August 5, 2016

Association of Canadian Advertisers
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Canadian Media Directors' Council
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Re: Submission for the CONSENT AND PRIVACY DISCUSSION PAPER released by the OFFICE OF THE PRIVACY COMMISSIONER OF CANADA

Thank you to the Policy and Research Group of the Office of the Privacy Commissioner of Canada for opening a dialogue on the current consent model and allowing submissions for input. The Association of Canadian Advertisers (ACA) and the Canadian Media Directors' Council (CMDC) has read and understood the Office of the Privacy Commissioner's Consultation Procedures and should be considered under category of advocacy group.[1]

Executive Summary and Conclusion

The ACA and CMDC do not consider statutory changes to be necessary, and note that PIPEDA was amended in June 2015 to clarify the requirement for individual consent to the collection, use and disclosure of their personal information. Further, we submit that the inherent balancing between the right of privacy of individuals and the needs of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances is best served through a combination of the potential solutions put forth in the Consent Discussion Paper.

Approaches to consent that emphasize increased transparency, de-identification of personal information should be viewed as furthering the purposes of PIPEDA. This includes a realistic approach to identifying whether there is a serious possibility that de-identified data could be used to identify an individual, rather than an approach based on speculation or conjecture, and regulatory guidance on 'no-go' and 'proceed with caution' zones

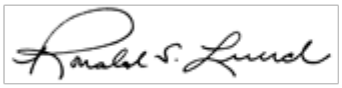
Conversely, overly broad interpretations of what constitutes personal information or an overly expansive application of the requirement for consent have the potential to undermine the ability for individuals to protect their privacy and for organizations to collect information. These circumstances may lead to adverse outcomes where individuals are overwhelmed by, and as a result disregard, privacy notices. Further, such approaches also have the potential to undermine the efforts of marketers to combat advertising fraud, particularly when applied to de-identified or non-identifiable information. Our concern is that this situation could lead to greater incentives on the part of entities committing fraud to violate individual privacy in an effort to evade detection by marketers.

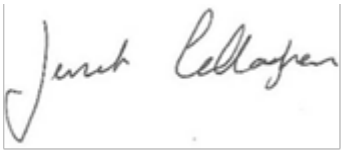
Lastly, the ACA and CMDC believe that the goals of PIPEDA are complemented by a strong self-governance model in which industry groups and individual organizations disclose their practices to individuals in a clear and understandable manner. In particular, industry groups and third parties that establish codes of practice for

[1] Policy and Research Group of the Office of the Privacy Commissioner of Canada. Notice of Consultation and Call for Submissions: Consent Discussion Paper, online: https://www.priv.gc.ca/information/research-recherche/consultations/2016/consent_notice-avis_201605_e.asp.

organizations that choose to participate in them play a particularly valuable role in establishing and popularizing recognized industry practices. This contributes to the ability of individuals to understand the manner in which their information may be collected, used and disclosed, as it helps to align the practices of the organizations participating in the code, and thus reduces the need for individuals to try to understand numerous variously drafted privacy policies – thus contributing to the transparency and understandability of privacy practices.

Thank you again for the opportunity to submit to this important policy exploration. We are available to clarify or discuss our submission with you and look forward to participating in any consultation process. We wish you well in your deliberations.





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I. Introduction

The Association of Canadian Advertisers (ACA) is Canada's premier marketing association, open to Canadian marketers, and dedicated to ensuring that their perspectives are heard, understood and respected. Our association is the only professional trade association solely dedicated to representing the interests of client companies that market and advertise their products and services in Canada. Our members, over 200 companies and divisions, represent a wide range of industry sectors, including manufacturing, retailing, packaged goods, financial services and communications. They are the top advertisers in Canada with collective annual sales of more than $300 billion.

The Canadian Media Directors' Council (CMDC) is an independent organization of media professionals representing advertising agencies and media management companies, working to advance the effectiveness of media advertising in Canada. Its members account for approximately 80% of the total media ad spend transacted annually in Canada.

Both of our organizations' interests are aligned on this matter and so we have chosen to file this submission jointly. Together we are Canada's advertising industry – the professionals who plan, create, produce and purchase the advertising of the vast majority of products and services in our country.

