

THE OTTAWA REGION  
*Charity & Not-For-Profit Law Seminar*

*Thursday, February 13<sup>th</sup>, 2020*

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# **2020 ESSENTIAL CHARITY AND NFP LAW UPDATE**

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## **2020 Essential Charity & NFP Law Update**

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### **OVERVIEW (Current as of February 7, 2020)**

- 2019 Federal Budget Highlights
- Report of the Special Senate Committee on the Charitable Sector
- Advisory Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Federal Legislation/Corporate Update
- Ontario Corporate Update
- Case Law of Interest

**OVERVIEW**



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## A. 2019 FEDERAL BUDGET HIGHLIGHTS

- Budget 2019 was presented on March 19, 2019
- 1. Journalism:**
  - Budget 2019 proposed tax measures to “provide support to Canadian journalism organizations producing original news”
  - On June 21, 2019, Bill C-97 received Royal Assent, implementing the following changes (now in force):
    - Allowing certain journalism organizations to register as qualified donees under the new category for “registered journalism organizations” (“RJOs”);
    - A refundable labour tax credit for qualifying journalism organizations, applicable to salary or wages as of January 1, 2019; and
    - A temporary non-refundable tax credit for “eligible digital subscriptions” to Canadian news for expenses made after 2019 and before 2025

- Some of the requirements for any of these incentives to apply, include:
  - Journalism organization must be classified as a “qualified Canadian journalism organization” (“QCJO”) within meaning of the ITA
  - A QCJO will need to meet eligibility requirements to be developed by an independent panel of experts from the Canadian journalism sector
  - A QCJO must engage primarily in the production of original news content on general interest matters
  - To be eligible as a qualified donee, a QCJO will also need to meet the narrow definition of “qualifying journalism organization”, in which event it could be registered as an RJO
- On December 20, 2019, CRA released a Guidance document, providing further information on these tax measures, and clarifying requirements for designation as a QCJO



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## 2. Stock Options:

- Budget 2019 proposed to limit use of the current employee stock option regime for high-income individuals employed at large, long-established, mature firms
- The direct consequence of the proposed changes would be to disallow the additional deduction for charitable donations of securities acquired under an employee stock option agreement above the vesting limit of \$200,000
- A public consultation to get input from stakeholders on various aspects of the proposed changes ended on September 16, 2019
- On December 19, 2019, the Federal Government issued an Update indicating that the implementation of the proposed changes would be delayed as the input received during the consultations is being reviewed
- More details on the proposed changes will be provided in Budget 2020



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## 3. Social Finance Fund:

- Budget 2019 provided further details about the Social Finance Fund first announced in the 2018 Fall Economic Statement
- It is to provide up to \$755 million on cash basis over a period of 10 years to provide charities, non-profits, and other social purpose organizations with access to new funding, and connections to private investors
- The investment of \$50 million over two years in the Investment Readiness Program, a pilot program of the Social Finance Fund, seeks to assist social purpose organizations to successfully participate in the social finance market
  - Organizations can access grants by applying to “readiness support partners”, such as Community Foundations of Canada



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## B. REPORT OF THE SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector in Canada
- In its year-long study, the Special Committee heard from various sector and government witnesses on an ongoing basis starting in April 2018 through to April 2019
- The final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* was released on June 20, 2019, and made 42 recommendations to the Government of Canada
  - See [https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB\\_Report\\_Final\\_e.pdf](https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf)

- Of the 42 Recommendations, some key ones are:
  - The Tax Court of Canada be given jurisdiction for hearings *de novo* over appeals from Charities Directorate decisions
  - Current three types of charities to be replaced by two categories, being public and private charities
  - Replace direction and control with an “expenditure responsibility test”
  - Review ITA provisions regarding charities every five years
  - Pilot project to study eliminating capital gains tax on charitable donations of private company shares and real estate
  - Consider means of ensuring that charities do not languish in donor-advised funds
  - Review of “ineligible individual” provisions in the ITA



## C. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

- The 2018 Fall Economic Statement released by the Department of Finance announced the Government's commitment to establish a permanent Advisory Committee on the Charitable Sector
- The Advisory Committee is to regularly consult with charities and advise the Government with respect to important issues facing the charitable sector
- On August 23, 2019, the Minister of National Revenue announced the full membership of the Advisory Committee, which is comprised of 3 senior Government officials (2 from the CRA, and 1 from Finance Canada), as well as 14 appointed sector members

- On December 17 and 18, 2019, the Advisory Committee met in Ottawa and discussed the importance of fostering the relationship between the charitable sector and the Federal Government
- The members identified the following priority themes:
  - Evolving the institutional framework to effectively advance public purposes and maximize sector impact;
  - Ensuring financial sustainability within the charitable sector; and
  - Establishing modern governance for the charitable sector



## D. RECENT CRA PUBLICATIONS AND PROGRAMS

- On March 8, 2019, the CRA published an information website and *Guide for cryptocurrency users and tax professionals*, providing compliance guidelines on digital/virtual currencies
- On June 1, 2019, the CRA launched new digital services through My Business Account, as a product of the Charities IT Modernization Project (“CHAMP”), including:
  - Online filing of T3010 charity returns
  - Ability to update certain information about charities electronically
  - New online application for charitable status



- In November 2019, the CRA released a GST/HST Ruling indicating that meals supplied by charities to seniors are not generally taxable
  - Charity was a registered charity for income tax purposes and a charity for GST/HST purposes, despite not being registered for GST/HST purposes
  - CRA ruled that the charity’s supply of food and beverages to residents of the facility would be exempt supplies pursuant to s.4 of Part V.1 of Sch.V to the *Excise Tax Act*, and not be subject to GST/HST
  - This section provides an exemption to supplies of food and beverages made by charities to seniors, underprivileged individuals, or individuals with a disability, and which are made under a program established and operated to provide prepared food to these individuals in their places of residence



- In November 2019, CRA released a revised Form T3010 with an accompanying guide
  - Most notable change was replacing questions for “political activities” with questions on public policy dialogue and development activities (“PPDDAs”) that were introduced to the ITA in December 2018



## E. FEDERAL LEGISLATION/CORPORATE UPDATE

### 1. *Canada Elections Act*:

- Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* came into force on June 13, 2019
- Now imposes reporting requirements on third parties that engage in “partisan activities, partisan advertising, and election surveys”, in addition to “election advertising”
  - Regulated activities during both the election period and pre-election period are now covered



## 2. Corporations Canada’s “Digital-first Approach”

- Corporations Canada has adopted a “digital-first approach” to encourage the use of digital services
- For online filing services, PDF forms can no longer be downloaded from their website (unless specifically requested), and only online forms may be used
- However, where online filing services are unavailable, PDF forms continue to be available on the website
- Corporations Canada has also introduced new service fees and service standards for CNCA corporations and federal cooperatives, in addition to express services being made available in certain situations



## F. ONTARIO CORPORATE UPDATE

- The Ontario Government had indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), but an Update released by the Government now indicates that the launch date is expected to move “beyond early 2020”
  - This is because of the Government upgrading technology to support the changes introduced by the ONCA, and to improve service delivery
  - Once the ONCA is in force, Ontario not-for-profit corporations will have 3 years to comply with the ONCA by amending their governing documents

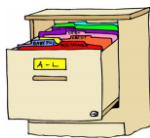


## G. CASE LAW OF INTEREST

- ***Chouman v Omar Al-Farooq Islamic Society, 2019 BCSC 754 (May 15, 2019)***
  - The BC Supreme Court granted oppression remedy against three societies governed by the BC *Societies Act* and five individuals purporting to act on behalf of the societies, on the basis that failing to follow the societies' by-laws and removing the petitioners as directors and members to gain control of the societies was oppressive and unfairly prejudicial behaviour
  - The respondents could not excuse their failure to follow the societies' by-laws by calling their behavior a mere failure to adhere to technical formalities
  - This case serves as a reminder that it is essential to comply with corporate law requirements outlined in the by-laws of an organization, and to do so in a reasonable and fair manner



- ***Promised Land Ministries v R, 2019 TCC 145 (June 28, 2019)***
  - The Court upheld CRA's decision to suspend the receipting privileges and qualified donee status of Promised Land Ministries ("PLM") for one year, for failing to maintain proper books and records, including invoices, receipts, and vouchers, for expenditures made on activities outside of Canada, and for failing to comply with a compliance agreement from a previous CRA audit, wherein PLM had agreed to take corrective measures to maintain proper books and records for its activities outside of Canada
  - PLM argued that its poor recordkeeping was due to problems with its former accountants, and that obtaining receipts for expenses on mission trips of the Pastor abroad was difficult as they were "cash economies"



- The Court found these to be “self-serving” arguments as PLM was aware of the requirements set out in the Agreement, and having been put on notice, it was up to PLM to find ways to substantiate its expenses for mission trips outside of Canada, even in “cash economies” where receipts may be difficult to obtain
- CRA suggested a voucher book could be used in cash economies where details of the expenses could have been recorded and signed by the individuals receiving the funds
- PLM could also not blame accountants for inadequate recordkeeping as PLM had the ultimate responsibility for maintaining proper books and records

- ***Watto v Immigration Consultants of Canada Regulatory Council, 2019 FC 1024 (July 30, 2019)***
  - The Federal Court held that the discipline section (s.158) of the *Canada Not-for-profit Corporations Act* (“CNCA”) does not restrict the power to discipline a member, or to terminate their membership to only “the directors, the members or any committee of directors or members of a corporation”
  - While the wording of the section may be construed narrowly, a broader interpretation was more consistent with the CNCA
  - Further, if Parliament had intended to limit the power to discipline members or circumscribe the class of persons who may exercise this power, it would have done so expressly



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- ***Benito v Immigration Consultants of Canada Regulatory Council, 2019 FC 1628 (December 18, 2019)***
  - Following the *Watto* decision, the Court held that s.158 of the CNCA permits disciplinary matters to be decided by a one person panel of the Discipline Committee, and the person does not need to be a director or member of the corporation
  - A plain reading of the section allows the Immigration Consultants of Canada Regulatory Council to “make by-laws that give power to discipline members of the organization and set out the circumstances and manner in which that power should be exercised”
  - Further, principles of interpretation allow for the word “members” in s.158 to also mean “member”, giving a single person the power to discipline

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- ***Bose v Bangiya Parishad Toronto, 2019 ONSC 5625 (September 30, 2019)***
  - The case involved a cultural organization and a religious congregation, both of which were incorporated under the Ontario *Corporations Act*, and had operated in tandem through a common board of directors and issued consolidated financial statements
  - While the cultural organization was properly organized under its incorporating statute, with members and holding proper elections; the religious congregation was never properly organized from a formal, corporate law perspective
  - An application for stay pending appeal was brought against Belobaba J.’s order to hold an election for the board of directors of the religious congregation, with the order being based on the principle of shareholder/member democracy

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- In dismissing the stay pending appeal, the Court reasoned that Belobaba J.’s recognition that members of the cultural organization were *de facto* members of the religious congregation was “a finding of fact or mixed fact and law based on undisputed evidence”
- Since for decades the voting members of the religious congregation were also members of the cultural organization, in order to end the “wrong usurpation” of the religious congregation and to ensure “the earliest restoration of member democracy to the Religious Congregation,” an election was required
- The Court found that even if an appeal was later allowed, the appellants had failed to establish that they would suffer irreparable harm



- ***The Canadian Islamic Trust Foundation v The Muslim Community of Edmonton Mosque and Muslim House, 2019 ABQB 872 (November 13, 2019)***
  - The Court held that a by-law adopted by the Society in 2014 was invalid because it failed to get the proper approval of its founding organization (“Foundation”), as required by the Society’s pre-existing 1997 by-law
  - In doing so, the Court rejected the Society’s argument that the required approval had been granted on the Foundation’s behalf by an individual, Mr. Chaudhary
  - The Society failed to provide proper evidence that
    - (i) Mr. Chaudhary had valid authority to approve the Society’s 2014 by-law on the Foundation’s behalf, (ii) that he had an official position in the Foundation, or (iii) any information outlining the basis on which Mr. Chaudhary had valid authority to act as the Foundation’s representative

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- In addition, the Court found that contrary to the Society's position in court, there was earlier email correspondence demonstrating the Society's own belief that the Foundation had not approved the 2014 by-law
- The Foundation's arguments that there were irregularities in the process to obtain membership approval, including invalid status of voting members for the 2014 by-law, and alleged irregularities in the process used to call the membership meeting for the approval of the 2014 by-law were rejected by the Court due to lack of necessary evidence

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- ***Church of Atheism of Central Canada v MNR, 2019 FCA 296 (November 29, 2019)***
  - In this case, the Court made the following findings:
    - Atheism is not a religion;
    - Charitable registration is a privilege, not a right, that functions as an indirect tax subsidy to encourage work carried out by registered charities;
    - "[T]he requirement that the belief system have faith in a higher Supreme Being or entity or reverence of said Supreme Being is not always required when considering the meaning of religion"

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- In response to CACC’s *Charter* arguments, the Court responded as follows:
  - s.2(a) freedom of conscience and religion was not violated because despite the right to practice atheistic beliefs being protected, the refusal to not grant charitable registration did not “interfere in a manner that is more than trivial or insubstantial with the appellant’s members’ ability to practice atheistic beliefs” since CACC could continue with its purpose and activities without registration
  - s.15 equality rights did not apply to CACC because this section only applied to individuals
  - With respect to s.17 multicultural heritage provisions, following precedent, the Court found the section to be an interpretative, not a substantive provision that can be violated



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- ***UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1 (January 6, 2020)***
  - The Court found that the *Charter* applies to how the University of Alberta sets conditions that affect the freedom of expression by its students on campus
  - In this case, a student association had organized an on-campus demonstration with the University’s approval, which attracted groups of counter-protestors
  - When Pro-Life requested permission for another demonstration, the University required payment of \$17,500 for security, or Pro-Life could hold the event indoors (“Security Decision”)
  - The Court held that the University’s action was subject to the *Charter* because education by means of freedom of expression has been the core purpose of the University since it was established by the government

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- The Court further reasoned that the grounds of the University are physically designed to ensure that students learn, debate and share ideas in a community space that is “hospitable to a pursuit of the truth about all things without a prescribed predefinition of truth before the pursuit begins”
- After taking the tone and content of expression of Pro-Life’s event into consideration, and recognizing the degree of deference available to the University under the judicial review framework, the Court found that the University’s Security Decision was not a reasonable and proportional limitation on Pro-Life’s freedom of expression

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**NAVIGATING PRIVACY  
BREACHES FOR CHARITIES &  
NFPs**

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**OVERVIEW**

- What Is Personal Information?
- What Is A Privacy Breach?
- A Snapshot of The Problem
- Possible Consequences of A Privacy Breach
- Boards of Directors and Liability For Privacy Breaches
- PIPEDA Requirements – Breach Prevention
- Reduce The Risk of Privacy Breaches
- Preparing For A Privacy Breach
- Responding To A Privacy Breach
- Legal Privilege For Privacy Breach Investigations
- Other Expert Advisors

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## A. WHAT IS PERSONAL INFORMATION?

- “Any information about an identifiable individual”
- Examples of personal information:
  - Name, address
  - Health card number
  - Financial information
  - Anything that pertains to a person’s health care
  - The identity of a person’s health care provider
  - Images of identifiable individuals
  - Video surveillance - whether or not recorded



## B. WHAT IS A PRIVACY BREACH?

- A “privacy breach” is the loss of, unauthorized access to, use or disclosure of personal information
- Common examples include when:
  - Unencrypted portable devices containing personal information are lost or stolen *e.g.*, laptops, USB keys, tablets, external hard drives
  - Personal information is mistakenly faxed or emailed to the wrong person
  - Employees access personal information without authorization (snooping)
  - Documents or devices are improperly disposed of



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- Privacy breaches can also result from cyber attack incidents such as:
  - Hacking (exploiting weaknesses in a computer system or network)
  - Data theft
  - Ransomware (where hackers use malicious software to block access to a computer system until a ransom is paid)
  - Phishing (pretending to be someone to trick people into giving you sensitive information)
  - Social engineering (tricking people into giving you money or data)



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## C. A SNAPSHOT OF THE PROBLEM

- The Office of the Privacy Commissioner of Canada (“OPC”) reported that, between November 1, 2018, when breach reporting under PIPEDA became mandatory, and October 31, 2019, 28 million Canadians were affected by a data breach
- 58% of reported breaches involved unauthorized access:
  - Employee snooping
  - Phishing and impersonation
- 12% of breaches were due to loss of computer, storage drive or paper documents

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- 8% of the breaches resulted from theft of documents or computer hardware
- 5% of the breaches resulted from accidental disclosure e.g. documents emailed or mailed to the wrong person
- And it is not just big businesses
- A 2016 US survey found that 63% of non-profits had a privacy breach that year
- In that survey, more breaches (20%) were caused by lost devices and lost paper files than by hackers (17%) but hacking incidents were found to be much more expensive and disruptive

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## D. POSSIBLE CONSEQUENCES OF A PRIVACY BREACH

- Privacy breaches are a real risk for all organizations
- Can result in:
  - Legal liability, including litigation, possibly class action
  - Regulatory investigations and enforcement
  - Business interruption (e.g. ransomware)
  - Financial loss – average cost of a data breach in Canada is \$4.4 million US\$ (Ponemon Institute Report 2019)
  - Reputational damage – perhaps most important in the charity and NFP sector
- “It takes 20 years to build a reputation and a few minutes of cyber-incident to ruin it.” – Stephane Nappo (Global Chief Information Security Officer & Board Advisor, Société Générale IBFS)

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- Majority of Canadians make financial donations to charities or NFPs
- Majority of Canadians prefer to donate online
- In the 2018 Global Trends in Giving Report, 92 percent of donors said it was important for charities to protect their financial and contact information from data breaches
- How can charities and other NFPs maintain the trust and confidence of their donors, clients and other stakeholders, and minimize the risk of reputational damage?



