

# ARTICLES

## LEAVING PRIVACY TO THE PRIVACY COMMISSIONER

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*The Competition Bureau no longer needs to play the role of privacy enforcer. Canada's competition authority envisioned itself as a necessary defender of Canadians' privacy interests where those interests could not be adequately protected elsewhere. Bill C-11, in introducing the Consumer Privacy Protection Act, transforms the Office of the Privacy Commissioner from mediator and conciliator to a dedicated privacy enforcer with the ability to make orders and recommend fines. With this welcome departure from the ombuds model, the Privacy Commissioner is better positioned than the Competition Bureau to take regulatory action against deceptive privacy claims: deceptive claims about what, how, and why consumers' personal information is being collected, used, and distributed. Faced with overlapping mandates, the Competition Bureau should enter into a referral agreement with the Office of the Privacy Commissioner for such claims, taking a significant enforcement effort off the Bureau's books and allowing each regulator to fulfill their own mandate.*

**Editor's Note:** *This paper was accepted for publication prior to the 2021 Federal election call, which resulted in Bill C-11 dying on the order paper. The paper remains unchanged as the arguments in the paper are still relevant, given similar attempts to reform Canada's privacy law to include harsher penalties and to mirror those in Europe's General Data Protection Regulation are likely in the future.*

*Le Bureau de la concurrence n'a plus à jouer le rôle de protecteur de la vie privée. L'autorité canadienne en matière de concurrence se voyait comme un défenseur nécessaire des intérêts des Canadiens en matière de protection de la vie privée lorsque ces intérêts ne pouvaient être adéquatement protégés ailleurs. Le projet de loi C-11, en introduisant la Loi sur la protection de la vie privée des consommateurs, transforme le Commissariat à la protection de la vie privée du Canada, qui passe de médiateur et conciliateur à protecteur de la vie privée habilité à rendre des ordonnances et à recommander des amendes. Cette innovation par rapport au modèle de l'ombudsman est bienvenue. Le Commissariat est mieux placé que le Bureau de la concurrence pour prendre des mesures réglementaires contre les déclarations trompeuses en matière de protection des renseignements personnels des consommateurs—déclarations trompeuses sur la nature des renseignements recueillis, sur la raison pour laquelle ils sont recueillis et sur la façon dont ils sont utilisés. Pour éviter le*

*chevauchement des mandats, le Bureau de la concurrence devrait conclure une entente de renvoi avec le Commissariat à la protection de la vie privée à l'égard de ces déclarations, soulageant le Bureau d'un effort important d'application de la loi et permettant à chaque organisme de s'acquitter de son mandat propre.*

***Note de la rédaction :** Cet article a été accepté pour publication avant le déclenchement des élections fédérales de 2021, qui a entraîné la mort au Feuilleton du projet de loi C-11. L'article demeure néanmoins tout aussi pertinent, dans la mesure où des tentatives similaires de réforme du droit canadien de la vie privée visant à durcir les sanctions, sur le modèle du Règlement général sur la protection des données de l'Union européenne, sont à prévoir.*

“We will take action.”<sup>2</sup> The Competition Bureau (the “Bureau”) began 2020 with a warning shot: Canada’s competition regulator, with order-making powers and administrative monetary penalties at its disposal, would be stepping into the privacy space to address misleading, deceptive privacy claims about what, how, and why consumers’ personal information and data was being collected, used, and distributed. Over the course of the next year, the Bureau would earn its first victory against a pre-eminent technology company’s privacy practices, and landmark privacy legislation would facilitate a closer relationship between the Bureau and the Office of the Privacy Commissioner (the “OPC”). At the same time, however, Bill C-11, the *Digital Charter Implementation Act, 2020*,<sup>3</sup> also obviates the need for the Bureau to act as privacy enforcer by redefining the OPC’s role, shifting it from its past as a mediator and conciliator to a new future as an enforcer. With new enforcement powers under the *Consumer Privacy Protection Act*,<sup>4</sup> broader than those currently enjoyed by the Bureau, the OPC would occupy the role the Bureau intended to fill as Canada’s privacy enforcer. As such, this paper argues that the Bureau should leave policing deceptive privacy claims to the Privacy Commissioner to better serve Canadians by referring all such claims to the OPC.

### **The Bureau’s foray into privacy law**

The Bureau views deceptive privacy claims as an extension of the deceptive marketing provisions of the *Competition Act*<sup>5</sup> (the “Act”), particularly in the digital era. The Deputy Commissioner of the Bureau’s Deceptive Marketing Practices Directorate, Josephine Palumbo, has stated that “the issues of privacy and deceptive marketing practices intersect in the online marketplace” such that the Bureau would act “when firms make false or

misleading statements about the type of data they collect, why they collect it, and how they will use, maintain and erase it.”<sup>6</sup> Sections 52 and 74.01(a) of the *Act* provide a dual-track, criminal and civil regime for addressing false and misleading representations. These provisions prohibit (1) a representation, omission, or practice (2) that was likely to mislead the public and (3) that was materially misleading.<sup>7</sup> For the Bureau, these provisions apply to consumers’ data “just as they do in more familiar contexts” on the basis that “firms should not mislead consumers”<sup>8</sup> into “provid[ing] information that they would not otherwise have offered or acquire products that they might not otherwise select.”<sup>9</sup> In particular, the Bureau focuses on the “real” cost of data collection in exchange for “free” online products and services. Such non-monetary transactions fall under the *Act*’s ambit and, given that the *Act* relies on consumers’ general impressions, cannot be “papered over” with privacy policies and other terms and conditions to “cure the deception.”<sup>10</sup> With this understanding of how the *Act* applies, the Bureau set out to “vigorously pursue online marketing practices that undermine consumer trust in the digital marketplace.”<sup>11</sup>

