

MEMORANDUM

To: Clinton Giustra Enterprise Partnership (Canada)
From: Terrance Carter, Ryan Prendergast and Sepal Bonni
File No.: 150385
File Name: Legal Opinion on Disclosure of Donor List
Date: May 8, 2015

“PRIVATE & CONFIDENTIAL”

A. PURPOSE AND LIMITATION OF OPINION

We confirm that our office has been retained by the Clinton Giustra Enterprise Partnership (Canada) (“CGEP (Canada)”) to provide a legal opinion concerning whether CGEP (Canada) can release personal information concerning its donors without their consent. The following constitutes our legal opinion in this regard.

This opinion is based upon our understanding of the facts we have been provided with to date. If our understanding of the facts is not correct or if additional or different facts become known at a subsequent time, the comments and recommendations contained in this opinion may need to be modified accordingly.

B. SUMMARY OF FACTS

The following is a brief summary of the facts that were presented to our office, upon which facts this opinion has been prepared.

1. CGEP (Canada) was incorporated as a non-share capital corporation under the *Canada Corporations Act* by letters patent dated August 30, 2007 under the name “Clinton Giustra Sustainable Growth Initiative (Canada)”.
2. On July 17, 2013, CGEP (Canada) amended its corporate name by supplementary letters patent under the *Canada Corporations Act* to its current name, i.e., “Clinton Giustra Enterprise Partnership (Canada)”.
3. On July 10, 2014, CGEP (Canada) continued under the *Canada Not-for-profit Corporations Act* by articles of continuance. The articles of continuance note that the location of the registered office of CGEP (Canada) is in British Columbia. The current registered office of CGEP (Canada) is located in the City of Vancouver.

4. The charitable purposes of CGEP (Canada)¹ are:
 - a) To alleviate poverty in developing nations by creating and providing employment training and education programs for low income persons;
 - b) To relieve poverty in developing nations by providing education to governments, non-government organizations and the public on the improvement and/or creation of a basic infrastructure, including road construction and the improvement of water quality;
 - c) To improve health care in developing nations by building health clinics and providing training and education to doctors and other health care professionals;
 - d) To advance education in developing nations by building schools and providing training and education for teachers;
 - e) To improve the environment in developing nations by increasing the public's understanding of the environment, its importance and environmental responsibility through educational programs such as courses, seminars, conferences and meetings and by collecting and disseminating information on that topic;
 - f) To receive and maintain a fund and/or funds and to apply all or part of the principal and income therefrom, from time to time, to charitable organizations that are also registered charities under the *Income Tax Act* (Canada).
5. On December 7, 2007, CGEP (Canada) received a notification of registration from Canada Revenue Agency ("CRA") that it is a registered charity under the *Income Tax Act* (Canada) ("ITA"). The effective date of registration was December 5, 2007.
6. CRA administratively designated CGEP (Canada) as a "charitable organization" under the ITA.
7. On January 1, 2008, CGEP (Canada) entered into an agency agreement with the William J. Clinton Foundation in the United States (now the Bill, Hillary, and Chelsea Clinton Foundation (the "Clinton Foundation"). It is our understanding that the agency relationship was entered into between CGEP (Canada) and the Clinton Foundation as a means for CGEP (Canada) to appoint the Clinton Foundation as its intermediary in order for the Clinton Foundation to carry out the charitable activities of CGEP (Canada) on its behalf. In addition, at the time the agency agreement was entered into, the Clinton Foundation was not a "qualified donee"² for income tax purposes in Canada, and due to the changing nature of foreign charitable organizations that have received a gift from Her Majesty in right of Canada maintaining their status, the Clinton Foundation has not been a qualified donee on a consistent basis.

¹ We have not reproduced the balance of purposes annexed to the articles of continuance as they are power clauses as opposed to charitable purposes.

² "Qualified donees" refers to organizations in Canada or foreign organizations that are exempt from Canadian income tax and can provide official donation receipts for income tax purposes. These include: registered housing corporations; registered municipalities in Canada; registered municipal or public bodies performing a function of government in Canada; prescribed universities outside of Canada, registered foreign organizations that have received gifts from the Canadian government; registered charities; registered Canadian amateur athletic associations; and Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations.

