



Thursday, January 8, 2020

The Honourable Minister Navdeep Bains
Innovation, Science and Industry (ISI)
By email charles.taillefer@canada.ca

Honourable Minister Bains,

IAB Canada on behalf of its members, would like to thank you for providing us with the opportunity to respond to your discussion paper “Strengthening Privacy for the Digital Age”. The Canadian online advertising industry is more prepared than ever, to help navigate the issues that were tabled within the document as key priorities as well as those raised in the 2019 announcement of the new Canadian Digital Charter, to help Canada thrive digitally in the coming years. Data and its various uses are the cornerstone of the estimated \$8.5 billion Canadian digital advertising sector that employs more than 40,000 Canadians. Facing the possibility of amended federal privacy laws, it is imperative that the digital advertising industry is actively involved in practical discussions around potential amendments that can help maintain the balanced approach to privacy and innovation that Canada is historically well known for.

As representatives of the Canadian digital advertising industry, we hope that our feedback and participation will be useful. We look forward to participating in further productive discussions as we collectively work toward modernizing our digital capabilities to bring Canada to the forefront of global digital innovation and economic growth while simultaneously protecting the rights and privacy of Canadian citizens.

About IAB Canada:

Established in 1997, IAB Canada is a not-for-profit association exclusively dedicated to the development and promotion of the rapidly growing digital marketing and advertising sector in Canada.

IAB Canada represents over 250 of Canada's most well-known and respected stakeholders in the digital advertising and marketing sector, including advertisers, advertising agencies,

media companies, digital media publishers and platforms, social media platforms, adtech providers and platforms, data companies, mobile and video game marketers and developers, measurement companies, service providers, educational institutions, and government associations operating within the space. Our members include numerous small and medium sized enterprises.

Companies in the digital advertising and marketing sector offer a wide range of highly innovative products and services, including valuable service offerings to individual Canadians. This sector is intensely competitive, and the long-term success of our members is fundamentally predicated on their ability to continually design, develop, offer and improve valuable digital products and services.

Our members include numerous small and medium sized enterprises and represent over 80% of the estimated \$8.5 billion industry in Canada. IAB Canada has a long history of creating programs that are designed to promote the responsible growth of the online advertising industry in Canada. Notably, IAB Canada was the founding member of the self-regulatory Ad Choices Program developed to enable industry compliance within the PIPEDA framework.

IAB Canada is the only organization fully dedicated to the responsible growth of digital/interactive advertising in Canada by delivering:

- Globally accepted digital ad standards;
- Advocacy for the Canadian digital advertising industry to the Canadian government;
- Trained human capital, through globally standardized courses, certification and custom workshops;
- Original Canadian digital marketing research; and,
- Information to the industry and enhanced communication between members.

IAB Canada would like to submit comments addressing four core areas of the “Strengthening Privacy for the Digital Age” discussion paper:

1. Enhancing Individuals’ Control
2. Enabling Responsible Innovation
3. Enhancing enforcement and oversight
4. Areas of ongoing assessment

Part 1: Enhancing Individuals' Control

The online advertising industry is a complex ecosystem requiring careful technical consideration in order to implement effective mechanisms with the desired policy outcomes. The industry is experiencing rapid transformation due to both regulatory and heated competitive challenges. These changes will inevitably impact the very infrastructure of the digital advertising landscape.

With over 21 years of developing codes, standards and best practices, IAB and its global network are uniquely equipped to develop technical frameworks that are grounded in the reality of digital media transactions while addressing nuanced regulatory compliance. IAB Canada and its members firmly believe in proactively working towards providing citizens with full transparency and choice when it comes to the use of their data for the purposes of online advertising. As founding members of the self-regulatory initiative Ad Choices, we have seen first-hand that citizens respond well to control mechanisms and we have learned a great deal about the importance of user interfaces in the context of driving meaningful interaction and consent.

In Canada and other markets around the world, IAB is on-the-ground solving for privacy requirements that work in the existing infrastructure, while already developing proposals for the future state of the industry that will most likely address many concerns expressed in this document, including the vision for a more standardized and globalized approach to delivering consent.

Consent and Transparency

IAB Canada believes in providing consumers with transparency and meaningful control of their data for interest-based advertising throughout the digital supply chain.

