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# CHARITY & NFP LAW UPDATE

**AUGUST 2018**

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Updating Charities and Not-For-Profits on recent legal developments and risk management considerations

# AUGUST 2018

## SECTIONS



## HIGHLIGHTS

# RECENT PUBLICATIONS AND NEWS RELEASES

## Ontario Decision is a Game Changer for Charities and Political Activities

By Jennifer M. Leddy & Terrance S. Carter

On July 16, 2018, in a decision, *Canada Without Poverty v AG Canada* ("CWP Decision"), that impacts all Canadian registered charities, the Ontario Superior Court of Justice struck down the provisions of the *Income Tax Act* ("ITA") restricting the amount of non-partisan political activities that registered charities may undertake on the grounds that the provisions infringed the charity's right to freedom of expression guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

The Government has appealed the CWP Decision, citing errors of law. Irrespective of the outcome of the appeal, the decision will have a significant impact on the public advocacy of charities for changes in law and policy because the Government has indicated in a joint statement by the Minister of Revenue and the Minister of Finance on August 15, 2018 that the appeal will "not change the policy decision the Government intends to take with respect to the removal of quantitative limits on political activities."

Although a full review of the court's *Charter* analysis is beyond the scope of this *Charity & NFP Law Bulletin*, what follows is a brief summary of the court's findings in the CWP Decision, as well as the Government's undertaking to amend the legislation and policy on political activities.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 425.

## Legislation Update

By Ryan M. Prendergast

### Draft Tax Legislative Proposals Released

On July 27, 2018, the Department of Finance Canada released draft legislative proposals for public consultation relating to several areas of tax. In particular, the Department released Legislative Proposals Relating to Income Tax and Other Legislation ("Draft Proposal"), along with accompanying explanatory notes. The Draft Proposal contains the amendments to the ITA that were announced in Budget 2018 and outlined in *Charity & NFP Law Bulletin* No. 417. Of interest to charities and not-for-profits, the Draft Proposal includes proposed changes to the reporting obligations under section 150 of the ITA, which outlines requirements for tax returns and filing dates for taxpayers, including trusts. Newly proposed subsection 150(1.2) would require express trusts that are resident in Canada to file a tax return, even where

they are excepted from doing so under subsection 150(1.1), but would provide an exception for trusts that are registered charities or non-profit organizations from these requirements. These proposals are open for public comments until September 10, 2018. Those interested may send their comments to fin.legislation-taxation-legislation-taxation.fin@canada.ca.

**Amendments Passed for Immigration and Refugee Protection Regulations, SOR/2002-227**

Amendments to the *Immigration and Refugee Protection Regulations* ("Regulations") were published in the *Canada Gazette* on June 22, 2018. Of interest to charities is the expansion of parties who are exempt from paying fees for the collection of biometric information under subsection 315.1(2) of the Regulations for temporary resident visas, study permits, or work permits. Under these amendments, a person seeking to work in Canada for a religious or charitable organization will no longer be required to pay the biometric fees under section 10.01 of the *Immigration and Refugee Protection Act* ("IRPA"), as long as he or she will be working without remuneration. Section 10.01 of IRPA was introduced through the *Economic Action Plan 2015 Act*, No. 1 and is not currently in force, but will come into force on a day to be fixed by order of the Governor in Council. Likewise, the amendments to the Regulation will come into force on the same day that section 10.01 of IRPA comes into force, or if registered at a later date, on the date of registration.

## Corporate Update

By Theresa L.M. Man

**New Online Filing Service for Registered Intermediaries Available**

Corporations Canada announced on June 26, 2018, that it is now providing an online service for registered intermediaries to file applications for certain exemptions under the *Canada Business Corporations Act* and the *Canada Not-for-profit Corporations Act* ("CNCA"). In this regard, Corporations Canada's website indicates that CNCA corporations may seek approval for exemption from nine specific CNCA requirements, such as authorization to extend the time for calling an annual meeting. Instead of paper filings, the new service allows registered intermediaries to apply online. Online applications must include a cover letter (which may be typed directly into the relevant field online), in addition to a single PDF file that includes a statement of facts, arguments, a draft exemption order, and any other relevant documents. The online service allows the application examiner to follow up directly with the requestor. The requirements that must be met for an exemption to be granted have not changed with this new online service.