This submission sets out the considerations and recommendations of the ACA and CMDC in response to the Office of the Privacy Commissioner of Canada's call for submissions on the discussion paper *Consent and privacy, A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act*,[2] and is intended to provide assistance to the Office of the Privacy Commissioner in upholding the *Personal Information Protection and Electronic Documents Act* and protecting the right of Canadians to privacy and the protection of their personal information, while respecting the right of Canadian marketers to commercial free speech, and their reasonable need to collect, use and disclose personal information, as well as non-identifiable information, in the course of their legitimate activities.

II. The Purpose of PIPEDA

At its core, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), seeks to balance the privacy rights of individuals with the needs of organizations to collect, use and disclose personal information. PIPEDA states that its purpose is to govern the collection, use and disclosure of Personal Information in a manner that recognises both "the right of privacy of individuals with respect to their personal information" and "the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances".[3]

This section has repeatedly been considered by both the courts, and the decisions of the Office of the Privacy Commissioner to guide the interpretation of PIPEDA, and has been interpreted to indicate that the Act requires a balancing of the rights of individuals and the needs of organizations. In *Eastmond v. Canadian Pacific Railway*, the Federal Court noted: "There is no doubt Parliament mandated the balancing of interests. The need for balancing is clear from the purpose clause which is section 3 in PIPEDA.[4] Similarly, in *R. v. Ward* the Court of Appeal for Ontario stated that "PIPEDA recognizes and seeks to protect an individual's right to privacy in respect of personal information provided to organizations. At the same time, PIPEDA acknowledges that disclosure of that information by those organizations will in some circumstances be reasonable and appropriate. The dual rationale underlying the legislation is reflected in s.3."[5]

We believe that the balancing inherent in PIPEDA should be central to any assessment of the consent model in

[2] Policy and Research Group of the Office of the Privacy Commissioner of Canada, May 2016, available at https://www.priv.gc.ca/information/research-recherche/2016/consent_201605_e.asp ("**Consent Discussion Paper**").
[3] PIPEDA, SC 2000, c 5, at s.3.
[4] *Eastmond v. Canadian Pacific Railway* [2004] FCJ No 1043 (QL), at ¶ 129.
[5] *R. v. Ward*, 2012 ONCA 660 (CanLII) at ¶ 41.

view of recent technological developments and patterns in the collection, use, and disclosure of personal information. Given the balancing required under PIPEDA, we submit that the purposes of PIPEDA are best achieved through a combination of the potential solutions put forth in the Consent Discussion Paper with the intention of respecting the rights both of individuals and the needs of organizations. We do not think legislative change is needed at this time, but rather recommends that the Office of the Privacy Commissioner adopt guidelines that clarify what constitutes valid consent in an online context with a focus on clear and understandable disclosure of organizational practices, and more clearly and pragmatically delineates what does and does not truly constitute "Personal Information" within the meaning of the Act. We also recommend an emphasis on consumer education, and a robust self-governance model that includes the guidance of the Office of the Privacy Commissioner and ultimately, enforcement through PIPEDA's current complaint mechanism, investigation by the Office of the Privacy Commissioner, and recourse to the Federal Court.

III. Enhancing Consent and Alternates to Consent

PIPEDA was amended in June 2015 in a manner that strengthens and clarifies the consent model, providing that "the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting".[6] While PIPEDA has from its inception required the "knowledge and consent" of the individual to the collection, use and disclosure of their personal information, the 2015 amendment has strengthened the consent requirement under the Act by more clearly stating that the requirement for knowledge extends to the nature, purpose and consequences of the organization's activities. This creates a high bar for meaningful consent given the complexity of possible collections, uses, and disclosures of personal information that may occur in the online context. Further statutory amendments to strengthen the consent model are not necessary as the current legislative framework already sets a clear, and in an online context often challenging, requirement for informed consent.

Conversely, our organizations do not suggest a weakening of the consent requirement as it is found in PIPEDA. Rather, we submit that the inherent balancing set out in the Act can be used to position the consent model as it currently exists in PIPEDA as a flexible one that recognizes and respects the rights and needs of all stakeholders and considers the nature of the information, the expectations of the individual, and nature of the information in question. PIPEDA appropriately recognizes that: "The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. ... In obtaining consent, the reasonable expectations of the individual are also relevant." Thus, in an online context, the appropriateness of a particular collection and use of information will depend on the nature of the information and its sensitivity and on the reasonable expectations of the individual. We would consider three approaches to be particularly useful in this regard: increased transparency, de-identification, and regulatory guidance and decisions establishing 'no-go' zones and 'proceed with caution' zones, consistent with the purpose of the Act.

