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## THE OTTAWA REGION *Charity & Not-for-Profit Law Seminar* Thursday, February 14<sup>th</sup>, 2019

### “RECENT DEVELOPMENTS IN THE LAW”

#### WELCOME

Welcome to the Ottawa Region *Charity & Not-for-Profit Law Seminar*, which is designed to assist charities and not-for-profit organizations in understanding developing trends in the law in order to keep up to date and to reduce unnecessary exposure to legal liability. This seminar is eligible for **5 hours substantive CPD credits** with the **Law Society of Ontario** and **CPA Professional Development** requirements.

The *Charity & Not-for-Profit Law Seminar*, with its related *Church & Charity Law™ Seminar* held annually in Toronto since 1994, is hosted by **Carters Professional Corporation (Carters)**, a law firm experienced in advising charities and not-for-profits, with offices in the Ottawa and Toronto areas. The Seminar is presented by a number of expert speakers, including our guest speakers: Kenneth Goodman, The Public Guardian & Trustee of Ontario, and Tony Manconi, Director General of the Charities Directorate of CRA.

#### CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and pre-paid handout package in the Foyer of the Centurion Conference Center, and help yourself to the complimentary Continental Breakfast.

If you NEED TO PAY the registration fee or have NOT YET REGISTERED, please proceed to the “Unpaid and New Registrations” table in the Foyer. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a pre-paid handout package from one of our greeters for more information.

#### CONTINENTAL BREAKFAST & LUNCH BUFFET

A complimentary Continental Breakfast is provided in the morning. A lunch buffet is also included with your registration fee. Both of these meals will be served in the Adriatic Ballroom.

#### REMINDERS

**Please silence all cell phones and electronic devices. We ask that no photos or videos be taken during the seminar as per our Privacy Policy.** For re-cycling purposes, please return your name tag (after removing your receipt), along with your Evaluation Form, before you leave.

#### RESOURCE MATERIALS

Included in this handout package are copies of today's presentation materials. These materials, along with numerous other articles, seminar materials, and newsletters of interest to charities and not-for-profits, including back issues of *Charity & NFP Law Bulletins*, *Charity & NFP Law Updates* and *Church Law Bulletins* are available free of charge at our websites of [www.charitylaw.ca](http://www.charitylaw.ca), [www.carters.ca](http://www.carters.ca), [www.churchlaw.ca](http://www.churchlaw.ca), [www.antiterrorism.ca](http://www.antiterrorism.ca) and Copies of *Charity & NFP Law Bulletins* and *Church Law Bulletins* are on display at the Carters booth in the Foyer outside of the Auditorium.

Copies of the booklet entitled “**2018 Legal Risk Management Checklist for Ontario-Based Charities**”, as well as the “**2018 Legal Risk Management Checklist for Ontario-Based Not-for-Profits**” are available for \$2.00 during breaks, and at no charge on our website at [http://carters.ca/index.php?page\\_id=41](http://carters.ca/index.php?page_id=41).

#### CHARITY & NFP LAW UPDATE

A limited number of copies of the [January 2019 edition](#) of the Charity & NFP Law Update are available at the Carters booth today. To receive the monthly Charity & NFP Law Update, e-mail us at [info@carters.ca](mailto:info@carters.ca) with “mailing list” in the subject line. Alternatively, please add your name and email address to our Sign-Up List at the Carters booth indicating your consent to receive firm newsletters and information about future seminars.

#### QUESTION PERIOD

Questions are welcomed and will be answered before the lunch break, as time permits, and at the end of the day. A question sheet is provided at the back of this handout and should be left at the front podium in the Auditorium or at the Carters booth at any time during the seminar.

#### ACKNOWLEDGEMENTS

We would like to acknowledge and thank Kenneth Goodman, Tony Manconi, and Ken Hall for their contribution as guest speakers at this year's seminar. All speakers have freely volunteered their time.

We would also like to recognize the sponsors and resource materials provided for the 2019 Ottawa Region *Charity & Not-for-Profit Law Seminar*: Netsuite for Nonprofits, Thomson Reuters Corporation, Lexis Nexis Group, Robertson Hall Insurance Ltd., CCCC and CRA.

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THE OTTAWA REGION  
*Charity & Not-for-Profit Law Seminar*  
*Thursday, February 14<sup>th</sup>, 2019*

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**AGENDA**

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7:45 a.m.	Check-In (Continental breakfast buffet provided in Adriatic Ballroom)	
8:30 a.m.	Opening Remarks and National Anthem	
8:40 a.m.	Essential Charity and Not-for-Profit Law Update	Jennifer M. Leddy
9:05 a.m.	Critical Privacy Update for Charities and NFPs	Esther Shainblum
9:30 a.m.	Clearing the Haze: Managing Cannabis in the Workplace in Ontario	Barry W. Kwasniewski
9:55 a.m.	Protecting Your Brand in the Digital Age	Sepal Bonni
10:20 a.m.	Morning Break (Coffee and tea provided) (25 minutes)	
10:45 a.m.	Charities and Politics: Where Have We Been and Where Are We Going	Ryan M. Prendergast
11:10 a.m.	The Coming of the ONCA (We Hope) and What to Start Thinking About	Theresa L.M. Man
11:35 a.m.	The Evolution and Empowerment of Charities in Ontario from the Perspective of the PGT	Kenneth Goodman, The Public Guardian & Trustee of Ontario
12:15 p.m.	Questions for the PGT and morning speakers	
12:25 p.m.	Lunch Break (50 minutes)	
1:15 p.m.	Acknowledgements	
1:20 pm	Lessons Learned from Claims to the Courtroom	Kenneth Hall, Robertson Hall Insurance and Sean Carter
2:05 p.m.	Tips for Avoiding Common Errors: A Charities Directorate Perspective	Tony Manconi, Director General of the Charities Directorate of the CRA
2:45 p.m.	Legal Challenges in Social Media for Charities and NFPs	Terrance S. Carter
3:10 p.m.	Question Period	
3:30 p.m.	Program Ends	

Please see **Speaker Biographies** on the following pages.

Take a moment to complete the **Evaluation Form** included at the back of this handout to help us make the next Ottawa Region *Charity & Not-for-Profit Law*<sup>™</sup> Seminar even better.

**REMINDERS**

**PLEASE MUTE ALL CELL PHONES AND ELECTRONIC DEVICES.**

For recycling purposes, return your name tag, along with your Evaluation Form, before you leave.

## SEMINAR HOSTS

**Carters Professional Corporation** is a law firm experienced in serving charities and not-for-profits, and is able to provide specialized legal services in the following areas of charity and not-for-profit law:

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

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

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

## SEMINAR RESOURCE EXHIBITORS

We are pleased to make resource materials from the following organizations available in the foyer.

- **Netsuite for Nonprofits**, <http://www.netsuite.com/portal/home.shtml>
- **Thomson Reuters Corporation**, <http://store.thomsonreuters.ca/home/>
- **Lexis Nexis Group**, <https://store.lexisnexis.ca/en>
- **Canadian Council of Christian Charities (CCCC)**, <https://www.cccc.org/>
- **Canada Revenue Agency (CRA)**, <https://www.canada.ca/en/services/taxes/charities.html>
- **Robertson Hall Insurance**, [www.robertsonhall.com](http://www.robertsonhall.com)

## GENERAL DISCLAIMER

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

## SPEAKER BIOGRAPHIES



**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 articulated 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](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorism.ca](http://www.antiterrorism.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 articulated with and been an associate with Fasken (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



**Kenneth Goodman**, B.A., LL.B. –The Public Guardian & Trustee at the Attorney General Office. Mr. Goodman received his B.A. from York University (Toronto, Ontario) and his LL.B. from the University of Windsor Law School. He was called to the Ontario Bar in 1982. He was in private practice before joining the Ministry in 1990 and joined the Office of the Public Guardian and Trustee in 1998. While in private practice Mr. Goodman was actively involved as a director and officer of several charities. In 2007, he received the AMS John Hodgson Award from the OBA for contribution and development of law in the charitable sector. He has written and lectured on family law, charity and trust law matters.



**Kenneth Hall**, B.A. (Hons), R.F. – President, Robertson Hall Insurance Inc., Mr. Hall specializes in customized insurance programs and risk management advice for over 7,000 churches and Christian charities across Canada. He is a frequent presenter at national denominational conferences, NGO association events, the Canadian Council of Christian Charities, webinars and educational seminars for churches and para-church organizations. His "Facing The Risk" series highlights current issues facing Christian charities and leaders, including abuse prevention, board governance, counselling services, injury prevention, transportation risk, refugee sponsorship, short-term mission safety, and many more.



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



**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 *Expert* 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*.



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



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



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

## UPCOMING CARTERS' SEMINARS OF INTEREST

**Carters Webinars: 2019 Spring Series** – Stay tuned, details to follow at [www.carters.ca](http://www.carters.ca).

## SAVE THE DATE 2018 AND 2019

The 26<sup>th</sup> Annual *Church & Charity Law™* Seminar will be held on **Thursday November 14, 2019**. More details will be available soon at [www.carters.ca](http://www.carters.ca).

The Ottawa Region *Charity & Not-for-Profit Law* Seminar will be held on **Thursday February 13, 2020**, tentatively. More details will be available soon at [www.carters.ca](http://www.carters.ca).

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# **The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar**

**February 14, 2019**

## **LIST OF POWERPOINTS**

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- ◆ **Essential Charity & Not-for-Profit Law Update**  
Jennifer M. Leddy, B.A., LL.B.
- ◆ **Critical Privacy Update for Charities and NFPs**  
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **Clearing the Haze: Managing Cannabis in the Workplace in Ontario**  
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **Protecting Your Brand in the Digital Age**  
Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent
- ◆ **Charities and Politics: Where Have We Been and Where Are We Going**  
Ryan M. Prendergast, B.A., LL.B.
- ◆ **The Coming of the ONCA (We Hope) and What to Start Thinking About**  
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **The Evolution and Empowerment of Charities in Ontario from the Perspective of the PGT**  
Kenneth Goodman, The Public Guardian & Trustee of Ontario
- ◆ **Lessons Learned from Claims to the Courtroom**  
Kenneth Hall, Robertson Hall Insurance and Sean Carter
- ◆ **Tips for Avoiding Common Errors: A Charities Directorate Perspective**  
Tony Manconi, B.A., Director General of the Charities Directorate of the CRA
- ◆ **Legal Challenges in Social Media for Charities and NFPs**  
Terrance S. Carter, B.A. LL.B., TEP, Trade-mark Agent

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **ESSENTIAL CHARITY AND NOT- FOR-PROFIT LAW UPDATE**


**By Jennifer M. Leddy, B.A., LL.B.**

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**The 2019 Ottawa Region  
Charity & Not-for-Profit Law  
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February 14, 2019**

## Essential Charity and Not-for-Profit Law Update

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### OVERVIEW OF THE TOPICS COVERED


- 2018 Federal Budget Highlights
- Update on Political Activities by Charities
- 2018 Fall Economic Statement Highlights
- Special Senate Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Tax Decisions, Rulings and Interpretations
- Corporate Updates
- Other Recent Changes in Ontario
- Case Law of Interest

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### 2018 FEDERAL BUDGET HIGHLIGHTS


- Federal Budget 2018 was presented on Feb. 27, 2018
- There were a number of important changes proposed in the Budget affecting charities and NFPs, including:
  - **Universities:** Definition of “qualified donee” (“QD”) was simplified so that universities outside of Canada that are qualified to be QDs are no longer required to also be listed in Schedule VIII of *Income Tax Act*, provided they meet registration requirements
  - **Municipalities:** Allows Minister of National Revenue to determine whether they may be eligible donees vs QDs on a case by case basis



