



Canadian Society of
Association Executives
National
Conference
2014

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AGENDA: EMPLOYMENT AND CORPORATE LAW UPDATE

- PRIVACY & SOCIAL MEDIA ISSUES IN THE WORKPLACE
- NEW LEAVES OF ABSENCE UNDER THE ONTARIO *EMPLOYMENT STANDARDS ACT, 2000*
- ACCOMMODATION ON THE BASIS OF FAMILY STATUS
- CNCA – I’VE CONTINUED – WHAT NOW?
- ONCA – STATUS UPDATE
- BC SOCIETIES ACT WHITE PAPER
- TELEMARKETING AND TRADE MARKS
- CASL – WHAT’S NEW IN THE LAND OF ANTI-SPAM

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We will start with some employment law!



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Privacy and Social Media Issues in the Workplace

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Privacy in the Workplace: Competing Concerns

- **Employee concerns = privacy**
- **Employer concerns**
 - Effect on productivity
 - Harassment
 - Employer liability for online defamation, copyright or trademark infringement
 - Background checks
 - Human rights and accommodation issues
 - Reputational concerns
 - Work culture

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Legislative & Regulatory Overview

PIPEDA

- Federally regulated employment (Banks, Airlines, Railroads etc.)
- Provincially-regulated private sector entities other than British Columbia, Alberta and Quebec, except personal information collected in the employment context

British Columbia, Alberta and Quebec

- Provincial legislation applying to employment and employee privacy
- *Quebec Charter and Civil Code*

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Rest of Canada

- No privacy legislation governing employee privacy *per se* but **torts created by statute** in British Columbia, Saskatchewan, Newfoundland and Labrador
- In 2013, new **common law tort in Ontario** recognized;
- In 2013, B.C. Supreme Court specifically declined to recognize a common law privacy tort in B.C.

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A note on Charities and Not-for-Profit Organizations

- PIPEDA defines a “commercial activity” as:
- “any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.”
- Organizations that operate as charities or non-profits are not subject to PIPEDA at all as long as they do not engage in a “commercial activity”.
- PIPEDA applies to the collection of personal information from employees of federal works, it does not apply to the collection of personal information from employees of provincially-regulated private works.
- Whether or not PIPEDA applies to a particular charity or not-for-profit would depend on the nature of the organization and the activity during which it is collecting personal information.

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A note on Charities and Not-for-Profit Organizations

- **British Columbia:**
- the *Personal information Protection Act* applies to private sector provincially regulated organizations, including not-for-profits and charities and the collection of personal information from their employees.
- **Alberta:**
- the *Personal Information Protection Act* applies to private sector provincially regulated organizations. It applies to not-for-profits only when they collect personal information in the course of a “commercial activity”
- **Quebec:**
- An *Act Respecting the Protection of Personal Information in the Private Sector* applies to collection, use and disclosure of personal information for all activities, not just commercial activities, and applies to all activities of charities and not-for-profits.

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Supreme Court – R. v. Cole

The Facts

- Computer science teacher
- School issued laptop computer
- Policy said **personal use permitted, e-mails private; stated that “all data and messages” employer’s property**
- Technician performed remote maintenance due to unusual activity relating to Cole’s laptop
- Technician found a hidden folder
- Hidden folder contained nude photographs of a female student and nude pictures of Cole’s wife



Supreme Court – R. v. Cole

- Technician and principal copied the contents of Cole’s computer; police took envelope of photographs and mirror image of laptop - no warrant
- Cole charged with child pornography and fraudulently obtaining information
- Court decided whether evidence obtained by police violated Cole’s *Charter* rights
- **One of the key issues before the court was whether Cole had a reasonable expectation of privacy in his personal data on the computer**



Supreme Court of Canada

“Canadians may reasonably expect privacy in the information contained on their own *personal* computers. ...the same applies to information on *work* computers, at least where personal use is permitted or reasonably expected.”

While workplace policies and practices may diminish an individual’s expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely.