**British Columbia Bill M 216, *Business Corporations Amendment Act, 2018* Passes Second Reading**

On May 17, 2018, British Columbia Bill M 216, *Business Corporations Amendment Act, 2018* ("Bill M 216") passed second reading. Bill M 216, which is a private member's bill, seeks to amend the British Columbia *Business Corporations Act* by inserting a new Part 2.3 to create a new category of corporations known as a "benefit company." If passed, BC will be the first jurisdiction in Canada to provide a legal framework for "benefit companies" to pursue social and environmental goals, rather than just profit. This legislation is intended to ensure mission-driven companies can stay true to their mission as they grow, while allowing them to attract capital by providing investors with certainty about the mandate of the company. Key features of a benefit company include the following:

- A benefit company must include a benefit statement in its notice of articles that it "has purposes that include conducting its business in a responsible and sustainable manner and promoting one or more public benefits." The term "public benefit" is defined to mean a "positive effect, including, without limitation, of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature, for the benefit of" (a) a class of persons (other than the company's shareholders), a class of communities or organizations, or (b) the environment, such as air, land, water, flora or fauna, or animal, fish or plant habitat.
- A benefit company must also set out a commitment in its articles to conduct business in a responsible and sustainable manner, and to promote the public benefits specified in its articles. This means that it must take into account the well-being of persons affected by the operations of the benefit company, and endeavour to use a fair and proportionate share of available environmental, social and economic resources and capacities.
- A benefit company must include "Benefit Company" or the abbreviated "B.Co." in its name.
- Its directors and officers must act honestly and in good faith with a view to (i) the best interests of the persons who may be materially affected by the company's conduct, and (ii) the promotion of the public benefits specified in the company's benefit provision.
- It must publish an annual benefit report that details how the benefit company demonstrated their commitment to responsible and sustainable conduct and to benefiting the public interest.

- Its shares must include a conspicuous statement of the company's status as a benefit company. It may not amalgamate with another corporation unless the amalgamation results in an amalgamated benefit company.

## Guidance on Social Investments Released by the Ontario PGT

By Terrance S. Carter & Luis R. Chacin

The Ontario Public Guardian and Trustee ("PGT") has recently released its "Charities and Social Investments Guidance" (the "Guidance"). The Guidance sets out the PGT's interpretation of the social investments framework introduced by the *Charities Accounting Act* ("CAA"), as amended by Bill 154, *Cutting Unnecessary Red Tape Act, 2017* on November 14, 2017. The stated purpose of the Guidance is "to provide information that charities need to be aware of if they make a social investment".

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 426.

## Federal Court Ruling May Affect Art Donation Exports

By Ryan M. Prendergast

The Federal Court of Canada released its decision in *Heffel Gallery Limited v The Attorney General of Canada* on June 12, 2018, which clarified the criteria by which an object of fine art falling within Group V of the Canadian Cultural Property Export Control List ("Control List") may be exported out of the country. For exports, section 40 of the *Cultural Property Export and Import Act* ("Act") requires an export permit for objects included on the Control List. Section 11 of the Act outlines certain criteria that a potential export must meet in order for a permit to be issued. The criteria under paragraphs 11(1)(a) and (b) of the Act is the same criteria required to meet the definition of "total cultural gifts" under subsection 118.1(1) of the ITA, which forms part of "total gifts" for tax purposes under subsection 118.1(1).

In this case, Heffel Gallery Limited ("Heffel Gallery"), an art auction house operating throughout Canada, had applied to the Canadian Cultural Property Export Review Board ("Board") for an export permit to ship a painting to London, UK. The Board denied the application on grounds that the painting did not meet the export permit requirements under section 11 of the Act, as it was of "outstanding significance" and "national importance," pursuant to subsections 11(1) and (3). Heffel Gallery brought an application for judicial review to the Federal Court of Canada, which declared the Board's decision as unreasonable.

The court held that the Board had adopted an overly broad interpretation of subsection 11(1) of the Act by focusing solely on the first requirement for "outstanding significance" under paragraph 11(1)(a), and automatically treating any artwork meeting this threshold as if it also satisfied the requirement for "national importance" under paragraph 11(1)(b). In concluding that the Board's decision was unreasonable, the court emphasized that "outstanding significance" and "national importance" must be determined separately.