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- **Journalism:** Government is going to review over next year whether charitable, non-profit journalism may be possibly recognized (see Fall Economic Statement below for an update)
- **Financial Support:** Funding of various charitable and NFP initiatives, generally to be made over a period of five years




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### UPDATE ON POLITICAL ACTIVITIES BY CHARITIES

- Over the last few months there have been a number of legislative and regulatory initiatives by the Department of Finance and CRA which replaced the term “political activities” with “public policy dialogue and development activities (PPDDA)”
- The result is that there are now no limits on PPDDA provided it is not a purpose in itself but is carried on in support of the charity’s stated purpose (e.g. advancement of education, relief of poverty, promotion of health) and is non-partisan
- For more see the presentation by Ryan Prendergast



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### 2018 FALL ECONOMIC STATEMENT HIGHLIGHTS

- 2018 Fall Economic Statement was released on November 21, 2018 by the Department of Finance
- Re-confirmed the government’s commitment to allow charities to engage more fully in public policy dialogue
- Announced the government’s commitment to establish a permanent Advisory Committee on the Charitable Sector, which would regularly consult with charities and advise the government with respect to important issues facing the charitable sector



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- Proposed providing up to \$755 million on cash basis over a period of 10 years to establish a Social Finance Fund to provide charities, non-profits, and other social purpose organizations with:
  - (1) access to new funding
  - (2) connections to private investors
- Proposed investing \$50 million over two years in the Investment and Readiness stream, which would assist social purpose organizations to successfully participate in the social finance market
- To support local journalism, the government proposed providing up to \$50 million over five years to support existing news sources in local communities



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- Proposed three new measures to ensure Canadian's continued access to informed and reliable civic journalism (more details will be provided in the 2019 Federal Budget):
  - (1) new category of qualified donee for eligible non-profit journalism organizations, allowing such organizations to issue official donation receipts to donors and receive funding from registered charities
  - (2) refundable tax credit for qualifying news organizations, with effective date to be set for January 1, 2019, to support labour costs
  - (3) temporary and non-refundable 15% tax credit for qualifying subscribers of eligible digital news media

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## SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector on Canada
- The Special Committee has heard from various witnesses on ongoing basis starting in April 2018
- Its study and resulting report on how Canada can better assist the charitable and NFP sector was to be completed by December 31, 2018, but has been extended to September 30, 2019



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## RECENT CRA PUBLICATIONS AND PROGRAMS

- On February 15, 2018, CRA reminded qualified donees that they have until March 31, 2019 to update their official donation receipts with the CRA's new website URL, which is "canada.ca-charities-giving"
- On February 28, 2018, the CRA posted a video, "Gift Certificates and Gift Cards", outlining when and how registered charities can issue official donations receipts for gift card or gift certificate donations
- On March 1, 2018, the CRA announced that September 2017 initiative of assigning new business numbers to internal divisions of charities will not be proceeding, i.e. status quo is to continue

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- Plan was to give separate business numbers to internal divisions to access CRA's online services via Charities IT Modernization Project ("CHAMP")
- This step is no longer required, meaning practice of derivative business numbers will continue
- On September 18, 2018, the CRA announced that the public release of CHAMP, scheduled for November 2018, will be delayed until June 2019
  - Once in place, CHAMP will provide several new e-services, e.g. T2050 and T3010 filings

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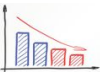
- On November 14, 2018, the CRA announced that it has stopped providing charities with peel and stick bar code labels for T3010 annual information return packages
- On November 15, 2018, CRA released an infographic (i.e. visual educational tool) "Changing Your Fiscal Year-End: What a registered charity needs to do", providing details on steps that must be taken when a charity changes its fiscal year-end
- On January 11, 2019, the CRA published its "Report on the Charities Program 2016 to 2018", which provides a review of statistics of registered charities, as well as programs and other resources implemented by the CRA over the past three years

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- The number of applications for charitable status decreased from 3,306 to 3,142
- The number of charitable registration decreased from 1,693 to 1,569
- Total number of revocations, including voluntary, after audit, and other revocations, increased from 1,372 to 1,562
- CRA states that it will be working on compliance related projects including:
  - "Reviewing the boards of registered charities to identify whether there are concerns related to ineligible individuals" and
  - "Reviewing activities involving the acquisition and construction of real estate to ensure such activities further a charitable purpose"



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## TAX DECISIONS, RULINGS AND INTERPRETATIONS

1. On April 9, 2018, the TCC released its decision on split receipting and donative intent in *Markou v The Queen*, 2018 TCC 66



- Involved an appeal of an assessment made under the ITA for filings of a group of individuals who had participated in the leveraged donation program
- The TCC concluded that "split gifts require that the gift portion of a transaction be separated from the non-gift portion, and that the gift portion be supported by donative intent."
- The 80% threshold in s.248(3) of the ITA will only be considered where the CRA and courts are able to split the transfer into two transactions and identify the appropriate donative intent

80%

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2. On June 12, 2018, the TCC released decision, *McCuaig Balkwill v The Queen*, regarding fair market value ("FMV") of donated wine to be sold at auctions hosted by charities
  - Issue was how to appropriately value wine, i.e. \$23,600 (position of charities issuing receipts) vs. \$4,700 (CRA's view based on actual auction prices)
  - TCC held that FMV of donated wine should not be based on LCBO's Private Ordering pricing, which is a monopoly, and relied on the CRA's expert instead
  - TCC made clear other methodologies possible in determining wine's FMV, provided they are supported with evidence and accurately applied
  - Charities receiving non-cash donations should bear in mind various FMV methodologies and keep full evidence of how calculations reached



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## CORPORATE UPDATE – FEDERAL

- On December 30, 2017, *Canada Corporations Act* ("CCA") and its *Regulations* were repealed
  - All federal NFP corporations under CCA now either transitioned to the *Canada Not-for-profit Corporations Act* ("CNCA") or dissolved
- Since December 2017, uncertified corporate documents available for purchase from Corporations Canada
- On June 26, 2018, Corporations Canada started online service to file applications for certain exemptions under the CNCA and *Canada Business Corporations Act*
- On October 4, 2018, Corporations Canada announced a new online service to obtain a certificate of compliance or a certificate of existence for a not-for-profit that is incorporated under the CNCA

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## CORPORATE UPDATE – ONTARIO

- Ontario government has indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA"), but exact timing remains uncertain
- As of December 10, 2018, charities and not-for-profit corporations incorporated under the OCA must keep, at their head office, a register of ownership interests in real property in Ontario along with certain supporting documents
- In December 2018, the government announced a joint consultation and review of the *Co-operative Corporations Act* by Ministry of Finance and Ministry of Government and Consumer Services



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## OTHER RECENT CHANGES IN ONTARIO

### 1. Social Investments in Ontario

- *Charities Accounting Act* ("CAA") applies to all charities in Ontario and provides that the *Trustee Act* (which deals with investment powers of trustees) apply to directors holding property for charitable purposes
- Bill 154 amended the CAA as of November 14, 2017
- These CAA amendments now permit charities to make "social investments" when they apply or use trust property to:
  - directly further the purposes of the trust and
  - achieve a "financial return" for the trust
- "financial return" is defined as an outcome in respect of the trust property that is better for the trust in financial terms than expending all the property



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- In April 2018, the Ontario Public Guardian and Trustee ("OPGT") released the "Charities and Social Investments Guidance" (the "Guidance")
  - It sets out the OPGT's interpretation of the social investment framework under the CAA
  - The Guidance clarifies that "financial return" is not required to be at market rates, and, depending on the terms of investment, it may not require the repayment of the invested capital
  - This suggests that even where the investment results in a partial loss of capital, it may still qualify as a social investment as long as the investment was directly furthering the charitable purpose of the charity



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- The Guidance recommends that a charity should base its decision to make a social investment on:
  - its charitable purposes and assets (assets may be considered although the CAA does not specifically reference them as consideration for trustees making social investments)
  - the rules and duties that apply to social investing
  - its governing documents, and
  - a director's or trustee's general fiduciary obligation
- The Guidance recognizes that charities making social investments must also comply with CRA requirements
  - This would include complying with requirements for program-related investments under CRA Guidance (CG-014) on community economic development activities

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## 2. Remuneration of Directors in Ontario

- On April 1, 2018, amendments to Regulation 4/01 ("Regulation") of the CAA came into force concerning remuneration of directors by authorizing "charitable corporations" to pay directors and "connected persons" in certain limited situations
- Amendments require charities to consider any accompanying Guidance which may be prepared
- In May 2018, the OPGT released its Guidance
- The Guidance provides that a director can be paid for certain services provided to a charity, subject to the charity's fulfillment of specific requirements
- The Guidance also states that directors and "connected persons" cannot be paid for: (1) being a director or employee or (2) fundraising/real property transactions

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- Guidance elaborates upon the Regulation requirements to authorize payments to directors or "connected persons" for certain services, including:
  - Board must consist of at least 5 directors, with at least 4 eligible to vote on the payment to the director or connected person
  - Board must believe at time of authorization that the payment is the charity's best interests
  - Payment amount must be reasonable
- Guidance provides more detail on the mandatory disclosure of payments to the members at the annual meeting and in financial statements
- Guidance states that charities are advised to keep records of everything related to compliance with the Regulation



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## 3. Other Legislation Updates in Ontario

- The Ontario *Children, Youth and Family Services Act, 2017* ("CYFSA") and four of its supporting regulations came into force on April 30, 2018
  - The CYFSA replaced the Ontario *Child and Family Services Act*, with the following key changes:
    - Age of protection has been increased to include 16 and 17 year olds, who may be found to be in need of protection subject to their circumstances
    - While the mandatory duty to report applies only to children younger than 16, under the CYFSA a person may make an optional report in respect of a child who is 16 or 17



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- Procedures to show respect for the culture of children under protection, including Indigenous children, by keeping children in their home communities, where possible
- Providing great accountability and oversight over child protection service providers
- Charities and NFPs working with children and youth in Ontario should work with their legal counsel to revise their child protection policy in accordance with the updated reporting requirements under the CYFSA



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- On November 1, 2018, the *Ontario Police Record Checks Reform Act, 2015* and its regulations came into force, implementing a new standardized regime governing police record checks including vulnerable sector checks
  - Vulnerable sector checks are used to determine an individual's suitability to work or volunteer in a position of trust or authority over vulnerable persons
  - Charities and NFPs that work with children or other vulnerable persons will need to be aware of these updated procedures that apply to their employees and volunteers when obtaining or updating vulnerable sector checks



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## CASE LAW OF INTEREST (in chronological order)

- John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's, 2018 NLSC 60 (Mar.16, 2018)**
  - Plaintiffs had been abused by teachers as residents of an orphanage linked to the Roman Catholic Episcopal Corporation of St. John's (the "Archdiocese"), with plaintiffs claiming the Archdiocese was vicariously liable for this abuse
  - Court held that the Archdiocese was not vicariously liable, as the orphanage and Archdiocese were separate corporate entities that operated without blurring these boundaries

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- Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26**
  - On May 31, 2018, the Supreme Court of Canada ("SCC") upheld religious autonomy in *Wall* decision
  - Court will generally not interfere in religious doctrine matters and procedural rules requiring doctrinal interpretation
- Trinity Western University Decisions ("TWU")**
  - On June 15, 2018, the SCC upheld the denial of accreditation regarding TWU's law school on the basis that its mandatory covenant on sexual conduct was discriminatory
  - The Court held that refusal of accreditation balanced the effects on religious freedom with the Law Societies objectives of protecting the public interest by ensuring diversity and equality in the profession

