

Updating Charities and Not-For-Profit Organizations on recent legal developments and risk management considerations.

APRIL 2015

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"Update on Ineligibility Requirements: CRA's Policy on Ineligible Individuals" on May 21, 2015

The [2015 National Charity Law Symposium](#) is being hosted by The Canadian Bar Association on May 29, 2015

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RECENT PUBLICATIONS AND NEWS RELEASES

No Silver Linings — CRA's Position on Cloud Computing Unchanged

By Linsey E.C. Rains

On March 22, 2015, the Tax Executives Institute, Inc. ("TEI"), a prominent association of in-house tax professionals, published Canada Revenue Agency's ("CRA") [responses to questions](#) that TEI put forward during its November 2014 liaison meetings with representatives from CRA and the Department of Finance. Although TEI's questions covered a broad range of topics reflective of its members' interests, e.g. transferring funds between tax accounts, transfer-pricing, and capital cost allowance, CRA's answers to TEI's questions about imaging and electronic records are particularly relevant to registered charities and non-profit organizations ("NPOs"), as defined in section 149(1)(l) of the *Income Tax Act* ("ITA"), who keep electronic records on servers located outside of Canada.

TEI asked CRA to clarify whether its position on three aspects of electronic record keeping had changed given the "significant advances in technology (e.g., cloud computing) that have increased taxpayers' ability to convert paper documents to electronic images and minimize administrative and storage costs" since CRA's Information Circular [IC05-1R1, Electronic Record Keeping](#) ("IC05-1R1") was released in 2010. TEI sought specific additional information about whether CRA:

1. Evaluates taxpayers' imaging processes to see if they comply with national electronic imaging standards;
2. Plans to participate "in any initiatives to update the national electronic imaging standards" referred to in its publications; and
3. Will eliminate "the requirement that electronic records be maintained on a server located in Canada."

Unfortunately, all three of CRA's responses to these issues essentially maintain the *status quo* despite the fact technology is outpacing the relevancy of its current policies, such as Information Circular [IC78-10R5, Books and Records Retention/Destruction](#) ("IC78-10R5") and publication [RC4409, Keeping Records](#) ("RC4409").

With regard to issue (1), CRA states that it "does not perform an analysis of a taxpayer's imaging process," as the taxpayer is responsible for complying with the appropriate record keeping standards. Moreover, CRA reiterates its position in RC4409 that taxpayers who are unsure whether their imaging

processes comply should obtain legal advice and keep their paper records if they cannot comply. CRA's response to issue (2) that it is not involved in any initiatives to update national standards, suggests CRA's position is unlikely to change in the immediate future. Finally, CRA's response to TEI's third question indicates CRA will not be eliminating the requirement for electronic records to be kept on a server located in Canada anytime soon. The response refers taxpayers to the ITA, IC05-1R1, IC78-10R5, and RC4409 for guidance on where taxpayers should keep their records. Although CRA will allow most taxpayers to keep their records outside Canada, these taxpayers must first obtain CRA's permission, which TEI notes imposes an administrative burden on both CRA and the taxpayer.

Accordingly, NPOs may wish to consider contacting their local Tax Services Office to request permission to keep their electronic records on a foreign server. However, CRA's response to question (3) is frustrating for charities because, unlike most other taxpayers, RC4409 and CRA's Guidance [CG-002, Canadian Registered Charities Carrying Out Activities Outside Canada](#) continue to indicate that registered charities cannot seek the CRA's permission to keep records outside of Canada.

In this regard, NPOs and registered charities that keep their records electronically should review their current arrangements with legal counsel, especially those who use cloud computing, to verify the location of their servers and take any remedial steps necessary to ensure they are in compliance with CRA's onerous electronic record keeping requirements.

Federal Government to Match Donations to Nepal Earthquake Relief Fund

By Terrance S. Carter and Ryan M. Prendergast

In response to the devastating earthquake that hit Nepal on April 25, 2015, the Government of Canada has created the Nepal Earthquake Relief Fund (the "Fund"). On April 27, 2015, the Minister of International Development and the Minister of Foreign Affairs [announced](#) that the Government will match eligible monetary donations dollar for dollar by contributing an amount equivalent to those eligible donations to the Fund. To be eligible, donations must be:

- Monetary, up to a maximum of \$100,000;
- Made by individual Canadians;
- Made to a registered Canadian charity that is receiving donations in response to the April 25, 2015 earthquake in Nepal;

- Specifically earmarked by such organizations for the purpose of responding to the earthquake; and
- Made between April 25 and May 25, 2015.

The announcement by the government states that the Fund is a separate fund from the funds raised by charities and will be used, “to provide financing to international and Canadian humanitarian and development organizations responding to the disaster, through established Foreign Affairs, Trade and Development Canada (DFATD) channels and procedures.” Since the charity that receives the original donation in support of earthquake relief in Nepal will not have control over how the matching funds are used, it appears as though this fund is meant more to encourage the broader fundraising effort in Nepal than to help specific charities with their ability to respond to the crisis in Nepal. Why the Government is better situated to determine the allocation of the Fund than registered charities with experience in providing international relief and already responding to the earthquake through donations they receive is not clear.

The announcement also contains information on how individuals fundraising on behalf of an organization, such as a school or faith group, can make sure funds donated to a registered Canadian charity on behalf of the organization will be matched in the Fund.

Registered charities receiving eligible donations in response to the Nepal earthquake are required to complete a form declaring the amount of eligible donations that the charity has received and submit this form to DFATD by June 12, 2015 in order to ensure that donations they receive will be matched by the Government to the Fund. Charities can do so by completing the Nepal Earthquake Relief Fund Declaration Form, which will be made available on the [DFATD website](#).

It is also interesting to note that the Government’s initial \$5 million contribution pledged on April 25, 2015 will count towards the matching funds. This appears to mean that the Government will not have to contribute any new funding until after individual Canadians have donated in excess of \$5 million in eligible donations to registered charities.