New Ontario Common Law Tort of "Intrusion upon Seclusion"

- On January 18, 2012 the Ontario Court of Appeal held that there is a new tort of "intrusion upon seclusion":

"One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the privacy would be highly offensive to a reasonable person."

- *Jones v Tsige* [2012] ONCA 32



Facts in *Jones v. Tsige*

- Defendant employee surreptitiously viewed bank records of another employee 174 times over 4 years
- When plaintiff discovered, advised employer, who suspended defendant for a week w/o pay for breach of policy
- Plaintiff filed lawsuit claiming her privacy interest in her confidential banking information had been "irreversibly destroyed"



Basis for lawsuit – *Jones v. Tsige*

- Plaintiff filed lawsuit claiming her privacy interest in her confidential banking information had been "irreversibly destroyed"
- Motion court dismissed the claim on basis that Ontario law didn't recognize tort of privacy
- Court of Appeal held it was appropriate for the court to recognize the new right of action for intrusion upon seclusion



New Privacy Tort

- **Elements of new tort:**
 - Defendant's conduct must be intentional or reckless;
 - Defendant must have invaded the plaintiff's private affairs or concerns without lawful jurisdiction; and
 - A reasonable person would regard the invasion as highly offensive

- **Proof of harm to a recognized economic interest not an element of the cause of action and, so far, damages are modest**

- **Plaintiff in *Jones v. Tsige* awarded \$10,000**



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Impact of New Tort

- **Casino Niagara v. OPSEU**
 - Grievor required accommodation on the basis of mental disability. Union argued that, based on *Jones v. Tsige*, employer's request for medical information was an unjustified invasion of privacy.
 - Arbitrator agreed that *Jones v. Tsige* reinforces the premium value of privacy in Canadian society but does not posit an absolute right to privacy:
 - It remains the case that **an employer is entitled to request and receive an employee's confidential medical or other information** to the extent necessary to answer legitimate employment related concerns, or to fulfil its obligations under the collective agreement or legislation, including the human rights or health and safety legislation (for example) . . . Or some other legitimate concern . . . **but only as necessary for that legitimate concern.**



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Key Considerations for Employers

- Be aware of the applicable privacy legislation, collective agreement provisions etc.
- Have use of technology policies and procedures in place
- Ensure policies:
 - Are explicit as to what activities are permitted, and which are forbidden; best to prohibit personal use
 - Are well known and understood by employees
 - Are consistent with current actual practices permitted by the employer – "operational realities"
 - Are clear on how the employer intends to monitor system behaviour

We can help you with policies!



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Impact of Social Media

- 92% of employers are using or planning to use social networks for recruiting this year
- 73% of recruiters will check social media profile
 - 93% of recruiters use LinkedIn
 - 66% of recruiters use Facebook
 - 54% of recruiters use Twitter
- **Risk of human rights complaint** if an employer obtains information about an employee's age, ethnic/racial background, religion, marital or family status, sexual orientation, political associations, etc.



The Use of Social Media in Discipline Cases in Ontario

Ornge Helicopters: The grievor was a flight planner with Ornge, an air ambulance service. He was dismissed after he posted a comment on a public internet message board about an injured passenger being transferred to hospital and for downloading pornography onto the employer's computer; discharge was held excessive and suspension without pay was instituted

Credit Valley Hospital (2012): The grievor was discharged after he posted pictures of the scene of a suicide in the Hospital parking lot on Facebook in breach of the employer's confidentiality policy; discharge upheld

Canada Post (Ponak Grievance) (2012): postal clerk was dismissed after her employer discovered her Facebook posts, made over the course of more than one month, that contained offensive, vulgar and threatening material primarily directed at her supervisors; discharge upheld; the arbitrator accepted, that she had been unaware that her postings were available to the public, this did not relieve her from the responsibility for what she wrote.



Key Considerations for Employers

- Have use of social media policies and procedures in place
- Ensure policies:
 - Are explicit as to what activities are permitted, and which are forbidden
 - Are well known and understood by employees
 - Specifically provide that breach of policies may result in discipline, up to and including termination of employment.

