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CRITICAL PRIVACY ISSUES INVOLVING CHILDREN'S PROGRAMS

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From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses for Canada, a national, not-for-profit, charitable home and community care organization. Before joining VON Canada, Ms. Shainblum was the Senior Policy Advisor to the Ontario Minister of Health. Earlier in her career, Ms Shainblum practiced health law and corporate/commercial law at McMillan Binch and spent a number of years working in policy development at Queen's Park. Ms. Shainblum practices in the areas of charity and not for profit law, health law, and privacy law.

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INTRODUCTION

- Privacy is already a significant risk exposure for charities, churches and other Not-for-Profits ("NFPs") - heightened when dealing with children
- Charities and NFPs must comply with Canada's privacy laws when dealing with children's personal information and must protect children's personal information that is in their care and control
- Number of ways providers of children's programs/services may engage children's privacy rights
- This presentation not exhaustive - organizations should consider privacy implications of other activities
- Note: For the purposes of this presentation, "child" or "minor" means a person under the age of 18 years

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A. WHAT IS PRIVACY?

- Privacy has been defined as "the right of the individual to control the collection, use and disclosure of information about the individual"
- Privacy includes having the right to:
  - determine what information about you is collected
  - determine how it is used
  - choose the conditions and extent to which your information is shared
  - access collected information to review its security and accuracy

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B. THE PRIVACY LAW CONTEXT IN CANADA

- Privacy legislation in Canada generally seen as quasi-constitutional - recently reaffirmed by Supreme Court of Canada in *Douez v. Facebook*
- Patchwork of laws that apply to privacy at both the federal and provincial levels Canada - no single source
- The main privacy laws of interest for charities or NFPs are:
  - Federal private-sector legislation (PIPEDA) - applies to organizations that collect, use or disclose personal information in the course of "commercial activities"

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

  - "Substantially similar" provincial legislation, *e.g.*, PHIPA (health), Alberta or BC PIPA
  - Ontario public-sector privacy legislation (FIPPA - provincial) (MFIPPA - municipal)
  - Privacy torts and privacy class actions
- Whether a charity or NFP is subject to PIPEDA depends on whether it engages in "commercial activity"

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- PIPEDA defines commercial activity broadly and would include commercial activity carried out by non-commercial organizations
- The Office of the Privacy Commissioner of Canada (OPC) has indicated that whether or not an organization operates on a not-for-profit basis is not conclusive in determining whether or not PIPEDA applies
- Even if a charity or NFP is not subject to PIPEDA or other specific privacy legislation, violations of privacy can now give rise to damage awards, tort claims and class action litigation in the courts

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- Canadian courts showing an increasing willingness to protect privacy interests
- *Jones v. Tsige* 2013 - Ontario Court of Appeal recognized a new common law tort of "intrusion upon seclusion"
- *Doe 464533 v. N.D*. - January 2016 Ontario courts recognized another new tort - "public disclosure of private facts" - still good law
- Privacy-related class action litigation is also on the rise in Canada - *e.g.* 2017 Winnipeg Royal Ballet class action brought by former students for intimate photos taken by instructor and posted online

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- Privacy law is evolving area - most prudent for a charity or NFP to treat all personal information that it collects, uses or discloses in the course of its activities as if it were subject to PIPEDA
- Also - charities and NFPs operating in other provinces may be subject to their privacy laws - *e.g.* BC PIPA applies to NFPs and charities, AB PIPA applies to religious societies, federally incorporated NFPs, others
- "Questions about data privacy and security have heightened expectations for the charitable sector to develop rigorous standards for how they organize, store and provide access to data" – Mowat Centre 2018

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C. PERSONAL INFORMATION

- Key concept in privacy law - "personal information"
- "Any information about an identifiable individual"
- Examples of personal information:
  - Name, address
  - Health card number
  - Financial information
  - Anything that pertains to a person's health care
  - The identity of a person's health care provider
  - Images of identifiable individuals
  - Video surveillance - whether or not recorded

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D. FAIR INFORMATION PRINCIPLES