Federal Budget 2015: Impact on Charities

By Ryan M. Prendergast, Linsey E.C. Rains and Terrance S. Carter, [Charity Law Bulletin No. 363](#), April 22, 2015

On April 21, 2015, Finance Minister Joe Oliver introduced the [Economic Action Plan 2015](#) (“Budget 2015”). Budget 2015 contains a number of important proposed amendments of benefit to the charitable and not-for-profit sector, which the Budget describes as “an engine of economic activity, employing some two million Canadians across the country.” These amendments include a capital gains tax exemption for individual and corporate donors upon disposition of private shares or real estate to registered charities; permitting registered charities, including private foundations and registered Canadian amateur athletic associations (“RCAAs”) to invest in limited partnerships; and the introduction of the Social Finance Accelerator Initiative, a program to encourage social finance in Canada.

Although Budget 2015 contains good news for the charitable sector, it is worth noting that the Budget did not include the Stretch Tax Credit for Charitable Giving proposed by Imagine Canada, or an administrative mechanism to provide an extension of the 36-month period announced in the 2014 Federal Budget in which an estate donation can be treated as a gift in a terminal return, for which many in the charitable sector had hoped. Nor was there any follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations (“NPOs”) under subsection 149(1)(l) of the [Income Tax Act](#), and most importantly, there were thankfully no new compliance requirements imposed on charities, as there have been in previous Federal Budgets.

This [Charity Law Bulletin](#) provides a summary and commentary of these and some of the other more significant provisions from Budget 2015 as they affect charities and NPOs.

Anti-Corruption Measures in Budget 2015

Sean S. Carter and Terrance S. Carter

Included in the federal [Economic Action Plan 2015](#) (“Budget 2015”) that was introduced into the House of Commons on April 21, 2015 (see [Charity Law Bulletin No. 363](#) for more details) were several proposed amendments dealing with “modernizing government.” Among these modernizing provisions, Budget 2015 proposes to introduce a new government-wide integrity framework for its procurement and real property transactions to ensure that the government does business with “ethical” suppliers in Canada and abroad. The purported goal of the revisions is to create an open, fair and transparent procurement

process that delivers the best value to Canadians, while being consistent with best practices abroad and ensuring suppliers due process. The specific structure of this new framework has not yet been revealed, though this announcement comes in the wake several large investigations of major contractors with the Canadian government for, among others things, corruption-related offences (which many include bribery).

Protecting against this type of corruption has been a stated cornerstone of Public Works and Government Services Canada (“PWGSC”), which is the main government department engaged in procurement and real property transactions for the federal government. PWGSC relies on an “[Integrity Framework](#)” made up of policies, procedures and governance measures to ensure fairness, openness and transparency. The offences covered under the Integrity Framework include money laundering and bribing public officials. As of March 1, 2014, the Integrity Framework was [enhanced](#) to include new provisions including a blacklist period of 10 years following a conviction or guilty plea, meaning that convicted companies would be ineligible to obtain PWGSC contracts and real property transactions for 10 years from the date of conviction (in Canada or other jurisdictions). Several major companies that are being investigated under these new provisions have complained that the Integrity Framework is too rigid and expansive; the blacklist applies for too long a period, there is no appeal process or carve-out for good conduct following an offence, and companies which have been convicted in international jurisdictions are incorrectly treated as if they had been convicted under Canadian law.

These changes proposed in Budget 2015 will likely have a broad impact on federal legislation that deals with anti-corruption in Canada, including Canada’s [Corruption of Foreign Public Officials Act](#) (the “Act”), which now also affects charities and not-for-profits. Currently, provisions such as section 3(1) of the Act prohibit bribery of foreign public officials when the bribe is intended “to obtain or retain an advantage in the course of business.” The violation of anti-corruption laws such as these can result in severe consequences, including criminal liability, the possible loss of charitable status, and the potential for personal liability on behalf of directors. As the proposed amendments in Budget 2015 are implemented, charities and not-for-profits doing work domestically, including those applying for Canadian government grants, as well as those working outside of Canada, will need to be cognizant of how this government-wide integrity framework will be structured and how it may affect their operations, if not immediately, then as other anti-corruption measures may be changed to be consistent with the new framework.

CRA News

By Ryan M. Prendergast

Charities Program Update — 2015

On April 9, 2015, the Charities Directorate released its third installment of the [Charities Program Update](#) (the “Program Update”), which updates charities and the charitable sector on the Charities Directorate’s recent programs and activities. The Program Update includes information on outreach and education initiatives, such as two new CRA guidances; compliance approaches, including the results of the 845 audits completed by the Charities’ Directorate; continuance under the [Canada Not-for-profit Corporations Act](#), and the new Charities IT Modernization Project. This Update is particularly noteworthy because of the details that it provides on the political activity audit program.

The Program Update states that the Charities Directorate recently finished its first full year of annual return reporting with the new political activities schedule (Schedule 7 in [Form T3010, Registered Charity Information Return](#)). Schedule 7 includes a line for charities to identify how they carry out political activities. Internet activity, media releases, and conferences/workshops/speeches or lectures were the top three methods of carrying out political activities.

The Program Update concludes with a discussion of the Directorate’s political audits. It indicates that of the 60 charities that have been selected for political activity audits, 2 have purposes of relieving poverty; 14 have purposes of advancing education; 7 have purposes of advancing religion; and 37 have other purposes beneficial to the community including areas such as animal welfare, upholding human rights, protecting the environment, international development, and promoting health. The Program Update did not indicate a specific breakdown of the purposes of these 37 charities. As of March 31, 2015, 21 political audits had been completed, 28 were underway and 11 had yet to begin. Of the completed audits, six charities received education letters, 8 received compliance agreements, 5 received notices of intention to revoke, one chose to voluntarily revoke and one was annulled.

CRA Releases Updated T4033 — Registered Charity Information Return

On April 2, 2015, CRA released an updated [T4033 Completing the Registered Charity Information Return](#) (the “T4033”). This version of the T4033 is meant to be used to help complete [Form T3010, Registered Charity Information Return](#), which was last updated on January 7, 2015 and [Form TF725, Registered Charity Basic Information Sheet](#). Charities with a fiscal period ending on or after January 1, 2015 should use this guide. While the updated T4033 does not indicate changes made as a result of the

update, as has been done in prior years, the revised T4033 now includes information about CRA's electronic mailing list and the first-time donor's super credit.

