CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW UPDATE

JANUARY 2019

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: ADRIEL N. CLAYTON
AND RYAN M. PRENDERGAST

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

JANUARY 2019

SECTIONS

Recent Publications and News Releases 2
In the Press 16
Recent Events and Presentations 17
Upcoming Events and Presentations 17
Contributors 18

HIGHLIGHTS

“PPDDA” In, “Political Activities” Out: CRA’s New Draft Guidance on PPDDA Open for Comment
CRA News
Legislation Update
- Royal Assent Received for Bill C-86, *Budget Implementation Act 2018, No.2*
- Proposed Amendments to *Immigration and Refugee Protection Regulations*, SOR/2002-227
- British Columbia *Speculation and Vacancy Tax Act* and Regulation 275/2018

Corporate Update
Court Declares Not-for-Profit Cemetery to be a Charitable Trust
Ontario Court Strikes Part of OSPCA’s Special Act for *Charter* Violation
Ontario Bill 66 and O Reg 498/18 Propose Amendments to Employment Legislation
New Raffle Options for Charities in Ontario
Medical Cannabis Exclusion from Benefit Plan Not Discriminatory
More Changes to Trademark Law That Will Impact Charities and NFPs
The CRTC Updates its Website on FAQs about CASL
Draft Guidelines on the Territorial Scope of the GDPR
Final Order Involving the Humboldt Broncos’ Crowdfunding Campaign
Update on Special Senate Committee on the Charitable Sector
- Committee Mandate Extended until September 30, 2019
- Committee Meetings of December 2018

The 2019 Annual Ottawa Region Charity & NFP Law Seminar

Thursday February 14, 2019
Hosted by Carters Professional Corporation in Ottawa, Ontario,
Guest Speakers include **Tony Manconi**, Director General of the Charities Directorate of the CRA,
and **Kenneth Goodman**, Public Guardian and Trustee of Ontario.
Brochure and online registration are available on our website.
Early bird deadline expires on February 4, 2019.

Get on Our Mailing List:
To automatically receive the free monthly *Charity Law Update*,
Click here or send an email to info@carters.ca with “Subscribe” in the subject line.

RECENT PUBLICATIONS AND NEWS RELEASES

"PPDDA" In, "Political Activities" Out: CRA's New Draft Guidance on PPDDA Open for Comment

By Terrance S. Carter and Ryan M. Prendergast

On December 13, 2018, the omnibus Bill C-86, *Budget Implementation Act, 2018, No. 2* ("Bill C-86") received Royal Assent and modified the rules in the *Income Tax Act* ("ITA") concerning "political activities" by registered charities and registered Canadian amateur athletic associations. In doing so, Bill C-86 removed reference to political activities from the ITA, including the quantitative limits on non-partisan political activities in particular, and instead introduced the concept of "public policy dialogue and development activities" ("PPDDAs"). Although the Bill C-86 amendments were well received by the charitable sector, they did not include a definition of PPDDAs. In the wake of the amendments, the Canada Revenue Agency ("CRA") released a substantive and carefully written draft administrative guidance CG-027, *Public policy dialogue and development activities by charities* (the "Draft Guidance") on January 21, 2019, shedding some light on its interpretation of PPDDAs and how it may administer the new rules. Further information on Bill C-86's application to political activities and PPDDAs has also been published by the CRA on a new Questions and Answers webpage, released simultaneously with the Draft Guidance ("PPDDA Q&A"). This *Charity & NFP Law Bulletin* provides a summary of the Draft Guidance and its impact on charities.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 438.

CRA News

By Ryan M. Prendergast

Report on the Charities Program 2016 – 2018

In helping to fulfil the Federal Government's pledge to share information about the regulation of charities, the CRA published its Report on the Charities Program 2016 to 2018 (the "Report") on January 11, 2019. The Report provides an overview of the charitable sector across Canada by outlining various statistics of registered charities between 2016 and 2018, as well as programs and other resources implemented by the CRA. In terms of statistics, it indicates that during that time, the number of applications for charitable status decreased from 3,306 to 3,142; the number of charitable registrations decreased from 1,693 to 1,569;

and total revocations increased from 1,372 to 1,562. An increase in revocations does not equate with an increase in enforcement related matters by the CRA, as the vast majority of revocations is a result of voluntary revocations or due to a registered charity failing to file their annual return when due, while revocations related to audits decreased from 28 to 26.

The Report also highlights the Charities Education Program (CEP), indicating its expansion in the 2017 – 2018 period with 277 visits to registered charities by CRA. It is indicated in the report that the CRA is considering further expanding the CEP to conduct more visits in the future.

Next steps for the CRA discussed in the Report include the launch of the Charities IT Modernization Project (CHAMP) in June 2019; administrative changes to help charitable registration; upcoming guidances, such as a guidance on advancing religion, advancing education, relieving poverty and carrying out related business activities; and additional educational tools for charities.

