

# Federal Law and Social Policy

Disclaimer – this information is not legal advice, nor does it represent the views of the government of Canada or its representatives. This information is a brief summary of current federal legislation and common law relevant to screening in Canada. For complete and up-to-date information, readers should check with appropriate authorities. Readers seeking legal advice should consult with a lawyer

## Overview

There is no single source of law in Canada that governs screening. Criminal, civil, constitutional and administrative statutes are all relevant to those organizations and individuals who carry out screening. As well, the common law has clearly established that organizations providing programs and services to people in the community have a legal duty to ensure the safety and well-being of those persons whom they serve. This duty to provide a safe environment is critical to screening, and is largely what motivates the efforts of community agencies and organizations to screen volunteers and employees who seek to occupy positions of trust with respect to children, youth and other vulnerable persons.

It should be noted that while the major impetus for screening efforts has been the promotion of safe environments, screening can also be used to promote financial stability, the security of property and assets and good business practices. Through proper screening, organizations can ensure that the appropriate people are in appropriate positions and that their performance, whether as volunteers or employees, is properly supervised and monitored. Much of the information in this document is based on screening to prevent physical or sexual abuse, because this is the focus of the government's commitment to screening and the rationale for many screening initiatives. However, readers are reminded that screening can be used to prevent many other types of harm and to promote sound human resource and volunteer management practices.

This document provides a basic overview of federal legislation relevant to screening and describes principles of common law that are important for screening. However, federal law and policy do not represent the total picture -- there is considerable overlapping between federal and provincial/territorial jurisdictions on issues relevant to screening. Key federal laws such as the Canadian Charter of Rights and Freedoms, the Criminal Code and the Criminal Records Act afford important protection to children and other vulnerable persons. There are also laws in the provinces and territories that relate to human rights, child welfare and protection, licensing of social service providers, protection of privacy and employment standards – and these are also important to the subject of screening.

Taken together, these overlapping federal and provincial laws form a complicated regulatory regime relevant to the screening of volunteers and employees by non-profit organizations, government agencies and private companies.

Organizations involved in screening must be aware of both federal and provincial laws and policies. National organizations having branches in more than one province or territory must be aware that their different branches may be subject to slightly different laws and procedures.

The subject of volunteer screening has become an important priority for the federal government and reflects a broader societal concern about the need to protect vulnerable persons from harm. In 1994 the federal government announced its commitment to combating violence against women and children. A consistent theme emerging from the government's consultations around this topic was that applicants seeking positions of trust with respect to children and vulnerable persons must be screened. Furthermore, it was determined that police information systems could be used to assist in such screening efforts. In 1994, the federal government created a national screening system using its national computer databases to help organizations identify among potential employees and volunteers those individuals who were known sex offenders or who had other relevant criminal records.

In 1995, the federal government launched the second phase of its Volunteer Screening Initiative – the development of a national education and training campaign on volunteer screening. This campaign was a great success, enabling thousands of non-profit agencies to undergo training on screening techniques. It also provided a critical momentum that has stimulated related provincial screening initiatives.

Most recently, the federal government announced its plans to invest \$115 million over four years to update the technology and improve the effectiveness of its national database, the Canadian Police Information Centre, or CPIC. The CPIC is used by Canadian law enforcement agencies to share information on offenders, missing persons, stolen property, registered firearms, crime scene evidence and stolen vehicles. Additional databases are used to identify persons with criminal records. The “CPIC Renewal” project will improve all of these systems and will also improve the ability of organizations to screen convicted sex offenders.

Legislative changes have also been proposed that will allow the disclosure of the criminal records of pardoned sex offenders that to this point, have not been available for screening purposes.

### **Sources of Law**

There are several ways to categorize laws governing the interactions between individuals and organizations in Canada.

The two main sources of law are common law<sup>1</sup> and statutes. Common law is the body of law that has evolved over centuries of judicial decision-making. Also known as “judge-made” law, the common law differs from statutes which are specific laws passed by legislative bodies. Often statutes simply codify principles of the common law. Examples of this include statutes on occupier’s liability that codify common law principles of negligence, and statutes on libel and slander that codify common law principles of defamation. Statutes may also be created to deal with new topic areas or to reflect changing societal values. Examples of the latter category of statutes would include laws dealing with intellectual property, human rights and privacy.

