

# Let's Not Get Psyched Out of Privacy:

Reflections on Withdrawing Consent to the Collection, Use and Disclosure of Personal Information

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## I. Introduction

The technologies that we use and the values we embrace construct an information hungry society. Our mass adoption of them has transformed many of us into *information junkies*, and those whose business it is to feed our *info-pangs* continuously demand *quid pro quo*: in order to *get* information, you must *give* some up.

Obviously, there are serious social consequences resulting from the information trade. It would not be unreasonable, therefore, to expect that informational privacy might attain value in this century similar to that of liberty in previous centuries. To some extent, this expectation is realized: our ability to determine for ourselves when, how, and to what extent information about us is communicated to others<sup>1</sup> has become globally recognized as an important aspect of personal liberty and self-determination.<sup>2</sup> Unfortunately, these global pronouncements are not yet well understood by the general public at the domestic level.

In Canada, the increased need for informational privacy has been directly linked to our rapid adoption of information technology. Here is how Bruce

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<sup>1</sup> See, for example, Alan F. Westin, *Privacy and Freedom* (New York, Atheneum, 1970) at 322.

<sup>2</sup> Privacy has historically been conceptualized as a right and has been linked with notions of dignity and autonomy. In 1948, for instance, the United Nations included privacy protections as Article 12 of the Universal Declaration of Human Rights. See <http://www.un.org/Overview/rights.html>. Similarly, Article 17 of the 1966 International Covenant on Civil and Political Rights refers to privacy. See <http://www.hrweb.org/legal/cpr.html>. Specific data protection regimes include: the Council of Europe's *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data* (<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>); the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data ([http://www.oecd.org/document/18/0,2340,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html)); and Directive 95/46 of the European Parliament ([http://www.cdt.org/privacy/eudirective/EU\\_Directive\\_.html](http://www.cdt.org/privacy/eudirective/EU_Directive_.html)).

Phillips, former Privacy Commissioner of Canada, described the advent of PIPEDA,<sup>3</sup> Canada's private sector privacy law, a few years ago:

This statute, which came into effect on 1 January 2001, constitutes the first determined effort to place a check upon, and ultimately to reverse, the massive erosion of individual privacy rights brought about by the application of computer and communications technology in the commercial world.<sup>4</sup>

To understand what PIPEDA aims to achieve, the Act is perhaps best understood from a *technosocial* viewpoint. Rather than viewing computer and communications technologies as mere instruments or things, one must understand such technologies as situated in the organizational, informational and human contexts that are required for their functioning.<sup>5</sup> Although PIPEDA is often thought of as little more than a set of rules and regulations for data-miners and digital marketers, in fact, its architecture reflects its much broader technosocial underpinnings. Viewed through a technosocial lens, PIPEDA is not simply about harnessing the speed of transmission, the massive storage capabilities, or the broad reach of networked computers. Instead, PIPEDA attempts to achieve a very delicate and complicated balance between the organizational, informational, economic and individual interests that are embedded within the broad social adoption of information technology.

In privacy law, consent is the nexus; it is the interface between human beings and our increasingly automated information gathering and dissemination tools. Consent acts as a kind of guardian of personal information. Except where it is unreasonable to require or otherwise inappropriate to obtain,<sup>6</sup> the knowledge and consent of an individual are required for the collection, use, or disclosure of her personal information.<sup>7</sup> Recognizing this, the current Privacy Commissioner of Canada, Jennifer

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<sup>3</sup> Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5 (hereafter PIPEDA).

<sup>4</sup> Bruce Phillips, "Foreword" in Stephanie Perrin, Heather H. Black, David H. Flaherty and T. Murray Rankin, *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (2001, Toronto, Irwin) at ix.

<sup>5</sup> See, for example, Saskia Everts, *Gender & Technology: Empowering Women, Engendering Development* (London, Zed Books, 1998) at 5 and Anne Scott, "Grounded Politics: Some Thoughts on Feminist Process in the Information Age", *ACM Computers & Society* vol 31, no. 4 (December 2001) pp 5-14.

<sup>6</sup> PIPEDA, *supra* footnote 3. Principle 4.3 contains a note which purports to define some situations where consent may be inappropriate, but PIPEDA section 2(2) explicitly excludes the Note. Instead, section 7 of PIPEDA sets out the only circumstances in which consent will be inappropriate. This model has been recognized at the Federal Court level in *Eastmond v. Canadian Pacific Railway* 2004 FC 852 where Justice Lemieux wrote at paragraph 186 that: "subsection 7(1) of the Act has given content to the words "except where inappropriate" found in 4.3 of the Schedule".

<sup>7</sup> PIPEDA, *supra* footnote 3, Principle 4.3.