Transparency

With relation to transparency, clear and easily understood privacy notices using a variety of approaches in addition to full privacy policies continue to remain the best manner in which individuals may be informed of the "nature, purpose and consequences" of the collection, use and disclosure of their personal information and provide their consent to it. In this regard, we think that organizations must strike a balance between clearly disclosing their practices, and seeking to do so in a manner that is so exhaustive or overly legalistic that it undermines the ability of individuals to understand the "nature purposes and consequences" of the collection, use and disclosure of their information.

Approaches to consent that pair a comprehensive yet clear privacy policy with additional privacy related information, in particular, layered approaches and just in time notices that present summarized information on an

[6] *Supra* note1, at s. 6.1.

organization's key privacy practices, are useful in that they provide a means by which individuals may be informed of the key collections, uses, and disclosures of their personal information, while still retaining more detailed information in a complete privacy policy for those individuals who choose to review it.

The ACA and CMDC stress that some responsibility must necessarily remain on the individual to inform themselves of the privacy language that they are providing their consent to and its consequences. PIPEDA seeks to balance the privacy rights of individuals with the needs of organizations to collect, use and disclose information, and the individual's responsibility to inform themselves of what they are agreeing to should be viewed as a necessary part of this balancing. The failure of a particular individual to review material that is clearly put to them and to which they indicate their consent should not be viewed as a failure on the part of an organization to obtain informed consent to the collection, use or disclosure of personal information within the meaning of PIPEDA. We would note that the 2015 amendments to PIPEDA clarify that consent in only valid where it is reasonable to expect that "an individual to whom the organization's activities are directed" would understand the nature, purpose and consequences of the collection, use and disclosure of their information. This provision should be read as requiring it to be reasonable to believe that individuals who consider the privacy related disclosures placed before them will understand the nature of their consent, not requiring it to be reasonable to believe individuals who choose to fail to inform themselves of what they are agreeing will have such an understanding.

An individual who chooses to disregard language that was clearly and understandably provided to them and to which they purport to agree, should be viewed as having a right to withdraw their consent under Section 4.3.8 of Schedule 1 to PIPEDA, but should not be able to argue they did not consent to the collection, use and disclosure of their personal information based on their decision to resist the efforts of the organization to inform them of the consequences of their consent.

We note that suggestions to allow individuals to manage privacy preferences across services by associating themselves with standardized privacy profiles, or to associate data with metadata indicating standard usage preferences, would be consistent with PIPEDA as it is currently drafted – provided it is structured as an advance consent by the individual to particular collections, uses or disclosures of personal information. This model would have the virtue of helping to reduce both decision overload on the part of the consumer, at least in respect of the information they agreed would be subject to the standard usage preferences, and reducing the need to consider numerous privacy policies as one uses the internet.

However, the use of standardized privacy profiles would be problematic if approached in a manner that diluted, rather than enhanced, the consent model by assuming that individuals have uniform preferences when it comes to which organizations collect, use, and disclose their information, or by assuming that all organizations collect, use, and disclose personal information in a limited number of similar manners. Provided however, this approach recognizes the paramountcy of the informed consent an individual may provide to, or conversely withdraw from, an organization, it would serve a useful role in establishing threshold consent levels that organizations may then build on where they receive informed consent to further collections, uses or disclosures of personal information from the relevant individual. Conversely, where an individual exercises their right under section 4.3.8 of Schedule 1 to PIPEDA to withdraw their consent to a particular collection or use of personal information, such withdrawal should be respected by the organization that received it regardless of the individual's broader privacy preferences in respect of other organizations.