- Under the *Canada Not-for-Profit Corporations Act* (“CNCA”), the *Ontario Not-for-Profit Corporations Act* (“ONCA”) (expected to be proclaimed in 2020), and *Ontario Corporations Act* (“OCA”) directors and officers are required to:
  - act honestly and in good faith with a view to the best interests of the company; and
  - exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances



Reasonable Person

- Directors and officers of charities and NFPs impacted by privacy breaches may be exposed to the risk of litigation and claims that they are liable for the breach
- The “Business Judgment Rule” protects directors and senior officers against hindsight and second guessing by third parties and the courts, provided that the directors have made an informed and reasonable decision
- Directors are also entitled to rely in good faith on reports of expert advisors



- Directors can show that they met the duty of care and made an informed, reasonable decision by, for example:
  - Demonstrating that they had information available to them and how they considered it
  - Obtaining expert advice on privacy and cybersecurity
  - Confirming that the organization has appropriate safeguards in place to protect personal information
  - Confirming that the organization has appropriate policies and procedures in place, including taking steps to prepare for and respond to breaches
  - Obtaining regular reports from management on cybersecurity and privacy issues
  - Obtaining insurance to cover these risks



## F. PIPEDA REQUIREMENTS - BREACH PREVENTION

- PIPEDA applies to every organization – including charities and NFPs - in respect of the personal information that it collects, uses or discloses in the course of commercial activities
- Most prudent for charities and NFPs to assume that the OPC or a court might find that they are engaged in commercial activity and that they are subject to PIPEDA
- Charities and NFPs should consider voluntary compliance with PIPEDA, whether required or not
- OPC - Charities and NFPs can benefit from complying with PIPEDA's underlying "fair information principles"

- PIPEDA principle 4.7 requires organizations to protect personal information by security safeguards appropriate to the sensitivity of the information
- The security safeguards must protect personal information against loss or theft, unauthorized access, disclosure, copying, use, or modification regardless of the format in which it is held
- The safeguards should include
  - Physical measures, such as:
    - Locking/securing doors, storage cabinets, premises
    - Restricting access to certain areas
    - Access cards and keys



- Organizational/administrative measures, such as
  - Security clearances
  - Limiting employee access to personal information on a “need-to-know” basis
  - Privacy and security policies and procedures
  - Implementing and enforcing policies
  - Training
- Technological measures, such as:
  - Passwords and encryption
  - Anti-virus, anti-malware software
  - Firewalls
  - Updating software
  - Cyber security audits

## G. REDUCE THE RISK OF PRIVACY BREACHES

- Many privacy breach risks can be mitigated by taking some basic steps, such as:
  - Do not collect or retain more personal information than is necessary
  - Encrypt and password protect laptops, USB keys and other portable devices
  - Avoid placing personal information on mobile devices
  - Avoid sending sensitive personal information by email or on wireless networks unless encrypted
  - Avoid faxing personal information as, *e.g.*, it is easily misdirected and could leave personal information publicly exposed
  - Make sure personal information, including hardware, is securely retained and disposed of
  - Use physical safeguards to protect personal information – such as locking office doors, filing cabinets, server rooms



- Build a culture of privacy – have ongoing employee privacy and security training to ensure they understand the risks and their responsibilities
- Limit employee access to personal information on a “need to know” basis and put audit trails in place
- Have strong privacy safeguards in your contracts with third parties
- Have appropriate and up-to-date anti-virus and anti-malware software
- Have appropriate systems in place to prevent hacking, intrusions and other threats to your network



"I HAVE IDENTIFIED THE SOURCE OF OUR PRIVACY BREACH AND DEALT WITH IT, SIR!"

## H. PREPARING FOR A PRIVACY BREACH

- The question is when, not if, a privacy breach will occur
- Organizations should be prepared ahead of time
- As part of that preparation it is important to develop a clear picture of your data practices including:
  - The jurisdiction(s) you operate in
  - What personal information you collect and why
  - How sensitive it is?
  - Where it is stored?
  - Who accesses it?
  - Whether it is transferred to third parties such as service providers



- Based on that preliminary work, the organization should put in place an incident response plan
- Having a plan in place will provide guidance for how a privacy breach should be handled if it occurs
- The plan would identify the internal and external personnel who would respond to a privacy breach, set out their roles and responsibilities and outline the procedures for responding to an incident
- Incident response plans should ensure that the organization complies with legal requirements, such as breach reporting obligations



- Incident response plans should be tested/drilled to develop skills, identify gaps and weaknesses and team members should practice/be trained so that they are able to respond appropriately to incidents
- Incident response plans should be reviewed and updated annually

“No plan survives contact with the enemy” – Helmuth von Moltke the Elder (19<sup>th</sup> century Prussian field marshal)



## I. RESPONDING TO A PRIVACY BREACH

- In the event of a privacy breach, the following steps should be taken in accordance with the incident response plan:

### 1. Containment

- Take immediate action to:
  - Stop the breach
  - Retrieve and secure any personal information that was collected, used or disclosed without authority
  - Prevent further breaches by *e.g.* shutting down the system that was breached, changing passwords, revoking access



## 2. Investigation

- Designate an investigation lead or team
- Investigate and document the breach
- Determine (not exhaustive):
  - The cause and extent of the breach
  - How many individuals were affected by the breach?
  - Who was affected by the breach: Staff, donors, clients, others?
  - What personal information was involved, how much personal information was involved, how sensitive was the information *e.g.* health or financial information





- Is the information encrypted or otherwise not readily accessible?
- What steps have already been taken to minimize the harm?
- Is there a risk of significant harm to individuals (e.g. bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property)?
- Is there a risk to the organization?
- Is there a risk of ongoing or further breach?

### 3. Notification

- Report and escalate to internal personnel/teams immediately upon discovery of the breach
- If the organization is subject to PIPEDA or if it chooses to voluntarily comply with PIPEDA, report to the OPC and notify the affected individual as soon as feasible after you have determined that a breach of security safeguards involving a “real risk of significant harm” to an individual has occurred
- Direct notification (e.g. mail, email, or telephone) is required except in limited circumstances



- The notification must include enough information to allow the individual to understand the significance of the breach and to take steps, if any are possible, to reduce the risk of harm that could result from the breach or mitigate the harm. Notices must contain the information set out in the regulations
- It may be appropriate to notify others of the breach such as the police, credit card companies, banks, credit reporting agencies or insurers
- If the organization is a health information custodian subject to Ontario's *Personal Health Information Protection Act*, notify the affected individual of the breach at the first reasonable opportunity and report to the IPC regarding privacy breaches
- If you are caught by the laws of another jurisdiction there may be other reporting obligations e.g. Alberta, GDPR (EU)

#### 4. Prevention of Future Breaches

- Determine:
  - If there are systemic issues that need to be corrected, e.g. gaps in security, inadequate contracts with third party vendors
  - If follow up or remedial action is necessary e.g. improved training, employee discipline
  - If new or amended privacy policies are required
  - If a security audit is required
- Develop a plan to prevent future breaches



## J. LEGAL PRIVILEGE FOR PRIVACY BREACH INVESTIGATIONS

- Solicitor-client privilege applies to confidential communications between a lawyer and client for the purpose of seeking or giving legal advice
- Documents that are subject to legal privilege do not have to be disclosed to third parties unless privilege is waived
- It could be beneficial for an organization responding to a privacy incident to retain legal counsel so that it is able to establish legal privilege over sensitive documents and communications, where appropriate, such as those revealing gaps and deficiencies
- It is advisable to retain legal counsel as early as possible

- The burden is on the party claiming the privilege to prove that it applies
- External counsel can also retain, direct and supervise other experts, for expressly stated legal advice or litigation purposes, and receive their reports, in order to establish privilege
- Care must be taken not to inadvertently waive privilege through e.g. communication with third parties





## K. OTHER EXPERT ADVISORS

- In addition to legal counsel, an organization may find it necessary or advisable to engage (possibly through counsel) other expert advisors including:
  - IT forensic specialists
  - Public relations/communications specialists
  - Investigators
- Organizations should also consider obtaining cyber insurance that could cover costs of incident response, legal and other advice and even the cost of ransom in some cases



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THE OTTAWA REGION  
***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

**“YOU CAN’T FIRE ME FOR THAT:  
I’M OFF DUTY!”**

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**The 2020 Ottawa Region  
Charity & Not-for-Profit Law  
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## OVERVIEW

- May an Employer Discipline or Terminate an Employee for Off-duty Conduct?
  - Just cause at common law
  - Off-duty conduct as grounds for dismissal
  - Cases where employers have successfully dismissed an employee for off-duty conduct
  - Improper social media use by employees resulting in termination for cause
  - Cases where dismissal or discipline for off-duty conduct was not justified
  - Protecting organization from liability



OVERVIEW

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## A. MAY AN EMPLOYER DISCIPLINE OR TERMINATE AN EMPLOYEE FOR OFF-DUTY CONDUCT?

### 1. Basic Principles

- Off-duty conduct is outside of office hours when the employee is on their own personal time and not acting on behalf of the employer. An employee's off-duty conduct is generally off-limits, subject to certain exceptions
- However, employers have a management right to impose reasonable rules to govern conduct in the workplace and can discipline and discharge employees who break those rules
- When an employee is guilty of serious workplace misconduct, the law recognizes the employer's right to dismiss the employee for just cause

### 2. Just Cause at Common Law

- **McKinley v BC Tel, [2001] SCR 161**: The Supreme Court of Canada legal tests:
  - a) *Does the evidence establish employee misconduct on a balance of probabilities; and if so,*
  - b) *Does the nature and degree of the misconduct warrant dismissal because it gave rise to a breakdown in the employment relationship, in that the misconduct "violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer?"*
- Employer has the burden of proof that the facts justified a termination for cause

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- Certain types of misconduct are recognized by courts to constitute just cause, which are related to an employee's conduct in the workplace, such as (but not limited to):
  - Dishonesty (for e.g. fraud and theft of employer or customer property)
  - Insolence and insubordination
  - Breach of trust
  - Conflict of interest
  - Chronic absenteeism or lateness without reasonable justification
  - Sexual or other workplace harassment
  - Intoxication
  - Misrepresentation as to qualifications or credentials

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### 3. Off-duty Conduct as Grounds for Dismissal

- ***Re Millhaven Fibres Ltd v Atomic Workers Int'l Union, Local 9-670, [1967] OLAA No 4:*** Employers have a limited right to discipline or potentially even terminate an employee for off-duty conduct where:
  - The employee's conduct harms the company's reputation in the community, its business or product
  - The employee's behaviour renders him or her unable to perform their duties satisfactorily
  - The employee's behaviour leads to the refusal, reluctance or inability of the other employees to work with him or her

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- The employee is guilty of a serious breach of the *Criminal Code*, causing injury to the general reputation of the company and its employees, or
- The employee's conduct makes it difficult for the employer to properly carry out its functions of efficiently managing its work and efficiently directing its workforce
- Proof of one of these factors is sufficient for termination for cause
- Employer will need to consider these factors and the evidence available to support them



#### 4. Cases Where Employers Have Successfully Dismissed an Employee for Off-duty Conduct

- ***Kelly v Linamar Corporation*, [2005] OJ No 4899:**
  - Court concluded that employer had cause to terminate manager who had regular contact with suppliers and customers in the community after he was arrested and charged with possession of child pornography
  - Termination for cause was appropriate in the circumstances because the employer had a strong reputation in its community of being a good corporate citizen and engaging in community-based activities, including youth



- Court found that the employee was in a public position, so he had a duty not to engage in conduct that would undermine his ability to do so
- Termination took place almost immediately after the criminal charges became public and before the criminal charges were resolved, but employee did eventually plead guilty to child pornography possession charge
- ***Grand Erie District School Board v Ontario Secondary School Teachers' Federation, District 23, 2016 CanLII 72391 (ONLA)***: Teacher who was involved in an international cheese smuggling operation terminated for cause

- ***Stokaluk v Deputy Head (Canada Border Services Agency), 2015 PSLREB 24***: Border services officer spent his off-duty time associating with individuals involved in a criminal organization and was also involved in drug trafficking
- ***Ottawa-Carleton District School Board v Ontario Secondary School Teachers' Federation, District 25, [2006] OLAA No. 597***: Chief custodian of School Board held to be incapable to carry out his responsibilities by robbing a bank during lunch hour



- ***Ross v New Brunswick School District No. 15, [1996] 1 SCR 825***: Teacher who made racist public statements and writings undermined his capacity to live up to the community's values for educators
- ***Smith v Kamloops and District Elizabeth Fry Society (1996), 20 CCEL (2d) 303 (BCCA)***: Social worker had a sexual relationship with a sex offender who was a client of the employer, which violated the employer's ethics code and potentially prejudiced employer as a non-profit organization
- ***York University Staff Association v York University, 2018 CanLII 41354 (ONLA)***: University employee posted anti-Semitic comments on Facebook and publicly criticized the university for disciplining him

## 5. Improper Social Media Use by Employees Resulting in Termination for Cause



- ***Chatham-Kent v National Automobile, Aerospace, Transportation and General Workers Union of Canada, [2007] OLAA No. 135***:
  - Employee, who was a personal caregiver at a home for the aged, had created a website accessible to the general public and published resident information and pictures, and made inappropriate comments of the residents of the home for the aged
  - Arbitrator upheld termination on the grounds of breach of confidentiality and inappropriate remarks about management and residents



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- ***Wasaya Airways LP v Air Line Pilots Association International, [2010] CLAD No. 297:*** Airline pilot posted comments on his Facebook page publicly degrading and belittling the customers and the company
  - Airline’s primary customers were native peoples whom he targeted in many of his online comments
  - Arbitrator upheld termination of the employee as they created potential harm to the company’s reputation and its ability to efficiently manage its business
- ***Canada Post v CUPW, [2012] CLAD No. 85:*** Arbitrator upheld termination of a postal clerk who made derogatory comments about Canada Post and his supervisors on Facebook, causing one supervisor to miss time off work for mental distress

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- ***City of Toronto v Toronto Professional Firefighters Association, Local 3888, 2014 CanLII 76886 (ONLA):***
  - Arbitrator upheld termination of a firefighter for sending out “tweets” which denigrated women, disabled persons and minorities, which were reported in the National Post newspaper
  - Arbitrator noted that in situations involving social media posts, the test as to whether the conduct warrants dismissal is whether *“a reasonable and fair-minded member of the public, if apprised of all the facts, [would] consider that the [employee’s] continued employment would so damage the reputation of the [e]mployer as to render that employment untenable”*



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- ***Strom v The Saskatchewan Registered Nurses Association, 2018 SKQB 110:***
  - A registered nurse posted comments on social media relating to the end of life care that her grandfather received at a care facility
  - She was unhappy with level of care, and in her comments she criticized the competence and professionalism of the staff, including registered nurses, who worked at the facility
  - The Saskatchewan Registered Nurses Association (“Nurses Association”), after a hearing before a discipline committee, ruled that in publicly posting these comments, nurse had engaged in professional misconduct

- The discipline committee assessed a fine of \$1000 and ordered her to pay costs of the disciplinary proceedings in the amount of \$25000
- On appeal, the Saskatchewan Court of Queen’s Bench ruled that the disciplinary decision of the Nurses Association was not unreasonable and was within its authority under *The Registered Nurses Act, 1988*
- Further appeal now before the Court of Appeal for Saskatchewan



## 6. Cases Where Dismissal or Discipline for Off-duty Conduct Was Not Justified

- ***Merritt v Tigercat Industries, 2016 ONSC 1214:***
  - Employer dismissed an employee with 17 years of service after he was charged with sexually assaulting two minors on the basis of the criminal charges and the reputational harm those charges had allegedly caused to the company
  - Court ruled that the dismissal for cause was not warranted because the charges did not relate to the employee's employment with the company or co-workers, and there was no evidence that the charges would damage the employer's reputation, and the employee was not in a position of responsibility with the company

- As employee had not been found guilty of a criminal offence as a criminal trial had not yet occurred, he was entitled to the presumption of innocence
- Court ruled that the employee was wrongfully dismissed and awarded him damages equivalent to 10 months wages
- An employee being charged with criminal conduct is not always enough to establish just cause

**NOT GUILTY**

- ***Klonteig v West Kelowna (District), 2018 BCSC 124:***
  - The British Columbia Supreme Court held that dismissal for cause was not warranted for a 13 year Assistant Fire Chief who failed two roadside breathalyzer tests
  - Employee’s off-duty misconduct was not sufficiently incompatible with employment or detrimental to the employer’s reputation to justify dismissal for cause
  - Employee was driving the employer’s vehicle when he failed the breathalyzer tests. However,
    - The vehicle was unmarked
    - There was no public knowledge of the employee’s administrative suspension
    - Employee’s conduct was not as morally reprehensible as in other cases