CRA Releases Updated T2046 — Return Where Registration of a Charity is Revoked

On April 13, 2015, CRA released an updated [T2046 — Return Where Registration of a Charity is Revoked](#). Registered charities that are required to pay the revocation tax after their registered status is revoked, or after they voluntarily give up their registration, must complete this form.

CRA Releases Updated Income Tax Folio S3-F9-C1: Lottery Winnings, Miscellaneous Receipts, and Income (and Losses) from Crime

On April 3, 2015, CRA released an updated [Income Tax Folio S3-F9-C1: Lottery Winnings, Miscellaneous Receipts, and Income \(and Losses\) from Crime](#). This Tax Folio was first released on December 9, 2014. It addresses the tax treatment of gifts and voluntary payments. The amended paragraphs refer to the civil law definition of gift. CRA recently referred to this Tax Folio in a letter stating its opinion on the tax treatment of funds raised through crowdfunding. See [Crowdfunding — CRA's Approach and Tax Implications](#) below.

CRA Updates RC59 Business Consent form

In late 2014, CRA updated [RC59 Business Consent](#) to require additional information in Part 5 — Certification. Part 5 now asks for further information about the individual signing the form, including whether they are an owner, corporate director, trustee, or individual with designated authority.

Legislative Update

By Terrance S. Carter

Bill C-51 Moves to Report Stage in House of Commons

Bill C-51, the much debated [Anti-terrorism Act, 2015](#), was referred to the Standing Committee on Public Safety and National Security on February 23, 2015, following Second Reading in the House of Commons. The Standing Committee reported Bill C-51 with amendments made to the wording of Clauses 2, 11, and 42. Bill C-51 reached Report Stage as of April 24, 2015.

Among the relevant changes proposed in the amendments by the Committee was the removal of the term "lawful" from line 29 of Clause 2, which, in describing an "activity that undermines the security of Canada," previously stated that "[f]or greater certainty, it does not include *lawful* advocacy, protest, dissent, and artistic expression." The inclusion of the term "lawful" in this definition had previously

garnered criticism for potentially unfairly targeting many groups and individuals engaging in advocacy, protest, dissent and artistic expression, including civil disobedience and wildcat strikes.

A discussion of the impact of Bill C-51 on charities and not-for-profits, as the Bill was originally drafted, has been previously outlined in [Anti-Terrorism and Charity Law Bulletin No. 39](#).

Intern Protection Act Defeated at Second Reading

On April 22, 2015, the House of Commons voted down Bill C-636, [Intern Protection Act](#) (the “Act”) at Second Reading. The Act proposed to amend the [Canada Labour Code](#) so that unpaid interns would qualify under the definition of an employee, and as a result, the Act would have extended workplace protections currently offered to regular employees to interns, whether paid or unpaid. Implementation of the Act would have also included added protections for interns with regard to sexual harassment and workplace safety.

The Act, if passed, would have had a significant impact on charities and not-for-profits, which are affected by the *Canada Labour Code* in many of the same ways that a for-profit organization is affected, and at times even more so, when taking into consideration their widespread reliance on volunteers and interns.

Saskatchewan Allows “Striptease” Only For Charitable or Community Causes

On January 1, 2014, the Saskatchewan provincial government implemented liquor regulations as part of greater legislative and regulatory changes made by the Saskatchewan Liquor and Gaming Authority (“SLGA”). These changes included the allowance of “striptease and wet clothing contests” in adult-only liquor permitted establishments. However, in March 2015, Saskatchewan Premier Brad Wall announced that the provincial government had reversed its decision to allow licensed striptease clubs in the province. Following this announcement, the SLGA updated its [Alcohol Control Regulations, 2013](#) (the updated Regulations are pending posting) with one exception granted for charitable and community causes.

The revised regulations will now allow striptease entertainment only in places such as theatres, casinos and exhibition halls, and only once a year, with a Special Occasion Permit. This exception is created in order to accommodate fundraising events that include striptease. In order to qualify for the exception, organizers will need to apply through the SLGA, and the event must be in support of a charitable or community cause. The charitable or community cause must also be publically identified in advance of the event, and the charity or community beneficiary must agree to its association with the event.

Corporate Update

By Theresa L.M. Man

British Columbia *Societies Act*

The long awaited new British Columbia [Societies Act \(Bill 24\)](#) received third reading in the legislature on April 22, 2015. Bill 24 was introduced for first reading on March 25, 2015. If passed, the new *Societies Act* will replace the current [Society Act](#), which governs approximately 27,000 societies. The current *Society Act* was enacted in 1977. The modernization of the incorporation and governance framework for non-profit corporations is a welcome change, following recent modernization brought by the federal *Canada Not-for-profit Corporations Act* and the Ontario *Not-for-Profit Corporations Act, 2010*, which the sector is still waiting to be proclaimed.

The proposed *Societies Act* is the result of a review by the B.C. Ministry of Finance in 2009, the release of a discussion paper in December 2011, the release of the [Societies Act White Paper: Draft Legislation with Annotations](#) in August 2014, and a roundtable discussion with stakeholders in January 2015. Once the new *Societies Act* is proclaimed, a pre-existing society must transition under the new Act within two years by filing a constitution, by-laws (consolidated into a single set of bylaws) and a statement of directors and registered office of the society.

Alberta Not-for-profit Corporate Legislation Reform

Alberta is also proposing the creation a new act to replace its current *Societies Act* and *Companies Act*. The deadline to submit comments on the Alberta Law Reform Institute's [Non-Profit Corporations — Report for Discussion](#) is May 1, 2015. The report indicates that the current legislation has not kept pace with the non-profit sector. It indicates that the current legislation should be updated to allow non-profits to accomplish their objectives; to clearly articulate the roles and responsibilities of directors and members; and to balance the requirements and the ability to comply. Overall, the report makes 62 recommendations in relation to governance of not-for-profit corporations, including, incorporation, membership, management and financial reporting. The report was released after consultation with stakeholder representatives and experts in the sector. Comments may be submitted by fax, mail, email or [online](#).