Stoddart, has described consent as “the fundamental principle on which PIPEDA is based.”<sup>8</sup>

In this article, we investigate PIPEDA’s conception of consent, with special emphasis on the right of individuals to withdraw consent. Not only do PIPEDA and similar data protection laws around the globe require consent prior to the collection, use, or disclosure of most personal information, we suggest that they set higher thresholds for obtaining consent than would be afforded by way of private ordering.<sup>9</sup> Unlike the law of contracts – where consent is seen as a single transactional moment – PIPEDA generally allows the information subject to withdraw consent at any time.<sup>10</sup> On this basis, we argue that PIPEDA’s consent model is best understood as providing an *ongoing act of agency* to the information subject. This notion, we suggest, is much more robust than the usual model for consent in private ordering, which treats consent as an isolated moment of contractual agreement during an information exchange.

Although consent-as-ongoing-agency is a promising antidote to the “erosion of individual privacy rights brought about by the application of computer and communications technology in the commercial world,”<sup>11</sup> an investigation of various psychological factors surrounding the decision whether to withdraw consent reveals that the full potential of this model may be compromised in practice. This unfortunate fact is made plain through an analysis of the psychological barriers to withdrawing consent. Our descriptive account of these psychological barriers also helps to explain why people who say that they value their privacy often appear to act otherwise.

Instead of viewing consent in isolation (and, accordingly, viewing these psychological considerations as stumbling blocks), PIPEDA may be read as providing a framework which aims to build a culture that better understands the importance of privacy protection. In so doing, the power of the psychological factors may be addressed and the significance of consenting and/or withdrawing consent to the collection, use and disclosure of personal information made meaningful again.

## II. Contractual *versus* Ongoing Consent

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<sup>8</sup> Jennifer Stoddart, "An Overview of Canada’s New Private Sector Privacy Law – The Personal Information Protection and Electronic Documents Act" (available at <[http://www.privcom.gc.ca/speech/2004/vs/vs\\_sp-d\\_040331\\_e.asp](http://www.privcom.gc.ca/speech/2004/vs/vs_sp-d_040331_e.asp)>).

<sup>9</sup> See Ian Kerr, "If Left to their Own Devices" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto, Irwin Law, 2005) and Ian Kerr, "Hacking at Privacy" in Michael Geist, ed., *Privacy Law Review* (Toronto, Butterworths, 2005).

<sup>10</sup> “An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice.” PIPEDA section 4.3.8 of Schedule 1.

<sup>11</sup> Phillips, *supra*, footnote 4.

Although the collection, use, and disclosure of personal information pursuant to PIPEDA generally requires “knowledge and consent”,<sup>12</sup> the notion of consent is nowhere defined in the Act. In its broader common law context, consent is often characterized as “freely given agreement.”<sup>13</sup> More specifically, consent is described as:

...voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Consent is implied in every agreement. It is an act unclouded by fraud, duress, or sometimes even mistake.<sup>14</sup>

Because the “voluntary agreement” aspect is so central, consent is often linked to the legal paradigm of contract. The notion of an agreement – contractual or otherwise – usually presupposes some particular aim or object. One never agrees in a vacuum; rather one agrees *to* something, or *with* something. In private law, certainly in contract law, consent is understood as inherently transactional – a definable moment that occurs when the parties crystallize the terms and conditions upon which they agree. Contractual consent is determined at the moment the parties communicate their intention to be bound by that agreement.<sup>15</sup> Whether executed or executory,<sup>16</sup> contractual consent is expressed in an instant. Once the parties have achieved a *consensus*, the contract is in place and the obligations become fixed. As of the moment this happens, the question of contractual consent is settled.

By contrast, the consent requirement set out in PIPEDA is not an isolated moment of agreement. Consent in PIPEDA is conceived of as somehow ongoing.

Of course, the notion of ongoing consent is not unique to privacy. Other areas of law – consent to treatment in health law, for example – regard consent as an ongoing process:

To many in the care-giving professions, consent is nothing more than obtaining a patient’s signature on a “consent” form. Such

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<sup>12</sup> *Supra*, footnote 6. See also section 7 of the Act.

<sup>13</sup> Dukelow, Daphne A. and Betsy Nuse, *The Dictionary of Canadian Law*, 2nd ed. (Scarborough, Ont, Carswell, 1995) at 232.

<sup>14</sup> Henry Campbell Black, Michael J. Connolly and Joseph R. Nolan, eds., *Black’s Law Dictionary*, 5<sup>th</sup> ed., (St. Paul, Minnesota, West Group Publishing, 1979) at 276.

<sup>15</sup> Gerald H. L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough, ON, Carswell, 1999) at 16-17 and Stephen Waddams, *The Law of Contracts*, 4th ed. (Toronto, Emond Montgomery Publications, 1999) at 66-67.

