

CANADA INTRODUCES DIGITAL CHARTER AND PROPOSES REFORMS TO PIPEDA

*By Esther Shainblum**

A. INTRODUCTION

On May 21, 2019, Innovation, Science and Economic Development Canada Minister Navdeep Bains announced the Government of Canada's intention to make significant changes to Canada's privacy regime. Launching Canada's new Digital Charter ("Digital Charter"), Minister Bains advised that the Digital Charter is intended to lay the foundation for modernizing privacy rules in Canada, rebuilding Canadians' trust and providing a framework for future governance of the digital landscape.¹ As part of the launch of the Digital Charter, Minister Bains also announced plans to modernize the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), Canada's private sector privacy legislation, which will in part implement the principles of the Digital Charter and contribute to their achievement.²

B. THE DIGITAL CHARTER

Incorporating the findings of the National Digital and Data Consultations that took place between June and September 2018 (the "Consultations"),³ the Digital Charter is an "ambitious, aspirational, principled approach to digital and data transformation"⁴ that will be the foundation for a "made in Canada digital

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¹ Innovation, Science and Economic Development Canada, *Canada's Digital Charter in Action: A Plan by Canadians, for Canadians* (21 May 2019), online: Government of Canada <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html>.

² Innovation, Science and Economic Development Canada, *Strengthening Privacy for the Digital Age*, online: Government of Canada <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00107.html>.

³ Innovation, Science and Economic Development Canada, *National and Digital Consultations*, online: Government of Canada <<https://www.ic.gc.ca/eic/site/084.nsf/eng/home>>.

⁴ *Supra* note 1.

approach.”⁵ The Digital Charter is composed of the following ten principles, which will form the building blocks for modernizing the rules governing the digital sphere in Canada:

- 1) **Universal Access:** All Canadians will have equal opportunity to participate in the digital world and the necessary tools to do so, including access, connectivity, literacy and skills.
- 2) **Safety and Security:** Canadians will be able to rely on the integrity, authenticity and security of the services they use and should feel safe online.
- 3) **Control and Consent:** Canadians will have control over what data they are sharing, who is using their personal data and for what purposes, and know that their privacy is protected.
- 4) **Transparency, Portability and Interoperability:** Canadians will have clear and manageable access to their personal data and should be free to share or transfer it without undue burden.
- 5) **Open and Modern Digital Government:** Canadians will be able to access modern digital services from the Government of Canada, which are secure and simple to use.
- 6) **A Level Playing Field:** The Government of Canada will ensure fair competition in the online marketplace to facilitate the growth of Canadian businesses and affirm Canada’s leadership on digital and data innovation, while protecting Canadian consumers from market abuses.
- 7) **Data and Digital for Good:** The Government of Canada will ensure the ethical use of data to create value, promote openness and improve the lives of people—at home and around the world.
- 8) **Strong Democracy:** The Government of Canada will defend freedom of expression and protect against online threats and disinformation designed to undermine the integrity of elections and democratic institutions.

⁵ *Ibid.*

- 9) Free from Hate and Violent Extremism: Canadians can expect that digital platforms will not foster or disseminate hate, violent extremism or criminal content; and
- 10) Strong Enforcement and Real Accountability: There will be clear, meaningful penalties for violations of the laws and regulations that support these principles.⁶

C. PROPOSALS TO MODERNIZE PIPEDA

One of the messages received by the Government of Canada from the Consultations was the need to reform PIPEDA. Together with the launch of the Digital Charter, the Canadian government also released a discussion paper, entitled “Strengthening Privacy for the Digital Age” (“Discussion Paper”), which introduced a number of proposals to modernize PIPEDA. The Discussion Paper identifies PIPEDA as requiring updating to bring it into alignment with technological developments that were unforeseen when it was enacted twenty years ago, as well as with “next generation” privacy and e-protection laws in Europe and the United States. The Discussion Paper proposals to modernize PIPEDA include the following:

1. Consent and Transparency, including:

Providing more meaningful controls and increased transparency to individuals by requiring organizations to provide individuals with the information they need to make informed decisions, including specific, standardized, plain-language information on the intended use of the information, the third parties with which information will be shared, and prohibiting the bundling of consent into a contract.”⁷

- Providing certain alternatives or exceptions to consent, such as to cover common uses of personal information for standard business activities and for the use of de-identified information for certain prescribed purposes, with penalties for re-identification. Consent would still be required for uses that have the biggest impact on individuals. Individuals should be informed about the use of automated decision-making, the factors involved in the decision, and where the decision

⁶ Innovation, Science and Economic Development Canada, *Canada’s Digital Charter: Trust in a digital world*, online: Government of Canada <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html>.