Modernizing Canada's Corporate Governance Framework

The federal government, through [Economic Action Plan 2015](#) ("Budget 2015"), proposes to modernize Canada's federal corporate governance framework by increasing participation in corporate leadership, improving shareholder democracy and communications, strengthening corporate transparency and

reducing the regulatory burden on Canadian businesses. The changes are proposed to be implemented through amendments to the [Canada Business Corporations Act](#) (“CBCA”). Related statutes governing cooperatives and not-for-profit corporations will also be amended in order to coordinate with these proposed amendments.

Among the goals proposed by these amendments are recognizing that increasing opportunities for women to serve on corporate boards and in leadership roles makes good business sense. This will be achieved by amending the CBCA to promote gender diversity among public companies, using the “comply or explain” model of disclosure currently required for TSX-listed companies and by most provincial securities regulators. It is interesting to note that in *Economic Action Plan 2012*, the government announced an Advisory Council to examine ways to increase the representation of women on corporate boards of directors. The Advisory Council for Prompting Women on Boards released its report in June 2014, [Good For Business: A Plan to Promote More Women on Canadian Boards](#), which highlights how the public and private sectors can increase the representation of women on boards, including the recommendation to “institute a ‘comply and explain’ approach for moving publicly traded companies towards an identified goal within published annual reports, with an explanation of results or lack thereof.”

As well, amendments will also be proposed to modernize director election processes and communications with shareholders and to strengthen corporate transparency through an explicit ban on bearer instruments, through which the identity of the owner can be concealed.

Crowdfunding – CRA’s Approach and Tax Implications

By Linsey E.C. Rains

On April 1, 2015, Canada Revenue Agency (“CRA”) explained its current approach to and the potential income tax implications of crowdfunding in its response to an urgent taxpayer request (CRA View #2015-057903117). Crowdfunding is a relatively new phenomenon where individuals or groups raise money to fund projects or ventures, typically through the Internet. Individual contributions are usually small and come from a large number of people. Crowdfunding websites such as IndieGoGo, FundRazr, and Kickstarter began appearing in the late 2000s and have grown in popularity since that time. CRA characterizes its understanding of the phenomenon of crowdfunding as “a way of raising funds for a broad range of purposes, using the Internet, where conventional forms of raising funds might not be possible.”

CRA's response indicated the tax consequences of money raised through a particular crowdfunding campaign must be assessed on a case-by-case basis using the specific facts and circumstances of each arrangement to determine whether the funds involved are to be classified as loans, capital contributions, gifts, and/or income. However, CRA did specifically note that

where funds are received by a taxpayer as a result of a crowdfunding arrangement for the development of a new product and that taxpayer carries on a business or profession, CRA generally considers such funds to be taxable income [...] unless it can be shown that the crowdfunding arrangement otherwise clearly represents a loan, capital contribution or other form of equity.

Further, if the funds are considered to be taxable income, CRA's response suggests taxpayers would be permitted to deduct "any reasonable costs incurred" with regard to the crowdfunding arrangement.

CRA's response also refers to paragraphs 1.3, 1.4, and 1.5 of "[Income Tax Folio S3-F9-C1: Lottery Winnings, Miscellaneous Receipts, and Income \(and Losses\) from Crime](#)," which was first published on December 9, 2014 and addresses the tax treatment of gifts and voluntary payments. These paragraphs clarify CRA's position that gifts are not taxable to the recipient so long as there is a voluntary transfer of property "without consideration and which cannot be attributed to an income-earning source." Although both the Income Tax Folio and CRA's response are silent on the issue of crowdfunding by charities, presumably funds raised this way could be treated as gifts, i.e. non-taxable, as long as they are made in accordance with CRA's gifting, fundraising, related business, and receipting policies.

Opt-in Versus Opt-out? Federal OPC Comments on Consent

By Sepal Bonni and Terrance S. Carter, [Charity Law Bulletin No. 365](#), April 29, 2015

On April 7, 2015, the Office of the Privacy Commissioner of Canada ("OPC") released PIPEDA Report of Findings #2015-001 "[Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program](#)." This report provides findings from an investigation initiated by the OPC of Bell's advertising program after the OPC received "an unprecedented number of public complaints" shortly after Bell announced, in August 2013, that it would use customers' personal information to enable targeted ads. The main issue on which the investigation focused was whether Bell should be able to use opt-out consent in which individuals are included in the advertising program unless they specifically opt-out, or if express opt-in consent should be used. In this regard, the finding is noteworthy for its extensive discussion of the factors used to determine whether an organization can rely on opt-in or opt-out consent when it collects, uses, or discloses its individuals' personal information. Charities and not-for-profit organizations must be aware of these factors in situations when they engage in commercial activity, such

as the selling, bartering, or leasing of donor, membership, or other fundraising lists. This [Charity Law Bulletin](#) briefly describes PIPEDA's consent requirements and outline what the new Bell report has added to the OPC's understanding of consent, underscoring the importance for charities and not-for-profits which collect, use and disclosure sensitive personal information to adopt an opt-in consent approach.

CRA Examines Tax Exempt Status of a Labour Union

By Ryan M. Prendergast

In a recent CRA View (#2014-0558101E5), Canada Revenue Agency ("CRA") examined the tax implications of profit-generating activities undertaken by a labour union. It did so in response to concerns about whether income earned by a union from commission fees, i.e., a portion of the premiums paid by members to an insurance provider for group life insurance premiums, could mean that the union has a "profit purpose." A related consideration was whether members could benefit from this income if it was made available to them.