With respect to compliance-related projects, the Report highlights future focuses of the CRA, including a review of charity boards to identify whether there are concerns related to ineligible individuals and a review of real estate acquisition and construction activities to ensure they further a charitable purpose. The Report also highlights the Charities Directorate's growing collaboration with other areas of the CRA in order to address "highly complex and offshore transactions."

Legislation Update

By Terrance S. Carter

Royal Assent Received for Bill C-86, *Budget Implementation Act 2018, No.2*

On December 13, 2018, the omnibus Bill C-86, *Budget Implementation Act 2018, No. 2* received Royal Assent, making highly anticipated changes to the political activities rules for charities under the ITA. As indicated above, Bill C-86 amends section 149.1 of the ITA by repealing the term "political activity" under subsection 149.1(1) and introducing the concept of "public policy dialogue and development activities," as a permitted charitable activity. These amendments are now in force, and may apply retroactively as far back as 2008. The CRA's interpretation of public policy dialogue and development activities is discussed in more detail above in *Charity & NFP Law Bulletin* No. 438.

Bill C-86 will also amend the *Trade-marks Act*, although these amendments do not have a set coming into force date yet. Of particular interest to charities, these amendments include limiting enforcements without

use in Canada, as well as simplifying the process by which official marks can be invalidated and removed from the Register. For further details on the Bill C-86 amendments to the *Trade-marks Act*, see More Changes to Trademark Law That Will Impact Charities and NFPs, below.

Proposed Amendments to *Immigration and Refugee Protection Regulations*, SOR/2002-227

On December 15, 2018, regulations proposing amendments to the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("Immigration Regulations") were published in the *Canada Gazette*. These amendments are intended to provide protection for migrant workers, which may include charitable and religious workers under Canada's International Mobility Program ("IMP") who are experiencing abuse or are at risk of abuse by their employers. More specifically, migrant workers who are issued employer-specific work permits ("ESWP"), which restrict their ability to work in the country to the employer named on their permit, may be deterred from reporting employer abuse because investigations into abuse could lead to a ban on the employer from employing migrant workers, thereby resulting in migrant workers with ESWP's facing financial burden and risk of deportation.

When the regulations come into force, the Immigration Regulations will be amended to allow "migration officers" to issue open work permits to migrant workers with ESWP's and their families who are in Canada if there are reasonable ground to believe that the migrant worker is experiencing employer-abuse or is at risk of abuse. Providing an open work permit will allow the migrant worker to work for any employer in the country and therefore avoid the risk of deportation. Further, the regulations will amend the IPRP to provide an exemption from the $155 work permit processing fee.

British Columbia *Speculation and Vacancy Tax Act* and Regulation 275/2018

On November 27, 2018, British Columbia's *Speculation and Vacancy Tax Act* received Royal Assent. In general terms, the Act requires the owner of a residential property to pay a yearly tax to the government in accordance with a provided formula, except in accordance with exemptions outlined in the Act. The Act defines "residential property" generally to include properties assessed as class 1 residential properties. Section 20 of the Act, in particular, exempts registered charities, as well as associations as defined under the *Cooperative Association Act*. Not-for-profits may also be exempt from the tax, provided that: 1) they hold the residential property "other than as a partner in a partnership or as a trustee of a trust" and 2) the property is "primarily used for a prescribed purpose." Such purpose is prescribed in *BC Regulation 275/2018*, which came into effect on December 10, 2018, and provides that the property owned by the not-for-profit must be used for a charitable purpose.

Corporate Update

By Theresa L.M. Man

Ontario Announces Legislative Review of the Co-operative Corporations Act

The Ontario Ministry of Finance and Ministry of Government and Consumer Services announced in December 2018 that Ontario would be conducting a legislative review of the *Co-operative Corporations Act* ("Co-op Act") on how to modernize the legislative framework and make it easier for co-operative corporations ("co-ops") to do business in Ontario. A consultation paper, *Helping Co-ops Thrive in Ontario: Modernizing the Legislative Framework for Co-operative Corporations in Ontario* was also released. The public may provide written submissions by January 31, 2019.

Broadly speaking, co-ops are corporations owned by members who seek to meet common needs, and can be formed on a not-for-profit basis. The Consultation Paper states that co-ops face certain challenges that may impede their growth potential and long-term viability, such as being under an outdated legislative and regulatory framework that is not well aligned with other Ontario business and corporate legislation. The consultation seeks input from the public on the following areas: how to make it easier for co-ops to do business in Ontario; how to better enable co-ops to self-govern while reducing red tape in the sector; which government body should be responsible for administering the Co-op Act; as well as whether the "50 per cent rule" (*i.e.*, co-ops cannot do more than 50 per cent of their business with non-members), audit requirements, and rules for raising capital for co-ops should be changed.

