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**THE 25TH ANNUAL CHURCH &
CHARITY LAW SEMINAR
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CRITICAL PRIVACY LAW UPDATE

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INTRODUCTION

- Significant developments in privacy law in 2018
- Important changes both globally and in Canada that:
 - Could change how churches, charities and NFPs in Canada operate; and
 - Should change how they understand their obligations around privacy, transparency and accountability
- Growing global emphasis on privacy and increasing stakeholder awareness and expectations that churches, charities and NFPs must take into account
- The following is a very brief overview

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1. Facebook and Cambridge Analytica

- Facebook allowed 87 million users' personal information ("PI") to be improperly accessed and misused by Cambridge Analytica for political purposes
- Facebook failed to safeguard PI and was not transparent about how it allowed third parties to harvest data on its platform
- Facebook's reputation has been damaged, it was fined and Cambridge Analytica and its parent company have shut down
- Has led to a larger global concern about whether people can trust organizations with their PI

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2. The General Data Protection Regulation ("GDPR")

- The GDPR came into force on May 25, 2018 and harmonizes data protection and privacy laws across all EU jurisdictions
- GDPR strengthens and enhances data protection rights for individuals and imposes strict requirements on organizations engaged in data "processing" - any operation performed on personal data including collection, use, disclosure or storage
- Organizations to which the GDPR applies must comply or face severe penalties

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- Why should churches, charities and NFPs in Canada care about the GDPR?
- GDPR applies to organizations not established in the EU if they process personal data of EU residents to offer them goods or services (whether or not a fee is charged) or if they monitor the behaviour of EU residents within the EU
- Merely having a website accessible in the EU will not constitute "offering goods or services." It must be apparent that the organization "envisages services to data subjects" in the EU

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- Factors include offering services in a language or currency of a member state or mentioning users who are in the EU
- Monitoring behaviour of EU residents while in the EU - any organization using permanent cookies on its website will be subject to the GDPR if it has users in the EU
- Failure to comply with GDPR can lead to fines of 4% of worldwide turnover or €20 million, whichever is higher
- If you think your church, charity or NFP may be subject to the GDPR, obtain legal advice

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3. Mandatory Breach Reporting

- On November 1, 2018, new breach notification, reporting and recordkeeping obligations came into force under the Personal Information Protection and Electronic Documents Act ("PIPEDA") and accompanying regulations
- Must report breaches to the Office of the Privacy Commissioner of Canada ("OPC") and notify affected individual (and possibly third parties) when:
 - An organization experiences a **"breach of security safeguards"** involving PI under its control
 - If it is reasonable in the circumstances to believe that the breach creates a **"real risk of significant harm"** to an individual ("RROSH")

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- "Breach of security safeguards" means loss of, unauthorized access to or unauthorized disclosure of PI
- "Significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property
- Relevant factors in determining whether a breach of security safeguards creates a RROSH include:
 - The sensitivity of the PI
 - The probability of misuse of the PI
 - Any other prescribed factor (none so far)

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- Obligations when a breach creates a RROSH:
 - Report the breach to the OPC;
 - Notify the affected individual
 - Notify any third party (e.g. the police, bank, credit reporting agency) that may be able to reduce or mitigate the harm
- Must retain records of all breaches for 24 months regardless of materiality
- Churches, charities and NFPs should not assume they are exempt from PIPEDA - what constitutes a commercial activity will vary with the facts of each case
- Churches, charities and NFPs should consider voluntary compliance given increasing stakeholder awareness and expectations around privacy, transparency and accountability

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4. New OPC Guidelines

- In 2018 OPC published two new guidance documents to improve compliance with privacy obligations:
 - "Guidelines for obtaining meaningful consent" – effective January 1, 2019 ("Consent Guidance")
 - "Guidance on inappropriate data practices" – effective July 1, 2018 ("Data Guidance")
- Consent Guidance sets out seven principles to guide organizations in their consent processes, including:
 - Provide information about privacy in a clear, comprehensive, understandable and accessible manner
 - Allow individuals to control the amount and the timing of detail they receive – e.g. layered format
 - Use innovative and interactive forms and tools to obtain consent

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- Data Guidance identifies a series of principles to protect individuals from inappropriate data practices
- Only collect, use or disclose PI for purposes that a reasonable person would consider appropriate in the circumstances (as per s.5(3) of PIPEDA)
- No-Go Zones, including collection, use or disclosure that is unlawful, unethical or likely to cause harm
- Churches, charities and NFPs should not assume they are exempt from PIPEDA
- These are best practices regarding consent and appropriate data practices in Canada - churches, charities and NFPs should adhere on a voluntary basis

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5. The US-Mexico-Canada Agreement ("USMCA")

- Chapter 19, "Digital Trade", deals with protection of PI, cross-border transfers of PI and data localization
- Underlying theme of privacy protections as potential barriers to trade runs throughout Chapter 19
- Requirement that each party must have a legal framework that protects PI of users of digital trade and key principles that should be included in a party's legal framework – but very low threshold for compliance
- Highlight on two specific provisions:
 - Article 19.11 - forbids a party from prohibiting or restricting the cross-border transfer of information, except in limited circumstances
 - Problem – Inconsistent with provisions in Alberta PIPA and Quebec Private Sector Privacy Act

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- Also inconsistent with GDPR, 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
- Data transfer restrictions are used when there are concerns about the level of protection personal information will receive when transferred outside national boundaries
- Article 19.12 - the "data localization" provision, prohibits a party from requiring companies to use or locate computing facilities in its territory as a condition of doing business there
 - Problem - Inconsistent with BC FIPPA, Nova Scotia PIIDPA, Federal Bank Act, which all require certain types of information to be stored in Canada

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- BC Freedom of Information and Privacy Association states that the USMCA conflicts with existing provincial legislation and puts the privacy of British Columbians at risk
- Canada Revenue Agency (CRA) requires Canadian registered charities to keep their books and records at their Canadian address – Article 19.12 could make it more difficult for them to store books and records on the cloud as it is less likely that cloud service providers will have computing facilities located in Canada


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CONCLUSION

- There is a growing global emphasis on and regulation of privacy as well as increasing stakeholder awareness and expectations
- Churches, charities and NFPs in Canada should move toward alignment with the new regulations and guidances to:
 - Ensure that they are compliant where applicable; and
 - Meet stakeholder expectations around privacy, transparency and accountability
- The stakes are high - possible reputational damage, loss of stakeholder confidence and possible fines and penalties

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