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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

LIST OF POWERPOINTS

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- **Employer Issues and Considerations in Response to COVID-19**

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- **Corporate Issues for Charities and NFPs in Responding to COVID-19, including AGMs and Annual Returns**

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- **Contract Termination Strategies as a Result of COVID-19**

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- **Privacy and Data Security Issues in Response to COVID-19**

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April 9, 2020

DUE DILIGENCE CONSIDERATIONS FOR DIRECTORS AND OFFICERS OF CHARITIES AND NFPS IN RESPONSE TO COVID-19

By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent

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Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of Corporate and Practice Manual for Charitable and Not-for-Profit Corporations (Thomson Reuters), a co-editor of Charities Legislation and Commentary (LexisNexis, 2020), and co-author of Branding and Copyright for Charities and Non-Profit Organizations (2019 LexisNexis). He is recognized as a leading expert by Lexpert, The Best Lawyers in Canada and Chambers and Partners. Mr. Carter is a member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

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A. INTRODUCTION

- COVID-19 has created an unprecedented situation for directors and officers (“D&Os”) of charities and not-for-profits (“NFPs”) in knowing how to respond
- D&Os are having to make decisions at lightning speed, some of which could impact the ability of the charity or NFP to continue to operate
- In order to make effective decisions, D&Os should be become familiar with the relevant legal issues that will need to be considered
- This will help D&Os determine the appropriate due diligence steps needed to fulfill their fiduciary obligation to protect the best interest of their organizations

- Under Canadian law, D&Os of charities and NFPs are required in general terms to:
 - act honestly and in good faith with a view to the best interests of the corporation (their **fiduciary duty**),
 - exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances (their **duty of care**)
- The “business judgment rule” recognizes that D&Os are not expected to be perfect, but need to take all reasonable measures and perform the necessary due diligence required to fulfil their fiduciary obligations
- This presentation discusses legal principles generally applicable across Canada, but with a focus on Ontario
- Professional advice should be sought from lawyers in applicable jurisdictions as necessary

B. DUE DILIGENCE CONSIDERATIONS

1. Keep Records of Decisions

- In order to discharge their duties during a crisis like the COVID-19 pandemic, D&Os of a charity or NFP need to become engaged
- The steps being taken, along with the reasoning behind the decisions, the dates on which the decisions and action items are being taken should be documented in writing, including board minutes
- This will provide evidence of the due diligence undertaken by the D&Os of a charity or NFP in the event of a legal challenge at a future time

2. Convene Meetings as Necessary

- Convene **board of directors' meetings** as soon as possible and meet regularly thereafter as necessary
- Determine whether board meetings and members' meetings can be held electronically – review requirements in the legislation and by-laws
- Determine whether **annual members' meetings** may need to be postponed or whether alternative methods for meetings may need to be considered
- Monitor changing filing dates for corporate returns
- Legal advice may be required
- See Theresa L.M. Man's presentation, *Corporate Issues for Charities and NFPs in Responding to COVID-19, including AGMs and Annual Returns*, for further details on meetings and other corporate matters

3. Develop a Communications Strategy

- It is essential to keep members, staff, volunteers, organisational beneficiaries, suppliers, as well as the broader constituent community informed about changes or measures being undertaken that might impact them
- Maintaining open communication during the COVID-19 crisis is key to maintaining reputational integrity
- It is important to have one person in the organization in charge of maintaining consistency in content and methodology of communication
- Keep written or electronic records of what communication was sent, on what date, and to whom

4. Keep Up-to-date with Government Actions

- Monitor federal, provincial and local public policy and public health-related orders, directives and restrictions which may impact the operations of the organization, both inside and outside Canada
- For example, on March 17, 2020, all non-essential workplaces in Ontario were ordered to be closed for 14 days. This order was extended on April 3, 2020, with a significantly shorter list of essential workplaces that can stay open (<https://www.ontario.ca/page/list-essential-workplaces>)
- It is also important to monitor government actions in other jurisdictions in which the charity or NFP may carry out programs affected by COVID-19

5. Review Risk Management Policies

- Review any existing risk management, disaster recovery and remote access policies
 - If these are not in place, consider adopting and implementing such policies as soon as possible
- Consider adopting succession policies for necessary key persons, if not already in place, in order to mitigate against the impact on possible loss of management for the organisation
- Review insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable, as well as any travel insurance policies covering staff or volunteers unable to return to Canada as a result of international travel restrictions

6. Review Contractual Obligations

- Review contractual obligations in light of government directives and public health recommendations regarding COVID-19 to determine their impact on planned events or conferences, as well as the delivery or receipt of goods and services
- Reviewing pre-existing provisions in contracts will allow D&Os of charities and NFPs to make informed decisions about next steps when contractual obligations cannot be fulfilled or need to be delayed
- See Sean S. Carter's presentation, *Contract Termination Strategies as a Result of COVID-19*, for more details on contract termination

7. Address Financial Matters

- It is essential to review the financial health of the charity or NFP on a regular basis by determining the anticipated impact of COVID-19 on donations, grants, investment income and capital, sponsorship income, membership income, sales of goods and services, and any other sources of income
- Then determine what corresponding actions need to be taken to offset the anticipated reduction in income
- Review all funding and other agreements with governments or other agencies to determine the charity's or NFP's obligations to deliver services and how that might be impacted by COVID-19

8. Address Employee Issues

- Ensure that salaries of employees continue to be paid, otherwise directors can be left exposed to personal liability for unpaid wages and vacation pay (e.g. up to six months' wages for CNCA corporations)
- Ensure that employee source deductions (e.g. CPP, EI) and GST/HST amounts pursuant to relevant legislation, are remitted when required to avoid personal liability
- Keep up-to-date with provincial and federal legislative changes to required government payments
- If considering layoffs and/or elimination of staff, legal advice should be sought
- See Barry W. Kwasniewski's presentation, *Employer Issues and Considerations in Response to COVID-19*, for more information on employment issues