- Basis of Canadian privacy law and include:
  - Must identify the purposes for which personal information is collected at or before collection
  - Must obtain consent for the collection, use, or disclosure of personal information
  - Must limit the collection of personal information to what is necessary for the purposes identified
  - Must collect personal information by fair and lawful means
  - Must give individuals access to the information about them

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E. PRIVACY RIGHTS OF CHILDREN

- Canada is a signatory to the UN Convention on the Rights of the Child - recognizes child's right to privacy and to the protection of the law against interference with his or her privacy
- Supreme Court of Canada - recognized the inherent vulnerability of children and the need to protect young people's privacy rights based on age, not the sensitivity of the particular child (*A.B. v. Bragg Communications Inc.*)

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E. PRIVACY RIGHTS OF CHILDREN (cont.)

- Working Group of Privacy Commissioners and Child and Youth Advocates - frames children's privacy as a quasi-constitutional and human right that outweighs other considerations
- The OPC -
  - the personal information of children is particularly sensitive, especially the younger they are
  - must bear this in mind when collecting, using or disclosing their personal information

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E. PRIVACY RIGHTS OF CHILDREN (cont.)

- OPC Report on Consent - From 13 to 18 must adapt consent processes to child's level of maturity
- Does not mean that consents given by such children will necessarily be effective
- Courts may hesitate to enforce a consent signed by a child between 13 and 18
- No clarity in case law yet whether consents signed by parents together with or on behalf of child are binding

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F. CONSENT TO COLLECTION, USE, DISCLOSURE

- Key concept in privacy law is **consent** to collection, use or disclosure of personal information
- Organizations face a problem with obtaining valid consent from children - "it can be challenging (or even not possible) to obtain meaningful consent from youth, and in particular younger children" - OPC
- OPC Report on Consent (September 2017) - OPC now takes the position that no valid consent can be obtained from a child under 13 years old

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G. HEALTH NUMBERS

- Some schools, daycares, camps and other organizations that are not health information custodians often collect children's health numbers for emergency purposes
- Under PHIPA such organizations are not permitted to require that children's health numbers be provided to them
- Charities and NFPs must make it clear that provision of health cards or health numbers is voluntary
- Retention and secure storage requirements - will be discussed later

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS

- Images of identifiable individuals are personal information
- Charities, including churches, and NFPs often use pictures of children to promote their programs or to share with parents and other stakeholders - often posted online
- Charities and NFPs must obtain consent to the collection, use and disclosure of personal information - including photographs of identifiable individuals
- Subject to the following discussion

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Standard practice among schools, religious organizations and other entities to request the consent from the child's parent or guardian
- Not clear that a court will enforce a consent or waiver signed by a parent on behalf of a child - no definitive case law yet on whether a waiver signed by a parent is binding on a minor
- A court may not enforce the waiver/consent or may only enforce some portions of it
- *Dewitt v. Strang* - recent NB case may lead to a definitive ruling on enforceability of parental waivers

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Risk of misuse - common for innocuous photos to be taken from websites and photo-shopped or posted with inappropriate content or comments
- National Post article April 18, 2017 - "Do you know where your child's image is?" - morphing innocent Facebook photos into sexualized imagery
- In February 2016 the French national police warned parents to stop posting photos of their children on Facebook as that could violate their privacy and expose them to sexual predators

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Sexualized images of a child becomes a permanent, indestructible record - ongoing violation
- Ethical considerations that come into play as photographing and posting images of young persons could expose them to potential misuse of their image
- If an organization does decide to assume the risk of photographing/posting images of minors, it should obtain robust consents, including consent to images or video footage of the child being stored, accessed or disclosed outside of Canada

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I. COLLECTING PERSONAL INFORMATION FROM CHILDREN

- Collection, use and disclosure of personal information is predicated on obtaining valid consent
- Problem of obtaining meaningful consent from children, especially younger children
- OPC recommends that providers of child-centric services avoid collecting personal information
- If collection of personal information is necessary, OPC recommends limiting it to the minimal information that will satisfy the purpose (*e.g.* what country are you in, rather than what city)

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I. COLLECTING PERSONAL INFORMATION FROM CHILDREN (cont.)

