FUTURE REFORM OF PRIVACY LAWS IN CANADA

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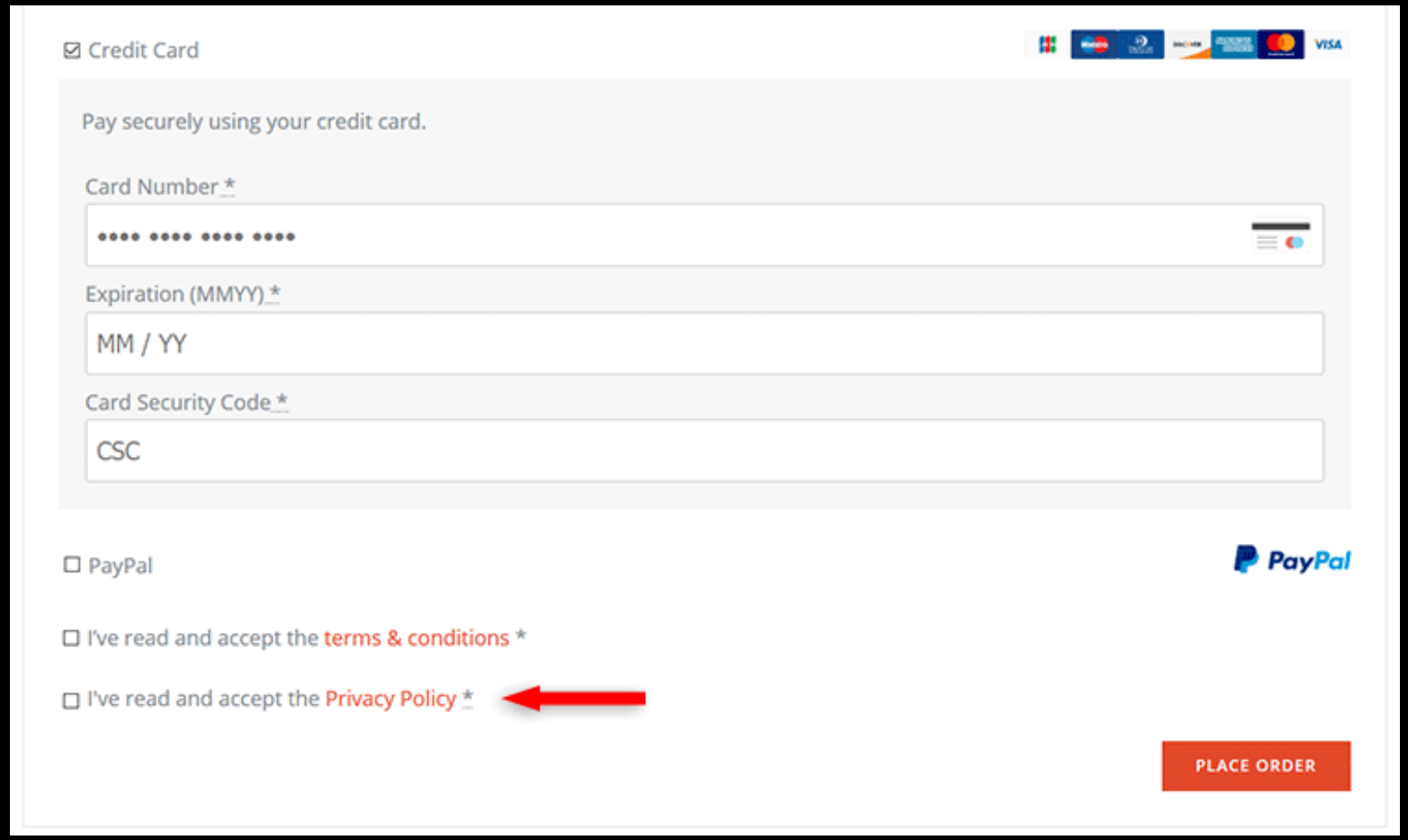
WTF?????

DATA PRIVACY DAY

IN THE AGE OF GOOGLE AND FACEBOOK, EVERY DAY IS DATA PRIVACY DAY

YOUR PRIVACY?