The government's review of the Co-Op Act will be its first ever review of the Act since its introduction in 1974. While this may appear to some as overdue, it will be welcome news for co-ops in Ontario, including those formed on a not-for-profit basis, and it is hoped that this review will lead to a more competitive legislative framework for co-ops in Ontario. While the nature of changes to the Co-op Act remains to be seen, co-ops in Ontario will want to keep an eye open for future changes to their corporate legislation.

Court Declares Not-for-Profit Cemetery to be a Charitable Trust

By Jennifer M. Leddy and Terrance S. Carter

On December 31, 2018, the Ontario Superior Court of Justice released its decision in *Friends of Toronto Public Cemeteries Inc v Mount Pleasant Group of Cemeteries*. The case deals with the operation of cemetery lands which began as a statutory trust in 1826, developed over time through subsequent special

acts, and is currently a special act corporation known as Mount Pleasant Group of Cemeteries ("MPGC"). It operates ten cemeteries and numerous crematoria, mausoleums, and visitation centres in the Toronto area. In addition, it has an affiliated funeral home business which operates on its cemetery lands. The court uses the term "director" and "trustee" interchangeably in the decision. This bulletin uses the word "director" for consistency except when the word "trustee" is used in a quote from the decision.

The applicants consisted of an individual, Ms. Wong-Tam, and a non-profit corporation, Friends of Toronto Public Cemeteries Inc, which is comprised of approximately 100 members who are residents in the Mount Pleasant Cemetery area. In finding that MPGC was a charitable trust whose directors had not been validly appointed since 1987, and that some of MPGC's operations exceeded the terms of the trust, the court looked to historical trust and corporate documents of MPGC.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 439.

Ontario Court Strikes Part of OSPCA's Special Act for *Charter* Violation

By Theresa L.M. Man

In another case concerning special act corporations, the Superior Court of Ontario released its decision in *Bogaerts v Attorney General of Ontario* on January 2, 2019. In this case, Mr. Bogaerts challenged the constitutionality of certain provisions in the *Ontario Society for the Prevention of Cruelty to Animals Act* ("OSPCA Act"). Specifically, he alleged that the OSPCA Act violates the section 7 right to life, liberty and security and the section 8 right against unreasonable search and seizure under *Canadian Charter of Rights and Freedoms* ("Charter"), as well as the division of powers in the *Constitution Act, 1867*, as it dealt with criminal matters.

The OSPCA Act is special legislation incorporating and governing the registered charity, Ontario Society for the Prevention of Cruelty to Animals ("OSPCA"). It administers and enforces animal welfare and protection throughout Ontario, and is given police powers to do so. While it is neither a Crown agent nor part of the provincial government, it is an independent charitable organization that has been given certain statutory powers relating to animal welfare in Ontario.

The court dismissed two of Mr. Bogaert's claims. It found that the OSPCA Act does not violate the division of powers in the *Constitution Act, 1867* because the pith and substance of the OSPCA Act is animal protection and the prevention of cruelty to animals rather than criminal law. It also found that the

OSPCA Act does not violate the section 8 *Charter* right, holding that there would be no reasonable expectation of privacy because the OSPCA's search and seizure powers are necessary to meet the objectives of the OSPCA Act.

However, the court held that the delegation in the OSPCA Act of police and other investigative powers to a private organization violates section 7 of the *Charter*, even though these provisions have been in the OSPCA Act prior to the creation of the *Charter*. The court recognized a new principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency, integrity, and accountability." In this regard, it found that the OSPCA is a private organization and private organizations "by their nature are rarely transparent, and have limited public accountability" and that "[a]lthough charged with law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable and potentially subject to external influence, and, as such, Ontarians cannot be confident that the laws it enforces will be fairly and impartially administered." The court therefore found the provisions in the OSPCA Act granting warrantless search and/or seizure powers to the OSPCA to be unconstitutional. As it found that the offending provisions could not be modified or read down to comply with the *Charter*, the court declared those provisions to be of no force and effect. However, this declaration of invalidity has been suspended for one year to allow the legislature sufficient time to consider the range of possibilities or to start from scratch in making policy choices, because immediate implementation of the declaration would deprive animals of their current protections under the OSPCA Act, and could adversely impact staff at the OSPCA and its affiliates.

This case demonstrates the importance of ensuring special act legislation does not conflict with legislation, such as the *Charter* or other portions of the Constitution of Canada. Where they do, such corporation can become, as stated by Mr. Bogaerts, "a victim of the legislation." Special act corporations should therefore be aware that where their legislated powers run counter to *Charter* rights or other Constitutional provisions, those powers may be declared invalid by the courts, even where those provisions had been in place prior to the *Charter* or Constitution's creation.

