

A More Effective “Made in Canada” Approach to Privacy Law: Amendment needed to the *Consumer Privacy Protection Act*.

The *Consumer Privacy Protection Act* (CPPA) in Bill C-27 would position Canada as a global leader in protecting privacy and fostering innovation.

The CPPA’s purpose statement reflects the need for Canada’s private sector privacy law to continue to achieve two essential priorities:

- 1. providing effective privacy protection for consumers; and,**
- 2. enabling Canadians to benefit from the enormous social and economic benefits of data use.**

These two priorities can and must be achieved in harmony.

The CPPA, as currently written, has a dual-purpose statement, which is to: **“govern the protection of personal information of individuals while taking into account the need of organizations to collect, use or disclose personal information in the course of commercial activities.”** This builds on the strengths of PIPEDA, which has been guided by the dual objective of protecting consumer privacy and enabling responsible data use and innovation since its enactment in 2001.

Consumer trust is critical to a successful business. Most organizations operating in Canada are responsible, and committed to building and maintaining a trusted relationship with their customers. They dedicate significant attention and resources to protect personal information. Canada’s privacy law must protect consumers in a manner that does not create an unnecessary administrative burden for companies, including SMEs.

Canadian consumers expect organizations to intuitively deliver the products and services that they need and want. They are demanding faster and better, more relevant information from companies to help them make informed purchase decisions.

The CPPA preserves Canada’s principles-based and technology-neutral approach to privacy, which acknowledges the varying capacities and sizes of Canadian organizations and ensures that the law would remain resilient in the face of rapidly evolving technologies, business models and consumer expectations.

The following amendments are needed to ensure that the policy intent of the proposed CPPA is achieved without unintended consequences for consumers and organizations:

A. Minors’ Data

The Canadian Marketing Association (CMA) unequivocally supports the protection of minors’ data. We have been a leader in setting standards for marketing to children and youth for decades, through our Canadian Marketing Code of Ethics & Standards, which was recently updated to reflect principles in the UK Children’s Code. Updates include provisions regarding the best interest of the child, age-appropriate application, detrimental use of data, data sharing and transparency, profiling, nudge techniques, geolocation, and connected toys and devices, and online tools.

The protection of minors' data is an important issue that warrants specific and special treatment. It needs to address real harms, not only through privacy law, but also through online harms legislation (Bill C-63), and through industry codes and certifications.

The CPPA's blanket approach to the personal information of minors (which deems it as sensitive in all cases and all contexts) would result in organizations collecting and retaining a significant amount of additional information about all individuals – well beyond what would reasonably be required for business purposes – simply for the purpose of verifying age to ensure compliance with the new law.

A more targeted approach that is less intrusive and consistent with other major jurisdictions would avoid the overcollection of information and the potential risks that could result. Our recommendations align with laws in the US and the EU.

Proposed Language: CMA Amendment 1

~~2(2) For the purposes of this Act, the personal information of minors is considered to be sensitive information.~~

11.1 (1) An organization that directs any of its activities to minors, or that has actual or deemed knowledge that it is collecting, using or disclosing the personal information of a minor, must take into account the particular sensitivity of such personal information when fulfilling its obligations under this Act, including sections 9(2), 11(1), 12(2)(a), 15(5), 53(2), 55, 57(1), 58(8) and 74.

(2) In fulfilling its obligations under subsection (1) and section 4, the organization may have regard to the needs and capabilities of mature minors.

B. Consent and Exceptions to Consent

The following changes to the bill's consent provisions are required to ensure a meaningful consent model and to combat consent fatigue:

- The exceptions to consent (for 'business activities' and 'legitimate interests') must exclude only activities that a reasonable person would not expect a business to undertake or that would expose them to harm. Legitimate business activities that have no significant impact on the individual, including routine R&D activities that help organizations better understand and serve their customers, should not require consent.
- The provision prohibiting implied consent where one of the above exceptions to consent is available should be removed, as it prohibits organizations from taking a more careful approach in cases where it is not clear whether a full exception to consent applies.
- The proposed CPPA appears to prevent organizations from relying on the new exception for legitimate interests if those legitimate interests do not outweigh any potential adverse effect on the individual – regardless of how remote or unlikely that potential adverse effect may be. This is an impossibly strict standard, and not necessary to provide adequate privacy protection. To rely on the 'legitimate interests' exception to consent, organizations should be required to consider the potential adverse effects on an individual that are 'reasonably foreseeable', rather than those that are remote or unlikely.