- The employee was not the public face of the fire department, as his role was primarily administrative
  - Employee’s conduct also did not cause his fellow firefighters to lose confidence in him
- Courts determining whether off-duty conduct justifies termination for cause will adopt a contextual approach *i.e.* one that must look at both the circumstances surrounding the misconduct and the nature of the employment relationship
  - Proportionality is important, in that a balance must be struck between the severity of the employee’s misconduct and the sanction imposed by employer

## 7. Termination on a Without Cause Basis

- If an employee commits off-duty conduct that employer does not condone, and no longer wants that employee to remain with the organization, there is the option to terminate on a without cause basis
- In some cases, it may be easier and less costly to terminate an employee without cause, paying the required termination package, and getting a signed release from the employee



### a) Compliance with legislation for termination on a without cause basis

- The legal right to terminate employees on a without cause basis is clear, but the termination cannot be contrary to the minimum standards prescribed by the *Employment Standards Act, 2000* (Ontario), including termination pay, potentially severance pay and benefit continuance for the minimum prescribed period
- Any termination cannot be based upon the grounds set out in s. 5(1) of the *Ontario Human Rights Code*



## 8. Protecting Organization from Liability

- Make it known to employees that the church or charity has a legitimate interest in regulating off-duty conduct which has a potential negative impact on the employer
- Employers can establish written policies with respect to off-duty conduct, so that employees know that they may be held accountable for off-duty conduct which has a direct impact on the employer
- Employers can add clauses to employment agreements, so that employees, even when off-duty, must conform to certain behavioural norms to safeguard the employer’s public image and reputation

- Such a clause would include, within the contractual definition of “just cause”, wording such as:
  - *“Just cause shall include personal conduct, either on or off duty, by the employee which is of such a serious and substantial nature that it would injure the reputation or interests of the employer if the employee is retained as an employee”*



## CONCLUSION

- Discipline or termination for off-duty conduct requires careful consideration, as legal issues can be complicated and nuanced
- Employers, including churches and charities, should know the applicable legal tests in relation to off duty conduct before taking steps against any employee in relation to the conduct in question
- There are no simple solutions and each fact situation is different
- When in doubt, seek professional advice

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THE OTTAWA REGION  
***Charity & Not-For-Profit Law Seminar***

*Thursday, February 13<sup>th</sup>, 2020*


**NEW TRADEMARKS ACT NOW IN  
FORCE: WHAT IT MEANS TO  
YOUR CHARITY OR NFP**

**By Sepal Bonni, B.Sc., M.Sc., J.D.**

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The 2020 Ottawa Region  
*Charity & Not-for-Profit Law*  
Seminar  
February 13, 2020

**New Trademarks Act Now in Force: What it Means to Your Charity or NFP**

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## OVERVIEW



- Trademarks Basics
- Amendments To The *Trademarks Act*
- Amendments Are in Force: Beware of Trolls or Squatters
- Identifying Trademarks
- Protecting Trademarks
- Enforcing Trademarks
- More Changes To Trademark Law Coming

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## A. TRADEMARKS BASICS

### 1. Understanding Trademarks

- Valuable form of intellectual property that legally protects your brand
- A trademark is any mark used for the purpose of distinguishing the source of goods (products) and services from others in the marketplace
- Trademarks can consist of:
  - A single word, “Carters”
  - A combination of words, “Red Cross”
  - A logo or symbol, McDonald’s “golden arches”
  - A slogan, Bounty’s “Quicker Picker Upper”
  - A sound, MGM’s “lion roaring” sound

### 2. Functions of a Trademark

- Indicates the source or origin of goods and services
- Serves as a shortcut in judging the quality of services, the credibility of information, and the reputation of the organization – it is the organization's way of saying “you can trust us” to the public
- Creates goodwill and brand awareness
- It captures the public’s attention and helps to get an organization’s message heard
- Distinguishes one organization from another and helps to eliminate public confusion

### 3. Obtaining Trademark Protection

- Trademark rights can be obtained:
  - Through **registration** under Canada's *Trademarks Act*
    - Several advantages to registration – discussed in more detail below
  - Through legitimate **use**
    - Unregistered trademark rights are governed by the common law in Canada (known as common law rights)
    - This protection arises automatically from actual legitimate use of the mark in association with goods and services
    - Generally, ownership of a mark goes to the first-to-use the mark

- Although a trademark does not need to be registered to be protectable, registration of a trademark provides significant benefits for the trademark owner – more on that to come
- Generally speaking, trademark registrations reward owners by increasing the value of their brand and by providing stronger enforcement rights through the *Trademarks Act* which better enables their brand and organization to grow
- Therefore, the purpose of trademark law is twofold:
  - To help the public distinguish between the goods and services of one owner from those of others and therefore to prevent public confusion and unfair competition; and
  - To protect the owner's investment and reputation

## B. AMENDMENTS TO THE *TRADEMARKS ACT*

- Came into force on June 17, 2019
- Drastically changed trademark law in Canada
- Key changes included:
  - The requirement that a trademark be in **use** before it proceeds to registration **has been eliminated**
  - Trademarks are now examined for distinctiveness making it harder to register trademarks
  - The definition of “trademark” has been greatly expanded to include non-traditional trademarks, including colours, holograms, moving images, scents, tastes, and textures

- The term of registration has been reduced from 15 years to 10 years
- The Nice Classification of goods and services has been adopted and, as a result, applicants are required to classify goods and services in accordance with the classification system
- A class-based government fee system has been introduced for filing and for renewal
- Canada joined the Madrid System for the International Registration of Marks making it simpler for Canadian trademark owners to protect marks in other jurisdictions, and vice versa

## C. AMENDMENTS ARE IN FORCE: BEWARE OF TROLLS OR SQUATTERS

- Charities and not-for-profits (“NFP”) should beware of trademark trolls or squatters
  - Because it is now possible to obtain registration of a trademark **without use**, trademark trolls have arrived in Canada
  - Trademark trolls or squatters refer to organizations or individuals that register trademarks without intending to use the marks, and then threaten to sue others who use the marks or offer large sums of money for the registration

- The Canadian Intellectual Property Office has reported that over 500 trademark applications have been filed covering all 45 classes of goods and services and nearly 100% of those applications were filed by trolls
- Trademark trolls are determining which unregistered marks are being used by organizations on their websites and social media and filing for registration of those marks
- The trademark trolls will likely then extort value for those registrations from unregistered trademark owners
- Given the removal of the use requirement to obtain registration, along with an increase in trademark trolls, there is also an increase in legitimate trademark filings

- Given these challenges, charities and NFPs need to take precautionary measures to ensure they are proactively:

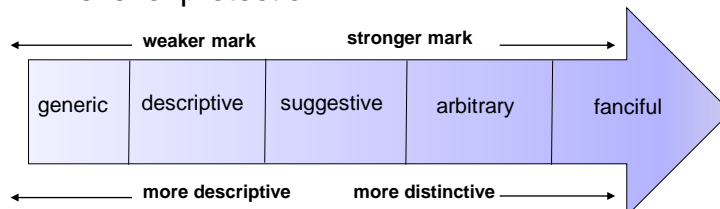
- Identifying trademarks
- Protecting trademarks
- Enforcing trademarks



- Each of the above will be discussed in more detail on the next slides

## D. IDENTIFYING TRADEMARKS

- Prepare a list of potential trademarks that are used, or are going to be used, by the organization
- Comprehensive trademark searches should be conducted on those marks to determine if they are in fact registrable trademarks
- Consider the distinctiveness of the trademark
  - The more distinctive a trademark, the greater its level of protection



## E. PROTECTING TRADEMARKS

### 1. Register Trademarks

- The easiest way to protect your brand against trademark trolls and other parties is to register your trademarks with the Canadian Intellectual Property Office
- There are several advantages to registering a trademark, including:
  - A presumption of ownership and validity
  - Exclusive rights to use the trademark in association with the registered goods and services
  - The registration is effective throughout Canada

- With an unregistered trademark, the owner must show extensive use, reputation, and goodwill in the mark to rely on these rights - there is no presumption of ownership and protection is not Canada-wide
- Suing for “trademark infringement”, which can be done only on the basis of a registered trademark, is generally easier (and less costly) than suing for “passing off” of unregistered trademark rights
- Failure to register can result in a costly and lengthy court battle
- Registration of a corporate name or business name does not itself give trademark protection
- Register your key trademarks including corporate names and business names if used as trademarks

## 2. Use it or Lose it and Use it Consistently

- Failure to use a trademark can be grounds for invalidating a registration and loss of common law rights
- Trademarks should be distinguished from surrounding text using **bold** or *italic* fonts or a stylized form
- Trademarks may become vulnerable to cancellation if not consistently used the same way
  - Alterations of a word mark that are *not* permitted include using revised spellings, abbreviations or including additional words around the trademark
  - Alterations of a design mark that are *not* permitted include any change to the design

- There should be someone within the organization responsible for making decisions regarding trademarks
  - This person should know what constitutes trademark “use” (because not all reproductions of a trademark will constitute trademark use)
  - This person should also be responsible for gathering evidence of trademark use and maintaining a repository of materials (both physically and electronically) showing use at periodic intervals



### 3. Ensure License Agreements are in Place

- A trademark license must be granted to third parties using the mark that shows control over use of the mark
  - Written license agreements are recommended
  - License must be granted by the trademark owner
  - Especially important when allowing others to use a mark in conjunction with an event or when entering a sponsorship arrangement
  - Use of your organization's trademark by an unlicensed user can inadvertently weaken the distinctiveness of your organization's valuable brand or result in the loss of trademark rights

- Licensing is relevant to consider any time a third party uses the charity or NFP's trademarks, including when:
  - Setting up separately organized charities and NFPs
  - Allowing affiliates to use trademarks
  - Permitting other organizations to use trademarks as evidence of membership
  - Permitting others to use trademarks in conjunction with an event conducted by others on behalf of the charity or NFP
  - When planning to enter into a sponsorship, cause marketing or donation agreements

## 4. Implement Trademark Style Guides and Policies on Use

- Implement a Trademark Style Guide that gives clear instructions on how to use the trademarks
- Ensure all licensees are provided with a copy of the Trademark Style Guide and that all trademark use is adequately monitored
- Implement policies that set out if and how employees can use the trademarks, including on social media
- Train staff on proper usage and markings
- Ensure the marketing team is kept in the loop and aware of the Trademark Style Guide
  - A new “look and feel” can be fatal to an existing trademark

## 5. International Considerations

- Generally speaking, trademark rights are national rights provided by individual governments to trademark owners
- Registration in Canada only protects the mark in Canada
- The launch of a new mark should be coordinated in all relevant jurisdictions
- There is a 6-month priority period that allows trademark owners to claim the filing date of the first trademark application filed for subsequent foreign applications
  - An earlier filing date provides the owner with many practical and technical advantages

- Canada joining the **Madrid System** allows brand owners to protect marks in various jurisdictions through a single application
  - Single international registration simultaneously has legal effect in multiple territories, including the EU
  - Convenient and cost-effective and can be easily extended to add new territories
  - Streamlined process for changes to ownership, address, renewals, etc.

## The International Trademark Registration Process

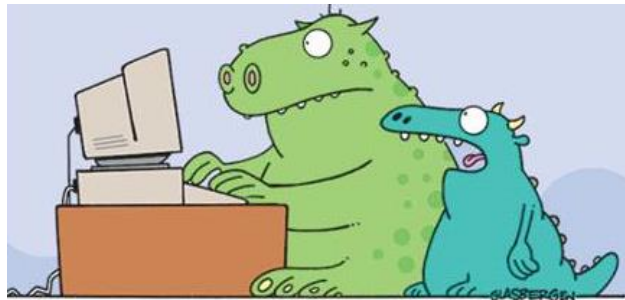


## F. ENFORCING TRADEMARKS

### 1. Monitor Unlawful Use of Trademarks

- Infringement occurs when the trademark or a confusingly similar trademark is used by someone other than the registered owner or an authorized licensee
- In order to prevent loss of distinctiveness of registered trademarks and therefore the loss of trademark rights, appropriate steps must be taken to protect and to enforce trademark rights
- All incidences of confusion should be documented
- Act promptly when faced with such instances of confusion as long periods of coexistence can work against a future claim of exclusivity that you may wish to assert

- Periodically monitor the Internet and other available sources for infringement of trademarks
- Send cease and desist letters to infringers
- Failing to take active steps to enforce trademarks can lead to a loss of trademark rights



"I'd sue them all for trademark infringement if I were you, Blog!"

- If infringement is occurring on social media sites or on other websites, leverage the tools made available by the platform
- For example, Facebook, Twitter, and YouTube have trademark infringement policies
- Given the increase of trademark trolls and the increase in Canadian trademark filings from applicants around the world, it will be even more important to monitor trademark filings through third party trademark watching services in order to enforce trademark rights
- With the amendments to the Act, there are also additional avenues of enforcement available to trademark owners

## G. MORE CHANGES TO TRADEMARK LAW COMING

- The changes to the law discussed on the previous few slides are already in force
- However, there are other important changes coming to trademark law as well that will impact charities and NFPs
- Most significantly, a special class of marks known as “official marks” will be greatly impacted
- Many charities and NFPs own these official marks rather than regular registered trademarks

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- Official marks are a unique and powerful form of intellectual property right
- Although similar to trademarks in some respects, official marks are only granted to “public authorities” and owners of official marks are given extraordinary protection
- Registered charities were generally able to obtain official marks until 2002 when the Federal Court tightened up the meaning of “public authority” to make it clear that status as a registered charity alone, is insufficient to constitute an organization as a public authority for the purpose of obtaining an official mark

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- As a result, many of these official marks continue to sit on the Trademarks Database because with the current regime, once an official mark is advertised, it remains on the trademarks register until it is either voluntarily withdrawn by the owner or struck from the register by a successful Federal Court action for judicial review
- Both of these circumstances are very rare and, as a result, once an official mark is on the register, it is theoretically perpetual in duration

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- However, the coming amendments to the *Trademarks Act* will provide an easy administrative process to invalidate an official mark if:
  - The entity that obtained the mark is not a public authority (**which would catch most registered charities**); or
  - The entity no longer exists
- As a result, official marks held by registered charities will be left vulnerable to attack and subject to removal once these provisions are in force

- Charities and NFPs should immediately check with trademark counsel to determine if in fact the organization's trademarks were registered as official marks or as regular registered trademarks
- If they were registered as official marks, immediate steps should be taken to secure parallel registered trademarks prior to these amendments coming into force



## H. CONCLUSIONS

- Trademarks and brands resonate with the public
- They help to reduce marketplace confusion and help to distinguish products and services
- They are economically efficient communication tools and transcend language and borders
- They are a piece of property that can be bought, sold or licensed
- In order to protect one of your organization's most important assets, ensure you are proactive in the management and protection of trademarks

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THE OTTAWA REGION  
***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

**FROM “PPDDAS” TO LOBBYING:  
THE NEW REALITY OF PUBLIC  
POLICY ADVOCACY BY  
CHARITIES**

**By Ryan M. Prendergast, B.A., LL.B.**

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<p><b>From PPDDAs to Lobbying: The New Reality of Public Policy Advocacy by Charities</b></p> <p><b>By Ryan M. Prendergast, B.A., LL.B.</b> rprendergast@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="259 833 638 882">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="645 833 1209 882">Ottawa Toronto Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorism.ca">www.antiterrorism.ca</a></td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorism.ca">www.antiterrorism.ca</a>
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<p><b>OVERVIEW OF TOPICS</b></p> <ul style="list-style-type: none"><li>• Refresher on Public Policy Dialogue and Development Activities (“PPDDAs”) by Charities</li><li>• Overlap of Laws Concerning PPDDAs</li><li>• When do PPDDAs Become Lobbying?</li><li>• Who is a Lobbyist?</li><li>• Compliance Issues for Charities and Not-for-profit Corporations (“NFPs”)</li><li>• Areas where Charities and NFPs may be Impacted</li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <span style="float: right;"><a href="http://www.carters.ca">www.carters.ca</a></span></p>

## A. REFRESHER ON PUBLIC POLICY DIALOGUE AND DEVELOPMENT ACTIVITIES (“PPDDAS”) BY CHARITIES

### 1. Amendments to *Income Tax Act (Canada)* (“ITA”)

- ITA was amended by Bill C-86 which received Royal Assent on December 13, 2018
- Amendments to the ITA in Bill C-86:
  - Subsections 149.1(6.1), (6.2) and (6.201) amended to remove the former “substantially all” test concerning political activities that had restricted registered charities from devoting no more than 10% of their resources on permitted political activities
  - Added a new definition of charitable activities that “includes public policy dialogue and development activities carried on in furtherance of a charitable purpose”

- Also adds a new definition of “public policy activities” as section 149.1(10.1) that provides that
  - “Subject to subsections (6.1) and (6.2), public policy dialogue and development activities carried on by an organization, corporation, or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose”
- Amendments to the ITA did not define “public policy dialogue and development activities”
  - The explanatory notes state that they “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”

- Bill C-86 retained the prohibition on charities from devoting their resources to the “direct or indirect support of, or opposition to, any political party or candidate for public office”, which “shall not be considered to be constituted and operated exclusively charitable purposes”
- ITA amendments also permit suspension for devotion of resources to partisan activities

## 2. CRA Guidance Concerning PPDDAs

- On January 21, 2019, CRA released CG-027 *Public policy dialogue and development activities by charities* (the “PPDDA Guidance”) together with a new Q&A webpage on PPDDAs by charities
- PPDDA Guidance defines PPDDA as including “seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country”
- The PPDDA Guidance confirms that the ITA places **no limits** on the quantum of PPDDA
- As such, charities may devote up to 100% of their total resources to PPDDA, provided that the PPDDA furthers the charity’s stated charitable purpose

- PPDDAs must be a means to achieve a charitable purpose and **cannot become the purpose itself**
  - E.g., “charitable purpose” cannot “refer to influencing the laws, policies, or decision of a government”
  - Rather, the purpose has to be a charitable purpose at common law, but PPDDA can be utilized to achieve that purpose
- In addition, PPDDA, when considered together with the charity’s stated purpose, must provide a public benefit

- Charities are still prohibited from “directly or indirectly supporting or opposing a political party or candidate for public office,” examples of which are provided in the PPDDA Guidance
- Examples of **direct** support or opposition, includes for example:
  - “Endorsing a candidate over social media”
  - “Telling people on a charity’s website not to vote for a political party”
- Examples of **indirect** support or opposition, includes for example:
  - “The internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election...”