We can help you with policies!



**New Ontario *Employment Standards Act, 2000*
Leaves of Absence**

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**New Leaves of Absence under the
Ontario *Employment Standards Act, 2000***

ESA recently amended to provide for the following three leaves, which employers must make available to employees **effective October 29, 2014**:

- **Family Caregiver Leave**
- **Critically Ill Child Care Leave**
- **Crime-Related Child Death or Disappearance Leave**

- In part a response to Employment Insurance (EI) special benefits for Parents of Critically Ill Children (PCIC), available since June 2013, during leave to take care of a critically ill child.
- In part **catching up** to some other provinces

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Family Caregiver Leave

- All employees are entitled to up to eight (8) weeks of unpaid Family Caregiver Leave in each calendar year to care for any of the following specified relatives:
 - The employee's spouse.
 - A parent of the employee or the employee's spouse.
 - A child of the employee or the employee's spouse.
 - A grandparent or grandchild of the employee or the employee's spouse.
 - The spouse of a child of the employee.
 - The employee's brother or sister.
 - A relative of the employee who is dependent on the employee for care or assistance.
- The scope of this leave also includes step-children, step-parents and foster children.

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Family Caregiver Leave

- The weeks of leave must be taken in full weeks, but do not have to be taken consecutively or in a single block.
- Employees must provide a certificate from a “qualified health practitioner” stating that the specified relative has a “serious medical condition”. The term “serious medical condition” is not defined in the ESA, except that it can be chronic or episodic.
- A “qualified health practitioner” means:
“a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided”



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Family Caregiver Leave

- This means that an employee could provide a certificate obtained outside Ontario, which could be difficult for employers to verify.
- Employees who wish to take leave must advise the employer in writing that they wish to take Family Caregiver Leave.
- An employee may take the leave before providing notice, and then advise the employer “as soon as possible”. Employees must provide a copy of the certificate “as soon as possible”, upon request from the employer.



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Critically Ill Child Care Leave

- Employees with at least six consecutive months of service may qualify for up to 37 weeks of unpaid Critically Ill Child Care Leave.
- Upon request from the employer, an employee must provide a copy of a certificate from a “qualified health practitioner” (defined in the same way as under Family Caregiver Leave) that states:
 - a) The child is critically ill and requires care or support of one or more parents and
 - b) The period during which the child requires care or support.



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Critically Ill Child Care Leave

- The child must be under 18 years of age
- "critically ill" is defined as "...a child whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury."
- The terms "baseline state of health" and "significantly changed" are not defined, and it remains to be seen how they will be applied in Ontario.
- The employee notice requirements are similar to those for Family Caregiver Leave, i.e. providing the employer with notice and a copy of the certificate upon request "as soon as possible." Additionally, the employee must provide a "written plan" that indicates the weeks in which he or she will take the leave.



Crime-Related Child Death or Disappearance Leave

- Employees with at least six consecutive months of service may qualify for an unpaid Crime-Related Child Death or Disappearance Leave.
- "Crime" means an offence under the Canada Criminal Code, and "child" means a person under 18 years of age.
- An employee can take up to 104 weeks in the event of a crime-related death of the employee's child, step-child or foster child.
- A "crime-related death" means the employee's child, step-child or foster child has died and it is "probable, considering the circumstances, that the child died as a result of a crime."



Crime-Related Child Death or Disappearance Leave

- An employee can take up to 52 weeks in the event of a crime-related disappearance of employee's child, step-child or foster child.
- A "crime-related disappearance" means the child has disappeared and it is "probable, considering the circumstances, that the child disappeared as a result of a crime."
- The leave ends after 104/52 weeks, or the day on which it "no longer seems probable" that the child died or disappeared as the result of a crime.
- An employee is not eligible for this type of leave if he or she is charged with a crime or if it is probable, considering the circumstances, that the child was a party to the crime.



