

The logo for Carters, featuring the word "CARTERS" in a large, white, serif font on a dark blue background.

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# THE OTTAWA REGION 2021 *Charity & Not-For-Profit Law Webinar Goes Virtual*

*Thursday, February 11<sup>th</sup>, 2021*

## WELCOME

Welcome to the Ottawa Region *Charity & Not-for-Profit Law Webinar*, which is designed to assist charities and not-for-profits in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability, with a focus this year on legal issues that charities and not-for-profits are facing in having to operate virtually, given the impact of the pandemic. For lawyers and accountants, this webinar is eligible for 4 substantive hours of CPD credits with the Law Society of Ontario and CPA Professional Development requirements.

The Ottawa Region *Charity & Not-for-Profit Law Seminar*, with its related *Church & Charity Law™ Seminar* held annually in Toronto since 1994, is being presented as a Webinar for the first time due to COVID-19. The Webinar is presented by **Carters Professional Corporation** (Carters), a law firm with offices in Ottawa, Toronto and Orangeville with experience in advising charities and not-for-profits in Ontario, across Canada, as well as internationally.

## ACKNOWLEDGEMENTS AND THANKS

We gratefully acknowledge and thank The Honourable Ratna Omidvar, C.M., O.Ont., Senator for Ontario and Tony Manconi, Director General of the Charities Directorate of the CRA for their contributions as our guest speakers at this year's webinar, as well as the lawyers at Carters who have volunteered their time in preparing for this Webinar.

## FORMAT OF THE WEBINAR

Presentations will be 20 minutes in length, including approximately 5 minutes for Q&A. The special presentations by our guest speakers, Senator Omidvar and Tony Manconi will be 40 minutes in length, including approximately 10 minutes for Q&A. Questions can be entered in the Question Box feature of the webinar. Unfortunately, not all questions can be answered due to time constraints.

## CARTERS RESOURCE MATERIALS

Today's electronic handout package, including the PowerPoint presentations and various resource materials, are available online during the webinar and can be downloaded for your use. These materials, along with numerous other articles, webinar materials, and newsletters of interest to charities and not-for-profits, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity & NFP Law Updates* are available free of charge at our websites at [www.charitylaw.ca](http://www.charitylaw.ca), <http://www.carters.ca>, [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorism.ca](http://www.antiterrorism.ca). As well, a link is being provided to the current recently updated version of the Legal Risk Management Checklist for Ontario-Based Charities and Legal Risk Management Checklist for Ontario-Based Not-for-Profits that includes a new section on COVID-19.

## CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, e-mail us at [info@carters.ca](mailto:info@carters.ca) with "mailing list" in the subject line. Alternatively, please click on the link on the webinar resources tab to add your name and e-mail address to our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the January 2021 edition of the [Charity & NFP Law Update](#) through our website.

**Carters Professional Corporation**

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## WEBINAR SPONSORS

Carters would like to thank the following companies for their sponsorship of the Annual *Church & Charity Law*<sup>TM</sup> Webinar that helps to underwrite costs associated with the Webinar, including contracting EventStream Production which is helping to ensure that the Webinar runs smoothly and professionally.

- **Robertson Hall Insurance**, 1-800-640-0933, [www.robertsonhall.com](http://www.robertsonhall.com)
- **Thomson Reuters**, 1-800-387-5164, <http://store.thomsonreuters.ca>
- **LexisNexis Canada Inc.**, 1-800-668-6481, <https://store.lexisnexis.ca>

## SECTOR RESOURCE MATERIALS

We are pleased to make resource materials from the following organizations available on the webinar platform.

- **Canada Revenue Agency, Charities Directorate**
- **Canada Revenue Agency, GST/HST Outreach Program**
- **Canadian Centre for Christian Charities**, <https://www.cccc.org>
- **Imagine Canada**, <https://www.imaginecanada.ca/en>
- **ONN (Ontario Nonprofit Network)**, <https://theonncan.ca>, <https://nonprofitresources.ca/Canadian>
- **Canadian Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>
- **Association of Fundraising Professionals (AFP)**, Toronto Chapter, <https://afptoronto.org/>

## ABOUT CARTERS

**Carters Professional Corporation** is a law firm with expertise in the area of church, charity and other not-for-profits and is committed to assisting clients in avoiding legal problems before they occur through effective legal risk management advice, including assistance with:

- |   |   |
|---|---|
| • Anti-bribery Compliance                           | • Governance Advice                     |
| • Counter-terrorism Policy Statements               | • Human Rights Litigation               |
| • CRA Charity Audits                                | • Insurance Issues                      |
| • Charitable Organizations & Foundations            | • Information Technology Law            |
| • Charitable Incorporation & Registration           | • International Trademark Licensing     |
| • Charitable Trusts                                 | • Investment Policies                   |
| • Charity Related Litigation                        | • Legal Risk Management Audits          |
| • Church Discipline Procedures                      | • Legal Audits                          |
| • Church Incorporation                              | • National and International Structures |
| • Corporate Record Maintenance                      | • Privacy Policies and Audits           |
| • Director and Officer Liability                    | • Religious Denominational Structures   |
| • Dissolution and Wind-Up                           | • Sexual Abuse Policies                 |
| • Employment Related Issues                         | • Social Enterprise and Social Finance  |
| • Endowment and Gift Agreements                     | • Special Incorporating Legislation     |
| • Foreign Charities Commencing Operations in Canada | • Charity Tax Opinions and Appeals      |
| • Fundraising and Gift Planning                     | • Trade-mark and Copyright Protection   |
| • Gift Acceptance Policies                          | • Transition Under the ONCA             |

## **PROTECTION FROM REGULATORY OFFENCES FOR CHARITIES AND NOT-FOR-PROFITS**

Charities and not-for-profits are facing significant liability and financial challenges due to increasing enforcement of federal and provincial regulatory legislation dealing with such matters as water, working conditions and environmental issues. Carters is able to provide advice and assistance at all stages from an initial investigation through to a full defence at a trial. For more information, contact Sean S. Carter at (1-877-942-0001 x241).

## **EVALUATION**

We appreciate your evaluation and comments. Feel free to use the Feedback Evaluation form available at the end of the webinar, or email your comments to [seminars@carters.ca](mailto:seminars@carters.ca). Complete the fillable pdf form and send by email as an attachment (In Adobe: File → Send File to [seminars@carters.ca](mailto:seminars@carters.ca)).

## **SAVE THE DATE 2022**

The **Ottawa Region 2022 Charity & Not-for-Profit Law Seminar** will tentatively be held on **Thursday, February 17, 2022**. More details will be available in the New Year at [www.carters.ca](http://www.carters.ca).

## **CARTERS OFFICE LOCATIONS**

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### **Toronto Office**

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### **Orangeville Office**

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Fax: (519) 942-0300

## **GENERAL DISCLAIMER**

Please note the following Disclaimer that applies to all presentations: This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

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## SPEAKER BIOGRAPHIES



**Sepal Bonni**, B.Sc., M.Sc., J.D., Trade-mark Agent - Sepal Bonni is a registered trademark agent and practices in all aspects of brand protection. Her trademark practice includes domestic and foreign trademark prosecution, providing registrability opinions, assisting clients with the acquisition, management, protection, and enforcement of their domestic and international trademark portfolios, and representing clients in infringement, opposition, expungement, and domain name dispute proceedings. She also assists clients with trademark licensing, sponsorship, and co-branding agreements. Sepal also advises clients on copyright and technology law related issues.



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



**Jacqueline M. Demczur**, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law Seminar*<sup>™</sup>.



**Barry W. Kwasniewski**, B.B.A., LL.B. – Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal advice pertaining to insurance coverage matters to charities and not-for-profits.



**Theresa L.M. Man**, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is chair of the CBA Charities and Not-for-Profit Law Section, a member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, and a member and past chair of the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.



**Tony Manconi**, B.A. – Tony Manconi was appointed as Director General of the Charities Directorate with the Canada Revenue Agency (CRA) on July 25, 2016. He is responsible for the overall management of the federal regulation of registered charities under the *Income Tax Act*. Mr. Manconi began his career in the Public Service in 1988 at the Secretary of State. Prior to joining the Charities Directorate, Mr. Manconi served as the Director General of the Collections Directorate of the CRA. Mr. Manconi holds a Bachelor's degree from Carleton University with a combined major in Law and Economics.



**Esther S.J. Oh**, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for [www.charitylaw.ca](http://www.charitylaw.ca) and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law Seminar*<sup>™</sup>, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



**The Honourable Ratna Omidvar, C.M., O.Ont.** In 2016, Ratna Omidvar was appointed to the Senate of Canada as an independent Senator representing Ontario. From 2018 – 2019, Senator Omidvar served as the Deputy Chair of the Special Senate Committee on the Charitable Sector. Senator Omidvar has over 30 years of experience working in the charitable sector at senior levels of management as well as serving as a board director and a volunteer with over 35 organizations. For over 16 years she transformed a small, private foundation – Maytree – into a champion for anti-poverty, diversity and inclusion and immigrant and refugee policy issues. She is the co-editor of *Five Good Ideas: Practical Strategies for Non-Profit Success* (2011).



**Ryan M. Prendergast, B.A., LL.B.** - Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan has co-authored papers for the Law Society of Ontario, and has written articles for *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on [www.charitylaw.ca](http://www.charitylaw.ca). Ryan has been a regular presenter at the annual *Church & Charity Law Seminar™*, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source.



**Esther Shainblum, B.A., LL.B., LL.M., CRM** - Ms. Shainblum practices at Carters Professional Corporation in the areas of charity and not for profit law, privacy law and health law. From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses for Canada, a national, not-for-profit, charitable home and community care organization. Before joining VON Canada, Ms. Shainblum was the Senior Policy Advisor to the Ontario Minister of Health. Earlier in her career, Ms Shainblum practiced health law and corporate/commercial law at McMillan Binch and spent a number of years working in policy development at Queen's Park.

#### ADDITIONAL LAWYERS AT CARTERS



**Sean S. Carter, B.A., LL.B.** – Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



**Nancy E. Claridge, B.A., M.A., LL.B.** – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of corporate and commercial law, anti-terrorism, charity, real estate, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity & NFP Law Update*. After obtaining a Master's degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award. Nancy is recognized as a leading expert by *Lexpert*.



**Jennifer M. Leddy, B.A., LL.B.** – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose." Ms. Leddy is recognized as a leading expert by *Lexpert*.



**Luis R. Chacin, LL.B., M.B.A., LL.M.** - Luis Chacin was called to the Ontario Bar in June 2018, after completing his articles with Carters. Prior to joining the firm, Luis worked in the financial services industry in Toronto and Montreal for over nine years, including experience in capital markets. He also worked as legal counsel in Venezuela, advising on various areas of law, including government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Business Law, Privacy Law and IT Law.



**[Adriel N. Clayton](#)**, B.A. (Hons), J.D. - Called to the Ontario Bar in 2014, Adriel Clayton manages Carters' knowledge management and research division, and practices in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.



**[Heidi N. LeBlanc](#)**, J.D. – Heidi is a litigation associate practicing out of Carters' Toronto office. Called to the Bar in 2016, Heidi has a broad range of civil and commercial litigation experience, including matters pertaining to breach of contract, construction related disputes, defamation, real estate claims, shareholders' disputes and directors'/officers' liability matters, estate disputes, and debt recovery. Her experience also includes litigating employment-related matters, including wrongful dismissal, sexual harassment, and human rights claims. Heidi has represented clients before all levels of court in Ontario, and specialized tribunals, including the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario.