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- Faas v CAMH, 2018 ONSC 3386 (June 6, 2018) (under appeal)**
  - The Faas Foundation and its principal ("Faas") made an application under s.6(3) of the CAA for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds donated by Faas
  - Courts have discretion to make orders under s.6(3) of the CAA if it is of the opinion that the public interest would be served by a PGT investigation
  - The court denied the application on grounds that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH's program and use of funds
  - Courts are reluctant to interfere with a charity's operations unless the public interest is being affected

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- The McKay Cross Foundation v ICSS, 2018 ONSC 6422 (October 30, 2018)**
  - Application to dismiss a claim made by plaintiffs for return of a \$100,000 donation to a registered charity, *Innovative Community Support Services*
  - Court considered the evidence and agreement between both parties to determine if donated funds were specific purpose charitable funds
  - Court found that donation was made with no strings attached; agreement was "too vague to be enforceable" and email exchanges did not indicate that donation was for a specific purpose
  - Charities and donors should enter into proper gifting agreements prior to donations being made, especially if gift is intended to have specific purpose

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- Friends of Toronto Public Cemeteries Inc. v Mount Pleasant Group of Cemeteries ("MPGC"), 2018 ONSC 7711 (December 31, 2018)**
  - Plaintiffs claimed that MPGC was a trustee of the cemeteries, had improperly appointed directors, and was not in compliance with its governing legislation
  - Court examined MPGC's complicated corporate and trust history going back to 1826
  - The Court found that
    - MPGC was subject to the trust and governance provisions of its 1826 and 1849 Acts
    - The current directors of MPGC had not been validly appointed as trustees in accordance with its 1849 Act

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- MPGC continues to hold its assets as trustee of the trust created by 1826 Act and amendments
- Trust administered by MPGC is a charitable trust
- MPGC is a trustee subject to the CAA
- The funding and operation of visitation centres and funeral homes are beyond the scope of the stated purpose of a "cemetery or cemeteries or places for the burial of the dead"
- The Court stated that
  - "...a blanket statement that *no* charitable corporations hold their assets in trust is simply too broad to be sustained."
  - "Care must be taken to examine the corporate and trust history to determine what conclusion best fits the facts."

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# **The 2019 Ottawa Region Charity & Not-for-Profit Law Seminar**

**February 14, 2019**

## **CRITICAL PRIVACY UPDATE FOR CHARITIES AND NFPs**


**By Esther Shainblum, B.A., LL.B., LL.M., CRM**

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**The 2019 Ottawa Region  
Charity & Not-for-Profit Law  
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February 14, 2019**

## Critical Privacy Update for Charities and NFPs


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## INTRODUCTION



- Significant developments in privacy in 2018
- Big changes both globally and in Canada that:
  - Could change how churches, charities and NFPs in Canada operate
  - Should change how they understand their obligations around privacy, transparency and accountability
- Growing global emphasis on privacy and increasing stakeholder awareness and demands for protection of their personal information
- Expectations that charities must take into account

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### A. SIGNIFICANT DEVELOPMENTS

#### 1. Facebook and Cambridge Analytica


- Facebook allowed 87 million users' personal information ("PI") to be improperly accessed and misused by Cambridge Analytica for political purposes
- Facebook failed to safeguard PI and was not transparent about how it allowed third parties to harvest data on its platform
- Facebook's reputation has been damaged, it was fined and Cambridge Analytica and its parent company have shut down
- Has led to a larger global concern about whether people can trust organizations with their PI



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**DOGBERT CONSULTS**

CUSTOMER DATA IS AN ASSET THAT YOU CAN SELL.

IT'S TOTALLY ETHICAL BECAUSE OUR CUSTOMERS WOULD DO THE SAME THING TO US IF THEY COULD.

SOUNDS FAIR. IN PHASE ONE, WE'LL DEHUMANIZE THE ENEMY BY CALLING THEM "DATA."


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### B. THE GENERAL DATA PROTECTION REGULATION ("GDPR")

- The GDPR came into force on May 25, 2018 and harmonizes data protection and privacy laws across all EU jurisdictions
- GDPR strengthens and enhances data protection rights for individuals and imposes strict requirements on organizations engaged in data "processing" - any operation performed on personal data including collection, use, disclosure or storage
- Organizations to which the GDPR applies must comply or face severe penalties




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#### 1. Why Should Charities in Canada Care About the GDPR?

- Extra-territoriality - GDPR applies to organizations that are not established in the EU if they:
  - process personal data of EU residents to offer them goods or services (whether or not a fee is charged); or
  - monitor the behaviour of EU residents within the EU
- Merely having a website accessible in the EU will not constitute "offering goods or services." It must be apparent that the organization "envisages services to data subjects" in the EU



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- Under the new European Data Protection Board Guidelines (the "EDPB Guidelines"), in order for the application of the GDPR to be triggered
    - There must be an element of "targeting" individuals in the EU, either by offering goods or services to them or by monitoring their behaviour
  - The EDPB Guidelines set out factors that indicate that goods or services are being offered, including:
    - Mentioning the EU or a member state by name
    - Giving EU addresses or telephone numbers
    - Using an EU domain name such as ".eu"
    - Mentioning EU customers
    - Using EU languages or currencies
    - Offering delivery of goods in EU member states

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- If one or any combination of these factors is present with respect to a Canadian charity, the charity may be caught by the GDPR
  - The second type of "targeting" activity triggering application of the GDPR is 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
  - EDPB Guidelines provide that "monitoring" means 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

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- EDPB Guidelines - not every online collection or analysis of personal data will automatically count as "monitoring"
    - there must be subsequent behavioural analysis or profiling involving that data, for it to constitute "monitoring"
  - But - examples of monitoring activities including "online tracking through the use of cookies or other tracking techniques such as fingerprinting"
  - Indicates that using cookies on a website that is accessible to EU residents will be enough to trigger the application of the GDPR, potentially capturing a broad range of Canadian charities
  - Other examples of monitoring include targeting advertisements to consumers based on their browsing behavior, CCTV

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## 2. Consequences of Breaching the GDPR

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- If a Canadian charity is caught by the GDPR due to extra territoriality, it must designate a representative within the EU to oversee its GDPR compliance. Failure to do so is a breach of the GDPR, which could lead to penalties
  - A Canadian charity may be exempted from this requirement if it can demonstrate that its data processing is "occasional", does not include large scale processing of certain categories of particularly sensitive data, and is unlikely to pose a risk to the rights and freedoms of natural persons
  - Failure to comply with GDPR can lead to fines of 4% of worldwide turnover or €20 million, whichever is higher
  - If you think your charity may be subject to the GDPR, obtain legal advice

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## 3. Mandatory Breach Reporting

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- On November 1, 2018, new breach notification, reporting and recordkeeping obligations came into force under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and accompanying regulations
  - Must report breaches to the Office of the Privacy Commissioner of Canada ("OPC") and notify affected individual (and possibly third parties) when:
    - an organization experiences a "**breach of security safeguards**" involving PI under its control
    - if it is reasonable in the circumstances to believe that the breach creates a "**real risk of significant harm**" to an individual ("RROSH")

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- "Breach of security safeguards" means loss of, unauthorized access to or unauthorized disclosure of PI
  - "Significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property
  - Relevant factors in determining whether a breach of security safeguards creates a RROSH include:
    - the sensitivity of the PI
    - the probability of misuse of the PI
    - any other prescribed factor (none so far)

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- Obligations:
  - report the breach to the OPC;
  - notify the affected individual
  - notify any third party (e.g. the police, bank, credit reporting agency) that may be able to reduce or mitigate the harm
- Must retain records of all breaches for 24 months regardless of materiality
- Charities and NFPs should not assume they are exempt from PIPEDA - what constitutes a commercial activity will vary with the facts of each case
- Charities and NFPs should consider voluntary compliance given increasing stakeholder awareness and expectations around privacy, transparency and accountability

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#### 4. New OPC Guidelines

- In 2018 OPC published two new guidance documents to improve compliance with privacy obligations:
  - "Guidelines for obtaining meaningful consent" – effective January 1, 2019
  - "Guidance on inappropriate data practices" – effective July 1, 2018



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- Consent Guidance sets out seven principles to guide organizations in their consent processes, including:
  - provide information about privacy in a clear, comprehensive, understandable and accessible manner
  - allow individuals to control the amount and the timing of detail they receive – e.g. layered format
  - use innovative and interactive forms and tools to obtain consent
- Data Guidance identifies a series of principles to protect individuals from inappropriate data practices
- Only collect, use or disclose PI for purposes that a reasonable person would consider appropriate in the circumstances



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- No-Go Zones, including collection, use or disclosure that is unlawful, unethical or likely to cause harm
- Churches, charities and NFPs should not assume they are exempt from PIPEDA
- These are best practices regarding consent and appropriate data practices in Canada - churches, charities and NFPs should adhere on a voluntary basis



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#### C. WHY CHARITIES SHOULD COMPLY WITH PIPEDA

##### 1. Commercial Activity versus Tax Status

- Charities are not automatically exempt from PIPEDA
- PIPEDA applies to any organization that collects, uses, or discloses personal information in the course of commercial activities (s. 2(1))
- What is relevant is the nature of the specific activities undertaken by an organization, not its tax status (as for profit or charity)
- OPC - "whether or not an organization operates on a non-profit basis is not conclusive in determining the application of the Act"

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- Whether an organization is collecting, using or disclosing personal information in the course of a commercial activity is fact-based
- OPC found that a non-profit daycare organization was caught by PIPEDA
  - payment for child care services was seen as a commercial activity
- OPC found that the non-profit Law School Admission Council was engaged in commercial activity
  - OPC stated that there is no exemption for non-profit or member-oriented organizations



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- Charities increasingly turning to sale of goods and services methods to earn revenue
  - increasing likelihood that revenue-generating activities may be caught by PIPEDA
- It is becoming increasingly complex for a charity (or the OPC or a court) to determine whether an activity falls within the scope of PIPEDA
- No bright-line test that can be applied to determine whether an activity is commercial in nature. Whether an activity constitutes a commercial activity will vary with the facts of each case



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- Most prudent for charities to assume that the OPC or a court might find that they are engaged in commercial activity and that they are subject to PIPEDA
- Therefore, charities should obtain consent and abide by the other "fair information principles"
- By complying voluntarily with PIPEDA, charities can also avoid accidentally breaching PIPEDA requirements if their activities turn out to be commercial - avoiding possible fines and penalties



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## 2. Public Policy

- No convincing public policy justification for excluding charities from privacy law requirements
- GDPR applies to charities and not-for-profits, as does BC *Personal Information Protection Act*, and many charities and not-for-profits are also subject to Alberta *Personal Information Protection Act*
- Many health information custodians under the Ontario *Personal Health Information Protection Act, 2014* and its counterparts in other provinces are charities



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- Charities and not-for-profits can and do comply with privacy legislation throughout Canada and elsewhere
- Charities across Canada are in control of a great deal of personal information, e.g. donors, clients and volunteers
- Majority of Canadians make financial donations to charities or not for profits
- Majority of Canadians prefer to donate online
- The privacy interests of many Canadians will turn on the nature of the privacy protections, safeguards and protocols that Canadian charities have in place



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### 3. Stakeholder Expectations

- There are increasing stakeholder awareness and expectations around privacy, transparency and accountability
- Consumers do not expect different standards of protection to apply depending on whether they are providing their credit card number to a charity or to an online retailer
- Stakeholders expect charities to safeguard their personal information, protect it from misuse and be transparent and accountable for how it is used