Canadian law can also be divided into public law and private law. Public laws are those that govern the relationships between members of the public and the government. Areas of public law include criminal law, constitutional law and administrative law. Private law, also called civil law, encompasses those laws that govern relationships between private individuals and public and private corporations. Areas of private law include contract law, tort (also known as the “law of negligence”) and in some instances, administrative law.

A large majority of screening activities are carried out by private organizations. For example, most organizations in the social services, faith, recreation and sport sectors are incorporated under provincial or federal legislation relating to non-profit societies or corporations. With the exception of perhaps schools and hospitals, these organizations are independent from government. From this perspective, a third distinction in types of law can be made between laws that are external to an organization and “laws”, or rules, that are internal to it.

The external laws that govern private organizations include criminal law, common law, administrative law, tort and human rights. Internally, organizations create rules by which they govern themselves. These rules are expressed through the organization’s constitution, bylaws, policies, procedures and regulations and create a form of “contract” between the organization and its members (including volunteers). This contract provides the organization with the legal authority to establish the rights, privileges and obligations of membership. These internal rules are significant to screening because many screening measures are carried out by private organizations according to their own internal policies and procedures.

### **Federal Law and statutes relevant to screening**

Areas of common law that are relevant to screening include:

- Negligence and liability
- Defamation
- Administrative law

### **Federal statutes that are applicable to screening include:**

- Canadian Charter of Rights and Freedoms
- Criminal Code and Criminal Records Act

- Young Offenders Act
- Privacy laws (including the Privacy Act and the Personal Information Protection and Electronic Documents Act)
- Canada Corporations Act

## **Negligence and Liability**

The common law of negligence is probably the single most important area of law for screening.

The term negligence refers to the responsibility or duty to ensure the safety of those persons who may be affected by our actions. In our daily lives we are expected to act in a reasonably diligent and safety-conscious manner so that others affected by our actions will not face an unreasonable risk of harm. "Standard of care" is by necessity a flexible standard, determined by speculating on what an average and reasonable person would do, or not do, in the same circumstances. It is also an objective standard, as the law credits all adults with similar intelligence and common sense. Thus, the law expects all adults to perceive the potential dangers or harm in a situation and to exercise the same degree of reasonable prudence and caution as any other adult would in the same circumstances.

Conduct that does not meet this objective standard of care may be negligent. Legally, conduct is negligent only when all four of the following elements are present:

- A duty of care owed;
- The standard of care imposed by this duty is not met;
- Harm is suffered as a result; and
- The failure to meet the standard causes, or substantially contributes to, the harm.

The most important element of this equation is perhaps the standard of care. This is the least well-defined element, and the one on which most cases of negligence will turn. Determining whether there existed a duty of care is relatively straightforward and similarly, there is rarely dispute about whether harm was suffered. The fourth element, causation, is highly technical and would likely only be argued by skilled lawyers in a court setting.

When all four of these elements are present, the conduct is negligent and the negligent individual may be liable. While the term negligence refers to the actual behavior that resulted in harm to someone, the term liability refers to responsibility for that harm. Even if all four of the elements of negligence are proven and the individual's conduct is deemed to be negligent, liability does not automatically follow. Many factors can reduce liability or eliminate it completely, including insurance, a valid contract waiving liability, contributory negligence on the part of the harmed person, or vicarious liability on the part of the organization who assumes responsibility for the negligent acts of its volunteers or employees.

From the perspective of screening and protecting vulnerable persons, several of these legal concepts are important and warrant further discussion.

### **Duty of care**

The circumstances that give rise to a duty of care stem from the existence of a certain relationship between persons, or between a person and an organization. This relationship might be very general one – for example, each of us owes a duty of care to those other persons that we can foresee might be affected by our actions, whether or not we have a close relationship with them.

The relationship that gives rise to a duty of care might also be a special relationship of trust and authority, such as that which exists between parent and child, teacher and student, pastor and parishioner, doctor and patient, driver and passenger, coach and athlete, program leader and participant, professional and client. A duty of care also exists between a service organization and the client group that it serves.