⁷ *Supra* note 2.

is impactful, information about the logic upon which the decision is based in order to reduce the risk of undue discrimination and bias.

- Explicitly requiring organizations to demonstrate their accountability, including in the context of transborder data flows. Perhaps not surprisingly, in light of this announcement, the Office of the Privacy Commissioner's ("OPC") recently announced consultation on transborder data flows, which was supposed to be underway at this time, has now been suspended.⁸

2. Data Mobility, including:

- In a nod to the European Union's General Data Protection Regulation ("GDPR"), the Discussion Paper proposes to introduce a new explicit right for individuals to direct that their personal information be moved from one organization to another in a standardized digital format, where such format exists.

3. Online Reputation, including:

- In another nod to the GDPR and hearkening back to the OPC's own Draft Position Paper on Online Reputation,⁹ the Discussion Paper proposes to enhance individuals' ability to maintain their online reputation and to remove personal information at the source by:
 - Providing individuals with the explicit right to request deletion of information they have provided about themselves;
 - Requiring organizations to inform minors about their right to delete or de-identify their personal information that they provided and how to do so;

⁸ For further information on the consultation, see Esther Shainblum, *Charity & NFP Law Bulletin No 445*, "OPC Signals Policy Change for Data Transfers Across Borders" (25 April 2019), online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2019/chylb445.pdf>>. While the OPC has not provided an official statement on its website concerning the suspension of the consultation, it has been reported that Privacy Commissioner Daniel Therrien announced its suspension in a speech, for example by AccessPrivacy, "OPC Transborder Dataflows Consultation Suspended" online: Osler <<http://campaign.r20.constantcontact.com/render?m=1101789949972&ca=0d00bef2-a26f-45e1-a7b4-6ba04c2ef97a>>.

⁹ For more information, see Esther Shainblum, *Charity & NFP Law Bulletin No. 416*, "Privacy Commissioner Releases Draft Position Paper on Online Reputation" (27 February 2018) online: Carters Professional Corporation <<http://www.carters.ca/pub/bulletin/charity/2018/chylb416.pdf>>.

- Requiring organizations to communicate changes or deletion of information about an individual to any other organization to whom it has been disclosed; and
 - Exploring the use of defined retention periods to increase data integrity and decrease the risk of misuse.
4. Data Trusts, including:
- Establishing a regime for the use of de-identified data in PIPEDA, whereby de-identified data could be processed without consent when managed by a data trust, to allow for greater sharing and use of data for socio-economically beneficial purposes, as long as such use is within a framework that protects against abuses of that data. It should be noted that the use of the word “processed” here is an explicit invocation of the GDPR.
5. Enhancing Enforcement and Oversight, including:
- Because the ombudsman model and enforcement of PIPEDA is outdated and does not incentivize compliance, the Discussion Paper proposes to provide the OPC with greater regulatory powers, including greater flexibility in investigating complaints, auditing and reviewing organizations, the power to make cessation and records preservation orders, extending and broadening the existing regime for fines and empowering the Court to make orders regarding statutory damages for non-compliance, to incentivize organizations to take measures to comply with PIPEDA.
6. Areas of Ongoing Assessment, including:
- The Discussion Paper acknowledges that PIPEDA’s scope of application and accountability should be reviewed to address new business models and types of organizations that are not traditionally acting as “controllers” or “processors” (again, explicitly invoking the language used in the GDPR) and that the applicability of PIPEDA should be updated and clarified in the following areas:
 - transborder data flows (in an apparent retreat from the OPC’s position in the Equifax ruling);¹⁰

¹⁰ *Supra* note 8.

- new technologies and players, such as Internet of Things and AI;
- expanding PIPEDA to non-commercial data collection activities.

The last point is of key importance to the charitable and not-for-profit sector. PIPEDA does not generally apply to charities and not-for-profits because most of the activities that charities and not-for-profits regularly engage in do not qualify as “commercial activities.” The possible expansion of PIPEDA to cover non-commercial data collection activities including, potentially, the activities of charities and not-for-profits, would be consistent with the position referenced in other publications by the author that there is no convincing justification for excluding charities and not-for-profits from the requirements of PIPEDA, particularly in light of the fact that many charities and not-for-profits across Canada are in control of a great deal of personal information, including that of donors, clients and volunteers.

D. CONCLUSION

While the Digital Charter represents the aspirations of the Government of Canada and is not binding, the principled approach introduced in the Digital Charter will likely be used to inform the development of legislation and other regulatory mechanisms. Although the PIPEDA reforms introduced in the Discussion Paper are not binding, they nevertheless signal the likely direction of future legislation. As such, charities and not-for-profits should continue to monitor for developments with respect to PIPEDA and other initiatives flowing from the Digital Charter principles.