- IAB Canada agrees with the notion of providing increased transparency and enhanced controls to citizens. There has been a significant amount of work done by IAB globally, to create a standardized taxonomy around data purposes that has now been implemented by the vast majority of the ad tech industry. This work was critical towards providing a realistic means to develop enhanced consent management platforms that would allow consumers to opt-out of advertising in an

informed and transparent manner.

- IAB Tech Lab's technical solution – the Transparency Consent Framework (TCF) for example, was implemented widely in Europe to address the GDPR. Working with DPAs across multiple countries, while simultaneously representing numerous stakeholders in the digital space, great steps toward 100 percent compliance has been attained. The TCF is also currently being adapted to aid in compliance within the CCPA framework. The TCF framework has provided citizens with significantly enhanced transparency and control allowing improved navigation of their privacy options while helping the advertising industry stay in compliance with complex privacy legislation.
- In 2019, IAB Tech Lab launched DataLabel.org, a global framework for businesses to appropriately disclose their data source information. IAB Canada believes that this framework provides a tremendous first step towards citizen-facing transparency and that Canadian businesses should be encouraged to participate in this global initiative. Programs like DataLabel.org lay a solid foundation for future downstream efforts to provide citizens with accurate facts around data being used by brands and the online advertising platforms. IAB Canada is working hard to promote the benefits of these programs to our members and will continue to do so in the hopes of increased engagement.
- As evidenced through our work in developing and helping to launch the AdChoices program, IAB Canada has been working with our members to encourage greater transparency and consumer controls. We believe that this inherently improves customer relationships while helping businesses responsibly leverage consumer data to deliver value. As founding members of the program, IAB Canada continues to encourage the modernization of the AdChoices tool to reflect the changing technical realities of online advertising.

IAB Canada believes that the “meaning” behind meaningful consent is losing value.

- As discussed in previous submissions, IAB Canada is concerned around the overuse of express (opt-in) consent mechanisms in the digital media landscape. The sheer volume of consent touchpoints is diminishing the “meaning” of consent and contributing to consent fatigue. IAB has proven internationally, that a more persistent opt-out consent mechanism can deliver appropriate control to citizens

while allowing for businesses across the entire supply chain to have greater security around compliance. It is therefore recommended that amendments look towards facilitating the implementation of effective technical frameworks.

- IAB Canada believes there is a significant amount of work to be done in educating citizens about the true value of digital advertising and how it actually works to deliver content and services to each and every Canadian. Canadians must be given an accurate account of how digital advertising works to provide free access to valuable content from music and instructional videos, and more critically, free and democratic access to Canadian journalism. Data-driven advertising is not an Internet phenomenon; it has been and continues to be a fundamental part of Canadian business.
- Significant efforts have been made by IAB Canada and its members to provide citizens with comprehensive rationale around data usage that impacts the various advertising they see.

IAB Canada is the critical stakeholder, representing the entire digital advertising industry. We remain open to engagement with government in its work to modernize privacy legislation and want to help in the quest to provide solutions that are technically sound for both citizens and the business community.

Data Mobility

At IAB Canada, we understand that portability and data mobility are very important components of increasing Canadians' individual control and consumer choice. However, it is imperative to remember that although data mobility provides certain advantages, it comes with inherent risks to consumer protection, privacy, confidentiality, cybersecurity, innovation and competition. IAB Canada, and our members, believe that when considering data portability, one needs to examine the process through the lens of both the individual and the business.

At IAB Canada we recommend a system that supports the principle of increased individual control over data and some limited additional choice, but that makes full portability conditional on there being adequate frameworks/infrastructure in place to protect economic growth.

This proposed approach will work to achieve the following:

- manage expectations of both individuals and businesses;
- recognize the need for businesses to invest in this area while avoiding unnecessary and excessive business costs;
- provide clear, simple and easily implemented obligations;
- limit uncertainty for all parties;
- allow for phased in approach as infrastructure and frameworks are developed; and,
- allow for the continuation of innovation as other needed frameworks and infrastructures are rolled out.

The introduction of data portability will also attract third party providers. The risk posed to consumers from such third-party providers must be properly assessed to confirm continued protection. IAB Canada believes that it will be necessary to ensure that all parties who might receive ported information remain accountable to the consumers in terms of privacy and confidentiality and maintain appropriate safeguards.