De-Identification

The ACA and CMDC consider the de-identification of information to represent a valuable tool in the protection of privacy. Truly de-identified information should not be subject to a consent requirement on its collection, use and disclosure – such a requirement would be outside the scope of PIPEDA in its current form, and applying PIPEDA's consent requirement to de-identified information would not serve to truly protect individuals' legitimate privacy interests as the data does not identify any individual. Placing a consent requirement on the use of de-identified data would substantially impact the legitimate needs of organizations to collect, use or disclose

information in an undue manner and would thus fail to respect the balancing inherent in PIPEDA.

Such an additional consent requirement would also greatly contribute to the difficulties that organizations experience in clearly disclosing their privacy related practices in a manner that is clear and understandable to the affected individuals, and would impose a further barrier to individuals trying to understand the manner in which their personal information is actually collected, used and disclosed. We would see this as having the potential to lead to a significant increase in the complexity of privacy language, notices, and requests for consent, with the potential effect of overwhelming individuals and desensitizing them to such requests. This may lead to an adverse effect whereby repeated or too frequent privacy notices are disregarded by individuals, undermining the requirement for informed consent in PIPEDA, and making it more difficult to truly 'inform' individuals, as they habitually disregard privacy related notices. We note that informing individuals through the use of privacy notices and policies already presents formidable challenges given the sheer number of policies that the average internet user will be exposed to in the online environment.[7]

We would also note that requiring consent for the use and disclosure of de-identified data could undermine the ability of organizations to de-identify data in a meaningful manner. When collecting and using information that is unquestionably personal information, under PIPEDA organizations may rely on express consent where the circumstances, including the nature of the transaction and the sensitivity of the information, render it appropriate in the circumstances. For example, where an individual is completing a purchase form and provides express consent in compliance with PIPEDA and Canada's Anti-spam Law to receive commercial email by ticking a consent box, the organization is able to associate that email address with various additional information, including the consent language used, their privacy policy as it read at that time, the website it was collected on, the date and the other information submitted by the individual. Similarly, when conducting behavioural tracking and targeting relying on opt-out consent in accordance with the Office or the Privacy Commissioner's Policy Position on Online Behavioural Advertising, organizations are able to assemble behavioural profiles and associate them with the language the organization used to disclose its behavioural advertising practices. In contrast, meaningful de-identification of information is in part a process of de-associating a subset of truly anonymous information from other information that would create a serious possibility the information could be re-identified. Requiring an organization to have individual consent in respect of de-identified information may undermine that process in so far as it may necessitate the retention of further potentially identifiable information to evidence that such consent had been obtained in actual fact.

In determining whether data is truly de-identified, the test established through the Canadian court rulings and relied on in subsequent decisions of the Office of the Privacy Commissioner of Canada, whether there is a "serious possibility the data could identify an individual, alone, or in combination with other information" remains appropriate.[8] While the definition of personal information in PIPEDA is broad and expansive,[9] it should not be viewed as being so broad and so expansive that PIPEDA departs from its purpose of establishing "rules to govern the collection, use and disclosure of personal information" while respecting both the right of privacy of individuals and the need of organizations to collect, use and disclose personal information. Interpreting personal information so broadly it encompassed information that did not truly present a "serious possibility" an individual could be identified from it would depart from the purpose of the Act.

Whether there is a "serious possibility" that information could identify an individual should more clearly consider the information available to the organization that holds the data, and whether in that context there is indeed a real and serious possibility that the information could be identified. While the definition of personal

[7] In addition to the research cited in the Consent Discussion Paper, the ACA and CMDC note that public opinion surveys prepared for the Office of the Privacy Commissioner of Canada in 2012 indicated that approximately 50% of Canadians "rarely" or "never" read privacy policies. Public Opinion Surveys, Survey of Canadians on Privacy-Related Issues Final Report, Prepared for the Office of the Privacy Commissioner of Canada. Phoenix SPI, January 2013 Online at: https://www.priv.gc.ca/information/por-op/2013/por_2013_01_e.asp#toc6 .

[8] *Gordon v. Canada (Health)*, 2008 FC 258 (CanLII).

[9] *Dagg v. Canada (Minister of Finance)*, 1997, 2 S.C.R., dissenting, 403 at para 68, ("Dagg"). While Dagg considered the definition of personal information in the Privacy Act, RSC 1985, c P-21, the definition is highly similar to that in PIPEDA.

information applies where information is about an "identifiable" individual, rather than an identified individual, interpreting the whether an individual is "identifiable" to include cases where information is only identifiable using statistical modeling or the inclusion of data sets not held by the organization removes the test from whether there is a "serious possibility" the information could identify an individual, into the realm of mere speculation and conjecture.