Ontario Bill 66 and O Reg 498/18 Propose Amendments to Employment Legislation

By Barry W. Kwasniewski

Ontario Bill 66, *Restoring Ontario's Competitiveness Act, 2018* ("Bill 66") received first reading on December 6, 2019. Of particular interest to charities and not-for-profits as employers, Bill 66 proposes to

amend the *Employment Standards Act, 2000* (“ESA”), among other acts. The proposed changes in Bill 66 are intended to reduce the regulatory burden on businesses.

Currently, section 2 of the ESA requires employers to post in the workplace a poster containing information about the ESA (“ESA poster”) prepared by the Minister of Labour (“Minister”). Employers are also required to provide a copy of the most recent ESA poster to all employees. Bill 66 proposes to amend section 2 by removing the requirement for employers to post the ESA poster in the workplace, although they will continue to be required to provide employees with the most recent ESA poster.

Concerning excess hours of work, the ESA restricts the number of hours per work week that an employer may require or permit employees to work, up to a maximum of 48 hours. However, there is an exception carved out to allow for this time to be exceeded where an employer has approval from the Director of Employment Standards (“Director”). Bill 66 proposes to remove this exception, such that employers will no longer require the Director’s approval before entering into such agreements.

With regard to averaging overtime pay, employers are currently required to obtain the Director’s approval to enter into agreements with employees allowing them to average out the employee’s work hours over at least two weeks for the purposes of determining the employee’s entitlement to overtime pay. Bill 66 proposes to remove the requirement for employers to first obtain the Director’s approval before entering into averaging agreements with employees, though the period of averaging in any such agreements could not exceed four weeks.

If passed in its current form, Bill 66 is intended to reduce the administrative burden on employers when entering into work hour agreements and averaging agreements with employees, as well as with regard to ESA posters. However, as Bill 66 has only been carried through first reading, these provisions are subject to change as the Bill is debated. Nonetheless, charities and not-for-profits should monitor the status of Bill 66, as these provisions would come into force upon Royal Assent.

In addition to the Bill 66 changes, amending regulations O Reg 498/18 were filed on December 14, 2018, making changes to existing O Reg 285/01, *When Work Deemed to be Performed, Exemptions and Special Rules* under the ESA. O Reg 498/18 adds an additional exemption to exclude several kinds of workers from the three hour rule found in the ESA, which rule generally requires employers to pay an employee for a minimum of three hours’ wages in the event that an employee who regularly works more than three hours a day attends work, but works less than three hours despite being able to work for longer. Of the following workers that are now exempt from the three hour rule, several may be of interest to charities

and not-for-profits: 1) a person employed as a student in a recreational program operated by a registered charity, whose work or duties are "directly connected" with the recreational program; 2) a person employed as a student whose duties are to instruct or supervise children, and 3) a person employed as a student who works at a camp for children.

New Raffle Options for Charities in Ontario

By Jacqueline M. Demczur

On January 18, 2019, the Government of Ontario announced that new changes to the charitable gaming licence regime administered by the Alcohol and Gaming Commission of Ontario ("AGCO") will now permit charities to hold electronic raffles both in-person and online, including the sale of tickets as well as the ability to pick winners and award prizes.

According to *Info Bulletin No. 89: Expanding Raffle and Electronic Raffle Options for Charities in Ontario* (the "Bulletin"), as published on November 30, 2018, the changes include an expanded variety of online raffles and raffle types that can now be conducted and managed electronically both in-person and online. The Bulletin also states that the AGCO is working towards an updated framework that would permit municipalities and First Nations licensing authorities to issue not just licences for paper-based raffles, as they are currently permitted, but also licences for charities to conduct and manage electronic raffles, for which the AGCO is currently the only licensing authority.

The new changes are now reflected in AGCO's Electronic Raffles: Licensing webpage, which provides step-by-step information for charities applying for a gaming licence, including a new video as well as AGCO's raffle licence terms and conditions. Similarly, AGCO's Charitable Gaming: Suppliers webpage provides certain minimum technical standards that electronic raffle systems are required to meet. The AGCO has also updated its Notification Matrix for notifications to be submitted to the AGCO prior to an electronic raffle event as well as the reporting of incidents involving electronic raffles.

Ontario charities whose fundraising efforts include electronic raffles, either in-person or online or both, will want to pay attention to these changes as they may apply to their ongoing or planned campaigns.