## B. OVERLAP OF LAWS CONCERNING PPDDAS

- The PPDDA Guidance notes that while the ITA permits PPDDAs without restriction, registered charities need to be aware of the intersection of other legal requirements such as:
  - Federal and provincial lobbying and election legislation
  - The common law in different provinces, as applicable
- The focus of this presentation is on lobbying activities conducted by registered charities as PPDDAs, or lobbying activity that may be carried out by an NFP federally or in Ontario
- However, before and during federal and provincial elections charities and NFPs should consider whether election legislation is applicable

- In addition to being governed by the ITA with respect to PPDDAs, there are also requirements imposed on charities by other legislation, such as the *Lobbying Act (Canada)*, *Canada Elections Act*, and the various provincial and municipal elections and lobbying legislation
- Lobbying legislation requires registration of certain lobbying activities, but there are variations in the thresholds required for registration by various organizations, types of communications that fall within the ambit of registrable activities (i.e. lobbying activities that, if conducted by a lobbyist or organization, must be registered), and the public office holders captured by each act

## C. WHEN DO PPDDAS BECOME LOBBYING?

- The PPDDA Guidance includes a list of what PPDDAs may include, for example:
  - **Advocacy** - “charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country”
  - **Mobilizing others** – “charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country”
- NFPs are not governed by PPDDAs and are therefore free to conduct lobbying or other activities subject to compliance with those laws

- The *Lobbying Act* (Canada) does not contain a definition for “lobbying” *per se*, though the Office of the Commissioner of Lobbying of Canada provides:
  - “Lobbying is **communicating**, with **public office holders**, for **payment with regard to**:
    - The making, developing or amending of federal legislative proposals, bills or resolutions, regulations, policies or programs;
    - The awarding of federal grants, contributions or other financial benefits; and
    - In the case of consultant lobbyists, the awarding of a federal government contract and arranging a meeting between their client and a public office holder.”

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- The *Lobbyists Registration Act, 1998* (Ontario) contains a definition of “lobby” in subsection 1(1), which includes communication “with a public office holder in an attempt to influence” matters similar to those outlined in the *Lobbying Act* (Canada)
- Other provincial lobbying legislation contains similar definitions for lobbying
- Charities and NFPs should also be aware that, many provinces also include “grass-roots communication” as a type of activity
  - “Any appeals to members of the public through the mass media or by direct communication that seek to persuade those members of the public to communicate directly with a public office holder in an attempt to place pressure on the public office holder to endorse a particular opinion”

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- Exemptions are contained within different lobbying statutes
  - Some communications that may otherwise be considered lobbying activities are exempt, such as:
    - Submissions, whether oral or written, to parliamentary or legislative committees that are public record;
    - Submissions, whether oral or written, concerning the enforcement, interpretation or application of the law; or
    - Making inquiries or requests for information;

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## D. WHO IS DOING THE LOBBYING?

### 1. Lobbyists In Charities And NFPs

- The *Lobbying Act* (Canada) imposes registration and reporting obligations concerning “in-house lobbyists” and “consultant lobbyists”
  - Consultant lobbyists are those who are hired to communicate with public office holders on behalf of a client. They may be professional lobbyists or those who, in the course of their work, communicate or arrange meetings with a public office holder
    - Examples of consultant lobbyists include government relations professionals, lawyers, notaries, engineers, accountants or other professional advisors who provide lobbying services

- Organizations may also employ “in-house lobbyists,” who are individuals employed by the organization, any part of whose duties it is to communicate with public office holders on the organization’s behalf in respect of lobbying
  - Under the *Lobbying Act* (Canada), charities and NFPs are only required to register with the Office of the Commissioner of Lobbying of Canada if the lobbying activities of in-house lobbyists “constitute a significant part of the duties”
  - The 20% Rule = if the cumulative lobbying activities of all employees of the charity or NFP exceed 20% of one person’s duty over a month, then the organization needs to register

- Who doesn't have to register?
  - Charities and NFPs that don't meet the threshold, e.g., 20% under federal law or 50 hours, cumulative of all directors, officers, and employees in Ontario
  - Volunteers
  - Individuals on their own behalf
    - PPDDA Guidance clarifies the application of the ITA to representatives of a charity involved in politics during "personal time" and that registered charities cannot "use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual's personal political involvement"

## 2. Who Is Being Lobbied?

- Under the *Lobbying Act* (Canada), "public office holders" are:
  - Members of the Senate or the House of Commons and their staff
  - Appointees to any office or body by or with the approval of the Governor in Council or a minister
  - Officers, directors or employees of any federal board, commission or tribunal
  - Members of the Canadian Armed Forces
  - Members of the RCMP
- Similar definitions in provincial lobbying legislation, but generally includes all elected officials, e.g., MPPs, MLAs, appointees, government employees, or employees of public bodies

## E. COMPLIANCE ISSUES FOR CHARITIES AND NFPs

- A charity or NFP under the *Lobbying Act (Canada)* with in-house lobbyists that meet the threshold must register and file returns
  - Returns are to be filed by the “employee who holds the most senior office in a corporation or organization and is compensated for the performance of their duties”
  - The general requirement to file a return for in-house lobbyists is within two months of meeting the threshold of having engaged in lobbying activities
- Consultant lobbyists are responsible for their own registration

- Commissioners under lobbying legislation have broad investigative powers, and may find the senior officer or lobbyist of a charity or NFP to be personally liable, and impose penalties for non-compliance of the reporting or registering requirements
  - Penalties may involve, for example, monetary fines ranging from \$25,000 to \$200,000, prohibitions on lobbying for a number of years, or in the case of the federal lobbying legislation, even imprisonment

## F. AREAS WHERE CHARITIES AND NFPS MAY BE IMPACTED

- Applying for Grants
  - Applying for a grant or other funding is not generally lobbying; using lobbyist to speak to public office holders about grants is lobbying
- Court of Appeal decision, *R v Carson*, 2019 ONCA 396
  - Former federal employee, i.e., “designated public office holder” under *Lobbying Act* (Canada) and so subject to a statutory five-year prohibition from carrying out lobbying activities
  - After leaving federal government and becoming ED of not-for-profit, public office holders contacted not-for-profit about change to funding agreement
  - Communications to alter terms of grant considered lobbying

- Having directors or officers involved in lobbying
  - Office of the Commissioner of Lobbying of Canada has noted that “[i]f the chairperson or member of the board ... receives remuneration beyond reimbursement of expenses, the requirement for registration as a consultant lobbyist applies...
  - What is remuneration?
    - Federal Court decision of *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388
    - Dealt with receipt of gift to the Prime Minister and family from the Aga Khan of a vacation on the Aga Khan’s private island
    - On judicial review, Federal Court determined “remuneration” should be broadly interpreted and not strictly limited to monetary payment

- Mobilizing others – “charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country”
  - PPDDA? Yes
  - Lobbying?
    - Taking out an advertisement in a newspaper or with a broadcaster to encourage the public to contact their MP
    - Mailing residents of an MP’s riding to contact their MP
    - Encouraging supporters to contact their MP on social media

- Other laws to be aware of:
  - In Ontario - Brampton, Hamilton, Ottawa, Peel Region, Toronto and Vaughan have adopted their own lobbying laws
    - Need to be aware of whether a municipal by-law is also applicable to any lobbying activities
  - *Canada Elections Act*
    - Charities and NFPs may fall under the broad definition of “third parties”
    - Reporting requirements apply to third parties that engage in “partisan activities, partisan advertising, and election surveys” and “election advertising”
    - Applies during the “pre-election period” as well

## CONCLUSION

- Lobbying legislation is complex, and can be a trap for unwary charities and NFPs
- Charities and NFPs need to be aware, if engaging in any lobbying activities, in addition to lobbying legislation, the requirements imposed by the ITA on charities
- ITA permits charities to engage in PPDDAs, so long as they are in furtherance of their charitable purposes, and do not directly or indirectly support or oppose a political party or candidate for public office (with no similar restriction on activities for NFPs)
- Charities and NFPs planning to become involved in these areas should seek legal advice before doing so

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THE OTTAWA REGION  
***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

**GOVERNANCE 101 FOR  
CHARITIES & NFPs: BACK TO  
THE BASICS**

**By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.**

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<p><b>Governance 101 for Charities and NFPs: Back to the Basics</b></p> <p><b>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</b> tman@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p><b>SETTING THE CONTEXT</b></p> <ul style="list-style-type: none"><li>• Governance in general terms means establishing, implementing and monitoring appropriate rules and policies by the organization’s governing body in order to achieve its purposes</li><li>• Proper governance requires appropriate structural and operational due diligence, and effective decision making</li><li>• This presentation reviews common questions regarding governance</li><li>• Potpourri of questions, from real life situations</li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <span style="float: right;"><a href="http://www.carters.ca">www.carters.ca</a></span></p>



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- Reference will be made to some not-for-profit legislation
  - OCA – *Ontario Corporations Act*
  - ONCA – *Ontario Not-for-Profit Corporations Act*
    - Anticipated to be proclaimed in force in 2020
    - Once proclaimed, will replace OCA
  - CNCA – federal *Canada Not-for-profit Corporations Act*

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## 1. WHAT ARE YOU?

### “We are a not-for-profit!”

- Terms “non-profit” and “not-for-profit” are used interchangeably and generally refer to organizations that do not operate with a view to make profit and any profits made are not passed on to their members
- “NFP” or “not-for-profit” is generally a corporate term, meaning a membership based corporation
- An NFP can have different income tax status:
  - Registered charity
  - Non-charitable tax-exempt non-profit organization

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## 2. FIND YOUR BIRTH CERTIFICATE

**“We are a corporation and we have a constitution, but no by-laws”**

**“What is letters patent/articles? Never seen them before!”**

- Every organization has a “governing document”
- It gives an organization its legal existence, and normally identifies the organization’s name, purposes, and its structure and internal procedures
- Different types of governing document (see table on next slide)
- Corporations must have by-laws

<b>Ontario OCA Corporations</b>	<b>Federal CNCA Corporations</b>	<b>Unincorporated associations</b>	<b>Trusts</b>
Letters patent	Articles of incorporation or Articles of continuance	Constitutions	Trust deed
Supplementary Letters Patent	Articles of Amendment	Amendments to Constitution	Amendments to trust deed
By-laws	By-laws	By-laws (optional)	Usually no by-laws

### 3. WE HAVE NO RECORDS!

**“Mary was our treasurer who keeps all our records. Her house was flooded last summer so we lost all our corporate records”**

- Very important to have proper records because
  - Meet *Income Tax Act* and CRA requirements, registered charities and non-profit organizations are required to keep books and records
  - Meet specific records keeping requirements in incorporating legislation
  - Meet other legislative requirements, etc. *Employment Insurance Act, Canada Pension Plan, Excise Tax Act, etc.*

- Other requirements that an organization has to maintain – e.g., funders, certification bodies, umbrella organizations
- Good governance and administration, e.g., maintain corporate history, comply with donor’s restriction, mitigate risks, prepare for legal challenges (e.g., CRA audits, law suits, insurance claims)
- Understand records requirements
- Adopt and implement records policy

## 4. WHAT BY-LAWS? WHO NEEDS BY-LAWS!

**“We don’t want to spend legal fees drafting by-laws, after all they are all the same. We took the by-laws from the foodbank next door and adopted it for our church. Voila, what a piece of artwork!”**

- By-laws is a living document and must reflect the uniqueness of each organization
- Internal governance process of a foodbank is very different from that of a church
- One size of by-laws does not fit every situation

**“We never follow our by-laws! In fact, I don’t even know where it is. It might be in the big book we got from our lawyer. And who has that big book?”**

- Important to ensure legality of proceedings
- Not following by-laws may invalidate decisions made, and make them subject to challenge
- Normally, when a lawyer incorporates a corporation, the lawyer would also prepare a corporate minute book (the “big book”?) containing key governing documents, e.g., articles of incorporation, by-law, initial organizational minutes, registers (i.e., listing) of members/directors/officers
- Minute book is a key part of the records
- Must keep the minute book in a safe place and continue to upkeep it

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**“Our by-law is too long, can we shorten it to 2 pages?”**

**“We do not understand our by-law, it is drafted by a lawyer!”**

- By-laws is a living document that reflects how the members of the organization want to operate
- By-laws set out rules for basic corporate structure and process, e.g.,
  - Membership – structure and meetings
  - Board - structure and meetings
  - Officers
  - Other key issues, e.g., who can do banking and sign documents, indemnity, conflict of interest

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- Must comply with legal requirements:
  - Incorporating legislation
  - Common law
  - Good governance and best practices
- Cannot be too brief
- Clear wording and plain language
- Anticipate potential problems and provide simple solutions
- Number all by-laws
- Keep records of historical by-laws
- Requires clear legal drafting, not creative novel writing

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**“Our members approved by-laws changes at our AGM. They are in our minutes.”**

- There are generally 3 ways to amend by-laws
- Adopt resolution – Generally not recommend, easy for changes to get lost and buried in the minutes
- Adopt amending by-law - Suitable when few changes
  - Pro – present short amending by-laws for adoption, easy for directors and members to understand
  - Cons – Need to refer back and forth with original by-law and amending by-law (but can prepare consolidated by-law for reference)
- Adopt new general operating by-law- Suitable when there are lots of changes
  - Pro – All changes are in one by-law
  - Cons – Entire by-law is open for amendment

## 5. WHO ARE OUR MEMBERS?

**“We do not have members, we only have directors”**

- Corporations and unincorporated associations must have members
- Membership can be:
  - Open – broad-based or narrow
  - Closed – directors and members are the same persons
- Generally no legal requirements on the minimum or maximum number of members

**“I am so excited that my 10 year old child just became a member of our church!”**

- Generally not a good idea to have minors as members
- Members have a lot of rights under the OCA, ONCA, CNCA
- Can affect membership notice and quorum requirements
- Not recommended to make minors “non-voting members” – because CNCA and ONCA have class veto rights on certain decisions
- Can make minors a non-membership category of persons, as such “adherents” or “youth participants”

## 6. I LOVE MEMBERSHIP MEETINGS!

**“We only have 5% of our members come to our AGMs”**

- Important for by-laws to require an appropriate quorum level
- May set a percentage or a number
- Not too high to make it difficult to make quorum
- Not too low so that a small group of members could highjack the meeting
- Needs to reflect the needs of the organization and what is practical
- If by-laws is silent, OCA, ONCA and CNCA default is majority of members

**“We do not want members to be able to call meetings”**

- Members have the right to requisition members meetings - OCA and ONCA (10%), CNCA (5%)
- ONCA and CNCA allow members to submit “proposals” – any member may submit a “proposal” to bring a matter to discuss at AGM (detailed rules in ONCA and CNCA)
- For unincorporated associations, depends on what the constitution and by-laws provide

**“The proxy form drafted by our lawyer is too complicated?”**

- A proxy gives the proxyholder the right to vote at membership meetings on behalf of the appointing member
- A proxy must comply with the requirements in the incorporating legislation (e.g., CNCA contains very detailed prescriptive rules)
- A proxy must also reflect rules in common law, e.g, how the proxy forms are designed and drafted, how proxies are solicited, collected, tracked etc.
- Proxies must be clear in order to avoid future litigation involving proxies
- Need to consider how to track and count proxies



**“We can’t hold our AGM this month. Oh well, we will just hold it in 3 months.”**

- Must comply with requirements in incorporating legislation when to hold AGMs
- OCA and ONCA - not later than 15 months after last AGM
- CNCA rule - not later than 15 months after last AGM, but not later than 6 months after fiscal year end
- If not incorporated, no legal requirement – check constitution or by-laws
- Registered charities – must file T3010 within 6 months after fiscal year end. Should have FS approved by the members by then even if no other legal requirements to do so

**“What is a special business vs special resolution? I am confused!”**

- These are terms defined in ONCA and CNCA
- They are not related and are not the same
- “Special resolution” means 2/3 of the votes cast
- “Special business” means any matters for decision at an AGM that are not consideration of the financial statements, public accountant’s report, election of directors and re-appointment of the incumbent public accountant
- Notice of AGM must (a) state the nature of special businesses in sufficient detail to permit a member to form a reasoned judgment on the business; and (b) state the text of any special resolution to be presented for adoption

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## 7. WHO? HE IS ON OUR BOARD? OH NO!