9. Ensure Workplace Health and Safety

- Essential to keep abreast of all appropriate health and safety measures for staff, volunteers, and beneficiaries so that exposure to COVID-19 is appropriately managed, particularly with respect to vulnerable persons
- Monitor mandatory closures of non-essential workplaces (see Ontario's amended list of essential workplaces)
- Ensure compliance with health and safety legislation, such as the *Occupational Health and Safety Act* (Ontario)
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays
- See Barry W. Kwasniewski's presentation, *Employer Issues and Considerations in Response to COVID-19*, for more information on workplace health and safety

10. Consider Privacy Implications

- Determine the extent to which the organization's measures in response to COVID-19 are in line with privacy legislation, where applicable, and consider what steps may be necessary in order to obtain appropriate consent
- Public health and safety may supersede usual privacy obligations during this time
- Working from home can raise additional privacy concerns
- See Esther Shainblum's presentation, *Privacy and Data Security Issues in Response to COVID-19*, for more information on privacy considerations

11. Canada Revenue Agency's Charities Directorate

- Form T3010 submission deadlines for charities:
 - The deadline for charities to file Form T3010, *Registered Charity Information Return* due between March 18, 2020 and December 31, 2020 has been extended to December 31, 2020 (announced by the CRA on March 20, 2020)
- Suspension of Charities Directorate operations:
 - All operations of the Charities Directorate, including call centre as well as registration and audit activities, have been suspended until further notice
 - Charities are encouraged to review the CRA Charities Directorate's Charities and Giving webpages, and visit the Charities Directorate's digital services through My Business Account

12. Use of Restricted Purpose Trust Funds

- As charities start to deplete their resources, they may be forced to consider encroaching on restricted purpose trust funds (e.g. endowments)
- However, to do so generally requires court approval
- In Ontario, assistance was announced by the PGT <http://www.carters.ca/pub/bulletin/charity/2020/covid/PGT-Statement-re-Accessing-Restricted-Funds.pdf>
 - PGT is allowing charities that are in danger of closing to access the income and capital of restricted purpose trust funds when necessary to enable them to continue their day-to-day operations, subject to certain conditions.
 - See announcement by the PGT for details

13. Manage Investments of Funds

- Investments of charitable funds must be carefully monitored at all times, particularly in a volatile market
- It is important for a charity to have a robust investment policy that reflects prudent investment standards, *i.e.* “the care, skill, diligence and judgment that a prudent investor would exercise in making investments” in accordance with s.27(1) of the *Trustee Act* (Ontario), or other applicable provincial legislation
- Important to document compliance with prudent investor standard
- Some provinces, like Ontario, provide statutory protections to D&Os if they have acted in accordance with an investment policy

14. Utilize an Audit Committee

- Generally, it is important for a charity or NFP to have an audit committee in order to review financial statements before they are approved by the board
- Audit committees are generally responsible for overseeing financial reporting, disclosure, corporate reporting and risk management
- Audit committees will be particularly important in reviewing financial outcomes from COVID-19
- Important to ensure that the audit committee complies with any requirements that may be imposed by the incorporating legislation, *e.g.* requirements on size, composition, and responsibilities of committee

15. Maintain Solicitor-Client Privilege

- If charities and NFPs are facing legal challenges and/or potential litigation, discussions with legal counsel to seek legal advice should be protected from disclosure in future litigation as long as privilege (e.g. solicitor-client) is properly maintained
- In this regard, important not to waive solicitor-client privilege by disclosing the content of discussions with third parties, even with former board members
- When the board meets to discuss legal advice, that portion of the minutes should be identified as being privileged and confidential as a result of legal advice being discussed

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OVERVIEW

- Workforce adjustment measures
 - Temporary lay-offs
 - Federal Work-Sharing Program
- Federal Relief Programs
 - Canada Emergency Response Benefit
 - Employment Insurance (“EI”) Benefits
 - Supplemental Unemployment Benefit Program
 - Canada Emergency Wage Subsidy (“CEWS”)
- Infectious Disease Leave under the Ontario *Employment Standards Act, 2000*
- Workplace Health and Safety Legislation and Related Considerations

A. WORKFORCE ADJUSTMENT MEASURES

1. Temporary Lay-offs

- Due to the closure of non-essential businesses, charities and NFPs may be faced with the prospect of having to temporarily lay-off some or all of its employees
- The Ontario *Employment Standards Act, 2000* (“ESA”) provides for temporary lay-off of employees for up to 13 weeks in any 20 week period, or up to 35 weeks in any 52 week period if certain obligations, such as benefit continuance are met by the employer
 - See sections 56(1) to 56(5) of the ESA for reference:
<https://www.ontario.ca/laws/statute/00e41#BK119>

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- While the ESA temporary lay-off is not considered a termination of employment, Ontario courts have in some decisions ruled that even a temporary lay-off may constitute wrongful dismissal at common law, unless the employee has agreed in advance to the lay-off
- To mitigate legal risks of temporary lay-offs
 - Limit the period of lay-off to as short a time as possible, while complying with all emergency measures imposed by governments, as well as the temporary lay-off time limits in the ESA
 - Continue benefits coverage for the period of the lay-off, and make it known to employees that they will be recalled as soon as possible

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- Consider asking employees for their written consent to a temporary lay-off to avoid allegations of wrongful dismissal to mitigate the risk of future litigation
- Consider other temporary measures, such as reduction in hours or pay
- Consider a temporary change in duties of employees
- Set up a remote workplan, if possible, for individual employees
- Be open and communicate with employees

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2. Federal Work-Sharing Program

- Temporary special measures to support both employers and employees, and are available to employers facing business downturns that may directly or indirectly be due to COVID-19
- Work-Sharing agreements involve employers, employees and Service Canada as the parties
- Program can be accessed by employers submitting their application, 10 calendar days prior to the requested start date, to ESDC.ON.WS-TP.ON.EDSC@servicecanada.gc.ca for Ontario
 - [Applications for a Work-Sharing Agreement form \(EMP5100\)](#)
 - [Attachment A: Work-Sharing Unit form \(EMP5101\)](#)

- Minimum duration for these agreements is 6 weeks and new changes extend the maximum duration from 38 weeks to 76 weeks
- Other recent COVID-19 related changes include:
 - The mandatory waiting period being waived for those who have already used the program previously
 - Previous requirements for a recovery plan have been eliminated
 - Employers' eligibility expanded to include NFPs experiencing a shortage of work due to a reduction of business activity and/or a reduction in revenue levels due to COVID-19

