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Via email: OPC-CPVPconsult2@priv.gc.ca; Daniel.Therrien@priv.gc.ca

Daniel Therrien
Privacy Commissioner of Canada
30 Victoria Street – 1st Floor
Gatineau, QC K1A 1H3

Dear Mr. Therrien:

Re: Consent Model for Collection of Personal Information under PIPEDA

The Canadian Bar Association's Privacy and Access Law Section and the Canadian Corporate Counsel Association (collectively the CBA Sections) welcome the opportunity to comment on the viability of the consent model used to collect personal information (PI) and solutions to improve individual control over PI in the commercial environment. We are responding to your May 2016 discussion paper. We have read and understood the consultation procedures for this topic.

The Canadian Bar Association is a national association representing approximately 36,000 jurists across Canada, including lawyers, notaries, law teachers and students, and its primary objectives include improvements in the law and the administration of justice. The Privacy and Access Law Section comprises lawyers with in-depth knowledge in the areas of privacy law and access to information. The Canadian Corporate Counsel Association (CCCA) is the national forum for in-house counsel. The CBA Sections have made several previous submissions on the *Personal Information Protection and Electronic Document Act* (PIPEDA).

Summary

The CBA Sections support the current framework of legislation to protect privacy and support the balance between the current requirement of obtaining knowledge and consent before collecting, using or disclosing PI. The CBA Sections do not propose a new consent model or additions to the current model in PIPEDA. The CBA Sections continues to rely on the courts and existing OPC investigation and powers for enforcement.

Current legislative framework still appropriate

Privacy does not exist in a vacuum. Rather, it exists in an extensive Canadian legislative framework that is intricate and harmonious in its reach and scope. This sophisticated legal framework has given breadth to the meaning of consent, and yet clearly recognizes that consent is not required in certain circumstances. This framework encompasses federal and provincial private and public sector laws and codes, criminal and human rights legislation, emerging common law torts, and, in Quebec, developments in the civil liability regime.

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PIPEDA, Canada's federal privacy law, has withstood the test of time, and continues to provide the necessary framework for ongoing technological evolutions. These evolutions include the collection and use of Big Data, the emergence of the Internet of Things, and development of data-driven innovation, all of which require the ongoing balance of the right to privacy with the need for organizations to collect, use and disclose PI for reasonable purposes. Our laws have been sufficient to address emerging online business models that increasingly rely on the collection of PI.

Privacy is not an inviolable right: it is a right *read into* section 7 of *Canadian Charter of Rights and Freedoms*, and must be balanced against competing concerns, including law enforcement, national security, third party individual rights and legitimate business purposes. PIPEDA is a consent-based model as it requires an individual's meaningful knowledge and consent for organizations to collect, use and disclose PI. Schedule 1 of PIPEDA speaks directly to the underlying principle of consent in the private sector, laying the foundation that businesses cannot force individuals to consent to the use of PI beyond legitimately identified purposes, *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, Schedule 1, s 4.3.3.

PIPEDA's consent model comes with what has become known as a series of "bells and whistles": accountability; limited collection; accuracy; correction; fairness; and retention. These bells and whistles create a framework that protects privacy while still allowing businesses and organizations to collect, use and disclose PI in pursuit of legitimate business opportunities. Importantly, PIPEDA's consent model is subject to the "reasonable person test" that requires assessment of knowledge and consent for defined purposes. This consent model under PIPEDA demands a reasonable purpose, except in narrowly defined circumstances when consent is not required.

At times we point to the EU and its new *General Data Protection Regulation* (GDPR) as a model. Yet in many ways GDPR is catching up with principles that have been part of our Canadian-made PIPEDA model and the broader legal framework previously described. Also, best practices in Canada have for years incorporated Privacy by Design (PbD) principles and conduct of privacy impact assessments. Nevertheless, given the global nature of data flows, the Office of the Privacy Commissioner (OPC) must collaborate with Innovation, Science and Economic Development Canada (ISED) to ensure that Canada's privacy framework as a whole is considered in any adequacy determination to allow for the ongoing flow of data to Canada. This collaboration will better align laws for cross-border data transfers for efficacy of commerce without sacrificing the protection of privacy offered to all individuals by Canada.

Canadian criminal legislation has also evolved in the area of cybercrime to ensure that consent and privacy are protected. The *Protecting Canadians from On-Line Crime Act* (S.C. 2014, c. 31) created new criminal offences under s. 162.1 and s. 163. These offences are designed primarily to counteract "revenge porn" by requiring consent for the distribution of intimate private images, and to protect vulnerable persons from public humiliation and cyber-bullying. The key is that the subject of the images had a reasonable expectation of privacy when the image was recorded, and because of that expectation, gave consent freely. The offence would have occurred if the images were then distributed without the subject's consent to persons who had no right to view them.