- Ability to provide meaningful consent for collection and use will depend on child's age and development
- May not be possible to explain services and risks to younger children so they can fully understand. If so, must communicate to child the need to involve a parent/guardian
- OPC - no valid consent from a child under 13
- Interesting contrast with the test of capacity to consent to a treatment in health care (Ontario), under PHIPA (Ontario) and under CYFSA (Ontario), which are not age-dependent

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE

- Charities and NFPs with websites should limit or avoid the online collection of personal information from children
- Problem of inadvertent collection of personal information - OPC, *e.g.* many children use their real names as username
- OPC and Working Group - concerns about online advertisements aimed at children and aligned with their specific interests - interest-based advertising (cookies) and disguised marketing
- United States - the *Children's Online Privacy Protection Act* ("COPPA") requires websites to obtain "verifiable" parental consent before collecting information from a child under 13
- No such law in Canada, and complaints that COPPA has been ineffective

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE (cont.)

- Charities and NFPs with websites are expected to have effective procedures to protect personal information - especially to protect the personal information of children
- Examples from the OPC include:
  - Limit/avoid collection from children
  - Obtain consent from parents of children under 13
  - Make sure default privacy settings are appropriate for the age of users
  - Verify that users are not using their real names as user names
  - Have contractual protections in place with online advertisers to prevent the tracking of users and monitor

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE (cont.)

- New European Union ("EU") General Data Protection Regulation ("GDPR") coming into effect May 25, 2018 has a number of provisions relating to children, including requirement for parental consent to collect, use, disclose ("process") personal information of a child under the age of 16
- Organizations will be required to make "reasonable efforts" to verify that consent has been given
- GDPR will also require privacy notices and other information directed at children to be in plain language and easy to understand
- GDPR will apply to Canadian organizations that collect or process personal data of EU residents to offer goods or services (even at no-charge)

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K. COLLECTING PERSONAL INFORMATION FROM THIRD PARTIES

- OPC Case #2012-007 - summer camp director collected a child's personal information from a camp she had previously attended without the parent's consent to decide if she would be a suitable camper
- The previous camp confirmed that personal information about the child was exchanged during a phone call
- Camp documents did not mention that camper personal information could be collected from other parties
- The OPC found that the complaint was well-founded - the camp had breached the child's privacy by collecting personal information without the child's/parent's knowledge or consent

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L. DISCLOSING PERSONAL INFORMATION TO THIRD PARTIES

- In OPC Case # 2012-008 the disclosing camp was found to have breached the child's privacy by disclosing her personal information without her/her parent's knowledge and consent
- When disclosing information about a child to a third party, a charity or NFP must have the individual's knowledge and consent to do so

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M. SURVEILLANCE

- Children are subject to increasing levels of surveillance - security cameras, nanny cams, video baby monitors, webcams in daycares
- Other technologies coming - *e.g.* fingerprint scanners, radio frequency tagging, Mattel's smart device "Aristotle" and toys connected to the internet
- Charities and NFPs must have consent for the collection, use and disclosure - this is personal information

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M. SURVEILLANCE (cont.)

- OPC Case #2011-008 - daycare used webcam for security purposes and so parents could check on their children online
- Parent complained that the daycare was recording and storing the videos (personal information) without consent and without adequate safeguards
- OPC - internet viewable real-time video surveillance of children is highly sensitive personal information and strong security measures were required - daycare did not have

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M. SURVEILLANCE (cont.)

- Daycare had to enhance its technological and contractual safeguards - *e.g.* regular deactivation of outdated passwords, encryption of the video data and auditing of logs for unusual activity
- In general, video surveillance should be limited in scope as much as possible to minimize interference with individual privacy
- OPC guidelines for video surveillance include:
  - Turn on cameras for limited periods, not always on
  - Minimize risk of capturing images of passersby

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M. SURVEILLANCE (cont.)