**“He is a bad guy on our board, the board just removed him from our board at our last board meeting! Phew!”**

- OCA used to allow the board to remove a board member
- OCA was amended Nov 14, 2017, to prohibit this, subject to by-law provisions reflecting the old rules
- OCA, ONCA and CNCA – directors can only be removed by simple majority vote of members

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**“Our by-laws states that we can have 5 to 10 directors”**

- OCA – by-laws must have a fixed number of directors, does not permit a board to have a minimum range
- ONCA, CNCA – can have flexible board size, but members need to “fix” number of directors when there is a change

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**“We have 150 directors on our board”**

- OCA and ONCA – there must be at least 3 directors
- CNCA –
  - soliciting corporation must have at least 3 directors
  - non-soliciting corporation can have as few as 1 director
- Maximum number of directors
  - No legal rules
  - Too many directors make it difficult for discussions, and to keep confidentiality
  - Generally 5 to 11 is suitable for most organizations

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**“They won’t let me submit a nominations form to nominate you, but I am going to nominate you from the floor regardless!”**

- OCA – silent on nomination rules, therefore subject to nomination policy adopted by the corporation
- ONCA and CNCA give members specific rights to nominate directors that trumps nomination policy
  - 5% of members can submit a proposal to nominate directors (specific rules in ONCA and CNCA on how to submit a proposal)
  - Any member can nominate from the floor

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**“John cannot come to our board meeting this Sunday, he wants to appoint a proxy. He said he appointed one for our AGM!”**

- It is not permissible for directors to appoint proxies
- A director has to fulfill fiduciary duties, something that cannot be delegated to a proxyholder
- If a director cannot attend a board meeting in person, the director can attend by conference call
- Members do not have fiduciary duties, therefore a member can appoint a proxy if permitted by the incorporating legislation and by-laws

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**“He is on our board all right, but he never shows up at our board meetings! Let’s just make him a non-voting director. That would make him feel warm and fuzzy!”**

- Directors of not-for-profits have onerous fiduciary duties to fulfill
- Directors of charities have additional duties as quasi trustees for charitable property
- One key way for a director to discharge fiduciary duties is by attending board meetings and expressing their views by voting
- Non-voting directors – the worst case scenario
  - Have onerous fiduciary duties to fulfill
  - Cannot vote and therefore no means to express their views by a vote

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**“It is an in camera meeting, who needs minutes!  
Where is the camera?”**

- Still need to keep minutes to document the discussion and decisions made
- After in camera meeting, record decision in open meeting minutes
- Need to be careful how to keep the minutes confidential, e.g., print in special color paper, locked in special cabinet, special circulate by email
- Consider adopting policy on in camera meetings

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**8. MEETING IS FUN!**

**“He did not vote. Should we count him in the no vote?”**

- Depends on how the by-laws is drafted
- For example 10 members, 7 attended, 5 voted
- Majority of all members = 6 (i.e., persons absent will be counted against the motion)
  - Majority of those present = 4 (i.e., persons who abstained will be counted against the motion)
  - Majority of those who voted = 3 (i.e., only persons who voted against the motion will be counted against the motion)

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**“We make decisions by simple majority vote, so we count 50% plus 1.”**

- They are not the same!
- For example 10 members, 7 attended, 5 voted
- Simple majority (of votes cast) = 3
  - 50% plus 1 = 4
    - 50% of 5 = 2.5
    - 2.5 + 1 = 3.5
    - Have to round up to 4 because you can not have half a person!

**“We could not set up a conference call for the board meeting. We will just circulate the resolution by email.”**

- OCA, ONCA, CNCA rules – Board and members can only make decision by one of two ways:
  - Hold a meeting – can be physical meeting, by telephone or electronic means
  - Written resolution which require unanimous consent
- Common law rules – A valid meeting must allow participants to communicate adequately with each other during the meeting so that they can have a meaningful discussion. Therefore, asking members/directors to indicate their wishes by email is NOT a valid means to meet

## 9. Audits?

**“Do we need an audit of our financials? They are so expensive! My company never needed an audit”**

- Whether an audit is required depends on the incorporating legislation
- This is NOT an accounting issue
- The rules for not-for-profits are different from those for for-profits
- OCA
  - Default – audit is required
  - Exemption – Audit may be waived only if (a) the revenue for that year is \$100,000 or less, AND (b) approved by 80% of the votes cast by the members to waive an audit for that year

- ONCA
  - Whether an audit or review engagement is required or may be waived depends on
    - Whether the corporation is a “public benefit corporation” as defined in the ONCA
    - Gross revenue for that year
  - See tables in following slides

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of	\$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)



- CNCA
  - Whether an audit or review engagement is required or may be waived depends on
    - Whether the corporation is a “soliciting corporation” as defined in the CNCA
    - Gross revenue for that year
  - See tables in following slides

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

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- Unincorporated association and trusts – up to you
  - Other considerations – benefits of audited financial statements
    - Provides transparency to members and public
    - Helps directors discharge fiduciary duties
    - Good due diligence and therefore helps to establish a due diligence defence
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***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

# **REAL ESTATE CHALLENGES FOR CHARITIES & NFPs**

**By Nancy E. Claridge B.A., M.A., LL.B.**

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2020 Ottawa Region <i>Charity &amp; Not-for-Profit Law</i> Seminar February 13, 2020</p>
<p><b>Real Estate Challenges for Charities and Not-for-Profits</b></p> <p>By Nancy E. Claridge, B.A., M.A., LL.B. nclaridge@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Corporate/Institutional Memory Problems</li><li>• Failure to Retain Proper Advisors/Failure to Provide Information to All Advisors</li><li>• Regulatory Compliance (CRA/PGT)</li><li>• <i>Planning Act</i> (Ontario)</li><li>• GST/HST</li><li>• <i>Assessment Act</i> (Ontario)</li><li>• <i>Religious Organizations' Lands Act</i> (Ontario)</li><li>• Land Transfer Tax (Ontario)</li></ul> <p>www.charitylaw.ca      www.carters.ca</p>	

## A. CORPORATE/INSTITUTIONAL MEMORY PROBLEMS

- Continuity of leadership is often lacking in charities and NFPs, leading to loss of institutional memory concerning real property issues, amongst other things
- Failure to fully document decision making and retain documents concerning a real property transaction may result in costly problems in the future
  - e.g. Are there ongoing obligations?
  - e.g. Are there rights that may be triggered by an act or omission of the charity/NFP?



- e.g. Will the form of a transaction dictate future transactions without the benefit of the proper context?
- Without full information, charities or NFPs may take steps that could result in avoidable litigation and the inability to properly respond
- The best defence against the lack of continuity of leadership is the proper documentation of all transactions and a practice of reviewing those documents before taking further steps with the property (sale/lease/mortgaging)

## B. FAILURE TO RETAIN PROPER ADVISORS/FAILURE TO PROVIDE INFORMATION TO ALL ADVISORS

- A real property transaction may require multiple advisors for the charity or NFP
  - Real Estate broker/agent
  - Lawyer
  - Mortgage Broker
  - Municipal Planner
  - Building Inspector/Engineer
  - Architect



- Advisors need to communicate amongst each other and cannot work in isolation or else critical information may be missed
- Clients need to ensure that all advisors have the information necessary to provide the proper advice
- Advisors may need jurisdiction-specific knowledge and so a cookie-cutter approach to managing a project may not work
- Cutting corners may save money in the short term, but could be very costly in the long-term



## C. REGULATORY COMPLIANCE (CRAPGT)

- Holding property for charitable purposes
  - General principle is that assets of a charity must be applied for the charitable purpose of the charity, subject to restrictions imposed by donors
- What if the property is more than the charity needs?
  - *Income Tax Act* – Passive Investment versus Related Business
    - Need to consider if land is held as a passive investment or related business under the *Income Tax Act*
    - Review CRA’s CPS-019 “What is a Related Business”

- CRA’s policy on “related business” focuses on a “business” that involves a commercial activity undertaken with the intention to earn profit and the charity derives revenues from providing goods and services
- Passive investments are generally not considered by CRA as business activities
- If leasing, buying or selling activities are considered to be “business” activities, then it can only be carried on by registered charities if they meet the criteria to be a related business
- It is an issue if a charity has become a commercial landlord and the rental is not a related business to the charity
- Operating an unrelated business may result in loss of charitable registration or monetary penalty

- The Public Guardian and Trustee also has the ability to review whether the interest of the charity in real estate is appropriate
  - e.g. is the land held for a charitable purpose, a business activity, or a passive investment
- Ontario *Trustee Act* imposes a prudent investment rule for land held by charities as a passive investment
- Standard of care required of a trustee involved in the investment of charitable property is “the care, skill, diligence and judgment that a prudent investor would exercise in making investments”



- Must also consider *Charities Accounting Act* provisions concerning holding land for purposes of leasing it or as a passive investment:
  - Cannot be prohibited from holding or leasing land by the terms of its investment powers
  - Revenue generated must be used for charitable purposes
  - Investment must be otherwise prudent given the particular investment powers of the charity
  - A substantial interest by a charity (20% or more) in a real estate company permits the PGT to make enquiries





## D. PLANNING ACT (ONTARIO)

- The *Planning Act* sets out the ground rules for land use planning in Ontario and describes how land uses may be controlled, and who may control them by:
  - Identifying matters of provincial interest;
  - Requiring municipalities to have regard to provincial interests in their land use planning decisions; and
  - Providing direction on the contents of municipal official plans and zoning by-laws

- How does this impact a charity or NFP purchasing or leasing land?
  - Charity and NFP must consider impact of
    - Provincial Policy Statements – municipal land use planning decisions are required to be consistent with the Provincial Policy Statement
    - See also Greenbelt Plan, Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Growth Plan for the Greater Golden Horseshoe and Growth Plan for Northern Ontario
    - These plans take precedence over local official plans and zoning by-laws

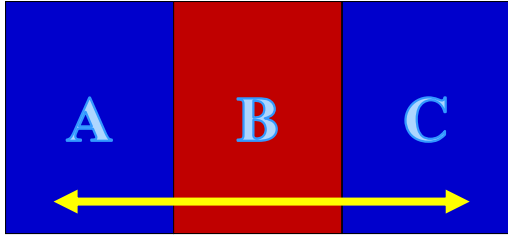
- Charities and NFPs must determine first if the land supports the proposed use generally
- If the use is supported generally, can the land specifically support the intended use
  - Road access
  - Set-back requirements
  - Height requirements
  - Parking
- Failure to ensure all elements are met may result in the acquisition of property that cannot be used by the organization



## Severances/Merger of Title

- Section 50 of Ontario's *Planning Act* deals with issues of "subdivision control" and "part lot control"
  - intended to control the manner in which land can be divided and dealt with
- Compliance with Section 50 is required or else a transaction may be invalid
- Failure to understand the Planning Act may result in inadvertent merger of title
  - merger of title may impact ability to finance or sell land

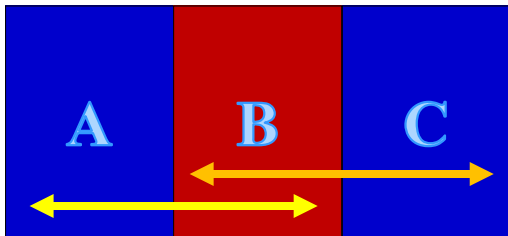
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- Example of merger of title: NFP-2020 owns Lots A and C (which are not lots on a registered plan of subdivision)
  - NFP-2020 can sell or mortgage Lots A and C independent of one another
  - But if NFP-2020 buys Lot B, Lots A, B & C merge in title and NFP-2020 must sell or mortgage all three lots together unless it obtains consent from the municipality

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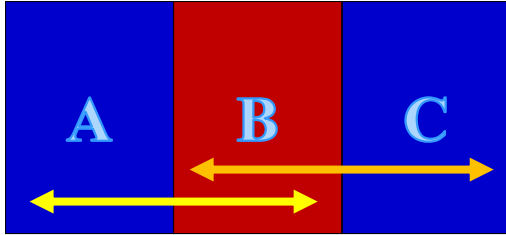
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- Let's complicate matters! NFP-2020 owns Lot A and Lot B. Lot A is a lot within a registered plan of subdivision. Lot B and Lot C used to be a single lot but Lot B was severed
- NFP-2020 can currently deal with Lots A and B independently of one another
- NFP-2020 buys Lot C and wants to mortgage it – it can't! Lot C is the remainder of a severance

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- To mortgage Lot C, Lot B must be included, but the same does not apply in reverse
- Lot B can be sold independently, but if Lot C is to be sold, it must include Lot B
- Such issues may be addressed by avoiding common ownership of abutting lots – not an easy thing for charities and NFPs
- Important to review exceptions

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### E. GST/HST

- Generally, the Goods and Services Tax (GST) of 5% (Harmonized Sales Tax (HST) of 13% in ON and 15% in NS, NB, PEI and NL) is normally payable on the purchase of real property unless a specific exemption applies
- There is no general exemption for charities/NFPs
- Unlike for-profit HST registrants, GST/HST is not “a wash” for most charities in utilizing input tax credits
- Depending on agreement (HST included in or in addition to), if GST/HST is payable, the party responsible for payment must either pay the tax or self-assess; the party receiving the tax must remit

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- In most cases, a church or charity will not be a GST/HST registrant for the purpose of claiming an input tax credit and therefore self-assessing
- As such, it is very important to carefully examine the issue of GST/HST and determine whether an exemption applies or if the GST/HST will have to be paid
- If ignored, whole transaction can be in peril if funds not available for closing
- If GST/HST is paid, the charity/NFP may need to consider applying for the Public Service Bodies' Rebate
  - (50% GST or federal portion of the HST and in Ontario 82% of the provincial portion of the HST)

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- When determining whether or not an exemption will apply, it is important to first examine the existing use of the real property
  - Future use is not a factor to consider
- e.g. if the existing use is commercial, then GST/HST is applicable
- e.g. if the existing use is by a charity for zero-rated goods or services, then GST/HST may not be payable
- The sale of real property by a “public service body” may be exempt – non-profit organization, charity, municipality, school authority, hospital authority, public college, university (all defined in legislation)

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- A sale of real property by a public service body (PSB) is exempt unless one of the exclusions below applies:
  - Sale of a “residential complex”
  - Deemed sale
  - Sale to an individual
  - Sale to a trust all of whose beneficiaries are individuals
  - Sale of property used primarily in commercial activities
  - Sale of real property where PSB has made an election under s. 211 of the *Excise Tax Act*



## F. ASSESSMENT ACT

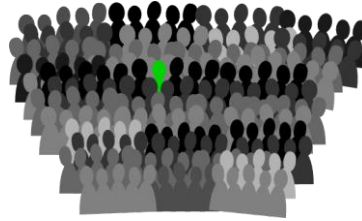
- All real property in Ontario is liable to assessment and taxation, subject to specific exemptions:
  - Cemeteries, burial sites
  - Religious or municipal cemetery land
  - Churches
  - Land ancillary to operation of a cemetery
  - Philanthropic organizations
  - Care homes
  - Non-profit hospices
  - Long-term care homes
  - Boy Scouts and Girl Guides
  - House of refuge
  - Charitable institutions, etc.

- It is important to carefully examine the requirements for the exemption
- If a charity does not qualify under the *Assessment Act* exemptions, there is a potential property tax rebate under Ontario's *Municipal Act*
  - Individual municipalities may also allow not-for-profits that are not registered charities to qualify for a rebate
  - Property must be occupied by the charity to qualify
  - Annual application

## G. RELIGIOUS ORGANIZATIONS' LANDS ACT (ROLA)

- ROLA was established to enable unincorporated associations to own and administer real property
  - Permits trustees appointed on behalf of the religious organization to hold land on a perpetual succession basis
  - Limits the purposes for which trustees may hold land for a religious organization:
    - Place of worship; Residence of its religious leader; Burial or cremation ground; Book store, printing or publishing office; Theological seminary or similar institution for religious instruction; Religious camp; Any other religious purpose

- It is very important to review the limitations of authority of the trustees and recognize when authorization must be obtained from the members
  - Section 6 of ROLA: The trustees of a religious organization **shall not** exercise any of the powers conferred upon them by this Act **until** they are authorized to do so by resolution of the organization, and the organization may attach such terms or conditions to any such authorization as it considers expedient



## H. LAND TRANSFER TAX (ONTARIO)

- Most transfers of real property in Ontario will result in the Land Transfer Tax (LTT) being payable (and in the City of Toronto, Municipal Land Transfer Tax (MLTT))
- LTT is an escalating tax rate from 0.5% to 2.5% (the MLTT virtually mirrors the LTT)
- Few exceptions to the imposition of this tax
- Gifts of land are still subject to LTT, unless there is no consideration passing for the gift, in which case the LTT will be nil
- The government includes the assumption of a liability as consideration passing for the gift



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- e.g. the assumption of a mortgage or part of a mortgage or other contract related to the land would be considered as consideration
- Such a situation could be costly for a charity/NFP
- In 2010, Ontario introduced an LTT exemption for charities for certain transfers of land between qualifying corporations (or trusts) that are registered charities and there is consideration
- To qualify, all of the following must be met:
  - Value of consideration must be nil (other than the assumption of any registered encumbrance)
  - If a qualifying corporation, must have been the beneficial owner immediately prior to the transfer

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- Must have paid LTT when it acquired the land
- Must have held the land for a charitable purpose
- Transferee must be a qualifying corporation and continue to hold the land for the same charitable purpose for at least one year after the date of transfer
- A qualifying corporation is a non-profit non-share capital corporation that is a registered charity
- If there is going to be deemed consideration on the transfer of the real property, it will be very important to carefully review the requirements of the exemption in order to avoid a costly land transfer

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**MANAGING SEXUAL ABUSE  
CLAIMS: THE NEW REALITY FOR  
CHARITIES & NFPs**

**By Sean S. Carter, B.A., LL.B. and Esther S.J. Oh, B.A., LL.B.**

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## Managing Sexual Abuse Claims: The New Reality for Charities & NFPs


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## OVERVIEW



### OVERVIEW OF TOPICS

- Introduction
- If an allegation of sexual abuse arises, what should I do first?
- After the initial reports are done, what do I do next?
- What can I say about the allegations, and to whom?
- What steps may be taken with an alleged perpetrator of abuse?
- What are some policy considerations?