The Bureau’s first target was Facebook, which, in 2018, was involved in the Cambridge Analytica scandal where Facebook users’ data was harvested by a third-party and ultimately used for political messaging and influence.<sup>12</sup> The Bureau launched an investigation, ultimately finding that Facebook violated section 74.01(a) of the *Act*, specifically that Facebook had provided the general impression that Facebook users controlled who could see or access their personal information, and that third-party applications would not have access to the data of users’ “friends” on the platform after April 30, 2015. In reality, at various times between 2012 and 2018, neither impression was true. Without admitting guilt, Facebook agreed to pay a \$9 million administrative monetary penalty and another \$500,000 in costs.<sup>13</sup> In announcing the settlement, the Bureau signalled that this unprecedented enforcement action was not a one-off: “we strongly encourage anyone who feels they have been misled by privacy claims to file a complaint with the Bureau.”<sup>14</sup>

In addressing Facebook’s deceptive privacy claims, the Bureau was effectively claiming the mantle of Canada’s privacy enforcer, a space already occupied by the OPC, whose mission is to protect and promote Canadians’ privacy rights.<sup>15</sup> Alongside the *Privacy Act*,<sup>16</sup> the OPC, led by the Privacy Commissioner, administers the *Personal Information and Electronic Documents Act*,<sup>17</sup> Canada’s federal private sector privacy law. Like the Competition Bureau, the OPC has been increasingly concerned with the use of personal information as currency.<sup>18</sup> In particular, the OPC has

recognized that changes in the breadth and depth of technology adoption has made it harder for individuals to provide meaningful consent, as individuals struggle “to know which organizations are processing their data and for what purposes.”<sup>19</sup> Under both the *Competition Act* and *PIPEDA*, deceptive privacy claims were prohibited, in the latter because obtaining consent through deception was not permitted.<sup>20</sup> The Bureau understood that addressing misleading privacy claims was “complementary with” the OPC’s mandate.<sup>21</sup> The OPC also recognized its “mutual interest” in policing deceptive privacy claims,<sup>22</sup> leading the OPC to advocate for greater cooperation between itself and the Bureau.<sup>23</sup>

Bill C-11 brings the Bureau further into the privacy fold, while also making its role redundant. Bill C-11 provides the Commissioner of Competition and the Privacy Commissioner with the ability to enter into an information sharing agreement to develop procedures for disclosing information “if the information is relevant to their powers, duties or functions.”<sup>24</sup> At the same time, Bill C-11 grants the OPC greater enforcement powers to address deceptive privacy claims.

### **The Bureau’s role as a privacy enforcer is made redundant by Bill C-11**

Prior to Bill C-11, Canada’s private sector privacy law was enforced by an ombuds model, rather than an adversarial process. *PIPEDA* provides 10 fair information principles that “form the ground rules” for how private sector companies that collect, use, or disclose personal information in the course of commercial activity must treat such personal information.<sup>25</sup> *PIPEDA*’s aim is to balance Canadians’ rights to their personal information with the reasonable commercial interest in using that information.<sup>26</sup> As such, *PIPEDA* is not prescriptive but rather “offers the necessary tools and guidance of a self-correcting scheme.”<sup>27</sup> As stated by former Privacy Commissioner Jennifer Stoddart, “each organization, given its business model and other regulatory requirements, must find ways to adhere to these principles and achieve the balance between its own legitimate needs and the rights of individuals to their privacy.”<sup>28</sup> Given this emphasis on balancing, flexibility, and self-determination, the Privacy Commissioner is more mediator and conciliator than judge and executioner.<sup>29</sup> The Privacy Commissioner does not punish wrongdoers, instead aiming to achieve a satisfactory outcome between complainant and the wrongdoing organization.<sup>30</sup> Put simply, the Privacy Commissioner “is a neutral third-party mandated to communicate openly with both parties and work actively with them to resolve their dispute, achieve a fair outcome and develop a transformative culture of privacy.”<sup>31</sup>

To this end, the Privacy Commissioner does not rely on enforcement or disciplinary powers but “depends[s] on the power of persuasion, as well as the credibility of the office.”<sup>32</sup> Like a traditional ombuds office, *PIPEDA*’s enforcement powers are tied to a complaints-driven process, whereby the Privacy Commissioner can conduct an investigation and make recommendations in response to a complaint.<sup>33</sup> However, the Privacy Commissioner does not have the power to issue binding orders to ensure an organization’s compliance with any such recommendations.<sup>34</sup> In other words, the OPC cannot force an organization to do anything it does not want to do.

The risk that organizations will choose not to comply with OPC recommendations has increased alongside the commodification of Canadians’ personal information. *PIPEDA* was drafted prior to the emergence of “Web 2.0,” a business model based on publishing user-generated content,<sup>35</sup> and the ubiquity of data collecting devices and technologies, such as the smart-phone. As Scassa states, *PIPEDA* was “designed for an economy in which personal information was a by-product of doing business, rather than a core commercial asset capable of limitless exploitation.”<sup>36</sup> As the role of personal data in commerce increases, the desire to voluntarily comply with the OPC’s recommendations decreases. The OPC’s investigation into Facebook for its role in the Cambridge Analytica scandal—where approximately 622,000 Canadian Facebook users’ information was disclosed to a third-party application—is one such example. In its joint investigation with the Office of the Information and Privacy Commissioner of British Columbia, the OPC found that Facebook failed to receive adequate consent, safeguard users’ personal information, or implement *PIPEDA*’s principles.<sup>37</sup> Additionally, Facebook had made commitments to the OPC following an earlier investigation in 2009 to modify third-party applications’ access to users’ personal information by using a “permissions” model for these applications.<sup>38</sup> During its investigation of the Cambridge Analytica scandal, the OPC found that its concerns about Facebook in 2009 “remained unaddressed for a further 5 years” and that Facebook had failed to “meaningfully implement its 2009 commitments to the OPC.”<sup>39</sup> Following the release of the OPC’s report on the Cambridge Analytica scandal, which also documented Facebook’s failure to live up to its 2009 commitments to the OPC, Facebook chose not to implement any of the OPC’s recommendations.<sup>40</sup> The OPC has filed an application to the Federal Court seeking a declaration that Facebook contravened *PIPEDA* and an order requiring Facebook to implement specific changes, including a prohibition on Facebook further collecting, using and disclosing any personal information of users in any manner that contravenes *PIPEDA*.<sup>41</sup> In return, Facebook applied for a judicial review of