8. On December 12, 2008, the Clinton Foundation entered into a memorandum of understanding with the U.S. Office of the President-Elect (the “MOU”). Under article II of the MOU, the Clinton Foundation undertook to “publish its contributors” during the year 2008, and “during any service by Senator Clinton as Secretary of State, the Foundation will publish annually the names of the new contributors.”
9. CGEP (Canada) has solicited donations from various donors in (Canada) for the purpose of conducting its charitable activities through its agency agreement with the Clinton Foundation. More recently, CGEP (Canada) has been accused of not complying with the MOU even though it does not appear to be party to it by not disclosing the names of contributors to CGEP (Canada)(the “Donor List”) to the public.
10. You have asked for our opinion concerning whether or not CGEP (Canada) can disclose the names of its donors contained in the Donor List to the public without first obtaining the consent of all the donors.

C. SUMMARY OPINION

In accordance with the analysis and the terms and limitations contained in this memorandum, it is our opinion that in consideration of all applicable law, CGEP (Canada) should not disclose the names of donors in the Donor List to the public without obtaining consent from the donors.

The question of whether CGEP (Canada) can disclose the names of its donors to the public without first obtaining the consent of the donors is dependent upon a careful consideration of overlapping federal and provincial laws. The collection, use, and disclosure of personal information in Canada, which would include the names and amounts of the contributions made by the donors on the Donor List, is generally subject to federal and provincial legislation governing privacy. While CGEP (Canada) is also a registered charity within Canada, federal taxation laws dealing with registered charities, as well as provincial common law dealing with charitable property in general (while relevant) do not address whether CGEP (Canada) can disclose the names of its donors contained in the Donor List to the public without consent.

Instead, since CGEP (Canada) operates and has its registered office in the Province of British Columbia, B.C.’s *Personal Information Protection Act* (PIPA) would be applicable in determining whether CGEP (Canada) can disclose the Donor List to the public without consent. PIPA generally applies to all organizations (including not for profit organizations) and to all personal information held by organizations, and further requires knowledge and consent of an individual prior to the use, collection or disclosure of personal information. As such, and pursuant to PIPA, CGEP (Canada) should not disclose the Donor List to the public without the prior consent of the donors.

While the federal privacy legislation in the form of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) may have application to the extent that CGEP (Canada) collected personal information in other provinces in Canada which have not enacted provincial privacy legislation, it is generally recommended that where organizations in Canada face overlapping obligations under privacy legislation, the more stringent legislation should be complied with. As a result, in determining how CGEP (Canada) uses personal information collected outside of B.C., it is recommended that CGEP (Canada)

comply with the privacy laws as applicable in B.C. under PIPA with regard to all donors across Canada, not just those located in British Columbia. A further consideration is that several jurisdictions in Canada have statutorily established causes of action for violations of privacy. As well, the courts in Ontario have recognized a cause of action under the common law for breach of privacy. Whether the release of donor information would be grounds for a cause of action does not appear to have been judicially considered. However, CGEP (Canada) obtaining consent from donors prior to disclosing the Donor List to the public would be an effective means of mitigating against any claim by a donor who reasonably expected that his or her donation to CGEP (Canada) would remain anonymous.

D. ANALYSIS AND OPINION

While the issue of whether CGEP (Canada) can disclose the names of donors may at first glance appear straightforward, when the differing laws at the federal and provincial levels in Canada are taken into consideration, along with the division of powers under the Canadian constitution, a nuanced review is required of federal and provincial laws related to charities, privacy, and the common law in each of the applicable jurisdictions in which CGEP (Canada) raised monies from donors. In determining whether CGEP (Canada) can disclose the names of donors who have made contributions to CGEP (Canada) without their consent, we have reviewed all of the applicable areas of law in order to see how they intersect with regard to the question that we have been asked address.

