Speaking Notes for Oral Submission to the House of Commons Standing Committee on Access to Information, Privacy and Ethics

Review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA)

Micheal Vonn, British Columbia Civil Liberties Association, Policy Director

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The BCCLA is a non-partisan society with a mandate to uphold civil liberties and human rights in Canada. Privacy is one of our key portfolios and we thank you for the invitation to appear at this review of PIPEDA.

I'll just note at the outset that we have been unable to review the GDPR sufficiently to comment on the upcoming review of adequacy and we are pleased that others are able to provide extensive commentary on that subject.

Enforcement Powers

Our association supports and echoes many of the concerns and recommendations that have already been made by academics, regulators and witnesses who have appeared on behalf of civil society. For example, we strongly support meaningful enforcement powers in PIPEDA, specifically, order-making powers, the ability to level financial penalties and to award compensation to complainants in appropriate circumstances.

We have been calling for this for over a decade. There is no longer any creditable argument for retaining the so-called 'ombudsperson model' as provincial counterparts have long demonstrated that order-making powers can be effectively combined with co-operative investigation, mediation and education.

Application to Federal Political Parties

Likewise we join others, including the BC Freedom of Information and Privacy Association, in calling for federal political parties to be covered under PIPEDA, like provincial political parties are covered under our corresponding legislation in British Columbia.

We have heard from many Canadians and most particularly, those from areas that consider themselves "ground zero" of various "robo-calls" scandals, that the complete failure to regulate the collection, use and disclosure of their personal information held by federal political parties is entirely unacceptable. For all the obvious reasons, including historical abuses that have facilitated electoral fraud, this is a matter of immense importance and urgency.

"The Right to be Forgotten"

I would like to speak briefly to the topic that is being discussed under the title "the right to be forgotten" and more broadly, as online reputation. This is an area of competing rights in which the BCCLA has not

yet decided on an official position. We are nevertheless very alive to the competing claims and in the interests of clarifying what is at issue, I have a few points.

First, we need to understand the context of this discussion and reject the notion that we are talking about a situation that is in any way analogous to ripping index cards out of the library card catalogue – the current 'go-to' metaphor for de-indexing.

In no library that has ever existed has anyone been able to command the service of gathering information about their neighbour who is not a public figure, or whose activities are otherwise not within 'the public interest' or for some reason notable. Tenants, co-workers, ex-partners of current partners, classmates, acquaintances: up until recently the vast majority of these members of the public enjoyed the privacy protection of practical obscurity. The internet and powerful search engines have eroded this protection very seriously, and people are being very significantly harmed.

For example: an online reputation matter that comes from BC. A small business in Nanaimo had a protracted battle with Google about Google's obligation, under its own policy, to remove anonymous online "reviews" that included libelous personal attacks on specific company employees. One of the company's employees, who I'll call Ms. Jones, was said to be racist and have "the attention span of a woodbug."

The company's inability to get the anonymous personal attacks on its employees removed was the subject of a CBC story, and in fact, it appears that it was only the negative publicity that finally got Google to remove the review.

I needed to recollect the facts of this story for this submission. It had been reported in the media. I found the article online using search terms: "Google, BC, online review, personal attack". This is precisely as it should be. The information about Ms. Jones was contained in the article, as it was when it was first published. This too is precisely as it should be. Then, as an experiment, I searched for "Ms. Jones", just by her name alone, as anyone might do – nosy neighbour, prospective employer, landlord, clients. The first substantive hit is the article containing the personal attack on her as a cognitively deficient racist. Is THIS as it should be?

And if this is a problem – and we know it is; people contact our organization looking for solutions to these problems – how do we fix it without causing harm to other critically important rights: access to information and freedom of expression.

In order to have that discussion, we have to be specific about the problem. The problem is not that searching for online reputation stories leads me to Ms. Jones; the problem is that searching for Ms. Jones leads me to the online reputation stories that report the content of libelous statements about her.

Without exploring what options are available to remedy this specific problem, it does seem, at a minimum, premature to announce that a remedy would necessarily be unconstitutional.

Certainly the hope would be to find a way to meaningful secure *all* the rights at issue.

“Ethical frameworks” and a “risk-based” approach to data usage

Finally, I just want to address the use of “ethical assessments” and “ethical frameworks” for ‘big data’ and the Internet of Things.

As the OPC has indicated in their overview of submissions received in their consultation on Consent, there is a great deal of enthusiasm within business and industry for “ethical frameworks” for the use of personal information, either as an added level of accountability or, more likely, as a compensation for a system in which consent is being eroded.

The question of if and how consent can be made meaningful is a very large discussion. My sole point at this juncture is to stress that the model for assessment that is being proposed is not ethical. Calling it an ethical framework is deeply problematic.

In this framework, the people who want to use the data, in order to make money from it, will decide whether it is justified to use the data given the risks – privacy, reputational, etc. The risks are assumed by other people. The people who stand to benefit are the people deciding what the risk level is, and whether their purposes should outweigh those risks. The people who are themselves being subjected to the risk, have no say in the process.

It is simply impossible to describe this distribution of benefits and risks as one that is “ethical”. Assuredly, there are many individuals who would undertake this task with a conscience and with a desire to operate ethically and fairly. That said, individuals aside, the process itself is nakedly one of the foxes guarding the henhouse, with a mere promise to be really ethical foxes. Although, you will note from the OPC’s review, not so ethical that they would like a disinterested third party, say an ethics board, to have any part of the guarding function.

In sum, we have no confidence that the “solution” of “ethical frameworks” is either ethical or a solution.

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