IAB Canada Briefing Document on Bill C-27

Monday, November 13th, 2023

Standing Committee on Industry and Technology
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Email: INDU@parl.gc.ca
cc: jbriggs@iabcanada.com, IAB Canada Privacy and AI Working Group Members

Members of the Standing Committee on Industry and Technology,

IAB Canada on behalf of its members, would like to thank you for providing us with the opportunity to provide official commentary on Bill C-27 currently being discussed in front of the INDU Committee.

Established in 1997, IAB Canada is the only not-for-profit association exclusively dedicated to the development and promotion of the rapidly growing digital marketing and advertising sector in Canada. We have been actively involved in the discussions surrounding the Digital Charter Implementation Act and our members support Canada's efforts to push forward in developing stronger guardrails around consumer privacy and the use of Artificial Intelligence.

Building trust among Canadian citizens is a mutual priority for our members and the Canadian government. It is our hope that we can see a balanced and fair piece of legislation pass that will support both innovation and consumer privacy protections. We feel the current conversations at the INDU Committee hearings are a positive step forward and while we await an invitation to appear as a witness, we hope you find our written recommendations, insights, and feedback to be useful.

Given the significant impact this legislation will have on the estimated $16.8 billion Canadian digital advertising sector which employs over 50,000 Canadians, we are committed to helping our government collectively work toward modernizing our digital capabilities to bring Canada to the forefront of responsible global digital innovation and economic growth.

About IAB 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, ad tech 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 $16.8 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. 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.

Globally, the IAB network and our collective stakeholders have been committed to modernizing privacy compliance since 2016 having developed a proven privacy framework that ensures consumers are able to make choices online that are technically executed while providing the supply chain with an accountability stream which includes a record of consent status in compliance with cross-jurisdictional laws.

Developed by an international community comprised of the most respected technical engineers this global approach to responsible, privacy-protected media transactions was first-born in Europe in response to the GDPR. IAB Canada has recently released the framework in Canada to proactively help our market raise the bar on privacy technology for the purposes of online advertising.

The Transparency and Consent Framework Canada (TCF Canada) allows participants in the online advertising ecosystem to clearly and consistently communicate with Canadian citizens about how their data is being used, while also providing an opportunity for them to object and manage their consent preferences in accordance with jurisdictional privacy laws both federally and provincially. As new legislation comes to pass the Framework is updated accordingly.

Hundreds of Consent Management Platforms leverage this framework to provide content publishers with the peace of mind that their consent activity is being managed in a globally

standardized way eliminating risk for industry all while enhancing privacy protection for consumers.

PART 1: IAB Canada Response to the Consumer Protection Privacy Act - CPPA

IAB Canada is supportive of our government's efforts to strengthen the privacy rights and protections of Canadian citizens. Our current privacy regime needs to be modernized to both allow for organizations to innovate and collect the data they need to provide products and services while enhancing the consumers online experience and building trust.

Since the introduction of former Bill C-11 followed by the tabling of the CPPA, the collaboration between government and industry has been significant and productive. Today we have what we feel is a balanced and well-thought-out draft legislation that should be taken swiftly across the finish line. We are particularly encouraged by several components of this Bill including the enhanced notice and transparency obligations as well as the recognition of industry codes of practice and certifications and an emphasis on accountability and building trust.

We are following the procedures closely and are looking forward to seeing more detail around the suggested amendments that were made by Minister Champagne as well as the recommendations by the Privacy Commissioner at their respective testimonies and anticipate that the Bill will be even stronger by the end of the parliamentary process.

Currently, our greatest concern is the continued delay and risk of non-passing and the resulting uncertainty and exacerbated patchwork approach to privacy with more provinces following Quebec's lead. In 2023, our industry has already sustained significant costs and challenges in preparation to come into compliance with a provincial legislation. These burdens have been especially difficult for SMEs and foreign entities wanting to do business in Canada. The time to pass this law is now and our members want to see the privacy portion of the Digital Charter move ahead without further delay.

While the delay of this legislation weighs heavily on our industry, our members recommend a few minor modifications.

These include:

1. **Exceptions to Consent or Use of Legitimate Interests to Allow for Reasonably Expected or Commercially Essential Activities.**

Our members request additional clarification on Section 15.6. The current draft outlines the "inappropriateness of relying on an individual's implied consent if their personal information is collected or used for an activity described in subsection 18(2) or (3)" creating considerable concern and confusion surrounding the ability of a business to rely on implied consent.

