

RECENT DEVELOPMENTS IN IT LAW AFFECTING CHARITIES AND NFPs

*By Sean S. Carter, Esther Shainblum and Luis R. Chacin**

A. INTRODUCTION

The exponential development of new digital technologies in recent years has had a profound effect upon established concepts and principles of privacy law, intellectual property law, securities law, as well as charity and not-for-profit law, amongst others. Within this context, regulators are having to cooperate with each other in order to deal with digital technologies meant to reach users across multiple jurisdictions and harmonize their respective legal regimes to ensure that their respective jurisdictions remain competitive and are able to attract technology-oriented investments and talent.¹

As a result of this rapidly changing legal environment, new landmark court decisions are being released and legislation introduced on an increasingly frequent basis. In response to this changing legal landscape, this *Bulletin* is intended to provide a select summary of recent developments in the law over the last year dealing with Information Technology (“IT Law”) as it relates to charities and not-for-profits and their use of the Internet and social media.

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¹ Trying to find the right balance, regulators may sometimes reverse previously adopted positions; see, for example, Esther Shainblum, “OPC Concludes Consultation on Data Transfers” on *Charity & NFP Law Update* (September 2019), online: <http://www.carters.ca/pub/update/charity/19/sep19.pdf#es1>; see also Ontario Securities Commission decision regarding the Bitcoin Fund in *3iQ Corp (re)*, 2019 ONSEC 37, online: https://osc.gov.on.ca/documents/en/Proceedings-RAD/rad_20191029_3iq-2.pdf

B. PRIVACY AND BIG DATA

1. PIPEDA Report of Findings #2019-002 (Facebook)

On April 25, 2019, the Office of the Privacy Commissioner of Canada (“OPC”), jointly with the Information and Privacy Commissioner for British Columbia, released its Report of Findings from the investigation into Facebook, Inc. (“Facebook”) for its failure to comply with the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) by disclosing the personal information of a number of its users to a third-party application (the “TYDL App”), and which information was later used by third-parties for targeted political messaging.²

The investigation found that: i) Facebook failed to obtain valid and meaningful consent and instead relied on the TYDL App and others, without making reasonable efforts to ensure that these parties were obtaining meaningful consent; ii) Facebook relied, unreasonably, on installing users to provide consent on behalf of each of their friends, often counting in the hundreds, to release those friends’ information to an app, even though the friends would have had no knowledge of that disclosure; iii) Facebook relied on contractual terms with apps to protect against unauthorized access to users’ information, but then put in place superficial, largely reactive, and thus ineffective, monitoring to ensure compliance with those terms; iv) Facebook did not take responsibility for giving real and meaningful effect to the privacy protection of its users, relying on overbroad consent language and consent mechanisms that were not supported by meaningful implementation.

In the News Release accompanying its Report of Findings, the OPC announced that “Facebook’s refusal to accept the Commissioners’ recommendations means there is a high risk that the personal information of Canadians could be used in ways that they do not know or suspect, exposing them to potential harms.”³ Despite attempts by the OPC to ensure that Facebook implements compliance measures regarding its accountability and privacy obligations, the OPC reported that Facebook “refused to voluntarily submit to audits of its privacy policies and practices over the next five

² Office of the Privacy Commissioner of Canada, Report of Findings #2019-002, online; <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-002/>

³ Office of the Privacy Commissioner of Canada, News Release (25 April 2019), online: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c_190425/

years.”⁴ In light of this, the OPC indicated that it “plans to take the matter to Federal Court to seek an order to force the company to correct its privacy practices.”⁵

2. Canada’s Digital Charter

On May 21, 2019, Innovation, Science and Economic Development Canada Minister Navdeep Bains announced the Government of Canada’s intention to make significant changes to Canada’s privacy regime. Launching Canada’s new Digital Charter (“Digital Charter”),⁶ Minister Bains advised that the Digital Charter is intended to lay the foundation for modernizing privacy rules in Canada, rebuilding Canadians’ trust and providing a framework for future governance of the digital landscape. As part of the launch of the Digital Charter, Minister Bains also announced plans to modernize PIPEDA, Canada’s private sector privacy legislation, which will in part implement the principles of the Digital Charter and contribute to their achievement.⁷