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THE OTTAWA REGION 2021  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 11<sup>th</sup>, 2021*

## LIST OF POWERPOINTS

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- ◆ **Critical Board Due Diligence During a Pandemic and Beyond**  
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Key Takeaways from CRA's New Guidances**  
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **Do's and Don'ts: Managing Employees Working Remotely**  
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **The Case for Empowerment of Charities in the 21st Century**  
The Honourable Ratna Omidvar, C.M., O.Ont., Senator for Ontario
- ◆ **How Charities and NFPs can Prepare for the ONCA**  
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Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **Intellectual Property Challenges in a Virtual World: Tips and Traps**  
Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent
- ◆ **Income Generation by Charities and NFPs: What's Possible and What's Not**  
Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **The Charities Directorate's Evolving Approach to Regulating the Charitable Sector**  
Tony Manconi, B.A., Director General of the Charities Directorate of the Canada Revenue Agency

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THE OTTAWA REGION 2021  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 11<sup>th</sup>, 2021*


# **ESSENTIAL CHARITY & NFP LAW UPDATE**

**By Esther S.J. Oh, B.A., LL.B.**

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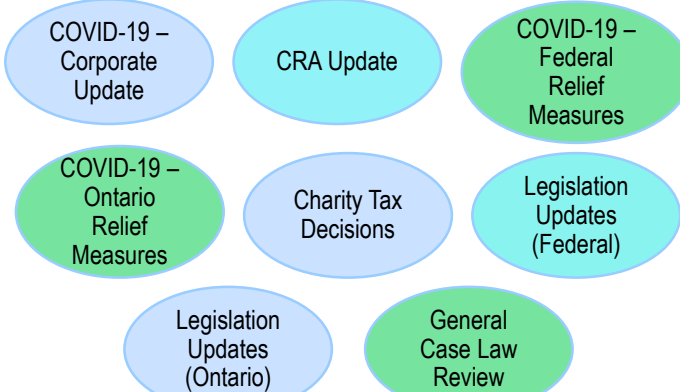
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<p><b>Essential Charity &amp; NFP Law Update</b></p> <p>By Esther S.J. Oh, B.A., LL.B.</p> <p>estheroh@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Ottawa Toronto Orangeville www.carters.ca www.charitylaw.ca www.antiterrorism.ca</p>

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**OVERVIEW (Current as of February 8, 2021)**



- COVID-19 – Corporate Update
- CRA Update
- COVID-19 – Federal Relief Measures
- COVID-19 – Ontario Relief Measures
- Charity Tax Decisions
- Legislation Updates (Federal)
- Legislation Updates (Ontario)
- General Case Law Review

All information in this PowerPoint is current as of February 8, 2021, but is subject to change. To sign up for our firm e-newsletter, click on the “Subscribe to our NEWSLETTER” button at [www.carters.ca](http://www.carters.ca)

[www.charitylaw.ca](http://www.charitylaw.ca) [www.carters.ca](http://www.carters.ca)

## A. COVID-19 – CORPORATE UPDATE

### 1. Federal Corporations (CNCA)

- On December 30, 2020, Corporations Canada published a reminder that the Order (which extended the deadline to call AGMs and present financial statements) has ended
- As of January 1, 2021, federal corporations will therefore return to “business as usual”

- For CNCA corporations, AGM must be held no later than 15 months after the previous AGM, and no more than six months after the last financial year-end

- Corporations Canada’s announcement:

- States that it is unsafe to hold in-person AGMs during the COVID-19 outbreak because it would contradict public health advice

- Reminds corporations that depending on the provisions in their by-laws, a corporation might be able to hold electronic AGMs

- For corporations with a small number of members, the members can sign a written resolution in lieu of holding an AGM

## 2. Ontario Corporations (OCA)

### a) Electronic meetings

- On October 1, 2020, Ontario government enacted amendments to permit directors' and members' meetings to be held electronically
  - Regardless of contrary provisions in a corporation's constating documents
  - Deadline extended until May 31, 2021

### b) Deadline to hold AGMs

- No further extensions to timelines to hold annual general meetings of members
  - Essential component of the democratic functions and self-governance of corporations

## B. CRA UPDATE

CRA Update

- New CRA Guidances are available:
  - Relief of Poverty and Charitable Registration (CG-029)
  - Advancement of Education and Charitable Registration (CG-030)
- Revisions to CRA Guidances on Charities Using Intermediaries are also available
- See Theresa Man's presentation "Key Takeaways from CRA's New Guidances" for further information
- See presentation by Tony Manconi, Director General of the Charities Directorate of the CRA, for other updates from CRA

## C. COVID-19 FEDERAL RELIEF MEASURES

COVID-19 –  
Federal Relief  
Measures

### 1. Canada Emergency Wage Subsidy (CEWS)

- Wage subsidy covering eligible employers for up to 85% of employee wages (on a sliding scale) up to a maximum of \$847 per week extended until June 2021

### 2. Canada Emergency Business Account (CEBA)

- Interest-free loans of up to \$60,000 to cover operating costs of certain charities and NFPs whose revenues impacted. Applications are open until March 31, 2021

### 3. Canada Emergency Rent Subsidy

- Bill C-9 amended ITA to introduce a rent subsidy available to charities and non-profits for up to 65% of their qualifying rent expenses (and up to an additional 25% for organizations temporarily shut down), until June 2021

## D. COVID-19 ONTARIO RELIEF MEASURES

COVID-19 –  
Ontario Relief  
Measures

### 1. Extension of Orders in Ontario

- On January 12, 2021, the Ontario government declared a second provincial emergency under section 7.0.1(1) of the *Emergency Management and Civil Protection Act* (“EMCPA”)
  - Emergency was extended 14 days after January 26, 2021, and ended on February 9, 2021
- Effective on January 14, 2021, the Ontario government issued a Stay-at-Home Order under the EMCPA requiring that every individual remain in their place of residence unless necessary for permitted purposes
  - Stay-at-Home Order was extended until February 9, 2021, and will be lifted gradually for each public health unit between February 10-22, 2021

## 2. Ontario Public Guardian and Trustee (“OPGT”)

- OPGT released a temporary guidance on March 30, 2020 (applies to Ontario charities only):
  - Permits charities in danger of closing due to economic hardships from COVID-19 to:
    - access the income and capital of their restricted purpose trust funds and
    - use such funds for day-to-day operations without the need to first obtain a court order
- See Ryan Prendergast’s presentation, *Critical Board Due Diligence During a Pandemic and Beyond* for further information

## 3. Legislation to Limit COVID-19 Liability

- On November 20, 2020, *Supporting Ontario’s Recovery and Municipal Elections Act, 2020* received Royal Assent and came into force, providing protection from liability for “persons” (including charities and other not-for-profits) operating during the COVID-19 pandemic
- The Act protects the person from liability from acts or omissions resulting in an individual being or potentially being infected with or exposed to COVID-19 on or after March 17, 2020, provided:
  - The person made a good faith effort to act in accordance with public health guidance and any applicable federal, provincial or municipal law relating to COVID-19; and
  - The person was not grossly negligent

- However, the protection from liability under the Act does not apply with respect to acts or omissions that occurred while a law required the person's operations to close, in whole or in part
- The Act also protects a person from vicarious liability for the acts or omissions of another person protected under the Act, but does not apply to limit claims launched by employees against their employers, subject to provisions of the *Workplace Safety and Insurance Act*
- Given the remaining potential for liability that will still exist where there is a finding of gross negligence, charities and NFPs should continue to monitor and ensure compliance with a public health-related guidance and laws when carrying out their activities

## E. CHARITY TAX DECISIONS

Charity Tax  
Decisions

### 1. *Ampratwum-Duah v The Queen, 2020 TCC 18*

- A religious minister ("Taxpayer") claimed charitable deductions for donations to a charity that he was the religious leader of, and he signed the donation receipts in his capacity as the charity's religious leader
  - No corroborating evidence, i.e. bank account or church records, testimony of other charity officials, was introduced
  - Taxpayer alleged no records were available because the donations were made more than six years earlier

- The Tax Court of Canada upheld the CRA's reassessment, indicating that supporting books and records were necessary and that
  - The donation receipts were insufficient evidence of donations, particularly as the Taxpayer had signed his own donation receipts
- The CRA reassessed and denied his deductions on grounds that he had access to the charity's records, signed his own donation receipts, and failed to keep sufficient books and records for his donations

## ***2. Church of Atheism of Central Canada v. Canada (National Revenue), 2019 FCA 296***

- Church of Atheism of Central Canada
  - CNCA corporation with a stated purpose “to preach Atheism through charitable activities...”
- In 2017 applied for charitable status and was refused by the Minister of Revenue
- Church appealed the decision arguing that the common law test governing the advancement of religion as a head of charity was invalid as contrary to sections 2, 15 and 27 of the Charter of Rights
- On October 29, 2020, application for leave to appeal to Supreme Court of Canada was dismissed

## F. LEGISLATION UPDATES (FEDERAL)

### 1. Bill S-222, *Effective and Accountable Charities Act*

- On February 8, 2021, Bill S-222, *Effective and Accountable Charities Act* was tabled in the Senate, removing the “own activities test” from the *Income Tax Act*, but allowing charities to share resources and work with non-QDs while ensuring “resource accountability” to achieve charitable purposes

### 2. Bill C-11, *Digital Charter Implementation Act, 2020*

- On November 17, 2020, the federal government introduced Bill C-11, which if passed would replace the privacy protection measures set out in PIPEDA with the *Consumer Privacy and Protection Act* and the *Personal Information and Data Protection Tribunal Act*
- See Esther Shainblum’s article at [www.carters.ca](http://www.carters.ca) for further details

### 3. Updates to List of Terrorist Entities

- On February 3, 2021, Public Safety Canada announced the addition of 13 new groups to the *Criminal Code* list of terrorist entities, including four ideologically motivated violent extremist groups: Atomwaffen Division, the Base, the Proud Boys and Russian Imperial Movement.
- The news release also states:
  - The *Criminal Code* mandates severe penalties for people and organizations that deal with property or finances of a listed entity
  - A listing can also support the denial or revocation of a Canadian organization’s charitable status if it maintains connections to listed entities



## G. LEGISLATION UPDATES (ONTARIO)

### 1. **Bill 118, *Occupiers Liability Amendment Act, 2020***

- Royal Assent was received on December 8, 2020. Once proclaimed into force, Bill 118 will amend the *Occupiers' Liability Act*
- Subject to certain exceptions, plaintiffs will be prohibited from bringing an action against occupiers of a premises and independent contractors, for personal injury damages from snow or ice injuries unless:
  - Plaintiff first serves written notice of the claim within 60 days of the injury, setting out the date, time and location of the injury
- Plaintiffs will still need to commence an action in accordance with the *Limitations Act, 2002* (as amended) to preserve their rights

### 2. **Accessibility Standards for Websites and Web Content of Large Employers**

- By January 1, 2021, designated public sector organizations and other organizations, including charities and NFPs, with 50 or more employees in Ontario, must make their internet websites and web content conform with the accessibility standards for websites and web content set out in the World Wide Web Consortium Web Content Accessibility Guidelines 2.0 at Level AA
  - Mandated under O Reg 191/11 Integrated Accessibility Standards under the under *Accessibility for Ontarians with Disabilities Act, 2005*

## H. GENERAL CASE LAW REVIEW

### 1. *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's, 2020 NLCA 27 (July 28, 2020)*

- Archdiocese in this case was not found to have done anything negligent on its own
  - Court found Archdiocese responded appropriately and satisfied any duty that existed in civil law
  - However, Archdiocese was found vicariously liable because of the specific facts surrounding its involvement with another distinct entity, and the actions of that other entity's staff and members

- Organizations may be found vicariously liable for the actions of separate third-party organizations where:
  - i. a sufficiently close relationship exists;
  - ii. and a connection exists to the incident causing the harm
    - where this may apply, due diligence measures must also extend to the other organizations
    - however, depends on the facts and the relationship between organizations
- Not a binding case outside of Newfoundland and Labrador, but persuasive authority in other provinces of Canada
- Leave to appeal to Supreme Court of Canada was denied

## 2. *Bose v. Bangiya Parishad Toronto, 2021 ONSC 59*

- Dismissal of an appeal of a decision recognizing that the members of one NFP were *de facto* members of another charity
- This case involves the Prabasi Bengal Cultural Association (“Cultural Org.”), and the Bangiya Parishad Toronto (“Religious Corp.”)
  - For several decades, the two organizations had a common board of directors
  - When a dispute arose, a minority of the Religious Corp.’s board purported to nullify the election of the board and purported to form a new board for the Religious Corp. (independent of the Cultural Org.)