1. Application of Legislation and Common Law Concerning Charities in Canada

While CRA through the Charities Directorate regulates the ITA with respect to the registration of charities for income tax purposes, the *Constitution Act, 1867* states at section 92 that:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ... The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.³

As such, while CRA federally regulates taxation matters related to charities, the jurisdiction concerning charitable matters falls to the provinces in Canada. With regard to CGEP (Canada), as noted above, its registered office is located in the province of British Columbia, which means CGEP (Canada) is also under the jurisdiction of the Attorney General of British Columbia and the inherent jurisdiction of the provincial courts.⁴ This means that in determining what CGEP (Canada) can or ought to do with the Donor List with respect to the laws governing charities in Canada, it is necessary to look at both the federal legislation under the ITA, and the statutes and common law applicable in the provincial jurisdiction.

³ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted to R.S.C. 1985, App. II, No. 5., at 92.

⁴ See for example, *Vancouver Opera Foundation (Re)*, 2015 BCSC 390 (CanLII) or *Mulgrave School Foundation (Re)*, 2014 BCSC 1900 (CanLII).

a) The Application of the *Income Tax Act* (Canada)

The ITA provides for a registration process under which organizations can apply for registered charity status in Canada. This registration process is administered by CRA’s Charities Directorate for income tax purposes under the ITA.

The ITA governs how CRA officials must protect taxpayer information. Section 241 sets out when CRA officials may be permitted to disclose taxpayer information to other government officials, individual taxpayers or the public. Under freedom of information legislation in Canada, e.g., *Access to Information Act* or the *Privacy Act*, certain taxpayer information held by CRA may be disclosed. With respect to registered charities, subsection 241(3.2) identifies taxpayer information relating to registered charities that may be released to the public.⁵ These are exceptions to the general rule that taxpayer information held by CRA is to be kept confidential except as permitted under the ITA.

While the ITA addresses if and how CRA may disclose taxpayer information, including certain taxpayer information related to registered charities, there is no restriction in the ITA on what, personal or confidential information another taxpayer can disclose, such as personal information held by a registered charity. As such, the ITA has no bearing on the question of whether CGEP (Canada) can disclose the names of donors in the Donor List without first obtaining their consent.

b) The Application of the Common Law

It is well established law in Canada that directors are in a fiduciary relationship with the corporation of the board of which they serve.⁶ Specifically, directors are responsible for all aspects of the corporation’s operations. Overseeing the affairs of the corporation encompasses a broad spectrum of duties, including: ensuring the organization adheres to and carries out the goals of the corporation; setting long-term objectives in accordance with these goals; ensuring financial stability; assessing the corporation’s performance; establishing policies; and being the public face of the corporation.⁷

The common law in Canada has also established that directors of charitable corporations in general have higher fiduciary duties in addition to those normally owed by directors to corporations. In this regard, case law in the Province of Ontario has held that directors of charitable corporations are subject to high fiduciary obligations similar to those of trustees with regard to charitable property.⁸ In the past, the courts in Ontario have held that directors of charitable corporations are akin to quasi-trustees with respect to their relationship to the charitable

⁵ See also Canada Revenue Agency, Guidance CG-008 *Confidentiality – Public Information*, dated August 15, 2011, online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/pley/cgd/cnfdntl-eng.html>.

⁶ *Canadian Aero Service Ltd. v O’Malley*, [1974] SCR 592, [1973] SCJ No 97 (SCC).

⁷ R. Jane Burke-Robertson & Arthur B.C. Drache, *Non-Share Capital Corporations*, loose-leaf, (Toronto: Carswell, 1992) ch 5 at 1-2.

⁸ *Ontario (Public Trustee) v Toronto Humane Society* (1987), 60 OR (2d) 236, 27 ETR 40, (Ont H Ct J).

property of the corporation. Over time, this evolved into the concept that directors are not necessarily similar to trustees, but rather are high fiduciaries with quasi-trustee responsibilities.⁹ While the majority of this law has developed in the Province of Ontario, in our view, case law in other jurisdictions in Canada would not be inconsistent with the law as decided in Ontario on this point.