The issue of data mobility is fundamentally about marketplace competition, access to goods and services by consumers, and the creation of favourable conditions for economic growth. It may, therefore, be an issue best explored by sector-specific regulators, and not only through PIPEDA review. Portability is also as much about competition and consumer protection as it is about privacy. Accordingly, ISI may want to consider a role for competition law and the Competition Bureau.

Should a new portability requirement be introduced into PIPEDA, IAB Canada believes it should be targeted and deliberate to meet stated objectives, needs and expectations. For example, contrary to the GDPR model which creates a sweeping data portability right that simply requires organizations to provide data in a “structured, commonly used and machine-readable format” and transmit it directly from one controller to another “where technically feasible”, any equivalent amendment in PIPEDA should provide far greater clarity on implementation.

To be meaningful (real for consumers and not overly burdensome for business), there is a need for infrastructure, recognizing that not all necessary infrastructure requirements and frameworks can exist within PIPEDA. There would need to be reasonable verification of the individual making the request and perhaps an opportunity to seek reasonable time

extensions for good cause. To be realistic and feasible in practice, the portability obligation would have to be limited to information under the organization's control and there would need to be a clear definition of "standardized digital format" as referenced in the White Paper.

Part 2: Enabling Responsible Innovation

Generally speaking, IAB and its members welcome creative means of enabling responsible data innovation.

For example, IAB Canada and its members would welcome the enablement of data trust agreements. The online advertising industry has a long history of creating both open and closed marketplaces. Historically, these marketplaces have not shared cross-entity data and have been limited to offering advertisers with a trusted selection of publishers and platforms with whom to trade. Data trust agreements could allow competitive coalitions to emerge in the Canadian digital media landscape. Trusts would also allow Canadian publishers to deliver greater scale of content within Canada while significantly streamlining the consent management process for citizens. In order to promote the use of data trusts as a means of achieving competitive advantage, consideration may be given to incentives like cross-entity certification processes, standardized technical solutions and flexible approaches such as streamlined reporting, guaranteed compliance with cross-border regulations and other important factors that are top of mind for risk adverse advertisers.

IAB Canada also supports the development of a co-regulatory model where government regulation and industry self-regulation work in tandem. This dual, collaborative model formally recognized in law would be an efficient mechanism for balancing consumer protections and business needs and complementing the heavy compliance responsibilities of regulators.

For example, organizations should be encouraged to develop tools to help themselves comply with the law. At a minimum, IAB Canada believes that organizations should be encouraged to develop and follow standards and codes of conduct and self-declare adherence to such, as these are relatively flexible and low-cost instruments. Industry codes of practice and standards should also be recognized as tools that can help organizations ensure compliance with PIPEDA and help demonstrate accountability. Although PIPEDA already offers language that recognizes the important role that the

Commissioner plays in encouraging organizations to “develop detailed policies and practices, including organizational codes of practice” (section 24.c), the OPC should play a more active and public role in supporting, enabling and recognizing such codes.

IAB Canada recognizes that publicly declaring self-adherence to codes and standards and not following the rules is a risk as with any other self-regulatory scheme. Nonetheless, it must be recognized that while these instruments are voluntary, they operate within a legal environment that holds organizations to account for them through regulatory regimes governing consumer protection, competition, health and safety, labour and environmental protection, as well as common law principles of contract and tort law. For example, if an organization purported to be in compliance with a Code but was not, they could be subject to consequences under the Competition Act (misleading advertising) etc.

Moreover, where necessary, and depending on the sector, additional incentives could be embedded in PIPEDA to require (or authorize) the involvement of a third party to assess and attest to organizations’ compliance with such industry codes and standards. Oversight by third parties (e.g. auditors, accountability agents) should, where warranted, be explicitly recognized in law as tools for compliance and enhanced privacy accountability and the third-party approvers themselves could be approved by the Standard Council of Canada.

The process, criteria and requirements for approving such certifications would need to be devised by ISI with input from the OPC and the Standards Council of Canada. These certifications of enforceable codes and certifications should act to shield companies from any random investigation by the OPC, without a reasonable cause to investigate.