- The Religious Corp. had not enacted its own by-laws or admitted its own members.
  - Therefore it was not possible to call a meeting of the members of the Religious Corp.
- The Court recognized that the Religious Corp.’s members were the members of the Cultural Org.
  - Religious Corp. had treated the members of the Cultural Org. as its members for decades, and the members of the Cultural Org. had regarded themselves as members of the Religious Corp.
  - Court ordered Cultural Org. members to hold a meeting to elect whom they wished to run their organizations, as the most practical and democratic option under s. 297 of the OCA

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THE OTTAWA REGION 2021  
***Charity & Not-For-Profit Law Webinar***


*Thursday, February 11<sup>th</sup>, 2021*

**CRITICAL BOARD DUE  
DILIGENCE DURING A PANDEMIC  
AND BEYOND**

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

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Ottawa Region 2021 <i>Charity &amp; Not-for-Profit Law</i> Webinar February 11, 2021</p>
<p><b>Critical Board Due Diligence During a Pandemic and Beyond</b></p> <p>By Ryan M. Prendergast, B.A., LL.B.</p> <p>rmp@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <ul style="list-style-type: none"><li>• COVID-19 has created an unprecedented situation for directors and officers (“D&amp;Os”) of charities and NFPs in knowing how to respond both effectively and in compliance with the changing law</li><li>• D&amp;Os are having to make decisions quickly, some of which could impact the ability of the charity or NFP to continue to operate</li><li>• In order to make effective decisions, D&amp;Os should be become familiar with the relevant legal issues that will need to be considered</li><li>• This knowledge will help determine the appropriate due diligence steps needed to fulfill fiduciary obligations to protect the best interests of their charities or NFPs</li></ul>	
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- Under Canadian law, D&Os of charities and NFPs that are corporations are required in general terms to:
  - act honestly and in good faith with a view to the best interests of the corporation (their **fiduciary duty**),
  - exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances (their **duty of care**)
- The “business judgment rule” recognizes that D&Os are not expected to be perfect, but need to take all reasonable measures and perform the necessary due diligence required to fulfil their fiduciary obligations
- This presentation discusses legal principles generally applicable across Canada, but with a focus on Ontario
- Professional advice should be sought from lawyers in applicable jurisdictions as necessary

## B. DUE DILIGENCE CONSIDERATIONS

### 1. Keep Records of Decisions

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

## 2. Convene Meetings as Necessary

- Convene **board of directors' meetings** quickly to deal with the crisis and meet regularly thereafter as needed
- Determine whether board meetings and members' meetings can be held electronically – review requirements in the legislation and by-laws
- Determine whether **annual members' meetings** may need to be postponed or whether alternative methods for meetings may need to be considered
- Monitor changing filing dates for corporate returns
- Legal advice may be required

## 3. Develop a Communications Strategy

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



## 4. Keep Up-to-date with Government Actions

- Monitor federal, provincial and local public policy and public health-related orders, directives and restrictions which may impact the operations of the organization, both inside and outside Canada
- See Theresa Man's presentation, *Key Takeaways from CRA's New Guidances*, for further details
- For example, on October 20, 2020, Ontario [introduced](#) the *Supporting Ontario's Recovery Act, 2020*, to protect workers, volunteers, and organizations who make honest efforts to follow COVID-19 public health guidelines. See Esther Oh's presentation, *Essential Charity and NFP Law Update*, for further details
- It is also important to monitor government actions in other jurisdictions in which the charity or NFP may carry out programs affected by COVID-19

## 5. Review Risk Management Policies

- Review any existing risk management, disaster recovery and remote access policies
  - If these are not in place, consider adopting and implementing such policies as soon as possible
- Consider adopting succession policies for necessary key persons in order to mitigate against the impact on possible loss of management for the charity
- Review insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable
  - Consider asking the insurance broker to advise in writing on the extent of insurance coverage and exclusions that may apply in a pandemic

## 6. Review Contractual Obligations

- Review contractual obligations in light of government directives and public health recommendations regarding COVID-19 to determine their impact on planned events or conferences, as well as the delivery or receipt of goods and services
- Reviewing pre-existing provisions in contracts will allow D&Os of charities and NFPs to make informed decisions about next steps when contractual obligations cannot be fulfilled or need to be delayed
- See article by Sean S. Carter and Heidi LeBlanc on practical strategies for dealing with termination of contracts in a pandemic: [Charity & NFP Law Bulletin No. 472](#)

## 7. Address Financial Matters

- It is essential to review the financial health of the charity or NFP on a regular basis by determining the anticipated impact of COVID-19 on donations, grants, investment income and capital, sponsorship income, membership income, sales of goods and services, and any other sources of income
- Review all funding and other agreements with governments or other agencies to determine the charity's or NFP's obligations to deliver services
- It is important for charities to develop a realistic reserve in order to cover operating costs in a crisis
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays

## 8. Address Employee Issues

- Ensure that salaries of employees continue to be paid, otherwise directors may be left exposed to personal liability for unpaid wages and vacation pay
- Ensure that employee source deductions (e.g. CPP, EI) and GST/HST amounts pursuant to relevant legislation, are remitted when required to avoid personal liability
- Keep up-to-date with provincial and federal legislative changes concerning required government payments
- If considering layoffs and/or elimination of staff, legal advice should be sought
- See articles by Barry W. Kwasniewski and Luis R. Chacin for further details on employment issues during the pandemic: [COVID-19 Resource](#) and [Charity & NFP Law Bulletin No. 465](#)

## 9. Ensure Workplace Health and Safety

- Essential to keep abreast of all appropriate health and safety measures for staff, volunteers, and beneficiaries so that exposure to COVID-19 is appropriately managed
- Ensure compliance with health and safety legislation, such as the *Occupational Health and Safety Act* (Ontario)
- See Esther Oh's presentation, *Essential Charity and NFP Law Update concerning Supporting Ontario's Recovery Act, 2020* for liability protection
- Evaluate and manage risks related to employee shortages, project cancellations, disruptions, and delays
- D&Os need to give special consideration to the role of volunteers during a pandemic
  - Volunteers carry similar obligations and liability as employees

## 10. Consider Privacy Implications

Determine the extent to which the organization's measures in response to COVID-19 are in line with privacy legislation, where applicable

Public health and safety may supersede usual privacy obligations during this time

Working from home can raise additional privacy concerns, such as increasing the risk of cyber attacks and privacy breaches, exposing D&Os to the risk of litigation for failure to protect PI and confidential business information

See Esther Shainblum's presentation, *Critical Privacy and Security Risks in a Virtual World*, for more information on privacy considerations

## 11. Use of Restricted Purpose Trust Funds

- As charities start to deplete their resources, they may be forced to consider encroaching on restricted purpose trust funds, such as endowment funds
- On March 30, 2020, assistance was announced by the Office of the Public Guardian and Trustee of Ontario ("PGT") allowing charities, which are in danger of closing, to access the income and capital of restricted purpose trust funds when necessary, without the need to first obtain a court order to enable them to continue their day-to-day operations, subject to certain conditions, which include:
  - Accessing the restricted purpose trust funds is the last resort, after access to reserve and non-restricted funds, as well as government funding has been used

- The charity is in danger of closing, including becoming insolvent or filing for bankruptcy or receivership
  - This does not mean that the charity must be on the verge of turning off the lights and locking its doors (*i.e.* can foresee closing in 30 to 60 days without other funding)
- To access funds, the PGT needs to be notified in writing, along with meeting other requirements
- While initial approval/consent of the PGT is not required, if the PGT subsequently disagrees, it will look to the reasonableness of the decision and the good faith of the directors at the time and decide what measures to take at that point

- If found to be an unreasonable decision, the PGT may require the funds to be replaced by the charity
- The PGT has advised that D&Os should seek legal advice if uncertain, including PGT's counsel being available to discuss
- D&Os should document the decision contemporaneously for purposes of a subsequent application under the *Charities Accounting Act*
- Charities are also required to keep an accounting of use of accessed funds
- For further details, see article by Ryan M. Prendergast on accessing restricted charitable funds during the pandemic: [Charity & NFP Law Bulletin No. 470](#)

## 12. Manage Investments of Funds

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

## 13. Utilize an Audit Committee

Generally, it is important for a charity or NFP to have an audit committee in order to review financial statements before they are approved by the board

Audit committees are generally responsible for overseeing financial reporting, disclosure, corporate reporting and risk management

Audit committees will be particularly important in reviewing financial outcomes from COVID-19

Important to ensure that the audit committee complies with any requirements that may be imposed by the incorporating legislation, *e.g.* requirements on size, composition, and responsibilities of committee

## 14. Maintain Solicitor-Client Privilege

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

## C. KEY TAKEAWAYS

- Board due diligence remains critical throughout pandemic
- Take pandemic as an opportunity to build for the next crisis:

- Does the board and/or committee need to meet more frequently or receive reporting more frequently?

- Did the pandemic reveal gaps in policies that would protect the board in another crisis?

- How can the board be proactive in preparing for the next crisis?

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# **KEY TAKEAWAYS FROM CRA'S NEW GUIDANCES**

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## The Ottawa Region 2021 Charity & Not-for-Profit Law Webinar February 11, 2021

### Key Takeaways from CRA's New Guidances

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

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### OVERVIEW

- On Nov. 27, 2020, CRA released 2 new guidances, updated 2 guidances, and finalized 1 guidance
- Brief high-level overview today

<b>New</b>	<ul style="list-style-type: none"><li>• Guidance CG-029 <i>Relief of Poverty and Charitable Registration</i></li><li>• Guidance CG-030 <i>Advancement of Education and Charitable Registration</i></li></ul>
<b>Updated</b>	<ul style="list-style-type: none"><li>• Guidance CG-002 <i>Canadian Registered Charities Carrying Out Activities Outside of Canada</i></li><li>• Guidance CG-004 <i>Using An Intermediary to Carry Out a Charity's Activities Within Canada</i></li></ul>
<b>Finalized</b>	<ul style="list-style-type: none"><li>• Guidance CG-027, <i>Public Policy Dialogue and Development Activities by Charities</i></li></ul>

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## A. New Guidance on Relief of Poverty

- New Guidance CG-029 *Relief of poverty and charitable registration* released on Nov. 27, 2020  
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charitable-registration-relief-poverty.html>
- See Charity and NFP Law Bulletin No. 482  
<https://www.carters.ca/pub/bulletin/charity/2021/chylb482.pdf>
- Relief of poverty is one of 4 heads of charity
- Charities under the relief of poverty category must show both the following:
  - their beneficiaries are experiencing poverty
  - their activities provide a charitable benefit that relieves the poverty of their beneficiaries

### WHAT

#### What is poverty?

- **Relative** – Poverty is a relative term
- **Definition** - Poverty = people who do not have the ability to acquire the basic necessities of life or simple amenities that are seen as necessary for a modest but adequate standard of living
- Prevention of poverty is not charitable

### HOW

#### How to relieve poverty?

- **Provide benefits** - Provide beneficiaries with a charitable benefit and that the beneficiaries are experiencing poverty – examples:
  - Provide basic necessities of life
  - Provide simple amenities, necessary for a modest but adequate standard of living, and activities that promote social inclusion
- **Extent of benefits** - Benefits limited to the extent that they are shown to relieve poverty
- **No undue private benefit** - Cannot provide benefit that is more than what is needed to relieve their poverty because the charity may be delivering an unacceptable private benefit

## WHO

### Who can be helped?

- **Criteria and process** - Establish “well-reasoned” criteria and process to evaluate beneficiaries to make sure that they need poverty relief
- **Indicators** - May use recognized poverty indicators or may establish other criteria
- **Purpose** - Charitable purposes should include a term that clearly describes its beneficiaries as those in need of poverty relief
- **Public** - Eligible beneficiaries must represent the public or a sufficient section of the public and not be unreasonably restricted