the OPC's investigation.<sup>42</sup> Ultimately, and in spite of Facebook's history of non-compliance with the OPC's recommendations, the OPC was powerless to address one of the largest privacy violations in Canadian history, other than taking a "naming and shaming" approach and entering into potentially lengthy litigation.<sup>43</sup>

Commentators agree on how to remedy *PIPEDA*'s and the OPC's shortcomings: provide the OPC with order-making and financial penalty powers, similar to those available to the Bureau. Houle and Sossin recommended additional order-making powers for the OPC, including the ability to issue fines and penalties, because "all the available data from provincial enforcement suggests that only the threat of penalties which affect the bottom-line can lead to a change in business behaviour, and ultimately, in business culture."<sup>44</sup> Scassa agreed: "companies may be unwilling to change lucrative business practices without hard obligations to comply. In some cases, significant monetary penalties may be necessary not just to compel compliance, but to deter future breaches of the law."<sup>45</sup> This approach found support within government as well: Privacy Commissioner Daniel Therrien;<sup>46</sup> the House of Commons Standing Committee on Access to Information, Privacy and Ethics;<sup>47</sup> and Innovation, Science, and Economic Development Canada<sup>48</sup> each recommended that the Privacy Commissioner be given appropriate enforcement powers, including the ability to make orders and impose fines for non-compliance. The Bureau, meanwhile, could wield all the powers others wished the OPC had: the Commissioner of Competition can apply to court for an order prohibiting deceptive marketing practices<sup>49</sup> and can also seek to impose administrative monetary penalties up to \$10 million, with an additional \$15 million for each subsequent offence.<sup>50</sup>

Against this background, the Cambridge Analytica scandal acting as the Bureau's steppingstone into privacy law was no accident. Cambridge Analytica was a watershed moment in privacy law. As Privacy Commissioner Therrien remarked, "the Cambridge Analytica scandal highlighted the unexpected uses to which personal information can be put, and... uncovered a privacy framework that was actually an empty shell."<sup>51</sup> The scandal demonstrated that "there is a crisis in the collection and processing of personal information online" that "cannot continue."<sup>52</sup> As such, Facebook faced a global response, with fines from the United Kingdom,<sup>53</sup> Italy,<sup>54</sup> and the United States, where the Federal Trade Commission issued a US\$5 billion penalty and subjected the company to new corporate and commercial restrictions.<sup>55</sup> Unlike its global peers, the OPC was unable to issue a similarly strong, or even symbolic, response to Facebook's conduct; as ultimately occurred, the OPC risked Facebook not engaging with the OPC's

recommendations and ignoring them. The Bureau was thus the only federal regulator capable of issuing a forceful Canadian response to Facebook's conduct, demonstrating a commitment to protecting Canadians' privacy while establishing a novel application of the *Competition Act's* deceptive marketing provisions.

However, if the *CPPA* is enacted, the OPC will be ready and capable for the next watershed moment. The *CPPA* specifically prohibits deceptive privacy claims: section 16 of the *CPPA* prohibits organizations from using false or misleading information or deceptive or misleading practices to obtain an individual's consent for the collection, use, or disclosure of that individual's personal information.<sup>56</sup> The *CPPA* provides the OPC with the ability to enforce this prohibition by issuing compliance orders requiring the organization to stop these claims and to publicize measures taken to address the issue, among other things.<sup>57</sup> Additionally, the *CPPA* provides that, similar to the Bureau, the OPC could recommend penalties to the newly formed Personal Data Protection Tribunal of up to the higher of \$10 million or 3 percent of the organization's gross global revenue in the prior fiscal year.<sup>58</sup> To put this change into perspective, applying these new penalties to the Facebook case, the OPC could have recommended a penalty of up to \$2.1 billion as compared to the Bureau's maximum administrative penalty of \$10 million (for a first offence).<sup>59</sup>

Importantly, the potential for criminal sanctions under section 52 of the *Act* does not necessarily mean that the Bureau can provide added value to policing deceptive privacy claims alongside the OPC. Under section 52, a person that knowingly or recklessly makes a representation, directly or indirectly, to the public that is false or misleading can face significant penalties, including a fine at the direction of the court or imprisonment for a term of up to 14 years, or both. To some, these substantial penalties offer heightened deterrence against making deceptive privacy claims, particularly since the *CPPA* does not include criminal sanctions. However, the *CPPA* is designed to be Canada's 21<sup>st</sup> century privacy law and, once it is enacted, Parliament will have determined that criminal charges are not the preferable way of sanctioning privacy violations. This approach is consistent with the absence of any recommendations for criminal sanctions in prior assessments of potential *PIPEDA* reforms,<sup>60</sup> and other jurisdictions pursuing significant financial penalties for deceptive privacy claims—not imprisonment. The Bureau pursuing criminal charges for deceptive privacy claims under section 52 would run counter to Parliament's preferred path for dealing with such claims as expressed in the *CPPA* and represent significant regulatory overreach with severe penal consequences. Notably, it is

unclear whether the Bureau would even pursue a prosecution under section 52 for deceptive privacy claims, considering that it elected not to pursue such charges in the Facebook case despite the scale of the breach and the party's status as a repeat offender.<sup>61</sup>

Accordingly, should Bill C-11 (and the *CPPA*) receive Royal Assent, it will no longer be necessary for the Bureau to enforce deceptive privacy claims; the OPC would be able to more effectively exercise its mandate to protect Canadians' privacy, backed by the power to recommend significant financial penalties for such conduct.