In this regard, the ACA and CMDC would also suggest that the organization's internal policies, security measures, employee training, and where information is processed or stored by a third party, contractual protections that restrict the use of the information and require appropriate security for it and in particular prohibit its re-identification, are also relevant considerations when assessing whether there is in fact a serious possibility that the de-identified information may be re-identified. Where de-identified information is protected by such factors, it would be less likely that there is in actual fact a "serious possibility" the information could be used to identify an individual, as opposed to mere speculation or conjecture it could be used in that manner.

In a manner similar to imposing a consent requirement in respect of truly de-identified information, unduly expansive interpretations of what constitutes personal information also contribute to the complexity of privacy policies and consent language, and as a result, the difficulty experienced by individuals in seeking to determine and understand the manner in which their personal information is collected, used and disclosed, and thus their ability to protect their core privacy rights.

Extremely expansive interpretations of what constitutes personal information also unduly interfere with the legitimate needs of organizations to analyze information that does not present a "serious possibility" it could identify an individual, undermining the balancing implicit in Section 3 of PIPEDA. We observe that this has the potential to lead to adverse outcomes from the perspective of protecting individual privacy. In the digital space, marketers are increasingly faced with forms of advertising fraud whereby computer programs such as bots are used to fraudulently generate impressions, views or clicks on advertising, thereby artificially inflating the marketer's costs where a pay per click or pay per impression model is used with the media supplier. As a result, marketers seek to establish that the entity interacting with their advertising is an actual human being. However, fraudulent programs may seek to rely on stolen information to lend themselves the semblance of being a human being. Such information may be obtained by the person orchestrating the fraud though the use of malware surreptitiously installed on a person's computer or device, (a violation of Canada's Anti-Spam Law in addition to PIPEDA), and which may harvest information regarding the person's use of the internet, or other information stored on or sent to or by the device, thus exposing the individual to identity theft and other harms.

In seeking to combat such advertising fraud, marketers must collect limited information pertaining to the entity interacting with their advertising with the intention of establishing that it is a human being. In most cases, where there is not truly a serious possibility such information could identify an individual it should not be treated as personal information subject to PIPEDA. In cases where limited, non-sensitive, identifiable information is collected for such purposes, the ACA and CMDC would suggest that an implied consent approach, analogous to that in the Office of the Privacy Commissioner's Policy Position on Online Behavioural Advertising, would be appropriate. Such an approach has the benefit of both combating fraud in the marketplace and reducing the incentive to utilise malware that can greatly compromise individual's personal information. Conversely, in this context, an overly broad interpretation of what constitutes personal information, or an overly expansive application of the requirement for consent, could lead to greater advertising fraud, and as a result, greater incentives to violate individual privacy to commit such fraud.

Regulatory Guidance and Decisions

The ACA and CMDC consider both clearly delineated 'no-go' zones where the collection, use and disclosure of personal information is not permitted, and 'proceed with caution zones', where a particular collection, use, or disclosure of personal information is permitted with enhanced privacy requirements, to be appropriate means through which the purpose of PIPEDA in establishing rules to govern the collection, use and disclosure of personal information in a manner that recognizes both the right of privacy of individuals and the need of

organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances can be met. However, we would consider that this is best done through regulatory guidance as to best practices, and would stress that individual consent must weigh heavily in assessing whether a "reasonable person" would consider purposes for collecting, using, and disclosing personal information appropriate in the circumstances".

We would consider regulatory guidance in respect of PIPEDA in its current, broad, form as an appropriate tool to establish 'no-go' and 'proceed with caution' zones as a matter of stated best practice. For online behavioural advertising and tracking, this is appropriately recognized by the existing Policy Position on Online Behavioural Advertising,[10] which establishes clear 'no-go' zones as described in the Consent Discussion Paper (i.e. organizations should not knowingly track children, and should not use tracking mechanisms that cannot be controlled by the individuals), and 'proceed with caution' zones, (e.g. tracking sensitive information only with the express consent of the individual). This is appropriate and consistent with the overall structure of PIPEDA in requiring the informed consent of the individual to the collection, use, and disclosure of their personal information, recognizing that individuals have a right to withdraw that consent, and that the form of the consent vary considering the circumstances and the type of information.