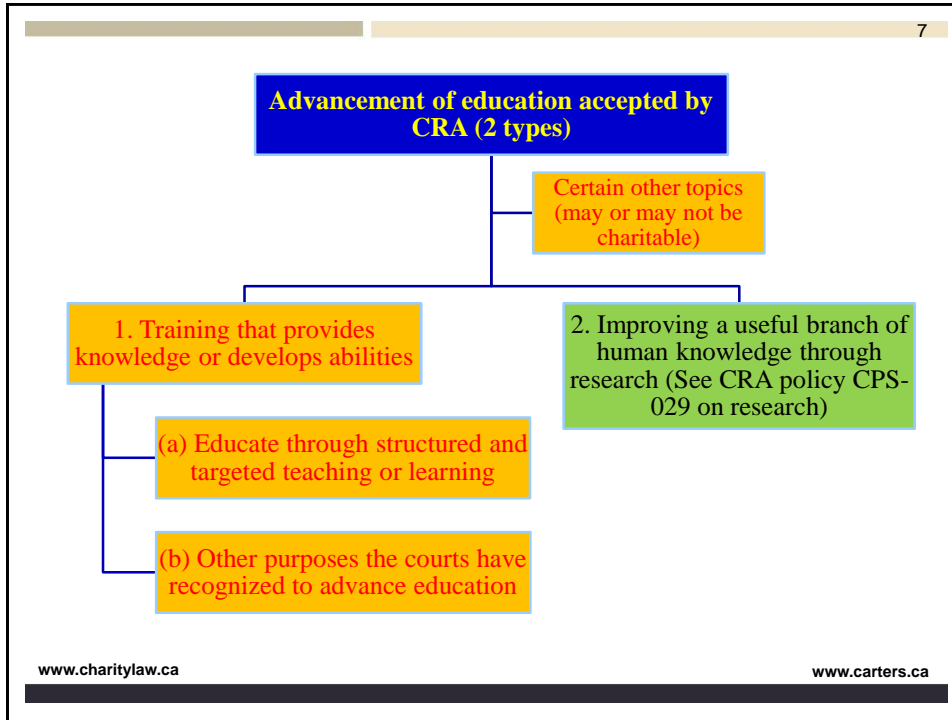
## OTHERS

### Additional issues

- **T5007** - May need to provide T5007 slips to beneficiaries if financial assistance is provided
- **Records** - Keep records of selection criteria and how relief is provided
- **Benevolent funds** - Donors give general direction that the funds be used in a particular program, but up to the charity to decide how funds are used and who may receive benefit

## B. New Guidance On Advancement Of Education

- New Guidance CG-030 *Advancement of education and charitable registration* released on Nov. 27, 2020  
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/whats-new.html>
- See Charity and NFP Law Bulletin No. 483  
<https://www.carters.ca/pub/bulletin/charity/2021/chylb483.pdf>
- Advancement of education is one of 4 heads of charity
- Not all education is charitable
  - Although the concept of education is broad, and all experience may be said to educate, what qualifies as education under charity law is limited
  - For education to be charitable, it must provide knowledge or develop abilities by deliberate teaching or training



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## 1(a) - Purposes that educate through structured and targeted teaching or learning

<b>What is this?</b>	<ul style="list-style-type: none"> <li>Includes education by formal or traditional classroom instruction, as well as less formal instruction (e.g., workshops, seminars, self-study)</li> </ul>
<b>Examples</b>	<ul style="list-style-type: none"> <li>Operate a private secondary school in X city</li> <li>Provide adult continuing education courses in business and accounting in Y community</li> <li>Provide seminars and workshops on finance and accounting, Indigenous art history, or car maintenance to the public</li> </ul>
<b>Content criteria (education)</b>	<ul style="list-style-type: none"> <li>Subject matter is useful and has educational value</li> <li>Subject matter is not focused on promoting a point of view</li> </ul>
<b>Process criteria (structured and targeted teaching or learning)</b>	<ul style="list-style-type: none"> <li>Structured format</li> <li>Legitimate, targeted attempt to educate</li> <li>Teaching or learning component</li> </ul>

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## 1(b) Other purposes the courts have recognized to advance education

**What is this?**

- Most of these purposes are connected with and support formal or traditional classroom education

**Examples**

- Scholarships, bursaries, prizes, and financial assistance for students
- Schools and tuition fees
- Providing educational facilities, teachers, equipment, and supplies
- Sports and education
- Community groups and clubs
- Alumni associations / School councils
- Student unions
- Museums and libraries

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## Special topics

**What is this?**

- Certain topics may or may not meet the CRA's requirements to be acceptable as a charitable purpose of advancing education, depending on whether they meet the mandatory content and process criteria

**Examples**

- Production and broadcasting / publishing books, magazines or other materials
- Conferences
- Vocational or professional education
- Providing information and education
- Experiential education
- Preschool and daycare programs
- Summer camps

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## C. Updated Guidance on Charities Using Intermediaries

- Updated Guidance CG-002 *Canadian Registered Charities Carrying Out Activities Outside of Canada*  
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadian-registered-charities-carrying-activities-outside-canada.html>
- Updated Guidance CG-004 *Using An Intermediary to Carry Out a Charity’s Activities Within Canada*  
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>
- Welcomed minor updates, but overall requirements remain the same
- See Charity and NFP Law Bulletin No. 484  
<https://www.carters.ca/pub/bulletin/charity/2021/chylb484.pdf>

## 1. Own Activities Test & Direction and Control

<b>ITA allows charities to use their resources in 2 ways</b>	Make gifts to qualified donees (“QDs”)	
	Conduct their own activities (“own activities test”) by 2 ways:	Charities’ own staff and volunteers Through third party intermediaries (non-QDs)
<b>ITA “Own Activities” test</b>	Activities must be directly under the charity’s direction, control and supervision and for which it can account for any funds expended	
<b>CRA “Direction and Control” policy</b>	When working through an intermediary, a charity must direct and control the use of its resources	
<b>Proposed changes to the ITA</b>	Bill S-222, <i>Effective and Accountable Charities Act</i> was tabled in the Senate on February 8, 2021, removing the own activities test, but allowing charities to share resources and work with non-QDs while ensuring “resource accountability” to achieve charitable purposes	

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<b>Active involvement</b>	Charities must be actively involved in programs to achieve its charitable purposes
	Can only make gifts to QDs
<b>Ongoing involvement</b>	Cannot carry out charitable purposes by simply giving monies or “resources” to non-QDs
	how the activity will be carried on
	the overall goals of the activity
	the area or region where the activity will be carried on
	who will benefit from the activity
<b>Guidances regulate</b>	what goods and services the charity's money will buy
	when the activity will begin and end
	How to conduct activities through intermediaries
	What to include in the written agreements with intermediaries
	How to maintain direction and control over intermediaries
	What books and records to obtain from intermediaries

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## 2. What’s New? – Examples of key differences

Previous Guidances	Revised Guidances
“resources” = physical, financial, material, IP, staff	“resources” = physical, financial, staff, volunteers
Rules on how to transfer “capital property” to non-QDs	Rules on how to transfer “real property (land and immovable property on land, such as buildings)” to non-QDs
4 common types of intermediaries - agency, contractor, joint venture participant, and co-operative participant	3 common types of intermediaries - consultant or contractor, joint venture participant, co-operative participants AND possible to have other types
One-time activity involving \$1,000 or less does not need a written agreement, when other forms of communication might be used to show direction and control	One-time activity involving \$5,000 or less does not need a written agreement, when other documents might be enough to show ongoing direction and control, e.g., written instructions, email records, meeting minutes, and regular reporting

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Previous Guidances	Revised Guidances
Measures to maintain direction and control:	Measures to maintain direction and control:
<ol style="list-style-type: none"> <li>1. Create and implement written agreement</li> <li>2. Communicate clear, complete, and detailed description of activity to intermediary</li> <li>3. Provide clear, complete, and detailed instructions to intermediary on ongoing basis</li> <li>4. Make periodic transfers of resources to intermediary, based on demonstrated performance</li> </ol>	<ol style="list-style-type: none"> <li>5. Monitor and supervise the activity, <i>including requiring regular reporting</i></li> </ol>
5. Monitor and supervise the activity	6. Intermediary to <i>either keep the charity's funds separate, or</i> account for them separately in its books and records
6. Intermediary <i>must keep the charity's funds separate from its own, and</i> to keep separate books and records	

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Previous Guidances	Revised Guidances
Charities can be Canadian representatives or offshoots of larger organizations outside Canada, <i>i.e., head bodies</i>	Charities can be Canadian representatives or affiliates of other (usually larger) organizations that are non-QD outside Canada
Charities must keep <i>adequate</i> books and records	Whether a charity's books and records are <i>adequate</i> , CRA looks at <i>the risk of non-compliance</i> for the particular activities – depending on the location, the activity, or the type of resources
Getting original source documents are recommended – but if it is not possible or practical, then the charity needs to <i>explain</i> why it cannot get them, and <i>make all reasonable efforts</i> to get copies and/or reports and records to support the expenditures, and <i>show that it has made such efforts</i>	Getting original source documents are recommended - but if it is not possible or practical, then CRA will <i>accept photocopied or electronic (scanned) documents</i> , as long as proper imaging practices are followed, and charity <i>should still make all reasonable efforts</i> to get source documents and/or reports and records to support its expenditures

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THE OTTAWA REGION 2021  
***Charity & Not-For-Profit Law Webinar***


*Thursday, February 11<sup>th</sup>, 2021*

**DO'S AND DON'TS:  
MANAGING EMPLOYEES  
WORKING REMOTELY**

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<p><b>Do's and Don'ts: Managing Employees Working Remotely</b></p> <p><b>By Barry W. Kwasniewski, B.B.A., LL.B.</b></p> <p>bwk@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <p><b>1. Overview</b></p> <ul style="list-style-type: none"><li>• COVID-19 Pandemic has caused significant changes in workplaces, including for charities and not-for-profits</li><li>• We are not certain if this is a temporary interruption or if the changes are creating a new permanent “normal”</li><li>• Note the “Do’s” and some “Don’ts” of managing employees who are working remotely, either part-time or full-time, and tips for dealing with challenges discussed throughout this presentation</li><li>• The employment laws discussed in this presentation relate to Ontario, so it’s important to consult with employment lawyers in other provinces as necessary</li></ul> <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>	

## 2. Current Situation

- Organizations have had to reduce their operating hours or close their doors because of government, emergency orders, regulations and public health directives
- Ontario government declared an emergency on January 12, 2021 and, after a 14-day extension, the order expired on February 9, 2021
- Depending on where you are located and the number of COVID-19 cases in your area, the situation may be more or less severe for workplace restrictions

## 3. Key Legal Issues: Do's and Don'ts

### First:

- compliance issues regarding the Ontario *Employment Standards Act, 2000*, focusing on overtime pay and working from home

### Second:

- developing a "Work from Home" policy: a management tool that sets expectations of employees working remotely

### Third:

- human rights law and issues employers may face with accommodation requests for staff working from home, focusing on the Ontario Human Rights Code "family status" provisions

## A. EMPLOYMENT STANDARDS COMPLIANCE

### 1. Do: Follow the Law in Ontario

- Overtime pay claims are a potential liability for employers with staff working from home
- Ontario's employment standards in the *ESA*, Section 22, require overtime pay at a rate of 1½ times the regular rate for each hour in excess of 44 hours per week: <https://www.ontario.ca/document/your-guide-employment-standards-act-0/overtime-pay>
  - Managers and supervisors are exempt from overtime hours obligations in Ontario
    - What exactly a “manager” or “supervisor” is has been frequently litigated

### 2. Managing Overtime

- Workers may be putting in OT hours while working from home either by mistake or to be more productive for the employer
- Employees must be paid overtime for work in excess of 44 hours per week; this can be expensive
- How to mitigate this risk? Do:
  - Give workers a set of written expectations and limitations for their hours per day and per week
  - Require employees to track and submit their hours regularly
  - Instruct employees that all overtime must be pre-approved in writing