In addition, we feel strongly that the Bill should provide legitimate interest exceptions to consent. However, we remain concerned its premise is only permitted in cases where "the personal information is not collected or used for the purpose of directly influencing decision making or behaviours". This broad sweeping statement is of concern to our members as it will not only impede their ability to serve their customers better but will also negatively affect the consumer experience.

This exception is extremely common in global privacy laws, including the GDPR, and has been established as a global best practice. It is essential for avoiding consent fatigue and an extremely negative, cumbersome, and unwieldly customer experience. If consent is required for each and every transaction with a customer, even those that are clearly intended to be of service to the end user (and in the "legitimate interests" of everyone concerned), customers will be overwhelmed without any benefits served.

The legitimate interest provision can be used by marketers to enhance, modify, or personalize communications/services on a website to better serve the preferences or needs of the consumer. Practical examples include a travel site relying on location to present a consumer with relevant travel options or a publisher using language preferences from a previous visit to provide content in the chosen language. From a commerce perspective, surfacing products based on availability by region definitively fits the requirements of legitimate interest. Another example would be the vendor's ability to send purchase and delivery confirmations to someone who has made a purchase using the profile already consented to.

While marketers rely on this exception to consent to understand how consumers are interacting with their content so they can continually improve the service offering, some of them will use the exception for critical infrastructure decisioning like surfacing essential settings related to accessibility. This overly narrow definition of both legitimate interest and business activities as well as the need for opt-in consent for measurement, fraud prevention and contextual ads would be highly problematic.

It is also important to note that the legitimate interest exception typically comes with its own safeguards – requiring organizations to complete a legitimate interest assessment – outlining the balance between their need to pursue the particular processing activity with the impact to the fundamental rights and freedoms of consumers. This "balancing test" makes it so the legitimate interests of a business cannot be overridden by those rights and freedoms of the data subject and has been successfully applied by companies around the globe under the GDPR.

We believe that Canadian legislation should be interoperable with the European standard and that this section could be revised to have the words "influencing the individual's behaviour and decisions" refer to specific types of practices or decisions that could have a significant impact on individuals or go against their reasonable expectation. This would allow for certain marketing and advertising practices to fall under the legitimate interest clause allowing marketers to

service their customers in a way that is expected and beneficial to the overall experience while still protecting their privacy rights.

2. **Consistency and Clarity around Definition of a Minor**

Under the CPPA "minors" are not explicitly defined leaving the interpretation to be defined by the provincial/territorial age of majority laws. This lack of federal clarity makes compliance increasingly challenging and can put organizations in a position where they will need to build and implement different privacy practices by location raising both the technical costs incurred as well as the risk of failing to comply with a myriad of obligations by jurisdiction.

Our recommendation would be to amend the Bill to include a single age threshold nation-wide. The Bill should specifically define the term "minor" and perhaps align with Quebec's Law 25 as it is already in effect, and which establishes a minor as someone under the age of 14 years old. This will be a less complicated approach will keep minors safe and set companies up for success – not failure.

3. **A More Nuanced Definition of Anonymization**

Under CPPA the current definition of "anonymization" is to "irreversibly and permanently modify personal information, in accordance with generally accepted best practices, to ensure that no individual can be identified from the information, whether directly or indirectly, by any means."

As currently defined, if additional information objectively exists that could re-identify information, regardless of who has access to it, it will be considered de-identified information and not meet the threshold of anonymized data.

As it is impossible to achieve a zero risk of deidentification many other jurisdictions such as the EU and Quebec have a more nuanced definition that includes a "reasonableness" element which allows for a risk-based approach.

This portion of the Bill should be modified to define anonymize as to ""modify personal information, in accordance with generally accepted best practices, in such a manner to ensure that an individual is not or no longer identifiable" "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." These recommendations set an appropriately high threshold and are in line with those proposed by CANON found here.

4. **A Lower Threshold for Disposal Rights**

While we believe that citizens should have the right to have their personal information disposed of upon request, we do feel that the obligations as they are currently drafted, are somewhat

broad in their scope and not in line with other provincial and global requirements. We recommend that this clause be more limited as it is in Law 25 and consistent with those requirements already established in the EU.