### **Standard of care**

The existence of a duty of care gives rise to a corresponding, objective standard of care. Standard of care refers to the level of care and attention that one person owes to another. Standard of care is determined by a combination of written standards, unwritten or industry standards and common sense. The behavior required to meet the standard of care will vary with the circumstances including the nature of the relationship between the parties, the nature of the activities being undertaken, the degree of supervision of the activity, the setting in which the activity occurs and the inherent risk in the activity.

The standard of care is a threshold that lies somewhere between taking virtually every precaution possible and eliminating all risk, and taking no precautions whatsoever and ignoring all risks. The legal concept of standard of care is fixed – it is what is reasonable in the circumstances -- but the conduct required to meet the standard will vary from one set of circumstances to another.

For example, the standard of care in the provision of ordinary services to adults may be relatively low. As the activities undertaken by these adults become riskier or more complex this standard may increase. Conversely, the standard of care may be relatively high in situations that involve providing services to youth and other vulnerable persons, who unlike ordinary adults are not as capable of perceiving potential harm, protecting themselves and making sound decisions.

Although the law does not define a “vulnerable person”, in the context of screening vulnerable persons have been defined as “those persons who have difficulty protecting themselves from harm and are at risk due to age, disability, handicap or other circumstances”. Vulnerable persons can include children, youth, the elderly and people with physical, mental, developmental, emotional, social or other disabilities. Vulnerable

persons might also include people dealing with addiction, people experiencing short-term trauma or people coping with loss or bereavement.

The standard of care may also be higher in situations where the relationship between two individuals is one of authority, power or trust. Typically, these relationships create a category of persons who are vulnerable. A relationship of trust is said to exist where:

- Someone has a degree of authority and power over another, such as a teacher or coach would have;
- Someone has unsupervised access to another person, such as a nurse or doctor;
- The activity specifically requires a close, personal and trusting relationship, such as a mentoring or matching program; or
- The service being provided renders the client vulnerable, as in a care-giver relationship.

All of these relationships and situations create a higher standard of care. When this standard goes unmet, the second and perhaps most critical element of negligence may be met.

It is the existence of relationships of trust and the resulting duty of care that gives rise to the responsibility to screen employees and volunteers. How one actually goes about conducting the screening, and how one uses screening information to make decisions about the suitability of a prospective volunteer or employee, become components of the corresponding standard of care. These components will vary with the nature of the organization, the type of program, the characteristics of the client group and other circumstances.

### **Vicarious liability**

Also referred to as “no-fault” liability, vicarious liability refers to situations where a person or entity can be held liable for the acts of someone else, not because of anything either of the parties did or failed to do, but because of a special relationship that exists between the two parties. The most common types of vicarious liability involve employment situations – where employers may be held vicariously liable for the actions of their employees. Similarly, non-profit organizations may be held vicariously liable for the actions of their volunteers.

Vicarious liability may be imposed on an organization not because it acted harmfully or promoted harmful actions, but rather simply because it was responsible for the conditions under which the harm occurred. These conditions include the measures that the organization takes in the recruitment, placement and supervision of employees and volunteers.

In recent years there has been a trend in the courts to hold organizations increasingly accountable for the harm suffered by clients at the hands of their staff or volunteers. The Supreme Court of Canada recently issued two judgments (*Bazley v. Curry* and *Jacobi v.*

Griffiths) relating directly to the question of whether an organization should be held responsible for the actions of an employee or volunteer who harms children, even where the organization has not itself been negligent.

In these two cases, the Supreme Court revisited the previous test for determining vicarious liability, which was to ask whether the wrongful acts of the employee or volunteer were authorized by the employer or were closely connected to authorized acts. If there was a close connection, then vicarious liability could be found. These two judgments have established a modified test that looks at whether the circumstances of a program or activity enhance the risk of harm to participants. The following factors, among others, may influence whether the risk of harm is increased:

- The opportunity for the employee/volunteer to abuse his or her power;
- The extent of power and authority the organization grants to the employee/volunteer;
- The vulnerability of the participant;
- The nature of the activity or program; and
- The degree of physical contact required in the relationship between the employee/volunteer and the participant.