Importantly, the court held that an artwork that is "of such a degree of national importance that its loss to Canada would significantly diminish the national heritage" pursuant to paragraph 11(1)(b) of the Act must have a direct connection to Canada, and must "at a minimum … have a significant impact on Canadian culture." This significance must be "particular to Canada and Canadians" as opposed to an object that merely provides for a study into the multicultural environment in Canada. In this case, the court held that the painting in question did not meet this high threshold of "national importance." The court held that the Board had incorrectly focused only on the issue of "outstanding significance" under paragraph 11(1)(a) of the Act and failed to consider whether the artwork was also of "national importance." As a result, the court held that the Board's decision that the artwork was of national importance was unreasonable.

The stringent interpretation of the test for outstanding significance and national importance under section 11 of the Act will likely impact registered charities with respect to tax receipting. Under the ITA, registered charities may issue a tax receipt to donors for gifts of certified cultural property, which are given such status pursuant to the section 11 test. Because the threshold for the national importance criteria has now been raised to require a direct connection to Canada, fewer gifts will meet the test for certified cultural property, thereby decreasing the number of cultural property items that will be eligible for tax receipts. Given that this tax incentive was established to encourage the transfer of cultural property from private to public collections, the decreased availability of this tax incentive will likely negatively impact the quantity and quality of donations made. The decision has since been appealed by the Attorney General of Canada to the Federal Court of Appeal. While the appeal is pending, the Government of Canada has released a practice notice regarding applicants for certification of cultural property outlining that applicants can either satisfy the national importance test established in this case or request a deferral from the Board until a decision has been made on the appeal of this case. However, charities that receive gifts of cultural property will want to closely monitor the status of the appeal for further developments in the law.

## Excess Corporate Holdings of Private Foundations under *Alter-Ego* Trusts

By Theresa L.M. Man

On May 8, 2018, the Canada Revenue Agency ("CRA") responded to a question at a Roundtable regarding the application of excess corporate holdings rules (no. 2018-0745861C6). Specifically, the question addressed whether subsections 188.1(3.3) and (3.5) of the ITA would apply where a private foundation receives the residue of an *alter-ego* trust after the death of the life interest beneficiary.

By way of background, the excess corporate holdings regime was introduced for private foundations to limit potential opportunities for persons connected with a foundation to use their own and the foundation's shareholdings for their own benefit. The rules limit a private foundation's share ownership that also takes into account the holdings of any relevant person (defined in subsection 149.1(1) to generally mean a person not dealing at arm's length with the foundation). The rules in section 149.2 of the ITA provide that a private foundation must divest itself of excess shares if the private foundation and any non-arm's length persons ("relevant persons") collectively own more than 20% of any class of a corporation's shares. Failure to do so can result in loss of charitable status for the private foundation. Subsection 188.1(3.3) of the ITA sets out conditions in which the subsection 188.1(3.5) provisions for avoidance of divestiture would apply to a private foundation.

Further, paragraph 149.2(5)(b) allows a private foundation five years to meet the divestment obligation if the excess is the result of a donation by way of a bequest. The term, "bequest", is not defined in the ITA but is defined in *Black's Law Dictionary* as "the act of giving property by will or property disposed of in a will." The CRA acknowledges that paragraph 149.2(5)(b) will apply in a situation where the private foundation acquires the shares as a beneficiary under an individual's will. For tax and other estate planning reasons, an individual will transfer shares to a so-called life interest trust as a will substitute and such trusts generally include an *alter-ego* trust and a joint spousal and common-law partner trust as well as spousal trusts.

As such, given that the *alter-ego* trust may be considered a will substitute for an individual and results in the acquisition of shares by the private foundation in circumstances substantially similar to that which would occur under a will (in that the individual has all of the use of the freeze shares while he is alive and the shares are distributed to the private foundation after his death), the CRA was asked to comment on whether the private foundation will be subject to subsection 188.1(3.5) such that it will be treated as owning a portion of the freeze shares.

The CRA was of the view that whether subsections 188.1(3.3) to (3.5) apply to a particular situation is a mixed question of fact and law that can only be determined following a review of the circumstances and all underlying documentation with respect to the situation. However, given the broad nature of these provisions, where a private foundation is a beneficiary under an alter-ego trust, consideration must be given to subsections 188.1(3.3) to (3.5) for the purposes of determining the private foundation's excess corporate holdings percentage and divestment obligation percentage for a taxation year.