Medical Cannabis Exclusion from Benefit Plan Not Discriminatory

By Barry W. Kwasniewski

On October 26, 2018, the Human Rights Tribunal of Ontario (the "Tribunal"), in *Rivard v Essex (County)*, dismissed an application alleging that a denial of coverage under an employer's benefit plan for medical cannabis expenses was a breach of the Ontario *Human Rights Code* ("Code") on grounds of discrimination on the basis of disability. In finding that the application should be dismissed on the basis that there was no reasonable prospect of success, the Tribunal clarified that the denial of coverage must be connected to the disability in order to potentially constitute a violation of protected rights under the Code. As the denial of medical cannabis coverage was not due to the applicant's disability but rather the terms of the benefit plan, such denial was not discriminatory under the Code.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 440.

More Changes to Trademark Law That Will Impact Charities and NFPs

By Sepal Bonni

As previously reported in the November 2018 *Charity & NFP Law Update*, significant changes to Canada's trademark laws will be coming into effect on June 17, 2019. While charities and not-for-profits should be cognizant of these changes, they should also be aware of additional changes coming to Canadian trademark law as a result of Bill C-86. As stated in the Legislation Update, above, the omnibus Bill C-86 received Royal Assent on December 13, 2018, and includes amendments to a wide variety of legislation, including the *Trade-marks Act*. The most significant amendments to the *Trade-marks Act* that will impact charities and not-for-profits are further discussed below.

Charities and not-for-profits that seek to enforce registered trademarks during the first three years of registration will be required to provide evidence of use of the trademarks in Canada (or have special circumstances justifying the non-use) in order to enforce the trademarks. In light of this change, trademark owners should ensure proper use of registered trademarks in accordance with the use requirements of the *Trade-marks Act.*

Perhaps the most significant change that will impact charities and not-for-profits is that the Registrar of Trademarks will have the authority to remove an official mark from the registry if the official mark owner is not a public authority or no longer exists. This change to the trademark regime will have large consequences on charities and not-for-profits that hold official marks.

Official marks are a unique and powerful form of intellectual property right. Although similar to trademarks in some respects, official marks are only granted to "public authorities" and owners of official marks are given extraordinary protection. Registered charities were generally able to obtain official marks until 2002 when the federal court tightened up the meaning of "public authority" to make it clear that status as a registered charity alone, is insufficient to constitute an organization as a public authority for the purpose of obtaining an official mark. As a result, despite the fact that official marks granted to charities are technically erroneously-issued, many of these official marks continue to sit on the trademarks database because with the current official mark regime, once an official mark is advertised, it remains on the trademarks register until it is either voluntarily withdrawn by the owner or struck from the register by a successful federal court action for judicial review. Both of these circumstances are very rare and, as a result, once an official mark is on the register, it is theoretically perpetual in duration.

However, the new amendments to the *Trade-marks Act* will provide an easy administrative process through which either the Registrar of Trademarks or any person can have an official mark invalidated if the entity that obtained the mark is not a public authority (which would catch registered charities) or no longer exists. As a result, official marks held by registered charities will be left vulnerable to attack and subject to removal once these provisions are in force. In taking steps to protect their intellectual property, charities and not-for-profits that have official marks should therefore immediately secure parallel registered trademarks for any official marks they currently have prior to these amendments coming into force.

As the above noted amendments to the *Trade-marks Act* do not have a set coming into force date, charities and not-for-profits should monitor the status of these amendments and in the meantime ensure that all trademarks are properly used and registered trademarks are secured for any official marks.

The CRTC Updates its Website on FAQs about CASL

By Ryan M. Prendergast

The Canadian Radio-television and Telecommunications Commission ("CRTC") updated its website on *Frequently Asked Questions about Canada's Anti-Spam Legislation* (the "Updated FAQ") on December 18, 2018. The Updated FAQ provides general information with respect to Canada's Anti-Spam Legislation ("CASL"), including information about when CASL applies, what constitutes a commercial electronic message ("CEM"), as well as reference to additional guidance from the CRTC, such as the *Compliance*

and Enforcement Information Bulletin CRTC 2018-415, discussed in the November 2018 *Charity and NFP Law Update*.

Regarding consent, the Updated FAQ states that express consent, unlike implied consent, does not expire. However, consent may be withdrawn at any time. The Updated FAQ also includes information regarding the conspicuous publication exemption, which permits the sending of CEMs to persons who have conspicuously published their electronic address, as well as other exemptions for surveys, market research and employment opportunities.

The Updated FAQ also lists a number of factors for determining whether a "personal relationship" exists in the context of social media. Since CASL applies to CEMs sent to an electronic address, the Updated FAQ defines electronic address as either an email account, an instant messaging account, a telephone account, or any similar account, such as a social media account, as determined on a case-by-case basis. However, the Updated FAQ states that CASL does not apply to the one-way general broadcast of a commercial message on social media.

With regard to the application of CASL to charities and not-for-profits, the Updated FAQ adds little new and removes one of the previously provided examples of CEMs exempt from CASL where the "primary purpose" is to raise funds for a charity.