- Do not use in/aim cameras at areas where people have a heightened expectation of privacy *e.g.* washrooms, locker rooms, windows
- Post notice about the use of cameras visible before entering camera range
- If possible, do not record continuously, only record when problematic activity is occurring
- Store recorded images securely
- Keep recordings only as long as necessary to fulfill the purpose and securely destroy

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N. CHILD, YOUTH AND FAMILY SERVICES ACT, 2017

- Child, Youth and Family Services Act, 2017 (CYFSA) – passed April 30, 2018
- Part X goes into force January 2020 - based on PHIPA/fair information principles
- Child and youth service providers governed by CYFSA may only collect, use or disclose personal information (a) if they have the individual's consent and it is necessary for a lawful purpose or (b) the collection, use or disclosure without the individual's consent is permitted or required by the Act
- Consent must be knowledgeable - individual must know the purpose and know that they can give, withhold, or withdraw consent

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N. CHILD, YOUTH AND FAMILY SERVICES ACT, 2017 (cont.)

- Individuals are presumed to be capable - able to understand information relevant to deciding whether to consent and the reasonably foreseeable consequences of giving, withholding or withdrawing consent
- Decision of a child younger than 16 who is capable prevails over decision by a substitute decision-maker
- On December 4, 2017 The Ministry of Children and Youth Services released draft regulations under CYFSA which, when in force, will create a number of privacy obligations to be satisfied by entities that meet the definition of "service provider" under CYFSA, including charities and not-for-profits
- Child and youth service providers will need to develop processes that are compliant with Part X of CYFSA and the regulations

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O. HELP/COUNSELLING/ADVICE LINES FOR CHILDREN

- A number of privacy matters that charities and NFPs should consider when engaging in this activity
  - trace phone calls?
  - record phone numbers?
  - record calls?
  - parental consent?
  - handling of recorded personal information?
- Should be addressed in an appropriate privacy policy
- Positive obligation to report if reasonable grounds to suspect that a child is or may be in need of protection

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Q. PREVENTING PRIVACY BREACHES

- Charities and NFPs are required to protect children's personal information against loss or theft, unauthorized access, disclosure, copying, use, or modification
- Fair information principles - onus is on organizations to use safeguards that are appropriate to the sensitivity of the personal information
- Consider amount and sensitivity of information in determining what safeguards are appropriate, *e.g.* health information
- Must use appropriate safeguards:
  - technical (passwords, encryption, auditing)
  - administrative (training, security clearances, "need-to-know" access)
  - physical (secure areas, ID, locked cabinets)

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Q. PREVENTING PRIVACY BREACHES (cont.)

- Only retain personal information as long as necessary to fulfill the purposes for which it was collected
- Securely dispose of personal information so that reconstruction is not reasonably possible
- Ontario Information and Privacy Commissioner - most common causes of privacy breaches:
  - Insecure disposal of records (paper and electronic)
  - Lost/stolen portable devices (laptops, USB)
  - Unauthorized access (snooping, hacking)
- Failure to appropriately safeguard children's personal information or to destroy it securely can place a church, charity or NFP at risk of a privacy breach

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R. RETENTION AND INSURANCE

- Organizations should develop and implement procedures and policies with respect for the retention of personal information that include minimum and maximum retention periods
- Key principle - Personal information shall be retained only for as long as needed to fulfill the purposes for which it was collected
- OPC - Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous

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R. RETENTION AND INSURANCE (cont.)

- Some insurers may require charities and NFPs to retain personal information indefinitely in order to qualify for Abuse Liability Coverage - Seems inconsistent with the principles of retention
- OPC Report of Findings #2014-019 - “lessons learned” suggests that it may be possible to retain for longer if the individual consents to a longer retention period
- Complicated issue - need legal advice

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S. RISK EXPOSURE FOR CHARITIES AND NOT-FOR-PROFITS

- Failure to comply with the requirements of privacy law regarding the personal information of children can place a charity or NFP at risk of privacy law suits, complaints to the relevant Privacy Commissioner, financial costs and reputational loss or damage
- Charities and NFPs should have robust privacy policies and procedures in place to mitigate these risks

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