Proposed Language: CMA Amendment 2

~~15(6) It is not appropriate to rely on an individual's implied consent if their personal information is collected or used for an activity described in subsection 18(2) or (3).~~

Proposed Language: CMA Amendments 3 and 4

18 (1) Business activities – An organization may collect or use an individual’s personal information without their knowledge or consent if the collection or use is made for the purpose of a business activity described in subsection (2) and

(a) a reasonable person would expect the collection or use for such an activity; and

~~(b) the personal information is not collected or used for the purpose of influencing the individual’s behaviour or decisions.~~ (b) the personal information is not used to interact directly with the individual for the purpose of influencing the individual’s behaviour or decisions.

18 (3) Legitimate interest – An organization may collect or use an individual’s personal information without their knowledge or consent if the collection or use is made for the purpose of an activity in which the organization has a legitimate interest that outweighs any reasonably foreseeable potential adverse effect on the individual resulting from that collection or use and

(a) a reasonable person would expect the collection or use for such an activity; and

~~(b) the personal information is not collected or used for the purpose of influencing the individual’s behaviour or decisions.~~ (b) the personal information is not used to interact directly with the individual for the purpose of influencing the individual’s behaviour or decisions.

(4) Prior to collecting or using personal information under subsection (3), the organization must

(a) identify any reasonably foreseeable potential adverse effect on the individual that is likely to result from the collection or use;

(b) identify and take reasonable measures to reduce the likelihood that the reasonably foreseeable effects will occur or to mitigate or eliminate them; and comply with any prescribed requirements.

C. Automated Decision Systems

The CMA supports the bill’s proposal that organizations provide more transparency upfront (and at an individual’s request) about automated decision systems (ADS) that make predictions, recommendations or decisions about them – as long as the definition of ADS is appropriately scoped to focus on solely automated decisions, and the obligation to explain at an individual’s request is focused on decisions that **are likely to** have a significant impact on individuals.

Without these amendments, the bill’s requirements could overwhelm consumers, create significant financial and administrative burdens for organizations and disincentivize organizations from developing and leveraging automated or partially automated systems, impacting Canada’s position as a global leader in automation.

Proposed Language: CMA Amendment 5

2 (1) automated decision system means any technology that ~~assists or~~ replaces the judgement of human decision-makers using techniques such as rules-based systems, regression analysis, predictive analytics, machine learning, deep learning and neural nets.

63 (3) If the organization has used an automated decision system to make a prediction, recommendation or decision about the individual that ~~could~~ **is likely to** have a significant impact on them, the organization must, on request by the individual, provide them with an explanation of the prediction, recommendation or decision.

D. De-identified and Anonymized Data

Leveraging de-identified and anonymized data is one of the most privacy-protective mechanisms on which organizations rely to innovate and provide value to consumers. It is critical that the CPPA not create unworkable definitions of de-identified or anonymized data, nor overly restrict its use, which would impede important data-driven technologies and services and redirect the innovation they enable to other jurisdictions with less restrictive frameworks.

The bill should incorporate the amendments put forward by the Canadian Anonymization Network (CANON), which aim to ensure that **policy standards for deidentified and anonymized data** enable innovative and beneficial uses of data, while reasonably protecting against foreseeable privacy risks.

Proposed Language: CANON Brief Amendment

2 (1) anonymize means to irreversibly and permanently modify personal information, in accordance with generally accepted best practices, to ensure that there is no reasonably foreseeable risk in the circumstances that an individual can be identified from the information, whether directly or indirectly, by any means

20 An organization may use an individual's personal information without their knowledge or consent to de-identify or anonymize the information.