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- In the 2018 Global Trends in Giving Report, 92 per cent of donors said it was important for charities to protect their financial and contact information from data breaches
- Charities and not-for-profits should take these expectations into account when developing and adopting their privacy practices
- By aligning with PIPEDA, charities can maintain the trust and confidence of their donors, clients and other stakeholders, and minimize the risk of reputational damage



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### 4. Litigation

- Canadian courts showing an increasing willingness to protect privacy interests
- Violations of privacy can give rise to damage awards, tort claims and class action litigation in the courts
- Privacy-related class action litigation on the rise in Canada - e.g. multi million dollar Winnipeg Royal Ballet class action brought by former students for intimate photos taken by instructor and posted online



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- Risks associated with privacy breaches and violations including the risk of court action, class action litigation, court awarded damages and reputational injury
- Floodgates have been opened for new privacy-based lawsuits
- The rise of class action lawsuits to remedy privacy breaches poses an existential risk to all organizations
- The standards set out in PIPEDA will shape stakeholder expectations, and possibly court expectations, regarding how an organization should collect, use, disclose and safeguard personal information



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### CONCLUSION

- There is a growing global emphasis on and regulation of privacy as well as increasing stakeholder awareness and expectations
- Charities and NFPs in Canada should move toward alignment with PIPEDA, including mandatory breach notification and the new guidances, to:
  - Ensure that they are compliant where applicable
  - Meet stakeholder expectations around privacy, transparency and accountability
- The stakes are high - possible reputational damage, loss of stakeholder confidence and possible fines and penalties

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**February 14, 2019**

## **CLEARING THE HAZE: MANAGING CANNABIS IN THE WORKPLACE IN ONTARIO**


**By Barry W. Kwasniewski, B.B.A., LL.B.**

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## Clearing the Haze: Managing Cannabis in the Workplace in Ontario

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### OVERVIEW

- Overview of Federal Legislation
- Overview of Provincial Legislation
- Medical Use of Cannabis in Canada
- Recreational Cannabis in the Workplace in Ontario
- Workplace Cannabis Policies
- Regulating Off-Duty Employee Conduct
- Accommodating Medical Use of Cannabis
- Employee Addiction to Cannabis

For more information see *Charity & NFP Law Bulletin #431* at [carters.ca](http://carters.ca)

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### A. OVERVIEW OF FEDERAL LEGISLATION

#### 1. General Background

- On October 17, 2018, Federal Bill C-45, the *Cannabis Act* ("Federal Act"), came into force, legalizing the recreational use of cannabis in Canada
  - Each province and territory has its own legislation to regulate the recreational use of cannabis such as where cannabis can be bought and used, as long as their laws comply with the parameters set in the Federal Act
  - Municipalities, within their jurisdiction as authorized by their province or territory, may make bylaws and regulations concerning cannabis

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- The Federal Act permits individuals:
  - Who are 18 years or older to access cannabis recreationally, although the legal age of use may be increased by the province or territory (e.g. the legal age in Ontario is 19 years)
  - To possess up to 30 grams of dried cannabis, or an equivalent amount in a different form (e.g. cannabis oil) from a provincially licensed or approved retailer
  - To grow up to four cannabis plants per residence for personal use
  - To make cannabis edibles at home for personal consumption
- The Federal Act permits cannabis suppliers to brand their products, however, they are not permitted to:
  - Brand in a way so as to make it appealing to youth
  - Sponsor events

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#### 2. Federal Act Penalties and Restrictions

- The Federal Act repeals the criminal penalties for cannabis possession, subject to its designated limits,
  - However it establishes a range of penalties for breaching these designated limits, including other regulatory provisions of the Act
- For example, the Federal Act creates two new criminal offences, with a maximum penalty of 14 years in jail for:
  - Giving or selling cannabis to youth, or
  - Using a youth to commit a cannabis related offence
- Directors or officers of a corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence may also be liable for conviction under the Act

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- Individuals in Canada are prohibited from taking cannabis across Canadian borders
  - Regardless of the amount of cannabis
  - Even if the individual is authorized to use cannabis for medical purposes
  - Even if the individual is travelling to another area where cannabis has been legalized or decriminalized
- Individuals who do transport cannabis out of Canada will also be subject to the laws of the other country
- Link to *Cannabis Act*, SC 2018, c16:  
<https://laws-lois.justice.gc.ca/eng/acts/C-24.5/FullText.html>
- Summary of *Cannabis Act* by the Department of Justice:  
<http://www.justice.gc.ca/eng/cj-jp/cannabis/>

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## B. OVERVIEW OF ONTARIO LEGISLATION

- The recreational cannabis regime is governed in Ontario through several acts (and their regulations) including:
  - Ontario *Cannabis Act, 2017*, SO 2017, Schedule 1
  - Ontario *Cannabis Retail Corporation Act, 2017*, SO 2017, c 26, Schedule 2
  - Smoke-Free Ontario Act, 2017*, SO 2017, c 26, Schedule 3
- Originally, recreational cannabis would be available in Ontario through a government operated retail model similar to the LCBO

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- However, Bill 36, *Cannabis Statute Law Amendment Act, 2018* ("CSLAA") was introduced on September 27, 2018 and came into force on October 17, 2018
  - The CSLAA replaced the retail model above with a new system whereby cannabis will be available through private retail stores as of April 1, 2019, subject to licensing and approval by the Ontario government
  - Until April 1, 2019, individuals in Ontario can only access recreational cannabis online, through the Ontario Cannabis Store ("OCS")
    - The OCS only delivers orders to addresses within Ontario, and requires visitors to verify their age before entering the website
- Link to OCS: <https://ocs.ca/>
- Link to CSLAA: <https://www.ontario.ca/laws/statute/s18012>

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## C. MEDICAL USE OF CANNABIS IN CANADA

- The medical use of cannabis was legalized in 2001
- Since April 1, 2014, individuals could access cannabis for medical purposes using only a doctor's prescription, as opposed to a license from Health Canada
- Access to medical cannabis is regulated by the federal *Cannabis Regulations*, SOR/2018-144, which replaced the previous *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 on October 17, 2018
- Employers have been dealing with matters of medical cannabis with respect to the duty to accommodate under the Ontario *Human Rights Code* ("HRC")

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## D. RECREATIONAL CANNABIS IN THE WORKPLACE IN ONTARIO

### 1. Smoke-Free Ontario Act, 2017

- The Ontario *Cannabis Act, 2017* approaches the use of cannabis similarly to tobacco in that the permitted places of cannabis consumption are governed by *Smoke-Free Ontario Act, 2017* ("SFOA")
- SFOA places certain obligations on employers regarding the use of recreational cannabis, including:
  - Requiring employers to ensure compliance with the Act with respect to the prohibition of cannabis in an "enclosed workplace"
  - Giving notice to employees of such prohibition
  - Posting signs of such prohibition in the enclosed workplace
- Link to SFOA: <https://www.ontario.ca/laws/statute/17s26>

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- Regarding workplaces, SFOA only prohibits use of cannabis in "enclosed workplaces", defined under s.1(1):
  - the inside of any place, building or structure or vehicle or conveyance, or a part of any of them,
    - that is covered by a roof,
    - that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and
    - that is not primarily a private dwelling, or
  - a prescribed place
- SFOA does not prohibit the ingestion of cannabis (i.e. cannabis edibles) in the workplace, as the limitation on the use of cannabis in enclosed workplaces applies only to smoking or holding lighted cannabis
- While employers may still prohibit these activities, the activities are not in and of themselves, illegal

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### 2. Ontario Occupational Health and Safety Act

- Section 25 of the Ontario *Occupational Health and Safety Act*, RSO 1990, c O.1 ("OHSA") requires employers to take "every precaution reasonable in the circumstances for the protection of the worker"
  - Employers and managers can be charged and prosecuted for health and safety violations under the OHSA, and face substantial fines and penalties
  - Even with the legalization of cannabis, employees do not have the right to be impaired in the workplace
- Link to OHSA: <https://www.ontario.ca/laws/statute/90o01>

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### 3. Employer Rights Regarding Performance of Duties

- Employers have the right to require that employees report to work in a condition in which they are fit to perform their duties
  - Cannabis can be considered in the context of other substances that cause impairment, regardless of whether it is legal or not
- Employees do not have an unfettered right to smoke cannabis at work, even if they are authorized to use cannabis for medical reasons
  - Confirmed by the Human Rights Tribunal of Ontario in *Aitchison v L&L Painting and Decorating Ltd*, 2018 HRTO 238 (February 28, 2018)

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### 4. Challenges of Employers Regarding Cannabis Impairment

- A person who is under the influence of cannabis may not show obvious traits of impairment
- There is no generally accepted observational testing that untrained individuals can carry out to determine cannabis-related impairment
- Employee showing signs of impairment should be advised to cease work immediately, and interviewed by management as to signs of impairment
- Management should interview others who interacted with impaired employee
- Prior to re-attendance at work, employee should be asked about impairment at work and provide an explanation. If no explanation is offered, employee could be subject to discipline

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- Signs of cannabis impairment can include:
  - Dizziness, drowsiness, fatigue
  - Confusion, impaired focus and memory
  - Altered emotional states such as paranoia, suspiciousness, nervousness, and anxiety
  - Impairment of motor function and perception
- The acute effects of cannabis impairment generally last between 2 to 4 hours. However, these effects can linger for up to 24 hours after consumption or even longer
- Cannabis impairment can significantly impact an individual's ability to work effectively, respectfully, and in many cases, safely
- Some organizations are offering courses for managers on identifying cannabis impairment

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### E. WORKPLACE CANNABIS POLICIES

- The use of recreational cannabis by employees does not trigger any duties under the HRC, subject to issues of addiction
- Employers have the right to set rules and policies for the recreational use of cannabis in the workplace
  - Employers may prohibit the use of recreational cannabis at work in any form during working hours
  - Employers may prohibit employees from attending work while impaired, whether from use of cannabis or any other substance causing the impairment

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- Workplace rules may be enforced through employee discipline, including a progressive discipline policy
- Employers should update or establish a workplace drug and alcohol policy or a more general "fitness to work" policy to include references to recreational cannabis
- There is debate over how detailed a policy regarding the use of recreational cannabis should be

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- The Canadian Armed Forces ("CAF") has a highly detailed policy regarding the use of cannabis by CAF members (see: <http://www.forces.gc.ca/en/about-policies-standards-defence-admin-orders-directives-9000/9004-1.page>)
  - The University of Toronto has guidelines clarifying employee obligations relating to impairment in the workplace, defining 'fitness to work' as when:
    - "An employee is able to safely and acceptably perform assigned duties without limitation resulting from the use or after effects of intoxicants (whether a medication or otherwise)."
- (see: <http://www.hrandequity.utoronto.ca/wp-content/uploads/sites/15/2018/06/Human-Resource-Guideline-on-Fitness-for-Work.pdf>)
- Each organization needs to consider how they will manage cannabis, and make those known to employees

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## F. REGULATING OFF-DUTY EMPLOYEE CONDUCT

- Generally, employers cannot regulate an employee's off-duty conduct that is legal, unless it is tied to workplace performance issues
  - However, an employer who is a religious ministry may establish conduct requirements regulating the use of drugs or alcohol through lifestyle and morality standards or similar documents
- However, regulating off-duty employee conduct is complex and dependent on the nature of the ministry and its interpretation of the essential precepts of the faith
  - For example, the Trinity Western University cases involving its code of conduct show that policies based on social morality can be problematic
- Therefore it is important to obtain legal advice before prohibiting cannabis use based on such standards