- “Dark hours”: Do inform employees that during certain times they are not permitted to log onto their work computers or respond to emails or calls (e.g. before 8 a.m. or after 5 p.m.)
- Managers: Do not expect employees eligible for overtime to respond to calls or emails during their off hours, or you may be required to pay compensation

### 3. Vacation “Do’s”

- Section 33 of the ESA: minimum two weeks per year for employees with less than 5 years, and three weeks per year for employees with more than 5 years
- <https://www.ontario.ca/document/your-guide-employment-standards-act-0/vacation>
- Unused vacation time can accrue for employees working from home into a significant liability
- Employers must set clear policies with employees, and may require them to take vacation time (even if they are unwilling)
- Employees working from home have the same legal rights as those who are physically at work

## B. DO: CONSIDER WORK-FROM-HOME POLICIES

### 1. New and Uncharted Territory?

- Even prior to the pandemic, it was already common for some industries, such as IT to have employees working remotely
- But many organizations in the charitable and NFP sectors are not used to remote work, so it's necessary for management to adjust
- Organizations may want to consider written policies for employees to set clear guidelines
  - There is no legal requirement for these policies but they should be helpful and proactive

### 2. Typical Issues in Work-From-Home Policies

- Permitted duration and days of the week for work from home and work in the office
- Discretionary right of employer to oversee and alter or revoke the agreement to work from home depending on the employer's needs
- Exclusivity: an employer's right to require that employees at home work only for the employer and not operate a side business without consent
- Regular working hours and overtime authorization to exceed regular working hours, or "core hours" for an employee who is working on a flexible schedule



- Equipment requirements, such as computers and software, to be approved by the employer, for staff working remotely to complete assigned tasks
- Security requirements: maintaining passwords, restricting access to other members of the household, protecting confidentiality of saved information
  - May need to have policies to restrict the use of personal devices, if they lack security, for work purposes
- When to allow the employer access to the employee's home to assess the security of equipment in the working area, or to conduct maintenance or repairs and retrieve equipment

- Responsibility for ordering and paying for home office supplies for employee to complete their work
- Employee responsibility to maintain personal property, including liability insurance coverage, in a case of damage to property, and any injury claims by third parties for incidents on the employee's premises
- Employee's income tax responsibilities, such as determining the tax implications for maintaining a home office area on their property, and encouraging them to seek advice from a qualified tax professional
- These issues should all be part of a work-from-home policy to give clear instructions about rights and obligations; work-from-home may be time limited

### 3. Don't: Risk Constructive Dismissal Claims

- Employers should be clear in their policies that working from home is not an “essential condition” of the employment contract and may be a temporary situation
- Otherwise, if required to return to an office, staff who have been working from home may claim a “constructive dismissal”: a legal argument that the employer breached the employment contract
- “Constructive dismissal” is a common law concept that states an employer cannot change an “essential condition” of an employment contract without consent
- Such claims are brought to court as wrongful dismissal lawsuits and can lead to expensive monetary payouts depending on the circumstances

## C. HUMAN RIGHTS CODE COMPLIANCE

### 1. Human Rights “Do’s”

- The pandemic is upsetting the regular routine of our family lives with closures of daycares and schools, increasing the burden on parents and caregivers
  - Employees are struggling to fulfill their obligations to their families along with work requirements
- Ontario Human Rights Code ss. 5(1) and 5(2) prohibits discrimination and harassment in employment on the grounds of “family status”

**Do:**

- be aware of your human rights obligations as an employer to your employees

## Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or disability. [Emphasis added.]

## Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, **family status** or disability. [Emphasis added.]

- Employers will need to be flexible with employees' family needs if they are seeking accommodations, especially in light of the ongoing pandemic
- Employers must consider an employees' request for accommodation along with possible alternate work arrangements
  - Alternate arrangements can include modified work hours, reduced hours or leave of absence for family care obligations
- Ontario Human Rights Commission's COVID-19 policy statement includes a discussion of family status discrimination in the context of employment: [http://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-pandemic](http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-pandemic)

## E. KEY TAKEAWAYS

- ✓ Working remotely is a new reality that has developed very rapidly because of the COVID-19 pandemic
- ✓ Managing employees working from home is a significant operational and legal challenge for many organizations in the charity and NFP sectors
- ✓ Charities and NFPs need to rethink how work can be done, as many employees will expect a more flexible work-from-home policy, even after the pandemic ends

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# HOW CHARITIES AND NFPs CAN PREPARE FOR THE ONCA

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<p><b>How Charities and NFPs Can Prepare for the ONCA</b></p> <p>By Jacqueline M. Demczur, B.A., LL.B.</p> <p>jdemczur@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. THE ONCA IS COMING SOON!</b></p> <ul style="list-style-type: none"><li>• <i>Ontario Not-for-Profit Corporations Act, 2010</i> (“ONCA”) is expected to be proclaimed soon in 2021</li><li>• It will replace <i>Ontario Corporations Act</i> (“OCA”), whose Part III governs non-share capital corporations</li><li>• It’s taken a LONG time to get the ONCA to this point<ul style="list-style-type: none"><li>– Royal assent in October 2010</li><li>– Proclamation delayed several times since 2013</li><li>– Reasons? Technical amendments (done Nov. 2017) and tech improvements (still to be done?)</li><li>– Some draft Regulations released in June 2020 but more to come</li><li>– Proclamation deadline extended by Motion 89 (Sept 2020) to December 31, 2021 at latest</li></ul></li></ul> <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>

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- Original purposes of the ONCA:
  - Enhanced corporate governance and accountability
  - Simplified and more modern incorporation process
  - More membership rights
  - Improved protections for directors and officers
- Continue to monitor updates on the Ministry's website at <https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations> and [www.charitylaw.ca](http://www.charitylaw.ca)

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**B. WHAT DO YOU MEAN WE HAVE TO CHANGE? IMPLICATIONS OF THE ONCA'S PROCLAMATION**

- ONCA applies to all OCA corporations automatically
- Optional transition process within 3 years of proclamation to make necessary changes to current governing documents
- Prudent to go through transition by preparing both of the following documents reflecting the ONCA's detailed requirements:
  - Articles of amendment
  - New general operating by-law

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Otherwise, if no transition done, then corporation will not be dissolved BUT...LPs, SLPs, by-laws and special resolutions deemed to come into conformity with ONCA

Only exceptions are those provisions listed in the ONCA (ss. 207(3)) which can remain valid beyond the 3 year ONCA transition period

Result?  
Uncertainty

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**C. DO IT RIGHT - HOW TO GET READY FOR YOUR ONCA TRANSITION**

- 1. Collect governing documents**
  - Letters patent, supplementary letters patent
  - All by-laws, including amendments
  - Collect governance related documents, e.g. org charts, policies, manuals, etc.
  - Confirm your corporation is actually under the OCA and needs to transition to the ONCA
- 2. Review governing documents**
  - Do they reflect current governance process? If not, what is the process?
  - Are changes desired? Write them down, create a wish list

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### 3. Review key ONCA features

- This understanding will help you figure out how your current governance structure will be impacted by the ONCA and how to draft your new ONCA documents
- Need to understand the ONCA framework
  - Rules in the Act
  - Regulations (still to come)
  - Articles and By-laws
- Three types of rules in ONCA
  - Mandatory rules – Cannot be overridden
  - Default rules – Can be overridden if stated
  - Alternate rules – Can be opted into if desired

### 4. Compare ONCA rules with current governance

- Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

### 5. Prepare new ONCA documents

- Articles of amendment to amend portions of Letters Patent (“LP”) offside of the ONCA’s requirements
- Current by-law will need to be replaced or substantially revised because the ONCA differs so much from the OCA

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**6. Obtain membership approval and complete filings**

- Need special resolution of members to approve
- File articles of amendment with the Ministry (but not the by-laws)
- Registered charities need to file all of the ONCA documents with Canada Revenue Agency, Charities Directorate

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**D. OVERVIEW - KEY ELEMENTS OF THE ONCA**

**1. Incorporation and Corporate Powers**

- Incorporation as of right with only 1 incorporator
- Certificate of incorporation issued - no more LPs
- No need to file by-laws or financial statements
- Default ONCA by-law applies if no by-law adopted
- Corporation will have powers of a natural person

**2. Public Benefit Corporations (PBCs)**

- Corporations will be PBCs or non-PBCs
- PBCs include charitable corporations and non-charitable corporations receiving more than \$10,000 in public donations or government funding
- Additional requirements imposed on PBCs

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### 3. Financial Review

- Members required to appoint at each AGM by ordinary resolution an auditor or person to conduct review engagement
- There are rules for exemption depending on gross annual revenues (GAR) for (1) need to appoint an auditor and (2) audit vs. review engagement
- Exemption rules/thresholds differ if PBC vs non-PBC



### 4. Directors

- Minimum 3 directors, with range possible if in Articles
- Directors elected at AGMs
- Ex-officio directors possible
- Appointment of directors by Board between AGMs
- If different member groups elect x directors to the Board, must structure members as separate classes
- Directors no longer need to be members
- Maximum 4 year term of directors
- No limit though on maximum number of terms
- Staggered terms for directors possible
- Removal of any director by majority vote of members (mandatory)
- Directors must consent in writing to take office

## 5. Members and their Rights/Remedies

- A corporation must have members, with articles to set out member classes
- If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class
- By-laws must set out the conditions for membership
- Default rule is 1 vote per member (subject to articles)
- ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, *i.e.* a veto
- Bill 154 (2017) proposed delaying implementation of all membership class votes for at least 3 years after the ONCA's proclamation

- Motion 89 excluded extending these class vote provisions, meaning that since that the ONCA's proclamation will be sometime in 2021, the class vote provisions have died as of December 31, 2020
- Default rules to terminate membership
- Articles or by-laws may give directors, members or a committee the power to discipline or terminate members within mandatory parameters
- Members may remove directors by majority vote, with exception of ex officio directors
- Members have extensive rights and remedies, which must be respected (cannot contract out)
  - Requisition members' meetings
  - Submit proposals
  - Access corporate records, *e.g.* membership list
  - Numerous remedies available to utilize

## E. KEY TAKEAWAYS

Monitor the ONCA

Have a committee in charge of the process

Engage your board of directors

Prepare early

Seek legal help

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# **CRITICAL PRIVACY AND SECURITY RISKS IN A VIRTUAL WORLD**

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<p><b>Critical Privacy and Security Risks in a Virtual World</b></p> <p>Esther Shainblum, B.A., LL.B., LL.M., CRM</p> <p>eshainblum@carters.ca 1-866-388-9596</p> <p>© 2021 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <ul style="list-style-type: none"><li>• Unprecedented numbers of people are working from home (“WFH”) due to the Covid-19 pandemic</li><li>• The new WFH reality has exposed organizations, including charities and NFPs, to additional privacy and security risks</li><li>• Unclear what the long term impact of the pandemic will be on how people work in the future - “office centrality is over” (see <a href="https://bit.ly/34K91WH">https://bit.ly/34K91WH</a>)</li><li>• Charities and NFPs will continue to face privacy and security risks associated with WFH for the foreseeable future</li></ul> <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>

## B. THE PIVOT TO WFH

- At the beginning of the pandemic, the primary threat was to the physical safety of workers
- Abrupt pivot to WFH arrangements, seemingly overnight
- Many charities and NFPs were not prepared to manage the large scale, sudden shift to WFH
- Some charities and NFPs did not have the tools or infrastructure to support a remote workforce or their remote access infrastructure could not support the increased demand
- At the same time, charities and NFPs facing declining revenues due to the pandemic

## C. THE RISKS OF WFH

- New normal of WFH means an unprecedented risk to organizations, including charities and NFPs
- Organizations more reliant on their technology and computer systems than ever before - but
- Multiple, dispersed remote work places make it more difficult for organizations to:
  - maintain security
  - monitor and enforce employee compliance with policies and procedures
  - keep track of sensitive information and who is accessing it
  - find out about and respond to privacy breaches



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- Employees are working outside safeguards present in the workplace environment e.g. firewalls, anti-virus software, face-to-face contact, and policies and procedures designed to prevent or mitigate cyber and privacy breaches
- WFH makes it more difficult for employees to communicate with one another - more susceptible to phishing and social engineering
- WFH makes it harder to reinforce the need for vigilance and strict processes