- Employees’ eligibility requirements:
 - Eligible to receive EI Benefits;
 - Agree to reduce normal working hours by the same percentage and share the available work;
 - Must be “core staff” – year-round, permanent, full-time or part-time employees needed to carry out the day-to-day functions of the business; and
 - Now also includes employees considered essential to the recovery and viability of the business
- For more information, refer to:
 - <https://www.canada.ca/en/employment-social-development/corporate/notices/coronavirus.html#work-share>

B. FEDERAL RELIEF PROGRAMS

1. Canada Emergency Response Benefit (“CERB”)

- Temporary income support program for employees who stopped working due to COVID-19
- These reasons may include, for example: layoff, being quarantined or sick with COVID-19, need to take care of others who are quarantined or sick, and/or needing to take care of children or other dependents whose care facility is closed due to COVID-19
- Must not have voluntarily quit job
- Do not need to be eligible for Employment Insurance (“EI”) to apply
- Provides \$500 a week for up to 16 weeks – amount of \$2000 paid in blocks of 4 weeks

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- Other eligibility requirements include:
 - Residing in Canada;
 - Being at least 15 years of age;
 - Must have had an income of at least \$5000 in 2019 or in 12 months prior to application date; and
 - Are or expect to be without employment for at least 14 consecutive days in the initial four-week period with no employment income being expected for subsequent benefit periods
- If became eligible for EI regular or sickness benefits on March 15, 2020 or later, claim will automatically be processed through the CERB

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- The CERB is being jointly delivered by Service Canada and the Canada Revenue Agency (“CRA”)
- Available from March 15, 2020 to October 3, 2020
- Applications opened April 6, 2020 with specific days being set up to apply for the CERB based on the month of birth of the applicant
- Must apply by December 2, 2020
- To begin application process, visit <https://www.canada.ca/en/services/benefits/ei/cerb-application.html>

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2. EI Benefits

- Always been in place and available to employees losing their jobs through no fault of their own, which would include shortage of work or temporary/mass layoffs
- Unless an employer provides for paid leave entitlements, this is particularly helpful for employees that meet the EI insurable hours requirement and other eligibility criteria
- Available to COVID-19 related absences from prior to March 15, 2020, and individuals will become EI eligible again once the CERB has been exhausted
- **EI Sickness benefits:**
 - Up to 15 weeks of income replacement for individuals that qualify for EI Benefits and are unable to work due to being ill or in quarantine
 - The one-week waiting period that applied to EI sickness benefits was waived, along with the waiver of the requirement for a medical certificate

3. Supplemental Unemployment Benefit Program

- Plan to enable an employer to top up employees' EI benefits during a period of unemployment due to a temporary or indefinite layoff for, among other things, illness, quarantine, or temporary stoppage of work
- The Plan must be registered with Service Canada, otherwise any top-up amounts (up to 95% of wages) paid by the employer would be considered insurable earnings and be deducted from the employee's EI benefits
- For more information, visit <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-supplemental-unemployment-benefit.html>

4. Canada Emergency Wage Subsidy (“CEWS”)

- The goals of the CEWS include preventing further job losses and encouraging employers to rehire employees laid off due to COVID-19
- This is a 75% wage subsidy to eligible employers, including charities and NFPs, that see a drop of at least 15% of their revenue in March 2020 and 30% for the following months
- For charities and NFPs, revenue will include most forms of revenue, excluding revenues from non-arm’s length persons, and they may choose to include or exclude any government funding received when calculating loss of revenue as long as a consistent approach is maintained
- Revenue may also be calculated either on an accrual or cash basis, but not a combination of both

- **Claiming and Reference Periods for Eligibility:**
 - Revenues of March, April and May 2020 can be compared to that of the same month of 2019, or to an average of the employers’ revenue earned in January and February 2020

	Claiming period	Required reduction in revenue	Reference period for eligibility
Period 1	March 15 to April 11	15%	March 2020 over: <ul style="list-style-type: none"> • March 2019 or • Average of January and February 2020
Period 2	April 12 to May 9	30%	April 2020 over: <ul style="list-style-type: none"> • April 2019 or • Average of January and February 2020
Period 3	May 10 to June 6	30%	May 2020 over: <ul style="list-style-type: none"> • May 2019 or • Average of January and February 2020

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- There would be no overall limit on the subsidy amount that an eligible employer may claim
- The subsidy amount for a given employee on eligible remuneration paid between March 15 and June 6, 2020 would be the greater of:
 - 75% of the amount of remuneration paid, up to a maximum benefit of \$847 per week; and
 - the amount of remuneration paid, up to a maximum benefit of \$847 per week or 75% of the employee's pre-crisis weekly remuneration, whichever is less
- Employers may be eligible for a subsidy of 100% of the first 75% of pre-crisis wages or salaries of existing employees, and will also be eligible for a subsidy of up to 75% of salaries and wages paid to new employees
- Employer must pay wages and then apply for subsidy. Employees do not wait to get paid

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- Applications for the CEWS would be made online through CRA's *My Business Account* portal
- Employers must maintain records demonstrating their loss of revenues and remuneration paid to employees
- CEWS eligible employers will also become entitled to claim a 100% refund for certain employer-paid contributions to Employment Insurance and Canada Pension Plan, *etc*
 - The refund only applies for weeks when employees are on leave with pay and for which the employer is eligible to claim for the CEWS for those employees, *i.e.* the employee does not perform any work for an entire week but is being remunerated
 - Employers continue to collect and remit employer and employee contributions as usual, and apply for a refund at the same time as for the CEWS

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- **Temporary Wage Subsidy:**
 - On March 18, 2020, the Federal Government had proposed to provide eligible small employers, including charities and NFPs, a temporary wage subsidy, which would equal 10% of remuneration paid from March 18, 2020 to June 19, 2020, up to a maximum subsidy of \$1,375 per employee and \$25,000 per employer
 - For employers eligible for both the 10% wage subsidy and the CEWS, any benefit from the 10% subsidy for remuneration paid in a specific period would generally reduce the amount available to be claimed under the CEWS in that same period
 - Further, organizations not qualifying for the CEWS may still qualify for the 10% wage subsidy