3. Data Mining

Regulators in the European Union and the United States, such as the Federal Trade Commission (“FTC”), are confronting the aggressive data mining practices, and more broadly, the power of large online social media and technology giants, such as Facebook and Google. There has been a particular focus on data mining involving children and protecting their privacy, as evidenced in the FTC’s vote to fine Google \$170 million dollars in August 2019 to settle accusations that its subsidiary, YouTube, illegally collected personal information about children.⁸ These actions should be carefully noted by any charity or not-for-profit with online platforms used by young children, as there may be similar action taken by regulators in Canada, such as the OPC.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Innovation, Science and Economic Development Canada, “Canada’s Digital Charter in Action: A Plan by Canadians, for Canadians” (21 May 2019), online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html

⁷ See *Charity & NFP Law Bulletin No. 449* (30 May 2019), online: <http://www.carters.ca/pub/bulletin/charity/2019/chylb449.pdf>

⁸ Natasha Singer and Kate Conger “Google is Fined \$170 Million for Violating Children’s Privacy on YouTube” (September 4, 2019), *The New York Times*, online: <https://www.nytimes.com/2019/09/04/technology/google-youtube-fine-ftc.html>; Natasha Singer et al, “YouTube to be fined up to \$200 million for Children’s Privacy Violations” (30 August 2019), *The New York times*, online: <https://www.nytimes.com/2019/08/30/technology/youtube-childrens-privacy-fine.html>

4. Facial Recognition Technology

On May 14, 2019, San Francisco became the first major city in the United States to vote in favour of banning local government agencies' use of facial recognition technology.⁹ The ban arose from widespread concerns about the potential for abuse of this powerful technology. In addition, facial recognition technology is not as accurate when identifying women and people of colour, reflecting the primarily white male bias of the datasets used to create it and leading to false identification positives.¹⁰

On May 30, 2019, the Canadian Civil Liberties Association demanded an immediate moratorium on the use of facial recognition technology in Toronto until standards, checks and balances could be developed and debated by city council and its website calls on Canadians to sign a petition calling for facial recognition technology to be banned.¹¹ Former Information and Privacy Commissioner of Ontario Ann Cavoukian has praised San Francisco's ban and expressed concern that the technology's use in public spaces presents a threat to individual privacy and could be abused.¹²

C. ARTIFICIAL INTELLIGENCE

1. Canada Directive on Automated Decision-Making

On April 1, 2019, the Government of Canada's Directive on Automated Decision Making (the "Directive") came into effect, with compliance required by April 1, 2020.¹³ The Directive applies to federal government departments and institutions and establishes a number of requirements dealing with impact assessments, transparency, quality assurance, recourse, and reporting.

⁹ Board of Supervisors of the City and County of San Francisco, Ordinance, File No. 190110, online: <https://sfgov.legistar.com/View.ashx?M=F&ID=7206781&GUID=38D37061-4D87-4A94-9AB3-CB113656159A>; see also, Tony Raval, "Examining The San Francisco Facial-Recognition Ban" (21 June 2019), Forbes, online: <https://www.forbes.com/sites/forbestechcouncil/2019/06/21/examining-the-san-francisco-facial-recognition-ban/#79bd389f1d69>

¹⁰ *Ibid.*, Raval.