Unlike PIPEDA the CPPA contains an express obligation that "If an organization disposes of personal information at an individual's request, it must, as soon as feasible, inform any service provider to which it has transferred the information of the request and ensure that the service provider has disposed of the information." Representing an industry that is comprised of many stakeholders across the ecosystem we feel that this burden of responsibility on the organization of origin is too high. While a responsibility does exist it should be reworded to say that "organizations are obligated to take all reasonable steps to ensure that the deletion takes place." We do not feel that an organization should be held responsible for ensuring that the third parties they work with comply with deletion requests and that this obligation is too onerous.

5. **A Scaled Approach to Financial Penalties**

C-27 brings with it the potential for infractions to be subject to the highest fines in the world. With the comparative size of the Canadian market, the current level of legislative and compliance burden, and the potential for the risk to both innovation and small and medium sized business, we feel that this should be reconsidered.

Our members believe that fines should be administered as a last resort and should be administered on a sliding scale that considers efforts made to comply (adherence to codes of practice, transparency efforts etc. as well the size of the organization in terms of their revenue and ability to pay. GDPR-like penalties of 4% of global revenues have created a significant deterrent to data driven innovation in the EU. IAB Canada members believe that we should learn from this example and that there should be a more proportionate approach in Canada. Our members are also concerned about the potential implications of allowing for a private right of action. With such high fines and the potential for even greater financial penalties, the risk of doing business in Canada could be seen as too high.

6. **Criteria for Tribunal Make Up**

While we support the idea of having a Tribunal, we would like assurances that the members forming this integral group have adequate knowledge and acumen in the areas of industry and privacy. In an ever-evolving digital world, preserving consumer privacy has become very complex and it is imperative that those making determinations around enforcement have a full understanding of the landscape as well as the various sector ecosystems.

7. **An Adequate and Fair Transition Period**

The CPPA introduces significant changes to PIPEDA – Canada's longstanding privacy regime. However, it is not clear how much time organizations will have to change their operational

processes and where necessary, integrate new technologies that will allow them to come into compliance with the new law once passed. Other jurisdictions such as Quebec and Europe have generally provided a 24 -36-month transition period and we would like to see at minimum, a similar and reasonable transition timeline. In such a complex ecosystem time is critical to both assess current business practices as well as plan and build technically for the future. This lead in time will not only give businesses sufficient time to prepare it will also allow for guidance to be issued and regulations to be developed. The government could also consider a phased in approach to implementation not unlike what we saw with Law 25 in Quebec.

PART 2: IAB Canada Response to AIDA

IAB Canada and its members have been actively involved in discussions with all levels of federal government around reformed privacy legislation. Over the past several years industry has been invited to the table to dissect and discuss what a new federal privacy law could and should look like and we feel that what we are now facing is a welcomed legislation with the CPPA.

However, when it comes to the potential regulation of AI we do not feel as involved, informed or as optimistic. The decision to bundle a law governing AI with the privacy bill has left both industry and Canadian citizens in a less than desirable position. AIDA should have been given the same respect as CPPA by being introduced separately and afforded comparable time, care and collaboration with industry and the academic community.

As noted in the AIDA Companion Document that was issued earlier this year it is projected that the global AI market could grow to reach over $2 trillion CAD by 2023. With its rapid growth and undeniable impact on our economy and our citizens, we insist that broad reaching consultations are held with varying sectors and subject matter experts. If we want to truly be leaders in this space, we need to listen to those already using and building the technology to understand what can and cannot be done and what we, and our global allies, are already doing to help protect the rights of our citizens. The internet is borderless, and our laws should work and align with global efforts if we are to both protect Canadians and harness the benefits of the technology to better service Canadians and position ourselves as a leader in this space.

We remain steadfast in our belief that the CPPA needs to pass without further delay, and we hope that there is an amendable solution that can be agreed to by the Committee that will allow CPPA to pass and AIDA to be given more time and consideration. There are still too many remaining questions and grey areas in the AIDA as drafted for us to adequately ask the right questions on behalf of our members.