C. INFECTIOUS DISEASE LEAVE UNDER THE ESA

- In Ontario, the ESA gives employees the right to take unpaid job-protected [leaves of absence](#), which include sick leave, critical illness leave, personal leave, family caregiver leave, and bereavement leave, among others
- The *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* was passed on March 19, 2020 providing employees with job-protected leaves for employees who are quarantined, in self-isolation or directly affected by travel restrictions due to COVID-19, unable to work because of school or daycare closures, or due to their need to care for “specified individuals”
 - The [list](#) of “specified individuals” has now been widely expanded – see section 50.1(8) of the ESA

- The ESA had provisions for an [emergency leave](#) limited to **declared emergencies**, but now has been amended to include **infectious disease leaves**
- This Leave may last for the entire period an employee is unable to perform their job duties for reasons prescribed by the ESA or until the day the emergency ends
 - Ontario has been in a state of emergency since March 17, 2020, allowing employees to apply for the declared emergency leave
 - COVID-19 has also been designated as an infectious disease, giving employees entitlement to seek an unpaid leave of absence under the infectious disease provision because of a COVID-19 related reason, deemed to have started on January 25, 2020

D. WORKPLACE HEALTH AND SAFETY

1. *Occupational Health and Safety Act (Ontario)* (“OHSA”)

- Duties of employers:
 - Take all reasonable precautions to protect the health and safety of employees
 - Provide employees with the information and training to protect against hazards
 - Duty to report “occupational illnesses” of employees to the Ministry of Labour, Training and Skills Development and the union, if present, within 4 days
 - Definition of “occupational illness” is broad enough that it would include COVID-19 if contracted by the employee while at work

- Also a duty in Ontario to report occupational illnesses to the Workers' Compensation Board, if covered by it, within 3 days
- Rights of employees:
 - Right to refuse work if have “reason to believe” that the workplace is unsafe to work in (exceptions for workplaces where risk is inherent as part of the job)
 - An employer may not discipline or retaliate
- Violations of the OHSA can lead to an employer being penalized and opens them up to the possibility of being sued

2. Other Relevant Considerations For Employers

- Stay informed with the recommendations and guidance provided by the World Health Organization, Public Health Agency of Canada, Ontario Ministry of Health and Long-term Care, *etc.*
- Implement social distancing measures, including encouraging employees to work remotely, making use of telephones or videoconferencing, and if that is not possible, avoid close contact if physically present at the workplace

- Follow Government of Canada travel directives – all business or personal travel of employees should be discouraged
- Require all employees to disclose any COVID-19 associated symptoms and send them home to self-isolate for 14 days
 - The same applies if an employee discloses that they or a family member has been in contact with someone who was exposed to or tested positive for COVID-19

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SETTING THE CONTEXT

- There are relief measures extending the deadline to file CRA and corporate returns because of COVID-19
- Charities and NFPs need to adjust how they hold board meetings and members' meetings during the COVID-19 pandemic because
 - Limit on how many people can gather
 - Physical distancing
 - Directors' fiduciary duties to act in the best interest of the organization by balancing the need to comply with legal requirements against the need to protect the health and well-being of directors and members and not subject them to risk of virus infection
- See Bulletin 466

<http://www.carters.ca/pub/bulletin/charity/2020/chylb466.pdf>

I. CRA AND CORPORATE FILINGS

A. CRA FILING DEADLINE

Registered charities – T3010 due within 6 months after their fiscal year end

For charities with T3010 due between March 18, 2020 and December 31, 2020	Relief – filing deadline extended to December 31, 2020
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NPOs have to file T2 (if incorporated) and T1044 (required for some NPOs) due 6 months after their fiscal year end

For NPOs that have a filing due date after March 18 and before June 1, 2020	Relief – filing deadline extended to June 1, 2020
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Note – NPOs whose fiscal year is Dec 31, 2019, their filing deadline is June 30, 2020, they have no relief

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B. CORPORATE FILING DEADLINE

CNCA Corporations – Annual Returns due within the 60 days after “anniversary date” (date the corporation incorporated, amalgamated or continued under CNCA)

For corporations whose anniversary date is between February 1 and June 30, 2020	Relief – filing deadline extended September 30, 2020
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Federal Special Act Corporations – Annual Returns due between April 1 - June 1

All federal special act corporations (filing period April 1 to June 1, 2020)	Relief – filing period extended to the period of April 1 to September 30, 2020
--	--

OCA corporations - Annual Returns filed at same time as time required to file their tax/information returns with CRA (whether or not they are filed with the returns with CRA or filed separately with the ministry)

All OCA corporations where CRA provides relief to file tax/information turns	Relief – Filing deadline for annual returns is also similarly delayed
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II. HOLDING MEETINGS

A. BOARD MEETINGS

- Generally not an issue for OCA and CNCA directors to hold meetings by telephonic or electronic means, but may not be the practice for some (e.g. small or local community or religious organizations)

OCA

- Directors and committee of directors may meet by telephonic or electronic means if certain conditions are met, and the by-laws do not otherwise provide
- Relief - Emergency Order (Reg 107/20) under ss. 7.1(2) of *Emergency Management And Civil Protection Act*
 - Provides flexibility to hold board meetings electronically during emergency
 - Made March 30, 2020, retroactive to March 17, 2020

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S. 283(3.1) suspended during emergency	S. 283(3.1) new temporary provision during emergency
Directors may meet “by such telephone, electronic or other communication facilities” provided that all of the following conditions are met:	Directors may meet “by such telephone, electronic or other communication facilities” provided that the following is met:
(1) all the directors present at or participating in the meeting consent	
(2) the facility used permits “all persons participating in the meeting to communicate with each other simultaneously and instantaneously”	The facility used permits “all persons participating in the meeting to communicate with each other simultaneously and instantaneously”
(3) the by-law does not otherwise provide	The above mechanism can be used despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise

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- Option to use written resolution in lieu of holding a board meeting if signed by all directors [s. 298(1)]
- CNCA**
- Directors may participate in a meeting of directors or of a committee of directors “by means of a telephonic, an electronic or other communication facility” if all of the following conditions are met: [s. 136(7)]
 - (1) If all the directors of the corporation consent
 - (2) The facility permits all participants to communicate adequately with each other during the meeting
 - (3) The by-law does not otherwise provide
 - No relief from Corporations Canada
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- Common law does not permit proxy vote at board meetings or alternate directors
- How to hold virtual board meetings?
 - Similar issues to address as those for members' meeting (see next section of presentation)
 - Generally easier to address meeting issues because of small number of participants, e.g., conference call, Skype, WhatsApp, Zoom