The essence of these two decisions is that if an organization makes program staffing decisions that enhance the risk of harm, the organization may be vicariously liable should harm occur. For example, programs can be more or less risky depending on the qualifications of the employee/volunteer, the degree of supervision, or the nature of the setting in which the work is performed or the service provided. The greater the risk the more careful the organization is required to be.

The onus is on the organization to manage their risks by consciously and systematically making decisions about the nature of their programs and activities, and the risks that each decision entails. Clearly, screening comes into play as the organization has an obligation to institute reasonable risk management measures in the areas of recruitment, screening, placement and supervision of employees and volunteers so as to minimize the risk of harm in their programs and activities.

### **Occupier's liability**

Occupier's liability is an area of negligence dealing with the duties and responsibilities of those who own, operate or control premises. Occupier's liability applies to all individuals and all types of organizations, both public and private, and all types of premises including land, buildings and other structures. In all provinces, the common law duty of an occupier is codified in statute.

To understand the relevance of occupier's liability to screening, it is necessary to understand the definition of an "occupier" and to know specifically what the law says about the duty of an occupier.

An occupier is defined as a person who is in physical possession of a premises, a person who has responsibility for and control over the condition of a premises or the activities

carried out on a premises, or a person who has control over persons allowed to enter a premises. At any given time there can be more than one occupier of a single premises. Premises are defined as land, buildings and other structures erected on land. Occupiers can thus include owners or renters of land or buildings as well as occasional or one-time users of land or buildings, such as public facilities or public parks.

Occupiers have an affirmative duty to take reasonable care to ensure the safety of those persons who use their premises. This duty applies to the condition of a premises, the activities being carried out there, and most importantly from the perspective of screening, the actions of persons on the premises, whether employees, volunteers, participants or other third parties.

The law of occupier's liability has very broad application for screening. It imposes on occupiers the overall duty to ensure a safe environment through measures to manage risks, including measures to appropriately screen, select and supervise personnel, whether employees or volunteers.

## **Defamation**

Like negligence, defamation is a matter largely addressed by common law. The law of defamation has great significance to screening. A major disincentive to an organization disclosing or publicizing negative information obtained through a screening process is the fear of a lawsuit for defamation. This concern also underlies the reluctance of many organizations to provide detailed reasons for the dismissal of an employee or volunteer, or to provide truthful references when requested by other prospective employers.

Individuals within organizations who have responsibility for carrying out screening activities need to be aware of the law of defamation as it exists in common law as well as in various provincial statutes. In particular, two out of a possible four main defenses to a claim of defamation are relevant to screening. These two defenses are justification and qualified privilege.

The defense of justification occurs when the otherwise defamatory information about an individual can be proved to be true. A suspicion or a belief that the information reflects the truth is not sufficient -- the substance of the information must be proved true and accurate. It should be noted that "knowing" that something is true is quite different from "proving" that something is true. A person relying upon this defense must be confident that they have full, factual and well-documented information.

The defense of qualified privilege occurs when the person furnishing the information about an individual has a legal, social or moral duty or interest to do so, and the person to whom this information is furnished has a corresponding duty or interest in receiving it. There is no absolute test for what is privileged and what is not -- it depends on the circumstances under which the information is provided. The circumstances must be such that the threat to one person's reputation gives way to a greater public interest or concern.

The important public policy objectives of protecting youth and vulnerable persons from harm through screening will often support a defense based upon qualified privilege.

### **Administrative Law**

Most screening activity is carried out by private, non-profit organizations. In addition to being subject to external federal and provincial statutes and common law, these organizations are self-governing through their own internal rules. The vast majority of Canadian non-profit organizations are “private tribunals” – that is, they are autonomous, self-governing, private organizations that have the power to establish policies, write rules, make decisions and take actions that affect their members, participants, clients and constituents. A body of law called administrative law prescribes the rules by which tribunals, both public and private, must operate.

There are two important principles of administrative law that apply to private tribunals. The first is contract and the second is natural justice, now almost synonymous in Canada with procedural fairness. Both of these are described below.