There is no doubt that the technology needs to be regulated however, being right is paramount to being first and before AIDA is passed, IAB Canada would like the following to be considered and/or implemented:

1. **Broader stakeholder engagement and discussion on regulation prior to passing and adequate transition time.**

The way in which AI legislation is formed in Canada will define our ability to innovate and stay at the forefront of this new era of computing. We need to get this right. Therefore, it is imperative that AIDA be developed with the input of a multitude of experts. We are fortunate in Canada to have a trove of industry leaders who are building, using, and planning for a future that is heavily influenced by AI and Machine Learning (ML) - many are IAB Canada members. As such, we are requesting a more comprehensive consultation between government and stakeholders (not unlike what we had with CPPA) before government passes the law and provides draft regulations.

A broader consultation will allow industry to contribute valuable insights on how various use cases may be impacted and help avoid critical fault lines in regulating areas that will hinder Canada's ability to balance innovation and our ability to compete on a global stage with critical citizen protections.

To allow for the appropriate breadth of consultation, we would then ask that compliance timelines be amended accordingly. Under the law businesses are "expected to institute appropriate accountability mechanisms to ensure compliance" and will be "held accountable for the creation and enforcement of appropriate internal governance processes and policies to achieve compliance with the AIDA." Given the uncertainty of how operations will be impacted, we ask for the outlined timeline to be paused until all stakeholder consultations and regulation development have taken place so that industry is able to assess the changes required, has time to implement and is set up for success.

2. **Clear, concise definitions and recognition of need for shared taxonomy.**

Widely adopted standardized definitions and shared taxonomy is essential in legislation if we are to ensure widespread compliance and global interoperability. The digital advertising sector has long recognized the importance of taxonomy and language and its connection to borderless compliance and safety online. The success of IAB Europe and IAB Canada's TCF framework for privacy relies heavily on this premise as the industry has aligned on common language around purposes of data use that could help drive meaningful consent to citizens in Europe and Canada respectively in the context of online advertising. The use of AI must also use a standard taxonomy that provides clear and basic communication of purposes or processes. So, when a business is obligated to explain how they are using AI to process a user's data – and the possible risks - there is a consumer friendly, agreed upon way of doing so.

Currently some terms in the current proposal require clarification and more detail others require alignment with existing regulatory or self-regulatory efforts.

High Impact – Government has said that the criteria for high impact systems will be defined in regulation. Given that our members could potentially find their systems falling under this category and subsequent regulation, we are asking that this definition be provided immediately so we may identify which of our member practices could fall under this definition and allow u**s** to engage in meaningful debate and to ensure that the definition takes a risk-based approach that aligns with international best practice.

Specific Stakeholder Groups - To assess the impact on specific stakeholder groups, we request further clarity on the definitions of deployers, developers and operators and assurances that these definitions will be consistent with those outlined in other pieces governing AI such as the Self-regulatory Code of Practice for Generative AI, potential trademark guidance and other recognized international standards and legislation.

Our members believe that responsibilities will depend on the people in the value chain and what role they play in the organization's operation. Responsibilities should be assigned accordingly and be applicable to specific sectors as required.

Anonymization – The definition of anonymization should align with definition given in federal privacy law. This is still being dissected in the Committee hearings but once determined should mirror one another.

Artificial Intelligence System – This definition should be aligned with the OECD/EU AI definition as stated in the Minister's letter to the Committee. The current reference in AIDA to "related to human activities" is initially confusing and inconsistent with other widely used definitions and could therefore affect interoperability on a global scale.

Harm/Material Harm – In AIDA 'harm' is broadly conceived as physical or psychological harm, property damage, or economic loss, and lacks a threshold or test of materiality. IAB would suggest that the definition of harm be amended to include:

(a) material physical or psychological harm to an individual;

(b) material damage to an individual's property; or

(c) material unlawful economic loss to an individual; or

(d) material adverse legal effects on an individual. (prejudice)

3. **Clarity around "person responsible" and greater specificity around the roles and responsibilities of different actors along the AI value chain.**

The AI value chain is extremely complex and can involve multiple developers, vendors and users. As currently drafted, AIDA's requirements could capture multiple entities, creating confusion around who is actually responsible for complying with the legislation. Our members believe that responsibilities will depend on the people in the value chain and what role they play in the organization's operation. Responsibilities should be assigned accordingly.

As we requested in our response to the Self-Regulatory Code of Practice for the Use of Generative AI we need to be able to assess the impact of this regulation on specific stakeholder groups. As such, we would require some further clarity on the definitions for deployers, developers and operators and assurances that those definitions will be consistent with those across the various obligations and global responses to AI.