B. MEMBERS' MEETINGS

- OCA and CNCA requirements for how AGMs can be held
- Special members' meeting can also be held during the COVID-19 pandemic, but unlikely will be held unless it is an absolute emergency
- The COVID-19 pandemic is especially a problem for corporations that normally hold their AGMs in the spring or early summer

1. Option – Postpone the AGM

OCA

- AGM must be held not later than 18 months after its incorporation and subsequently not more than 15 months after the previous AGM [s. 293]
- Relief – Emergency Order (Reg 107/20) to delay the AGM for all OCA corporations
 - If AGM is required to be held during the emergency, then the AGM can be delayed to be held no later than the 90th day after the day the emergency is terminated
 - If AGM is required to be held within 30 days after emergency is terminated, then the AGM can be delayed to be held no later than the 120th day after the day the emergency is terminated

- Example - Last AGM was held on March 24, 2019 => 15 months after the last AGM is June 24, 2020
 - If emergency declaration ended more than 30 days before June 24, 2020 (e.g. May 15, 2020), then AGM will need to be held by June 24, 2020
 - If emergency declaration ended less than 30 days before June 24, 2020 (i.e. between May 25, 2020 and June 24, 2020), then AGM will need to be held within 120 days after the date when the declaration ended - this will give up to 4 months to prepare for the AGM
 - If emergency declaration ended after June 24, 2020, then AGM will need to be held within 90 days after the declaration ended – this will give 3 months to prepare for the AGM

CNCA

- AGM must be held not later than 18 months after its incorporation and subsequently not more than 15 months after the previous AGM, but no later than 6 months after the financial year end [CNCA s. 160(1) and CNCR s. 61]
- No blanket relief from Corporations Canada
- May apply to Corporations Canada to extend the time for calling an AGM if Corporations Canada's policies are met (e.g. members will not be prejudiced, detrimental not to delay the AGM)

- Examples where desirable to delay the AGM
 - Not possible to adopt written resolutions in lieu of holding an AGM (option 3 is not available)
 - Hybrid or virtual meetings cannot or not suitable to be held (option 4 is not available)
 - Audited financial statements not ready because the audit is delayed due to COVID-19
- Creative DIY solutions and not to ask for order to delay AGM? – Cautions:
 - Directors and officers under the CNCA must comply with the CNCA and regulations under the CNCA, articles, by-laws, and unanimous member agreements
 - The date when the AGM is held has to be reported in the Annual Return

- Consequence of delaying the AGM

OCA

- If an election of directors is not held at the proper time, the directors continue in office until their successors are elected [s. 287(4)]

CNCA

- A director not elected for an expressly stated term ceases to hold office at the close of the first AGM following the director's election [s. 128(5)]
- Appointed directors hold office for a term expiring not later than the close of the next AGM [s. 128(8)]
- If directors are not elected at a meeting of members, the incumbent directors continue in office until their successors are elected [s. 128(6)]

2. Option – Absentee Votes

- Not really an “option” but needs to be considered
- Various issues to consider, for example are absentee votes permitted, are they included in quorum count ...?
- **OCA** – members are entitled to vote by proxy (s. 84)
- **CNCA**
 - Only 3 types of absentee voting permitted under the CNCA regulations: voting by proxy, by mailed-in ballots, and by means of a telephonic, electronic or other communication facility
 - Absentee voting may only be used if they are specifically permitted in the by-laws - If by-law does not permit absentee voting, by-law amendments to permit this are not effective until they are approved by special resolution of the members [ss. 197(1)(m)]

3. Option – Written Resolutions in Lieu of AGM

- **OCA** – in lieu of holding a members’ meeting, a resolution in writing may be passed if signed by all members [s. 298(2)]
- **CNCA** - in lieu of holding a members’ meeting, a resolution in writing may be passed if signed by all members entitled to vote on that resolution and the requirements under the CNCA are met [s.166]
- This method is only of use where the membership is small and the matters to be decided are not contentious

4. Option – Electronic AGM

- In general, 2 types of electronic meetings
 - Virtual meeting - all members join the meeting by electronic means, such as conference call or web conference
 - Hybrid meeting - hold an in-person meeting and members may participate in the meeting by electronic means
- In light of the COVID-19 pandemic, a hybrid meeting would likely involve only a few persons attending in person, with the vast majority of the members attending by electronic means
- Lots of considerations, no one-size-fits-all solution
- May not be suitable for some circumstances

(a) Consideration – Legislation and By-laws

OCA

- Relief by Emergency Order (Reg 107/20) to allow electronic members’ meetings

S. 125.1(1) suspended during emergency	S. 125.1(1) new temporary provision during emergency
Members’ meetings be held by “telephonic or electronic means” and members may “through those means, votes at the meeting or establishes a communications link to the meeting”	Members’ meetings be held by “telephonic or electronic means” and members may “through those means, votes at the meeting or establishes a communications link to the meeting”
unless the by-laws provide otherwise	The above mechanism can be used despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise

CNCA

- Default rule is that members are entitled to participate at members’ meetings in person
- Hybrid meeting – Under the CNCA, members are also entitled to participate by “telephonic, an electronic or other communication facility” *if* the corporation provides such means, i.e., a hybrid meeting. If a corporation does not wish to allow members to participate in meetings electronically, it should opt out of such right in its by-laws [s. 159(4)]
- Virtual meeting - Corporations that want to permit virtual meetings by “an electronic or other communication facility” must include specific permission to do so in their by-laws [s. 159(5)]
- Need to review by-laws to determine what types of meetings are permitted

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- For both hybrid and virtual meetings, members may vote by means of a telephonic, electronic or other communication facility provided that the facility meets both of the following requirements:
 - enables the vote to be gathered in a manner that permits its subsequent verification
 - permits the tallied vote to be presented to the corporation without it being possible for the corporation to identify how the person voted [CNCA s. 159(4)&(5),165(4); CNCR s. 71(2)]
- Note that the same requirements apply to electronic voting at in-person meetings [CNCA s.165(3); CNCR s. 71(1)]

