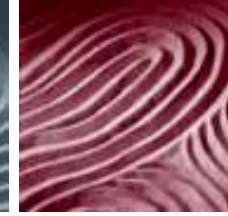
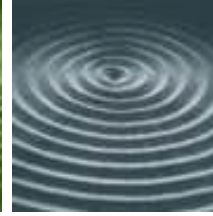


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Application of privacy laws to charitable organizations and not-for-profits

Rachel L. Blumenfeld
and Eve Munro
April 19, 2004

APPLICATION OF PRIVACY LAWS TO CHARITABLE ORGANIZATIONS AND NOT-FOR-PROFITS

Eve C. Munro and Rachel L. Blumenfeld

The impact of Canada's privacy laws on provincially-based and national charitable and not-for-profit organizations has been the source of some concern by many of these organizations as January 1, 2004 approaches.

Federally, the *Personal Information Protection and Electronic Documents Act (PIPEDA)*, will apply as of January 1, 2004, to the provincially-regulated private sector in provinces that have not passed substantially-similar legislation. But the application of this legislation to a charity is open to constitutional challenge. While the federal government has relied on its "trade and commerce" power in instituting *PIPEDA* by limiting its application to personal information collected, used and disclosed in the course of an organization's "commercial activities," the regulation of charities is clearly reserved to the provinces by section 92(7) of the Constitution. A charity found in breach of *PIPEDA* may have a constitutional argument that the legislation does not apply to it at all.

Assuming *PIPEDA* passes constitutional muster in relation to charities, whether the activities of such an organization are caught in a province which does not have substantially-similar legislation (such as Ontario), will depend on the nature of those activities. *PIPEDA* applies to the collection, use and disclosure of personal information in the course of "commercial activities." "Commercial activities" are defined in *PIPEDA* to specifically include the selling, bartering or leasing of donor, membership or other fundraising lists. They will also include other activities of charities and not-for-profit organizations which are "commercial" in character, for example the sale of gifts and other items and the provision of paid services. The term "commercial activity" may be interpreted broadly and encompass any activity where there is an exchange of consideration.

As of January 1, 2004, three provinces will have legislation in force to protect personal information. In British Columbia, the *Personal Information Protection Act (PIPA)*, will protect personal information in the provincially regulated private sector. Alberta's legislation, also entitled the *Personal Information Protection Act*, received Royal Assent on December 4, 2003. Quebec has had private sector privacy laws since 1994. The Quebec's legislation was deemed to be "substantially-similar" to *PIPEDA* (SOR 2003-374). No determination has been made to date with respect to the B.C. and Alberta acts.

Alberta's New Legislation

Alberta's *Personal Information Protection Act* recently received Royal Assent and is effective as of January 1, 2004. With respect to charities and not-for-profit organizations, Alberta's privacy legislation applies only to the personal information that is in the custody or control of a "non-profit organization" (as defined in the legislation) if it is collected, used or disclosed by the organization in connection with a commercial activity carried out by the non-profit organization. Similar to *PIPEDA*, "commercial

activity" includes "the selling, bartering or leasing of membership lists or of donor or other fund-raising lists."

The Alberta Information and Privacy Commissioner has identified a number of activities that may be considered commercial in nature, including the sale of merchandise within the Province, the provision of counselling or other paid services and the collection of names and addresses of individuals who register for a conference (see <http://www.psp.gov.ab.ca/pdf/InfoSheet1.pdf>).

"Non-profit organization" is specifically defined in the Alberta legislation as meaning an organization that is incorporated or registered under specified Alberta legislation (the *Societies Act*, *Agricultural Societies Act* and part 9 of the *Companies Act*) or that meets the criteria to be established under the Regulations. An organization that operates in Alberta as a non-profit but is not covered by the definition in the legislation will be subject to the entire Alberta *Personal Information Protection Act*. It is expected that the Regulations will be sufficiently broad to exempt as non-profit organizations most charitable and not-for-profit organizations that operate in Alberta. Given the limitation in application to commercial activities, and unlike the British Columbia's new legislation, the Alberta Act will likely not extend the application of the privacy rules to the activities of charities and other not-for-profits beyond the application of those rules under *PIPEDA*.

New British Columbia Legislation

The situation in British Columbia under *PIPA* will be significantly different for charities and not-for-profits. Unlike *PIPEDA* and Alberta's *Personal Information Protection Act*, commercial activities have not been carved out as the area of application of *PIPA*. B.C.'s *PIPA* applies to the collection, use and disclosure of personal information by both for-profit and not-for-profit organizations in the Province of British Columbia (this is the case as well with respect to the Quebec legislation). The exceptions are fairly limited and include the collection, use and disclosure of personal information in the following circumstances:

- (a) For personal or domestic purposes;
- (b) For journalistic, artistic or literary purposes;
- (c) If *PIPEDA* applies;
- (d) If the provincial public sector privacy legislation, the *Freedom of Information and Protection of Privacy Act*, applies to the personal information;
- (e) In certain documents and records related to the courts and judicial administration;
- and
- (f) The collection of personal information that has been collected on or before *PIPA* comes into force.

British Columbia's *PIPA* applies to the collection, use and disclosure of personal information in the course of both commercial and non-commercial activities (such as fundraising or the provision of services for no consideration). It also applies to the collection, use and disclosure of personal information about employees in the provincially regulated private sector.