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## A. INTRODUCTION

- Every Charity and NFP (which for purposes of this presentation are collectively referred to as “Charity”) hopes that it will never encounter sexual abuse allegations that occurred through one of its programs
- However, a number of high-profile incidents of abuse (including those that have occurred at Charities), now make sexual abuse issues a primary concern for all organizations



- This presentation outlines what Charities can do when an abuse allegation arises
  - While abuse issues are multi-faceted, this presentation outlines general guidelines from a legal perspective only
  - Since every situation is unique and different considerations apply in each case, Charities should obtain legal advice in order to obtain appropriate guidance based on their circumstances
  - Comments from a litigator’s perspective and a solicitor’s perspective are provided throughout this presentation

## B. IF AN ALLEGATION OF SEXUAL ABUSE ARISES, WHAT SHOULD I DO FIRST?

*Comments from a Litigator's Perspective:*

### Identify Whether Mandatory Reporting Requirements Might Apply Under Provincial Child Protection Legislation

- What is the age of the alleged victim of abuse?
- Mandatory reporting requirements apply under provincial child protection legislation where an alleged victim meets the age requirement
- In Ontario, the *Child, Youth and Family Services Act* ("CYFSA") defines a "Child" as a person under the age of 18 years (CYFSA s. 2(1))

- CYFSA sets out mandatory reporting requirements to report suspected child abuse
  - However, mandatory reporting requirements do not apply in respect of a Child who is 16 or 17 years of age
    - Instead a person "may" make a report regarding a Child who is 16 or 17 (CYFSA s. 125(4))
- A person who has a duty to report shall make the report directly to the children's aid society and shall not rely on any other person to report on the person's behalf (emphasis added) (CYFSA s.125(3))
  - Cannot delegate reporting to senior leader at Charity, the person must make the report directly
  - A person who has additional reasonable grounds to suspect abuse shall make a further report even if the person has made previous reports with respect to the same child (CYFSA s.125(2))

- The Ministry of Children and Youth Services states that if a person has reasonable grounds to suspect that a child “is or may be in need of protection”, then they must promptly report the suspicion and the information on which it is based
  - “Reasonable grounds” refers to the information that an average person, using normal and honest judgment, would need in order to decide to report [http://www.children.gov.on.ca/htdocs/English/childrens\\_aid/reportingabuse/abuseandneglect.aspx](http://www.children.gov.on.ca/htdocs/English/childrens_aid/reportingabuse/abuseandneglect.aspx)
- Charities need to document the reports that were made as evidence that they have discharged their duty to report

- Persons who perform professional or official duties with respect to children, including health care professionals, teachers, religious officials, “youth and recreation workers” and others, are guilty of an offence if the following applies:
  - the person fails to report suspected abuse and
  - the information regarding suspected abuse was obtained in the course of the person’s professional or official duties (CYFSA ss.125(5),(6))
    - “youth and recreation worker” does not include a volunteer (s. 125(7))

## Identify Whether Other Legal Requirements May Apply Where Minors are Not Involved in an Abuse Allegation

- In Ontario, where an alleged victim is 16 years of age or older, mandatory reporting requirements under CYFSA protection legislation would not apply
- Charity should review whether occupational health and safety requirements may apply, if an employee is involved in the incident
  - If an incident of workplace harassment or workplace violence may have occurred, there are statutory obligations under the Ontario *Occupational Health and Safety Act* to investigate the incidents

- Charity should determine whether it has an anti-workplace harassment / workplace violence policy that is to be followed for individuals who are not employees (e.g. volunteers or guests at the Charity's programs)
  - Employees of Charities may report incidents of potential workplace harassment or workplace violence, even if the harassment is alleged to have been committed by non-employees
- Consider non-mandatory reporting to CAS or law enforcement agencies - when might it be appropriate or help to minimize risk? (Discussed below)
- In any situation it would be important to involve legal counsel for the Charity specific to your situation

*Comments from a Solicitor's Perspective:*

### **Does the Charity Have Jurisdiction?**

- Did the incident occur during the Charity's programs?
- Did the incident occur on the Charity's property or premises (whether rented or owned)?
- Incidents occurring at a private gathering of individuals who happen to participate in the Charity's programs (i.e. but not at a sanctioned program of the Charity) are outside of the Charity's jurisdiction
- Best to clarify whether an event is a sanctioned program of the Charity or not
- Charity sanctioned events should ideally be identified with appropriate signage and clear communications in accordance with applicable policies of the Charity

## **C. AFTER THE INITIAL REPORTS ARE DONE, WHAT DO I DO NEXT?**

*Comments from a Litigator's Perspective:*

### **Address Immediate Safety Concerns**

- Immediate steps should be taken to protect vulnerable persons and others at the Charity from potential harm
- Depending on the facts and nature of the relationship a Charity and/or employees may have fiduciary relationship, and at the very least will likely have a duty of care central to liability in negligence
  - In some cases it may be necessary to temporarily restrict alleged perpetrator from accessing Charity's premises and programs



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- If an alleged perpetrator is volatile and poses a risk of harm, the Charity can review the option of issuing a trespass notice under the *Trespass to Property Act* of Ontario
  - As an owner of property (whether as registered owner on title or under a lease or rental agreement), the Charity has the right to exclude any individual from attending on their property
  - Trespass notice would prohibit the alleged perpetrator from attending the Charity's premises
    - Includes leased, owned and premises rented for a special event of the Charity
    - The trespass notice does not need to provide any reasons for the notice

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- Trespass notice can either be time limited (e.g. one year) or apply for an indefinite period of time
- Take steps to ensure that the trespass notice is delivered in a way that can be objectively proven
  - Preferred methods may include delivery by a third party, such as a process server, registered mail or courier
- If an alleged perpetrator breaches the trespass notice, the Charity could contact the police regarding the breach or seek civil relief
  - A copy of the trespass notice and proof of its service should always be kept available at the Charity's premise(s) in a secure location, in case police need to be called to enforce the trespass notice

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## Take Steps to Preserve Evidence

- Charity has a positive duty to preserve evidence in case there is a criminal investigation or civil proceedings in the future
  - E.g. all relevant text messages, email messages, pictures, written correspondence, video footage from security cameras or other evidence should be preserved and kept in a secure location (producing back-up copies may also assist)
- Consider what steps need to be taken if the Charity's property (such as a cell phone, computer, email accounts etc.) might have relevant information on it (protecting against destruction of evidence)

## Options on Offering Assistance to Victim

- Charity might want to offer assistance to the alleged victim; however, Charity needs to consider what liabilities may arise (especially if the police are still investigating)
  - Charity must avoid actual or perceived interference with evidence or testimony to reduce liability criminally and civilly
- Charity may recommend that the victim obtain independent legal advice to reduce exposure to liability

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- Charity may also offer counseling services to an alleged victim
  - Counseling services provided by a third party can be suggested to avoid issues of Charity's interference with evidence or conflicts of interest
  - Before offering counseling or other forms of assistance, Charity should first consider what parameters are to apply
    - Is it even appropriate given the circumstances? Facts and legal advice are central to understanding issues and ramifications to potential victim and what form it may take

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- E.g. consider initial time limits to apply to the duration of third party counseling or other services and issue of selection of which third party professional will assist;
- Proper documentation of each step and consideration is essential
  - One of the worst sources of evidence is a person's memory



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*Comments from a Solicitor's Perspective:*

**Has the Board Of Directors Been Informed?**

- The board of directors has the legal duty to manage the Charity as a charitable corporation as the “directing mind” of the organization
  - All directors may be exposed to potential liability for the actions of the Charity
- As such, it is essential that the board of directors be advised of all abuse allegations without delay
- At larger organizations, senior employees may be delegated the duty to co-ordinate matters with legal counsel, police and other parties. However:
  - Board should be kept informed of developments
  - Board approval should be obtained for all decisions

- If a legal claim has been threatened or commenced, Charity should retain a lawyer to protect its interests
  - The directors and officers of the Charity might want to consider obtaining independent legal advice as the lawyer acting for the Charity cannot act on behalf of any of the directors or officers or senior administration in their personal capacity
  - This is not to suggest that any directors, officers have done anything wrong or have been negligent, but rather because the Charity's lawyer acts solely for the Charity and can focus only on what is in the best interests of the Charity

## Recording of Board Minutes

When a report on the abuse allegation is provided at a board meeting, board minutes should be carefully recorded

- Where legal advice is discussed, minutes should be carefully recorded to avoid inadvertent waiver of solicitor-client privilege
- *In camera* minutes can be helpful in this regard
  - At the beginning of the board discussion, a brief explanation of the issues can be provided in generic terms (but without going into detail), together with a brief statement that the board will be going into an *in camera* session in light of the sensitivity of the issues involved

- Separate minutes of the *in camera* session should be kept outlining the key points of discussion and issues considered by the board
- After the *in camera* session has ended, the board should adopt resolutions approving any board decisions (i.e. outside of the *in camera* session)
- The resolutions of the board should then be recorded in the regular minutes of the board meeting
- In order to avoid waiving solicitor-client privilege, all communications from Charity's lawyer should be kept strictly confidential and minutes of board discussions should be carefully drafted in a manner appropriate to the circumstances

- If questions on highly sensitive issues arise, it may be best to discuss those in communications with or in consultation directly with the Charity's lawyer to protect those communications with solicitor-client privilege
- After the board meeting, the minutes from *in camera* session will need to be kept:
  - In a secure location that is not accessible by unauthorized parties, and
  - Separate from the other minutes of board meetings
- This is important in order to avoid unauthorized access to the *in camera* minutes,
  - e.g. an administrative personnel who is updating the minute book might inadvertently review highly confidential *in camera* minutes

### *Comments from a Litigator's Perspective:*

#### **Preparation of a Written Chronology**

- Shortly after an allegation of abuse arises, the Charity should consider (in consultation with legal counsel) preparing a written explanation of the events
- Written summary should provide a narrative of what, where, when and by whom an incident occurred, including, but not limited to:
  - Chronological summary of events, witnesses, etc.
  - Detailed explanation of steps taken by the Charity to investigate the allegations and protect vulnerable persons
  - Copies of emails or supporting documents can be attached to the written summary

- Hard copies of the documents should be kept securely in a locked cabinet
- Electronic copies should be saved in a password protected folder and computer terminal
- Electronic copies are less secure, and could be subject to possible hacking or accidental review by unauthorized parties
- Consider, with assistance of legal counsel, if the assertion of privilege (and fulfilling the requisite elements) may be of assistance
- Be aware of rights and liability associated with information regarding accused to avoid chances of defamation or privacy related exposure

### *Comments from a Solicitor's Perspective:*

#### **Possible Report to Insurer**

- In some cases, there may be a duty to inform the insurer for the Charity
- Different wording is used in different insurance policies
  - Some policies require a report to the insurer in circumstances that might lead to a claim
  - Other policies require a report to the insurer only where there is an actual claim or a threat of legal action

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- Where a Charity is uncertain, assistance from insurance counsel can be sought to clarify reporting obligations under the insurance policy
- Failure to inform insurer according to the terms of policy may result in loss of coverage
- Where it is determined that a report to the insurer is required, Charity can schedule a call with the insurer
  - Verbal report can be done by phone, with two Charity representatives on the call
  - After the call the Charity can follow up in writing to confirm the key points discussed during the call

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- Once the insurer has reviewed the matter, the insurer might choose to appoint legal counsel to protect the Charity's interests, as well as the interests of the insurer
  - In some cases, the Charity can continue to have its own legal counsel to review what is being proposed by the lawyer appointed by the insurer
  - Lawyer for Charity can act on a "watching brief" to make sure insurer appointed lawyer is acting in Charity's best interests
- Where a report has been made to its insurer, the Charity should avoid communications with third parties
  - Best to avoid verbal or written comments which (in the insurer's opinion) may compromise the Charity's defence. Such actions could jeopardize the Charity's insurance coverage

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*Comments from a Litigator's Perspective:*

**Possible Report to Insurer**

- Claims are being specifically drafted to assist in denial by insurers (i.e. intentional acts) to exert pressure
- Some insurers are opting for blanket denials of coverage assuming that the insured will not have the resources to defend the action and bring an application for coverage
- Continual oversight and monitoring of litigation is a central duty of the Charity, and personal liability of individual directors for costs of the action may arise (*Alaimo v. Di Maio*, 2009 CanLii 4848 (ONSC))
- Conflicts of interests, divergent or simply different goals may arise throughout litigation – remember the Charity is the party to the litigation (not the insurer)

**D. WHAT CAN I SAY ABOUT THE ALLEGATIONS, AND TO WHOM?**

*Comments from a Litigator's Perspective:*

- It is essential that the Charity maintain a high degree of confidentiality regarding the alleged sexual assault within only a small group of leaders directly involved. This is important to:
  - Protect the privacy of the alleged victim
  - Protect the privacy of the alleged perpetrator
  - Avoid potential liability exposure involving claims of defamation of character against the Charity
  - Avoid inadvertently interfering with any police and/or Children's Aid Society ("CAS") investigations (including current or future investigations that may not yet have started)

- In all communications, the Charity and its leaders may want to avoid making public statements, even without specifics and names
- Often when sexual abuse is alleged, the alleged victim or alleged perpetrator may make allegations against the Charity in emails to a large group:
  - It can be tempting for the Charity to provide a group email response to clarify mischaracterizations
  - Often advisable to avoid interference with criminal investigation, privacy breaches and/or legal liability by avoiding “reply all” or group responses – timing and manner of response are fundamental
  - Legal advice is recommended since every situation is unique, and communications may be on a variety of platforms (email, social media, etc.)

### *Comments from a Solicitor's Perspective:*

#### **Possible Communications with Members**

- In the context of a religious charity or a closely-knit organization, the Charity's board and leaders might want to provide an update to the members on what has happened:
  - Some members might have already heard about the allegation and want further information
  - Any updates to members provided at a gathering of members should be brief, strictly factual and read from a written script prepared in advance
  - Again, legal advice is recommended as each situation is different

*Comments from a Litigator's Perspective:*

**Communications and Record Keeping**

- Documents need to be kept securely in a manner that is accessible only by a small group of authorized persons (e.g. password protected or locked cabinet)
- Precise notes or recordings (if possible) should be kept of any phone calls or in-person meetings with parties, including the alleged victim. If follow up communications between the Charity and alleged victim of abuse are necessary, it may be easiest for the alleged victim to have one primary contact person (consider same gender as victim)
  - During phone calls and/or meetings the alleged victim can be advised a second person is present

- If police/CAS investigations have already commenced, it may be best to stop all communication with alleged victim and/or perpetrator to avoid potentially interfering with the investigations being carried out
  - Each situation is unique and legal advice is recommended
- If rumours begin circulating or if the media becomes involved, legal advice can be sought regarding how to manage the public relations issues
- Ensure the 'narrative' and public statements (where necessary) are coordinated, reflect the truth and are internally consistent

- Any press releases must:
  - Not interfere or comment on any ongoing police and/or CAS investigations;
  - Respect privacy requirements of parties involved; and
  - Reflect balance and consistency, and be aware of variety of possible outcomes and thus statements should be carefully crafted so as not to make unfair comment or allege unsubstantiated facts
- In some cases, a public relations consultant may also be retained to provide assistance, particularly if there is a political aspect or potential long-term damage (e.g. Boy Scouts – potential bankruptcy, reputational damage)

## E. WHAT STEPS MAY BE TAKEN WITH AN ALLEGED PERPETRATOR OF ABUSE?

*Comments from a Solicitor's Perspective:*

### Reviewing Employee or Volunteer Status

- It is customary for a Charity to temporarily suspend a person from certain duties while investigation of sexual abuse allegation is underway
- In the earlier stages it would be premature to make a final decision to terminate or alter the terms of a person's employment or volunteer status until all relevant information has been collected
  - In some cases, allegations may constitute false allegations against the employee / volunteer
- After receiving the relevant information, the Charity can consider the findings, the best interests of the Charity and others involved with the Charity, with paramount consideration given to safety concerns

## Possible Restorative Steps

- Some religious charities may feel strongly that they wish to take rehabilitative approach to assist alleged or convicted perpetrators to permit them to come to the religious charity's programs. This is a high risk approach
- If a rehabilitative approach is taken, at a minimum the alleged perpetrator must be accompanied at all times by a designated adult while attending at the Charity's premises and programs, in accordance with applicable policies
- Where there is a criminal charge or conviction involving abuse of children, the court will normally order that the perpetrator must not come within a particular distance of children or places where children congregate (such as schools, playgrounds, children's programs and others)
  - As such, in practice, a court order might preclude an alleged or convicted perpetrator from attending the Charity's program and premises for that reason