<sup>16</sup> An executory contract is one which has not yet been completely fulfilled by one or more of the parties: Gerald H. L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Scarborough, ON, Carswell, 1994) at 108.

an impression belies the fact that consent is a “process” which involves a treatment relationship and effective communication over a period of time. The fact that some provincial legislation or regulations require signed written “consents” to treatment does not change this fact. ... [T]he signed consent form is nothing more than evidence of consent. It is not the consent itself.<sup>17</sup>

There are a number of similarities in the consent-seeking-processes in health law and privacy law. Both regimes require that the person consenting have the mental capacity and be legally competent to consent.<sup>18</sup> Both require that the organization seeking consent provide adequate disclosure of the relevant information needed by the person choosing whether to consent.<sup>19</sup> Both regimes strictly limit the scope of consent to the specified purpose or procedure.<sup>20</sup> Both provide the person consenting with the opportunity to ask (and receive understandable answers to) questions concerning that to which they are consenting.<sup>21</sup>

While the two systems share these basic requirements as core elements of the consent seeking process,<sup>22</sup> there is also an important difference between the two. Consent to treatment in a medical context is inherently specific, usually relating to a particular procedure or set of procedures. By contrast, consent under PIPEDA often has implications and effects which extend well beyond a specific transaction or series of transactions.<sup>23</sup>

### III. Consent as an Act of Ongoing Agency

To understand and appreciate the *ongoing consent* doctrine, one must recognize PIPEDA as predicated on the notion that individuals have a *right* to control personal information about themselves. If individuals have such a right-of-control then, unless they surrender it,<sup>24</sup> they retain ultimate control over their personal information in spite of

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<sup>17</sup> Lorne Rozovsky, *The Canadian Law of Consent to Treatment*, 2d ed. (Markham, Butterworths, 1997) at 1.

<sup>18</sup> *Ibid* at 3.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid*.

<sup>22</sup> Some of which will not always be resolved during the first instance of consent.

<sup>23</sup> It is interesting to note that Canadian medical consent law does contain an exception which makes it possible for a physician to extend surgery beyond the procedure authorized by the patient (Rozovsky, *supra*, footnote 17 at 17). This is analogous to the “consistent use” provisions of Canada’s Privacy Act (R.S. 1985, c. P-21) as recognized in sections 9 and 11. In contrast, the drafters of PIPEDA have not included such a clause, making “consistent use” inapplicable under PIPEDA.

<sup>24</sup> A question arises as to whether this right is alienable. See, for example, James Rule and Lawrence Hunter "Towards Property Rights in Personal Data" in Colin J. Bennett and Rebecca Grant, eds., *Visions of Privacy: Policy Choices for the Digital Age* (Toronto, University of Toronto Press, 1999).

consenting to its use by some organization. The consent afforded to an organization to use an individual's personal information must therefore be understood to be restricted. Consent *does not* give the organization ultimate control over personal information in perpetuity.

In other words, the *continued use* of an individual's personal information must be understood as a necessary consequence, not of the initial consent to collect the information, but rather of that person's *continuing consent* to the organization to use that information. Consent, for the purposes of PIPEDA, must not be thought as a "release" of information, nor as a complete "assignment" of control over the information. Rather, it is a "license" that permits some *limited* collection, use or disclosure.<sup>25</sup>

Principle 4.5 also deals with the issue of retention.<sup>26</sup> The fact that an organization cannot retain indefinitely is further indication of a limited consent, one which is linked to specific purposes.

Taken altogether, this strongly suggests that information is not unilaterally released when consent is given, but rather that an individual has ongoing agency in managing her personal information.

This ongoing right of control held by the individual is reinforced in law by the corollary requirement of ongoing consent, which is codified in Principle 4.3.8 of PIPEDA. This Principle permits individuals to withdraw consent at any time.<sup>27</sup> This provision, in conjunction with a number of others mentioned above,<sup>28</sup> is meant to place the individual in control of her personal information at all times, signaling that consent, in the privacy law context, is an *ongoing act of agency*.

PIPEDA's framework sets up support for this contention, especially in the Schedule 1 Principles. Organizations are to be open about their information management practices<sup>29</sup>, presumably in order that individuals are able to make informed initial decisions and revisit those decisions when and if necessary.

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<sup>25</sup> Under PIPEDA Principle 4.2.2, consent is only given for the purposes specified. Under Principle 4.4 these purposes must be appropriately limited, and under Principle 4.5 all uses or disclosures require consent and should be documented *per* Principle 4.5.1. Almost any new purpose beyond those already specified requires new consent, as set out in Principle 4.2.4.

<sup>26</sup> PIPEDA Principle 4.5.3 states that personal information that is no longer required to fulfill the identified purposes should not be retained, and requires organizations to develop guidelines and implement procedures to govern the destruction of personal information.

<sup>27</sup> Subject to legal or contractual restrictions and reasonable notice.

<sup>28</sup> *Supra*, footnote 25.

<sup>29</sup> PIPEDA Principle 4.8.

The ability to withdraw consent is only one of the possible responses open to an individual as she manages her personal information - individuals have a right of access to their personal information<sup>30</sup> and a corresponding right to challenge the accuracy or completeness of that information.