As a consequence, directors of charitable corporations must ensure that the charitable property of the charitable corporation is used to carry out the purposes of the charity.¹⁰ Specifically, the directors have a positive duty to further the charitable purposes of the charitable corporation, and generally owe a fiduciary duty to the public to use donations for the charitable purposes of the charity.¹¹ While charitable property may refer to the financial resources of a charity, i.e., donations received from the public, for income tax purposes, and at common law, it can also refer to non-financial property, such as intellectual property or human resources, including employee or volunteer time.¹²

As such, to the extent that the donor list of CGEP (Canada) constitutes charitable property, the directors of CGEP (Canada) must make sure that if the Donor List were to be disclosed to the public that doing so would be in the best interest of CGEP (Canada) and would be a means to advance its charitable purpose(s). While there are other factors relevant to the determination of whether the board of CGEP (Canada) can disclose the names of its donors, a primary consideration in doing so would be whether it is a means of furthering the charitable purposes for which CGEP (Canada) was established.

2. The Application of Canadian Privacy Legislation

In Canada, federal privacy legislation in the form of the *Personal Information Protection and Electronic Documents Act* (PIPEDA)¹³ sets national standards for private sector organizations that may collect, use or disclose personal information in the course of commercial activities. Generally speaking, PIPEDA applies to all organizations within Canada in the course of commercial activities. However, PIPEDA also provides that an organization may be exempted from the legislation if it operates entirely within a province that has enacted privacy legislation that is deemed to be substantially similar to PIPEDA. To date, Quebec, British Columbia (B.C.) and Alberta have enacted privacy legislation that has been declared substantially similar to PIPEDA, while other provinces also have substantially similar legislation enacted, but only with respect to personal health information. As such, organizations operating entirely in the

⁹ Ken Goodman, "Fiduciary Considerations Involving Charitable Property" (Paper delivered at the Canadian Bar Association/Ontario Bar Association 2010 Annual Church & Charity Law Seminar, 18 November 2010) at 5.

¹⁰ Ontario Public Guardian and Trustee, "Duties, Responsibilities and Powers of Directors and Trustees of Charities", (9 December 2010) online at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet3.asp>.

¹¹ *Ontario (Public Guardian & Trustee) v. AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170, [2001] O.T.C. 432.

¹² CRA, Summary Policy CPS-R13 *Resources*, June 9, 2003, online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r13-eng.html>, CRA, Questions and Answers about Political Activity, online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/qstns-eng.html>, at A.12.

¹³ SC 2000, c 5.

provinces of Quebec, B.C. and Alberta will find themselves governed by their respective provincial privacy legislation.

The Office of the Privacy Commissioner of Canada (OPC), which oversees compliance with Federal privacy legislation, has also stated that it may be possible for one organization to be subject to both provincial and federal laws. Determining the jurisdictional question of which legislation (provincial or federal) applies is a complex one, and is one that the OPC investigates at the time a complaint is launched, taking into account various factors, such as the location in which the activity complained of takes place in, the location of preparatory activities, the location and residency of the parties involved and location of the contract. The analysis requires a flexible and contextual approach on a case by case basis. As such, federal privacy legislation may be applicable if a donor initiates a complaint in a province that does not have substantially similar privacy legislation, and the OPC determines that it has jurisdiction over the matter. As such, it is very likely that federal and provincial privacy laws are applicable to CGEP (Canada) since the Donor List likely contains the personal information of donors which are residents of various provinces. To this end, if the donor is a resident of Quebec, B.C. or Alberta, the specific provincial legislation applies. However, if the donor is a resident of another province without substantially similar privacy legislation, it is likely that PIPEDA would apply. However, it is important to note that the OPC has stated “organizations faced with this kind of scenario [where more than one law may be applicable] may look at the differences between the laws. [...] If you follow the more stringent requirement all the time, you will very likely comply with both laws.”¹⁴

The federal and various provincial privacy legislation share the same explicitly stated purposes. Further, Alberta’s privacy legislation is very similar to PIPEDA and operates on the same basic premises. Notably, Quebec’s and B.C.’s provincial legislation apply to every organization that collects, uses and discloses personal information, *regardless of whether or not it was for commercial purposes*.