Crime-Related Child Death or Disappearance Leave

- Employees must advise the employer in writing that they wish to take the leave and provide a "written plan" that indicates the weeks in which he or she will take the leave. However, an employee may take the leave, and then advise the employer and provide the written plan "as soon as possible".
- An employer may require an employee to provide "evidence reasonable in the circumstances" to entitlement to leave. It is not clear what evidence could be requested in these circumstances, and what would be considered "reasonable".
- Given the possibility that circumstances (and eligibility under the ESA) may change as police investigate the death or disappearance of the child, the Company may wish to periodically obtain information to confirm an employee's continued eligibility for the leave of absence.



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Similar Leaves in Some Other Provinces

- **Manitoba:**
 - Leave Related to the Death or Disappearance of a Child
 - Leave Related to Critical Illness of a Child
 - Compassionate Care Leave
- **Quebec:**
 - Disappearance of a Minor Child Leave
 - Death of a Spouse or Child as a Result of a Crime
 - Family Care Leave
- **Alberta:**
 - Compassionate Care Leave (NEW - effective February 1, 2014)
- **British Columbia**
 - Compassionate Care Leave
 - Family Responsibility Leave



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Accommodation on the Basis of Family Status



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Accommodation on the Basis of Family Status

- Both the Ontario *Human Rights Code* and the Federal *Human Rights Act* provide that every person has the right to be free from discrimination in employment on the ground of family status
- Human rights legislation across most provinces prohibits discrimination on the basis of family status
- Ontario *Code*, s. 10(1)
 - “family status” means the status of being in a parent and child relationship
- Federal *Act*
 - No definition



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Johnstone v. Canada (Border Services Agency) (FCA, 2014)

Johnstone v. Canada (Border Services Agency) (FCA, 2014)

- Johnstone, worked as a full time border services officer with the Canadian Border Services Agency (“CBSA”) on rotating shifts. She requested full time employment working fixed day shifts that would allow her to arrange childcare for her young children. Johnstone and her husband’s schedules overlapped 60% of the time they worked, leaving them unable to provide necessary childcare on a reliable basis.
- CBSA policy allowed fixed day shifts for employees with religious or medical accommodation needs but otherwise limited fixed day shifts as requested by Johnstone to part time employees; part time employees were not eligible for the same benefits as full time employees.
- The Canadian Human Rights Tribunal held that the CBSA discriminated against Johnstone; a judicial review and appeal of the Tribunal’s decision followed.



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Johnstone v. Canada (Border Services Agency) (FCA, 2014)

The Federal Court of Appeal:

- Confirmed family status **incorporates parental obligations** such as childcare obligations
- Set out a **test** for making out a **prima facie case of workplace discrimination** on the prohibited ground of family status resulting from a childcare obligation. The employee must show:
 - (i) That a child is under his or her care and supervision;
 - (ii) That the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice;
 - (iii) That he or she has made reasonable efforts to meet that childcare obligation through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
 - (iv) That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.



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Johnstone v. Canada (Border Services Agency) (FCA, 2014)

- **Johnstone met the test:** she had made serious but unsuccessful efforts to secure reasonable alternative childcare arrangements and Johnstone's regular work schedule interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligations.
- CBSA engaged in a discriminatory practice – established no defence that the practice was a *bona fide* occupational requirement.
- the CBSA did not refuse to provide static shifts to Johnstone on a full-time basis on the ground that this would cause it undue hardship. Rather, it refused the proposed schedule on the ground that it had no legal duty to accommodate Ms. Johnstone's childcare responsibilities.



Family Status – Other Provinces

- **Johnstone TEST** adopted by:
- Human Rights Tribunal of Ontario
Wing v. Niagara Falls Hydro Holding Corporation, 2014
- Human Rights Tribunal of Alberta
• *Clark v. Bow Valley College, 2014*



And now it is time for some corporate law!