Finally, individuals have the power to challenge an organization's compliance with the requirements of PIPEDA,<sup>31</sup> both via a complaint to the Privacy Commissioner<sup>32</sup> and, if necessary, by proceeding to Federal Court after the Privacy Commissioner releases a report of her findings in the matter.<sup>33</sup>

#### IV. Psychological Barriers to Withdrawing Consent

In response to the claim that individuals have a right to determine for themselves when, how, and to what extent personal information is communicated to others, a number of critics have complained that most people don't seem to care all that much about this right.<sup>34</sup> These critics say that when you look at how people behave, it seems that many if not most do not *truly* value the right to control their personal information. People seem willing to hand over their personal information in exchange for benefits as trivial as the possibility of winning a toaster, and few ever exercise the right to withdraw consent to the collection, use, or disclosure of personal information.<sup>35</sup>

This behaviour is inconsistent with expressed privacy values<sup>36</sup> and there is value in exploring *whether and why* people rarely exercise their right to withdraw consent to the collection, use, and disclosure. Such an investigation, thus far absent in the Canadian privacy law and policy literature, is important because a systemic failure to exercise the right to withdraw consent reduces the consent principle to little more than the transactional moment of private ordering, rendering PIPEDA's new, robust, ongoing consent practically worthless. Ongoing consent requires the exercise of agency in granting, modifying, reconsidering and withdrawing consent in response to changing circumstances.

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<sup>30</sup> PIPEDA Principle 4.9. and section 8 of the Act.

<sup>31</sup> PIPEDA Principle 4.10.

<sup>32</sup> PIPEDA Section 12.

<sup>33</sup> PIPEDA Section 14.

<sup>34</sup> Acquisti, A. and Grossklags, J. (2004). "Privacy attitudes and privacy behavior", in J. Camp and S.R. Lewis, eds., *The Economics of Information Security: Advances in Information Security*, Volume 12, 65-178, (Norwell, Massachusetts, Kluwer, 2004)..

<sup>35</sup> As Oracle C.E.O. Larry Ellison famously said, "Well, this privacy you're concerned about is largely an illusion. All you have to give up is your illusions, not any of your privacy." (Interview with anchor Hank Plante of KPIX-TV, a San Francisco TV station, on September 21, 2001.)

<sup>36</sup> See for example Ekos Research Associates *Privacy Revealed: The Canadian Privacy Survey*(1993) (Ottawa, Ontario) 10.

So, why do people who have consented to an organization's demand for personal information generally refuse to review, revise or withdraw their consent? Let's consider a typical example involving a hypothetical individual named Jij.

Recently, Jij visited the Toronto Star website to read an article recommended by a friend. From the title, it appeared that the article was interesting and relevant, and the website offered immediate and "free" access – *with one catch*: in order to read the article, Jij had to register as a user. By registering, Jij permitted the Toronto Star to collect and use a variety of personal information. Jij knows this but, in the moment, her desire to read the article outweighed her concern about information privacy, so she completed the registration process and thus agreed to the collection and use of her personal information without even trying to understand the implications of doing so. Having a basic understanding of privacy law, Jij did so knowing that she could, at any time, withdraw her consent.

But will she?

Much will depend on a number of psychological factors that influence the way that Jij makes a decision about whether to withdraw consent. Our analysis suggests that these factors work in concert, resulting in a circumstance already well-known to marketers: namely, that consent, once given, is unlikely to be withdrawn.<sup>37</sup>

Jij likes to think of herself as a consistent person, someone who makes careful and considered decisions that take into account her values and preferences. Yet Jij just acted in a way that is inconsistent with her own values -- she has freely consented to a sweeping collection and use of personal information in return for a relatively small reward. She is not alone in this either. According to a recent PEW survey, 60% of all Americans are "very concerned" about privacy, while at the same time 54% have shared personal information in order to get access to a Web site, and an additional 10% are willing to provide this information if asked.<sup>38</sup> Thus, at least one quarter of those surveyed have acted or are prepared to act with inconsistency similar to Jij's, releasing personal information for relatively small or nonexistent rewards seemingly despite significant concerns about their own privacy.

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<sup>37</sup> Opt-out protocols (where consent is assumed unless explicitly withdrawn) lead to greater rates of consent than do opt-in protocols (where the default is no consent). See E. J. Johnson, S. Bellman, and G. L. Lohse "Defaults, Framing, and Privacy: Why Opting in ≠ Opting Out, (2002), *Marketing Letters*, 13(1), 5-15.

<sup>38</sup> S. Fox, L. Rainie, J. Horrigan, A. Lenhart, T. Spooner and C. Carter, "Trust and privacy online: Why Americans want to rewrite the rules" (2000), The PEW Internet and American Life Project, available at <[http://www.pewinternet.org/pdfs/PIP\\_Trust\\_Privacy\\_Report.pdf](http://www.pewinternet.org/pdfs/PIP_Trust_Privacy_Report.pdf)>.

