



## **Response to la Commission d'accès à l'information de Quebec Consultation on Consent Guidance for Law 25**

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IAB Canada on behalf of its members, would like to thank you for providing us with the opportunity to respond to your recently released guidelines on the consent provisions in Quebec's Law 25. Data and its various uses are the cornerstone of the estimated \$14.2 billion Canadian digital advertising sector and therefore it is imperative that the digital advertising industry is actively involved in practical discussions around privacy amendments and guidance 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 well over 80% of the estimated \$14.2 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.

Most notably we recently launched [The Transparency and Consent Framework Canada \(TCF Canada\)](#) which provides technical specifications and policy documents to help players in the digital marketing and advertising ecosystem clearly and consistently communicate with end users about how their data is being used, while also providing an opportunity for users to object and manage their consent preferences in accordance with jurisdictional privacy laws.

TCF Canada allows content publishers to disclose what data is being collected and the purposes for which the site owners and the companies they partner with, intend to use it. The Framework gives the publisher and advertiser stakeholders a common language with which to communicate consumer consent for the delivery of relevant online advertising and content.

IAB Canada is actively involved in productive policy discussions with various government departments including ISED, the OPC, the CAI, Elections Canada, AGCO and Health Canada.

## **Our Response**

### **1. What general assessment do you make of the draft guidelines?**

IAB Canada would like to thank you for providing us with additional detail around Law 25's consent requirements and while we do feel there is a need for a practical interpretation of the statute, we ask you to consider the following:

**Additional time to comply with newly enacted guidance.**

While we appreciate the CAI's work and willingness to develop and issue additional guidance and clarity on how to interpret Bill 64 a core feature of any successful guidance is receiving it in advance of the requirements coming into effect. By the time it is finalized (in October) enforcement will have already commenced for a law that includes draft guidance including interpretations more burdensome than any other known international privacy standards (even the GDPR). For companies to adequately prepare to come into compliance based on these interpretations a reasonable amount of time must be provided. And although the CAI does not have the authority to extend the effective date of the new provisions, we recommend providing some additional time to companies to comply with incremental requirements. This could be done, for example, by acknowledging these new challenges and saying that these circumstances will be taken into consideration during enforcement actions.

Digital advertising is a complex ecosystem with a multitude of players across the supply chain being involved in a single advertisement appearing on a web page. As such, our members need to fully understand the potential implications of the consent requirements on their ability to market to their customers, what is required to comply and how their existing technology needs to evolve in a manner that does not result in several costly iterations. Having consent requirements that go above and beyond the current infrastructure, can be extremely cost prohibitive to companies leading to fewer choices for end users and an inferior user experience. It is important to note that these changes are systemic and not cosmetic in nature.

IAB Canada welcomes the opportunity to meet with your team to clearly demonstrate some of the challenges we face with the requirements being put forth and why we feel more clarity and time will allow us to comply with Law 25 at the highest level possible.

**Grey areas remain – additional clarity required.**

IAB Canada is tracking a great deal of confusion, uncertainty, and hesitancy amongst our members as they remain unclear of some of their obligations under this new law – particularly around consent and profiling. While the guidance is helpful (although somewhat prescriptive) we feel there is still more work required to shed light on the grey areas that exist that are only compounded by the technical nature of our industry. With Law 25 exceeding existing consent requirements in all other jurisdictions remaining questions need to be answered and discussed in a two-way forum to ensure industry has all the clarity they need to be able to fully comply. We request meaningful and open dialogue with your office and welcome the opportunity to work together moving forward.

**Greater recognition of the global impact.**

Law 25 was developed to provide residents of Quebec a higher level of privacy protections and rights. However, as Quebec is a key market to everyone doing business in Canada making this anything but a local legislation. Our members across the globe – representing all stakeholder groups - are preparing for these new obligations and have made great strides technically to allow our industry to legally function within the patchwork of unique cross jurisdictional laws across the US and Europe. With the development and release of the Global Privacy Platform and TCF Canada advertisers have a technical signalling framework that allows for jurisdictionally compliant consumer consent preferences to be shared through the supply chain. These frameworks use best in class existing technology that many businesses have already invested in, and the incompatible requirements of Law 25 are proving to be an expensive operational challenge for many. While our industry remains committed to enhanced privacy protections, we do fear that the extraterritorial application of these legislations could have a detrimental impact on the Quebec economy as some organizations will pull out of the province altogether leaving Quebec consumers with fewer choices not because they don't believe in supporting privacy enhancements but because of the challenges associated with operating in what represents a small market for many.

We also request that any guidance moving forward be provided in both official languages to reduce the costs of independent translations and the risks of varying interpretations ensuring the highest level of understanding and ability to comply across a global audience. Not only is it common practice among other global regulators it will also serve to incentivize compliance among global partners who are leaning in on Canadian policy developments looking for information and guidance so they too can operate legally in our region.

**A more enhanced and inclusive consultative process moving forward.**

For any future consultations IAB Canada asks for a more inclusive, open and in person dialogue with the Quebec government. Law 25 is a regulation that impacts all Canadians and by only inviting a limited list of organizations to submit a full response we believe you are missing out some vital representation from many sectors operating in Canada and limiting yourself to a less active and involved consultation.