## Court of Appeal: Termination Clause Excludes Common Law Damages

By Barry W. Kwasniewski

On June 22, 2018, the Ontario Court of Appeal released its decision in *Amberber v IBM Canada Ltd.*, which case dealt with the enforceability of a termination clause within a written contract of employment. In this case, the employer, IBM Canada Ltd., successfully appealed a summary judgment where the motion judge held that the termination clause was unenforceable in precluding an employee from claiming common law damages regarding reasonable notice. The Court of Appeal, in reversing the summary judgment order and declaring that the clause was in fact enforceable, clarified certain contract interpretation principles pertaining to the termination clause. Of particular importance to the construction and interpretation of contracts was the aspect of the decision dealing with the need to read the entire clause as a whole and avoiding ambiguity when interpreting contracts. This decision is relevant to charities and not-for-profits that are seeking to enforce termination clauses in employment contracts with their employees.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 427.

## Federal Court Upholds Privacy of Personal Information Against CRA

By Esther Shainblum

On June 15, 2018, the Federal Court released its decision in *Canada (National Revenue) v Hydro-Québec*, in which the court denied the Minister of National Revenue's ("Minister") request for authorization to receive customer information from Hydro-Québec, notwithstanding the fact that Hydro-Québec was prepared to surrender the information to the Minister. This information would have included the names, addresses, phone numbers and billing dates, among other things, of Hydro-Québec's customers who were paying a business rate for services ("business customers").

The Minister has a broad power to collect information or documents from any person for the purpose of administering and enforcing the ITA under subsection 231.2(1). However this power is subject to subsection 231.2(2) of the ITA, which requires the Minister to first obtain the authorization of a judge if the requested information or documents relate to "one or more unnamed persons." Since the Minister wished to collect information relating to unnamed persons from Hydro-Québec, it brought an application to the court for authorization. The court denied the application on grounds that it did not meet the criteria required for judicial authorization to be granted under the ITA. The court also exercised its judicial discretion to deny the request due to the "practically unlimited scope of the request and a complete lack of consideration for the invasion of privacy."

In its analysis, the court examined the statutory test by which a court may grant judicial authorization under subsection 231.2(3) of the ITA, which requires two conditions to be met: (1) that the person or group to whom the information relates is ascertainable, and (2) that the information is to verify that the person or group is complying with any duty or obligation under the ITA. The court rejected the Minister's interpretation of the ITA provision on the basis that it was overly broad and would enable "an unlimited invasion of privacy." Adopting a strict reading of the ITA test, the court found that "the information and documents that may be required are those that shed light on compliance with the Act of an ascertainable group within the meaning of the ITA". The court held that the "mere identity of the business clients of a public utility does not meet that requirement." Further, the court noted that in determining whether a group is ascertainable, the judge must ensure that "the requested documents be part of a tax audit conducted in good faith, with a genuine factual basis."

The court therefore held that the Minister failed to sufficiently demonstrate either part of the test under subsection 231.2(3). Importantly, it unequivocally stated that, even if the conditions were met, it would have refused to grant judicial authorization because of the extent of the intrusion requested by the Minister. Emphasizing that the court retained discretion to grant authorization whether or not the conditions were met, it held that judicial intervention was required to prevent an "invasion of the privacy of many people".

This case is particularly relevant to the rising concerns with privacy protection and gives some assurance to charities and not-for-profits that the government does not have limitless authority to collect the information of taxpayers. Rather, the court clearly affirms that the public significantly has the right to privacy from the state and in this case held it to be more important than the Minister's request for information under the ITA. Charities and not-for-profits that receive requests from the CRA to collect

information of unnamed persons may therefore be able to deny such requests, and should seek legal advice prior to divesting such information.