YOU ARE NOT READING THEM

For good reason:

"Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days"

- *The Atlantic* (2012)

"PRIVACY" LAWS

Personal Information Protection and Electronic Documents Act (PIPEDA)

Loi sur la protection des renseignements personnels dans le secteur privé

General Data Protection Regulation (GDPR)

PRIVACY POLICY CONTENTS REFLECT THE LAWS

Personal Information collected, used and disclosed

&

User rights

Personal Information collected, used and disclosed

&

User rights

Personal data, purposes of processing & transfer

&

DATA SUBJECT RIGHTS

“PIPEDA SUCKS”

-Allen Mendelsohn, BA, MBA, BCL, LLB, LLM, noted expert in privacy law, esteemed attorney and respected lecturer at McGill’s Faculty of Law

PIPEDA SUCKS PARAPHRASED

(then) Privacy Commissioner of Canada (Daniel Therrien):

"The time has come for Canada to change its privacy protection model to ensure that… regulatory bodies can effectively protect the privacy rights of citizens" (2017)

"Modern laws consistent with evolving international norms are urgently required if we are to provide Canadians with the protection they expect and deserve" (2018)

PIPEDA IN A NUTSHELL

"Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1"

Schedule 1 → the "10 Principles" of protection of personal information

So what happens if an organization doesn't comply???

PENALTIES FOR NON-COMPLIANCE UNDER PIPEDA

OFFICE OF THE PRIVACY COMMISSIONER POWERS OF ENFORECEMENT UNDER PIPEDA

SCRAPPING PIPEDA

Bill C-11 November 17, 2020

*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*

a.k.a.

Digital Charter Implementation Act, 2020

IS IT AN IMPROVEMENT?

PIPEDA

The purpose …is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information

CPPA

The purpose …is to establish — in an era in which data is constantly flowing across borders and geographical boundaries and significant economic activity relies on the analysis, circulation and exchange of personal information — rules to govern the protection of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information

BUT IT *IS* AN IMPROVEMENT!!!!

- Enforcement mechanisms for OPC and the new Tribunal
- $$$$$$ penalties
- Increased user rights

→ Good for individuals

ENFORCEMENT MECHANISMS

- ✓Upon complaint of an individual, the Commissioner "**must** carry out an investigation" (though there are some exceptions when they don't have to)
- ✓After the investigation, Commissioner moves on to an **inquiry**
- ✓After the inquiry, Commissioner may issue a "Compliance Order". Stress on the word "order" → PIPEDA has "Compliance **agreements**"
- ✓After the inquiry, the $$$$$...

$$$$$ PENALTIES

"the higher of **$10,000,000 and 3% of the organization's gross global revenue** in its financial year before the one in which the penalty is imposed"

→Tribunal imposes upon recommendation of the Commissioner

"liable to a fine not exceeding the higher of $**25,000,000 and 5% of the organization's gross global** revenue in its financial year"

→ For some more serious offenses, such as not reporting a data breach to the Commissioner

$$$$$ FROM THE COURTS TOO?

<u>"Private Right of Action"</u>

You *can* sue for a CPPA violation, BUT:

1. Only after the Commissioner or Tribunal has **already** found contravention of the CPPA
2. You must sue within 2 years

NEW USER RIGHTS

- Right to data mobility upon your request
- Right of “disposal” upon your request
- Right to be informed about automated decision-making

OTHER GOOD STUFF FOR YOU

→"An organization must make readily available, **in plain language**, information that explains the organization's policies and practices put in place to fulfil its obligations under this Act"

→An organization must disclose "names of any third parties or types of third parties to which the organization may disclose the personal information"

BUT COMPANIES GET STUFF TOO

- ✓ New enhanced "exception to consent" for legitimate business purposes
- ✓ Increased possibilities for use of "de-identified" information without user's consent
- ✓ Due diligence defence for Tribunal-imposed penalties

CPPA IS FAR FROM PERFECT

- ☒ NO “Data protection by design and by default” / “Privacy by design”
- ☒ NO “Privacy as a human right”
- ☒ Still a limited application
- ☒ NO right to be forgotten or de-indexing right
- ☒ Only a limited private right of action

→ Compare with GDPR

Bill 64 – *An Act to modernize legislative provisions as regards the protection of personal information*

→Unlike the federal bill, updates the existing *Loi sur la protection des renseignements personnels dans le secteur privé*

Introduced June 2020, adopted in principle (120-0!) October 20,2020 (still a ways to go…)

BILL 64 HIGHLIGHTS

- Also big $$$$$ penalties – up to $25,000,000 or 4% of worldwide annual revenue (imposed by overseeing body CAI itself)
- Also a private right of action, but without the prior violation requirement
- User rights – data portability, de-indexing, right to object to automated processing
- New mandatory data breach notifications
- Privacy be design / default – called "confidentiality by default" in English, for companies offering a "technological product or service"

The changes are long overdue and a big step forward, but maybe we could have done better, especially at the federal level. But there is still time.

THANKS :-)

QUESTIONS?

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