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- Additional risk factors:
  - Lack of adequate cybersecurity awareness training for WFH
  - Stretched or inadequate IT support
  - Employees WFH setting up and managing their own remote connections
  - Employees using personal devices, such as laptops, phones and USB drives, to access core IT systems and sensitive work information
  - Organizations without secure remote access, such as virtual private networks (“VPNs”)
  - Employees accessing core IT systems or sensitive workplace information using poorly secured home internet connections

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- Employees sharing computers, devices and workspaces with family members/roommates
- Employees installing software on corporate devices
- Relaxing the rules, not following usual processes or policies
- The use of free platforms that may not have adequate security
- No clear plan for what to do in case of an incident when WFH
- Corporate policies that do not address or reflect WFH

## D. THE SURGE IN CYBERCRIME

- Cybercrime has surged globally as a result of the shift to WFH and home based networks
- Since Covid cyberattacks have increased at a rate of three to five times and phishing attempts have increased in both frequency and sophistication (see <https://hbr.org/2020/05/>)
- Coronavirus “possibly largest-ever cyber security threat” due to the total volume of cyber attacks related to the pandemic (see <https://bit.ly/3oUbAxs>)
  - 667% increase in cyber attacks in USA March, 2020
  - April, 2020 FBI reported a 400% spike in cybersecurity complaints

- The Canadian Internet Registration Authority (CIRA) reported an increased volume of cyber attacks during the pandemic (see <https://bit.ly/322nQ4W>)
- Canada was the most frequently targeted country for phishing attacks during the first quarter of 2020 and there was a 25% spike in ransomware attacks in Canada in the first quarter of 2020.
- In July 2020, Blackbaud revealed that it had been the subject of a ransomware attack that impacted charities around the world, including many in Canada

- Cybercriminals are taking advantage of the pandemic in multiple ways:
  - Leveraging the massive shift to poorly secured home networks and devices to attack and compromise organizations' systems:
    - Weak passwords, out of date or insecure devices and software and the lack of layers of authentication or protection can make an organization vulnerable to attack
  - Using deception and manipulation to bypass defenses and safeguards and to gain entry or data, including:

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**Phishing** – exploiting COVID fear and anxiety by pretending to be a trustworthy entity and sending pandemic-themed phishing emails to trick people into clicking links or fake websites or downloading attachments that contain malware or ransomware

**Spear phishing** – similar to phishing but well-researched and targeted toward a specific individual or organization

**CEO Fraud** – a similar scam, impersonating senior executives to trick people into transferring funds or downloading malware

**Clickbait** – pretending to offer something such as free healthcare advice about COVID

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### E. MITIGATING THESE RISKS

- Charities and NFPs need to consider a number of measures to mitigate the risk of data loss, privacy breach or cyber attack
- Technological measures such as:

Provide employees WFH with corporate-owned devices managed and controlled by the organization

Proactively audit and test for vulnerabilities and regularly deploy updates and patches to address them

Use a VPN to create a secure connection between remote workers and the organization's network/sensitive data

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- Require strong and complex passwords for all accounts/devices
- Enable Multi Factor Authentication requiring multiple forms of verification to access the VPN, network or PI
- If personal devices must be used, regularly update their operating systems and require them to have the same security solutions as corporate owned devices to prevent them being an attack vector. Obtain extra licenses if necessary
- Implement quick access to IT support in case of breach/incident

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- Privacy and cybersecurity measures such as:
  - Limit the collection, use and disclosure of personal information to the minimum necessary
  - Avoid emailing PI, send encrypted/password protected emails, obtain consent to email if possible, send test emails
  - "Hygiene" - secure devices and information, clean desks, protect monitors, eavesdropping, no PI taken home, minimize printing of PI, secure storage and disposal of PI
  - Limit or restrict access to PI for personal devices/mobile devices/removable media
  - Password protect and encrypt devices/removable media

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- Training and Policy measures such as:

Establish a WFH policy that sets out expectations and responsibilities for employees WFH

Review and update technology policies as needed to address WFH

Adapt and enforce privacy policies to ensure that employees WFH continue to comply with privacy law and policies

Have clear privacy breach and security incident response protocols in place

Implement mandatory cybersecurity awareness on cybersecurity threats, phishing, WFH securely and how to video conference securely

Conduct cybersecurity awareness training on a regular, ongoing basis

Obtain adequate cyber insurance coverage to protect the organization against cyber-crime and fraud

## F. KEY TAKEAWAYS

- WFH is here to stay, at least for the immediate future
- Charities and NFPs should be implementing measures to mitigate the risks associated with WFH
- Takeaways:
  - Employee education and cybersecurity awareness
  - Incident response plan
  - Enable MFA
  - Eliminate/reduce personal devices
  - VPNs
  - Cyber insurance coverage
  - Home office hygiene

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# **INTELLECTUAL PROPERTY CHALLENGES IN A VIRTUAL WORLD: TIPS AND TRAPS**

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### A. OVERVIEW OF IP RIGHTS

- Intellectual Property (“IP”) refers to intangible property, which are creations of the mind

The main types of IP are:

- Patents: applies to new and useful inventions
- Trademarks: a distinctive element that identifies goods or services provided by one source from others, includes words and logos
- Copyright: an original literary, dramatic, musical or artistic work
- Industrial Design: a shape, configuration, pattern or ornament applied to a finished article

- Generally speaking, **copyright** and **trademarks** are the main forms of IP that charities and not-for-profits (“NFPs”) own and will therefore be the focus of this presentation

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- Establishing a legal right to IP is of vital importance for the following reasons:
  - Organizations can leverage IP
  - Reproducing the IP of others can violate the owner's rights
    - This type of violation is referred to as infringement, and IP owners have legal remedies against those who have infringed their IP
  - The effective management of IP belonging to a charity or NFP can help to protect and grow the assets of the organization
- Therefore, an awareness of IP law and how it affects the day-to-day operations of a charity or NFP is of significant importance

## B. WHAT IS COPYRIGHT?

- Copyright protects original literary, artistic, dramatic or musical works
- The word "original" is key in defining a work that qualifies for copyright protection

The work does not need to be new, but must originate from the author, not be copied, and involve some intellectual effort

- Originality can be tricky to determine and many court cases revolve around the question of whether a work has been copied, even in part, from someone else's work

## C. WHAT IS A TRADEMARK?

- Trademarks are likely the most important part of your brand and one of the most powerful forms of intellectual property because it protects an organization's image
- A trademark is any mark used for the purpose of distinguishing products and services from others in the public
- In particular, names, logos, or slogans are parts of your organization's brand known as "trademarks"
- Trademarks legally protect your brand and grant your organization exclusive rights to their use in the public

## D. INFRINGEMENT

Since copyright and trademark rights give you the exclusive right to use that particular work or trademark, anyone that breaches or violates those rights (i.e., uses your work or trademarks) without your permission is infringing your rights

If you copy work or trademarks from a third party without permission, you are infringing their rights

## E. TIPS FOR PROTECTING IP IN THE DIGITAL WORLD

### 1. Automatic Protection

- There is automatic **copyright** protection for an author if he or she is a Canadian citizen or person ordinarily resident in Canada, or is a citizen of various other international convention countries



- There is also automatic **trademark** protection as soon as a trademark owner commences use of its trademark, but proceed with caution as discussed in the coming slides



### 2. Registration

- Registering copyright with Canadian Intellectual Property Office (“CIPO”) entitles the owner to a registration certificate that constitutes official proof of ownership
- Creates a rebuttable presumption that copyright exists in the work and that the copyright registrant is the owner of said work
  - This can be useful when asserting rights
- Registering a trademark with CIPO offers numerous advantages:
  - A presumption of ownership and validity
  - Registration of a corporate name or business name does not itself give trademark protection
  - Exclusive rights to use the trademark in association with the registered goods and services

- With an unregistered trademark
  - owner must show extensive use, reputation, and goodwill in the mark, to rely on these rights
  - there is no presumption of ownership
- The registration is effective throughout Canada
- Suing for trademark infringement which can be done only on the basis of a registered trademark and 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
- Can act as a defense to a trademark infringement claim against you
- A registered trademark has equity
  - it becomes an asset of the trademark owner and can be sold or licensed

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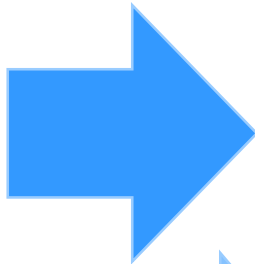
### 3. Policies and Contracts

- A charity or NFP can help to reduce the risk of infringing IP that is owned by a third party by creating an IP Policy for employees and volunteers to follow
- A Social Media Policy should also be implemented that addresses the organization's policies regarding the use of IP
- A charity or NFP should also have policies in place that protect its own IP including an IP Policy posted on its website or Terms and Conditions of Use that address the use of the organization's IP
- Implement contracts with employees, volunteers and independent contractors that clearly state that the organization is the owner of all IP and that moral rights are waived, further discussed in later slides

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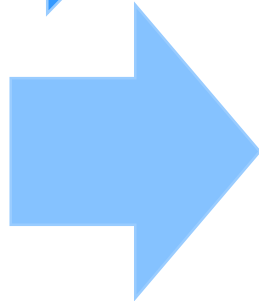
## F. IP TRAPS IN THE DIGITAL WORLD



As discussed, IP can be a significant asset if effectively managed, but can also result in liability

Important questions for charities and NFPs to ask are:

- Does the organization have the rights necessary to carry out its activities without infringing on the rights of others?
- Does the organization possess good title to the IP that it believes it owns?



### 1. Copyright Ownership Generally

- Generally, the *author* of the work is the first *owner* of the copyright, unless an exception exists
  - There can be multiple authors for one work
  - The author is whoever writes, produces or otherwise creates a creative work
  - Corporations cannot be must be human authors as an author
  - The *Copyright Act* also recognizes and protects the creator's "moral rights" which includes the right to attribution, integrity, and association
    - moral rights can be waived but cannot be assigned

## 2. Copyright Works Created by Employees

- One exception to the author being the first owner of copyright is if the author is employed under a contract of service or apprenticeship, the employer automatically owns the copyright to the work
- There are three requirements for this to happen
  - The employee must be employed under a contract of service or apprenticeship
  - The work must have been made in the course of that employment or apprenticeship
  - There must not be an agreement to the contrary
- The author retains moral rights to the work

## 3. Copyright Works Created by Independent Contractors and Volunteers

- One difficult question that frequently emerges is whether a person is under a “contract of service” or a “contract for services”
- Independent contractors, volunteers, and quasi-employees are not usually considered to be under a “contract of service”
- Therefore, a charity or NFP will not automatically own the rights to works its volunteers or independent contractors create (*i.e.*, web designers, logo developers)
- Disputes can arise over ownership of copyright works
- Often charities and NFPs will be surprised to learn what they do not own the copyright for

## 4. Trademark Ownership Generally

- When you use a mark in the marketplace you accrue *common law* or unregistered trademark rights
  - Registration is the confirmation of common law rights acquired through use
  - The first user of a trademark is the party entitled to use and own the trademark, regardless of if (or when) an application to register the trademark was filed
  - The first user is technically entitled, but the first party to file gains a significant procedural advantage in securing rights
  - The scope of protection for common marks is restricted to the geographic area and to the actual use of the mark, whereas the registration is effective throughout Canada

## 5. Failure to Search, Register, and Control Trademarks

- To avoid lengthy legal battles, charities and NFPs should ensure they:

Search	Register	Control
Conducting a trademark search prior to using a trademark allows you to avoid encroaching on others' rights and can help determine who is potentially encroaching on your pre-existing rights	Registering trademarks allows you to enforce against later users of confusing similar trademarks and registration can act as a defense if a third party is trying to sue you for trademark infringement	Trademark use should be controlled to avoid losing trademark rights



## 6. Using Third-Party Material

- Content that is not created by the charity or NFP does not belong to the organization and therefore cannot be used without permission
- Employees and volunteers may not consider whether IP rights apply to a work, or may assume that an exception applies or that they will somehow be personally exempted from responsibility
- If an employee or volunteer infringes IP in the performance of their duties for the organization, then it is ultimately the organization that will be held responsible in most cases
- Use of collective licensing (e.g. CCLI) - several important considerations on what you can or cannot do with the content online (e.g. what is the license for, can you use the content online, etc.)