31 (1) An organization may disclose an individual's personal information without their knowledge or consent if:

(a) before the disclosure is made

(i) the personal information is de-identified,

(ii) the organization notifies the Office of the Privacy Commissioner of Canada of the disclosure, and

(iii) the organization enters into an agreement with the person to whom or the body to which the information is to be disclosed that stipulates appropriate privacy and security measures to be put in place by the person or body, including a prohibition against re-identification of the information by the person or body;

(b) the disclosure is made to

(i) a government institution or part of a government institution in Canada,

(ii) a health care institution, post-secondary educational institution or public library in Canada, (iii) any organization that is mandated, under a federal or provincial law or by contract with a government institution or part of a government institution in Canada, to carry out a socially beneficial purpose, or

(iv) any other prescribed entity, in accordance with prescribed requirements; and

(c) the disclosure is made for a socially beneficial purpose; and

(d) the organization complies with any other prescribed requirements.

General

[X] Disclosure for socially beneficial purposes The Governor in Council may make regulations respecting persons or bodies to whom or to which an organization may disclose an individual's personal information under s. 39(1) without the individual's knowledge and consent for socially beneficially purposes, as well as conditions for the disclosure.

124 Regulations made under subsection 122(1), ~~or~~ section 123, or section |X| may distinguish among different classes of activities, government institutions or parts of government institutions, information, organizations or entities.

130 (4) Sections 39 and |X| come into force on a day to be fixed by order of the Governor in Council.

75 An organization must not use information that has been de-identified, alone or in combination with other information, to identify an individual except

- (a) where the organization can rely on consent or another authority under this Act to
- (b) ~~(a)~~ to conduct testing of the effectiveness of security safeguards that it has put in place;
- (c) ~~(b)~~ to comply with any requirements under this Act or under federal or provincial law;
- (d) ~~(c)~~ to conduct testing of the fairness and accuracy of models, processes and systems that were developed using information that has been de-identified;
- (e) ~~(d)~~ to conduct testing of the effectiveness of its de-identification processes;
- (f) ~~(e)~~ for a purpose or situation authorized by the Commissioner under section 116; ~~and or~~
- (g) ~~(f)~~ in any other prescribed circumstance.

E. Transition Period

The law should come into force in a staged manner over three years, so Canadian organizations have adequate time to implement the required substantial changes to compliance plans, IT systems, business processes and staff training.

The CMA proposes that the following sections of the bill should come into force, by order of the Governor in Council, within the time periods indicated below:

- 1) To come into force no earlier than 24 months after the Digital Charter Implementation Act, 2022 receives Royal Assent:

- S. 4 – Minors’ authorized representatives
- S. 18 – Business activities and legitimate interest exceptions to consent
- S. 53 – Period for retention and disposal
- S. 54 – Personal information used for decision-making
- S. 62 – Openness and transparency - policies and practices
- S. 123 – Data mobility frameworks

To come into force no earlier than 36 months after the Digital Charter Implementation Act, 2022 receives Royal Assent:

- S. 15 – Form of consent (express consent default)
- S. 55 – Disposal at individual’s request
- S. 63 (3) & (4) – Automated decision system explanation
- S. 72 – Disclosure under data mobility framework

- 2) To come into force no earlier than the tabling of the report following the first Parliamentary review as set out in s.129 of the Consumer Privacy Protection Act:

- S. 107

Proposed Language: CMA Amendment 6

130 (1) Subject to subsections (2),(3) and (4), this Act comes into force on the day on which section 3 of the *Digital Charter Implementation Act, 2022* comes into force.

(2) Sections 4, 18, 53,54, 62 and 123 come into force on a day to be fixed by order of the Governor in Council.

(3) Sections 15, 55, 63(3) and (4), 72, 76 to 81, paragraph 83(1)(d), subsection 94(3) and section 125 come into force on a day to be fixed by order of the Governor in Council.

(4) Section 107 comes into force on a day to be fixed by order of the Governor in Council.

About the Canadian Marketing Association

The CMA is the voice of marketing in Canada and our purpose is to champion marketing’s powerful impact. We are the catalyst to help Canada’s marketers thrive today, while building the marketing mindset and environment of tomorrow. We provide opportunities for our members from coast to coast to develop professionally, to contribute to marketing thought leadership, to build strong networks, and to strengthen the regulatory climate for business success. Our Chartered Marketer (CM) designation signifies that recipients are highly qualified and up to date with best practices, as reflected in the Canadian Marketing Code of Ethics and Standards. We represent virtually all of Canada's major business sectors, and all marketing disciplines, channels and technologies. Our Consumer Centre helps Canadians better understand their rights and obligations. For more information, visit thecma.ca.

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