Examples of where a more inclusive process has been successful include our work with Health Canada on the marketing to kids file and with ISED on federal privacy legislation development. Extensive dialogue and the creation of guidance in tandem with industry results in a greater level of comfort and understanding and ultimately a higher level of confidence regarding compliance obligations.

**2. Do the guidelines seem legally valid to you? Are the directions they give consistent with each other?**

There are three areas in the guidance that we believe are in contradiction with one another:

**Guidance relating to section 8.1 “profiling provision.”**

This has been the most concerning piece of guidance in the document and many of our

members have spoken up about the detrimental impact this could have on industry. We heard various opinions on this in both our IAB Canada member discussions and at the Access Privacy webinar where the CAI was in attendance.

Section 8.1 of Law 25 states that any person who collects personal information from the person concerned using technology that includes functions allowing the person concerned to be identified, located or profiled **must first inform the person:**

- (1) of the use of such technology; and
- (2) of the means available to activate the functions that allow a person to be identified, located or profiled.

The guidance for this section of the statute (31B) does not outline a requirement to inform but takes it further and dictates that mandatory expressed consent is required for identification, tracking and profiling (S 8.1). It states that “technologies that identify, track or profile individuals be turned off by default” and that a consumer needs to be notified and grant **expressed consent** prior to this technology being turned on.

Knowing the country, province, or city where someone is located is not the same thing as knowing their precise geolocation and, in several cases, it is actually required in order to fulfill services and comply with applicable laws. It is important that the guidance takes that into consideration and provides a reasonable criterion, reserving “express consent” only for sensitive use cases involving location. This is, for example, what laws in the United States do: some of them define “precise geolocation” as “sensitive personal data”. Precise geolocation in those laws is normally defined as an individual’s specific location with precision and accuracy within a radius of 1,850 feet (approximately 564 meters).

As an example, in the dynamic environment of digital advertising there has been a global adoption of the use of Consent Management Platforms – a technology that allows users to exercise their consent choices in a meaningful way allowing for business to collect and maintain a centralized trail of user consents to demonstrate compliance with privacy regulations. As recognized in your guidance, the CMP is a leading privacy enhancing technology helping to ensure compliance and accountability within a patchwork of transparency, notice and consent requirements. The CMP scenario is an example of where profiling, location and identification technologies is not a “sensitive” or invasive but necessary and done in order to provide better service to customers and in many cases are a means of permitting an organization to know where a user is entering their site from and in effect which jurisdictional privacy laws – and user experience need to be applied.

The CMP is a key component of TCF Canada and TCF EU – two frameworks that have allowed advertisers to legally operate under federal privacy laws. As we currently work to adapt this framework to operate under the requirements of Law 25 CMPs find themselves in the face of uncertainty of having to develop solutions somewhat blindly without knowing whether they will be considered in line with the legislature's expectations.

As Law 25 only applies to residents of Quebec it is necessary to identify that population so we can continue to apply federal requirements to the rest of Canada. This will become particularly important as we see new federal laws pass that may not align with this new legislation.

The “expressly given” consent requirement should be limited to sensitive personal information only, and while we recognize in some cases location, profiling or identification might rise to the level of “sensitive” and therefore, trigger the requirement for explicit consent, this should not be the standard rule for any technology involving profiling, location or identification, which are incredibly broad and amorphous terms that encompass many if not most processing activities performed by businesses. The guidance should follow the approach taken by PIPEDA and other global privacy laws and only impose those stricter requirements (e.g., express consent) when the processing will configure a sensitive use case.

It is also important to note that to comply with Québec’s other laws, companies operating in Quebec need to be able to know which customers are located in the province in order to provide them with a Quebec-compliant user experience. For example, companies operating in Quebec need to know which customers are in Quebec so they can (1) inform and serve them in French in accordance with the *Charter of the French Language* and (2) provide them with pre-purchase notices, disclosures and other information required by the *Consumer Protection Act*.

#### **Expressed consent as the default.**

Within the statute we are introduced to various types of consent that are available for use in multiple situations depending on the type of information that is being collected/used. The guidance however deviates from the wording of the statute and articulates in Section 30 that priority is given to express consent and states that “an organization should seek express consent whenever possible.”

This is yet another problematic example of where the guidance deviates from the requirements and implies a greater obligation than intended. The guidance must align with the law and not go above or beyond in its interpretation which is that expressed consent is not necessary in all incidences and should only be required when related to sensitive personal data.

Section 36 outlines when an organization can rely on implied consent when 3 requirements are met in any given use case: a) If it does not target sensitive information, b) If it is not contrary to the reasonable expectations of persons according to the context, c) If no risk of serious harm arises from the intended use or disclosure. Implied consent should also be allowed for use cases involving profiling, identification or location if also aligned with the above 3 requirements. This should also be expressly stated in the guidance ensuring a reasonable approach that balances the interests of the data subjects but without creating unreasonable burden of additional consents for everything, which will overwhelm customers and create consent fatigue. It will also ensure alignment with other global privacy laws, including the GDPR decreasing the operational burden.

