in s. 7(3) (d.1) and (d.2).

With these recommended amendments, and with the guidance quite appropriately expected from and offered by the courts, we think Bill S-4 will offer sufficient protection.

3. When he appeared before this committee, Minister Moore and department officials from Industry Canada were quite insistent that the Digital Privacy Act was completely compliant with the Supreme Court ruling on warrantless disclosures in R. v. Spencer. However, the Privacy Commissioner, Mr. Therrien, was much less sure. What is your opinion on this; is Bill S-4, in its current form, compliant with R. v. Spencer?

CBA SECTIONS' RESPONSE:

We believe that Bill S-4, with the amendments proposed by the CBA noted above, is compliant with the Supreme Court of Canada decision in *R. v. Spencer*. In that case, the Court interpreted a specific legislative provision. Again, the courts have begun to interpret "lawful authority" in the context of facts before them, which is part of their function. Further, in collaboration with the private sector, the OPC can develop additional guidance on what is lawful authority in specific circumstances, as needed.

Thank you for the opportunity to provide this additional input. Please let us know if we can be of any further assistance.

Yours truly,

(original letter signed by Sarah MacKenzie for Deirdre Wade)

Deirdre Wade
Chair, Privacy and Access Law Section

cc : Charmaine Borg, M.P. Charmaine.Borg@parl.gc.ca