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- Can by-law be amended to permit hybrid meeting or virtual meeting [s. 152]?
 - CNCA permits directors to make, amend or repeal any by-laws (except matters referred to in ss. 197(1)) and such by-law will become effective immediately until the next meeting of members, at which time the members may confirm, reject or amend the by-law, amendment or repeal by ordinary resolution
 - However, corporations may opt out of this by-law amendment mechanism, but to require all by-law amendments not be effective until approved by special resolution of the members

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- Note that the by-laws of many CNCA corporations may not permit by-law amendments under s. 152 for different reasons, for example:
 - Not reflect practice of the organization (especially pre-CNCA practice)
 - Not appropriate for the directors to make unilateral changes to the by-laws and to act on them before they have been approved by the members
 - Confusing to decide what by-law changes could be amended by the board to take immediate effect, and which by-law changes fall within ss. 197(1) of the CNCA which require approval by special resolution of the members before becoming effective

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(b) Consideration – IT platform capabilities and meeting issues

- When determining a suitable electronic platform for the meeting, considerations will need to be given to the technical capabilities of the platform
- There are many platforms in the market, the platform being contemplated must meet the unique needs of each organization
- Decide if you want to look for a short-term solution just for the COVID-19 pandemic or plan for the long-term to hold electronic members' meetings in future

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- Must meet requirements for a valid meeting
 - An electronic meeting must still meet all of the elements required to have a valid meeting, the platform must be able to meet all these requirements
 - Notice of meeting – e.g., proper information to be included in notice, timely delivery of notice, proper notice delivery method
 - Absentee votes – e.g., how to notify members of their right to cast absentee votes, how will they be cast, how will the votes be collected and tallied

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- Meeting procedure, for example:
 - How would the chair have control of the meeting?
 - How would attendees participate and speak at the meeting and what protocol to follow?
 - How would moving, seconding, amending, and discussion of motions be handled?
 - How to ensure only one person has the floor at one time? How would the chair control who has the floor?

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- Collect and tally votes
 - Does the platform allow participants to communicate adequately with each other during the meeting so that they can have a meaningful discussion ? [one-way live streaming is not a suitable platform]
 - Can the CNCA requirements on how votes are to be gathered be met [See above slides, CNCA s. 159(4)&(5),165(4); CNCR s. 71(2)]?
 - Is it necessary to use the meeting platform with a voting platform?
 - How would attendees vote and how would the votes be tracked?
 - How to track the voter only votes once? Can the voter change his vote?

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- Other meeting and IT logistics issues
 - Is there a limit on how many persons can participate at the same time?
 - Is there a limitation on the maximum length of the meeting?
 - Are there special hardware and internet requirements?
 - Is software download required?
 - Will each voter have a dedicated log in & voting ID?
 - Is test run supported?
 - Is live technical support available?
 - Can the meeting be recorded and if so, how long will the recording be maintained?
 - How would attendee registrations be tracked?

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- Are there costs involved in utilizing the platform?
- Will the platform be available after COVID-19 in case if the organization would like to continue holding electronic meetings?

- Privacy and security issues, for example
 - Is log in secure? How to ensure the person who logged in is the “right” person? How to ensure others are not logged in or “listen in”?
 - If materials are distributed through the platform, is it secure?
 - Are the voting and tallying functions secure?
 - How is the privacy of the attendees maintained?

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- Minutes
 - Minutes must still be kept by a real person of the proceedings
 - Not good practice to treat a video/audio “recording” of an electronic meeting as the “minutes”

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- Examples of common IT platforms available, pros and cons for each one
 - GetQuorum
 - GoToMeeting
 - Zoom
 - Onstream Meetings
 - Broadbridge
 - ClickMeeting
 - Pragmatic
- May couple with voting platform, e.g.,
 - Election Buddy
 - Simple Survey
 - Simply Voting
 - Secured Voting

(c) Consideration – Situations where electronic meeting may not be suitable

- Even if a suitable IT platform is available, it may still not be suitable to hold an electronic members' meeting for various reasons
- Example - organizations with a large membership of constituents who are elderly or have disability issues
 - Would they have access to the necessary electronic device to connect and log into the meeting?
 - Would notice of meeting and meeting materials be provided to them electronically and how would they have access?
 - Would they be intimidated to speak or participate at such a meeting?

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- Would there be a high possibility for voting errors because elderly members may not be familiar with the technology?
- Other examples of practical issues
 - Organizations that are not accustomed to holding electronic meetings, e.g., local church or mosque
 - Organizations with a large membership (such as those with a few thousand members) and they have never held an electronic AGM before
 - If non-voting members are entitled to attend and speak (but not vote) at an AGM, how would they be tracked?
 - How to deal with members who want to nominate from the floor directors for election?

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- Are there contentious matters to be decided involving heated debates with complex proceedings (such as multiple amendments from the floor on motions being decided)?
- How to hold the AGM outside of annual conference if they are usually held together?

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Tips to ensure a successful electronic meeting

- Know the legal requirements
- Do due diligence to find an appropriate IT platform
- Adopt electronic meeting policy and workflow
- Ensure sufficient time to complete the logistics
- Have plenty of preparation
- Give clear instructions to attendees
- Chair of meeting
 - Plays a key role, calm and be in control of the meeting, be knowledgeable of the requirements
 - Helpful for a script be prepared ahead of time
 - Have a technical person nearby to help if necessary
- Do rehearsals and test run

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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

CONTRACT TERMINATION STRATEGIES AS A RESULT OF COVID-19

By Sean S. Carter, B.A., LL.B.*
*Assisted by Heidi LeBlanc, B.A., LL.B.