The Updated FAQ also describes the investigative powers and enforcement actions of the CRTC. Investigative powers include the power to issue a Notice to Provide requiring persons to produce data, information or documents in their possession or control; the Preservation Demand requiring telecommunications service providers to preserve transmission data; the power to apply to court for a Search Warrant. Examples of enforcement actions include a Warning Letter, an Undertaking, a Notice of Violation or an Administrative Monetary Penalty. The Updated FAQ also provides information regarding the appeal process available upon being served with a Notice of Violation from the CRTC.

Draft Guidelines on the Territorial Scope of the GDPR

By Esther Shainblum

Between November 2018 and January 2019, the European Data Protection Board, an independent European body established by the EU's General Data Protection Regulation ("GDPR"), was seeking comment on the draft *Guidelines 3/2018 on the territorial scope of the GDPR (Article 3)* (the "EDPB

Guidelines”). The Guidelines provide some clarification for controllers and processors, including those not established in the EU, as defined under the GDPR. For general information on the GDPR, see *Charity & NFP Law Bulletin* No. 419.

The EDPB Guidelines confirm that, even if not established in the EU, controllers and processors, which may include Canadian charities and not-for-profits, may be caught by Article 3(2)(a) or (b) of the GDPR if they process personal data of EU residents to offer them goods or services or to monitor their behaviour within the EU. In this regard, while Article 3(2) of the GDPR applies to the personal data of data subjects who are in the EU, regardless of their citizenship, residence or other legal status, there must be an element of “targeting” individuals in the EU, either by offering goods or services to them or by monitoring their behaviour, in order for the GDPR to apply.

The EDPB Guidelines set out a number of factors that may, alone or in combination with one another, indicate the controller’s or processor’s intention to offer goods or services to a data subject in the EU, including: i) the EU or at least one Member State is mentioned by name; ii) marketing and advertisement campaigns have been directed at an EU audience; iii) EU addresses or telephone numbers are mentioned; iv) an EU domain name such as “.eu” is used; v) there are travel instructions from one or more EU Member States; vi) EU customers are mentioned; vii) EU languages or currencies are used; or viii) the delivery of goods in EU Member States is offered. If one or any combination of these factors is present, organizations in Canada, including charities and not-for-profits, may be subject to the GDPR.

The second type of activity triggering the application of Article 3(2) is the monitoring of data subject behaviour in the EU. “Monitoring behaviour” includes tracking individuals on the Internet to analyze or predict their personal preferences, behaviours and attitudes.

According to the EDPB Guidelines, in order for the GDPR to apply, the monitoring must relate to a data subject in the EU and the monitored behaviour must take place within the territory of the EU. The EDPB Guidelines state that “monitoring” does not exclusively mean tracking a person on the Internet, but can also include tracking through other types of network or technology, such as wearable and other smart devices. The EDPB Guidelines also provide that not every online collection or analysis of personal data of individuals in the EU will automatically count as “monitoring” within the meaning of Article 3(2), and that there must be subsequent behavioural analysis or profiling involving that data, for it to constitute “monitoring.”

The EDPB Guidelines go on to list examples of monitoring activities, including "online tracking through the use of cookies or other tracking techniques such as fingerprinting." In this regard, using cookies on a website that is accessible to EU residents will be enough to trigger the application of the GDPR, potentially capturing Canadian charities and not-for profits. Other examples of "monitoring" that are listed include targeted advertisements to consumers based on their browsing behavior; closed circuit TV and various online activities related to an individual's health status or diet.

If a Canadian charity or not-for profit is caught by the GDPR due to Article 3(2), it is required to designate a representative within the EU who is mandated to ensure its compliance with the GDPR. Failure to appoint a representative or failure to make the identity of the representative available to data subjects would be a breach of the GDPR, exposing it to the significant penalties available. The Canadian charity or not-for-profit would be able to avoid the obligation to appoint a representative if it can demonstrate that its data processing is "occasional", does not include, on a large scale, processing of certain categories of particularly sensitive data, and does not pose a risk to the rights and freedoms of natural persons.

Given the significant penalties for non-compliance, Canadian charities and not-for-profits that may be caught by the GDPR should implement a plan to bring themselves into compliance as soon as possible.

Final Order Involving the Humboldt Broncos' Crowdfunding Campaign

By Jacqueline M. Demczur

On November 28, 2018, the Saskatchewan Court of Queen's Bench released its Final Order involving the allocation of the funds raised through the GoFundMe online crowdfunding campaign for the benefit of the victims of the April 6, 2018 accident involving twenty-nine individuals, including members of the Humboldt Broncos junior hockey team (the "Campaign"). As discussed in the October 2018 *Charity and NFP Law Update*, the application by the Humboldt Broncos Memorial Fund Inc. ("HBMFI") was made pursuant to Saskatchewan's *The Informal Public Appeals Act* ("IPAA") and the *Canada Not-for-profit Corporations Act* ("CNCA").