## F. WHAT ARE SOME POLICY CONSIDERATIONS?

*Comments from a Solicitor's Perspective:*

### Importance of Adopting Appropriate Policies

- Charities need to adopt policies as may be appropriate for their programs
  - E.g. child protection policy, anti-harassment policy and/or vulnerable persons' policies
- While policies cannot guarantee abuse will not occur, they can however, help to protect the Charity from potential liability by reducing the likelihood that incidents of abuse would occur, through the implementation of checks and balances within the operations of the Charity

- In the context of children's programs, a child protection policy would also serve as evidence of due diligence steps taken by the Charity to protect its children and would thereby assist in defending against any legal claims, should they arise
- Police checks are one important step in a more comprehensive screening procedure that should be set out in the Charity's policy, for volunteers and employees who wish to work with vulnerable persons
  - Not all perpetrators of abuse have a past criminal record and a number of incidents have involved first-time abusers
- Many insurance companies now require organizations to have an abuse prevention plan as a prerequisite to providing relevant insurance coverage

## **Policies Need to Comply with Legal Requirements and Organizational Needs**

- Charities should ensure that their child protection policy, anti-harassment policy and/or vulnerable persons' policies reflect up-to-date legal requirements, operational needs and best practices that may apply
  - Child abuse reporting requirements are governed by provincial legislation
  - As such, charities carrying out children's programs in multiple provinces should have a policy that reflects applicable requirements in each province
  - Procedures to obtain vulnerable sector checks are also different in each jurisdiction and often require some form of supporting documentation to be provided by the Charity

- Policies should be reviewed on a regular basis
  - For possible legal updates:
    - E.g. in Ontario, the new *Child, Youth and Family Services Act* came into force April 2018 and the new *Police Records Reform Act* came into force on November 2018
  - For possible operational updates:
    - E.g. expansion or other changes to children’s programs, that can occur from time to time

## *Comments from a Litigator’s Perspective:*

### **Importance of Procedural Fairness in Policies**

- In investigating and addressing abuse allegations, it is important to comply with any written policies and procedures of the Charity
- Substance and enforcement of policies should reflect level of procedural fairness and fundamental justice
  - Some Christian Charities might have governing documents and policies containing Bible references, prohibiting “acts of the sinful nature, impurity, debauchery, discord and selfish ambition...”
  - Such provisions would most likely be found unenforceable due to vagueness, if legally challenged

- Enforcement of a Charity's policies in relation to alleged perpetrators should be done in a consistent and objective manner
  - Failure to do so would be detrimental in the context of a civil claim or publicity regarding the alleged incident
  - Enforcing policies inconsistently (e.g. enforcing certain rules, but not others) can result in the Charity being subject to possible criticism and possible legal action or allegations of human rights violations

*Comments from a Solicitor's Perspective:*

**Consistent Implementation of Policies in Programs**

- Charities must ensure that policies are not only adopted but are being followed in their operations
- Training should be provided on an on-going basis to all new and existing employees and volunteers regarding steps to implement the various policies
  - In one case, a church had a child protection policy in place (which included a requirement for police checks for employees and volunteers working with children), but the individual in charge of doing the police checks did not get them completed
  - The church advised the insurer that it had an abuse prevention policy and obtained insurance coverage for abuse claims



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- Three years later a youth leader was charged and later pleaded no contest to sexually abusing three teenagers in the youth group
- Youth leader had a previous sexual offence conviction that would have been disclosed if a police check had been done
- Insurance coverage was denied on the basis of a material misrepresentation
- Abuse prevention and anti-harassment policies should be implemented at all Charity's programs, including programs held in homes
  - One possible exception: Child protection policies might not apply at family programs where parents are responsible for their own children. This should be set out in the policy

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- Many churches and religious charities carry out meetings at a member's home on a weekly or bi-weekly basis (e.g. referred to as cell groups, house churches, and other meetings)
- Risk of abuse can arise from sources not directly within the Charity, including the following:
  - Abuse by teenaged babysitter of children while adults had their group meeting
  - Criminal conviction of partner of person hosting the meeting in their home (even though the host's partner has no direct involvement in the Charity)
  - Abuse or harassment committed by a guest attending the Charity's program at someone's home

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***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

**EVOLVING TRENDS IN  
PHILANTHROPY: MORE THAN  
JUST CHARITABLE DONATIONS**

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>The 2020 Ottawa Region Charity &amp; Not-for-Profit Law Seminar February 13, 2020</b></p>
<p><b>Evolving Trends in Philanthropy: More Than Just Charitable Donations</b></p> <p><b>By Terrance S. Carter, B.A., LL.B.</b> tcarter@carters.ca 1-877-942-0001</p> <p>© 2020 Carters Professional Corporation</p>	
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<p><b>INTRODUCTION</b></p> <ul style="list-style-type: none"><li>• The face of philanthropy is evolving</li><li>• This is in part due to rapid changes in information technology, particularly on the internet and social media, in addition to the changing character of donors through shifts in demographics, as well as a change in donor expectations</li><li>• Donors today are also interested in funding innovative projects through inventive methodologies</li><li>• This presentation explains the ways in which philanthropy is evolving and what leaders in the charitable sector need to know in order to keep abreast of these evolving trends and the legal issues they involve</li></ul>	
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## A. OVERVIEW OF EVOLVING TRENDS

- Funding Social Enterprises
- Funding Social (Impact) Investments
- Donor-Advised Funds
- Cryptocurrency Donations
- Crowdfunding
- Third-Party Fundraising Campaigns
- Fundraising Through Influencer Marketing
- Sponsorship
- Cause-Related Marketing

## B. FUNDING SOCIAL ENTERPRISES

- Charities are able to participate in social enterprises to a limited extent and as such are looking to attract donations to fund social enterprise programs
- In general, “social enterprise” can be described as
  - a business dedicated to achieve a social mission, or
  - making a profit to achieve a social good
- A social enterprise is not expected to provide a significant return to the investor, since the focus is on achieving a social good instead of a profit
- Social enterprises combine charitable missions, corporate methods, and social consciousness in ways that transcend traditional business and philanthropy



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- The ongoing public interest in “social enterprise” in Canada is reflected in the introduction of new provincial social enterprise legislation, e.g. Community Contribution Companies (B.C.); Benefit Companies (B.C.); Community Interest Companies (N.S.)
- Ontario has been looking at introducing “dual purpose” corporate legislation, but not clear when that will occur
- However, provincial social enterprise corporations are still taxable companies and therefore have no general tax incentives available for investors who make contributions of capital or loans to these corporations
- Charities though, enjoy tax advantages in being exempt from tax and being able to issue tax receipts
- The conundrum for charities is to determine what they can do to fulfill their charitable purpose through “social enterprise” while still being compliant as a registered charity under the *Income Tax Act* (“ITA”)

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- Registered charities that are not private foundations are able to carry on “related businesses” but are limited to business activities that are “linked” and “subordinate” to their charitable purposes
- Registered charities are generally able to invest in a subsidiary for-profit corporation and receive receiptable donations of up to 75% of net income of that company
- The following are examples of income generation by charities that can constitute a form of “social enterprise” as a direct charitable activity
  - Businesses that provide permanent employment to those with disabilities (see CG-014)
  - Employment-related training for the unemployed (see CG-014)

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- Low income rental housing (see CG-022)
- Sales of goods and services, e.g. tickets to symphony, religious literature sold by a church (see CG-013)
- Providing micro-loans and loan guarantees, e.g. to assist eligible beneficiaries in attending courses to enhance employability or to establish a business (see CG-014)
- Making program-related investments, which are investments that directly further the charitable purposes of the charity, and not made solely to generate a return, e.g. share purchases in for-profit company to achieve charity’s charitable purpose (see CG-014)

## C. FUNDING SOCIAL (IMPACT) INVESTMENTS

- Charities may also establish a fund or receive gifts intended to undertake “impact investing”, also referred to as “social investing” or “socially responsible investing”
- The Ontario *Charities Accounting Act* (“CAA”) was amended on November 14, 2017
  - CAA applies to all charities in Ontario and provides that the *Trustee Act* (which deals with investment powers of trustees) applies to trustees holding property for charitable purposes
  - Under these amendments, charities are now permitted to make “social investments”, by applying or using trust property to both:
    - directly further the purposes of the trust; and
    - achieve a “financial return” for the trust

- “Financial return” is defined in the CAA as an *“outcome in respect of the trust property [that] is better for the trust in financial terms than expending all the property”*
- In April 2018, the Ontario Public Guardian and Trustee (“OPGT”) released the “Charities and Social Investments Guidance” (the “Guidance”)
  - The Guidance clarifies that “financial return” is not required to be at market rates, and depending on the terms of investment, it may not require the re-payment of the invested capital
  - This suggests that even where the investment results in a partial loss of capital, it may still qualify as a social investment as long as the investment was directly furthering the charitable purpose of the charity

- Before a charity makes a social investment, it is important that the charity understands the legal issues that need to be considered in undertaking social investments, some of which are described below
  - Charities holding “endowments” need to review their historical gift documentation to determine any limitations on the expenditure of capital, e.g. whether or not capital is to include realised capital gains as part of a “total return” approach
  - Social investment must follow CAA requirements:
    - Must meet the dual purpose of furthering a charitable purpose and achieving financial return
    - Board members must consider if “advice” is needed
    - Board members must be satisfied that it is in the interest of the charity to make a social investment

- No ability of the board to delegate decision making on social investments
- Liability protection of directors in making a social investments is more limited than regular investments
- Does the proposed investment fall into one or more of the three investment regimes available to charities in Ontario, and the requirements of each regime?:
  - Ordinary investment under the *Trustee Act*;
  - Social investment under the CAA; and/or
  - Program-related investment under the CRA’s “Community Economic Development Guidance” (CG-014)



## D. DONOR-ADVISED FUNDS

- Donor-Advised Funds (“DAFs”) have garnered much attention lately
- A DAF is a type of charitable giving vehicle, established when a fund is created by a donor through an initial donation to a registered charity (“DAF charity”)
- The flexibility in structuring DAFs is one reason why their use has grown significantly in Canada
- By 2016, in Canada:
  - There were an estimated 10,700 DAFs, holding \$3.2 billion CAD in assets, with \$300,000 CAD average fund size
  - Community foundations were estimated to hold DAFs with \$1.7 billion CAD in assets (versus \$5.8 billion CAD in total assets)
  - Private/public foundations created solely to hold DAFs estimated to have \$1.5 billion CAD in assets



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- DAFs are expected to continue growing in popularity in Canada, and are projected to potentially reach \$7.5 billion CAD by end of 2023
- The gift by the donor is irrevocable, and the donor receives a charitable donation receipt from the DAF charity in exchange for the gift
- Income generated by the capital in a DAF is gifted to qualified donees (most often to registered charities)
- The donor is given the unique role of making non-binding suggestions to the DAF charity regarding distribution of assets from the DAF to other charities
- However, despite this donor advice, all administrative, operational, and governance matters including compliance with the ITA and the policies of the CRA, are the sole responsibility of the DAF charity

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- One of the more pressing concerns regarding DAFs is how much ongoing control a donor can have over the DAF after the gift is made
- A “selling point” of DAFs in some marketing communications is that they allow the donor to have the perception of ongoing “control” over who receives disbursements from the DAFs, the amounts and timing of disbursements, and even their investment decisions
- There can be a “disconnect” between how DAFs legally and functionally work
- Too much donor control over the DAF after the gift has been made begs the question of whether there is legally a gift, and if it is receiptable under the ITA
- Documents creating a DAF must clearly state that
  - It is the DAF charity which administers the fund
  - The DAF charity reserves the right to not follow advice of the donor regarding how monies in the DAF are to be distributed or applied

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## E. CRYPTOCURRENCY DONATIONS

- Cryptocurrencies are virtual currencies that use distributed ledger technology (e.g. Blockchain networks) to facilitate payments without financial intermediaries, and for transparency, such as to trace donations and the beneficiaries involved, increasing donor confidence
- Receipting issues
  - They are considered a commodity for income tax purposes (not “money” or “currency”) (see CRA’s “Guide for cryptocurrency users and tax professionals”, June 27, 2019)
  - Donations in cryptocurrencies are, therefore, subject to the rules for gifts-in-kind, and determination of fair market value (FMV) on the date of the donation is necessary for receipting purposes, including the deemed fair market value rule

- Mining cryptocurrencies by a charity, either directly or through a pooled fund, might not meet the “prudent investor standard” or alternatively, may not constitute a permitted “related business”
- Initial Coin Offerings (ICOs), which involve the charity creating its own cryptocurrency may be subject to provincial securities legislation
- Cybersecurity issues
  - Possible increased risk of hacking and real world crime (extortion and violence)
  - Costly mistakes if incorrect transfer because transactions are not reversible
  - Potential greater exposure of director and officer liability

## F. CROWDFUNDING

- Crowdfunding involves fundraising by appealing to a “crowd” (broad group or network) of small donors, using the Internet and social media, e.g. GoFundMe
- More commonly used for specific projects with a time-limited campaign strategy
- Crowdfunding generally involves three elements: the campaigner, the crowd, and the platform
- There are various types of crowdfunding
  - Charities typically use donation-based crowdfunding (e.g. donating to a project or cause) or reward-based crowdfunding (e.g. contributing funds in return for non-financial benefits, such as tickets or free gifts)
- Crowdfunding campaigns can be done by both charitable organizations and non-charitable organizations

- Crowdfunding platforms establish their own terms of use and the charity’s or NFP’s only option is to either accept those terms or not, with no bargaining power
  - An example of IP conditions on one crowdfunding site:
 

*“If you provide material or post content onto the [the platform] website, you are hereby waiving all moral rights you may have in the material you have provided or posted. By providing or posting this material onto [the platform], you hereby grant to [the platform] a nonexclusive, royalty free, perpetual, and irrevocable license which allows [the platform] the right to use, edit, modify, adapt, reproduce, publish, distribute and display such material”*

- Crowdfunding, other than by charities, may be subject to informal public appeals legislation (e.g. Saskatchewan's *Informal Public Appeals Act*)
  - This legislation was applied to crowdfunding campaigns (e.g. Humbolt Broncos)
  - The Uniform Law Conference of Canada's ("ULCC") model legislation from 2011 has only been adopted in Saskatchewan
  - The ULCC recently released a Consultation Paper in 2019 for a proposed *Uniform Informal Public Appeals and Crowdfunding Act* to revise the model legislation
  - It is possible that other provinces may also introduce similar legislation



- Charities should consider some of the following issues when using crowdfunding platforms:
  - What are the terms of use that the charity is accepting by using a crowdfunding platform?
  - Is the charity fully complying with applicable privacy legislation with regard to the personal information of donors, supporters, volunteers or employees and the personal information they share on social media and crowdfunding platforms?
  - Could the charity be exposed to liability for unauthorized sharing of data?
  - Does the charity have policies and practices in place regarding the management of personal information, such as those dealing with the proper collection, retention, use and protection of such information?