¹¹ Canadian Civil Liberties Association, "Deputation on Facial Recognition System" (30 May 2019), online: <https://ccla.org/ccla-deputation-facial-recognition-technology-used-toronto-police-services/>; see also Philip Lee-Shanok, "Privacy advocates sound warning on Toronto police use of facial recognition technology" (30 May 2019), CBC News, online:

<https://www.cbc.ca/news/canada/toronto/privacy-civil-rights-concern-about-toronto-police-use-of-facial-recognition-1.5156581>

¹² *Ibid.* See also Howard Solomon, "Canadian privacy experts praise San Francisco ban facial recognition software" (16 May 2019), IT World Canada, online: <https://www.itworldcanada.com/article/canadian-privacy-experts-praise-san-francisco-ban-on-facial-recognition-software/418107>

¹³ Government of Canada, "Directive on Automated Decision-Making" (2019), online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>

The stated objective of the Directive is “to ensure that Automated Decision Systems are deployed in a manner that reduces risks to Canadians and federal institutions, and leads to more efficient, accurate, consistent, and interpretable decisions made pursuant to Canadian law,” where Automated Decision System is defined to include, “any technology that either assists or replaces the judgement of human decision-makers”. Appendix A of the Directive provides relevant definitions, including a definition of Artificial Intelligence as “[i]nformation technology that performs tasks that would ordinarily require biological brainpower to accomplish, such as making sense of spoken language, learning behaviours, or solving problems.”¹⁴

2. OECD Council Recommendation on Artificial Intelligence

On May 22 2019, the Organisation for Economic Co-operation and Development (“OECD”) released its Recommendation on Artificial Intelligence (the “AI Recommendation”),¹⁵ the first intergovernmental standard on artificial intelligence (“AI”). The Recommendation aims to “foster innovation and trust in AI by promoting the responsible stewardship of trustworthy AI while ensuring respect for human rights and democratic values.”¹⁶ The AI Recommendation interacts with other OECD standards in privacy, digital security risk management, and responsible business conduct, setting a standard that is “implementable and sufficiently flexible to stand the test of time in this rapidly evolving field.”¹⁷ As such, the AI Recommendation identifies five values-based principles: i) inclusive growth, sustainable development and well-being; ii) human-centred values and fairness; iii) transparency and explainability; iv) robustness, security and safety; and v) accountability.

In June 2019, at the Osaka Summit, G20 Leaders welcomed G20 AI Principles based on the AI Recommendation.¹⁸

¹⁴ *Ibid.*

¹⁵ Organisation for Economic Co-operation and Development, C/MIN(2019)3/FINAL, online: [https://one.oecd.org/document/C/MIN\(2019\)3/FINAL/en/pdf](https://one.oecd.org/document/C/MIN(2019)3/FINAL/en/pdf)

¹⁶ *OECD/LEGAL/0449 Background Information*, online: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>

¹⁷ *Ibid.*

¹⁸ *Ibid.*

3. Resolution of the Federal, Provincial and Territorial Information and Privacy Commissioners

On October 1 and 2, 2019, Canada's Federal, Provincial and Territorial Information and Privacy Commissioners passed a resolution calling on their respective governments to modernize privacy and access to information legislation in Canada in light of new technologies and legislative advances made in other countries including, without limitation, enacting legislation that requires AI and machine learning technologies to be designed, developed and used in respect of fundamental human rights, by ensuring protection of privacy principles such as transparency, accountability, and fairness.¹⁹

D. BLOCKCHAIN

1. Upcoming changes to the *Excise Tax Act* to clarify virtual currency sales tax treatment

On May 17, 2019, the Department of Finance released for public consultation a set of draft legislative proposals relating to the *Excise Tax Act*, including the proposal to treat virtual currency (e.g. Bitcoin) as a "financial instrument" for GST/HST purposes, meaning that suppliers would not be required to charge and collect GST/HST on supplies of virtual currency.²⁰ The draft legislation provides that the definition of "financial instrument" will be amended to include "virtual payment instrument," where:

virtual payment instrument means property that is a digital representation of value, that functions as a medium of exchange and that only exists at a digital address of a publicly distributed ledger, other than property that

- (a) confers a right, whether immediate or future and whether absolute or contingent, to be exchanged or redeemed for money or specific property or services or to be converted into money or specific property or services,
- (b) is primarily for use within, or as part of, a gaming platform, an affinity or rewards program or a similar platform or program, or
- (c) is prescribed property.²¹