In its Final Order, the Court accepted the report of the Advisory Committee previously appointed on August 15, 2018 and whose recommendation the HBMFI also accepted. Taking note of the survivors' wishes that they all benefit equally regardless of their medical condition, the report from the Advisory Committee recommended that the funds be allocated among three different groups of beneficiaries: a) the

families of the 16 persons who died in the accident; b) the 13 surviving claimants, and c) "any remaining funds in trust to the 13 surviving claimants in equal shares, share and share alike."

As more online crowdfunding campaigns continue to be used for raising funds for both charitable and non-charitable objects, and even though the IPAA is unique legislation only applicable in Saskatchewan and does not apply to qualified donees as defined under the ITA, this case provides an interesting precedent for the distribution of funds raised through crowdfunding campaigns. Charities and not-for-profits in other parts of Canada will also want to monitor whether, in the coming years, other provinces decide to adopt comparable legislation to that currently in place in Saskatchewan.

Update on Special Senate Committee on the Charitable Sector

By Esther S.J. Oh

Committee Mandate Extended until September 30, 2019

During its November 29, 2018 sitting, the Senate approved the motion by members of the Special Senate Committee on the Charitable Sector (the "Committee") to extend the period to study and report on the impact of federal and provincial laws and policies governing the charitable and not-for-profit sector from the previously set deadline of December 31, 2018 until September 30, 2019.

In support of the motion, Committee member Honourable Senator Ratna Omidvar explained that the Committee requires an extension to ensure that its final recommendations "reflect the scope, depth and complexity" of the Committee's work. In that regard, the Committee requires additional time to conclude an online survey sent to hundreds of charities and not-for-profits across Canada, including processing the results of the survey which need to be tabulated, analyzed and synthesized into the Committee's final report. Senator Omidvar also noted that the extension would allow the Committee to review Bill C-86 which includes proposed amendments to the ITA that alter the extent to which registered charities can engage in what were formerly called non-partisan political activities, but under Bill C-86 will be referred to as "public policy dialogue and development activities." Senator Omidvar also noted that other areas requiring further work by the Committee include issues relating to the creation of a permanent advisory committee on the charitable sector within the CRA, an investment in new social finance funds, both of which were referred to in the 2018 Fall Economic Statement and discussed in *Charity & NFP Law Bulletin No. 435*, as well as a new provision to allow non-profit journalism and journalistic organizations to issue official donation receipts.

Committee Meetings of December 2018

In December 2018, the Committee continued its study on the charitable and not-for-profit sector with two meetings on December 3, 2018 and December 10, 2018, which focused on "advocacy and political activity as it relates to charities and non-profit organizations." Minutes of each meeting are available on the Committee website.

The December 3 meeting included comments urging the Committee to support the passage of Bill C-86 to affirm the importance of allowing charities to engage in public policy dialogue without fear of loss of charitable status in pursuit of charitable purposes, issues relating to the *Canada Without Poverty* decision, and the changes subsequently proposed by Bill C-86, which has now received Royal Assent. The general consensus from the witnesses was that the approval of Bill C-86 was a positive development.

The December 10 meeting covered issues relating to the importance of permitting lobbying and communication with elected officials without restriction where the subject matter relates to the charity's charitable purpose, a proposal to permit charities to carry on any type of revenue generation so long as the proceeds are used to further its charitable purpose. It was also suggested that the requirement that charities must carry out their "own activities" be removed given the enormous administrative burden that arises to draft complex agreements to meet this requirement even though there is little evidence of any harm being prevented, and discussion on whether the disbursement quota could be set by regulation rather than in the ITA to provide flexibility to charities subject to market conditions and interest rates. The Committee also discussed how the sector is changing with the use of social media, crowdfunding and social enterprise, as well as certain modern legislation, such as Saskatchewan's legislation on informal public appeals, which governed issues relating to the funds raised to assist the victims of the Humboldt Broncos accident, but which legislation is not available in any other provinces.

IN THE PRESS

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

How Top Court Weighed in on Freedom of Religion in 2018, an article written by Terrance S. Carter and Jennifer M. Leddy was published in The Lawyers Daily on December 18, 2018.

RECENT EVENTS AND PRESENTATIONS

ICD West GTA Conference hosted a session on NFP Amalgamations on January 24, 2019. The panel consisted of Tom Dyck, CEO, MiHi Inc.; Jim Commerford, President and CEO, YMCA of Hamilton/Burlington/Brantford; and Ian Smith, Vice President, StrategyCorp, and Theresa L.M. Man of Carters as moderator.

