

March 13, 2020

Office of the Privacy Commissioner of Canada 30 Victoria Street Gatineau, Quebec K1A 1H3

# RE: OPC's proposals for ensuring appropriate regulation of artificial intelligence

Dear Commissioner,

The Canadian Marketing Association (CMA) is submitting the following comments in response to the OPC's consultation on the regulation of artificial intelligence (AI).

The CMA supports the responsible and ethical use of artificial intelligence in Canada. We agree with the OPC's assertion that AI "provides for many beneficial uses ... (and) has great potential in improving public and private services." In addition to the transformative potential of AI to improve social outcomes, research indicates AI has the potential to double annual economic growth rates in developed countries in the next 15 years.

In our modern digital economy, consumers increasingly expect organizations to deliver the intuitive products and services they want and need. In a recent survey by Ipsos Canada, 50% of consumers indicated a desire to see internet advertising that is relevant and targeted to them, despite having concerns about the security of their personal information. Similarly, a 2018 research study, Data Privacy – What the Canadian consumer really thinks, found that a strong majority of Canadian consumers (76%) are willing to share personal data in order to receive benefits, as long as the data is properly protected. Younger generations are adopting a more pragmatic attitude towards their data and realize that data-exchange is increasingly fundamental to accessing many of the beneficial services they use and interact with daily. User data-driven systems, including recommendation engines, customer service chatbots and marketing geared towards consumer preferences, are important and beneficial tools and services for consumers, and organizations looking to better serve them.

Although Canada is a leader in AI research and development, research by Forbes Insights indicates we are lagging behind other G7 countries in our adoption of AI technology. Our regulatory approach must continue to enable the private sector to innovate in ways that are responsible and beneficial. A policy framework that is overly prescriptive would impede important new technologies and services, and push AI activity, and the innovation it enables, to other jurisdictions.

### Wider implications of Al

While privacy protection is an important component of the analysis of AI regulation, many other perspectives need to be taken into account, including issues relating to intellectual property law, competition law and policy, economic development initiatives, human rights and consumer

protection laws, employment laws, and laws and policies respecting particular industry sectors that may make use of AI technologies. For example, many of the issues relating to bias and discrimination in decision-making have already been examined from these other perspectives, such as through human rights laws, although not specifically with respect to AI solutions. These additional perspectives also implicate areas of federal and provincial legislative authority, so must involve and consider the interests of both levels of government. Considering a regulatory approach to AI based on only one perspective risks creating negative and unintended consequences for other legitimate industrial and public policy interests, as well as entrenching on provincial rights.

The wider topic of AI, its potential risks and benefits, and appropriate regulatory treatment warrants further time and thought beyond this consultation period and privacy protection focus. Relevant pieces of legislation, including PIPEDA, need not have AI built into them. Instead, government should aim to guide organizations on how they apply to AI. The CMA looks forward to further engagement with government policymakers regarding decisions in this important area.

We note that some of the points raised in this consultation, such as those related to enforcement powers and demonstrable accountability, were widely discussed as part of the Government of Canada's consultation on its proposals to modernize PIPEDA. The CMA previously provided written comments on these matters, and we continue to be actively engaged with ISED as they make policy decisions on the future state of the law. In the interim, we are pleased to provide high-level comments on the proposals that your office has presented about how PIPEDA could be reformed to address aspects of AI.

# Preserving PIPEDA's strengths as flexible and technology-neutral

As a principles-based law, PIPEDA already has the capacity to fundamentally address the appropriate handling of personal information in the context of many AI systems and uses, proving the flexibility of the law to apply to new technological developments.

Some AI systems may involve large-scale multi-sourced data streams that may create a need for enhanced consent processes. In other more contained contexts, complying with current consent obligations is more manageable. Similarly, while in some cases, the precise nature of the correlations and data insights that may flow from AI technology may not be known in advance, in many instances, this can be managed under the current framework by obtaining consent to perform data analysis for a variety of potential purposes or obtaining additional consent where required to apply AI learnings to personal data for previously unidentified purposes.