## Canadian Presence Not Always Required to Establish Use of Trademark

By Sepal Bonni

On July 25, 2018, in *Dollar General Corporation v 2900319 Canada Inc.*, the Federal Court considered the issue of "use" of a trademark in Canada in association with "retail variety store services" without a physical presence in Canada. This is an important issue for trademark registrants, including charities and not-for-profits, given that once a registration is three years old, any person can request that the registration be expunged *(i.e.,* cancelled) for non-use. If an expungement proceeding is initiated, the trademark owner must furnish evidence of use of the trademark in association with each of the goods and services listed in the registration certificate in accordance with the definition of "use" provided in the *Trademarks Act* ("Act"). If the trademark has not been used in Canada during the relevant period or the requisite "special circumstances" are not presented to excuse the non-use, the Registrar can elect to expunge the registration or amend the registration (*i.e.*, delete the specific goods and services that the trademark has not been used in association with). As a result, it is important for organizations, including charities and not-for-profits, to understand what constitutes "use" of a trademark in Canada.

In this case, the court overturned the decision of the Trademarks Opposition Board ("TMOB") to expunge the DOLLAR GENERAL trademark registration. Dollar General Corporation ("Dollar General") operates brick-and-mortar stores in the USA, but not in Canada. Although Canadian residents can access Dollar General's website and make purchases online, the company does not ship directly to Canada. Instead, consumers in Canada must pay a fee to a third party to ship the goods to Canada. Based on these facts, the TMOB expunged the registration for non-use in Canada in association with "retail variety store services."

In reversing the TMOB's decision to expunge the mark, the court rejected the notion that goods must be shipped directly by the owner to customers in Canada to constitute use of the mark in Canada. In doing so, the court relied on the propositions that the definition of "services" in the Act requires a liberal and broad interpretation and that if members of the public receive a benefit from the activity, the activity is a service. While the court noted the evidence was not perfect, it held that the interactive nature of the website together with the benefit the website provided to Canadians were sufficient to establish "use" within the meaning of section 4 of the Act.

This decision provides some assurance to non-Canadian charities and not-for-profits who do not have a physical presence in Canada that having a website that Canadians can access and benefit from is likely sufficient to demonstrate the requisite evidence of use to maintain trademark registrations in Canada.

While this decision suggests that courts may take a broad interpretation of the definition of "use" in association with services, the court's analysis indicates that the determination is subjective and each case will ultimately turn on its evidence. As such, charities and not-for-profits should be proactive in ensuring that trademark registrations can withstand non-use challenges. This includes ensuring that trademarks are used in accordance with the definition of use provided in the Act and maintaining adequate records of such use. Further, charities and not-for-profits should ensure that trademark registrations cover a broad range of services (*e.g.*, primary, incidental and ancillary services) such that if an expungement proceeding is initiated, some of the services associated with the trademark may be maintained even if others are struck out for non-use. This approach will also avoid the necessity of a costly appeal to the Federal Court if the TMOB cancels a registration certificate for non-use. Lastly, legal counsel should be consulted to ensure that trademark registrations can therefore withstand such non-use challenges.

## Cemetery Case Highlights Need for Good Recordkeeping

By Esther S.J. Oh

On June 6, 2018, the Small Claims Court (Ontario), released its decision in *Abrams v Judean Benevolent & Friendly Society*, which involved a claim for breach of contract with respect to the reservation and purchase of burial plots in the Greater Toronto Area. The plaintiff, Abrams, was an 87 year-old man who had reserved and purchased four side-by-side cemetery plots ("Plots") in 1995 and 1998, respectively, from the defendant, the Judean Benevolent & Friendly Society ("Society"). Abrams was a member of the Society since 1994. The Plots had been purchased for the Abrams family in accordance with Abrams' late wife's wish that she be buried with her husband and their two children beside each other. However, Abrams discovered after the passing and burial of his wife in 2016 that someone else had been buried in the fourth plot which Abrams had earlier assumed belonged to his family. He accordingly sued the Society for $25,000 for breach of contract, loss of peace of mind, mental distress, as well as aggravated and punitive damages, given that Abrams was no longer able to fulfil his late wife's wishes to bury the four family members side-by-side as he had planned.

In support of his claim, Abrams produced a copy of the cheque used to reserve the Plots under the names of himself and his family, a copy of the signed receipt acknowledging his payment for "4 plots side by side at Pardes Shalom Cemetery," and letters from the Society confirming that the four Plots indeed had been reserved for him and his family, specifically naming the four individuals.