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## G. ACCOMMODATING MEDICAL USE OF CANNABIS

- The medical cannabis regime operates independently from the recreational cannabis regime
- A legal duty to accommodate is triggered when an employee claims to be suffering a disability within the meaning of the HRC
  - This duty extends to the use of medical cannabis
  - Employees who have been prescribed medical cannabis are to be accommodated the same as any other disabled employee who has been prescribed medication

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- The HRC has a broad definition of "disability, meaning that there may be many medical conditions for which cannabis may be prescribed, which trigger employer duties to accommodate under the HRC
- There is a mutual duty on both employee and employer with respect to the workplace accommodation process when an employee is prescribed medical cannabis
- Obtaining and assessing the necessary medical information is a necessary part of the workplace accommodation process

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- If an employee wishes to use medical cannabis and attend work, the employer should require the following information from the employee's prescribing physician:
  1. When and how the product needs to be used;
  2. Whether the product needs to be used at work;
  3. In what form the product must be consumed;
  4. Where the employee will consume the product if it needs to be taken at work;
  5. The period of time the employee is anticipated to take the product; and
  6. The side effects and restrictions when using the product, and the length of these effects.
- This information helps employers assess whether the medical cannabis will affect the employee's ability to perform his or her duties, and how such duties can be modified to accommodate the employee's needs

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- However, a prescription for medical cannabis does not entitle the employee:
  - To be impaired at work
  - To compromise his or her safety, or the safety of others
  - To smoke in the workplace
  - To unexcused absences or late arrivals
- Accommodation of medical cannabis requires an objective assessment of
  - Any factors that limit the employee's ability to perform his or her work duties
  - Potential reasonable accommodations that could be made available to the employee
- It may be advisable for employers to seek the assistance of an independent medical examiner regarding these matters of assessment

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## H. EMPLOYEE ADDICTION TO CANNABIS

- With the expected increase in prevalence of recreational cannabis use, there is also a risk of increased rates of cannabis addiction
- The Human Rights Tribunal of Ontario has ruled on numerous occasions that drug or alcohol addiction can constitute a "disability"
- Employers should have policies stating how they will respond to potential cases of employee substance addiction issues
  - These policies should encourage or even require employees to come forward if they feel that they have a substance addiction problem, without risk of reprisal

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- As part of the accommodation process, employees who come forward may need to be granted time off work to deal with addiction issues
- Any immediate termination of an employee who comes forward with substance addiction issues could result in a human rights complaint against the employer
- However, an employer that has and implements policies properly addressing potential addiction issues will decrease the risk of being faced with human rights complaints

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## I. CONCLUSION

- Changes to the legal status of cannabis in Canada have created new challenges for employers
- It is important for employers to have workplace policies which address recreational cannabis use
  - Employers who currently do not have drug and alcohol policies should seriously consider adopting them
- Managers should be trained to identify signs of cannabis impairment
- Workers should be able to report safety and other concerns with respect to cannabis use

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- Policies should clearly articulate and reinforce the requirement that the employees
  - Must be fit for work
  - Understand the consequences of failing to comply with such policies
- However, policies should also provide for reasonable accommodation of employees who may be suffering from addiction issues or who have been prescribed cannabis for legitimate medical reasons

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **PROTECTING YOUR BRAND IN THE DIGITAL AGE**

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

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**The 2019 Ottawa Region  
Charity & Not-for-Profit Law  
Seminar™  
February 14, 2019**

## Protecting Your Brand in the Digital Age

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### A. WHAT IS A BRAND?

- A brand is one of an organization's most important assets
- It is what an individual first thinks of when he or she sees the organization's name and logos
- Serves as a shortcut in judging the quality of services, the credibility of information, and the reputation of the organization – it is the organization's way of saying "you can trust us" to the public
- It captures the public's attention and helps to get an organization's message heard



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### B. WHY IS A SUCCESSFUL BRAND IMPORTANT?

- Motivates partners, the public, volunteers, employees and members to increase their commitment
  - People prefer working, volunteering, and giving to well-known brands
- Distinguishes one organization from another and helps to eliminate confusion
- Creates equity and brand value, which can lead to lucrative licensing opportunities
- For a charity or not-for-profit that does not sell products or services, your brand is everything



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### C. WHAT IS A TRADEMARK?

- Canadian and international laws recognize certain aspects of brands as protectable forms of *intellectual property*
- Trademarks are likely the most important part of your brand and one of the most powerful forms of intellectual property because it protects an organization's image
- In particular, names, logos, or slogans are parts of your organization's brand known as "**trademarks**"
- Trademarks legally protect your brand and grant your organization exclusive rights to their use in the public

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- A trademark is any mark used for the purpose of distinguishing products and services from others in the public
- Indicates the source or origin of goods and services
- Assures the public of the quality of goods and services
- Creates goodwill and brand awareness
- The best way to enhance protection of trademarks is with a trademark registration



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### D. CHALLENGES WITH PROTECTING BRANDS IN THE DIGITAL AGE

- The ease of which content is distributed creates challenges
  - Easy to upload, download, copy
- Internet has an international element
  - Very easy to transcend borders
  - Which court has jurisdiction over disputes?
  - Claiming damages from infringers in a borderless digital environment is extremely difficult
- Enforcement is more difficult
  - Enforcing trademark rights that are violated on the internet can be difficult
    - Who is the infringer? How do you find the infringer? Where are they located?

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- With social media, branding reaches a large audience around the world in an instant
  - Failing to register trademarks prior to using them online can lead to third parties poaching marks
- Given all of these challenges, charities and not-for-profits need to take precautionary measures to protect their valuable brands



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## E. PROTECTING BRANDS IN THE DIGITAL AGE

### 1. Register Your Trademarks

- The easiest way to protect your brand in the digital age is to register your trademarks with the Canadian Intellectual Property Office
- There are several advantages to registering a trademark, including:
  - A presumption of ownership and validity
  - Exclusive rights to use the trademark in association with the registered goods and services
  - A registration is a public, searchable claim to rights in a trademark which may deter third parties for filing and using a similar trademark

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- With an unregistered trademark, owner must show extensive use, reputation, and goodwill in the mark to rely on these rights - there is no presumption of ownership
- The registration is effective throughout Canada
- Suing for trademark infringement, which can be done only on the basis of a registered trademark, is generally easier (and less costly) than suing for passing off of unregistered trademark rights
- Failure to register can result in costly and lengthy court battle
- A registered trademark has equity - it becomes an asset of the trademark owner and can be sold or licensed

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- Registration of a corporate name or business name does not itself give trademark protection
- Register your key trademarks including, corporate names, business names, and logos if used as trademarks
- Consider registering your #hashtag and domain names

## hashtag

/ˈhæftɑːɡ/

noun

a word or phrase preceded by a hash sign (#), used on social media sites such as Twitter to identify messages on a specific topic.

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

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

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## 3. Ensure License Agreements are in Place

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

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## 4. Monitor Unlawful Use of Trademarks

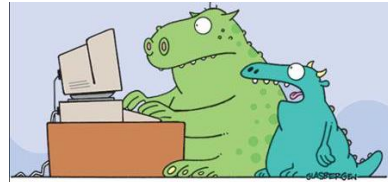
- Infringement occurs when the trademark or a confusingly similar trademark is used by someone other than the registered owner or an authorized licensee
- In order to prevent loss of distinctiveness of registered trademarks and therefore the loss of trademark rights, appropriate steps must be taken to protect and to enforce trademark rights



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



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- If infringement is occurring on social media sites, leverage the tools available on the site
- For example, Facebook and Twitter both have trademark infringement policies



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

- Implement a Trademark Style Guide that gives clear instructions on the use of trademarks
- Implement policies that set out if and how employees can use the trademarks
- With social media, branding reaches a large audience around the world in an instant
- Failing to register trademarks prior to using them online can lead to third parties poaching and registering marks prior to the owner
- Registration of a corporate or business name does not by itself grant trademark protection
- Once registered, ensure marks are properly used on social media - e.g., train staff on proper usage and markings

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## 6. International Considerations

- Trademarks are governed independently by every country
- Registration in Canada only protects the mark in Canada
- Co-ordinate launch of a new brand in order to maintain control at early stages
- 6-month priority period allows you to claim filing date of first trademark application for subsequent foreign applications

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## F. HOT OFF THE PRESS DEVELOPMENTS

### 1. Amendments to the Trademarks Act

- Changes to the *Trademarks Act* will be implemented on **June 17, 2019**
- Key changes include:
  - The requirement that a trademark be in use before it proceeds to registration will be eliminated
  - Trademarks will be examined for distinctiveness which will make it harder to register trademarks
  - The definition of "trademark" will be greatly expanded to include non-traditional trademarks, including colours, holograms, moving images, scents, tastes, and textures

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- The term of registration will be reduced from 15 years to 10 years
- The Nice Classification of goods and services will be adopted and, as a result, applicants will be required to classify goods and services in accordance with the classification system
- A class-based government fee system will be introduced for filing and for renewal
- This means that government filing **fees will go up significantly** and it will be much more expensive to obtain trademark registrations. Applicants will be forced to curtail goods and services to one or two classes
- With the current regime, the filing fees are the same regardless of the number of goods and services included

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What should you do prior to **June 17, 2019**:

- Proactively **file** trademark applications before the class-based government fee system is implemented which will result in an increase in government fees
- **Renew** registrations to take advantage of the 15 year renewal period and to save on fees, as it will be much more expensive to renew registrations after the new law is in force
- Consider **expanding** goods and services in existing registrations before the increase of government filing fees

What can YOU Do?



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- Beware of trolls
  - Because it will now be possible to obtain registration of a trademark without use, trademark trolls in Canada have already arrived
  - The Canadian Intellectual Property Office has reported that over 500 trademark applications have been filed covering all 45 classes of goods and services and nearly 100% of those applications were filed by trolls, likely with the intent to extort money from legitimate trademark owners that have not filed applications
  - With organizations using trademarks on digital platforms, trademark trolls are determining what marks organizations are using on websites and social media and filing those marks

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- This will likely continue and become an even more prevalent problem as we approach the implementation date
- As a result, charities and not-for-profits must be proactive in filing for new trademark registrations and expanding existing registrations now in order to avoid falling victim to trademark trolls
- Given the increase of trademark trolls and the expected increase in Canadian trademark filings from applicants around the world, it will be even more important to monitor trademark filings through trademark watching services in order to enforce trademark rights

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## 2. More Changes to Canadian Trademark Law

- The changes to the law discussed on the previous few slides will take place on **June 17, 2019**
- However, there are other important changes coming to trademark law as well that will impact charities and not-for-profits
- Most significantly, a special class of marks known as "official marks" will be greatly impacted
- Many charities and not-for-profits own these official marks rather than regular registered trademarks

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## 3. What is an Official Mark?