It is important to preserve PIPEDA's strengths as principles-based and technology neutral, with its rules applying to all processing. Since AI is an evolving area, a definition developed today is unlikely to anticipate what the term might come to mean in the future. As the uses and implications of AI continue to be developed and understood, it would be difficult for a law made at a particular point in time to predict the trajectory of technology. We have seen this with the EU's GDPR, which includes separate concepts of data controllers and processors, and the difficulty that has resulted in applying the law to blockchain, where data control is decentralized.

It is more important than ever for PIPEDA to be nimble in the face of rapidly evolving technologies and business models, allowing organizations to determine the most effective way to meet their common obligations. Bridging the gap between principles and practice should occur in a staged

approach, with significant input from those with direct knowledge of Al's operational realities. Private sector organizations should be encouraged to develop self-regulatory approaches within the ambit of principled guidance from government, with those approaches informing future Alspecific regulations. One cannot come before the other.

The development of voluntary best practices and standards should be encouraged, including an allowance in the Act for the formal recognition of some certifications and codes by ISED and the OPC, with oversight from select third-party accrediting bodies approved by the Standards Council of Canada. The OPC and the courts should consider adherence to these as evidence of an organization's due diligence or as a mitigating factor in investigations.

## Adopting a forward-looking risk-based approach to Al

We agree that an organization's personal information practices related to AI must be in accordance with the 10 principles embedded in PIPEDA. The current, explicitly stated purpose of PIPEDA is to set rules governing the collection, use and disclosure of personal information in a manner that recognizes both individual privacy rights and the appropriate needs of organizations. In the context of a law governing the private sector, this balanced objective continues to be the prudent approach, and properly recognizes and affords influence to the legitimate interests of both consumers and organizations.

As the privacy attitudes and expectations of consumers evolve, the term "privacy" is somewhat fluid, meaning different things to different people and in different contexts. To many, a "rights-based" approach suggests a regulatory framework that makes certain interests (legally recognized as "rights") paramount over others. While this may be an appropriate framework in some contexts, such an approach would be disproportionate with respect to regulating the collection, use and disclosure of personal information in the course of commercial activity.

As a fundamental principle, regulatory action respecting AI should only be undertaken where necessary to respond to real-world harms, rather than pursuing a proactive scheme based on perceived potential risks. Regulatory approaches based on theoretical outcomes can stifle innovation and limit the realization of the full benefits of the digital economy to consumers, business and society in general.

As AI becomes increasingly important to the future of Canada's digital economy, any consideration of its regulatory approach should seek to minimize disruption and avoid negative unintended consequences for Canadian organizations. Alongside the many tangible benefits to individuals of AI systems and processes, Canadian businesses are able to improve accuracy and efficiency and reduce costs. Regulatory restrictions that would impede or prevent the use of such technology would put Canadian businesses at a competitive disadvantage with respect to businesses in other jurisdictions, like the US, that do not impose such restrictions.

#### In conclusion

Any regulatory approach to AI must carefully weigh potential risks, such as algorithmic bias, against the many economic and social benefits of the technology and must consider the issues and risks from a broad range of industry and public policy imperatives.

The regulation of AI is an important issue that warrants considerable further study and discussion, including among stakeholders with deep expertise in the area. The CMA will continue engaging with ISED as it makes policy decisions in this area.

If you have questions about our submission, please contact Fiona Wilson, Director of Government Relations at fwilson@thecma.ca or 416-644-3748.

We look forward to our continued constructive dialogue with your office.

Sincerely,

Sara Clodman

Vice-President, Public Affairs and Thought Leadership

## **About the CMA**

The CMA is the voice of the Canadian marketing profession. We represent more than 400 corporate, not-for-profit, public, and post-secondary members, including Canada's most prestigious brands. Our community also includes creative, media, and PR agencies, research firms, management consulting firms, technology companies and other suppliers to the marketing community. We are committed to helping Canadian organizations maintain high standards of conduct and transparency through our mandatory <a href="Code of Ethics & Standards of Practice">Code of Ethics & Standards of Practice</a>, and our privacy and data protection resources for marketers and consumers. As the recognized longstanding leader in marketing self-regulation, we strive to ensure an environment where consumers are protected and businesses can thrive.