In its defence, the Society took the position that its current bylaw, which was enacted in January 2011 ("2011 Bylaw), only allows members of the Society to be buried in the Society's plots, and that since Abrams' son was no longer a member in good standing of the Society for failure to pay membership fees, the reservation for Abrams' son had been cancelled on that basis. However, the Society lacked evidence supporting this position; the Society could not produce the bylaw that was in effect in 1995 and 1998 (when the reservation and purchase of the Plots was made) and the Society did not know what changes were made to the previous bylaws when adopting the 2011 Bylaw. On this issue, the court stated, "In my view, it is not reasonable to give meaning to a 1998 receipt using 2011 by-laws." The court also noted that there was no evidence suggesting that a refund had been given to Abrams for the fourth Plot and that the receipt and letters produced by Abrams pertaining to his purchase of the Plots did not contain any conditions and were interpreted by the deputy judge as "confirming outright entitlements [to the Plots] not contingent on anything."

As a result, the court found that the Society had breached the contract with Abrams, as it was not possible to reserve three additional plots that were beside the deceased wife's plot. Abrams was awarded almost $1,000 for the return of the reservation fee and cost of the fourth plot, $5,000 for mental distress and $1,200 in legal costs.

This case serves as a reminder to charities and not-for-profits that the records of an organization, including past versions of bylaws and documentation relating to the rights of members, should be safely kept so that they can be retrieved in the event that they are later required in the context of a dispute or a legal claim.

## CBA Submits Recommendations for 2019 Pre-Budget Consultations

By Jacqueline M. Demczur

On August 3, 2018, the Canadian Bar Association Charities and Not-for-Profit Law Section ("CBA") provided recommendations to the federal government in response to the government's call for submissions and recommendations on the 2019 Pre-Budget Consultation, as reported in the June 2018 *Charity & NFP Law Update*. The CBA advocated for the modernization of the regime for charities and not-for-profits, for

amendments to the ITA to allow charities and not-for-profits to innovate, conduct business and earn tax-exempt profit in certain circumstances, and for the removal of barriers that restrict registered charities from working with non-registered charities or other not-for-profit organizations in order to maximize the work of the groups.

With regard to modernization of the regime for charities and not-for-profits, the CBA highlighted the federal government's support for social enterprise and social finance initiatives, and stated that a modern regulatory system was not only in line with the government's interests, but that it was needed to allow organizations to work more effectively and promote a sustainable environment within the sector. With regard to amendments to the ITA, the CBA recommended that the ITA should "clarify that charities and not-for-profit organizations must be able to innovate, carry on business activities and earn tax exempt profits, as long as those profits are used for the purposes of the organization and not for the undue benefit of any party or the personal benefit of any director, shareholder or member, directly or indirectly."

The CBA indicated that these changes would benefit charities and not-for-profits by increasing certainty in the area of compliance to the law and decreasing the administrative costs and burden of dealing with compliance issues. This increased efficiency and productivity would in effect not only result in a sustainable regulatory environment for the organizations, but also "significantly increase its contributions to the growth and expansion of Canada's economy." Given that the deadline to submit recommendations for Budget 2019 has now passed, charities and not-for-profits will need to wait until the government's release of Budget 2019, generally done in the spring, to see its impact on the charitable and not-for-profit sector.

## Data Breach Costs in Canada Among the Highest in the World – Ponemon Institute Study

By Esther Shainblum

On July 11, 2018, the Ponemon Institute, LLC published the results of its annual study of the financial impact of data breaches on organizations in its 2018 Cost of a Data Breach Study: Global Overview ("Study"). The Study surveyed IT, data protection and compliance professionals in fifteen countries or regions whose organizations had experienced data breaches over the past year. According to the Study's findings, the cost of data breaches on organizations' bottom lines has continued to rise and more consumer records are lost or stolen every year.

In calculating costs to organizations, the Study broke the cost of a privacy breach into four cost centres: (1) costs related to detection, reporting and escalation of data breaches; (2) costs of notifying the individuals whose data was breached, notifying regulators and carrying out regulatory activities and communications; (3) costs of the post-breach response, including implementing processes to help individuals whose data was compromised and to pay for redress and reparations; and (4) the costs of lost business resulting from the data breach, such as business disruption, system downtime, customer "churn," revenue losses and loss of reputation and goodwill.