As discussed in further detail below, in order to determine if the CGEP (Canada) Donor List can be disclosed to the public without the consent of the donors, the two most important pieces of relevant privacy legislation to be considered are the federal PIPEDA (which operates on the same basic premise as Alberta’s provincial legislation), and B.C.’s *Personal Information Protection Act*¹⁵ (PIPA) (which operates on the same basic premise as Quebec’s provincial legislation). Since B.C.’s privacy legislation is the most stringent, the recommended approach would be to follow this piece of legislation when CGEP (Canada) uses, collects or discloses personal information.

a) The Application of Provincial Privacy Legislation

The OPC states that if an organization operates internally in a province that has enacted privacy legislation which is deemed to be substantially similar (such as B.C.), the organization must

¹⁴ Office of the Privacy Commissioner of (Canada), “Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia’s *Personal Information Protection Acts*” (2004), online: Government of (Canada) <https://www.priv.gc.ca/resource/fs-fi/02_05_d_26_e.asp>.

¹⁵ SBC 2003, c. 63.

comply with that province's laws.¹⁶ Since CGEP (Canada) operates and has its registered office in B.C., B.C.'s PIPA is applicable in determining whether CGEP (Canada) can disclose the Donor List without consent.

In this regard, PIPA applies to all organizations and to all personal information held by organizations unless PIPA states that it does not apply.¹⁷ To this end, PIPA expressly states that an "organization" includes a not for profit organization.¹⁸ Accordingly, PIPA differs fundamentally from the federal privacy legislation PIPEDA, such that it applies to the entire private sector (subject to limited exceptions) in both commercial and non-commercial transactions. In this regard, CGEP (Canada) is subject to PIPA when it collects, uses and discloses personal information. Accordingly, in order to determine if CGEP (Canada) can disclose the Donor List without obtaining consent from donors, PIPA's requirements must be examined.

Despite the fundamental difference between PIPEDA and PIPA regarding the requirement of commercial activity to trigger the application of the Acts, B.C.'s PIPA does have several similarities to PIPEDA in that it imposes positive obligations on organizations that collect, use or disclose personal information. Similarly to PIPEDA, PIPA requires knowledge and consent of an individual prior to the use, collection or disclosure of personal information.¹⁹ In this regard, according to PIPA, CGEP (Canada) cannot disclose the Donor List without the prior consent of the donors. Since it is evident that CGEP (Canada) must obtain consent of the donors prior to disclosing the Donor List, the next relevant consideration is the form of consent required.

Similar to PIPEDA, the form of consent can be implied, negative (opt-out) or express (opt-in) consent. Determining the form of consent requires consideration of the reasonable expectations of the individual and the sensitivity of the information.²⁰ Regarding the reasonable expectations of the individual, where individuals would not reasonably expect that their information would be used, collected or disclosed in a certain manner, express consent should be obtained. Considering the donor information was originally collected to provide the donor with a charitable tax credit, it could be reasonably expected that the personal information would also be used to contact the donor for future donations. However, the reasonable person would not likely assume that their name and possibly the donation amount would be disclosed publicly. It is likely that the reasonable person would expect that CGEP (Canada) would give them a choice with respect to whether or not they wish to have their personal information disclosed to the public, if at all.

The notion of sensitive information is also important and a key factor in determining the form of consent that is necessary. Express (opt-in) consent should be obtained where the information is

¹⁶ Office of the Privacy Commissioner of (Canada), "Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia's *Personal Information Protection Acts*" (2004), online: Government of (Canada) <https://www.priv.gc.ca/resource/fs-fi/02_05_d_26_e.asp>.

¹⁷ SBC 2003, c. 63 at s.3(1).

¹⁸ SBC 2003, c. 63 at s.1.

¹⁹ SBC 2003, c. 63 at s.6.

²⁰ Office of the Information & Privacy Commissioner for British Columbia, "A Guide to B.C.'s *Personal Information Protection Act* for Businesses and Organizations" (2012), online: <<https://www.oipc.bc.ca/guidance-documents/1438>> at 15.

considered sensitive.²¹ Even where personal information is considered non-sensitive, the reasonable expectations of the individual may be such that they warrant express consent.²² If the proper form of consent is not obtained, there could potentially be a breach of privacy legislation. Although “sensitive information” is not defined in the legislation, it is generally accepted that financial information is considered sensitive information.²³ In this regard, since the disclosing of the Donor List includes sensitive information including the names of individuals, the donation amount, and the fact that they donated to a particular charity, it would be reasonable to conclude that the Donor List includes sensitive personal information which warrants express consent. Further, the fact that the individuals would not reasonably expect a disclosure of their personal information to the public further supports the need to obtain express consent. Accordingly, the Donor List should not be disclosed without the express consent of the donors. As Quebec’s privacy legislation operates on the same basic foundations as B.C.’s privacy legislation, the analysis and conclusion above are also applicable to Quebec’s privacy legislation, and as such to Quebec donors to CGEP (Canada), if applicable.