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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Special Carters COVID-19 Webinar: Legal Issues for Charities and NFPs April 9, 2020</p>
<p>Contract Termination Strategies as a Result of COVID-19</p> <p>By Sean S. Carter, B.A., LL.B.* scarter@carters.ca 1-877-942-0001</p> <p>*Assisted by Heidi LeBlanc, B.A., LL.B. © 2020 Carters Professional Corporation</p>	
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INTRODUCTION

- COVID-19 has meant that charities and not-for-profits (NFPs) may need to make decisions to minimize liabilities related to income loss, program changes, etc.
- This presentation will focus on strategies to consider when one or all parties are unable to carry out contractual duties because of COVID-19
- The governmental (and other) restrictions are constantly evolving, but charities and NFPs may need to make difficult decisions regarding events months away
- The cancellation of events, services, etc. will likely result in significant monetary losses. It is important to consider what potential strategies are available, whether it be through effective private negotiation or preparation for future litigation

- The courts in Ontario that deal with civil actions (Superior Court of Justice) are (and have been) open, subject to evolving limitations
- Each situation could be subject to judicial review. For now, delay will certainly be experienced, but the underlying legal responsibilities remain binding
- Duties such as the responsibility to preserve evidence (even if only a prospect of litigation) and compliance with existing legal responsibilities continue to exist
- Though contractual responsibilities continue during the unique circumstances of a pandemic, there are potential options for relief or limiting penalties, losses or liabilities if proactive steps are taken and legal advice is sought

1. Force Majeure (“FM”) Clauses

- These type of clauses (not a free floating remedy) exist in a variety of contracts, but they do not necessarily provide complete relief from contractual responsibilities. Each FM clause is unique and the facts may drastically change how a court may interpret it
- These FM clauses often include language that relieves the parties of some/all contractual responsibilities if certain events occur, commonly “acts of God, riots, strikes...” and other events beyond human foresight
- Since SARS and the ‘Bird Flu’, many contracts have actually referred to “pandemics” in the FM list, so it will be up to the courts to interpret whether the individual contractual clause was meant to cover a pandemic like COVID-19 (e.g. is it an ‘act of God’?)

- It is important, however, to remember that well-meaning attempts to invoke the FM contractual clause (if already existing in the contract) may inadvertently lead to anticipatory or peremptory breach of contract
- It may be best initially that the FM clause be utilized as a tool to assist in ‘without prejudice’ negotiations, and only openly invoked as a matter of last resort
- Need to pay careful attention to the “notice” periods within these FM clauses
- They may require a minimum notice period to notify the other parties that the FM clause is to be invoked. Parties can reach out and discuss issues related to FM clauses on a without prejudice basis much earlier, in an effort to reduce potential damages, losses and liability

- It is not a foregone conclusion that a FM clause may be enforced by the court, particularly if it is part of some un-negotiated “terms and conditions” written in small print on the back of each contract. The ‘*contra proferentem*’ rule may provide the court the basis to hold a FM clause unenforceable
- The facts of the case, conduct of the parties, and the terms of the FM clause will be mainly determinative if it proceeds to court
- Because of the likely delay that will occur in enforcement in the civil courts over the next year or two particularly, there are strong reasons to consider early negotiated settlement or even private arbitration

2. What about ‘Frustration of Contract’?

- Where a FM clause is not present in the contract or has been stuck down, the parties may be able to resort to the common law remedy of ‘frustration of contract’
- Remember that *until* a court rules on it, frustration is simply a remedy or defense to be raised depending on the specific facts of the situation
- Therefore, frustration does not depend on either party raising it in the moment (but it may assist in without prejudice negotiations)
- It is difficult to predict whether the contract will be deemed to be frustrated, however the purpose of the contract (and whether it has been undermined) and the timing will be critical to the analysis

3. Impossibility ...*closely related to Frustration*

- Impossibility is some dramatic change that radically impacts on the very nature of the contract
- This remedy has been widened beyond simply what is impossible and really should be understood as what is commercially impracticable
- Again, it is a matter of law (a defence or remedy to be raised); however impossibility may be a remedy that courts rely on for this pandemic
- *E.g.*, a church *could* hold a conference at a resort that defies government direction and safety at that time (in that it may be fined), but it is commercially impracticable to do so because of government directions and common sense safety precautions
- Again, this is a highly fact-specific analysis, and it is legal relief that the court may grant after. However, it can be used to assist in “without prejudice” discussions

4. Liquidated Damages Clause

- These clauses exist in many contracts to discourage last minute cancellation and (in theory) to quantify the damages if a party wants to terminate the contract
- Because so many contracts have them, it is another critical reason why parties may want to avoid anticipatory breach of contract (as termination is a precondition)
- A lot of contracts will have these clauses with pre-specified monetary penalties. However, even if termination of the contract is likely, not all penalty clauses will hold up to judicial scrutiny

- If the clause is akin to a penalty, the liquidated damages clauses may not be enforced, particularly if there was no attempt, when the contract was formed, to estimate the actual loss or damages or may violate public policy
- While there is little case law yet to support this, this pandemic may very well be the 'public policy' reason courts may look to in order to either strike or dramatically lessen a liquidated damages clause
- This analysis does not apply to deposits, which are to be assessed separately and are often forfeited, but the return (or partial return) of the deposit may be an effective position for negotiation

CONCLUSION - What to do?

- Given this relatively unprecedented situation, ensure that liabilities (including contracts for services or goods) are carefully reviewed
- These strategies may assist both those parties that wish for relief from some aspect of the contract and those that need to ensure that the maximum amount of funds or damages are retained
- No one likes to litigate, but the threat alone should not push an organization into accepting an unreasonable position. Negotiation and effective advocacy of your position is crucial in protecting charitable and NFP assets
- There is little doubt that there will be years of litigation that ensue from this pandemic period, so getting help early and being proactive can save tremendous time and resources in litigation

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SPECIAL CARTERS COVID-19 WEBINAR: LEGAL ISSUES FOR CHARITIES AND NFPS

April 9, 2020

PRIVACY AND DATA SECURITY ISSUES IN RESPONSE TO COVID-19

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<p>Privacy and Data Security Issues in Response to COVID-19</p> <p>Esther Shainblum, B.A., LL.B., LL.M., CRM eshainblum@carters.ca 1-866-388-9596</p> <p>© 2020 Carters Professional Corporation</p>	
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INTRODUCTION

- Charities and Not-for-Profits (“NFPs”) must be aware of privacy and data security issues when dealing with this crisis
- Privacy laws continue to apply – must balance protecting individual privacy against protecting the health and safety of the larger community/workplace
- Brief presentation - two key areas of risk:
 - COVID-19 and personal information in the workplace
 - Cyber-safety