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

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

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

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- You should immediately check with your counsel to determine if in fact your trademarks were registered as official marks or as regular registered trademarks
- If they were registered as official marks, immediate steps should be taken to secure parallel registered trademarks prior to these amendments coming into force



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## G. CONCLUSIONS

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

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **CHARITIES AND POLITICS: WHERE HAVE WE BEEN AND WHERE ARE WE GOING**

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

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**OVERVIEW OF TOPICS**

- Review of Recent Initiatives to Modernize the Rules
- Current Legislative Amendments Applying to Registered Charities and the Conduct of Political Activities and What's on the Horizon
- Current Draft Administrative Guidance Concerning Public Policy Dialogue and Development Activities by Charities

See *Charity & NFP Law Bulletins* on this topic at  
[www.carters.ca](http://www.carters.ca), e.g., *Charity & NFP Law Bulletin No. 438* at  
<http://www.carters.ca/pub/bulletin/charity/2019/chylb438.pdf>

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**A. REVIEW OF RECENT INITIATIVES TO MODERNIZE  
THE RULES**

- 1. Winding Down of the Political Activities Audit Program for Charities and Consultation with Sector**
  - On January 20, 2016, Minister of National Revenue, Diane Lebouthillier, announced the winding down of CRA's review of registered charities' political activities which began in 2012
    - A news release from the Government of Canada stated the political activities audit program showed substantial compliance with the rules regarding charities' involvement in political activities and that of the 30 completed audits, only 5 resulted in revocation

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- On September 27, 2016, the Minister of National Revenue announced, "the start of public consultations on the rules regarding the involvement of registered charities in political activities" and that a consultation panel had been established consisting of 5 experts
  - Consultation began with the sector in September, 2016 and concluded in December, 2016
- On May 4, 2017, CRA published the Report of the Consultation Panel on the Political Activities of Charities (the "Consultation Report"), prepared after the consultation with the charitable sector, and recommended:
  - Define "political activities" to mean "public policy dialogue and development" and to permit charities to engage in public dialogue

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- Changes to CRA compliance and appeals, audits, communication and collaboration
- Removal of legislative reference to non-partisan political activities and "political activities"
- A modern legislative framework that focuses on charitable purposes rather than activities
- In conjunction with the release of the Consultation Report, the Minister of National Revenue announced that the government would suspend the remaining audits of charities for political activities initiated in 2012
- On February 27, 2018, the Liberal Federal Government tabled the 2018 Budget, which indicated the government's commitment to provide a response to the Consultation Report on political activities by charities

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**2. ITA Provisions Concerning Political Activities Struck Down as Unconstitutional**

- On July 16, 2018, Ontario Superior Court of Justice struck down provisions of the ITA restricting the amount of non-partisan political activities that registered charities may undertake in the decision of *Canada Without Poverty vs AG Canada* (the "CWP Decision")
  - Provisions infringed the charity's right to freedom of expression under 2(b) of the *Canadian Charter of Rights and Freedoms*
  - Court found that there is "no justification of s.149.1(6.2), that draws a distinction between charitable activities and non-partisan 'political activities' in the nature of public policy advocacy"

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- On August 15, 2018, the Minister of National Revenue announced that the Government of Canada had appealed the decision, citing errors of law
  - The Minister also stated that the CWP Decision would “not change the policy direction the Government intends to take with respect to the removal of quantitative limits on political activities”
  - The government also signaled its intention to amend the ITA to implement recommendation #3 of the Consultation Report to “allow charities to pursue their charitable purposes by engaging in non-partisan political activities and in the development of public policy”
  - Appeal of the CWP Decision by Government of Canada was later abandoned

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## B. CURRENT LEGISLATIVE AMENDMENTS

### 1. September Release of Proposed Legislative Amendments for Public Consultation

- On September 14, 2018, the Department of Finance Canada released a draft proposal of legislative amendments for public consultation (the “September Proposed Amendments”)
  - The September Proposed Amendments proposed to remove from the ITA the reference to the “substantially all” test concerning the ability of registered charities to engage in political activities

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- Explanatory notes to the September Proposed Amendments stated that CRA would need to make the determination of permitted political activities by reference to the common law
  - Without reference to the “substantially all” test, this meant that CRA’s interpretation of “incidental” would be critical given there was relatively little case law in this area after 1985
- On October 2, 2018, CRA released draft guidance *Charities and public policy advocacy* for public consultation, but this was subsequently withdrawn

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### 2. Bill C-86, Budget Implementation Act, No. 2 Introduced

- On October 25, 2018, the Department of Finance Canada tabled a Notice of Ways and Means motion which set out various amendments to the ITA, including those relating to political activities from the September Proposed Amendments, which had been revised as a result of public consultation
- Bill C-86 received Royal Assent on December 13, 2018
- Important to note many of these amendments are retroactive to 2008 or 2012 as applicable, and therefore will impact suspended audits

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- Amendments to the ITA in Bill C-86
  - Bill C-86 includes the amendments to subsections 149.1(6.1), (6.2) and (6.201) to remove the “substantially all” test
  - Keeps the prohibition on charities from devoting their resources to the “direct or indirect support of, or opposition to, any political party or candidate for public office”, which “shall not be considered to be constituted and operated exclusively charitable purposes”
  - Removes suspension for non-compliance with the “substantially all” test but permits suspension for devotion of resources to partisan activities

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- Adds a new definition of charitable activities that “includes public policy dialogue and development activities carried on in furtherance of a charitable purpose”
  - Explanatory notes clarify that charities’ participation in “public policy dialogue and development activities” is “without limitation”
- Also adds a new definition of “public policy activities” as section 149.1(10.1) that provides that
  - “Subject to subsections (6.1) and (6.2), public policy dialogue and development activities carried on by an organization, corporation, or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose”

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- The explanatory notes explain that new section 149.1(10.1) "ensures that, where some or all of the activities of a charity are public policy dialogue and development activities carried on in support of its stated purpose, those activities will not be considered to reflect a separate political purpose." [emphasis added]

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- Amendments to the ITA did not define "public policy dialogue and development activities"
  - The explanatory notes state that they "generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country"
  - The Consultation Report recommended use of the term "public policy dialogue and development" and recommended that it mean "providing information, research, opinions, advocacy mobilizing others, representation, providing forums and convening discussions"
- On October 31, 2018, a press release stated, "These changes are consistent with Recommendation no. 3" of the Consultation Report"

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## C. CURRENT DRAFT ADMINISTRATIVE GUIDANCE

### 1. Highlights of CRA New Draft Guidance on PPDDA

- On January 21, 2019, CRA release CG-027 Public policy dialogue and development activities by charities (the "Draft Guidance") together with a new Q&A webpage on public policy dialogue and development activities ("PPDDA") by charities
- The Draft Guidance is open for comments until Apr. 23, 2019
- Definition of PPDDA is confirmed to include "seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country"

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- For the most part, the Draft Guidance also includes the list of PPDDA from the Consultation Report, for example:
  - **Advocacy** - "charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country"
  - **Mobilizing others** - "charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country"

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- The Draft Guidance confirms that the ITA places **no limits** on the quantum of PPDDA
- As such, charities may devote up to 100% of their total resources to PPDDA, provided that the PPDDA furthers the charity's stated charitable purpose
- However, PPDDA, as a means to achieve a charitable purpose, **cannot become the purpose itself**
  - E.g., "charitable purpose" cannot "refer to influencing the laws, policies, or decision of a government"
  - Rather, the purpose has to be a charitable purpose at common law, but PPDDA can be utilized to achieve that purpose

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- In addition, PPDDA, when considered together with the charity's stated purpose, must provide a public benefit
- The Draft Guidance and CRA's Q&A also confirm:
  - A charity can make a gift to another qualified donee to support the recipients PPDDAs, which the ITA previously limited concerning political activities; and
  - Resources in support of political activities used to be excluded from satisfying the disbursement quota, but expenditures towards PPDDAs will be included in determining whether or not a registered charity has met the disbursement quota

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- However, charities continue to be prohibited from “directly or indirectly support or oppose a political party or candidate for public office,” examples of which are provided in the Draft Guidance
- Examples of **direct** support or opposition, includes for example:
  - “endorsing a candidate over social media”
  - “telling people on a charity’s website not to vote for a political party”
  - “making a donation to a political party or a candidate’s election campaign”

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- Examples of indirect support or opposition:
  - “a charity’s internal planning documents explicitly confirm that it will oppose a political party that takes a different view on a certain policy issue...”
  - “the internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election...”
  - The Draft Guidance also requires that a registered charity with a website or blog, “must monitor these platforms, and remove messages that support or oppose a political party or candidate for public office” or post a notice that “messages that support or oppose a political party or candidate will be removed”

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- Examples of allowed activities:
  - Communicating about policy issues
    - PPDDAs can occur at any time, either in or outside of an election period, provided they do not identify a political party or candidate
  - Informing the public about policy positions of political parties and candidates
    - Registered charities can, “[p]ublish on its website or social media platforms... the policy positions of all political parties...” provided it does so in a neutral fashion
    - Hold all candidates debates
    - Provide the voting record for all MPs or other level of government on an issue

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- The Draft Guidance also clarifies the application of the ITA to representatives of a charity involved in politics during “personal time”
  - Must be done carefully
  - Registered charities cannot “use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual’s personal political involvement”
  - Representatives are suggested to “indicate that their comments are personal rather than the views of the charity”

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- The Draft Guidance notes that while the ITA permits PPDDA without restriction, registered charities need to be aware of the intersection of other legal requirements such as:
  - Federal and provincial lobbying and election legislation
  - The common law in different provinces, as applicable, although the Draft Guidance is unclear on this point

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## 2. Issues to be Aware of with Draft Guidance

- Avoid mission drift
  - PPDDA activities are only allowable where they support the “stated purpose” of a charity
  - Registered charities need to be clear about their charitable purposes and whether PPDDAs furthers those activities
  - E.g., avoid pursuing PPDDA to encourage a change in the law that is not related to the charitable purposes of the charity

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- Keep books and records
  - The Draft Guidance states that, “A charity must keep records that demonstrate its primary consideration in carrying on PPDDAs is to further its stated charitable purpose and provide a public benefit.”
  - The Draft Guidance makes reference to reliance on records throughout, e.g., review of meeting minutes concerning indirect support of political candidates
  - The onus remains on the charity that PPDDA activities are done in compliance with the ITA
    - An absence of records may make this difficult

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- Track expenditures accordingly
  - Registered charities previously had to carefully track political activities in order to meet quantitative limits
  - Since PPDDA carried on in furtherance of a stated purpose are charitable activities, it will be important to categorize these expenditures accurately

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- How will this impact new registrations?
  - The T2050 currently asks questions with respect to any intended “political activities” of a registered charity, which are further addressed in CRA’s guidance on completing the T2050
- How will this impact the T3010, given retroactive application of legislation?
- Both to be updated in the near future


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### CONCLUDING THOUGHTS

- Bill C-86 is a very good development for the charitable sector in Canada
- Important to remember though that recommendation no. 3 of the Consultation Report was described as an “interim legislative step” necessary with respect to political activities
- The Consultation Report contained other recommendations, including the modernization of the charitable framework in Canada which is “urgent and needed”, beyond changes dealing with political activities

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**February 14, 2019**

## **THE COMING OF THE ONCA (WE HOPE) AND WHAT TO START THINKING ABOUT**

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

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**OVERVIEW**

- Status of ONCA
- Overview of ONCA Transition Process
- Overview of Key Elements of The ONCA
- Practical Steps For Transition

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**A. STATUS OF ONCA**

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") may finally be proclaimed in early 2020!!
- Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953 - Part III of OCA governs non-share capital corporations
- New ONCA will apply to Part III OCA corporations
- Key timeline of ONCA
  - October 25, 2010 - ONCA received Royal Assent
  - 2013 - Original anticipated proclamation date, later delayed to January 2014
  - June 5, 2013 - Bill 85 introduced, proposing changes to ONCA, with ONCA to be proclaimed 6 months after enactment of Bill 85
  - May 2, 2014 - Ontario Legislature dissolved, Bill 85 died on the Order Paper

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- September 2015 - Ministry announced that the ONCA would come into force after two things have happened
  - Legislature has passed technical amendments to the ONCA and related legislation
  - Technology at the Ministry is upgraded to support these changes and improve service delivery and the Ministry would provide the sector with at least 24 months' notice before proclamation
- Technical amendments
  - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, was introduced on September 14, 2017, and received Royal Assent on November 14, 2017
  - Bill 154 introduced changes to the OCA, ONCA and Ontario *Business Corporations Act*
  - See *Charity & NFP Law Bulletin* No. 409 at carters.ca

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- Technology - Following the Royal Assent of Bill 154, Ministry's website indicates that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery
- 24 month's notice - Ministry's website also states that it is working to bring ONCA into force as early as possible, with a target of early 2020 - thus giving NFP corporations at least 24 months' notice before the ONCA comes into force
- See Ministry's website for updates  
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force.