It is also relevant to note that in different contexts, the Information and Privacy Commissioner of Alberta and Newfoundland and Labrador’s Information and Privacy Commissioner, both have noted that the names of donors and the amount of their donations is considered personal information and should not be disclosed:

I turn now to the names of individuals who made donations to the Public Body. I find that the names of the individual donors is their personal information ... as the names of these individuals appear in the context of information establishing that they made donations to the Public Body. A presumption therefore arises that disclosing the names of the individual donors would be an unreasonable invasion of their personal privacy, given that disclosing their names in the context of the donations they have made would reveal that they made donations in particular amounts to support research intended to disprove the possibility of climate change.²⁴

I conclude that the information sought by the Applicant – the name of the registered charity to which the former Chief Electoral Officer donated his MHA pension during his term as CEO – is personal information. It is, first of all, “recorded information about an identifiable individual”: the former Chief Electoral Officer. Secondly, it is information about how the former Chief Electoral Officer spent his pension income, and so it constitutes “information about the individual’s financial status or history”... Information about the former Chief Electoral Officer’s pension income, including the source, the amount and the manner in which he disposes of it, is clearly an aspect of his financial status or history. Thirdly, depending on the nature and purposes of the charitable organization to which the former Chief Electoral Officer chose to donate the money, the information sought could also be regarded as information related to his religious or political beliefs... or as an expression of his personal views or opinions...²⁵

²¹ Office of the Information & Privacy Commissioner for British Columbia, “A Guide to B.C.’s *Personal Information Protection Act* for Businesses and Organizations” (2012), online: <<https://www.oipc.bc.ca/guidance-documents/1438>> at 15.

²² *PIPEDA Report of Findings #2015-001 Results of Commissioner Initiated Investigation into Bell’s Relevant Ads Program* (7 April 2015), online: <https://www.priv.gc.ca/cf-dc/2015/2015_001_0407_e.asp#heading-005-8> at para. 77.

²³ *PIPEDA Case Summary #2003-203 Individual raises concerns about consent clauses on credit card application form* (1 April 2004), online: <https://www.priv.gc.ca/cf-dc/2003/cf-dc_030805_01_e.asp>.

²⁴ Order F2010-036, 2011 CanLII 96613 (AB OIPC) at para. 77.

²⁵ *Newfoundland and Labrador (House of Assembly) (Re)*, 2008 CanLII 31390 (NL IPC) at para.15.

Accordingly, it is recommended that CGEP (Canada)’s Donor List not be disclosed to the public, without the express consent of the donors. In this regard, as the donor’s name coupled with the donation amount would likely be considered sensitive information which the reasonable individual would not expect to be disclosed, express consent should be obtained in order to comply with federal and provincial Canadian privacy legislation.

b) The Application of Federal Privacy Legislation

As mentioned above, PIPEDA protects personal information collected by organizations operating in provinces and territories that have not enacted their own privacy legislation. PIPEDA may also be applicable to organizations such as CGEP (Canada) which are located in provinces with substantially similar privacy legislation when the personal information of residents from other provinces has been affected.²⁶ In this regard, as discussed above, although CGEP (Canada) is located and operates in the province of B.C., which has substantially similar privacy legislation enacted, since it is likely that CGEP (Canada)’s Donor List consists of a collection of donors from across Canada, PIPEDA may be applicable in determining if the CGEP (Canada)’s Donor List can be disclosed without the prior consent of the donors.

PIPEDA applies in the general context of “commercial activities,” which is defined 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.”²⁷ It is important to note that PIPEDA does not categorically exempt charitable organizations from its provisions. Additionally, the OPC has specifically stated, “the bottom line is that non-profit status does not automatically exempt an organization from the application of the Act.”²⁸ In order to determine if PIPEDA applies, the fundamental question is whether CGEP (Canada) is carrying out a commercial activity when it collects, uses and/or discloses the Donor List.