¹⁹ Office of the Privacy Commissioner of Canada, "Effective privacy and access to information legislation in a data driven society, Resolution of the Federal, Provincial and Territorial Information and Privacy Commissioners" (1-2 October 2019), online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/joint-resolutions-with-provinces-and-territories/res_191001/

²⁰ Government of Canada, "Department of Finance Canada Consulting on Draft Goods and Services Tax/Harmonized Sales Tax Legislation" (17 May 2019), online: <https://www.fin.gc.ca/n19/19-049-eng.asp>.

²¹ Draft Legislation Relating to the *Excise Tax Act* (May 2019), online: <https://www.fin.gc.ca/drleg-apl/2019/gst-hst-tps-tvh-eng.asp>

As such, a virtual payment instrument is a digital representation of value that functions as a medium of exchange (*i.e.*, it is not money, but it is *like* money in that it may be accepted as payment in transactions for property and services) and which exists only at a digital address of a publicly distributed ledger (*e.g.* blockchain).²²

2. Libra and Facebook Pay

Facebook announced June 28, 2019 that it would be releasing its own cryptocurrency, named Libra,²³ proposed as a “stablecoin” supported by an underlying basket of fiat currencies, and which would allow money transfers at nearly zero cost. Despite wide initial support, major collaborators such as PayPal, eBay, Mastercard and Visa all left the project in early October over concerns that regulators may not allow it any time soon. Of note, the US Federal Reserve, in its November 2019 Financial Stability Report, stated that a global stablecoin, such as Facebook’s Libra, has “the potential to rapidly achieve widespread adoption.”²⁴

On November 12, 2019, Facebook announced Facebook Pay, a payment system to shop and donate on Facebook, Messenger, Instagram and WhatsApp.²⁵ However, unlike Libra, Facebook Pay is “built on existing financial infrastructure and partnerships,” meaning it can be rolled out with less red tape. According to the announcement, “Facebook Pay will begin rolling out on Facebook and Messenger this week in the US for fundraisers, in-game purchases, event tickets, person-to-person payments on Messenger and purchases from select Pages and businesses on Facebook Marketplace.”

3. UNICEF Launches Cryptocurrency Fund

The United Nations Children’s Fund (“UNICEF”) announced on October 9, 2019, that it would be able to receive, hold and disburse donations of cryptocurrencies through its newly-established UNICEF Cryptocurrency Fund.²⁶ This is an important development as an increasing number of

²² Explanatory Notes Relating to the *Excise Tax Act* (May 2019), online: <https://www.fin.gc.ca/drleg-apl/2019/gst-hst-tps-tvh-eng.asp>.

²³ See online: <https://libra.org/en-US/>

²⁴ Board of Governors of the Federal Reserve System, “Financial Stability Report” (November 2019), online: <https://www.federalreserve.gov/publications/files/financial-stability-report-20191115.pdf>.

²⁵ Facebook, “Simplifying Payments with Facebook Pay” (12 November 2019), online: <https://about.fb.com/news/2019/11/simplifying-payments-with-facebook-pay/>. At the time of writing, WeChat Pay has been widely adopted in certain parts of the world; see online: https://pay.weixin.qq.com/index.php/public/wechatpay_en.

²⁶ United Nations Children’s Fund, online: <https://www.unicef.org/press-releases/unicef-launches-cryptocurrency-fund>

charities seek new ways to reach donors, as well as beneficiaries, located in parts of the world where established financial services channels are not available.

E. CONCLUSION

This select summary of recent developments in IT Law is intended to provide an opportunity for charities and not-for-profits to see how the dubbed “fourth industrial revolution”, also known as the “digital revolution”, will change how charities and not-for-profits will be interacting with partners, clients, donors, and governments over the next few years. It will therefore be important for charities and not-for-profits to keep abreast of recent development in IT law as they occur.



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