Private tribunals derive their authority through their constitution, bylaws, policies and rules. Taken together, these are the organization’s “governing documents” and they form a “contract” between the organization and its members. This contract works to the benefit of all parties by establishing and clarifying their respective rights and obligations. Occasionally, however, the contract may work to the detriment of the parties, if the policies that make up the contract are poorly designed, vague, contradictory or ill-suited to the needs of the organization.

Private tribunals have a second legal obligation, which is to interpret and implement their governing documents according to the rules of procedural fairness. Basically, there are three rules of procedural fairness:

- Decisions must be made by those having proper authority;
- Persons affected by a decision must have the right to present their case; and
- Decision-makers must not make a decision influenced by bias.

How do these principles of administrative law relate to screening? Most screening of volunteers is carried out by private organizations according to internal policies pertaining to risk management and volunteer management. These policies must be prepared and implemented in a manner that respects the administrative law principles described here.

As well, most volunteers are “members” of the organizations for whom they volunteer, and volunteering opportunities are widely recognized as a benefit or privilege of membership. The development and implementation of these policies and screening measures must not only comply with statutes and common law, they must also be incorporated properly into the organization’s governing documents, and in their implementation must respect the principles of procedural fairness.

## **CANADIAN CHARTER OF RIGHTS AND FREEDOMS**

### **Purpose**

The Canadian Charter of Rights and Freedoms is entrenched in the Canadian Constitution and takes precedence over all other laws in Canada. The Charter guarantees to all individuals certain fundamental rights including language, mobility, democratic, procedural and equality rights. These rights are open-ended which means that the Charter's rights and entitlements are continually defined, interpreted and clarified through judicial decision-making.

Like other pieces of human rights legislation, the Charter strives to find a balance between doing what is best for the collective community while ensuring that individual rights are respected. From the perspective of screening, the Charter seeks a balance between the public's right to be safe from known criminals and the criminal's rights as an individual in a democratic society. This balance is continually tested by Charter-based court cases.

### **Implications for screening**

The Canadian Charter of Rights and Freedoms applies to governments, government institutions and government action. It does not apply to private organizations. As noted previously, much screening activity is carried out by private, non-profit organizations whose activities do not constitute government action and are not subject to the Charter. Thus, the direct impact of the Charter on screening is limited.

However, a great many private organizations are subject to federal, provincial and territorial human rights laws that prohibit discrimination in the provision of goods, services, facilities and accommodation. To a certain extent these laws mirror the discrimination provisions of the Charter.

Organizations providing services and facilities to the public cannot discriminate on the basis of certain grounds including race, nationality, ethnicity, colour, religion, sex, age or mental or physical handicap. These laws also govern discrimination in employment on prohibited grounds, including prior criminal record. As a result, organizations and employers cannot discriminate against a prospective employee if he or she has received a pardon for a criminal offense.

However, there is an important exception to this prohibition. Where an employer can demonstrate a bona fide occupational requirement – in other words a good faith, legitimate requirement that an employee does not have a record of offenses, or does not have a record for certain types of offenses – the employer may deny opportunities to prospective employees. In other words, the employer may discriminate.

Human rights laws tend not to reference volunteers explicitly, nor do they define employees. Therefore, it is not entirely clear whether volunteers are included in this prohibition of discrimination on the basis of criminal record. criminal code and criminal records act

## **Purpose**

The Criminal Code of Canada regulates offences by individuals against the state, against property and against other persons. The Criminal Code is a federal statute over which the federal government has jurisdiction. Actual implementation of the Criminal Code through the justice system including the courts, policing, and corrections and parole systems is a shared responsibility of the federal government and the provinces.

## **Implications for screening**

From the perspective of an organization that carries out screening, a history of any criminal activity may represent a legitimate concern about the suitability of a prospective volunteer or employee for a position within an organization. Depending on the position, offenses that are relevant to screening may include:

- offenses against persons such as assault, sexual assault and other sexual offenses (where the position involves contact with, or caring for, vulnerable persons);
- offenses against property such as theft, embezzlement or fraud (where the position involves handling money or caring for the assets of an organization); and
- offenses related to substance abuse, including abusive use of alcohol (where the position involves driving motor vehicles, operating machinery or being entrusted with other similar, significant responsibilities).