In order to answer this question, the two parts of the definition of commercial activity must be dissected. Firstly, given the definition of commercial activity in PIPEDA, where CGEP (Canada) engages in *one* particular transaction or act of a commercial nature, the said transaction or act could, on its own, trigger the application of the legislation to CGEP (Canada). Secondly, where CGEP (Canada) engages in the selling, bartering, or leasing of donor or other fundraising lists, this could also trigger the application of the legislation.

Although either of these two circumstances could potentially trigger the application of PIPEDA, the possible situations and potential application of PIPEDA are not to be analyzed further in this report since B.C.’s PIPA requires the express consent of donors to disclose their personal

²⁶ Office of the Privacy Commissioner of (Canada), “Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia’s *Personal Information Protection Acts*” (2004), online: Government of (Canada) <https://www.priv.gc.ca/resource/fs-fi/02_05_d_26_e.asp>.

²⁷ SC 2000, c 5 at 2(1).

²⁸ Office of the Privacy Commissioner of (Canada), “The Application of the *Personal Information Protection of Electronic Documents Act* to Charitable and Non-Profit Organizations” (2004), online: Government of (Canada) <http://www.privcom.gc.ca/fs-fi/02_05_d_19_e.asp>.

information to the public in any event. As the mentioned above, the OPC has stated “organizations faced with this kind of scenario [where more than one law may be applicable] may look at the differences between the laws. [...] If you follow the more stringent requirement all the time, you will very likely comply with both laws.”²⁹ Given the above statement by the OPC, the best and most cautious approach is to comply with B.C.’s PIPA legislation for two reasons. Firstly, this piece of legislation is the most applicable since CGEP (Canada) operates in B.C., and secondly, because B.C.’s PIPA is the most onerous and stringent of the applicable privacy legislation, the recommended approach would be to comply with this legislation.

Accordingly, in view of the above, the CGEP (Canada) Donor List cannot be disclosed without the consent of the donors. In this same fashion, the rationale and conclusion above are equally relevant to the application of Alberta’s provincial privacy legislation.

3. The Application of the Privacy Policy and Website

Notwithstanding the above analysis and conclusions, it is also important to be aware that CGEP (Canada) has a privacy policy that specifically states the following:

CGEP (Canada) shall ensure that personal and/or company information (including financial and donor information) shall not be used or disclosed for purposes other than those for which it was collected, except with the written consent of the individual or company as required by law, and any use of personal and/or company information shall be properly documented.

Given this statement, the reality is that even if CGEP (Canada) were of the opinion that privacy legislation does not apply and the Donor List could be disclosed without consent, then, at a minimum, the statement above would need to be complied with, in order to avoid breaching a specific representation that has been made to CGEP (Canada)’s donors. The statement above requires that CGEP (Canada) obtain written consent *as required by law*. As such, since CGEP (Canada) operates in the province of B.C., and B.C.’s PIPA requires express consent, adherence to this statement would be necessary. Otherwise, a donor would have a very good argument to allege that CGEP (Canada) has breached its own representation and had, therefore, misled donors and the public. It is our understanding that some donors were made aware of the privacy policy when large contributions were made, and CGEP (Canada) had obtained consent from some donors to display their name on a previous version of the CGEP (Canada) website.

We should also note that the website for CGEP (Canada) includes an option for a donor to request that their identity remain anonymous if they choose to give a donation. While it is our understanding that the total number of contributions to CGEP (Canada) through its website is not significant, the foregoing conclusion concerning compliance with any representation through its website that donor anonymity would be respected would equally be applicable.

²⁹ Office of the Privacy Commissioner of (Canada), “Questions and Answers regarding the application of PIPEDA, Alberta and British Columbia’s *Personal Information Protection Acts*” (2004), online: Government of (Canada) <https://www.priv.gc.ca/resource/fs-fi/02_05_d_26_e.asp>.

4. Common Law in Provincial Jurisdictions

The foregoing discussion illustrates that Canadian federal and provincial privacy legislation, coupled with CGEP (Canada)'s Privacy Policy, confirm that GCEP (Canada) cannot disclose the Donor List without the express consent of the donors.