As also mentioned in our previous submission we would like to suggest consideration be given to roles that are directly impacted by this AIDA. For example, more explicit nomenclature that defines "content creators" given content originators will play an upstream role that will implicate areas of responsibility downstream. We would also expect there to be some clarity with regards to nuances around the human oversight element and how this would apply across the roles defined.

4. **Consideration for industry codes of practice based on sector specific use cases.**

In the AIDA companion document, it states that "voluntary certifications can play an important role as the ecosystem is evolving".

IAB Canada strongly supports the development of standard codes of practice for the use of AI for the purposes of digital advertising. With almost 20 years of experience leveraging algorithms and technical standards that are critical to the industry, IAB Canada is well-positioned to work with its global network of IABs, the IAB Tech Lab and its vast bench-strength of the most talented engineers worldwide to help develop frameworks and tech solutions that are designed by the industry for the industry.

IAB has a long history of developing frameworks that address security, safety, compliance with cross-jurisdictional regulations in the sector. Recognizing the critical aspect of accountability, IAB has also developed technical specifications in areas like privacy that enable verifications and documentation of transactions online and works with neutral third-parties to ensure appropriate oversight. These codes of practice can also be extended into content authentication and safeguarding through the use of standardized watermarking or other verification methods developed using sector specific use cases.

IAB Canada members care deeply about the development of codes and practices for AI because they have a significant impact on the supply chain's ability to optimize content for monetization

and also, because advertisers leverage AI to generate ads and make investment decisions based on predictive models that are largely produced through machine learning and AI.

We would like the government to consider including an allowance for these types of industry developed codes of practice to be recognized under AIDA as they are under CPPA.

5. **Enforcement Structure – Request for additional detail and amendments.**

While we support the staged approach to implementation as well as the self-regulatory introduction to compliance illustrated in the companion document, we have some remaining questions and concerns that need to be raised.

Non-compliance with AIDA brings with it significant fines and/or criminal charges and our members would like more clarity around the enforcement structure as well as some recommended amendments. In the current draft, the Data Commissioner responsible for the enforcement of AIDA will sit within ISED. We feel that this could present a possible conflict of interest if the body responsible for governing this emerging technology is also mandated to promote innovation across industry. Our members believe that this position should reside independently outside of ISED.

We are also concerned about the criminal liability an organization could face if in contravention of AIDA. This in conjunction with the potential large fines will undoubtedly act as a further barrier to investment and innovation as Canada will be the only region globally with such penalties.

In addition, we would like confirmation as to whether the tribunal model outlined in CPPA will also be incorporated into AIDA.

6. **Interoperability with Global Efforts.**

AIDA is intended to protect Canadians, ensure the development of responsible AI in Canada, and to prominently position Canadian firms and values in global AI development. Inter-operability with legal frameworks in other jurisdictions is a key consideration in the development of regulations, to facilitate Canadian companies' access to international markets as well as encourage global organizations to continue to operate in Canada.

With developments in other markets being announced as recently as two weeks ago with President Biden's Executive Order, it would be prudent to take our time so that we can understand and incorporate these developed principals into our own legislation and by making explicit references to, and alignment with other international legislation, self-regulatory efforts, standards, and industry best practices. This would ensure global interoperability of AI systems which would lessen the barrier to participate in our local market and would strengthen AIDA significantly.

We would also recommend adding a "compliance" clause to ensure that organizations who comply with a specific international framework (whether it be the G7 principles or ISO standards for example) would be compliant with AIDA. This would ensure interoperability of our legislation here in Canada and encourage organizations to comply with one recognized framework, thus avoiding a burgeoning of regional approaches and tremendous administrative burden.

Summary

Thank you for receiving and considering our submission to the current review of the Bill C-27 the new federal legislation being proposed to govern both privacy and artificial intelligence. IAB Canada and its members support the enhancement of privacy protections as well as the necessary guardrails for AI for Canadians. Our industry recognizes the need to develop consumer trust not only because it is the right thing to do, but also because it is essential for businesses to succeed.

IAB Canada as the trusted trade organization dedicated to the responsible and sustainable growth of the online advertising sector in the country, welcome any questions or feedback regarding this submission and look forward to participating in upcoming consultations and discussions to further address the specifics of the regulations and their impact on the digital ecosystem.

Sincerely,

Sonia Carreno
President, Interactive Advertising Bureau of Canada
scarreno@iabcanada.com