The Study found that the average cost of a data breach has increased around the world, with the highest average per capita costs of a data breach being in the United States ($233 USD) and Canada ($202 USD). Canada had the highest direct costs per compromised record, at $81 USD per record, including expenses such as forensic expert costs, legal costs and identity protection services for victims. The United States had the highest indirect per capital cost of a data breach at $152 USD, such as the costs of using organizational resources for breach-related activities as well as the loss of goodwill and customer churn, with Canada in second place at $116 USD. It also found that criminal and malicious attacks cause the most data breaches, with organizations in the United States ($258 USD) and Canada ($213 USD) spending the most money to resolve malicious or criminal attacks on personal data. According to the Study, data breaches resulting from human error or system failure are less expensive to resolve.

The Study identified a number of factors that will affect the cost of a data breach. The top five cost-reducing factors include having an incident response team, extensive use of encryption, business community management involvement, employee training and participation in threat sharing. The top five cost-increasing factors include third-party involvement, extensive cloud migration, compliance failures, extensive use of mobile platforms and lost or stolen devices. Generally, the Study found that organizations that identified and contained data breaches more quickly were able to keep costs lower; costs for organizations that took over 100 days to do so were on average $1 million USD higher than those who took fewer than 100 days. The Study also identified a consistent relationship between the number of records lost and the cost of the data breach. The more records are lost, the higher the cost of the breach.

As data breaches can impact any organization, charities and not-for-profits should review the findings of the Study and of the potential costs to organizations for breaches of personal data. The Study serves as a reminder that the costs of data breaches can be extremely high and that charities and not-for-profits should adopt internal policies to prevent data breaches. Additionally, its outline of the factors that influence these

costs may be a useful resource to guide charities and not-for-profits in implementing best practices to decrease costs when responding to data breaches.

## Anti-Terrorism/Money Laundering Update

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

**International Tax Crime Alliance Formed: Joint Chiefs of Global Tax Enforcement**

On July 3, 2018, the CRA announced that tax enforcement authorities from Canada, Australia, the Netherlands, the United Kingdom and the United States have united to combat international tax crime and money laundering. The joint operational group was established as the Joint Chiefs of Global Tax Enforcement ("J5") and was formed in response to a call to action from the Organisation for Economic Co-operation and Development in November 2017 to increase effectiveness in dealing with tax crimes. This call to action sets out ten global principles to effectively fight tax crime and recommends collaboration to create a strategy to address cross-border tax crimes.

The J5 is represented by heads of tax crime and senior officials from the CRA, the Australian Criminal Intelligence Commission and Australian Taxation Office, the Dutch Fiscal Information and Investigation Service, Her Majesty's Revenue & Customs from the United Kingdom and the Internal Revenue Service Criminal Investigation from the United States. Each member of the J5 has also committed one full-time resource to the group and may increase this number depending on the specific projects that are implemented.

Accordingly, the J5 is focused on strengthening their capacity to enforce tax and money laundering laws and will do so by sharing data, technology, implementing new approaches in enforcement and conducting joint operations. The group had their first meeting at the end of June 2018 along with leading experts from each of the members' countries to develop strategies in relation to the enforcement against cybercrime and transnational tax crime. While the J5 has no specific focus on tax crimes and money laundering via the charitable and not-for-profit sector, its findings may have a future impact on Canadian charities and not-for-profits, particularly if they result in increased data sharing and new enforcement procedures in Canada.

## Carters is Pleased to Welcome Luis R. Chacin as a New Associate

Carters is pleased to welcome Luis R. Chacin as an associate. Luis joins Carters after completing his articles with the firm and being called to the Ontario Bar in 2018. He has over nine years of experience in the financial services industry in Toronto and Montreal, and previously worked as legal counsel at the Office of the President and Cabinet in Venezuela. Luis' practice focuses on corporate and commercial law, real estate, and wills and estates.

## Inclusion in Best Lawyers in Canada 2019

Terrance S. Carter, Theresa L.M. Man, and Jacqueline M. Demczur of Carters Professional Corporation were again recognized as leaders in the area of Trusts and Estates Law in the Charity and Not-For-Profit Law subspecialty by the 2018 edition of *The Best Lawyers in Canada*. Terrance S. Carter has been recognized since 2006, Theresa L.M. Man has been recognized since 2012, and Jacqueline M. Demczur has been recognized since 2014.

# IN THE PRESS

**Charity & NFP Law Update – June 2018 (Carters Professional Corporation)** was featured on *Taxnet Pro*™ and is available online to those who have OnePass subscription privileges.

