THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Business

Proposed new federal privacy law steers middle course

By **David Young**

David Young

(December 1, 2020, 1:53 PM EST) -- On Nov. 17 the federal government introduced its long-awaited legislation to reform Canada's private sector privacy law, the *Personal Information Protection and Electronic Documents Act*. By Bill C–11, the *Digital Charter Implementation Act*, the government proposes to replace PIPEDA with a new act, the *Consumer Privacy Protection Act* (CPPA), and to enact a separate law, the *Personal Information and Data Protection Tribunal Act*.

There have been strong urgings to adopt a law similar to the EU's *General Data Protection Regulation* (GDPR) — which includes a rights-based approach to privacy as well as significant financial penalties for non-compliance. However, a contrary view — expressed particularly by business stakeholders — is that the principles-based approach of PIPEDA should be maintained, with appropriate increased enforcement powers.

The CPPA arguably seeks to steer a middle course — adopting a number of enhanced prescriptive rules reflective of the GDPR's more stringent regime but at the same time preserving the Canadian privacy experience under PIPEDA — informed by that statute's more flexible principles-based approach.

The CPPA retains PIPEDA's *10 Fair Information Principles* but adopts a number of GDPR rights, or versions of them, including the right to be forgotten, the right to portability and the right to be informed of the implications of automated processing.

Significantly, the CPPA adopts an enforcement regime that is very GDPR-like married to an order-making power for the privacy commissioner. Depending on the nature of the non-compliance, penalties are imposed by the new Personal Information and Data Protection Tribunal — not by the commissioner — or fines are imposed through prosecutions.

This penalty framework is analogous to Canada's competition law enforcement regime under which the commissioner of competition seeks administrative monetary penalties from the Competition Tribunal, or recommends prosecution for offences, punishable by fine or imprisonment. If the recent competition experience is guidance, consent settlement agreements under the CPPA are likely to be the norm.

The CPPA also introduces a statutory private right of action. The new right will enable a wide scope for class actions. However, its availability is conditioned on the commissioner or the tribunal making a finding of breach or a prosecution resulting in a conviction.

Significantly, the CPPA retains consent as the key control right for individuals. In contrast, the GDPR provides that consent is only one of several bases for information to be processed lawfully. A more prescriptive definition of "consent" harkening to the commissioner's 2018 *Guidelines for obtaining meaningful consent* is stipulated. Enhanced transparency rights — requiring plain language privacy policies and the right to an explanation for automated decision making, as well as the new rights of deletion and portability — support this enhanced emphasis on an individual's control over their personal information.

To address circumstances where express consent may be either difficult to obtain or not appropriate, as well as to encourage innovation, the CPPA includes expanded exceptions to the consent requirement, including for designated "business activities," "socially beneficial activities" and de-identified information. These exceptions are seen as facilitating collection and use of personal information in circumstances where consent would be understood and therefore unnecessary, as well as through the use of de-identified data. To be noted, there is no express right for an individual to object to such collection or uses.

The CPPA arguably falls short of some expectations.

Most glaring is the omission of expressly extending the law to political parties. Related to this missed opportunity appears to be a narrowing of the application of the new law with respect to charities and other not-for-profit organizations which have certain compliance obligations under PIPEDA but under the CPPA potentially may not be subject to any requirements.

Another area in which the CPPA falls short of expectations is the treatment of rights with respect to automated processing of data. The CPPA stipulates transparency requirements for individuals affected by automated decision making such as online tracking and targeting. However, it does not contain the correlative right to object to such automated processes, as is provided in the GDPR.

Significantly, merely days before the tabling of Bill C-11, the privacy commissioner released his report and recommendations regarding artificial intelligence. The commissioner recommended not only the right to a meaningful explanation but also the right to contest automated decisions.

Bill C-11 will be reviewed by parliamentary committee. Submissions to the committee can be expected addressing both perceived omissions in the legislative regime as well as concerns regarding the impact and in some instances the lack of clarity of certain of its provisions.

The government has indicated an 18-month transition period for the legislation to take effect following enactment. Sensibly, given the breadth and potential impact of the new law, a minimum six-month period for review and debate is likely before the bill is adopted into law, implying a timeline of not earlier than January 2023 for the Act to come into force.

David Young is principal at David Young Law*, a privacy and regulatory counsel practice in Toronto.*

Photo credit / undefined undefined ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Richard Skinulis at* Richard.Skinulis@lexisnexis.ca *or call 437- 828-6772.*