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**B. OVERVIEW OF ONCA TRANSITION PROCESS**

- ONCA applies automatically upon proclamation, except where overridden by existing corporate documents
- Optional transition process within 3 years of proclamation in order to make the necessary changes to their governing documents
- Prudent to go through the transition process by adopting new by-law and articles of amendment
- If no transition process taken in 3 years, then
  - Corporation will not be dissolved
  - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA - will result in uncertainty

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- Not moving the following provisions from by-laws or special resolutions to articles in order to comply with ONCA is fine until articles of amendment are endorsed
  1. Number of directors
  2. Two or more classes or groups of members
  3. Voting rights of members
  4. Delegates under section 130 of the OCA
  5. Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution
- Share capital social clubs under the OCA will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

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## C. OVERVIEW OF KEY ELEMENTS OF THE ONCA

### 1. Incorporation and Corporate Powers

- Removes ministerial discretion to incorporate - incorporation will be as of right
- Obtain certificate of incorporation, not letters patent
- Only one incorporator is needed
- No need to file by-laws or financial statements with the government
- Default by-law will apply if no by-laws adopted within 60 days after incorporation
- Corporation has the capacity, rights, powers and privileges of a natural person, eliminates the concept of a corporation's activities being *ultra vires*
- ONCA will not apply to corporations sole "except as is prescribed"

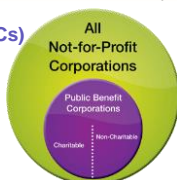
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### 2. Public Benefit Corporations (PBCs)

- All corporations categorized into PBCs and non PBCs
- PBCs include
  - "charitable corporations" - common law definition
  - Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from public donations or the federal or a provincial or municipal government or an agency of such government - Need to monitor revenue sources and level annually



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- If a non-charitable corporation reaches threshold, deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year
- Public sources means
  - Donations or gifts from persons who are not members, directors, officers or employees of the corporation
  - Grants or similar financial assistance from the federal, provincial or municipal government or government agency

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- Consequences of being a PBC
  - Not more than 1/3 of the directors may be employees of the corporation or its affiliates
  - Higher thresholds for dispensing with appointing an auditor or a person to conduct a review engagement
  - For charitable corporations, net assets on dissolution must be distributed to a Canadian corporation that is a registered charity with similar purposes, or to the government or government agency
  - For non-charitable corporations, net assets on dissolution must be distributed to a PBC with similar purposes, to a Canadian corporation that is a registered charity with similar purposes, or to a government or government agency

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- Upon the liquidation and dissolution of a non-PBC, its net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)

### 3. Financial Review

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting
- There are rules for exemption

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

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

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- #### 4. Number of Directors and Election
- Minimum 3 directors
  - Articles may provide a maximum and minimum range
  - For PBCs - not more than 1/3 of the directors may be employees of the corporation or its affiliates (charities can have none)
  - Directors are elected at AGMs
  - Can have ex-officio directors
  - Directors may appoint directors between AGMs
    - 1 year term, 1/3 cap
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- If different groups of members elect x directors to the board, must structure membership as separate classes - need to consider workarounds
  - Directors are no longer required to be members
  - Maximum 4 year term for directors (but no limit on number of maximum terms)
  - May have staggered terms
  - Removal by majority vote of members
  - Directors must consent to take office (all consents must be in writing)
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- #### 5. Directors and Officers – Powers, Duties and Defence
- Objective standard of care for directors and officers to
    - Act honestly and in good faith with a view to the best interests of the corporation
    - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
  - Reasonable diligence defence for directors
    - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
    - Defence includes good faith reliance on financial statements and reports of professionals
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- #### 6. Members
- A corporation must have members
  - Articles must set out the classes of members
  - If only one class of members, all must be voting
  - If two or more classes, articles must provide voting right to at least 1 class
  - By-laws must set out the conditions for membership
  - Default 1 vote per member, unless articles provide otherwise
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- All classes of members (regardless of voting or non-voting classes) are entitled to vote separately as a class on fundamental changes and certain amendments to articles, including
  - Change to any rights or conditions attached to a class of members or change to the rights of other classes of members relative to the rights of a particular class of members
  - Amalgamation if affects membership rights
  - Continuance to another jurisdiction if affects membership rights
- Thus a class of members could reject a change - effectively resulting in a class veto
- Bill 154 proposes to delay implementation of all membership class votes for at least 3 years after proclamation of ONCA

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- Default rules to terminate membership and member's rights apply (unless articles or by-laws state otherwise)
  - upon death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination
- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
  - Must set out circumstances and the manner in which the power may be exercised
  - Power must be exercised in good faith and in a fair and reasonable manner - give 15 days notice of a disciplinary action or termination with reasons and must give opportunity for the member to be heard
  - Member may apply for a compliance or restraining order if that power is misused

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## 7. Members' Meetings

- Notice of meeting - 10 to 50 days before the meeting
- Record date - Directors may fix a "record date" of no more than 50 days before a members' meeting to determine who the members are for purpose of calling a members' meeting
- Voting – optional proxy votes, voting by mail, voting by telephonic or electronic means
- Proxyholders - May require only members are eligible to be proxyholders
- Circulation of financials - Financial statements, auditor's report or report of person who conducted a review engagement, and any further information required by the articles or by-laws must be given to members upon request at least 21 days (or other period prescribed in the regulations) before an AGM

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## 8. Members' Rights and Remedies

- Members may remove directors by simple majority vote (but not ex officio directors)
- Members have extensive rights and remedies - e.g.,
  - Requisition holding members' meeting (by 10% of voting right)
  - Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
  - Submit proposal to nominate directors (by 5% of voting right)
  - Access corporate records, including membership list

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- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Derivative action, subject to faith-based defiance by religious corporations
- Compliance and restraining orders
- Court ordered wind-up and liquidation
- Must respect these rights, cannot contract out
- Having a smaller membership may reduce the exposure to these rights

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## 9. Conflict of Laws

- ONCA must be read in conjunction with applicable charity law
- If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following
  - A non-share capital corporation, then the provision in the other legislation prevails
  - A charitable corporation, then the legislation applicable to charitable corporations prevails
- Some provisions of the ONCA will not apply to charities

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## D. PRACTICAL STEPS FOR TRANSITION

1. Collect governing documents
  - Letters patent, supplementary letters patent
  - All by-laws, including amendments
  - Collect governance related documents - e.g., organizational charts, policies, manuals
2. Review governing documents
  - Do they reflect current governance process? If not, what is current governance process?
  - Are changes desired?
  - Write them down, come up with a wish list

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3. Review the key features of the ONCA
  - This understanding will help the corporation determine how its governance structure and the content of the articles of amendment and by-laws will be impacted
  - Understanding the ONCA framework
    - Rules in the Act
    - Some details in the Regulations
    - Articles and by-laws
  - Three types of rules in ONCA
    - Mandatory rules - cannot be overridden by the articles or by-laws
    - Default rules - by-laws or articles can override
    - Alternate rules - articles/by-laws can include certain optional rules provided by ONCA

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4. Compare ONCA rules with current governance structure and practice
  - Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
  - What to do if current by-laws or desired governance does not comply with ONCA?
5. Prepare articles of amendment and new by-laws
  - Information on articles of amendment not available yet
  - By-law will need to be replaced or substantially revised because the ONCA differs from the OCA
6. Obtain membership approval and filings
  - Need special resolution to approve, then file articles (but not by-laws) with Ministry
  - Other filings, e.g., registered charities will need to file with Canada Revenue Agency


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## CONCLUSION

- Monitor ONCA/Bill 154
- Have A committee in charge of the process
- Engage board of directors
- Prepare early
- Seek legal help

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **THE EVOLUTION AND EMPOWERMENT OF CHARITIES IN ONTARIO FROM THE PERSPECTIVE OF THE PGT**

**By Kenneth R. Goodman  
Ontario Public Guardian and Trustee**


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 Ministry of the  
Attorney General

## Office of the Public Guardian and Trustee Charitable Property Program

The Evolution and Empowerment of  
Charities in Ontario from the  
Perspective of the PGT

Kenneth R. Goodman  
Ontario Public Guardian and Trustee

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## Introduction

- Over the past 20 years, the Office of the Public Guardian and Trustee (OPGT) has taken steps to empower charities and those holding charitable property to do their good work;
- We've made changes both to our processes and to the law itself.

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## Charities and Not-for-profits

- Good Governance for each is based on the same principles and duties;
  - Know the Law
  - Know the Organizations Purposes
  - Know the By-Laws
  - Know your fiduciary duties

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## Good Governance

- Underlying Principles of Good Governance
  - Fulfil your Fiduciary Duties
  - Always Act in the Best Interest of the Organization
  - Always Act within the Organization's Purposes

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## Good Governance

- Good Governance Practices:
  - Communication
    - Know when to talk
    - Know when to listen
  - TRANSPARENCY
    - With Membership
    - With Board
  - Documentation
    - Decisions
    - Rationale



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## Charity Law



- Charity law is mostly judge-made.
- The Charities Accounting Act (CAA)
  - Unique to Ontario;
  - Allows the Attorney General, on the advice of the PGT, to make Regulations;
  - Provides an opportunity for improvements to the law to make it easier for charities and those holding charitable property to do their good work;
  - A non-charitable organization holding charitable property is a trustee under the CAA.

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## PGT Process for Change

- The PGT looks at the law to find a good balance between assisting directors and trustees to be more efficient and effective, on one hand, and ensuring that charitable property is protected, on the other.
- This includes:
  - Listening to directors and trustees asking for change;
  - Reviewing the history of the rule and the purpose the rule serves;
  - Evaluating whether the purpose still necessary or whether there is a better way to serve that need;
  - Considering whether we can enhance the tools already available.

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## Changes: 1997 - 2018



1. S.13 *Charities Accounting Act* (CAA), 1997
2. Wills reporting rule removed, 2000
3. Prudent Investor Rule, 2001
4. Update of Charities Incorporation Process/pre approved objects, 2001
5. Authorization to Indemnify, 2001
6. Combining Property Held for Restricted or Special Purposes, 2001
7. Charities can invest in land, 2009
8. Charitable Gifts Act repeal, 2009
9. Accumulations Act amended, 2009
10. Updated Reporting Requirements, 2014
11. Social Investments, 2017
12. Charity Law Prevails, 2017
13. Payments to Directors, 2018
14. Special Provisions, 2018

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## Section 13 of the CAA, 1997



- Charities and others holding charitable funds sometimes require Court orders on non-adversarial matters which are settled in law, including;
  - Cy-pres Applications: Trust funds that can no longer be used for their original purpose;
  - Payments to directors, either as employees or for providing other services;
  - Trust agreement amendments in order to comply with CRA's Distribution Quota.

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## Section 13 of the CAA, 1997



- The Court process can be adversarial, complex and expensive;
- Directors and trustees are compelled to spend charitable funds on legal fees and court costs in order to be compliant with the law.