### **Two regulators are not better than one**

Overlapping jurisdiction between the Bureau and the OPC over deceptive privacy claims has the potential to harm both Canadian businesses and consumers. The Bureau's jurisdiction is nothing if not crowded. Take merger control, for example: depending on the industry at issue, the Bureau shares merger control jurisdiction with the Canadian Radio-television and Telecommunications Commission;<sup>62</sup> the Minister of Transport;<sup>63</sup> the Office of the Superintendent of Financial Services ("OSFI");<sup>64</sup> and the Minister of Innovation, Science and Industry.<sup>65</sup> Indeed, the Bureau already shares jurisdiction for false and misleading representations made by federal financial institutions with OSFI.<sup>66</sup> By also prohibiting deceptive privacy claims, the *CPPA* would introduce another layer of overlap for the Bureau to navigate.

Such overlap harms Canada's business environment. Canada dropped from fourth to 23rd in the World Bank's Ease of Doing Business rankings between 2006 and 2019.<sup>67</sup> Canada's position in the World Economic Forum's Competitiveness Index has also fallen.<sup>68</sup> While Canada's public sector performance on this index has improved, Canada still ranks 38th out of 140 countries in the burden of government regulation. The efficiency of Canada's legal framework for settling disputes has also been reduced.<sup>69</sup> Regulatory overlap is one of the culprits for this poor performance. Canadian business leaders have identified reducing regulatory burden as the one thing the Canadian government can do to improve Canada's business environment.<sup>70</sup> As the Canadian Chamber of Commerce noted, "Canada's complex network of overlapping regulations from all levels of government has created a costly and uncertain environment to operate a business."<sup>71</sup> The Advisory Council on Economic Growth further stated that Canada could "stimulate more investment and attract more capital" by setting "the global gold standard for regulatory efficiency and predictability."<sup>72</sup>

Engendering further overlap between the Bureau and OPC would be contrary to the vision of effective regulation shared by the Canadian government and the Bureau. The Canadian government has invested in a regulatory reform agenda “to make the Canadian regulatory system more agile, transparent and responsive.”<sup>73</sup> The government’s External Advisory Committee on Regulatory Competitiveness recommended that these reforms should focus on “reducing irritants and inefficiencies that add unnecessary cost, duplication and/or delay for business and citizens” to “save time and money, and free up resources that can be put to better uses such as enhancing innovation and competitiveness.”<sup>74</sup> The Bureau, meanwhile, has advocated for regulation only “when there is good evidence to show that, without regulation, policy objectives will not be met.”<sup>75</sup> Commissioner of Competition Matthew Boswell has stated that regulation “should be evidence-based and not overly restrictive.”<sup>76</sup> Following adoption of the *CPPA*, the Bureau continuing to pursue deceptive privacy claims would go against these principles, given the OPC’s mandate and expanded enforcement powers to address these claims. No evidence or policy objective supports the Bureau continuing to deploy its limited resources to police conduct over which the OPC has jurisdiction, creating unnecessary costs, duplication, and delay in the enforcement process as the regulators coordinate their actions.

Allowing this overlap to subsist would be particularly problematic because the Bureau is not required to address consumer complaints in the same way as the OPC. To date, protecting Canadians’ privacy has been based on a complaint-driven model, whereby the OPC is legislatively required to investigate consumer’s privacy complaints, an approach the *CPPA* maintains.<sup>77</sup> The Bureau, meanwhile, has no such obligation. Indeed, a 2019 audit of the Bureau found that it did not have defined procedures for triaging complaints and no defined criteria for determining the value of a complaint, which could “cause inconsistencies, omissions, errors and delays in how complaints are assessed, referred, or closed.”<sup>78</sup> By soliciting privacy complaints, the Bureau is pulling consumers from a regulator that is *required* to investigate their complaints towards one that *may* do so.

The Bureau would also be soliciting complaints for conduct that is likely to be widespread, pervasive, and overwhelming. The Bureau itself has highlighted one type of deceptive privacy claim that would run afoul of the *Act*: a mobile phone flashlight application that collects location information, as the application is collecting information incidental to the consumer’s main objective for using the application and not related to the functionality upon which the user is focused.<sup>79</sup> With this example in mind, 89.5% of Canadian

households owned a mobile phone in 2017.<sup>80</sup> In that same year, a study found that 70% of smartphone applications reported users' personal data to third-party tracking companies.<sup>81</sup> A user's personal information would become available to these third-parties as soon as the user allows access to even a single application, even if the user declines application permissions on all other applications.<sup>82</sup> In other words, most Canadians are likely to have a smartphone application reporting their personal information to a third-party in a manner incidental to the user's main objective for using the application, contrary to that user's general impression of how the application would treat their personal information. A general privacy policy or other terms and conditions will not cure that deception. Put simply, most Canadians are likely to have been deceived by smartphone applications in a way that contravenes the *Act*. As only one example of a particular deceptive privacy claim, using only one data collection method on only one kind of device, policing deceptive privacy claims may well become a resource and time-consuming enforcement and triaging endeavour for the Bureau to pursue.