## G. THIRD-PARTY FUNDRAISING CAMPAIGNS

- Several legal issues arise when third parties are undertaking fundraising events, particularly when promoted on social media e.g. P2P campaigns
- Because the name of the charity is being used in conjunction with the fundraising event by the third party, the charity could be seen as endorsing and/or being responsible for the event as if it was its own
- Some of the legal issues that could come up include:
  - Civil liability for injuries at a fundraising event, including the abuse of children or vulnerable persons
  - Lack of necessary permits to hold an event
  - Misuse of IP as well as failure to exercise control required for appropriate licencing of IP
  - Misrepresentation to the public of how much money goes to the charity, *i.e.* gross or net proceeds



- Failure to obtain a waiver and/or release from participants for the charity and its board
- Failure to obtain indemnification of the charity and its directors and officers
- Failure of the third party to obtain appropriate insurance coverage that includes the charity and its directors and officers as additional insureds
- Failure to advise the insurer of the charity about the event, possibly resulting in loss of insurance coverage for failure to advise of a material risk
- Lack of appropriate agency appointment for the third party to receive and/or remit funds to the charity
- Failure to monitor and approve the crowdfunding site and/or giving portals with regard to the terms of use
- Lack of ability to audit third-party campaigns

## H. FUNDRAISING THROUGH INFLUENCER MARKETING

- Influencer marketing falls under the scope of the *Competition Act*, which prohibits false and misleading advertising, and failure to disclose material information
- On January 13, 2020, the Competition Bureau published new guidance for influencers to provide adequate disclosures when they are being paid by advertisers (which can include charities)
  - These disclosures need to be as clear as possible and contextually adequate
- Additionally, *Ad Standards*' published "Disclosure Guidelines", which were last updated in January 2019, contain a list of Do's and Don'ts for "Influencer Marketing", including the use of disclosure hashtags such as #ad or #sponsored, and the disclosure of any compensation given to an influencer

## I. SPONSORSHIP

- As an alternative to traditional philanthropy, businesses may support a charity through sponsorship and claim a tax deduction for sponsorships in a similar way that they can for a donation (subject to a 75% limit for donations and a reasonableness test for sponsorships)
- Sponsorship is described by the CRA as
  - "when a business makes a donation toward the cost of a charity's activity or event and, in return, the charity advertises or promotes the business's brand, products or services"
- When it is intended to be a **donation** – if the sponsoring business receives only the same level of recognition as other donors and receives minimal recognition, the charity may issue a donation receipt to the business for the full amount of the donation

- When it is intended to be a **sponsorship** – if the sponsoring business receives special or more than minimal recognition, then the CRA will consider this to be a sponsorship
  - Sponsorship is an advantage, and its fair market value must be subtracted from the donation amount to determine the eligible amount of the donation receipt, in accordance with split-receipting rules under the ITA
  - If the value of the sponsorship cannot be calculated, the charity cannot issue a donation receipt
- The sponsoring business may be able to categorize its sponsorship costs as an advertising expense, provided that the sponsorship is “considered reasonable” and “given with the intent of generating income”

## J. CAUSE-RELATED MARKETING

- Cause-related marketing (or social marketing ventures) are funding opportunities where a charity works in collaboration with a non-charitable partner to sell goods and/or services
  - e.g. Tim Hortons restaurants hold a “Camp Day” where it donates 100% of proceeds from all coffee purchases made on that date to support Tim Hortons Foundation Camps
  - e.g. 7-Eleven® Canada holds an annual “Slurpee Name Your Price Day” where customers decide the price paid for a slurpee, and 100% of the proceeds are donated to charities, such as Food Banks Canada
- Often, the expenses incurred related to the venture are paid by the non-charitable partner and the charity contributes its logo or other form of intellectual property

- The business, as a donor, may be entitled to a donation receipt from the charity
- However, the benefit that the for-profit entity receives under cause-related marketing arrangement is considered an “advantage”, which will need to be subtracted from the fair market value of the donation in order to calculate the eligible amount of the gift for purposes of the official donation receipt
- Since it can be very difficult to calculate the value of an advantage in cause-related marketing arrangements, the CRA suggests that a charity consider whether the expenses from the cause-related marketing arrangement should be claimed as an advertising expense

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THE OTTAWA REGION  
***Charity & Not-For-Profit Law Seminar***


*Thursday, February 13<sup>th</sup>, 2020*

**EVOLVING PLANS AND  
PRIORITIES AT THE CHARITIES  
DIRECTORATE OF CRA,  
INCLUDING ACCESSING MY  
BUSINESS ACCOUNT AND  
ONLINE SERVICES**

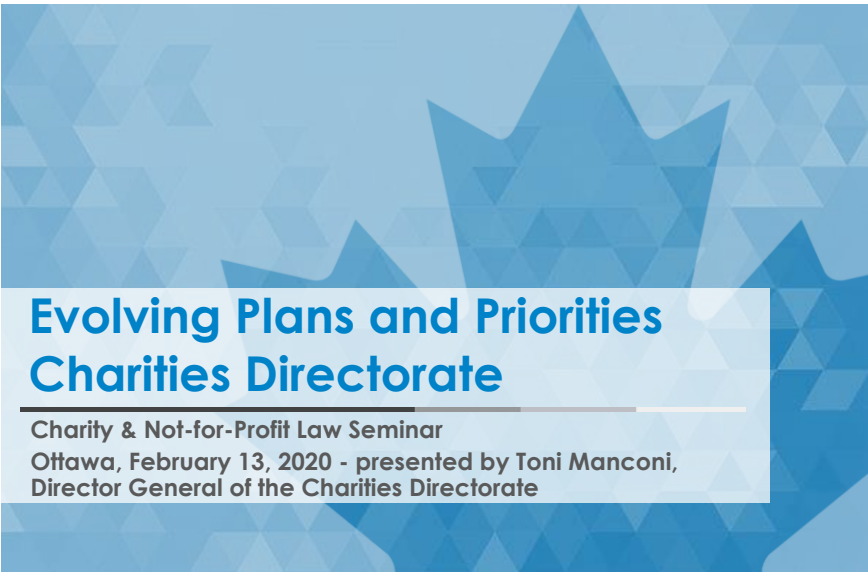
**By Tony Manconi, B.A. and Jeff Zander B.Sc.**

**Charities Directorate, Canada Revenue Agency**

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Canada Revenue Agency / Agence du revenu du Canada



## Evolving Plans and Priorities Charities Directorate

Charity & Not-for-Profit Law Seminar  
Ottawa, February 13, 2020 - presented by Toni Manconi,  
Director General of the Charities Directorate



Canada

## At a glance...

- New government
- Charities Directorate focus:
  - Enhanced services to charities and increasing the transparency of the work we do
  - Expanded educational products and services
  - Streamlined process for responding to applications for registration
  - Reduced wait times for responding to written enquiries
  - Charitable sector interactions with the Directorate modernized as we move towards e-services

## 2019 Announcements

- **Budget 2019**: New tax measures to support Canadian journalism organizations producing original news
- **March 2019**: The Response to consultation panel related to Political Activities, and we acted on the recommendations
- **Spring 2019**: Launched in-person charities information sessions
- **June 2019**: Senate Committee on the Charitable Sector released its Report in examining the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations
- **August 2019**: First Advisory Committee for the Charitable Sector

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## Program news...

- ❖ **Allocation project: Education on the allocation of expenditures as required in the T3010**
- ❖ **Charities Education Program: tool to educate charities on their obligations**
- ❖ **Credit Counselling Project: review of the small population of credit counselling agencies (CCAs) operating as registered charities**
- ❖ **Considerations for a Thematic Page: educating the public**

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## Other news ...

- ❖ **Improvements to the Registration process**
  - re-designed our registration webpages to an intuitive 4-step process to obtain charitable registration
  - interactive document checklist to assist applicants with submitting an application
  - increased our telephone communications with applicants as a first contact
  
- ❖ **Technology: moving from paper to electronic by providing digital services that allows for:**
  - electronic applications for organizations that want to become registered charities
  - registered charities to complete their T3010s on line
  - It also allows charities to submit documents electronically to the Charities Directorate

Canada Revenue Agency / Agence du revenu du Canada

## Accessing My Business Account and Online Services

For Charities, RCAAAs and RNASOs  
Ottawa – February 13, 2020  
Presented by Jeff Zander, B.Sc., Charities Directorate


Canada

## Digital services for charities

Charities' directors or trustees can use the new digital services by logging into My Business Account (MyBA)

### CRA login services

Select the service you would like to log in / register for.

<p><b>My Account</b></p> <p>Access <b>your own</b> information:</p> <ul style="list-style-type: none"><li>• Individuals</li></ul>	 <p><b>My Business Account</b></p> <p>Access <b>your business</b> information:</p> <ul style="list-style-type: none"><li>• Business owners</li><li>• Partners</li><li>• Directors/trustees on a board</li><li>• Officers of a non-profit organization</li></ul>	<p><b>Represent a Client</b></p> <p>Access <b>someone else's</b> business or individual information, including your <b>employer</b>:</p> <ul style="list-style-type: none"><li>• Accountants</li><li>• Tax and payroll service providers</li><li>• Employees</li><li>• Legal representatives (power of attorneys, trustees, etc.)</li><li>• Family and friends</li></ul>
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## List of directors and trustees

- Just because a director or trustee is listed on the charity's account with the Charities Directorate, **doesn't** mean they will be able to access to the charity's account in MyBA.
- Currently, the names in the charity's account are not necessarily matching the list of directors/trustees updated by charities every year in their returns.
- To ensure that the charity's account is up to date, a charities must send a letter signed by an authorized director/trustee, with a list of all its current directors and ask that they be added as owners on the charity's account.

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## Why the SIN?

- The SIN is the number that identifies a person for income tax purposes and is used for certain federal programs.
- Used by the CRA to authenticate a person when registering for the first time to the digital services.
- Also used by the CRA to authenticate a person as the director/trustee (owner) of a charity before giving access to the charity's account in MyBA.
- Not for the charity to use.

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## Never used CRA's digital services?

- Two ways to register and access MyBA:

- Option 1:

**Option 1 – Using one of our Sign-In Partners**

Log in or register with the same sign-in information you use for other online services (for example, online banking).

[Sign-In Partner Login / Register](#)

[► View list of Sign-In Partners](#)

- Option 2:

**Option 2 – Using a CRA user ID and password**

Log in with your CRA user ID and password, or register.

[CRA login](#) [CRA register](#)

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## Option 1: Register through a Sign-In Partner

- Step 1 – Select your Sign-in Partner
  - Enter your regular online banking credentials to access CRA's login services

**SECURE KEY Concierge** Online Access Made Easy

**Select Sign-In Partner**

By selecting a Sign-In Partner, you are agreeing to the Terms and Conditions and Privacy Notice of Security Concierge.

Please Note: If you currently utilize the 'Choice Rewards MasterCard' Sign-In Partner please switch to another Sign-In Partner prior to November 8th, 2019 on which date the 'Choice Rewards MasterCard' option will be disabled and will no longer be visible as an option for Security Concierge.


**SIMPLE | CONVENIENT | SECURE**

- ✓ It's easy to use
- ✓ We protect your privacy
- ✓ No passwords or personal information (i.e., name, address, date of birth, etc.) are exchanged during this process
- ✓ Your Sign-In Partner won't know which government service you're accessing and the government won't know which Sign-In Partner you're using

Terms and Conditions | About SecurityKey Concierge | Privacy Notice

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## Option 1: Register through a Sign-In Partner

- Step 2 – Provide personal information to CRA
  1. Your social insurance number (SIN)
  2. Your date of birth
  3. Your postal code or ZIP code
- We will mail you a CRA security code (5-10 days)
- Step 3 – Enter the CRA security code
  1. Return to My Business Account
  2. Select "Sign-in Partner Login" to log in with online banking credentials
  3. When prompted, enter your CRA security code
- Step 4 – Enter your charity's BN

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## Option 2: Select CRA register to get a CRA user ID and password

- Step 1 – Provide personal information
  1. Your social insurance number (SIN)
  2. Your date of birth
  3. Your postal code or ZIP code
  4. An amount from your income tax and benefit returns. Have a copy of your returns handy. (The line amount requested will vary. It could be from the current tax year or the previous one.)
  5. Create a CRA user ID and password
  6. Create your security questions and answers
  7. Enter your charity's business number if asked
- We will mail you a CRA security code (5-10 days)

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## Option 2: Select CRA register to get a CRA user ID and password

- Step 2 – Enter the CRA security code
  - Return to My Business Account
  - Select "CRA login"
  - Enter your CRA user ID and password
  - When prompted, enter your CRA security code
- Step 3 – Add your charity's BN if you haven't done it yet

The screenshot shows the Canada Revenue Agency (CRA) My Business Account interface. At the top, there are logos for the Government of Canada and the Government of Canada in French, along with a 'Français' link. Below this is a dark blue header with 'Canada Revenue Agency' and a 'Logout' button. The main content area is titled 'My Business Account' and 'Manage profile - add BN to profile'. It features a form for 'Manage Business number (s) in your profile' with a text input field and a label '\* Business number (9 digits) (required)'. There are 'Previous' and 'Add' buttons below the input field, and a 'Help with this page' link on the left.

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## When to contact the Directorate

- You must call the Charities Directorate to access your charity's account in MyBA if:
  - You don't see your charity's business number once logged into MyBA and can't add it to your profile.
  - Your charity's registration was revoked and you want to apply for re-registration.

 1-800-267-2384

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## Represent a Client

- A charity can authorize a representative, an employee or an internal division to access its RR account using **Represent a Client**.

### CRA login services

Select the service you would like to log in / register for.

My Account	My Business Account	Represent a Client
<p>Access <b>your own</b> information:</p> <ul style="list-style-type: none"> <li>• Individuals</li> </ul>	<p>Access <b>your business</b> information:</p> <ul style="list-style-type: none"> <li>• Business owners</li> <li>• Partners</li> <li>• Directors/trustees on a board</li> <li>• Officers of a non-profit organization</li> </ul>	<p>Access <b>someone else's</b> business or individual information, including your <b>employer</b>:</p> <ul style="list-style-type: none"> <li>• Accountants</li> <li>• Tax and payroll service providers</li> <li>• Employees</li> <li>• Legal representatives (power of attorneys, trustees, etc.)</li> <li>• Family and friends</li> </ul>

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## Represent a client - permissions

- The list of services that representatives can do online on behalf of a charity varies depending on the level of authorization that the charity has consented to.
- There are three levels of authorizations:
  - view only access (level 1)
  - update and view access (level 2)
  - delegate authority, update, and view (level 3)

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## Now that you are logged in MyBA

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## Now that you are logged in MyBA

- Once logged in MyBA, all business numbers where you are registered as an owner are visible. You can go from one BN to the other during the same session.
- Select your charity's BN

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## What can a charity do in MyBA?

- Scroll down to the Registered charity quadrant if your charity has multiple program accounts

**Registered charity**

RR 0001

- [View program account details](#)
- [Apply to be a registered charity or RCAA](#)
- [View application status](#)
- [File a return](#)
- [Adjust a return](#)
- [View expected and filed returns](#)
- [Update registered charity or RCAA information](#)
- [Manage address](#)
- [Manage language preference](#)
- [View program account name](#)

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## View expected and filed returns

### View expected and filed returns

#### Fiscal period summary

BN/Account number: 123456789RZ0001  
 Organization: Demo Business

#### Expected returns

Fiscal period	Due date	Status	Progress
2018-01-01 to 2018-12-31	2019-06-30	Expected	

#### Filed and adjusted returns

Select the return you want to view by clicking on the link in the table below.  
 To view, a return's status must be Processed/Filed.

Fiscal period	Date received	Status	Type	Submission period
2017-01-01 to 2017-12-31	2018-06-26	Processed/Filed	Original	Paper
2016-01-01 to 2016-12-31	2017-06-15	Processed/Filed	Original	Paper
2015-01-01 to 2015-12-31	2016-06-07	Processed/Filed	Original	Paper
2014-01-01 to 2014-12-31	2015-06-22	Processed/Filed	Original	Paper
2013-01-01 to 2013-12-31	2014-06-04	Processed/Filed	Original	Paper

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## File a return

### File a return

#### Fiscal periods with expected and overdue returns

BN/Account Number: 123456789RR0001

Organization name: Your Name

#### Expected returns

Select	Fiscal period	Due date	Status	Progress
<input checked="" type="radio"/>	2018-04-01 to 2019-03-31	2019-09-30	Expected	
<input type="radio"/>	2017-04-01 to 2018-03-31	2018-09-30	Overdue	
<input type="radio"/>	2016-04-01 to 2017-03-31	2017-09-30	Overdue	
<input type="radio"/>	2015-04-01 to 2016-03-31	2016-09-30	Overdue	
<input type="radio"/>	2015-01-01 to 2015-03-31	2015-09-30	Overdue	

Fill out the return

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## T3010 return - Overview

### T3010 Registered Charity Information Return Overview

Name: ACCOUNT NAME FOR 123456789 RR 0001  
 BN/Registration number: 123456789RR0001  
 Fiscal period: April 01, 2018 to March 31, 2019

#### Review before you start

Is this return for you?

To assist you in filling out this form, refer to guide [T4033, Completing the Registered Charity Information Return](#).

**Note:** Even if a charity is inactive, a Registered Charity Information Return must be filed to maintain its registered status.

#### Completing this return

All charities must file a **complete** and **accurate** return within 6 months of its fiscal period end. Failure to do so can result in revocation of its registration status.

[Privacy statement](#)

#### Your progress

Section	Progress	Status	Action
Basic information sheet	<div style="width: 100%;"></div>	Not Started	Start
Section A - Identification	<div style="width: 100%;"></div>	Not Started	Start
Section B - Directors/Trustees and Like Officials	<div style="width: 100%;"></div>	Not Started	Start
Section C - Programs and general information	<div style="width: 100%;"></div>	Not Started	Start

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## Update registered charity information

### Update registered charity or RCAA information

BN/Account Number: 123456789RR0001

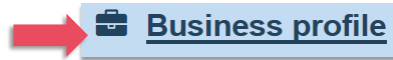
Organization name: Your Name

\* Select the category that you would like to update (required)

- Select
- Change director
- Change public information
- Change organization's legal name
- Change organization's fiscal period end
- Request permission to accumulate
- Change bylaws
- Change purposes and activities
- Amend governing document
- Change legal status
- Request associated status
- Change organization's designation
- Request disbursement quota reduction
- Amalgamate, merger, consolidate
- Request guidance on receipting
- Submit an enquiry
- Request voluntary revocation

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## Email notifications



My Business Account

Notification preferences

### Notification preferences

**Business number** 123456789  
**Business name** CLIENT NAME 123456789

When an email address is added:

- we will stop sending paper mail and send an email when there is mail available to view in My Business Account;
- we will send an email when important changes are made on this account.

You can add up to three email addresses per program account.

For more information see [notifications from the CRA](#)

#### Accounts registered to receive notifications

Program account	Email address
<b>Registered charity (RR) account</b>	
123456789 RR0001	Jane.Doe@CharitableFoundation.ca

▶ Review terms of use

+Add email address ⓘ Edit email address ⓘ Delete email address ⓘ

Remove account notifications ⓘ

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## More information

- Our Charities and giving webpages on Canada.ca are a great source of information to learn more about the digital services.
- Be the first one to learn about any new information posted on the website by subscribing to our [Charities and giving – What's new](#) electronic email list at:

**[canada.ca/cra-email-lists](https://canada.ca/cra-email-lists)**