A. HANDLING PERSONAL INFORMATION – SCREENING AND MANAGING COVID-19 IN THE PHYSICAL WORKPLACE

- Charities and NFPs may have to collect, use and disclose personal information in order to:
 - Protect their employees, volunteers and clients
 - Maintain a safe workplace
 - Provide services to clients
- Charities and NFPs may adopt screening procedures including:
 - Taking temperatures of people coming into the workplace
 - Asking questions about travel history, family history, living arrangements, physical symptoms

- Management of COVID-19 in the workplace may include advising co-workers, clients and others that someone has been diagnosed, requiring certain individuals to self-isolate and making other notifications, if applicable, such as under OHSA
- All of these actions constitute the collection, use and disclosure of personal information
- Depending on where charities or NFPs operate, different privacy legislation, or no privacy legislation, may apply
- Charities and NFPs should continue to abide by the following basic, overarching privacy law principles when collecting, using and disclosing personal information in response to the COVID-19 emergency

1. Reasonable Purposes

- Charities and NFPs should only collect, use or disclose personal information for purposes that are reasonable and appropriate
 - Likely that collecting, using and disclosing personal information to prevent the spread of the disease would be seen as reasonable

2. Identify Purposes - A COVID-19 Response Policy

- Charities and NFPs should identify the purposes for which personal information is collected at or before the time of collection
 - Charities and NFPs should put in place and communicate to their employees, volunteers, clients and other stakeholders a COVID-19 response policy
 - The COVID-19 response policy should document how the charity or NFP will collect, use and disclose personal information to prevent and manage the spread of COVID-19
 - Will also assist in obtaining meaningful consent, to be discussed in a few minutes

3. Minimize Collection, Use And Disclosure

- Charities and NFPs should limit their collection, use and disclosure of personal information to the minimum necessary for the purposes identified
 - Should not collect more personal information than required to fulfil the identified purposes
 - What is necessary will likely depend on direction from public health authorities, medical professionals and other relevant sources
 - Use and disclosure of personal information should also be minimized to that which is necessary to achieve the purposes

4. Consent

- Charities and NFPs should obtain consent for the collection, use, or disclosure of personal information
 - Although a number of privacy statutes may provide exceptions to the requirement to obtain consent in emergency situations, the default position should be that consent is required
 - Legal advice should be obtained before making the determination that consent is not required
 - Must also consider the appropriate form of consent – e.g. express or implied - depends on the nature of the information and the reasonable expectations of the person

- Charities and NFPs should obtain express consent when the personal information is likely to be considered sensitive
 - such as health information
- Consent must also be meaningful
 - must understand the nature, purposes and consequences of what they are consenting to
 - COVID-19 response policy can be useful in this regard

5. Safeguarding

- Charities and NFPs should protect the personal information that they have collected by security safeguards appropriate to the sensitivity of the information
 - Should include physical, technological and administrative safeguards
 - Charities and NFPs with remote workforce should consider whether additional security measures are required to protect personal information

B. DATA SECURITY

- Many employees are working remotely due to social distancing and mandatory closure of all non-essential workplaces
- These arrangements – often hastily assembled – have put charities, NFPs and other workplaces at increased risk of cyber attacks and privacy breaches
- Cyber attacks have intensified as a result of the pandemic, with increases in the incidence of phishing, malware attacks and email scams
- One U.S. study found a 667% increase in cyber attacks in March 2020
 (<https://thehill.com/policy/cybersecurity/490232-cyber-threats-spike-during-coronavirus-pandemic>)

- Cyber criminals are also taking advantage of the fact that many home devices are not securely protected
- Toronto Star - “most Canadians don’t realize how insecure their home internet connection is compared to the system in an office environment”
<https://www.thestar.com/news/gta/2020/03/18/working-from-home-youre-likely-now-at-greater-risk-of-being-hacked-experts-say.html>
- Other risks of remote work/access include using personal devices to access core IT systems, sharing computers and devices, not keeping devices, passwords and documents secure

- Difficult to keep systems secure, to keep track of sensitive information and who is accessing it and to find out about and respond to privacy breaches
- Challenging to protect personal information and confidential business information
- Directors and officers of charities and NFPs may be exposed to the risk of litigation, including potential claims of breach of their fiduciary duties and breach of duty of care
- Charities and NFPs need to take steps to ensure that personal information is adequately safeguarded, as discussed on the next few slides

1. What Charities And NFPs Should Do To Protect Personal Information

- Build a culture of privacy and training employees to be extra-vigilant against COVID-19 phishing scams
- Educate staff about the need to comply with privacy law and organizational privacy policies while working remotely
- Keep enterprise software up to date to reduce the risk of hacking and malware
- Set up a virtual private network to be used by employees for accessing work data
- Understand where personal information is stored and restricting access on a need-to-know basis
- Provide charity/NFP owned devices to employees as much as possible

- Vet employee owned devices to ensure that they meet security standards
- Encrypt data on portable enterprise devices and removable media
- Have robust contracts with third-party service providers
- Ensure that data is backed up regularly
- Ensure adequate and trustworthy IT support is available for remote workers
- Have clear privacy breach and security incident response protocols in place and ensuring that staff is informed of them
- Obtain adequate cyber insurance coverage to protect the organization against cyber-crime and fraud

2. What Remote Workforce Should Do To Protect Personal Information

- Charities and NFPs should also require their employees to take a number of steps, including:
 - Use only charity/NFP provided or approved devices and software that is regularly updated to protect against viruses and malware
 - Upgrade home routers to the latest version and ensure their Wi-Fi connection is secure
 - Fortify their passwords using multi-factor authentication where possible
 - Only access work data using the charity/NFP's virtual private network

- Avoid sending sensitive information via email and only using secure charity/NFP resources to share files
- Store work devices safely and securely, without access to anyone else
- Be suspicious of emails
 - that refer to the coronavirus,
 - that ask them to click on links or open files,
 - that create an image of urgency or severe consequences or
 - that ask for unusual things or information

CONCLUSION

- Charities and NFPs will encounter a number of privacy and data security issues during the COVID-19 pandemic
- They should ensure that adequate strategies and measures are put in place to mitigate the risks of privacy and data breaches

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