Put simply, the Bureau lacks the resources necessary to meaningfully address consumers' deceptive privacy complaints, while also ensuring consumers and businesses continue to benefit from a competitive Canadian economy. For the last decade, the Bureau's budget was stagnant: the Bureau's 2019-2020 budget of \$53.7 million and workforce of 382 employees<sup>83</sup> represented a 4% increase and 5% decrease, respectively, in the Bureau's budget and workforce from 2011-2012.<sup>84</sup> These resource limitations were juxtaposed against the Bureau's vision of itself as a more proactive enforcer employing "timely and evidence-based enforcement action"<sup>85</sup> as well as "[doing] everything in its powers to protect consumers and businesses from anti-competitive activity throughout the COVID-19 pandemic."<sup>86</sup> With the 2021 federal budget, the Bureau is set to receive a substantial resource injection, with \$96 million over five years (starting in 2021-2022) and \$27.5 million ongoing to enhance competition to "protect consumers, lower prices and spur innovation" in the digital economy.<sup>87</sup> Policing widespread, pervasive and overwhelming deceptive privacy claims will diminish the effect these newfound resources will have on the competitive outcomes they seek to generate, eating away at the regulatory enforcement capacity these funds were provided to build in the first place. Importantly, unlike with deceptive privacy claims, no other regulator can provide the same outcomes for competition as the Bureau can with these additional resources. Indeed, as Commissioner Boswell has pointed out, when it comes to addressing

competition concerns in Canada, the Bureau is the sole regulator responsible: “we are it for Canada.”<sup>88</sup>

The *CPPA* provides an opportunity for the Bureau to lessen its burden. While the Bureau may be on its own for competition enforcement, the Bureau can rely on the OPC, Canada’s dedicated privacy enforcer, to protect Canadians from deceptive privacy claims. *PIPEDA*’s ombuds model was initially chosen, in part, to avoid “overlap and proliferation of rules of law, especially within the federal system.”<sup>89</sup> While the Bureau has previously been steadfast in its commitment to enforcing the *Competition Act* despite any overlap with *PIPEDA*,<sup>90</sup> the *CPPA* changes the equation, making the OPC the more appropriate enforcer for these claims than the Bureau. The overlap would be real, with the potential to harm both businesses and consumers.

To eliminate this overlap and to promote regulatory efficiency, in establishing an information sharing agreement between them, the Bureau and OPC should formalize a structure that facilitates the Bureau’s referrals of all deceptive marketing claims regarding the collection, use, and/or distribution of data or personal information from the Bureau to the OPC. Doing so will help the Bureau further the Canadian government’s goal of addressing regulatory overlap to foster a better business environment, provide consumers with a single regulator that is legislatively mandated to address their deceptive privacy complaints, and allow the Bureau to focus its efforts and resources on its core competition mandate to the benefit of Canadian businesses and consumers, especially as Canada emerges from the COVID-19 pandemic.

## Conclusion

Bill C-11 represents an opportunity for the Bureau. Canada’s competition authority envisioned itself as a necessary defender of Canadians’ privacy interests where such interests could not be adequately protected elsewhere, demonstrated by the Bureau and OPC’s differing enforcement outcomes in addressing Facebook’s conduct for the Cambridge Analytica scandal. Should the *CPPA* be proclaimed into law, Canada will have something it has not had previously: a dedicated privacy enforcer with the ability to make orders and recommend fines. In such event, the Bureau would no longer *need* to take action on deceptive privacy claims; the OPC would fulfill that role. In the face of overlapping mandates, establishing a referral agreement for such claims with the OPC would take a significant enforcement effort off the Bureau’s books, one pervasive and widespread enough to potentially

overwhelm its limited resources and mandate. Such an arrangement would allow each regulator to fulfill their own mandate: the OPC protecting Canadians' privacy through a complaints-driven regime, and the Bureau benefitting Canadian businesses and consumers by ensuring the competitiveness of the Canadian economy. To use Commissioner Boswell's words, such an arrangement would be "evidence-based and not overly restrictive." Put simply, the *CPPA* presents an opportunity for the Bureau to put its words into action when it comes to the enforcement of deceptive privacy claims by walking away and leaving the field to a dedicated privacy enforcer, the OPC. It is an opportunity the Bureau should seize.

## ENDNOTES

<sup>1</sup> Cullen Schreiter is an associate in the Competition, Antitrust & Foreign Investment group at Blake, Cassels & Graydon LLP. The author thanks Kevin MacDonald and Gregory Sheppard for their comments. The author retains sole responsibility for any errors and the views expressed herein. The opinions expressed herein are those of the author and do not necessarily reflect the views of Blake, Cassels & Graydon LLP or its clients.

<sup>2</sup> Competition Bureau Canada, Speech, "Honest Advertising in the Digital Age", (22 January 2020), online: <<https://www.canada.ca/en/competition-bureau/news/2020/01/honest-advertising-in-the-digital-age.html>> ["Honest Advertising"].

<sup>3</sup> Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess, 43rd Parl, 2020 (first reading 17 November 2020) [*Digital Charter Implementation Act*].

<sup>4</sup> *Ibid.*, cl 2 [*CPPA*].

<sup>5</sup> *Competition Act*, RSC 1985, c C-34.

<sup>6</sup> Honest Advertising, *supra* note 2.

<sup>7</sup> Brian A Facey & Cassandra Brown, *Competition Act: Commentary and Annotation* (Toronto: LexisNexis Canada, 2019) at 153.

<sup>8</sup> Competition Bureau Canada, Discussion Paper, "Big data and Innovation: Implications for competition policy in Canada" (2017) online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04304.html>> at "V. Big data and deceptive marketing practices" ["Big Data Discussion Paper"].

<sup>9</sup> Competition Bureau Canada, Report, "Big data and innovation: key themes for competition policy in Canada Response to Public Comment (2018), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>> at "Deceptive marketing practices" ["Big Data Key Themes"].

<sup>10</sup> Competition Bureau Canada, Bulletin, "The Deceptive Marketing Practices Digest—Volume 5" (4 March 2020), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04520.html>>.

<sup>11</sup> *Ibid.*

<sup>12</sup> Carole Cadwalladr & Emma Graham-Harrison, “Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach” (17 March 2018), online: *The Guardian* <<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>>.

<sup>13</sup> *Facebook Inc v Commissioner of Competition*, 2020 Comp Trib 7.

