

DIGITAL CHARTER IMPLEMENTATION ACT, 2020

*By Esther Shainblum and Luis R. Chacin**

A. INTRODUCTION

ON NOVEMBER 17, 2020, the Minister of Innovation Science and Industry introduced Bill C-11, the proposed [Digital Charter Implementation Act, 2020](#) (“Bill C-11”).¹ If passed, Bill C-11 would replace the privacy protection measures set out in the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)² with the *Consumer Privacy and Protection Act* (“CPPA”) and the *Personal Information and Data Protection Tribunal Act*, significantly overhauling Canada’s private sector privacy law regime. The balance of this *Bulletin* will provide a high-level overview of the CPPA and, where applicable, its relevance to charities and not-for-profits.

B. CPPA

THERE ARE SOME familiar aspects to the CPPA as it incorporates and codifies many of the concepts that were formerly included in Schedule 1 of PIPEDA, including: organizations’ accountability for personal information; limiting collection, use and disclosure of personal information; access to and amendment of personal information; designating a privacy officer; using personal information only for appropriate purposes; the requirement for consent; and the ability to challenge organizations’ compliance with privacy law. However, the CPPA also includes a number of new or enhanced features that will have a significant

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¹ *Bill C-11, An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Session, 43rd Parliament, Canada, 2020 (first reading 17 November 2020) [Bill C-11].

² *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

impact on organizations that are subject to the legislation. These features include: the new Personal Information and Data Protection Tribunal (“Tribunal”); new order making powers for the Office of the Privacy Commissioner (“Privacy Commissioner”); administrative monetary penalties of up to \$10 million CAD or 3% of global revenue in the previous financial year, whichever is higher, for certain contraventions; and fines of up to \$25 million CAD or 5% of global revenue in the previous financial year for certain, more serious, offences.

Other important features of the CPPA include: modified rules around what constitutes “valid” consent, including requirements for use of “plain language” and timing, as well as exceptions to the need to obtain consent in certain situations such as for prescribed business activities; the right to be informed when an organization uses an automated decision system to make a prediction, recommendation or decision about an individual and the right to be told how the information that was used to make that prediction, recommendation or decision was obtained; the right to request that an organization dispose of personal information that it has collected, subject to certain limitations (*i.e.*, a limited right to erasure); the right to request an organization to disclose personal information that it has collected to another organization, subject to a data mobility framework (*i.e.*, a limited right to data mobility); rules for the use of de-identified information; and a private right of action where an organization has been found by the Privacy Commissioner and the Tribunal to have contravened the CPPA.

The CPPA clarifies that organizations may transfer personal information to third party service providers without their knowledge or consent, deems organizations that use service providers to have control over the personal information that is transferred and requires them to ensure that the service provider provides substantially the same protection as the organization itself is required to provide under the CPPA.

As proposed by Bill C-11, the CPPA would apply to personal information that is collected, used and disclosed both internationally as well as inter-provincially. It empowers the Privacy Commissioner to approve and certify codes of practice and certification programs that provide for substantially the same or greater protection of personal information as some or all of the protection provided under the CPPA and requires organizations to implement a privacy management program – not simply a privacy policy – that includes, among other things, the organization’s privacy policies, practices and procedures.

C. IMPACT ON CHARITIES AND NOT-FOR-PROFITS

ONE OF THE key issues from the perspective of charities and not-for-profits is the extent to which, if any, the CPPA will apply to them. Section 6(1) of the CPPA provides that the CPPA will apply to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities. “Commercial activities” is defined as “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, taking into account an organization’s objectives for carrying out the transaction, act or conduct, the context in which it takes place, the persons involved and its outcome”.³ It is worth noting that the definition of “commercial activities” in PIPEDA explicitly includes “the selling, bartering or leasing of donor, membership or other fundraising lists,”⁴ but that this language was omitted from Bill C-11. It is unclear what the public policy reason was for omitting the selling, bartering or leasing of such lists from the definition of “commercial activity” in Bill C-11. Whatever the reason, this omission may lead to a situation in which organizations are no longer required to obtain consent for the creation and use of such lists, although it is not clear why this would be.

Based on the definition of commercial activities in the proposed legislation as well as the language of section 6(1), charities and not-for-profits do not, on the face of it, seem to be subject to the CPPA. However, as we have noted in previous publications, donors, clients and other stakeholders generally expect charities and not-for-profits to safeguard their personal information, protect it from misuse, and be transparent and accountable for how it is used. Under PIPEDA, even in situations in which they are not subject to the legislation itself, charities and not-for-profits are able to refer to the ten fair information principles that are listed in its Schedule 1 as best practices and guidelines for them to follow in handling personal information. Bill C-11 would have the effect of repealing Schedule 1 and, if they are not caught by the legislation, leaving charities and not-for-profits with no guidance around appropriate privacy practices.

It is unfortunate that the CPPA creates uncertainty by failing to address this important sector. Other jurisdictions have chosen to move forward differently, including the European Union’s *General Data Protection Regulation*, the British Columbia *Personal Information Protection Act*, and the Alberta

³ Bill C-11, *supra* note 1, Part 1, cl 2, *Consumer Privacy and Protection Act*, section 2.

⁴ PIPEDA, *supra* note 2, subsection 2(1).

Personal Information Protection Act, all of which apply to charities and not-for-profits. Similarly, as discussed in the [August 2020 Charity & NFP Law Update](#), Ontario launched consultations to improve the province's privacy legislation, including how to "expand the scope and application of the law to include non-commercial organizations, including not-for-profits, charities, trade unions and political parties". As Bill C-11 proceeds through the legislative process, it is to be hoped that there will be additional clarity on this issue.

It should be noted that any entity, including one to which the CPPA does not apply, may apply to the Privacy Commissioner for approval of a code of practice or certification program that provides for substantially the same or greater protection of personal information as some or all of the protection provided under the proposed legislation. Charities and not-for-profits that wish to have certainty about which privacy rules and procedures apply to them or to effectively manage their legal and reputational liability with respect to personal information, may wish to consider applying to the Privacy Commissioner for approval of a code of practice or certification program.

D. CONCLUSION

IF BILL C-11 is passed, charities and not-for profits will need to work with their legal counsel to review their privacy policies and practices and determine what steps to take, if any, to ensure compliance.