Such inconsistency can be uncomfortable, and psychologists have a name for this discomfort: *cognitive dissonance*.<sup>39</sup> According to the theory of cognitive dissonance, inconsistent beliefs or beliefs that are inconsistent with actions can give rise to an uncomfortable psychological state. The above example has all the hallmarks of a situation that will trigger cognitive dissonance<sup>40</sup>: (i) Jij feels personally responsible for her own decision to consent and thus cannot blame her actions on someone or something else; (ii) Jij understands that, as a direct result of her decision, her privacy, which is something she values, has been compromised; (iii) the justification for her decision is relatively weak, since she could, with relatively little effort, have accessed the article through other means; and (iv) she has clearly made a free choice to release her personal information.<sup>41</sup>

Psychological research has demonstrated that people tend to resolve cognitive dissonance through one of three mechanisms.<sup>42</sup> One possibility is to trivialize some of the competing cognitions.<sup>43</sup> In the current situation, this could translate into Jij convincing herself either that the privacy violation in this case is not important, or that privacy itself is overvalued.

Another possibility is to seek selectively information consistent with her decision. In the realm of consumption, this translates into selective attention to positive product information regarding a chosen alternative.<sup>44</sup> In this case, Jij could seek and attend to information suggesting that the collection and use of personal information by the Toronto Star does *not* constitute a privacy violation, since the Toronto Star has a privacy policy and therefore *must* be privacy compliant.<sup>45</sup>

The third mode of dissonance reduction is change of attitude, opinion, or behaviour.<sup>46</sup> Jij could, for example, modify her attitude about information privacy so that she considers privacy to be less important, or she could

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<sup>39</sup> See L. Festinger, *A theory of cognitive dissonance* (Palo Alto, CA, Stanford University Press, 1957) and L. Festinger, *Conflict, decision, and dissonance* (Stanford, CA, Stanford University Press, 1964).

<sup>40</sup> J. Cooper and R. H. Fazio, "A new look at dissonance" (2004), *Advances in experimental social psychology* 17, at pp. 227-266.

<sup>41</sup> E. Harmon-Jones, J. W. Brehm, J. Greenberg, L. Simon and D. E. Nelson, "Evidence that the production of aversive consequences is not necessary to create cognitive dissonance" (1996), *Journal of Personality and Social Psychology* 70(1), pp. 5-16.

<sup>42</sup> J. W. Brehm and A.R. Cohen, *Explorations in Cognitive Dissonance* (New York, Wiley, 1962). See also Festinger *supra*, footnote 39.

<sup>43</sup> L. Simon, J. Greenberg and J. Brehm, "Trivialization: The forgotten mode of dissonance reduction" (1995), *Journal of Personality and Social Psychology*, 68, pp. 247-260.

<sup>44</sup> D. Ehrlich, I. Guttman, P. Schonbach and J. Mills, "Postdecision exposure to relevant information" (1951), *Journal of Abnormal and Social Psychology* 54, pp. 98-102.

<sup>45</sup> Jacquelyn Burkell and Valerie Steeves, "Privacy Policies on Kids' Favourite Web Sites", Presented at the 6th Annual Privacy and Security Workshop, Privacy and Security: Disclosure, University of Toronto on November 3, 2005. available at <<http://idtrail.org/content/blogcategory/21/72/>>.

<sup>46</sup> A. Elliot and P. Devine, "On the motivational nature of cognitive dissonance as psychological discomfort" (1994), *Journal of Personality and Social Psychology* 67, pp. 382-394.

perhaps place less value on her privacy with regard to the particular information that she has disclosed to the Toronto Star.

Each of these resolutions would address Jij's current state of psychological discomfort; at the same time, however, each reduces the likelihood that Jij will later withdraw her consent. In fact, once she has successfully resolved the dissonance there is little reason for her to go back and revisit her original consent: after all, she now perceives that decision as consistent with the only value that would lead her to revoke it (that is, her valuing of privacy). This is not to say that she *couldn't* withdraw her consent. She *could*. However, the principle of cognitive dissonance suggests that she may not be motivated to do so.

There are other aspects of the situation that could have the same effect; aspects that will tend to bias decisions *against* withdrawing consent. These arise from what is, essentially, a re-weighting of the gains and losses associated with consent. This re-weighting occurs once the initial decision has been made, and arises as a direct result of the decision itself.

Typically, an individual considering initial consent is weighing the subjective value of an immediate *gain* (e.g., of access to the Toronto Star), against the subjective value of a less salient loss of control over personal information, with ramifications that, though significant, are less immediate. In contrast, withdrawing consent typically results in an immediate loss (e.g., the loss of access to the Toronto Star), and the gain of the relatively distant, ephemeral, and potentially partially illusory benefit of control over her personal information.<sup>47</sup>

In addition to bringing to an end the permission given to an organization to collect, use, or disclose personal information, sometimes the practical effect of withdrawing consent is to reverse the benefits and burdens that coincided with the conferral of the original consent: much of what is lost in consent is gained in withdrawal, as is much of what is gained in consent lost in withdrawal.<sup>48</sup> There are, however, at least two reasons to think that the relative value of these gains and losses will change after an initial decision to consent: specifically, that the subjective value of consent will actually become *greater* once the initial consent has been offered.