These questions arose from the perspective that the labour union achieved its tax-exempt status as a non-profit organization, as defined in paragraph 149(1)(l) of the [Income Tax Act](#) ("ITA"). However, in its letter, CRA stated that the labour union in question more likely achieves its tax-exempt status under paragraph 149(1)(k) of the ITA, and, therefore, does not need to be concerned about the specific profit limitations set out for non-profit organizations. Paragraph 149(1)(k) states that no tax is payable by "a labour organization or society or a benevolent or fraternal benefit society or other." The letter noted that tax-exemption under 149(1)(k) would not in and of itself restrict profit-generating activities, "unless the activity were such that the organization was no longer a labour organization." That said, in relation to a labour union's profit-generating activities, CRA also stated that:

It is our view that the profit-generating activities cannot be the principal activity of the 149(1)(k) entity and must be undertaken for the purpose of achieving its objective of representing employees to ensure favourable working conditions.

In addition, the letter indicated that under 149(1)(k), there is no requirement that members not benefit from the income of the organization. Given the less restrictive approach to revenue-generating activities, and members benefitting from the income of the organization, there may be entities which currently consider themselves to be exempt under paragraph 149(1)(l) as non-profit organizations, which, as a question of fact, may be entitled to exemption under 149(1)(k) if they are a "a labour organization or society" or a "benevolent or fraternal benefit society."

It is interesting to note that, in its response, CRA referenced the proposed subsection 149.01(1) contained in Bill C-377, [*An Act to amend the Income Tax Act \(Requirements for Labour Organizations\)*](#). The Senate completed Second Reading of this Bill on November 25, 2014, and it has since been referred to the Standing Senate Committee on Legal and Constitutional Affairs. Subsection 149.01(1) provides a more detailed definition of a labour organization to include any

labour society and any organization formed for purposes which include the regulation of relations between employers and employees, and includes a duly organized group or federation, congress, labour council, joint council, conference, general committee or joint board of such organizations.

This definition provides the missing link between CRA's reference to a labour union's purpose in the above answer and what is currently included in the ITA's brief reference to the tax-exempt status of labour unions.

Carters Brief on Anti-Terrorism to HoC Finance Committee

By Terrance S. Carter, Nancy E. Claridge and Sean S. Carter

At the request of the House of Commons Standing Committee on Finance (Canada), Carters Professional Corporation (as represented through Terrance S. Carter) has been asked to appear on April 30, 2015 and make a submission on the Committee's study of the cost, economic impact, frequency and best practices to address the issue of terrorist financing both here in Canada and abroad. In its submission, Carters describes that in its experience, charities that operate in the international context want to be compliant with Canada's anti-terrorism legislation, but many find it challenging to do so from a practical context. Two main problems identified are first, charities find the relevant legislation to be overly broad, confusing and difficult, if not impossible, to comply with on a practical basis; and second, charities operating in the international arena generally find that there is a lack of clear rules or guidelines from the Canadian government to assist them in knowing exactly what it is that they should or should not do in order to be compliant with the Canada's anti-terrorism legislation.

In response to the challenges described above, the Carters submission makes recommendations that include developing and implementing "made in Canada" guidelines that will allow charities that wish to be compliant to have clear parameters with what they need to do and what they should not do in order to comply with Canada's anti-terrorism legislation and be able to evaluate their performance. More information regarding this recommendation and others is available in Carters' [*Brief to the Standing Committee*](#) ([*aussi disponible en français*](#)).

SCC Denies Leave to Appeal in Advancement of Religion Case

By Jennifer M. Leddy

On April 23, 2015, the application for leave to appeal the decision of the Federal Court of Appeal (“FCA”) in [*Humanics Institute v The Minister of National Revenue*](#) to the Supreme Court of Canada was dismissed with costs. The Federal Court of Appeal upheld the decision of the Minister of National Revenue not to register the Humanics Institute as a charity. The FCA found that the Humanics Institute’s purposes were broad and vague and the activities in support of its purposes did not advance religion or education in the charitable sense. In particular, the FCA found that the concept of “Oneness of Reality” that was being advanced by the Appellant was too broad and vague. The argument also failed because the Appellant could not point to a “particular and comprehensive system of faith and worship” or body of teachings, an element of the definition of religion set out in the Supreme Court of Canada decision in [*Syndicat Northcrest v Amselem*](#).

Relying on its own decision in [*Fuaran Foundation v Canada*](#) (“*Fuaran*”), the FCA also found the Appellant’s proposed activities were not charitable. It held that building and maintaining a sculpture park is not a targeted attempt to promote religion, as required in *Fuaran*, in which the FCA held that it was insufficient to “simply make available a place where religious thought may be pursued.”

While the appellant argued that it would promote religion by initiating workshops, seminars, and other educational programs, the FCA held that “merely expressing aspirations does not entitle an applicant to charitable status.” The Appellant also failed in its Canadian Charter of Rights and Freedoms claim that refusal of charitable registration infringes its freedom of religion, because the Appellant could not establish that the Minister’s decision objectively, as distinct from subjectively, interfered with its freedom of religion.

Listed Charity Unable to Use Taxpayer Funds for Legal Defence

By Nancy E. Claridge

The Federal Court has determined that the International Relief Fund for the Afflicted and Needy (Canada) (“IRFAN”), a revoked charity, cannot use taxpayer funds to cover the costs of its attempt to challenge the federal government’s April 2014 decision to list the organization as a terrorist entity under section 83.05 of the [*Criminal Code*](#). The decision in [*International Relief Fund for the Afflicted and Needy \(Canada\) v Minister of Public Safety and Emergency Preparedness*](#) was released April 9, 2015.

IRFAN raised the issue in question after its property and assets were frozen as a result of being listed as a terrorist entity. They sought an exemption from the Minister of Public Safety and Emergency Preparedness (the “Minster”) to unfreeze monies held in its lawyer’s trust account to allow payment of legal fees already incurred, as well as an exemption to permit the organization to raise funds to pay for legal services in relation to the listing. In a letter dated November 27, 2014, the Minister allowed the first exemption, but refused to allow IRFAN to raise new funds. IRFAN subsequently commenced an application for judicial review of the Minister’s decision and brought a motion seeking an order to compel the Attorney General of Canada (the “AG”) to pay for its legal costs.