- 3. Are the guidelines of adequate scope, given their objective to clarify the criteria for valid consent? Are they complete? If there are aspects that you feel should be added, please name and detail them.**

IAB Canada appreciates the effort being made to provide detailed information and clarity surrounding the consent obligations in Law 25. We do find that there are still some grey areas on what is specifically required to comply that we have detailed in the following questions relating to this topic.

We also have received notice from many of our members that the inclusion of guidance around the confidentiality incident provision is causing undue confusion as it does not belong in this within these considerations and should be included in separate guidance specific to that provision that is already in effect. We suggest that it be removed entirely.

- 4. Taking into account your activities, those of the people or organizations you represent and your expertise, do you think these guidelines can be applied in practice and are they realistic? Do you anticipate any negative consequences resulting from the orientations presented, and, if so which ones? If you foresee difficulties, please explain the reasons and provide examples and detailed information, if possible.**

In addition to the challenges associated with the profiling clause there are few negative impacts that could be presented stemming from the guidance provided.

#### **Consent fatigue vs expressed consent wherever possible.**

While the guidance references the issue of consent fatigue it also presents an interpretation that will only conflate the issue. With a reliance on “expressed consent wherever possible” and the requirement for opt in for “profiling, location and identification technologies” organizations are forced to present their consumers with an insurmountable number of new consent requests leading to a negative and frustrating user experience.

The guidance also uses examples of layering requests or adding in math equations to prevent consent fatigue. These are not proven concepts and only act as an additional barrier between the user and the content they are trying to reach. This inundation of information and the requirement of a separate opt in consent for each purpose is just too much and not what we believe was the intention of the statute. We saw this happen in Europe when the ePrivacy directive created the obligation to obtain consent for non-essential cookies and users became overwhelmed by cookie banners everywhere. The government back tracked on this guidance and the European Commissioner for Justice and Consumers recently launched a “Cookie Pledge”, which is an effort to combat consent fatigue and to identify better, and more customer-friendly approaches to protect individual choice and data security that constantly requesting consent.

We ask that you consider a user's right to experience services with less friction. Businesses often only have a few seconds to get a customer's attention online and adding too much resistance could be detrimental for businesses and consumers creating fatigue and resulting in users abandoning services altogether or consumers opting-in without reviewing the consent specifics just so they can get onto viewing the content they came there for.

Other areas of the guidance that will create issues include being obligated to Use "precision and clarity of terms", "separate information for each purpose" using "language that is as specific as possible about the purpose for which it is seeking consent" while also being concise and using as few words as possible (62). This is contradictory in nature and difficult to implement for a business. We suggest that organizations are permitted to use their judgement in determining what is reasonable to provide in order to gain informed consent from their customers depending on the given situation.

Being permitted to only ask a consumer once for a specific purpose is also detrimental to business. Instead, the CAI perhaps should consider a time limitation between requests that is fair and reasonable.

**5. Are the examples illustrating the guidelines useful in illustrating the Commission's orientations? Are they believable?**

While illustrations and examples are sometimes helpful in this case, we see them as limiting, sometimes unbelievable and should be removed altogether. We feel that they could be perceived as the "only way" to achieve the policy objective or as best practices and that there should be room for interpretation based on specific industry use cases. Putting examples in a law that is meant to live the test of time also can lead to outdated information that needs to be revised on a more ongoing basis.

If examples are deemed necessary, we recommend that sector specific examples are developed in collaboration with appropriate sector representatives and associations as guidance for industry. For example, IAB Canada would work with the CAI to develop use case examples from online advertising that would refer to existing technologies and practices that already exist.

**6. Is the format of the guidelines suitable and easy to consult? Is the text clear enough.**

While we appreciate the time and consideration that was put into the draft guidelines, we do find them to be impractical in format. The guidance document is far too long and when put together with future guidance on other provisions would become insurmountable and impractical. We ask for less prescriptive guidance that allows for sectors to interpret the law based on their business use cases and feel that if a more meaningful collaborative and inclusive consultation process be implemented to allow for useful guidance to be created and distributed



on the remaining provisions, we will find ourselves with something more succinct and meaningful.

We do reiterate our earlier request that any guidance should be received prior to enforcement and therefore ask for the timing to be more closely aligned. Any future guidance should also be made available in both official languages, so time and money are not being spent on inadequate translation raising the risk of misunderstanding of requirements.

**Summary:**

Thank for you considering our submission to your consultation on the CAI's guidance regarding the consent provisions in Law 25. IAB Canada and its members support the enhancement of privacy protections for Canadians and are committed to building consumer trust.

IAB Canada encourages you to reach out to us at any time with any questions or feedback regarding this submission and look forward to participating in upcoming consultations and discussions to further address the specifics of the legislation and the impact on the digital ecosystem.

Sincerely,

A handwritten signature in black ink that reads "Jill Briggs". The signature is fluid and cursive, with the first letter of each name being significantly larger and more stylized than the others.

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