Like the federal legislation, British Columbia's *PIPA* imposes obligations upon organizations in respect of the collection, use and disclosure of personal information. The ten "Fair Information Principles" which are appended to and form part of *PIPEDA* are also at the core of the requirements of *PIPA*, though not specifically incorporated. Although the various provisions and exceptions are quite detailed, in essence British Columbia's new legislation prohibits the collection, use and disclosure of personal information without notice of purposes and the consent of the individuals. It also requires organizations to adopt and implement a privacy policy and to appoint an individual in the organization to administer the policy. Organizations must also permit individuals to access and correct their personal information on request and adopt reasonable procedures to restrict access to personal information and provide security to prevent unauthorized disclosure.

British Columbia's new laws apply (subject to the exceptions noted) to all organizations operating in the province. The fact that an organization may be headquartered or incorporated elsewhere is not determinative. The starting point is that organizations collecting, using and disclosing personal information in the Province of British Columbia will be subject to *PIPA*.

We understand that the offices of the Privacy Commissioners for Canada, British Columbia and Alberta are reviewing jurisdictional issues with a view to avoiding overlapping enforcement. We expect some guidance to be forthcoming from these offices.

That said, organizations with operations in a number of provinces, will need to determine which laws apply to them. As noted above, British Columbia's new laws, which are broader in scope than *PIPEDA* and Alberta's legislation, will apply to all organizations operating in that province, whether or not they are headquartered there.

Indeed, the jurisdictional issues that arise for the charitable and not-for-profit sector are unique to this sector. The jurisdictional issues surrounding privacy legislation are not of substantial practical consequence in respect of the operational activity within Canada of most business or commercial entities in the provincially regulated private sector, given the substantial similarity of *PIPEDA* and the provincial legislation in its application to these entities. Organizations operating in multiple jurisdictions will simply elect to adopt a standard of best practices as a uniform policy (although jurisdiction must still be considered with respect to the application of the laws to employee personal information.) When advising charities and non-profits on the application of privacy laws, one must analyze whether the organization engages in commercial activities (which activities are caught by *PIPEDA*), and then whether it operates in any manner, commercial or noncommercial, in British Columbia or Quebec (and thereby caught by the legislation in respect of their activities within those provinces including with respect to employee personal information).

On a practical note, charitable and not-for-profit organizations subject to more than one legal regime should also consider adopting a standard of "best practices" that will provide uniformity to the organization's policies and practices while meeting the highest

standard applicable. Indeed, it may be prudent for all charitable and not-for-profit organizations to implement the ten "Fair Information Principles" to ensure donor and user satisfaction and protect themselves from public complaints.

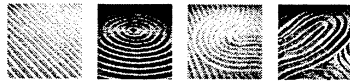
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CHARITABLE ORGANIZATIONS:
"Does this privacy stuff apply to us?"



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Does PIPEDA apply to charities? Legal response

- Jurisdictional issues
 - Provincial sphere
 - B.C. legislation
 - Applies to all "organizations" operating in the province
- Exchange of donor lists-explicitly covered
 - Defn of "commercial activity":
"Any particular transaction, act or conduct or any regular course of conduct that is of a commercial character...including the selling, bartering or leasing of donor, membership or other fundraising lists."

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Does PIPEDA apply to charities? Gov'tal response

- Industry Canada's Q&A (for health sector):
 - fundraising is not a commercial activity, but must look at nature of activity not of the institution (Qus 63 and 24)
(<http://e-com.ic.gc.ca/epic/internet/inecic-ceac.nsf/en/gv00235e.html>)
- Privacy Commissioner's Fact Sheet:
 - "Non-profit status does not exempt automatically an organization from the application of the Act... Fundraising is not a commercial activity."
 - Recommends that charities and non-profits "provide their donors ... with an opportunity to decline to receive further communications."
(http://www.privcom.gc.ca/fs-fi/02_05_d_19_e.asp)

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Application to charities

- Application to for-profit activities
 - 3rd party contracts (mailing houses)
 - Related business (gift shops)
 - Golf tournaments, dinners, raffles?
- Provision of services?
- May be interpreted broadly

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Practical response: Best practices for charities

- Implementation of principles – prudent business practice
 - donor, user expectations
- AFP Guide, other industry practices
 - “Privacy 101”: http://www.afptoronto.org/new_on_site/Privacy101.pdf

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Privacy issues for charities

- Implementation of principles – similar process as commercial organizations
 - Audit
 - Privacy statement, policy – see AFP booklet
 - Identify purposes of collection
- Contracts with 3rd party consultants, mailing houses – include provisions re privacy
- Purchasing or renting lists? Due diligence
- Foundation-operating charity sharing of lists

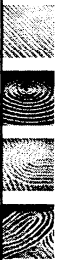
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Consent issues

- To sell, trade donor lists
 - explicit
- To publish donor names, level of donation
 - Is an opt-out sufficient?
- Send information, solicitation
 - Include privacy statement, policy in mailings

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Privacy issues for charities

- Accuracy of information
 - E.g., of address of donor where mailing includes amount of donation
- Safeguarding information
 - Limit access to donation information
 - Internet donations
 - Volunteers
 - Training
 - Sign acknowledgement

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Highlights

- Appoint a Chief Privacy Officer
- Conduct an audit
- Develop policies and procedures
- Develop method for obtaining consent
- Train staff and volunteers on policies and procedures
- Security of information

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