In addition to the restrictions under federal and provincial privacy legislation which are enforced by federal and provincial regulators, it should also be noted the privacy legislation and the common law in provincial jurisdictions have recently expanded to provide civil remedies available to individuals who believe their personal information has been misused or that their privacy has been violated.

As such, in addition to the need to be wary of contravening any general statutory restrictions, e.g., PIPEDA or PIPA, the directors of CGEP (Canada) need to also be wary of civil claims that individuals would have under statute or at common law if CGEP (Canada) were to disclose the Donor List without consent. For the purposes of this opinion, it is not feasible to conduct a comprehensive review of privacy legislation and the common law in each province with respect to causes of action for violations or breaches of privacy.

While such claims may be remote as a cause of action related to disclosure of the Donor List, they should be taken into consideration by the board of CGEP (Canada) prior to the release of the Donor List if such release occurs without first obtaining the consent of the donors.

a) Recourse for Individual Donors at Common Law

For jurisdictions in Canada which have not adopted a cause of action by statute for breach of privacy, some provincial jurisdictions may provide recourse at the common law for a cause of action concerning breach of privacy.

For example, in the province of Ontario, the Court of Appeal has recently recognized a cause of action identified as an action for "intrusion upon seclusion".³⁰ The Court indicated that such cause of action should be recognized, in part, because technological change has historically motivated the legal protection of the individual's right to privacy, and it is within the capacity of the common law to evolve to respond to problems caused by the routine collection of personal information that is easily accessible in electronic form, including "financial information", which the Court recognized as being vulnerable. Financial information, in this regard, may include personal information concerning the name of a donor and the amount of his or her donation to a particular charity.

The Court determined the elements of the intrusion upon seclusion are as follows:

- 1) The defendant's conduct must be intentional or reckless;

³⁰ *Jones v Tsige*, [2012] O.J. No. 148, 2012 ONCA 32.

- 2) The defendant must have invaded, without lawful justification, the plaintiff’s private affairs or concerns; and
- 3) A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish; however, proof of harm to an economic interest is not necessary.

The Court further explained that, in order to meet the elements of the tort, intrusions must be “highly offensive” when viewed objectively on the reasonable person standard. In this regard, although the disclosure of the Donor List by CGEP (Canada) without the consent of donors would not likely give rise to a cause of action, a reasonable person may be highly offended by its disclosure if it was their intention that their donation and the amount of the donation was to be kept confidential.

While it does not appear that other provincial jurisdictions have definitively recognized a similar cause of action at common law, given the evolution of the law in Ontario, where other provinces have not created such cause of action by statute, the decision in Ontario may be followed as precedent in those jurisdictions. As a result, it is recommended that CGEP (Canada) obtain the consent of donors prior to releasing their personal information in the Donor List in order to mitigate the possibility of such claim.

b) Recourse for Individual Donors under Statute

While Ontario and other provinces have not recognized under statute a cause of action for breach of privacy, British Columbia, Saskatchewan, Manitoba and Newfoundland and Labrador have enacted statutes which create the tort of “violation of privacy” within those jurisdictions.

Whether or not a donor in one of those four provinces would have a claim under the law for a “violation of privacy” if the Donor List were to be disclosed without their consent would be fact specific and dependent upon the applicable legislation. However, regardless of the particular legislation, legal liabilities for breach of the privacy legislation may be onerous and in some circumstances may include consequences such as damages and injunctions.

In each province that has enacted such legislation, it is generally a defence under the statute that no violation of privacy has occurred if the person entitled to consent provides his or her consent to the disclosure.³¹ As a result, to the extent that the legislation may apply, it would be recommended that CGEP (Canada) obtain consent from donors in those jurisdictions if CGEP (Canada) decides to disclose the Donor List of donors in those provinces.

³¹ See *Privacy Act* RSBC 1996, chapter 373 at 2(2)(a), *The Privacy Act* CCSM c. P125 at 5(a), *The Privacy Act* RSS 1978, c P-24, at 4(1)(a), and *Privacy Act* RSNL1990 CHAPTER P-22, 5(1)(a).