Tool kit approach remains valid

The CBA Sections support a tool kit approach to privacy protection in Canada, using various methods individually or together to achieve an end. The CBA Sections suggest implementation of best practices and OPC guidance as good tools for use in Canada. This multi-faceted approach remains valid in the ever-changing environment of privacy protection.

We continue to encourage organizations to adopt existing best practices, such as PbD. While not required by Canadian privacy legislation, the principles in PbD are increasingly built into accountability models implemented by Canadian organizations. Additionally, there will be opportunities to develop other best practices around transparency and layered privacy notices to reflect technological advances.

Another tool comes in the form of guidance from the OPC. The OPC may seek input and collaborate with stakeholders to develop policies and best practices for evolving situations. A collaborative approach that is sensitive to commercial realities and human behaviour and which invites innovators themselves to share best practices would likely be more effective than a reactive, enforcement-focused approach, such as used in the GDPR.

While we believe that the PIPEDA consent model continues to be flexible and robust, others argue that additional clarity may be required. For example, others raise the possibility of introducing a new exemption to consent where there is a legitimate business interest. Additionally, others suggest an expanded definition of "publicly available" to reflect changing times and to make it technology-neutral. This expanded definition would include other similar instances where individuals may choose to make their PI publicly available, while still maintaining control over their PI. However, the existing balance in PIPEDA and the potential of unintended consequences need to be considered when introducing any new exemption to consent.

Enforcement model

The judiciary has an ongoing role in protecting privacy and assessing damages as part of PIPEDA's enforcement framework. Privacy protections in other parts of Canada's privacy framework also provide remedies for the non-consensual uses and disclosures of PI. The courts are uniquely qualified and well-placed to assess damages uncovered by the OPC investigation and to order any necessary changes to an organization's practices.

Courts in common law jurisdictions have recently created two new torts giving rise to a cause of action: intrusion upon seclusion (*Jones v. Tsige,* 2012 ONCA 32); and non-consensual distribution and publication of intimate facts and images (*Jane Doe 464533 v. X,* 2016 ONSC 541). Both decisions demonstrate the Ontario courts' ability to recognize new civil actions in the privacy protection realm, and reinforce the principle that consent must be robust and freely given only for the purposes for which they were initially contemplated. In the *Jane Doe* decision in particular, the aggrieved party was awarded $141,708.03 in general, aggravated, and punitive damages, and costs.

Quebec has a long history of providing meaningful remedies for victims of non-consensual use of PI, beginning with the seminal decision in *Aubry v. Vice Versa*, [1998] 1 SCR 591, which dealt with non-consensual dissemination in an artistic magazine of an image taken in public. This set the stage for a line of Quebec jurisprudence addressing non-consensual use of PI, which has extended to cyberspace. For example, in the 2014 decision *L.D. c J.V.*, 2015 QCCS 1224, a Quebec court ordered a defendant to pay his ex-girlfriend $29,000 in compensatory damages and $3,000 in punitive damages for non-consensual dissemination of an explicit video he surreptitiously took of her, even though there was no evidence he had uploaded the video. He was also ordered to destroy any videos, images and copies, and refrain from uploading the same to the internet. In *Pia Grillo v. Google inc*., 2014 QCCQ 9394 a Quebec court awarded damages against Google to a plaintiff whose image, street address and other PI were captured in Street View images, despite Google having blurred some of the PI at her request. In Quebec, the question is not whether there is some social good served by a commercial activity making one's privacy interests a necessary casualty, but whether the privacy invasion could have been avoided by adopting a less invasive alternative.

The OPC is not restricted from leveraging its existing powers to enforce privacy rights where consent is nullified or vitiated. The OPC is empowered to investigate, audit and take to court any organization that fails to uphold its obligations under PIPEDA. The OPC also has new enforcement powers under Canada's Anti-Spam Legislation (CASL) and PIPEDA in certain other circumstances.

On May 31, 2016, the CBA Privacy Law Section wrote to ISED on the draft data breach notification regulations. We recommended a robust, flexible approach to drafting the regulations to balance the seemingly incompatible privacy rights of the individuals with the facilitation of commerce for legitimate business purposes. That objective remains here. Our goal is to hold organizations accountable to protect privacy in a way that still enhances their service delivery. The introduction of mandatory breach notification and reporting will enshrine the legal obligations with which businesses must comply, obligations that many organizations have complied with voluntarily for years as part of their ongoing obligations to safeguard PI.

Conclusion

In conclusion, the CBA Sections remain of the view that PIPEDA's flexible consent model is working well, that existing enforcement provisions are sufficient when buttressed by other remedies in Canada's legal framework, and a collaborative, cooperative approach through consultation and discussion with industry will help promote the objectives of PIPEDA and help businesses adapt to technology innovation without hampering advancements.

Yours truly,

(original letter signed by Kellie Krake for Laura W. Davison and Frédéric Pérodeau)

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