<sup>14</sup> Competition Bureau Canada, News Release, “Facebook to pay \$9 million penalty to settle Competition Bureau concerns about misleading privacy claims” (19 May 2020), online: <<https://www.canada.ca/en/competition-bureau/news/2020/05/facebook-to-pay-9-million-penalty-to-settle-competition-bureau-concerns-about-misleading-privacy-claims.html>>.

<sup>15</sup> Office of the Privacy Commissioner of Canada, “How the OPC protects and promotes privacy” (10 November 2016), online: <<https://www.priv.gc.ca/en/about-the-opc/what-we-do/mm/>>.

<sup>16</sup> *Privacy Act*, RSC 1985, c P-21.

<sup>17</sup> *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

<sup>18</sup> Office of the Privacy Commissioner of Canada, “The strategic privacy priorities” (14 December 2018), online: <<https://www.priv.gc.ca/en/about-the-opc/opc-strategic-privacy-priorities/the-strategic-privacy-priorities/>>.

<sup>19</sup> Office of the Privacy Commissioner of Canada, Discussion Paper, “A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act” (May 2016), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/consent\\_201605/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/consent_201605/)> at “Challenges to meaningful consent: New technologies and business models”.

<sup>20</sup> See Office of the Privacy Commissioner of Canada, “Submission to the Competition Bureau Re: Consultation on Big Data and Innovation Discussion Paper” (17 November 2017), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub\\_cb\\_171117/#fn2-rf](https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_cb_171117/#fn2-rf)> [“OPC Big Data Submission”]. See also PIPEDA, *supra* note 17, Schedule 1, cl 4.3.5.

<sup>21</sup> Honest Advertising, *supra* note 2.

<sup>22</sup> OPC Big Data Submission, *supra* note 20.

<sup>23</sup> Office of the Privacy Commissioner of Canada, Report, “2019-2020 Annual Report to Parliament on the Privacy Act and Personal Information Protection and Electronic Documents Act” (2020), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/ar\\_index/201920/ar\\_201920/](https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201920/ar_201920/)>.

<sup>24</sup> CPPA, *supra* note 4, ss 115(1)-(2); *Digital Charter Implementation Act, 2020*, *supra* note 3, cl 14.

<sup>25</sup> Office of the Privacy Commissioner of Canada, “Privacy Guide for Businesses” (2020), online: <[https://www.priv.gc.ca/media/2038/guide\\_org\\_e.pdf](https://www.priv.gc.ca/media/2038/guide_org_e.pdf)> at 7; PIPEDA, *supra* note 17, s 4. Some organizations are regulated by provincial privacy legislation in Alberta, British Columbia, and Quebec that has been found to be substantially similar to PIPEDA.

<sup>26</sup> PIPEDA, *supra* note 17, s 3.

<sup>27</sup> Jennifer Stoddart, “Cherry Picking Among Apples and Oranges: Refocusing

Current Debate About the Merits of the Ombuds-Model Under PIPEDA” (20 June 2006), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2005/omb\\_051021/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2005/omb_051021/)> at “I.a. Structure of the Act” [“Cherry Picking”].

<sup>28</sup> Jennifer Stoddart, “Privacy in the Era of Social Networking: Legal Obligations of Social Media Sites” (2011) 74:2 Sask L Rev 263 at 264.

<sup>29</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Towards Privacy By Design: Review of the Personal Information Protection and Electronic Documents Act*, 42-1 (February 2018) at 8 (Chair: Bob Zimmer) [*Towards Privacy by Design*].

<sup>30</sup> Teresa Scassa, “Moving on From the Ombuds Model for Data Protection in Canada” (2019) 17:1 CJLT 90 at 90 [“Moving on From the Ombuds Model”].

<sup>31</sup> Cherry Picking, *supra* note 27 at “IV.a Complaint-Driven Model”.

<sup>32</sup> Carolyn Steiber, “57 Varieties: Has the Ombudsman Concept Become Diluted?” (2000) 16:1 Negotiation J 49 at 56.

<sup>33</sup> Linda C Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection” (2000) 13 *Harv Hum Rts J* 1 at 9.

<sup>34</sup> See *Towards Privacy by Design*, *supra* note 29 at 8.

<sup>35</sup> France Houle & Lorne Sossin, “Powers and Functions of the Ombudsman in the Personal Information Protection and Electronic Documents Act: An Effectiveness Study” (August 2010), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/pipeda\\_h\\_s/#fn31-rf](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2010/pipeda_h_s/#fn31-rf)> at “2.1 The technology dimension: Emergence of Web 2.0”.

<sup>36</sup> Teresa Scassa, “Reforms to the *Personal Information Protection and Electronic Documents Act* must give the privacy commissioner real enforcement powers” (7 June 2018), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/june-2018/enforcement-powers-key-pipeda-reform/>>.

<sup>37</sup> Office of the Privacy Commissioner of Canada, Report of Findings, “Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia” (25 April 2019), online: <<https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-002/>> at paras 1, 41-42, 85, 114, 165, 182.

<sup>38</sup> *Ibid* at para 20.

<sup>39</sup> *Ibid* at paras 164, 183.

<sup>40</sup> See Office of the Privacy Commissioner of Canada, News Release, “Facebook refuses to address serious privacy deficiencies despite public apologies for “breach of trust” (25 April 2019), online: <[https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c\\_190425/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c_190425/)> [Facebook refuses to address serious privacy deficiencies].

<sup>41</sup> The Federal Court has the power to make this order under *PIPEDA*, *supra* note 17, s 16. See Office of the Privacy Commissioner of Canada, News Release, “Privacy Commissioner files Notice of Application with the Federal Court against

Facebook, Inc” (6 February 2020), online: <[https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an\\_200206/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200206/)>.