In the last decade there have been a number of amendments to the Criminal Code to clarify, and in many cases, broaden the scope of offenses against persons. For example, criminal harassment, also known as stalking, is a relatively new offense under the Criminal Code. This relevant section of the Code makes it an offense to cause someone to fear for his or her own safety by repeatedly watching, following, communicating with or threatening him or her.

Recent amendments to the Criminal Code also include the identification of a number of sexual offenses other than sexual assault. These include:

- Sexual interference – it is an offense to touch, either directly or indirectly, with the body or an object, a person under 14 years of age, for a sexual purpose;
- Invitation to sexual touching – it is an offense to invite, counsel or incite a person under 14 years of age to touch the body of another person, including the body of the person who has invited such touching;
- Sexual exploitation – it is an offense for a person in a position of trust or authority to commit either of the above two offenses against a person who is 14 years old or older, but under 18.

One defense against a charge of assault or sexual assault is that the victim consented. However, the Criminal Code describes situations in which consent cannot be obtained – these include situations where force is applied or threatened; where the victim is

incapable of consenting (for example, due to mental incapacity); where the victim expresses a lack of consent; where the victim, having initially consented, expresses a change of mind; and lastly and perhaps most importantly from the perspective of screening, where the accused is in a position of trust, power or authority over the victim. It is only in the last ten years that the Criminal Code has made the principle of consent clearer, particularly in situations where there exists a trust or authority relationship and that trust is abused.

The Criminal Code does not define "position of trust" but leaves this to the courts to determine on a case-by-case basis, depending on the specific circumstances of each case. Case law in the last decade has expanded the types of relationships that create a position of trust beyond family relationships to include teachers, coaches, baby-sitters, health care practitioners, care-givers, youth workers, social workers, recreation leaders and individuals representing employers, community organizations, churches and other public and private institutions.

The Criminal Code does not identify "sexual abuse" as an offense. In its common usage, sexual abuse refers to a pattern of behavior that would include one or more of the sexual offenses referred to previously. Typically, the term sexual abuse is used to describe a pattern of criminal behavior over a period of time, as opposed to a single incident which can be described more properly as one of the above-noted sexual offenses.

Those persons who play a role in screening volunteers and employees on behalf of organizations should be aware that offenses under the Criminal Code have varying degrees of severity, and as a result are dealt with in a number of ways within the criminal justice system.

- Summary conviction offenses are typically considered minor and would include offenses such as public indecency and exposing oneself to a child. Convictions for these offenses are not usually registered in the criminal records database.
- Indictable offenses are typically considered more serious and would include assault with a weapon and aggravated sexual assault. These offenses will be registered in the criminal records database.
- In between these two categories of offenses is a third category known as hybrid offenses. In prosecuting hybrid offenses, the Crown may prosecute by summary conviction or indictment, depending on the circumstances of the case. These offenses include sexual assault, sexual interference, invitation to sexual touching and sexual exploitation. Depending on how the prosecution chooses to handle a case, these records may or may not be registered in the criminal records database.

Individuals responsible for screening should also understand the meaning of the terms "convicted", "found guilty" and "pardoned" when examining criminal records information, and the types of questions that can be posed to prospective employees or

volunteers on a screening form or in an interview. For example, not all persons who are found guilty of a crime receive a conviction, as lesser offenses or mitigating circumstances may result in an absolute or conditional discharge. Thus, persons who have been "found guilty" of an offense may receive a discharge and thus have no "conviction" or criminal record. As well, persons who have been convicted of criminal offenses and have served their sentences may apply to have them pardoned, in which case the criminal record is removed from the criminal records database. These differences mean that a police records check may, or may not, reveal a potential volunteer or employee's criminal past.

The problem of identifying persons who may have been found guilty of a relevant criminal offense but have since received a pardon is being addressed in forthcoming amendments to the Criminal Records Act. Among these amendments is one that will allow criminal records of pardoned sex offenders to be made available for screening purposes when the pardoned offender seeks a position of trust in relation to young or other vulnerable persons. It is anticipated that these amendments will be passed into law sometime in 2001.

