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THE IMPACT OF THE US-MEXICO-CANADA AGREEMENT (USMCA) ON PRIVACY AND IP ISSUES

By Esther Shainblum and Sepal Bonni[*]

A. INTRODUCTION

On September 30, 2018, the governments of the United States, Mexico, and Canada ("Parties" or "Party") announced the completion of negotiations with respect to the United States-Mexico-Canada Agreement ("USMCA").[1] Although it has yet to be signed and ratified, the USMCA will govern trade and investment among the three Parties, replacing the North American Free Trade Agreement.[2] All Canadians, including charities and not-for-profits, will be impacted by the USMCA, including its provisions relating to privacy and intellectual property ("IP"), as described in this *Charity & NFP Law Bulletin*.

B. IMPACT OF THE USMCA ON PRIVACY

Despite its title, "Digital Trade", Chapter 19 of the USMCA deals with a number of privacy-related issues which are not without controversy, such as the protection of personal information, cross-border transfers of personal information and the physical location of computing facilities that store or process data.[3]

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[*] Esther Shainblum, B.A., LL.B., LL.M., CRM, practices in the areas of charity and not-for-profit law, privacy law and health law with the Carters Ottawa office. Sepal Bonni, B.Sc., M.Sc., J.D., practices intellectual property, privacy, and information technology law with the Carters' Ottawa office. The authors would like to thank Christina Shum, B.M.T., J.D., Student-at-Law, for her assistance in preparing this Bulletin.

[1] Government of Canada, "A New United States-Mexico-Canada Agreement" (24 October 2018), online: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/usmca-aeumc/index.aspx?lang=eng

[2] *Ibid.*

[3] Office of the United States Trade Representative, "United States-Mexico-Canada Agreement Text" (accessed 24 October 2018) online (pdf): *Chapter 19 Digital Trade* <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/19%20Digital%20Trade.pdf>.

1. Protection of Personal Information

"Personal information" is defined for the purposes of Chapter 19 as "any information, including data, about an identified or identifiable natural person". The tone for Chapter 19 is set in Article 19.2 which recognizes, on the one hand, the importance of developing frameworks that promote consumer confidence in digital trade and, on the other hand, the importance of avoiding unnecessary barriers to the use and development of digital trade. The underlying theme of privacy protections as potential barriers to trade runs throughout Chapter 19.

Article 19.8 recognizes the economic and social benefits of protecting the personal information of users of digital trade and requires each Party to adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In developing this legal framework, Article 19.8.2 requires each Party to consider the principles and guidelines of relevant international bodies, including the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, which are specifically cited.

However, footnote 5 to Article 19.8 advises that a Party can comply with this provision in a number of ways – either by adopting or maintaining comprehensive or sector specific privacy legislation (at one end of the spectrum) or simply by enacting laws to enforce voluntary undertakings by enterprises (at the other end of the spectrum). The latter option indicates that the threshold for compliance with the requirement to have a legal framework in place is quite low. It is unclear why this important detail was set out in a footnote rather than in the body of the USMCA.

Article 19.8.3 sets out the key principles that should be included in a Party's legal framework, including limitation on collection, choice, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and accountability. Article 19.8.3, picking up on the theme of privacy as a trade barrier and the need to strike a balance between competing interests, requires the Parties to ensure that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented. Article 19.8.5 requires each Party to publish information on the personal information protection it provides, including how individuals can pursue remedies. Article 19.8.6 refers to the need to promote compatibility between the Parties' different

approaches to protecting personal information and again cites the APEC Privacy Framework as a valid mechanism for both promoting cross-border information transfers as well as for protecting personal information.

2. Cross-border Transfers of Personal Information and Physical Location of Computing Facilities that Store or Process Data

Among the Chapter 19 provisions that have attracted the most attention are Article 19.11, which forbids a Party from prohibiting or restricting the cross-border transfer of information, except in limited circumstances, and Article 19.12, the "data localization" provision, which prohibits Parties from requiring companies to use or locate computing facilities in that Party's territory as a condition of doing business there. Concerns have been expressed that these two provisions could lead to an erosion of privacy protection. Data transfer restrictions are used when there are concerns about the level of protection personal information will receive when transferred outside national boundaries. In Canada, Alberta's *Personal Information Protection Act*[4] requires organizations to notify individuals that personal information will be transferred outside of Canada for processing and to provide information about their outsourcing policies and practices. In Quebec, the *Act respecting the protection of personal information in the private sector* requires organizations that wish to transfer personal information outside of Quebec to first determine whether the personal information will be protected, failing which they are prohibited from transferring the personal information.[5]

Data transfer restrictions are also part of the regime established by the General Data Protection Regulation ("GDPR"), the European Union's privacy regulation, which permits transfer of personal data outside the EU only to countries that can ensure an adequate level of protection or subject to appropriate safeguards.[6] Organizations subject to the USMCA that also deal with EU members will have to consider how to reconcile these diverging approaches.