**Special Senate Committee Update** written by Jacqueline M. Demczur was featured in the AFP Ewire on July 18, 2018.

# RECENT EVENTS AND PRESENTATIONS

**Your Association's Brand and Reputation: Why it Matters?** was presented by Sepal Bonni and Terrance S. Carter at the 2018 CSAE Trillium Summer Summit on July 12, 2018 in London, Ontario.

**Legal Issues in Fundraising on Social Media** was presented by Terrance S. Carter on Wednesday July 18, 2018 as the Carters Summer 2018 Carters Charity & NFP Webinar. Handouts and On Demand/Replay are available by clicking the links.

## UPCOMING EVENTS AND PRESENTATIONS

**CPA Ontario Not-for-Profit Conference** will be held on September 11, 2018. Terrance S. Carter will present jointly with Jan Pedder from Ernst & Young LLP on the topic of "Legal Issues in Tax Receipting".

**Association of Treasurers of Religious Institutes (ATRI) Conference 2018** will be held from September 28 to October 1, 2018. Terrance Carter will present jointly with Father Frank Morrisey on the topic of "Canon Law Meets Civil Law in the Operation of Religious Institutes".

**Volunteer Ottawa/Bénévoles Ottawa** will host a session entitled "Legal Check-Up - Duties and Liabilities of Directors and Officers of Charities and Not-For-Profits" presented by Terrance S. Carter in Ottawa on October 17, 2018.

**25th Annual *Church & Charity Law* Seminar™** - Thursday November 8, 2018. Hosted by Carters Professional Corporation in Greater Toronto, Ontario. Guest speakers include **Tony Manconi**, Director General, Charities Directorate, Canada Revenue Agency and **Ken Goodman**, Public Guardian and Trustee of Ontario. Click for Registration and Brochure.

# CONTRIBUTORS

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**Michelle E. Baik**, i.B.B.A., J.D. - Called to the Ontario Bar in 2015, Michelle has joined Carters' Litigation Practice Group. Michelle has broad experience in civil litigation having articled and been an associate with an insurance defence boutique law firm in Toronto. She worked as Legal Counsel for one of the largest banks in Canada. Michelle obtained a degree in International Bachelor of Business Administration from the Schulich School of Business, and her J.D. degree from the University of Windsor. Michelle's practice areas include general civil, commercial and not-for-profit related litigation, administrative law, insurance defence litigation, loss transfer claims, and personal injury litigation.

**Sepal Bonni**, B.Sc., M.Sc., J.D., Trade-mark Agent - Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articled and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance 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 Butterworths, 2018), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

**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 articled 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.

**Luis R. Chacin**, LL.B., M.B.A., LL.M. - Luis was called to the Ontario Bar in June 2018, after completing his articles with the firm. 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 at the Office of the President and Cabinet in Venezuela, where he advised on various areas of law, including government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Corporate and Commercial Law, Real Estate, and Wills and Estates.

**Nancy E. Claridge**, B.A., M.A., L.L.B. – Called to the Ontario Bar in 2006, Nancy 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 & NFP 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.

**Adriel N. Clayton**, B.A. (Hons), J.D. - Called to the Ontario Bar in 2014, Adriel Clayton rejoins the firm to manage Carters' knowledge management and research division, as well as to practice 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*.

**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 *Lexpert* and *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.

**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.

**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 (CCCB). 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."

**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* and *Best Lawyers in Canada*. 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 an executive member of the Charity and Not-for-Profit Section of the OBA and the CBA Charities and Not-for-Profit Law Section. Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS* and *Charity & NFP Law Bulletin*.

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**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. 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 - 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. Ms. Shainblum practices in the areas of charity and not-for-profit law, health law, and privacy law.

**Christina Shum,** graduated from Osgoode Hall Law School in 2018. While attending Osgoode, Christina interned at International Justice Mission where she provided research on bonded labour laws, and summered at CGI where she focused on contractual matters in IT law. She also volunteered as a community mediator and was Vice-President of Osgoode's Women's Network and Co-President of the Osgoode Peer Support Centre. Prior to attending law school, Christina obtained her Bachelors of Music Therapy from the University of Windsor and her Associate diploma in piano performance from the Royal Conservatory of Music.

## ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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