<sup>42</sup> *Facebook Inc. v Canada (Privacy Commissioner)* (15 April 2020), Ottawa, ON CA T-473-20 (application for judicial review).

<sup>43</sup> *Facebook refuses to address serious privacy deficiencies*, *supra* note 40.

<sup>44</sup> Houle & Sossin, *supra* note 35 at “Recommendation #3: Granting limited order-making powers”.

<sup>45</sup> Moving on From the Ombuds Model, *supra* note 30 at 95.

<sup>46</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 42-1, No 47 (16 February 2017) at 1610 (Daniel Therrien, Privacy Commissioner).

<sup>47</sup> *Towards Privacy by Design*, *supra* note 29 at 61.

<sup>48</sup> Innovation, Science and Economic Development Canada, “Proposal to Modernize the Personal Information Protection and Electronic Documents Act” (21 May 2019), online: <[https://www.ic.gc.ca/eic/site/062.nsf/eng/h\\_00107.html](https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00107.html)> at “C. Tools to address non-compliance or offences” [*Proposal to Modernize*].

<sup>49</sup> *Competition Act*, *supra* note 5, s 74.01(a).

<sup>50</sup> *Ibid*, s 74.1(c).

<sup>51</sup> Office of the Privacy Commissioner of Canada, Speech, “Appearance before the Standing Committee on Access to Information, Privacy and Ethics (ETHI) before the International Grand Committee on Big Data, Privacy and Democracy” (28 May 2019), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2019/parl\\_20190528/](https://www.priv.gc.ca/en/opc-actions-and-decisions/advice-to-parliament/2019/parl_20190528/)>.

<sup>52</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 42-1, No 124 (1 November 2018) at 1215 (Privacy Commissioner Daniel Therrien).

<sup>53</sup> United Kingdom Information Commissioner’s Office, News Release, “ICO issues maximum £500,000 fine to Facebook for failing to protect users’ personal information” (25 October 2018), online: <<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/10/facebook-issued-with-maximum-500-000-fine/>> [“ICO issues maximum fine”]. Facebook was fined the maximum allowable fine of £500,000 under the *Data Protection Act 1998*, 1998 c 29 (UK), but the Information Commissioner made clear that she would have imposed a higher penalty had the conduct taken place under the European Union’s General Data Protection Regulation. See also EC, *Commission Regulation (EC) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC*, [2016] OJ, L119/1.

<sup>54</sup> Mark Scott, “Facebook fined €1M over Cambridge Analytica scandal” (28 June 2019), online: *Politico* <<https://www.politico.eu/article/facebook-fined-cambridge-analytica/>>.

<sup>55</sup> United States Federal Trade Commission, News Release, “FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook” (24 July 2019), online: <<https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>>.

<sup>56</sup> *CPPA*, *supra* note 4, s 16.

<sup>57</sup> *Ibid*, s 92(2).

<sup>58</sup> *Ibid*, s 94(4).

<sup>59</sup> Facebook's overall annual revenue in 2019 was US \$70,697,000,000. See United States Securities and Exchange Commission, *Form 10-K: 2019 Annual Report, Facebook Inc* (Washington, DC: 2020), online: <<http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf>> at 42.

<sup>60</sup> See e.g. *Towards Privacy by Design*, *supra* note 29; *Proposal to Modernize*, *supra* note 48.

<sup>61</sup> The Bureau will pursue the civil track unless (a) there is clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation and (b) if such evidence is available, the Bureau is satisfied that criminal prosecution is in the public interest, having regard to the seriousness of the alleged offence alongside certain mitigating factors. See Competition Bureau of Canada, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act" (22 September 2019), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html>>.

<sup>62</sup> The Canadian Radio-television and Telecommunications Commission must approve any change of control or ownership of a licensed undertaking under the *Broadcasting Act*, SC 1991, c 11. See *Television Broadcasting Regulations*, 1987, SOR/87-49, s 14; *Radio Regulations*, 1986, SOR/86-982, s 11; *Discretionary Services Regulations*, SOR/2017-159, s 10.

<sup>63</sup> The Governor in Council, on recommendation of the Minister of Transport, must approve transactions involving a "transportation undertaking" or an "air transportation undertaking", the latter of which also involves a notification to the Canadian Transportation Agency for a determination that the transaction would result in that undertaking being a "Canadian" undertaking. See *Canada Transportation Act*, SC 1996, c 10, ss 53.1(1)(a)-(b), 53.2(1), 53.2(7).

<sup>64</sup> The Office of the Superintendent of Financial Services must approve acquisitions or increases of a significant interest and/or control of a federally regulated entity. See *Bank Act*, SC 1991, c 46, ss 373(1), 377.1(1), 395, 875(1), 883(1), 905; *Trust and Loan Companies Act*, SC 1991, c 45, ss 375(1), 375.1(1), 387; *Insurance Companies Act*, SC 1991, c 47, ss 407(1), 407.1(1), 419, 927(1), 932(1), 946; *Cooperative Credit Associations Act*, SC 1991, c 48, ss 354(1), 354.1(1), 358.

<sup>65</sup> The Minister of Innovation, Science and Industry must approve reviewable investments by non-Canadians. See *Investment Canada Act*, RSC 1985 c 28, s 16.

<sup>66</sup> *Bank Act*, *supra* note 64, s 980.1; *Trust and Loan Companies Act*, *supra* note 64, s 533(1.1); *Insurance Companies Act*, *supra* note 64, s 1023.1; *Cooperative Credit Associations Act*, *supra* note 64, s 465(1.1).

<sup>67</sup> "Making regulation a competitive advantage" online: *Deloitte* <<https://www2.deloitte.com/ca/en/pages/finance/articles/regulatory-competitiveness.html>> at 6; World Bank, "Ease of Doing Business Rankings" online: *Doing Business* <<https://www.doingbusiness.org/en/rankings>>.