UPCOMING EVENTS AND PRESENTATIONS

OBA Institute will be held by the Ontario Bar Association Charity & Not-For-Profit Law Section and the theme is entitled "Privacy, Land Development, And Other Key Updates In Charity And Not-For-Profit Law" on Tuesday, February 5, 2019. Esther Shainblum will be presenting on the topic of "Privacy Issues Affecting Charities."

CPA Canada Not-for-Profit Forum 2019 by Chartered Professional Accountants Canada on February 6 and 7, 2019. Terrance S. Carter will present on February 6, 2019 on the topic of "Essential Charity Law and Compliance Update."

The 2019 Annual Ottawa Region Charity & Not-for-Profit Law Seminar will be held on Thursday February 14, 2019, and is hosted by Carters Professional Corporation in Ottawa, Ontario. Guest Speakers include Tony Manconi, Director General of the Charities Directorate of the CRA, and Kenneth Goodman, Public Guardian and Trustee of Ontario. Brochure and online registration are available on our website. Early bird deadline expires February 4, 2019.

CSAE Trillium 2019 Winter Summit is being held on February 15, 2019 in Burlington, Ontario. Theresa L.M. Man and Terrance S. Carter will present on the topic of "Maintaining NPO Tax Exempt Status: What You Need to Know and Why it Matters."

CONTRIBUTORS

Editor: Terrance S. Carter
Assistant Editors: Adriel N. Clayton and Ryan M. Prendergast

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, 2019), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*, 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 Carters. Prior to joining the firm, Luis worked in the financial services industry in Toronto and Montreal for over nine years, including experience in capital markets. He also worked as legal counsel in Venezuela, advising on various areas of law, including pensions, government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Corporate and Commercial Law.

Nancy E. Claridge, B.A., M.A., LL.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of 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 vice chair of 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*.

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

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

Christina Shum, B.M.T., J.D – Ms. Shum graduated from Osgoode Hall Law School in 2018 and is Student-at-Law at Carters. 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

Links not Working: If the above links do not work from your mail program, simply copy the link text and paste it into the address field of your internet browser.

Get on Our E-Mailing List: If you would like to be added to our electronic mailing list and receive regular updates when new materials are added to our site, click here or send an email to info@carters.ca with "Subscribe" in the subject line. Feel free to forward this email to anyone (internal or external to your organization) who might be interested.

Privacy: We at Carters know how important your privacy is to you. Our relationship with you is founded on trust and we are committed to maintaining that trust. Personal information is collected solely for the purposes of establishing and maintaining client lists; representing our clients; and to establish and maintain mailing lists for the distribution of publications as an information service. Your personal information will never be sold to or shared with another party or organization. For more information, please refer to our Privacy Policy.

Copyright: All materials from Carters are copyrighted and all rights are reserved. Please contact us for permission to reproduce any of our materials. All rights reserved.

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

CARTERS PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE CARTERS

PARTNERS:

Terrance S. Carter B.A., LL.B. (Counsel to Fasken)	tcarter@carters.ca
Jane Burke-Robertson B.Soc.Sci., LL.B. (1960-2013)	
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M.	tman@carters.ca
Jacqueline M. Demczur B.A., LL.B.	jdemczur@carters.ca
Esther S.J. Oh B.A., LL.B.	estheroh@carters.ca
Nancy E. Claridge B.A., M.A., LL.B.	nclaridge@carters.ca
Jennifer M. Leddy B.A., LL.B.	jleddy@carters.ca
Barry W. Kwasniewski B.B.A., LL.B.	bwk@carters.ca
Sean S. Carter B.A., LL.B.	scarter@carters.ca
Ryan M. Prendergast B.A., LL.B.	rprendergast@carters.ca

ASSOCIATES:

Esther Shainblum, B.A., LL.B., LL.M., CRM	eshainblum@carters.ca
Kristen D. Morris B.A., J.D.	kmorris@carters.ca
Sepal Bonni B.Sc., M.Sc., J.D.	sbonni@carters.ca
Adriel N. Clayton, B.A. (Hons), J.D.	aclayton2@carters.ca
Michelle E. Baik, i.B.B.A., J.D.	mbaik@carters.ca
Luis R. Chacin, LL.B., M.B.A., LL.M.	lchacin@carters.ca

STUDENT-AT-LAW

Christina Shum, B.M.T., J.D.	cshum@carters.ca

Toronto Office
67 Yonge Street, Suite 1402
Toronto, Ontario, Canada
M5E 1J8
Tel: (416) 594-1616
Fax: (416) 594-1209

Orangeville Office
211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada
L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300

Ottawa Office
117 Centrepointe Drive, Suite 350
Nepean, Ontario, Canada
K2G 5X3
Tel: (613) 235-4774
Fax: (613) 235-9838

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.
© 2019 Carters Professional Corporation