## 7. Social Media

- Examples of Social Media: LinkedIn, Facebook, Twitter, Instagram, Pinterest, YouTube, Google+, etc.
- Ensure IP of others (and your own) are not infringed
- Social media can expose your organization to liability for infringing the IP rights of others
- Monitor social media sites for postings by employees and third parties that may infringe IP of others
- Review posted content and consider who is the owner
- If the organization does not own the work, any reproduction of that work on social media can constitute IP infringement

## G. KEY TAKEAWAYS

IP is a very valuable asset to charities and NFPs

It is beneficial for charities and NFPs to familiarize themselves with the laws surrounding copyright and trademarks

To implement policies and procedures in order to protect its IP and to avoid any unintended consequences

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THE OTTAWA REGION 2021  
***Charity & Not-For-Profit Law Webinar***


*Thursday, February 11<sup>th</sup>, 2021*

**INCOME GENERATION BY  
CHARITIES AND NFPs:  
WHAT'S POSSIBLE AND  
WHAT'S NOT**

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

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Ottawa Region 2021 <i>Charity &amp; Not-for-Profit Law</i> Webinar February 11, 2021</p>
<p><b>Income Generation by Charities and NFPs: What's Possible and What's Not</b></p> <p>By Terrance S. Carter, B.A. LL.B., TEP, Trademark Agent</p> <p>tcarter@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p>	
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	2
<p><b>OVERVIEW OF TOPICS</b></p> <ul style="list-style-type: none"><li>The Importance of Income Generation</li><li>Income Generation by Charities</li><li>Income Generation by NFPs</li><li>Key Takeaways</li></ul>	
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## A. THE IMPORTANCE OF INCOME GENERATION

- Given the negative impact of COVID-19 on charities and NFPs, enhancing income generation has become an important topic of discussion
- “NFP” refers to “not-for-profits” and for the purpose of this presentation focuses on “non-profit organizations” (NPOs) under par.149(1)(l) of the *Income Tax Act (ITA)*
- In order to facilitate income generation, it is important to understand what is permissible and what is not
- This presentation does not deal with receipting or HST/GST issues
- As well, given the complexities of the issues, the presentation provides only a general overview
- For specific fact situations, advice should be sought from a qualified professional

## B. INCOME GENERATION BY CHARITIES

### 1. Income Generation from Gifts

- What is a gift?
  - Voluntary transfer of property without valuable consideration
  - *E.g.* cash gifts
  - *E.g.* gifts of property
- Gifts from different donors
  - Individuals
  - Corporations and businesses
  - Qualified donees (*e.g.* public foundations)
- Donation receipts can be issued, subject to split-receipting rules to determine “eligible amount”

## 2. Government Contracts, Grants & Contributions

- Important to review the terms of government contracts
- Contracts must relate to the purpose of the charity

## 3. Income from Charitable Programs/Sale of Goods

- Charities can earn income from their charitable programs and/or sale of goods
- Charging fees for charitable programs and/or the sale of goods will be charitable if the programs or sale of goods:
  - Serves the charity’s beneficiaries;
  - Directly furthers a charitable purpose; and
  - Should be reasonable in the circumstances and typically aimed at cost recovery
- See CRA Guidances (CG-013) on Fundraising and (CG-018) on Arts Activities and Charitable Registration, as well as Policy Statement (CPS-024) Meeting the Public Benefit Test, for details

- Examples of fees for charitable programs and/or sale of goods by a charity that are generally seen as charitable:

- |  |  |
|--|--|
| – <i>University and college tuition fees</i> | – <i>Rent from low income housing</i>        |
| – <i>Hospital health care services</i>       | – <i>Fees from long-term care facilities</i> |
| – <i>Symphony ticket sales</i>               | – <i>Sale of religious literature</i>        |
| – <i>Museum ticket sales</i>                 | – <i>Sale of medical support devices</i>     |
| – <i>Counselling fees</i>                    |  |

- If profits occur, charities can keep the profits

- No charitable donation receipts can be issued because value is being received in return

#### 4. Income from Social Businesses

- Charities can earn income from running a business to provide permanent employment for individuals with disabilities
  - Must employ only individuals with disabilities, except for training staff and supervisors
- Charities can also earn income from employment related training that relieves unemployment
- See CRA Guidance (CG-014) on Community Economic Development (CED) for details

#### 5. Income from Membership Fees

- Charities can earn income from membership fees
- Charitable donation receipts can be issued for the “eligible amount” of membership fees

#### 6. Income from Conference Fees

- Charities can earn income from conference fees for in-person and virtual conferences tied to their purposes
- No donation receipts can be issued, because value is being received in return

#### 7. Income from Sponsorships

- Charities can earn income from sponsorships provided that they are done on an irregular basis
- No donation receipt can be issued, but businesses can claim a tax deduction for sponsorship, subject to the reasonableness of the expenses claimed

#### 8. Income from Lotteries/Raffles

- Games of chance e.g. bingo, Nevada tickets, etc.
- No donation receipt can be issued

## 9. Income from Fundraising Events

- Galas, dinners, auctions, concerts, golf tournaments
- Crowdfunding campaigns and other online events
- Donation receipts can be issued but are subject to split-receipting rules in determining “eligible amount”

## 10. Income from Fundraising by Third Parties

- Charities can earn income from third-party fundraising events, either in person or on the internet, e.g. a P2P campaign
- However, the charity must remain in control of tax receipting and be able to account for all income
- Important to have a written agreement in place with the third party undertaking the fundraising

## 11. Income from Passive Investments

- Charities can earn income from passive investments arising from “mere ownership” of property
- Investment income includes interest, dividends, royalties, or rental income involving basic services
- Investments generally must meet the prudent investor standard under the *Trustee Act* (Ont.) or other provinces
- Investment income may also come from “social investments” or “impact investments” where there is a dual purpose of financial return and charitable purpose(s)
  - In Ontario, the requirements for a “social investment” under the *Charities Accounting Act* may apply
  - “Program Related Investment” (PRI) rules under CRA (CG-014) CED Guidance may also apply



## 12. Income from “Related Business”

- CRA permits charitable organizations and public foundations to carry on “related businesses”
- However, private foundations cannot carry on any business activities (“related business” or otherwise)
- With a “related business”, there is no requirement that the charity price the sale of products or services on a cost recovery basis
- Non-compliance, though, resulting from engaging in businesses that are not a “related business” can result in penalties and even revocation
- See CRA Policy (CPS-019) What is a Related Business?
- A “related business” is a business that is either:
  - Substantially run by volunteers (90%); or
  - Linked and subordinate to a charity’s purpose

### a) Substantially run by volunteers

- ❖ “Related Business” is defined in the ITA to include a business that is unrelated to the objects of the charity provided that it is run substantially (90%) by volunteers

- 90% volunteer determination is based on a head count done on an annual basis

- *E.g.* calculation is based on the number of people used to operate the business rather than the number of hours worked

- A business run by 90% volunteers can be unrelated to the charitable purpose (like PEI church lobster dinners)

## b) Linked and subordinate to charitable purposes

- ❖ Four forms of linkage identified by CRA:
  - A usual and necessary concomitant of charitable programs;
    - Business activities that supplement a charity's charitable programs, like a hospital cafeteria
  - An off-shoot of a charitable program;
    - Charity may create an asset it can sell in the ordinary operation of charitable programs
  - A use of excess capacity;
    - Earns income during the periods when assets and staff are not being used to full capacity
  - Sale of items that promote the charity or its objects;
    - Involves sales that are intended to advertise, promote, or symbolize the charity or its objects

## c) Factors that indicate subordination to the charitable purpose:

- The business receives a minor portion of the charity's attention and resources;
- The business is integrated into the charity's operation (not acting as a self-contained unit);
- The charity's charitable goals continue to dominate its decision-making; and
- The charity continues to operate for an exclusively charitable purpose by permitting no element of undue private benefit to enter into its operations

## 13. Income from a For-Profit Subsidiary Corporation

### a) Generally

- In order to avoid a charity carrying on an “unrelated business” with resulting penalties and possible revocation, a charity could consider incorporating a for-profit subsidiary corporation in order to operate an “unrelated business”
- A subsidiary corporation could also be effective in containing liability within the subsidiary corporation
- However, in setting up a subsidiary corporation, there are a number of factors that would need to be carefully considered, including those listed on the next slides:

- i. Tax Liability Under *ITA*
  - Tax would have to be paid on income earned but generally may claim a deduction for donations up to 75% of net income
  - As well, some management service fees and sponsorship fees may be charged by the charity to reduce taxable income of the for-profit subsidiary
  - Resulting tax from placing “unrelated business” activity in a for-profit subsidiary may be quite low, depending on the circumstances
- ii. Charity Needs to Receive FMV for the Use of Any of Its Resources
  - The charity cannot simply gift resources to its for-profit subsidiary
  - Instead resources transferred must be done at FMV

### iii. Charity Owning an Interest in a Business

- The charity would need to justify the investment of charitable resources as either:

OR

Meeting the prudent investor standard under applicable provincial *Trustee Acts*

A Program Related Investment under the CRA's CED Guidance, and possibly as a "social investment" in Ontario under the *Charities Accounting Act*

- In Ontario, PGT has the right under the *Charities Accounting Act* to make inquiries where the charity owns a "substantial interest" in a business (20%)

### iv. Restrictions on Foundations Owning a For-Profit Business Corporation

- Public and private foundations cannot acquire more than 50% of issued share capital with full voting rights
- However, shares may be gifted to a foundation (regardless of the percentage) as long as the foundation does not acquire more than 5% of the shares for consideration
- Private foundations are subject to excess corporate holding rules requiring public disclosure over 2% and divestment requirements over 20%

## C. INCOME GENERATION BY NFPS

### 1. Requirements to Be an NPO

- For a NFP to qualify as an NPO under the *ITA*, an organization must meet all 4 requirements under par. 149(1)(l) of the *ITA* throughout each taxation year

1. Not be a charity (registered or common law)

2. Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit

3. Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit

4. Not distribute or otherwise make available any income for the personal benefit of a member

- Tax exempt status under par. 149(1)(l) of the *ITA* is a question of fact that can only be determined after a review of the purposes and activities of the NPO
- CRA is generally of the view that an NPO can engage in income-generating activities and earn a profit, provided that the profit is unanticipated and unintentional
- NPOs can also engage in limited fundraising activities
- NPOs can maintain reasonable operating reserves
- See CRA IT-496R Non-Profit Organizations for historical position on NPOs
- CRA current rules on profit generation by NPOs is in a state of flux as a result of inconsistent CRA rulings and interpretations
- Therefore, difficult to know with any certainty what is acceptable income generation by NPOs and what is not

## 2. Income Generation Generally Associated with Cost Recovery Activities and/or Reasonable Reserves

- Membership fees
- Sale of goods & services to members tied to the non-profit purpose of the NPO
- Fees for training courses
- Conference fees
- Sponsorship fees
- Fundraising events
- Investment income from reasonable reserves

## 3. Income from a For-Profit Subsidiary Corporation

### a) Generally

- In order for a NFP to avoid carrying on for-profit business activities that could jeopardize its tax exempt status as an NPO, a NFP could consider using a for-profit subsidiary corporation
- CRA has indicated that an NPO can earn income from owning a for-profit subsidiary corporation
- However, the availability of this option depends on the facts of each case
- For instance, an NPO using “excess funds” to purchase shares and/or make loans to a taxable subsidiary may be viewed as having a profit motive, since CRA may see that the NPO has raised more funds than needed to do its non-profit work