- <sup>68</sup> Klaus Schwab, “The Global Competitiveness Report” (2019) at 14, online (pdf): *World Economic Forum* <[http://www3.weforum.org/docs/WEF\\_TheGlobalCompetitivenessReport2019.pdf](http://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf)>.
- <sup>69</sup> *Ibid* at 139.
- <sup>70</sup> “Competitiveness Scorecard: Measuring our success on the global stage” (5 March 2019), online: *Business Council of Canada* <<https://thebusinesscouncil.ca/report/competitiveness-scorecard/>>.
- <sup>71</sup> “Death by 130,000 Cuts: Improving Canada’s Regulatory Competitiveness” (May 2018), online: *Canadian Chamber of Commerce* <<https://static1.squarespace.com/static/5afb304d506fbcacf1448abf/t/5f74cf57a8d7d83aedc0288e/1601490783193/180531DeathBy130000CutsImprovingCanadasRegulatoryCompetitiveness.pdf>> at 2.
- <sup>72</sup> *Ibid* at 12.
- <sup>73</sup> Department of Finance Canada, Budget Plan, “Equality Growth: A Strong Middle Class” (27 February 2018), online: <<https://budget.gc.ca/2018/docs/plan/budget-2018-en.pdf>> at 118.
- <sup>74</sup> Laura Jones *et al.*, “External Advisory Committee on Regulatory Competitiveness Recommendation Letter” (29 July 2019), online: *Government of Canada* <<https://www.canada.ca/en/government/system/laws/developing-improving-federal-regulations/modernizing-regulations/external-advisory-committee-regulatory-competitiveness/external-advisory-committee-regulatory-competitiveness-recommendation-letter-july-2019.html>>
- <sup>75</sup> Competition Bureau Canada, “Balancing regulation and competition” (4 October 2016), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>>.
- <sup>76</sup> Competition Bureau Canada, Speech, “*Advancing Competition in a Changing Marketplace*” (10 October 2018), online: <<https://www.canada.ca/en/competition-bureau/news/2018/10/advancing-competition-in-a-changing-marketplace.html>>.
- <sup>77</sup> PIPEDA, *supra* note 17, s 12; CPPA, *supra* note 4, s 83.
- <sup>78</sup> Innovation, Science and Economic Development Canada, Report, “*Audit of the Competition Bureau Report*” (May 2019), online: <[https://www.ic.gc.ca/eic/site/ae-ve.nsf/eng/h\\_03895.html](https://www.ic.gc.ca/eic/site/ae-ve.nsf/eng/h_03895.html)> at “4.4: Intake and Triage”.
- <sup>79</sup> Big Data Discussion Paper, *supra* note 8 at “V.A. Collection of data”.
- <sup>80</sup> Canadian Radio-television and Telecommunications Commission, Report, “*Communications Monitoring Report 2019*” (January 2020), online: <<https://crtc.gc.ca/pubs/cmr2019-en.pdf>> at 28.
- <sup>81</sup> Narseo Vallina-Rodriguez & Srikanth Sundaresan, “7 in 10 smartphone apps share your data with third-party services” (The Conversation, 29 May 2017), online: *The Conversation* <<https://theconversation.com/7-in-10-smartphone-apps-share-your-data-with-third-party-services-72404>>.
- <sup>82</sup> Narseo Vallina-Rodriguez *et al.*, “Tracking the Trackers: Towards Understanding the Mobile Advertising and Tracking Ecosystem” (26 October 2016) online (pdf): <<https://arxiv.org/pdf/1609.07190.pdf>> at 5.
- <sup>82</sup> Saksham Chitkara *et al.*, “Does this App Really Need my Location? Context-Aware Privacy Management for Smartphones” (2017) 1:3 Proc ACM Interact

Mob Wearable Ubiquitous Technol 1, online: <[https://www.ftc.gov/system/files/documents/public\\_comments/2017/09/00006-141375.pdf](https://www.ftc.gov/system/files/documents/public_comments/2017/09/00006-141375.pdf)> at 2.

<sup>83</sup> Competition Bureau Canada, Report, “Annual Report of the Commissioner of Competition for the Year Ending March 31, 2020” (6 November 2020), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04542.html#sec06-1>> at “Financial snapshot” [2020 Annual Report].

<sup>84</sup> “Is Canada’s Competition Watchdog on a Leash? Ottawa Must Champion Competition Enforcement” (8 November 2018) at 8, online (pdf): *C.D. Howe Institute Competition Policy Council* <<https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf/Final%20Communique%20Nov%202018.pdf>>.

<sup>85</sup> Competition Bureau Canada, “Competition in the digital age: The Competition Bureau’s Strategic Vision for 2020-2024” (11 February 2020), online: <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/\\$file/Strategic-Vision-2020-24-En.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/$file/Strategic-Vision-2020-24-En.pdf)> at 5-6, 10.

<sup>86</sup> Competition Bureau Canada, “COVID-19: What the Competition Bureau is doing” (6 May 2020), online: <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h\\_04525.html](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04525.html)>.

<sup>87</sup> Department of Finance Canada, Report, “Budget 2021: A Recovery Plan for Jobs, Growth and Resilience” (19 April 2021), online: <<https://www.budget.gc.ca/2021/report-rapport/p2-en.html#chap4>> at Chapter 4.

<sup>88</sup> House of Commons, Standing Committee on Industry, Science and Technology, *Evidence*, 43-2, No 9 (3 December 2020) at 1240 (Matthew Boswell, Commissioner of Competition).

<sup>89</sup> Houle & Sossin, *supra* note 35 at “1.2.1: Choice of government institution”.

<sup>90</sup> Big Data Key Themes, *supra* note 9 at “Deceptive marketing claims” (“The Bureau will continue to enforce provisions of the Act even if the offending actions may be subject to enforcement under PIPEDA”).