Justice Mactavish held that the motion should be dismissed. To begin, she discussed the requirements of granting a “Rowbotham order,” which requires the AG to remunerate counsel, or an order to advance costs. Both tests require that the party seeking state-funded costs be unable to pay its own legal costs. The burden of proof is on the party seeking the order. Justice Mactavish did not accept IRFAN’s argument that the court should accept its admittedly weak evidence because, as a listed entity, IRFAN has a statutory duty to disclose its assets, and, therefore, the RCMP (and therefore the Minister) is already aware of IRFAN’s impecunious financial position. She emphasized that IRFAN had neither “satisfied the indigency requirement ... nor [had] it demonstrated that it genuinely cannot afford to pay for the litigation.” Justice Mactavish also held that IRFAN had not met the requirements of showing that it was unable to represent itself adequately or find other legal representation, as it had not yet exhausted all potential *pro bono* opportunities. In this regard, she noted that there are a number of other lawyers who are willing to take on cases such as this one on a *pro bono* basis. Further, and for the benefit of other lawyers consulted in the future, she emphasized that Minister’s counsel had “clearly stated on the record that there would be no basis on which to prosecute counsel simply for representing IRFAN in connection with this application” due to its status as a listed entity.

Justice Mactavish’s conclusion, however, makes it clear that litigation involving IRFAN is far from over. She stated that she was “satisfied that the underlying application for judicial review involves an unusual situation implicating new legislation that has not previously been tested,” and, consequently, dismissed the motion “without prejudice to IRFAN’s right to bring a further motion for state-funded costs on better evidence.”

OPC Fact Sheet Released on Collecting Youth Information Online

By Sepal Bonni

On March 25, 2015, the Office of the Privacy Commissioner of Canada (“OPC”) released [*Collecting from kids? Ten tips for services aimed at children and youth*](#), a Fact Sheet of key tips for services aimed at children. Under the [*Personal Information Protection and Electronic Documents Act*](#) (“PIPEDA”), organizations must obtain the informed consent of individuals prior to using, collecting or disclosing personal information. The OPC has consistently viewed personal information relating to youth and children as being of particular sensitivity, though the legislation does not explicitly treat this information separately.

Charities and not-for-profits should be aware that the OPC has stated that children’s personal information should not be collected unless it is absolutely necessary, cautions against inadvertent collection, and states that any agreements regarding the collection of personal information need to be very clear regarding who needs to agree to the terms and conditions; children should not be expected to agree to any agreement and the consent of parents or guardians must be required.

The OPC relied on information from three Reports of Findings issued by the OPC in preparing the OPC’s Fact Sheet. These Reports examined topics including [*a webcam service used by a private daycare centre*](#); [*a social networking site for youth aged 13-18*](#); and [*the privacy practices of an interactive online platform for kids*](#). The results of these Reports are consistent: in order to protect the privacy rights of children, the collection of personal information of children should be minimized, if not eliminated.

The Fact Sheet makes ten recommendations based on the results of the three Reports:

1. Limit, or avoid altogether, the collection of personal information.
2. Be careful about ‘inadvertent’ collection.
3. Have an appropriate retention schedule for inactive accounts.
4. Speak to the specific services being provided to youth.
5. Make sure your users can understand you – or know to engage their parents/guardians.
6. Consider the user experience.
7. Make clear who is agreeing to terms and conditions.
8. Ensure you have proper defaults for the age of your users.
9. Know what is happening on your site.
10. Prevention is preferable to monitoring.

Legislation such as Bill S-4, the [Digital Privacy Act](#), hopes to ameliorate the current state of youth-centric online services collecting children's information, including a proposed provision that aims to enhance the concept of valid consent.

Charities and not-for-profits that are engaged in the collection of youth and children's personal information including but not limited to photographs and videos, should consider the ten recommendations noted above.

Employer Liable For Dismissal and Ont. Human Rights Code Damages

By Barry W. Kwasniewski, [Charity Law Bulletin No. 364](#), April 29, 2015

[Bray v Canadian College of Massage and Hydrotherapy](#) ("Bray"), a recent decision from the Ontario Superior Court of Justice (Small Claims Court), illustrates what can go wrong if an employer attempts to unilaterally impose workplace related changes on an employee after that employee returns to work following a leave of absence, such as a pregnancy or parental leave. Additionally, it underscores that employers cannot treat employees differently based on grounds protected by the Ontario's [Human Rights Code](#) (the "Code"). In his decision dated January 31, 2015, Deputy Judge Winny broadly canvassed the law on constructive dismissal, damages in lieu of notice, and discrimination, as well as aggravated and punitive damages. Deputy Judge Winny consistently found in favour of the plaintiff. Although the plaintiff had limited her claim to \$25,000, because it was brought in Small Claims Court, Deputy Judge Winny assessed total damages for reasonable notice, discrimination, and punitive damages at \$42,700. He therefore awarded the plaintiff \$25,000 plus interest. Although *Bray* was decided in Small Claims Court, the decision has important lessons for employers in Ontario, including charities and not-for-profits, which will be reviewed in this [Charity Law Bulletin](#).

Ontario Budget Short on New Announcements for Charities and NPOs

By Esther S.J. Oh

On April 23, 2015, The Honourable Charles Sousa, Minister of Finance, tabled [Ontario Budget 2015 Building Ontario Up](#) (the "Budget"). This Budget takes a conservative approach in order to meet the stated goal of eliminating the deficit and returning to a balanced budget by 2017–2018. It includes tight controls on education and health care spending and the Budget caps spending on provincial programs to a minimal growth rate of 0.9 percent until 2018. Due to the cap on program spending, most items of

interest in the Budget were previously announced. Charities and not-for-profits in Ontario will, therefore, be hard-pressed to find any significant items in the Budget.