## **Young Offenders Act**

### **Purpose**

The Young Offenders Act parallels the Criminal Code but applies specifically to young persons aged 12 to 17. The main feature of this Act is that, with some exceptions, young persons are not held responsible for crimes in the same manner or to the same extent as adults. By and large, youths convicted of crimes are treated differently from individuals tried as adults because the focus of youth criminal sentencing is rehabilitation as opposed to deterrence or punishment. The retention, destruction and disclosure of their criminal records is very strictly controlled. Furthermore, these records become virtually inaccessible five years after the offender has reached his or her 18th birthday. The result is that very little information about a young offender can be obtained through police databases.

### **Implications for screening**

In recent years there has been much discussion and debate surrounding amendments to the Young Offenders Act – however, few amendments have been passed into law and none have been passed that affect screening responsibilities or procedures.

## **Privacy Act and Personal Information Protection and Electronic Documents Act**

### **Purpose**

These two statutes relate to the management and disclosure of personal information held by federal government departments and federal institutions. Like parallel legislation in the provinces, these statutes seek to balance the legitimate need of federal public

institutions to gather information about individuals and the rights of individuals to keep such personal information private and confidential. This balance is achieved through a complex set of rules regarding the collection, retention, use, disclosure and disposal of personal information held by public institutions.

### **Implications for screening**

Under this legislation, personal records may be disclosed if the individual who is the subject of the records consents to such disclosure. Individuals may also obtain access to their own personal records for their own use. These two aspects of privacy legislation are relevant to screening in that the majority of screening programs and measures are based on the principle of "voluntary consent" – in other words, the individual who is being screened for a volunteer or employment position is asked to give their consent to the release of personal information relevant to screening.

The Personal Information Protection and Electronic Documents Act is new legislation enacted in January 2001. This statute is a component of the federal government's electronic commerce strategy and is a response to the perceived need to protect consumers engaged in e-commerce transactions. This legislation extends the protection of privacy laws to the federally-regulated private sector (transportation, telecommunications, inter-provincial commerce etc.) and in another three years will extend privacy laws to all sectors, both public and private.

When this occurs, these statutory measures will have a significant impact on screening as they will mean that all private organizations, including businesses, will have to meet the same checks and balances that the government must presently meet in gathering, storing, using and disclosing personal information about individuals. This statutory framework will also lead to regulations and rules about how private organizations manage personal information, including information gained through the screening process. The existence of such regulations and rules will likely represent a positive development as many private organizations are presently uncomfortable dealing with the confidential information that they obtain through the screening process.

## **Canada Corporations Act**

### **Purpose**

The Canada Corporations Act is the statute under which many national non-profit organizations and charities are incorporated. This statute and its counterparts in all provinces and territories are similar in terms of setting out the requirements for corporate governance and specifying the obligations and entitlements of members, directors and officers of corporations.

### **Implications for screening**

There are two important aspects of incorporation that are relevant to screening. The first is that the personal liability of members and directors of incorporated organizations is limited: in other words, should an incorporated organization be found liable for negligent hiring, screening or supervision, or be found vicariously liable for the harmful actions of an employee or volunteer, the individual directors, officers and members of the

organization will not be personally liable for the consequences. The same cannot be said of unincorporated groups such as small community organizations. The advantages and protection of this “corporate veil” are well worth the modest effort and expense to obtain and maintain incorporated status.

The second aspect of incorporation relevant to screening is that directors of non-profit organizations assume significant legal obligations by virtue of their fiduciary relationship with members. These obligations are no different than the legal obligations that directors of for-profit corporations owe to their shareholders.

The basic responsibility of a director is to represent the interests of the membership in directing the business and affairs of the organization, and to do so within the parameters of the law. The legal duties of directors are divided into three parts:

- To act reasonably, prudently, in good faith and with a view to the best interests of the organization;
- To not use one’s position as a director to further private interests;
- To act within the governing bylaws of the organization and within the laws and rules that apply to the organization.

It is this third area of fiduciary responsibility that is most relevant to screening – or more appropriately, to the failure to screen. All organizations have a duty to provide a safe environment for their clients, members, participants and staff. Directors of organizations who fail to ensure that the organization complies with statutory and common law obligations to fulfill this duty by appropriately screening employees and volunteers may be deemed to have failed to fulfill their fiduciary responsibilities under the Canada Corporations Act.

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