With respect to data localization, provincial legislation in British Columbia (*Freedom of Information and Protection of Privacy Act*)[7] and Nova Scotia (*Personal Information International Disclosure*

[4] SA 2003, c P-6.5, s 13.1.
[5] CQLR c P-39.1, s 17.
[6] Regulation (EU) 2016/679, Art 45-46.
[7] RSBC 1996, c 165.

Protection Act)[8] as well as the federal *Bank Act*[9] already require certain types of information to be stored in Canada. In the case of British Columbia, the BC Freedom of Information and Privacy Association has issued a press release stating that the USMCA conflicts with existing provincial legislation around data localization and puts the privacy of British Columbians at risk.[10]

In addition, the Canada Revenue Agency (CRA) requires Canadian registered charities to keep their books and records at their Canadian address filed with CRA and prohibits them from keeping books and records at a foreign address.[11] Canadian registered charities wishing to store their books and records on cloud based servers will have to contend with these conflicting requirements as Article 19.12 could make it less likely that service providers will have computing facilities located in Canada.

3. Limits to Unsolicited Commercial Electronic Communications

Article 19.13 of the USMA requires each Party to adopt or maintain measures that limit unsolicited commercial electronic communications ("Spam"). Article 19.12.2 deals with Spam sent to email addresses and requires Parties to have measures that require Spammers to enable recipients to prevent the ongoing reception of Spam or to require their consent to receive commercial electronic messages. Article 19.12.3 requires Parties to endeavor to reduce or prevent Spam sent to destinations other than an email address. Article 19.12.4 requires each Party to provide recourse against suppliers who do not comply with the anti-Spam measures adopted. Canada has robust anti-spam legislation (CASL) and Article 19.12 suggests that suppliers of Spam from the other Parties will be required to comply with CASL's stringent requirements and will be subject to its significant penalties. Canadian organizations that send Spam outside of Canada will in turn be subject to both CASL as well as any anti-spam legislation in place in the destination country.

[8] SNS 2006, c 3.
[9] SC 1991, c 46, ss 239(1) and 597(2).
[10] BC Freedom of Information and Privacy Association, "USMCA Puts Privacy at Risk" (17 October 2018), online: <https://fipa.bc.ca/usmca-puts-privacy-at-risk/>.
[11] Government of Canada, "Books and Record" (last modified 21 July 2016), online: <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/books-records.html>.

C. IMPACT OF THE USMCA ON INTELLECTUAL PROPERTY

The USMCA also includes substantial provisions respecting intellectual property in Chapter 20, including patents, trademarks, trade secrets, and copyrights.[12] A few noteworthy provisions which may be of interest to charities and not-for-profits are listed below:

- The USMCA extends copyright protection in Canada from "the life of the author plus 50 years" to "the life of the author plus 70 years" for natural persons (Article 20.H.7(a)).
- The trademark provisions included in the USMCA do not differ substantially from current Canadian trademark law. The requirements include the agreement to ratify and accede to *The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (Article 20.A.7.2(a)), and the adoption and maintenance of a trademark classification system that is consistent with the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (Article 20.C.8). However, as previously reported in the March 2018 *Charity & NFP Law Update*, Canadian reform of the trademark system to incorporate international trademark treaties is already underway.
- The USMCA extends the term of patent protection for certain patents (Article 20.F.17).
- The USMCA includes added protection for industrial designs under Section G of the chapter. Canada has amended its *Industrial Design Act* and the new requirements have been previously included in the new legislation.
- Significant criminal and civil trade secret remedies and penalties included in the USMCA under Section J of the chapter may require Canada to develop trade secret legislation.
- Provisions have also been included dealing with the enforcement of intellectual property rights and border control measures.

[12] Office of the United States Trade Representative, "United States-Mexico-Canada Agreement Text" (accessed 24 October 2018) online (pdf): *Chapter 20 Intellectual Property Rights* <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/20%20Intellectual%20Property.pdf>.

D. CONCLUSION

Although the USMCA is not yet in place, all Canadian organizations, including charities and not-for-profits, should continue to monitor these developments as the USMCA approaches ratification and as Canada moves towards compliance with the USMCA over the coming months.