First, according to *prospect theory*<sup>49</sup>, decisions are made in a context where losses loom larger than gains, and where outcomes are evaluated against an

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<sup>47</sup> The benefit could be partially illusory if her information has already been provided, with consent, to a third party.

<sup>48</sup> Strictly speaking, this is not always the case. To continue our example from above, Jij may have read a number of articles in exchange for consent to collect, use, or disclose her personal information. Upon her withdrawal of consent, she will likely lose the ability to access articles in the future. But removing access does not put her back in her initial situation since that will not undo what she has already read.

<sup>49</sup> D. Kahneman and A. Tversky, "Prospect theory: An analysis of decision under risk" (1979), *Econometrica*, 47(2), pp. 263-291.

anchor point, or implicit comparator. If the decision under consideration is whether to offer consent in the first place, the most salient effect is a gain: right now Jij *doesn't* have access to the information she wants, and by consenting she would gain that access. By contrast, if her decision were to withdraw consent, it is likely that the most salient outcome is a *loss*: loss of access to information. Prospect theory states that losses are weighted more heavily in decision making than are gains. By extension, the negative value of loss of access when consent is withdrawn would be greater than the positive value of access gained when consent is offered. In the literature on decision making, this has also been called the *endowment effect*, and is reflected in the tendency to value an object more when one owns it.<sup>50</sup>

It is also important to consider *when* (and to some extent, *whether*) Jij experiences the benefits and losses associated with her decisions about consent. When making her initial decision, Jij is in some sense weighing an immediate benefit (being able to read the article) against a loss of information privacy whose effects are at some remove, both temporally and in terms of overall salience. In contrast, a decision to withdraw consent involves a comparison between an immediate loss (the loss of access) and a distant and ephemeral benefit (the benefit of regaining control of her information). It is well known in decision theory<sup>51</sup> that subjective utility – that is, the personal value of an outcome – changes depending on *when* the outcome will be experienced. In particular, the subjective value of a benefit or loss that Jij receives today is greater than the current subjective value of that same benefit or loss if it is to be received some time in the future. While the exact form of this discounting function is subject of much debate,<sup>52</sup> the existence of discounting is universally accepted.

The literature on decision making also suggests that discounts are generally greater for gains than for losses.<sup>53</sup> Thus, both gains and losses lose value as they are moved into the future: gains are perceived as less “good” and losses less “bad” – but the *rate* of change is faster for gains than for losses. When Jij considers the decision to withdraw consent, the loss (of access to the articles she wishes to read) is immediate; the gain, however, is not. To the extent that she sees the gain as something that will be realized in the future, its value is reduced – and the effect is all the greater because it is a *gain* that is distant in time, rather than a *loss*.

What are the implications of prospect theory and discounted utility for decisions regarding the withdrawal of consent? Suppose that the initial

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<sup>50</sup> Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler, "Experimental Tests of the Endowment Effect and the Coase Theorem" (1990), *Journal of Political Economy*, 98(6), pp. 1325-48.

<sup>51</sup> G.F. Loewenstein and J. Elster, *Choice over time* (New York, Russell Sage Foundation, 1992).

<sup>52</sup> U. Benzion, Y. Schachmurove and J. Yagil, "Subjective discount functions: An experimental approach" (2004), *Applied Financial Economics* 14(5), 299-311.

<sup>53</sup> See for example M. Ortendahl and J. F. Fries, "Time-related issues with application to health gains and losses" (2002), *Journal of Clinical Epidemiology*, 55, pp. 843-848, and R. H. Thaler, "Some empirical evidence on dynamic inconsistency" (1981), *Economic Letters*, 8, pp. 201-207.

decision to grant consent was a difficult one, because at that point the balance of gains and losses only weakly supported Jij's decision. If nothing else in the situation has changed, how does that initial consent change the balance of gains and losses? Initially, the gain was most salient and immediate, and the loss less salient and only to be experienced in the future. Now, however, the opposite holds. Given that losses weigh more heavily than gains, and given that gains are discounted at a greater rate than losses, all else being equal, the value associated with the withdrawal of consent will actually be greater than the subjective value of the initial consent. What is the result? Jij anticipates that if she withdraws her consent, she will actually feel *worse off* than she did before she offered it in the first place. Once again, the psychological factors at play make it *less* likely that Jij will withdraw consent.

Cognitive dissonance, prospect theory, and discounted subjective utility have been shown to apply to decision making in a wide variety of contexts.<sup>54</sup> Together, these theories predict a variety of decision biases, including a normatively irrational preference for the status quo<sup>55</sup> and the sunk cost effect.<sup>56</sup> The application of the relevant theories to the doctrine of ongoing consent is somewhat novel, but the extensions are natural, and there is no reason to think that these well-established decision biases are inapplicable to decisions about withdrawing consent.

Acquisti and Grossklags have argued that "we need to incorporate more accurate models of users' behavior into the formulation of both policy and technology".<sup>57</sup> We share this point of view. The psychological theories discussed above have obvious relevance for the principle of ongoing consent, and suggest important policy considerations that should be taken into account in the development and implementation of this doctrine.