IAB Canada believes that the OPC should not be given the authority to proactively review adherence to the certification of enforceable codes and standards (without it being connected to an investigation on reasonable grounds), contrary to what is suggested in the White Paper. This would be for the certification body and accountability arm to do.

IAB Canada is confident that a co-regulatory approach – rather than a strict policing approach - would better incentivize organizations to take on more ownership of their privacy compliance efforts; reduce the workload and resourcing needs of the OPC; and foster increased collaboration between the regulator and industry in true co-regulatory fashion. To further incentivize organizations, participation in certification schemes should also be required to be taken into consideration when deciding on an appropriate remedy following a non-compliance event.

IAB also recommends that any PIPEDA amendment to this effect should not prescribe specific codes or standards, but rather, formally recognize the importance of such tools as a way of enhancing compliance with privacy law.

Moreover, the actual development of codes of conduct or standards and any related certification programs should involve industry in a substantive way. ISI should work with stakeholders to determine which activities or areas warrant collective effort around standards and codes of conduct and in particular which of those require a formal certification recognized by ISI and the OPC and facilitated by the Standards Council of Canada and select third-party accreditors.

Part 3: Enhancing Enforcement and Oversight

In general, IAB Canada would like to see a more collaborative effort between the OPC and the business community to ensure a meaningful and more robust enforcement regime particularly in a regulatory sphere that is so rapidly evolving. In light of the uncertainty and unpredictability of the market, Canadians and organizations would benefit most from a collaborative model that allows the regulator to play an active part in helping enable creative and well-balanced solutions, rather than police activity that risks alienating responsible actors in the marketplace.

The ombudsperson model has, and can continue to work, and we believe that its effectiveness will suffer if we try to turn it into more of a prosecutor and enforcer. Recognizing the four key components of an effective enforcement regime described in the White Paper, IAB would rather see OPC place greater emphasis on its role as educator and advisor. As examples:

The OPC should earmark resources for public campaigns and the development of easy-to-use and publicly accessible toolkits. These would target consumers and businesses and could follow some of the best practices in the UK, the EU and Australia.

The OPC should publish all findings in a timely way to provide more adequate guidance to businesses in Canada and report more transparently, in a consistent and ongoing manner, on items such as the number of times they have used their audit powers, initiated investigations based on reasonable grounds, used any formal powers, etc.

The OPC should seek to make increased use of stakeholder communities to help inform policy directions and identify areas ripe for the development of new guidance, codes, certification schemes and research. Other perspectives, including that of ISI and/or the Standards Council of Canada, should be involved in the process. ISI could help ensure a more balanced view taking into account organizations' business needs, while the Standards Council can assist in developing codes and standards that are more practical, predictable, actionable and measurable. A structured approach to the development of guidance to ensure meaningful input by all stakeholders would also prove valuable.

Having the OPC play more of an advisory role would certainly be welcomed by well-meaning organizations seeking non-binding, advance opinions and guidance from the OPC in order to assist in their innovation and development efforts by providing greater certainty and predictability, without fear of being the subject of a surprise investigation. However, such a role would only be workable if more formal structural and procedural measures are in place to separate the advisory arm of the OPC from its investigation arm.

When PIPEDA alone may not be sufficient or there exists a desire for consistent rules for specific sector or activity, industry codes or standards could be developed and recognized in legislation. It is essential that certification remain a voluntary action by business to meet business needs.

More opportunities should also be found for the OPC to engage in external collaboration with industry. For instance, the OPC should become more actively involved in enabling the development and recognition of industry standards and codes of conduct (as described above) and participate in innovative mechanisms such as regulatory sandboxes and the like.

To the extent that the OPC is afforded with more enforcement powers in PIPEDA, these should be carefully counterbalanced by express articulation of rules of natural justice and procedural fairness. While flexibility of process may work in an ombud's regime where conciliation and resolution are the ultimate aims, fairness demands more certain and predictable rules when rights and obligations of the parties may be seriously impacted by an adversarial process. Enhanced powers of investigation, order-making and public interest naming should only be used in a manner proportionate to the conduct of the parties and their level of cooperation.

In terms of financial consequences, PIPEDA already contains the possibility for courts to award statutory damages to compensate individuals, and for the Attorney General to pursue criminal offences under the Act for the most egregious violations that may lead to fines or imprisonment.