Some items of interest for charities and not-for-profits include:

- The MaRS Centre for Impact Investing will manage a new \$1 million fund on behalf of Virgin Unite (the non-profit arm of the Virgin Group) to support early-stage social enterprises. This fund has been developed with the goal of raising up to \$5 million in additional investments. This was previously announced in December 2014.
- The provincial government will contribute \$4 million to support 11 social finance organizations through the Social Enterprise Demonstration Fund. The recipient organization will use the funds to provide loans or grants to accelerate the growth of early-stage social enterprises. This was previously announced in February 2015.
- The provincial government will double the Seniors Community Grant Program, which encourages non-profit initiatives to promote greater social inclusion, volunteerism and community engagement for seniors, to \$2 million per a year.
- The income eligibility threshold for low-income families to access legal aid is being raised through a series of scheduled increases. The first two increases took place on November 1, 2014 and April 1, 2015. When these increases are fully implemented, they will double the number of low-income individuals with access to legal aid. Prior to this development, the income eligibility threshold had not been increased since the 1990s.
- The \$810 million investment in the community and developmental services sector, previously announced in the 2014 Ontario Budget, is now supporting more than 600 non-profit delivery partners across Ontario that provide services to people with developmental disabilities. One particular focus is promoting employment opportunities for individuals with developmental disabilities.
- Ontario will parallel the new measures introduced in the 2014 Federal Budget regarding the taxation of trusts and estates. This includes “paralleling the federal approach of applying the highest PIT [personal income tax] rate to all trusts, with some exceptions, in 2016.” In addition, the Ontario tax credit rate for charitable donations over \$200 will be raised to 17.41 percent for top-rate trusts. This change is consistent with the maximum benefit of the credit for individuals who pay the Ontario surtax.

The Budget also notes that the government plans to carry out a comprehensive review of Ontario's corporate and commercial statutes to ensure those statutes are modernized and reflect the current needs of business and other corporations. In particular, the Budget states that "as an early priority, the government will take steps to enable the proclamation of the Ontario *Not-for-Profit Corporations Act, 2010*." As described in previous Charity Law Updates, the Ontario [Not-for-Profit Corporations Act, 2010](#) is not expected to come into force before 2016.

Alberta's Charitable Donation Tax Credit No Longer to be Reduced

By Jacqueline M. Demczur

On April 21, 2015, Alberta Premier Jim Prentice announced the cancellation of his government's plan to reduce the charitable donation tax credit (the "CDTC"). In 2007, the CDTC was enhanced from 12.75% to 21% on total donations over \$200.

The plan to reduce the CDTC was originally proposed by the Alberta government in order to save approximately \$90 million in revenue losses per year. It was originally proposed in Alberta Budget 2015 on March 26, 2015, but subsequently reversed less than one month later in order to maintain the credit at its current level. While the cut to the CDTC was among several austerity measures introduced in Alberta Budget 2015, including spending cuts and tax hikes on goods including gasoline, it has been the only one to date on which the government has subsequently decided to back track.

This decision is made in the wake of [Tax Expenditures and Evaluations](#) a release by the federal Department of Finance which includes an evaluation of the federal charitable donation tax credit (the "Report"). Although the Report does not arrive at a firm conclusion regarding the price effectiveness of this tax credit, it does state that international studies show that tax incentives similar to the Canadian donation tax credit "are likely effective in encouraging individuals to donate more." The Report also states that the current Canadian studies in this area are insufficient to draw definitive conclusions. For more discussion of this Report, see our March 2015 [Charity Law Update](#).

Workplace Inspection Blitz in Ont. to Target 'Precarious Employment'

By Barry W. Kwasniewski

On April 1, 2015, the Ontario Ministry of Labour [announced](#) that throughout 2015 it will be coordinating workplace inspection blitzes, focussing on the importance of workers' rights under both the [Occupational Health and Safety Act](#) ("OHSA") and the [Employment Standards Act, 2000](#) ("ESA").

These “blitzes” will be province-wide and sector-specific. From May–July 2015, one of the focus areas will be “precarious employment,” which, amongst other business types, includes fitness and recreation centres and the recreation industry in general. The recreation industry is likely being targeted at this time because it typically hires a large number of part-time and temporary summer employees. This blitz is, therefore, particularly important for charities and not-for-profits who engage in work that would fall within this sector.

In order to prepare for a potential workplace inspection, these organizations should be up-to-date on their understanding and application of core ESA standards, including: wage statements, unauthorized deductions, record keeping, hours of work, eating periods, overtime pay, minimum wage, and public holiday and vacation pay. Employers should remember that part-time employees are covered under the ESA, and therefore are entitled to such things as public holiday pay. Employers should also be aware that as a result of the [Stronger Workplace for a Stronger Economy Act, 2014](#), the OHSA was recently amended to include unpaid individuals such as interns, co-op students, and potentially volunteers in its definition of “worker”. This means that a blitz looking at worker’s rights under the OHSA will also include treatment of such individuals.

In addition to announcing the blitz schedule, it is also noteworthy that in February 2015, the Ontario Ministry of Labour [announced](#) that it will be launching public consultations on how to amend the ESA and the [Labour Relations Act, 1995](#) to best protect workers in Ontario’s changing economy. This review is expected to last 18 months. All employers, including charities and not-for-profits, should remain up-to-date on the various pieces of legislation that apply in the context of their specific workplace.

UK Law Commission Requesting Consultation on Technical Issues in Charity Law

By Esther S.J. Oh

On March 20, 2015, the Law Commission, a UK body established by the [Law Commissions Act 1965](#) for the purpose of promoting the reform of the law, published a consultation paper entitled [Technical Issues in Charity Law](#). The paper analyzes various issues in charity law and makes provisional proposals on how the law should be reformed. The topics covered by the paper include changing purposes, amending governing documents, applying property *cy-près*, the use of permanent endowments payments to charity trustees and other non-beneficiaries and the powers of the Charity Commission (the charity regulator in the UK). The Law Commission is inviting responses on the questions raised in the consultation paper

until July 30, 2015. The paper will be an interesting review of policy issues and changes being considered in the UK.