The implications for ongoing consent are clear: the decision biases described above will each tend to *reduce* the likelihood that consent, once offered, will be withdrawn. This discussion throws into sharp relief what is perhaps the most critical point. It is difficult to disabuse decision makers of the biases and heuristics that influence decision making. Consequently, one cannot expect that individuals who are not properly educated about the implications of consenting to the collection, use, or disclosure of personal information will recognize let alone remedy their tendency to "stick with" an initial consent.

## V. Not Stumbling Blocks, but Building Blocks

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<sup>54</sup> C. Camerer, "Prospect Theory in the Wild", in D. Kahneman and A. Tversky, eds., *Choices, Values and Frames* (Cambridge, Cambridge University Press, 2000) at pp. 288-300.

<sup>55</sup> Reflected in the endowment effect as described above.

<sup>56</sup> A tendency to 'throw good money after bad', pursuing a course of action even if it appears that the investment is not going to pay off.

<sup>57</sup> *Supra*, footnote 34 at 176.

As indicated in the section above, behavioural considerations can be understood as “barriers” to the meaningful withdrawal of consent. However, PIPEDA’s new approach to consent strives to accommodate these features of our psychology within the legislative framework, and to make of them not stumbling blocks but building blocks.

Consider, for instance, the tendency of individuals to trivialize the value of privacy in order to reduce their own psychological discomfort that arises from their consent to the release of private information. PIPEDA has some ability to respond to this. In fact, the role of the Privacy Commissioner of Canada was designed (in part) to counter such tendencies. Pursuant to section 24 of PIPEDA, the Privacy Commissioner has a legal duty to foster public understanding and valuation of privacy. It is fair to say that this is in fact an overarching goal of PIPEDA. The legislative schema actually requires the Commissioner to educate and encourage organizations to develop detailed privacy policies and practices. It also affords the Office of the Privacy Commissioner of Canada an educational mandate that goes well beyond the mere investigation of privacy complaints, promoting the development of a privacy-valuing and privacy-protecting culture. Among other things, the current Commissioner has promulgated these aspects of her mandate through a “contributions program”<sup>58</sup> and regular involvement in academic fora, such as the one that gave rise to this series of published articles. One of the intended effects of these activities is to encourage a broad understanding of the importance of privacy.

These activities could be significant, especially when one considers that individuals often respond to dissonance by diminishing the perceived importance of a particular privacy violation.<sup>59</sup> Where the focus is on the violation itself, it is easy to understand how the strategy of diminishing the importance of that violation might act to address dissonance. Recall, however, that PIPEDA is premised on the more general right of an individual to control personal information about herself. Given that the cultural and regulatory focus is predicated on personal autonomy and the importance of personal control, there is good reason to expect that such a schema, *if it stipulated, promoted and actually enforced higher thresholds for consent*, could have a transformative effect on the manner in which people perceive the importance of privacy-as-personal-control and consent-as-ongoing-agency.<sup>60</sup>

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<sup>58</sup> Available at <[http://www.privcom.gc.ca/information/cp/index\\_e.asp](http://www.privcom.gc.ca/information/cp/index_e.asp)>.

<sup>59</sup> Consequently, it is suggested that the Privacy Commissioner’s mandate is not merely to educate and encourage the valuation of privacy but to facilitate a change in the way that people *perceive* their own decisions about privacy.

<sup>60</sup> One could draw parallels here to a suggested approach for the Canadian Human Rights Act (R.S.C. 1985, c. H-6). In a recent report of the *Canadian Human Rights Act Review Panel*, the authors recommend that the language of the Act’s purpose clause and of the Act itself be changed in order to emphasize substantive equality – the notion that its provisions are not merely “special” protections created by the Act but ought rather to be understood as actualizations of full equality. See <[http://canada.justice.gc.ca/chra/en/chrareview\\_report\\_2000.pdf](http://canada.justice.gc.ca/chra/en/chrareview_report_2000.pdf)> at p. 11.

Altering people's perceptions away from the orientation of marketers might emasculate the negative effects characterized by prospect theory as well. If perceived losses loom larger than gains, then it matters a great deal how people understand the gains and losses that result from exchanges of their personal information - the manner in which information exchanges are structured and understood could effectively determine the decisions people make about initial consent and about whether to withdraw consent.