## b) Tax Liability

- Tax would have to be paid on the income earned by the subsidiary for-profit corporation
- However, unlike a charity, it is not possible to make a tax deductible donation from the subsidiary corporation to the NPO parent corporation
- Some management service fees, licence fees and sponsorship fees, though, may be charged by the NPO to the for-profit subsidiary to reduce income of the for-profit subsidiary and therefore its net income for tax purposes

## D. KEY TAKEAWAYS

- ✓ There are numerous opportunities available for income generation by charities & NFPs
- ✓ Charities in particular have a number of options to earn income that may not always be fully understood
- ✓ NFPs have more restricted opportunities to earn income because of the requirement “any purpose other than profit”
- ✓ Where a charity or NFP is not able to carry out a type of income generation, then a for-profit subsidiary corporation may be an option to consider
- ✓ The “devil is in the details”, so it is important to know the rules

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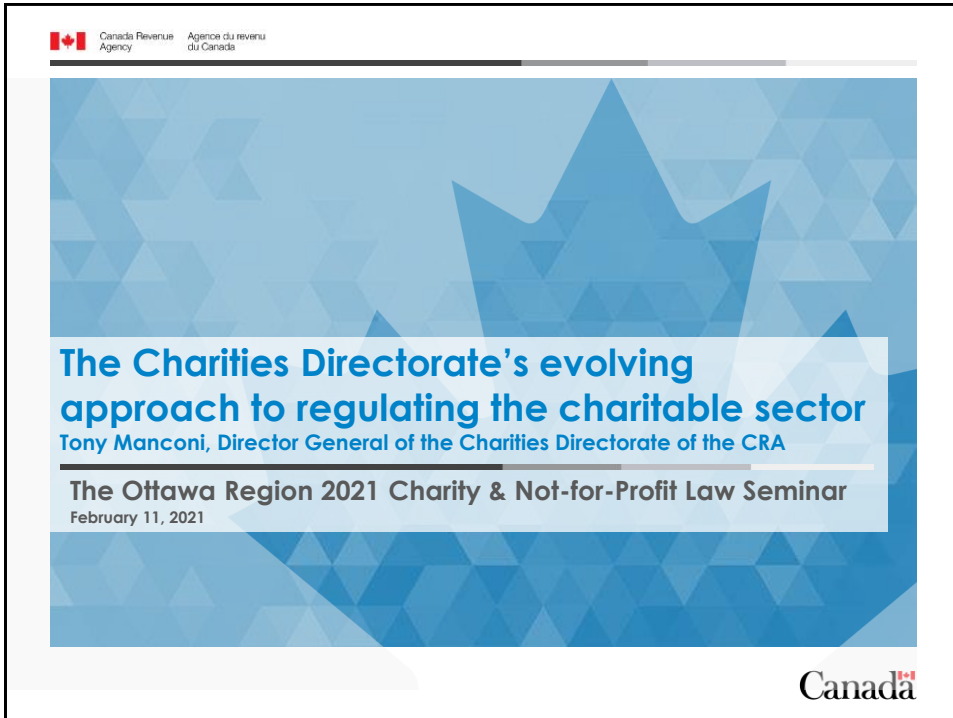
*Thursday, February 11<sup>th</sup>, 2021*

**THE CHARITIES DIRECTORATE'S  
EVOLVING APPROACH TO  
REGULATING THE  
CHARITABLE SECTOR**

**By Tony Manconi, B.A.**

**Director General,  
Charities Directorate, Canada Revenue Agency**

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**The Charities Directorate's evolving approach to regulating the charitable sector**  
Tony Manconi, Director General of the Charities Directorate of the CRA

**The Ottawa Region 2021 Charity & Not-for-Profit Law Seminar**  
February 11, 2021

Canada

## At a glance...

- Impacts of the COVID-19 pandemic on the Directorate
- What's new
  - Guidance products
  - Report on the Charities Program
- Engaging with the sector
  - Ongoing consultations
  - Advisory Committee on the Charitable Sector (ACCS)
- Our evolving approach
  - Enhancing digital services
  - Adapting our program
- On the horizon
- Call Us!

## Impacts of the COVID-19 pandemic on the Directorate

- **March 2020:**
    - Closed offices
    - Extended the filing deadline for the T3010, Registered Charity Information Return
    - Supported funding programs to assist charities
    - Established remote work for employees
  - **April 2020:** Ensured the client service call centre was back and up running
  - **May 2020:** Prioritized efforts to ensure that the review of applications for registration was on track
  - **September 2020:** Continued to resume compliance activities including audits, as well as the processing of voluntary revocations and revocations for failure to file
  - **Today:** Fully operational (virtually), continuing to explore options to evolve and adapt programs to the current environment
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## What's New: Guidance products

- Public policy dialogue and development activities
  - Relief of poverty and charitable registration
  - Advancement of education and charitable registration
  - Canadian registered charities carrying out activities outside Canada
  - Using an intermediary to carry out a charity's activities within Canada
- 

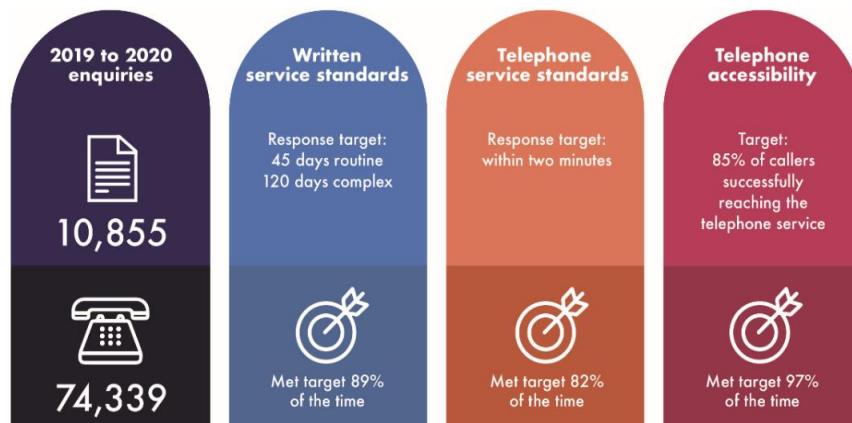
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## What's new: Report on the Charities Program

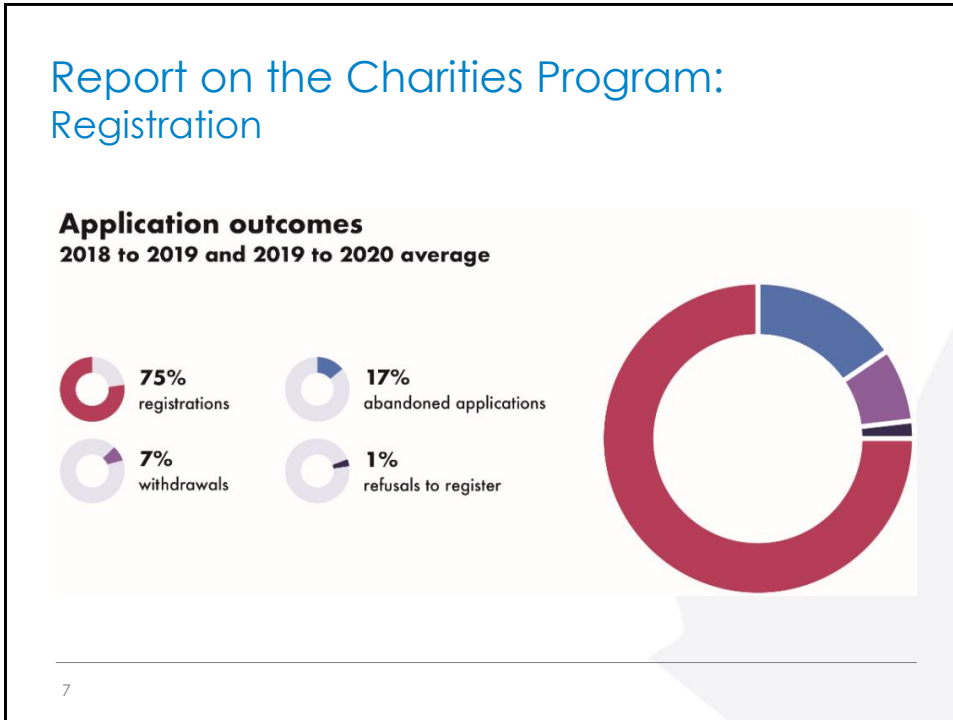
- Snapshot of the Charities Directorate including updates to services, policy, outreach, and operational activities.
- Summary of how the CRA continued to support and work with the charitable sector through the COVID-19 pandemic.
- Highlighted data from the 2018-2019 and 2019-2020 fiscal years.

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## Report on the Charities Program: Service standards



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- ## Ongoing consultations
- Consultations with the charitable sector have continued virtually.
    - Technical Issues Working Group (TIWG)
    - Federal/Provincial/Territorial Network of Charity Regulators
    - Advisory Committee on the Charitable Sector (ACCS)
- 8

## Advisory Committee on the Charitable Sector

- The ACCS is a consultative forum for the Government of Canada to:
  - engage in meaningful dialogue with the charitable sector;
  - advance emerging issues relating to charities; and
  - ensure the regulatory environment supports the important work that charities do.
- The ACCS provides recommendations to the Minister of National Revenue and the Commissioner of the CRA.

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## ACCS members (co-chairs)

- **Bruce MacDonald**, President & CEO, Imagine Canada (sector co-chair)
- **Hilary Pearson**, former President, Philanthropic Foundations Canada (sector co-chair)
- **Geoff Trueman**, Assistant Commissioner, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency (co-chair)

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## ACCS members (continued)

- CRA and Department of Finance members:
  - **Tony Manconi**, Director General, Charities Directorate, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency
  - **Pierre Leblanc**, Director General, Personal Income Tax Division, Tax Policy Branch, Department of Finance
  
- Sector members:
  - **Denise Byrnes**, Executive Director, OXFAM-Québec
  - **Terrance S. Carter**, Partner, Carters Professional Corporation
  - **Peter Dinsdale**, President & CEO, YMCA Canada
  - **Peter Elson**, Co-lead, Canadian network of partnership-oriented research on philanthropy (PhiLab), and Adjunct Assistant Professor, University of Victoria

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## ACCS members (continued)

- Sector members:
  - **Bruce Lawson**, President & CEO, The Counselling Foundation of Canada
  - **Arlene MacDonald**, former Executive Director, Community Sector Council of Nova Scotia
  - **Susan Manwaring**, Partner, Miller Thomson, and Chair, Canadian Bar Association Charities and non-for-profit section
  - **Kevin McCort**, President & CEO, Vancouver Foundation
  - **Andrea McManus**, Chair and Founding Partner of ViTreo Group, former Chair of the Association of Fundraising Professionals International Board
  - **Peter Robinson**, former CEO, David Suzuki Foundation
  - **Paulette Senior**, CEO & President, Canadian Women's Foundation
  - **Paula Speevak**, President & CEO, Volunteer Canada

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## ACCS priorities

- Five working groups were identified at the ACCS meeting of June 22, 2020, which will examine the following priorities:
  - Modernizing the regulatory framework in Government as it relates to the charitable sector;
  - Supporting the work of charities serving vulnerable populations;
  - Exploring charity-related regulatory and legislative issues faced by Indigenous Peoples and organizations;
  - Examining the regulatory approach to charitable purposes and activities, including its impact on charities working with non qualified donees, and charities engaging in revenue-earning activities; and
  - Improving data collection and analysis related to the charitable sector.

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## Our evolving approach

- Enhancing digital services:
  - Improvements to the registration process
  - My Business Account
  - E-communications
- Adapting our program:
  - Working virtually
  - Charities education program
  - Charity information sessions

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## On the horizon

- Promoting increased communication with the sector
- Charity Volunteer Information Return Program

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## Call us!

- Not sure about the rules?
- Want to make some changes?

Contact a representative Monday to Friday  
(except statutory holidays) between 9 a.m. and 5 p.m., local time:

- **By phone:**  
1-800-267-2384
- **By TTY service for people with a hearing or speech  
impairment:**  
1-800-665-0354

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