Should a regime of administrative monetary penalties also be introduced to dissuade bad behavior in the marketplace, it should be accompanied by specific ranges, along with a clear articulation of mitigating and aggravating factors to limit their arbitrariness. Serious thought must be given to whom is best placed to impose such penalties. From the perspective of expertise, impartiality and Ministerial accountability, IAB believes that other regulators, such as the Competition Bureau, would be better placed than the OPC to enforce monetary penalties against bad actors that wreak havoc in the marketplace.

Serious consideration must also be given to the quantum of fines, given the real risk of stifling innovation as organizations will be hesitant to innovate for fear that they could unintentionally contravene PIPEDA. Fines should also be administered on a sliding scale that takes into account such things as size of the organization in terms of its revenue and capacity to pay. IAB Canada and its members would caution against GDPR-like penalties of 4% of global revenues that have created significant deterrent to data driven innovation in the EU. We believe there should be a more proportionate approach in Canada.

Part 4: Areas of Ongoing Assessment

Specific challenges to SMEs

The cost to comply can become crippling to an organization and with each legislative amendment comes additional financial burden. Most of all, it is SMEs that are bearing the brunt of it. Barriers to comply include limited financial resources as well as staff with limited knowledge of privacy requirements and best practices.

IAB Canada represents many of these small businesses and strongly believes that the Government must find ways to make it easier for them to not only comply with PIPEDA, but to also become trusted organizations in the spirit of enabling them to grow and compete.

Following are some suggestions to lowering the barriers to compliance for SMEs in particular:

- The OPC should have practical resources and tools specifically designed for SMEs. This could include the creation of a roadmap and practical materials/toolkits that can be used to support SMEs with limited resources. The OPC should also look at developing more targeted education and outreach programs.
- The Government should also consider tax incentives for SMEs to certify to codes or standards in order to reduce the cost of compliance. Tax incentives should also be considered for those organizations who manage these code or standards so they can be provided to the SMEs at a reduced cost.

While we recognize that some of these suggestions would require government wide support, they would provide the much-needed relief from some of the financial burden and constraints organizations face in complying with laws and regulations.

Proposed Redrafting of the Law

While there are certain challenges in applying PIPEDA's fair information principles in today's highly dynamic data environment, it is clear that overall the statute has worked—and continues to work—as an elegant and effective model for organizations to respectfully treat personal information in the course of developing and offering highly innovative and valuable services, products, and features. PIPEDA remains particularly effective today because it was drafted in a technologically neutral and sectoral-agnostic fashion and is well-suited to address the seemingly novel privacy considerations that may be raised by new technological developments.

IAB Canada and its members believe that PIPEDA is not entirely broken and that the current framework provides sufficient protection to consumers and businesses. However, should PIPEDA be revised, we would insist that industry be consulted and involved in the process beyond this submission. IAB Canada is well positioned to work with ISI and the OPC to ensure that the digital economy in Canada is not brought to its knees by regulation. We propose a working relationship between Government and Industry where our members can feasibly adapt their practices within any new consent framework that may come into effect.

IAB Canada cautions the Government against simply following legal regimes such as Europe's General Data Privacy Regulation (GDPR) or California's Consumer Privacy Act (CCPA) as models for how a privacy standard should function. While well-intentioned and important developments in bringing deserved attention to the issue of data privacy, these rigid frameworks impose significant burdens on consumers while failing to stop many practices that are truly harmful; they also fail to recognize the various ways in which digital advertising subsidizes the plentiful, varied, and rich digital content and services consumers use on a daily basis and have come to expect. Consumers enthusiastically embrace the ad-supported model because of the free content and services it enables. They are aware of, and support, the exchange of value in which data-driven advertising funds the free or reduced- cost services they receive.

While we understand the Canadian Government's desire to achieve adequacy, we believe that certain strategic amendments to PIPEDA, as it exists, rather than wholesale reform, can get us closer to its intended state.

On behalf of IAB Canada, and all of its members, we thank you for the opportunity to submit our responses to the important questions being asked by the Government of Canada. We look forward to a future collaborative approach to privacy through ongoing discussions with our sector. If you have any questions or require any further information, please do not hesitate to reach out.

Sincerely,

A handwritten signature in black ink that reads "Sonia Carreno". The signature is written in a cursive, flowing style.

Sonia Carreno
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