- CNCA – oops, we have continued yet
- CNCA – we've continued, now what?
- ONCA – status update
- BC Societies Act – proposed changes
- Trade-marks
- Telemarketing
- CASL



CNCA: next steps



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CNCA: OMG! We haven't transitioned yet

- A reminder that corporations incorporated under the *Canada Corporations Act* must continue under the *Canada Not-for-profit Corporations Act*
- October 17th deadline has passed
- Corporations Canada has started taking steps to dissolve corporations that have not transitioned
- Dissolution is not automatic
- If you get a Pending Dissolution Notice – pay attention!!

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CNCA: OMG continued (excuse the pun)

- Corporations dealing with last minute transitions may want to do the “easy” part first and then deal with the more difficult parts after continuance
- There are some issues to avoid if you are still worrying about continuing – happy to discuss
- And there are special issues for charities...

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CNCA: You've transitioned – Now what?

- **Maintaining corporate records:**
 - All articles of the Corporation*#
 - Minutes of meetings/Resolutions of members and committees of members*#
 - Minutes of meetings/Resolutions of directors and committees of directors
 - Debt obligation register (if relevant)*
 - Directors register*#
 - Officers register*#
 - Members register*
- * these must be open to inspection by the directors at all reasonable times and if requested the corporation must provide the director with any extract of the records free of charge
- # a member, a member's personal representative and a creditor, such as a landlord, may examine these records and may, on payment of a reasonable fee, obtain copies of these records during usual business hours. Members are also entitled to a copy of the articles and by-laws. Additional requirements must be met before a member may examine the list of members.



CNCA: You've transitioned – Now what?

- **Accounting records must be prepared and maintained (not generally available for review by members; but financial statements are)**
- **You will have reporting obligations:**
 - Filing an annual return every year within 60 days of the anniversary date
 - Filing changes to registered office address
 - Reporting changes regarding directors – new directors; resigning directors; changes in addresses of directors
- **Soliciting corporations must filing copies of financial statements and reports of the public accountant every year not less than 21 days before each annual meeting or asap after a written resolution**



Quick reminder on soliciting corporations

- Any corporation that receives more than \$10,000 in public money*
- Do calculation at year end and become/cease to be a soliciting corporation at the date of the AGM following the year end
- Once have status, keep it for three years
- Then must have a minimum of three directors, must include a specified dissolution clause, and must not have a unanimous shareholders agreement; also impacts on the level of financial review required and financial statements must be filed
- (and keep in mind the "designated"/"non-designated" corporation distinction)



CNCA: You've transitioned – Now what?

- **Amend and file articles if changes are made:**
 - re name
 - province or territory of registered office
 - Fixed number or range of directors
 - Classes of members
 - Restrictions on activities
 - Statement of purpose
 - Statement regarding distribution of property
 - Anything else
- **Remember to send in copies of by-laws within 12 months of confirmation by members**

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CNCA: You've transitioned – Now what?

- **AGM to be held within 6 months of financial year end**
- **But it is possible to make an application to extend the time for calling an annual meeting of meetings, "if the Director reasonably believes that the members will not be prejudiced"**
- **(and exemptions have been granted.)**

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Ontario Not-for-Profit Corporations Act, 2010 ("ONCA") Status Report

- **Not expected to come into force before January, 2016**
 - Some technical amendments to the legislation will need to be passed by the Legislative Assembly
 - Technology upgrades are also required
- **3 year transition period once in force**



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BC Societies Act

- **Approx. 27,000 BC Societies**
- **The BC Ministry of Finance is in the process of developing a new *Societies Act* – this is not law yet!**
- **Societies will continue to have constitutions, bylaws and restrictions on share capital and distribution of assets**
- **Fundamental accountability provisions maintained for most organizations (e.g., minimum of three directors, public access to financial statements) – but see next slide around “member funded” organizations**



BC Societies Act

- **Will distinguish member funded societies from those that rely on public donations/government funding**
- **Member funded organizations will have fewer accountability measures e.g., only need one director and need not provide access to financial statements**
- **Would have online filing system – “every society would have a perennially updated and searchable set of bylaws”**