Preventing Money Laundering and Terrorist Financing in Australia

By Terrance S. Carter

The Financial Action Task Force (“FATF”) released the [*Mutual Evaluation Report of Australia*](#) (the “Report”) in April 2015, which includes an assessment of Australia’s anti-money laundering and counter-terrorist financing (“AML/CFT”) system. The FATF is an international body responsible for setting and monitoring international standards on combating money laundering and the financing of terrorism. A FATF Mutual Evaluation is a year-long peer-review conducted by an international panel of experts, analyzing the level of compliance with the FATF 40 Recommendations for combating money laundering and terrorist financing and the overall level of effectiveness of a country’s AML/CTF system. The FATF is then able to provide recommendations on how the system could be strengthened.

The Report recognises that though Australia faces a range of risks regarding money laundering and terrorist activity, it has a good understanding of these risks, coordinates domestically to address these risks and has highly effective mechanisms for international cooperation. However, the Report identifies that Australian authorities erroneously focus more on the disruption of predicate crimes, rather than on the subsequent laundering of the proceeds of these crimes, and their confiscation. Therefore, while Australia develops and shares good financial intelligence with law enforcement bodies and authorities, the Report urges that this information should lead to more money laundering and terrorist financing investigations, among other recommendations.

IN THE PRESS

[**Separating Fact From Fiction: Political Activities Revisited**](#) by Terrance S. Carter and Linsey E.C. Rains, *Mondaq*, April 13, 2015.

[**Tax Court Comments on Recordkeeping and Receipting**](#) by Linsey E.C. Rains, *Hilborn Charity eNews*, April 14, 2015.

[**Federal Budget 2015: Impact on Charities**](#) by Ryan M. Prendergast, Linsey E.C. Rains and Terrance S. Carter, *Taxnet Pro Tax Practitioners Forum*, April 20, 2015.

RECENT EVENTS AND PRESENTATIONS

AJAG Professional Development for Accountants hosted a webinar entitled “Preparing for and Surviving a CRA Audit” on Tuesday, April 7, 2015, presented by Terrance S. Carter.

[Imagine Canada Sector Source](#) hosted a webinar entitled “Holding Board Meetings: 101” on Thursday, April 16, 2015, presented by Theresa L.M. Man.

Child Development Resource Connection Peel (CDRCP) hosted a session entitled “Board Duties and Keeping Exempt Status” on April 20, 2015, presented by Theresa L.M. Man

[Canadian Association of Gift Planners Conference](#) was held in Halifax, Nova Scotia on Thursday, April 23, 2015. Terrance S. Carter presented “Pitfalls in Drafting Gift Agreements.”

UPCOMING EVENTS AND PRESENTATIONS

[Georgian College Fundraising and Resource Development](#) will host a session entitled “What You Need to Know but Were Afraid to Ask about Managing Endowed Funds” on Tuesday May 5, 2015, presented by Terrance S. Carter.

[The University of Montreal Faculty of Law](#) is hosting a conference entitled “The Law of Charity” that will be held on Friday May 8, 2015 including a panel discussion on “Charities and Political Activity” with Terrance S. Carter as a presenter.

[Canadian Council for International Co-operation \(CCIC\)](#) will host a seminar on Wednesday May 13, 2015 entitled “The Three Hot Legal Issues for Charities Operating Abroad” presented by Terrance S. Carter.

[Imagine Canada Sector Source](#) will host a webinar entitled “Update on Ineligibility Requirements: CRA’s Policy on Ineligible Individuals” on Thursday, May 21, 2015, presented by Ryan M. Prendergast.

[2015 National Charity Law Symposium](#) is being hosted by The Canadian Bar Association on Friday, May 29, 2015. Terrance S. Carter will present on the topic “Judicial Renderings to Consider.”

BDO LLP is hosting an evening seminar “Managing the Risk” on Wednesday June 3, 2015, with a session entitled “Basic Legal Risk Management for Charities and Non-Profits” to be presented by Terrance S. Carter.

Healthcare Philanthropy: Check-Up 2015, is being co-presented by Carters and Fasken Martineau for the 11th anniversary on Thursday, June 11, 2015. SAVE THE DATE. Two topics to be presented are as follows:

- “Essential Charity Law Update” presented by Theresa L.M. Man
- “Preparing for and Surviving a Charity CRA Audit” presented by Terrance S. Carter

[Institute of Corporate Directors \(ICD\)](#) is hosting a panel discussion entitled “CEO Succession Planning for NFPs” on Thursday, May 14, 2015 at the Sheraton Centre Toronto Hotel.

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Terrance S. Carter – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell 2013), and a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2015). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is Past Chair of the CBA National and OBA Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.



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Nancy E. Claridge – Called to the Ontario Bar in 2006, Ms. Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters 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.



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Anna M. Du Vent – Ms. Du Vent graduated from the University of Ottawa in 2015. Prior to attending law school, Anna completed a Master of Arts in International Development Studies. While in law school, Anna volunteered with the national and local levels of the Canadian Association of Refugee Lawyers. She was also a Research Assistant for the Legal Writing Academy, where she worked with first-year law students to develop their legal writing and research skills. Prior to law school, Anna worked in youth programming and community service organizations in Canada, the Philippines, the Marshall Islands, Peru, and Jamaica.



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Barry W. Kwasniewski - Mr. Kwasniewski joined Carters’ Ottawa office in October, becoming a partner in 2015, 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 opinions and advice pertaining to insurance coverage matters to charities, not-for-profits and law firms.



Theresa L.M. Man – 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* and *Best Lawyers*. She is vice chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA. In addition to being a frequent speaker, Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Canadian Fundraiser eNews* and *Charity Law Bulletin*. She is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell in 2013.



Esther S.J. Oh – 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 and the *Charity Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law*TM Seminar, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



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Linsey E.C. Rains - Called to the Ontario Bar in 2013, Ms. Rains joined Carters Ottawa office to practice charity and not-for-profit law with a focus on federal tax issues after more than a decade of employment with the Canada Revenue Agency (CRA). Having acquired considerable charity law experience as a Charities Officer, Senior Program Analyst, Technical Policy Advisor, and Policy Analyst with the CRA's Charities Directorate, Ms. Rains completed her articles with the Department of Justice's Tax Litigation Section and CRA Legal Services.

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