Rather than the marketers emphasis on "FREE access to" or "FREE registration for" information products, if, instead, people became focused on the right to control personal information and the importance of maintaining that right, the loss of personal control could more easily be perceived as outweighing the benefits of access to information or services received in exchange. It might even result in different kinds of bargains. For example, if people understood the potentially grave implications of surrendering control over their personal information, as the Privacy Commissioner of Canada has recently been forced to confront,<sup>61</sup> they might actually prefer paying a small subscription fee for the information product instead of surrendering control of their personal information; they might rather pay for flights or "gifts" instead of trading away the right of control over their personal data. There is also a much greater likelihood that people would more carefully consider what it means to consent and/or withdraw consent to the collection, use and disclosure of personal information. Currently, people share a general impression that consent to the use of personal information is an all-or-nothing, take-it-or-leave-it, instantaneous transaction; an offer that they cannot refuse

In addition to its potential ability to remedy the effects of dissonance and prospect theory, PIPEDA seeks to assist in addressing the difficulties imposed by "discounted subjective utility," i.e., situations where it is perceived that continued consent tends to trump the subjective value of initial consent. PIPEDA requires that individuals be made aware of any changes to the informational situation that gave rise to the initial consent and that unless the change is required by law, a new consent be received.<sup>62</sup> By forcing organizations to provide notice of collection or to identify new uses of personal information, individuals receiving such notice are displaced from the comfort of their initial position and confronted with the decision whether or not to consent to a secondary use of their personal information. Similarly, by implementing an ability to withdraw consent at any time, individuals are provided with the opportunity to become the agents of their own informational destiny.

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<sup>61</sup> Maclean's magazine recently reported that it was able to purchase the Privacy Commissioner of Canada's personal phone records from an American data broker. See [http://www.macleans.ca/topstories/canada/article.jsp?content=20051121\\_115779\\_115779](http://www.macleans.ca/topstories/canada/article.jsp?content=20051121_115779_115779).

<sup>62</sup> PIPEDA Principle 4.2.4.

But will the mere fact of these remedial possibilities built-in to PIPEDA actually ensure that individuals achieve this sort of informational agency? It is highly unlikely. Our intention here is certainly not to suggest that the mere enactment of PIPEDA is somehow sufficient to create a new cultural approach to the issue of consent and its role in informational privacy. Far from it.

That said, it does seem plausible that PIPEDA could be an important first step toward the development of such a culture. Viewing PIPEDA holistically, we are struck by the way the Commissioner's public education mandate maps onto the philosophical positioning of the individual as the axis of control over the collection, use and disclosure of personal information. An understanding of consent as an ongoing act of agency would be consistent with this approach and would provide a fulcrum for understanding privacy as more than mere data protection.

Understanding and valuing consent as an ongoing act of agency would require that organizations, and not just individuals, revise many of their current practices and policies. Unfortunately, most organizations continue to treat consent as a transactional moment, using standard form clickwrap agreements as a means of obtaining overarching "consents" for any/all potential uses and disclosures of personal information. This archaic, freedom-to-contract mentality fails to recognize the higher threshold assigned to consent in a privacy law context<sup>63</sup> and also fails to recognize the role that consent is meant to play as the nexus between people and information technology.

## VI. Conclusion

In this article, we have tried to articulate why the transactional approach to consent is the wrong approach in the privacy context through an examination of how the psychological barriers to withdrawing consent to the collection, use, and disclosure of personal information can actually help to inform a more robust approach to privacy protection in general and to the notion of consent as an act of ongoing agency in particular. Although there have been a number of recent complaints about the limitations of PIPEDA<sup>64</sup> as a result of the compromises that were made during its enactment,<sup>65</sup> the Act does

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<sup>63</sup> For an articulation of this thesis in the context of consent to the collection of personal information in the context of digital rights management, see I. Kerr, "If Left to their Own Devices", *supra*, footnote 9 and I. Kerr, "Hacking at Privacy", *supra*, footnote 9.

<sup>64</sup> Michael Geist, for example, has criticized the ombuds approach to the enforcement of PIPEDA, arguing that the Privacy Commissioner's inability to issue binding decisions means that there is insufficient incentive for companies to comply. See [http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article\\_Type1&c=Article&cid=1098655810217&call\\_pageid=971794782442&col=971886476975&DPL=IvsNDS%2f7ChAX&taodologin=yes](http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1098655810217&call_pageid=971794782442&col=971886476975&DPL=IvsNDS%2f7ChAX&taodologin=yes). For other examples, see the Canadian Internet Policy and Public Interest Clinic's report on PIPEDA at [http://www.cippic.ca/en/action-items/pl\\_article\\_for\\_cplr\\_july\\_2005.pdf](http://www.cippic.ca/en/action-items/pl_article_for_cplr_july_2005.pdf).

<sup>65</sup> The recognition of the need for PIPEDA sprung (at least in part) from concern about maintaining and facilitating Canada's international trading relationship. It was enacted under the federal trade and

inspire the inculcation of a better understanding of privacy and its importance in society. As we move towards the statutory review of PIPEDA,<sup>66</sup> it is time to start thinking more deeply about what further improvements and what additional institutions will be required to bring about the vision that PIPEDA contemplates.

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commerce power, and it focuses primarily on commercial activities. The CSA Model Code for the Protection of Personal Information which forms Schedule 1 of the Act was the result of a process in which business was intimately involved. See Christopher Berzins, "Protecting Personal Information in Canada's Private Sector : The Price of Consensus Building" (2002) 27 Queen's L.J. 609 at 623 for a discussion of these tensions.

<sup>66</sup> To be held early in 2006, five years after its introduction, as required by s.29 of PIPEDA.