BC Societies Act

From the White Paper on the proposed changes:

“Other key proposals in the draft legislation include the following:

- streamlining processes, by providing for incorporation by one person (section 12) and allowing indemnification and restoration without court order (sections 61 and 155);
- clarifying record-keeping and access to records (sections 19 to 27);
- setting out default governance provisions (Part 6);
- rationalizing distribution rules to prevent assets from being improperly disbursed (section 4) and clarifying directors’ liability for improper payments (section 59);
- providing greater protections for directors, who are often volunteers, including court-ordered relief in legal proceedings (section 103) and a defence for reasonable reliance on expert reports (section 60);
- clarifying that bylaw authorization is needed if directors are to be paid for their services (section 45);
- enhancing accountability by requiring disclosure of loans or other financial assistance (section 36);
- giving societies more flexibility to meet changing needs by enabling **unalterable** provisions in a society’s bylaws to be altered by special resolution (section 16).”



Official Marks: A reminder on being a public authority

- Entities that are “public authorities” under the Trade-marks Act can get special protection
- Act doesn’t define the terms but there is case law: need to be Canadian, subject to significant control by a level of Canadian government and activities that benefit the public
- Recent case sheds some light on how these are interpreted and some hints for how to protect

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In other trade-mark news

- Canada is moving toward implementation of provisions set out in the *Economic Action Plan 2014 Act* which will bring significant changes to the Canadian *Trade-Marks Act*. The specific date upon which the changes will come into force is unknown, but expected to fall in late 2015 or early 2016.
- Trademark registration renewal practice before the Canadian Intellectual Property Office (“CIPO”) will provide that:
- Renewal can only be requested 6 months before a registration’s expiry date and up to 6 months after that expiry date.
 - Registrations issuing after implementation will have 10 year terms and will be renewable for subsequent 10 year terms.
 - Existing registrations due for renewal prior to the implementation date will be renewed for 15 years as permitted under the current provisions of the *Trade-Marks Act*.
 - Registrations issued before implementation that are due for renewal after the implementation date will be renewed for 10 years.

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Do you do any telemarketing?

- CRTC recently fined a telemarketing company \$250,000 under the Unsolicited Telecommunications Rules
- Company was calling and soliciting donations of used items
- Important to remember that before placing telemarketing calls, you should consider whether and to what extent the rules apply
- They can be found at <http://www.crtc.gc.ca/eng/trules-reglest.htm>.
- E.g.: calls can be made during permitted time frame only

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A few notes for Charities

- Recent rule changes have reduced significantly the number of foreign charities that potentially qualify for qualified donee status: current list is at <http://www.crtc.gc.ca/eng/trules-reglest.htm>.
- The CRA has issued guidelines on the "ineligible individual" rules under the Income Tax Act
- Generally, an individual is an "ineligible individual" if he or she:
 - has been convicted of an offence (criminal or non-criminal) that is related to financial dishonesty or is relevant to the operation of the organization, such as fraud, forgery or the misappropriation of funds; or
 - was connected to an organization whose registration was revoked for a serious breach of the registration requirements, such as the issuance of fraudulent receipts or participating in abusive gift tax shelters, and the connection is through holding a position:
 - as a director, trustee, officer, or like official with the revoked organization;
 - of control or management of the revoked organization (directly or indirectly); or
 - as a promoter of the tax shelter that caused the revocation of registration

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A CASL update

- Most provisions of CASL came into force on July 1st
- Provisions regarding installation of computer programs and the alteration of transmission data in an electronic message come into force on January 15th 2015
- The provisions are aimed at viruses, malware and "phishing" – but they are broad and may affect anyone who provides software, mobile apps or other computer programs for purchase or download



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Thank You For Your Time

QUESTIONS?

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BLG's Charities and Not-for-profit group has a blog:
<http://blog.blg.com/nfp/default.aspx>

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