In cases where an organization has not complied with the regulatory guidance issued by the Office of the Privacy Commissioner, an investigation under PIPEDA may establish whether the organization has in fact violated PIPEDA, considering the facts surrounding the organization's actual practices, and ultimately PIPEDA may be enforced through a binding order of the Federal Court. Such investigations and rulings have the benefit of determining whether an organization has breached the broad protections set out in PIPEDA in the light of the actual practices of an organization and facts of the case, and the reasonable expectations of Canadians. In contrast, efforts to create specifically delineated legislative 'no-go' zones rather than the protection of broad privacy principles may miss this contextual analysis grounded in the facts of existing organizational practices and result in statutory prohibitions that are unduly broad, or conversely drafted too narrowly to respond to changing technological circumstances.

With respect to consent, while Section 5 of PIPEDA limits the collection, use or disclosure of personal information to purposes that a "reasonable person would consider are appropriate in the circumstances", regardless of consent, we would caution that the consent of a particular individual to the processing of their personal information should weigh heavily in determining that a reasonable person would consider the processing appropriate. Whether consent is sufficient in respect of a particular collection, use or disclosure of personal information would depend on the form of the consent, the nature of the collection, use or disclosure of personal information and the inherent sensitivity of the personal information. In accordance with Section 4.3.4 of PIPEDA, the more sensitive the information or the context in which it is used, the more explicit and express the consent needed. However, the reasonable individual would recognize that different individuals may deem different collections, uses or disclosures of their personal information appropriate and agreeable, and that recognizing the individual's right to privacy would entail recognizing their right to choose the manner in which their personal information is both used and not used. We would think it relatively rare that particular collections, uses, and disclosures of personal information would always be inappropriate in the face of the express, informed consent of the individual to whom those practices pertain.

To use the example of Bill S-201, and the proposed prohibition on requiring genetic testing as a requirement for providing goods and services or entering into a contract, Section 4.3.3 of Schedule 1 to PIPEDA already prohibits organizations from conditioning the provision of goods or services on an individual consenting to collections, uses or disclosures of personal information beyond those needed to meet explicitly specified and legitimate purposes. In this regard, the Office of the Privacy Commissioner has adopted an interpretive framework to address whether such explicitly specified and legitimate purposes are consistent with the requirement to limit the collection of information, and the overarching requirement for organizations to collect information only for purposes that a reasonable person would consider appropriate in the circumstances. The

[10] Office of the Privacy Commissioner of Canada. "Policy Position on Online Behavioural Advertising."

framework considers, among other things, whether the collection and use of the information is *necessary* to achieve a legitimate business purpose.[11] In contrast, Bill S-201 in its current form provides exceptions only for health care practitioners providing health services and persons engaged in medical, pharmaceutical or scientific research. It is conceivable that certain legitimate business purposes that individuals explicitly choose to engage in and to which they expressly consent, such as ancestry testing, may legitimately require genetic testing in order to carry out, but may not constitute health services or research. In this regard, the current analytical framework provides greater flexibility, while retaining statutory protection for the privacy rights of individuals.

IV. Governance

The ACA and CMDC believe that the goals of PIPEDA are complemented by a strong self governance model in which industry groups and individual organizations disclose their practices to individuals in a clear and understandable manner. In particular, industry groups and third parties that establish codes of practice for organizations that choose to participate in them play a particularly valuable role in establishing and popularizing recognized industry practices. This contributes to the ability of individuals to understand the manner in which their information may be collected, used and disclosed, as it helps to align the practices of the organizations participating in the code, and thus reduces the need for individuals to try to understand numerous variously drafted privacy policies – thus contributing to the transparency and understandability of privacy practices.

Such organizations also play a valuable role in providing tools to help individuals manage their privacy preferences in a centralized manner in respect of the participating organizations, allowing organizations to more easily give effect to withdrawals of consent, and in educating individuals in relation to the practices of their participants and how they may be controlled.

In this regard, we draw your attention to the Digital Advertising Alliance of Canada (DAAC). The DAAC is a consortium of the leading national advertising, marketing and media associations whose members share commitment to delivering a robust and credible self-regulatory program for responsible online interest-based advertising (IBA), called AdChoices. Member organizations include ourselves, the Association of Canadian Advertisers (ACA) and Canadian Media Directors' Council (CMDC), as well as Association of Creative Communications Agencies (A2C), Canadian Marketing Association (CMA), Conseil des directeurs médias du Québec (CDMQ), Institute of Communication Agencies (ICA), and the Interactive Advertising Bureau of Canada (IAB Canada). Advertising Standards Canada (ASC) is responsible for the accountability component of the AdChoices program for Canada.

The program launched in September 2013, with general adoption occurring throughout 2014-2015. As of writing there are 75 companies participating in the Canadian AdChoices program, consisting of advertisers, data aggregators, DSPs, SSPs, ad exchanges, ad networks, ad servers and publishers.

The fact that participation in these codes of practice is voluntary preserves the ability of differing organizations to collect, use and disclose personal information in differing manners, provided they comply with their statutory obligations under PIPEDA in doing so. Organizations are ultimately the entities that are in the position to know the manner in which they collect, use and disclose personal information, and are required to be accountable for such actions under PIPEDA.

Where organizations fail to comply with a voluntary industry code they have chosen to participate in, enforcement of the code should remain with the industry group that developed it, through means such as suasion, public statements of non-compliance and expulsion from membership, rather than involving the Office of the Privacy Commissioner in investigating and seeking to enforce voluntary industry practices in addition to the statutory requirements under PIPEDA. However, ultimately, the enforcement of PIPEDA would remain with the Office of the Privacy Commissioner and the federal courts. We would observe that purporting to participate in a

[11] Office of the Privacy Commissioner of Canada, "Statement on the use of genetic test results by life and health insurance companies."

particular industry code while not complying with its requirements may in some cases compromise an organization's ability to establish true informed consent within the meaning of PIPEDA, thus raising the prospect of investigation by the Office of the Privacy Commissioner and compliance orders in the Federal Court.

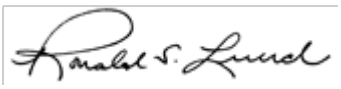
V. Conclusion

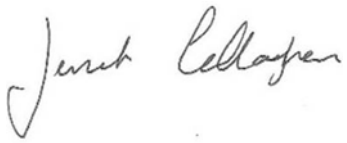
The ACA and CMDC do not consider statutory changes to be necessary, and note that PIPEDA was amended in June 2015 to clarify the requirement for individual consent to the collection, use and disclosure of their personal information. Further, we submit that the inherent balancing between the right of privacy of individuals and the needs of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances is best served through a combination of the potential solutions put forth in the Consent Discussion Paper.

Approaches to consent that emphasize increased transparency, de-identification of personal information should be viewed as furthering the purposes of PIPEDA. This includes a realistic approach to identifying whether there is a serious possibility that de-identified data could be used to identify an individual, rather than an approach based on speculation or conjecture, and regulatory guidance on 'no-go' and 'proceed with caution' zones

Conversely, overly broad interpretations of what constitutes personal information or an overly expansive application of the requirement for consent have the potential to undermine the ability for individuals to protect their privacy and for organizations to collect information. These circumstances may lead to adverse outcomes where individuals are overwhelmed by, and as a result disregard, privacy notices. Further, such approaches also have the potential to undermine the efforts of marketers to combat advertising fraud, particularly when applied to de-identified or non-identifiable information. Our concern is that this situation could lead to greater incentives on the part of entities committing fraud to violate individual privacy in an effort to evade detection by marketers.

Lastly, the ACA and CMDC believe that the goals of PIPEDA are complemented by a strong self-governance model in which industry groups and individual organizations disclose their practices to individuals in a clear and understandable manner. In particular, industry groups and third parties that establish codes of practice for organizations that choose to participate in them play a particularly valuable role in establishing and popularizing recognized industry practices. This contributes to the ability of individuals to understand the manner in which their information may be collected, used and disclosed, as it helps to align the practices of the organizations participating in the code, and thus reduces the need for individuals to try to understand numerous variously drafted privacy policies – thus contributing to the transparency and understandability of privacy practices.





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