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## Section 13 of the CAA, 1997



- The 1997 amendment to the Charities Accounting Act added section 13.
- Unique legislation that allows a charity to obtain a Court order without a formal Court application;
- Used for matters on consent and already established in law;
- Efficient and cost saving for charitable matters.

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## Wills reporting rule removed, 2000



- Prior to 1999, whenever a Will included a gift for charity, a copy of the Will had to be sent to the OPGT
- We received, reviewed and filed about 10,000 Wills a year
- We still receive over 100 per year, despite this change over 18 years ago

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### Prudent Investor Rule incorporation in the CAA, 2001

- In 1998, the Prudent Investor Rule was brought into the Trustee Act
- This was a change from the previous law, which validated only specific types of investments'
- It was unclear for directors of incorporated charities, who are not trustees, whether the old rule, the new rule, or the common law rules applied

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### Prudent Investor Rule incorporation in the CAA, 2001

- In 2001 the CAA was amended to include the Prudent Investor Rule into the CAA
- This applies to both directors and trustees and creates one legislative standard for the investment of charitable property

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### Pre-Approved Objects, 2001

- Prior to 2001, the OPGT had to review the application of every charity incorporating in Ontario
- This was an onerous task for charities, as:
  - It involved an extra fee for the PGT's review
  - The charitable purposes, although PGT approved, may not have been approved by CRA
  - Purposes are legal statements and can be difficult to draft so the processing time was often extended as amendments were required

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### Pre-Approved Objects, 2001

- In 2001, applications using 'pre-approved' objects no longer required OPGT review
- The OPGT worked with CRA to ensure that all 'pre-approved' objects met with CRA approval
- Charities are not required to draft purposes
- The PGT review fee is removed and application processing time is quicker

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### Authorization to Indemnify, s. 2 of O. Reg. 4/01, 2001

- It was not clear whether charitable funds could properly be used to indemnify or purchase indemnity insurance for directors as it was for the benefit of the directors rather than the charity
- As the size and complexity of charities increased, so did the liability risk for directors

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### Authorization to Indemnify, s. 2 of O. Reg. 4/01, 2001

- Ontario Regulation 4/01 (O. Reg 4/01) s.2 was introduced in 2001
- S. 2 authorizes directors to use charitable funds to provide indemnities to directors or purchase indemnity insurance
- S. 2 includes various safeguards to ensure the decision is made properly

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### Combining Restricted Funds, s. 3 of O. Reg. 4/01, 2001

- Historically, trust property, such as restricted purpose gifts, had to be kept in separate Trust accounts
- Trust account had to be separate, both from the general fund and other trust accounts
- Many directors and trustees were unaware that the law technically prohibited combining these funds for investment purposes

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### Combining Restricted Funds, s. 3 of O. Reg. 4/01, 2001

- Section 3 of O. Reg. 4/01 both clarified the law and allowed trust funds to be combined for investment purpose
- While a separate accounting for each fund is still required, the Regulation now allows the funds to be pooled for investment purposes

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### Charitable Gifts Act Repealed, 2009

- Prior to 2009, the Charitable Gifts Act (CGA) prevented charities from owning more than 10% of any business
- Any gift of shares above 10% had to be sold within 7 years
- The charity also had to report annually to the OPGT during those 7 years

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### Charitable Gifts Act Repealed, 2009

- The CGA was repealed in 2009
- At the same time, Section 4.1 was added to the *Charities Accounting Act* to allow the OPGT to request documentation with respect to businesses in which the charity has a 'substantial interest'

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### Accumulations Act Provisions, 2009



- Prior to 2009, Charities were not allowed to accumulate any income for longer than 21 years
- This presented a problem for charities who wished to capitalize income to protect against inflation or were not able to distribute the entire income each year
- In 2009, the s. 4 of the *Accumulations Act* was added to exclude charitable trusts

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### Charities can Invest in Land, 2009



- Until 2009, Section 8 of the *Charities Accounting Act* required that charities could only hold land if it was for 'actual use or occupation'
- Section 8 (2) allowed the PGT to vest the land in himself or herself under certain conditions
- This prohibited charities from renting out unused space and limited their ability to hold property that was not immediately needed for the charities actual use or occupation

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## Charities can Invest in Land, 2009



- In 2009 Section 8 was amended and simply requires that all land be used for a charitable purpose
- The removal of the phrase 'actual use or occupation' allows charities to lease out land, as long as the proceeds are used to further their charitable purposes

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## Updated Reporting Requirements, 2014



- The OPGT has reporting requirements pursuant to s.2 of the CAA
- OPGT developed simplified reporting requirements in 2014
- Once ONCA is place, information about charities incorporating in Ontario will be automatically forwarded to the OPGT

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## PGT Reporting Requirements



- Charities incorporated in Ontario must provide the PGT with any changes to:
  - Incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, Private Act)
  - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers.

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## PGT Reporting Requirements



- Charities incorporated elsewhere must provide the PGT with:
  - A copy of the incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, constitution, trust deed etc.);
  - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers;
  - Any changes to the first two requirements.

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## PGT Reporting Requirements

- Non-charitable not-for-profits and for-profit organizations holding charitable funds:
  - A copy of the trust deed, donor agreement or other document or under which the organization accepted or collected the funds;
  - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers;
  - Any changes to the first two requirements.

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## Social Investments 2017

- A social investment is defined as property applied to further the purposes of the charity and achieve a financial return;
- Prior to the 2017 amendment to the CAA, it was unclear if provincial law allowed charities to make social investments.

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## Social Investments 2017

- In late 2017, ss. 10.2 – 10.4 were added to the CAA to clarify the rules around social investments;
- The OPGT also publishes guidance on social investing. A copy is attached to this presentation.
- Too early to understand the impact on the charitable sector or the ways charities are utilizing the power
- Reasonableness and compliance is the key to any social investment

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## Payments to Directors 2018

- Directors of charities have a duty to avoid acting in a conflict of interest and receiving a personal benefit from the charity without a Court order;
- However, at times remunerating a director for services can be in the best interest of the charity, as they:
  - Can offer services below market rates;
  - Have inside knowledge of the charity;
  - Provide needed expertise both as a director and a service provider, such that resigning from the Board is not the best solution.

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## Payments to Directors 2018

- From 1997-2017 charities could apply to the OPGT for a Court order under s.13;
- Section 2.1 was added to O. Reg 4/01 in 2018 to create a simpler process for incorporated charities to be able to authorize payments to directors, despite the conflict.

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## Payments to Directors 2018

- The Regulation
  - Makes the law around conflicts clearer and easier to access;
  - Makes compliance with the law easier for charities;
  - Includes Guidance to assist charities in using the Regulation.

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## Special Provisions, 2018

- Changes to the *Corporations Act* lead to a reduction in the number of special provisions the OPGT required for charities incorporating in Ontario.
- Most notably, charities with the new provisions possess broader borrowing powers.

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## Upcoming and Unfolding

- The Ontario Not-for-Profit Corporations Act, 2010;
  - New/updated rules for charities and other not-for-profits incorporated in Ontario;
  - The government anticipates it will come into force in 2020;
- Senate Special Committee on the Charitable Sector;

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## New Tools for Directors and Trustees

- Running small businesses for income;
- Better investment opportunities for higher returns;
- Renting unused space in buildings owned by the charity;
- Social Investments authorized;
- Ability to utilize the talents of Board members;
- Court orders without going to Court.
- Simpler reporting
- Guidance to ensure compliance with the law

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## What Hasn't Changed – Fiduciary & Other Duties

- The underlying duties of charities, directors and trustees remain in place. These duties include:
  - Be reasonable, prudent and judicious with the charitable property;
  - Use the charity's property only to carry out the charitable purposes;
  - Avoid Conflict-of-Interest situations or follow the law when there is a conflict;

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## What Hasn't Changed – Fiduciary & Other Duties (cont'd)

- Act Gratuitously;
- Account for the charity's funds, act in person and make all major decisions;
- Invest according to the charity's incorporating documents or, if they do not contain provisions, according to the Trustee Act;
- When using any of these tools, ensure you are compliant with the law and making reasonable decisions.

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## Contact Information



■ **Office of the Public Guardian and Trustee  
Charitable Property Program  
595 Bay Street, Suite 800  
Toronto, ON M5G 2M6  
Tel: (416) 326-1963 or in Ontario  
toll free at 1-800-366-0335**

### Internet:

[www.attorneygeneral.jus.gov.on.ca/english/family/pgt/](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/)

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## Other Information

Brochures including this information and other charitable matters at the PGT's website:

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>



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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **LESSONS LEARNED FROM CLAIMS TO THE COURTROOM PART 1 – THE CLAIMS**

**By Kenneth Hall, President - Robertson Hall Insurance**

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The 2019 Ottawa Region  
Charity & Not-for-Profit Law  
Seminar™  
Ottawa – February 14, 2019

## Lessons Learned from Claims to the Courtroom Part 1 – The Claims

By Kenneth Hall, President - Robertson Hall Insurance

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### By the numbers



- We insure over 7,500 charities across Canada
- In the decade between 2007 - 2017, we saw 696 legal actions commenced against our own client organizations and/or boards directors
- These actions include civil court liability awards, out-of-court settlements, claims involving legal defense costs only, medical payment claims and human rights tribunal proceedings
- Of those actions, two civil liability claims were in excess of \$10,000,000

### By the numbers ... continued

**What is the largest civil liability judgement for a single personal injury victim?**

**\$18,400,000 awarded in 2009 to a teenage girl who suffered catastrophic and permanent injuries as a passenger in automobile accident in Ontario**

What are the implications of these types of liability awards for organizations who routinely have...

- Large numbers of adults, youth and children in programs?
- Participants in sports and recreation activities?
- Passengers transported in buses, vans & personal vehicles for sponsored events?
- Off-premises activities, field trips and short-term missions in countries and regions prone to crime, terrorism, civil unrest and natural disaster?

***Underinsurance ... liquidation of charitable assets ... unfunded personal liability against directors, and against members in an unincorporated church or association***

### What "triggers" a Liability claim?



- A Third Party Civil Lawsuit, usually in the form what is known as a *Statement of Claim*
- A threatened legal action, or what we in the insurance industry call a "love letter" from a lawyer, notifying the Policyholder of a lawsuit on behalf of a victim/plaintiff
- A serious accident, occurrence or incident that might reasonably lead to a lawsuit

**Examples:** An abuse allegation; a wrongful dismissal claim by a former employee; a slip and fall in your building or parking lot; an auto accident in an owned or leased vehicle, or in a private vehicle while being used on behalf of your programs and events, where there may be a potential injury, etc.

### Responsibilities of a Policyholder

#### When taking out a Liability insurance policy-

- Both policyholder and insurer must demonstrate Utmost Good Faith
- Non-Disclosure and/or Misrepresentation of Risk can void a claim

#### Ongoing, including at renewal time-

- Communicate Material Changes in Risk for your property and to your operations

#### In the event of a Claim-

- Duty to Report as soon as practicable to your Insurer any occurrence that may result in a liability claim
- Duty to Cooperate in an investigation and defense of a legal proceeding
- No admission of Liability to Third Party that may prejudice defense

***Remember, it is to your advantage to communicate with your insurance provider about potential liability claims to avoid breaching your policy conditions, and because your policy can cover your legal defense costs in an insurable claim!***



### Any Charity & Not-For-Profit needs at least two (2) types of Liability Coverage

General Liability (CGL)	Directors & Officers Liability (D&O)
<ul style="list-style-type: none"> <li>• <b>BODILY INJURY</b> Physical injury, disease, death, mental injury, etc.</li> <li>• <b>PROPERTY DAMAGE</b> Damage to tangible Third Party property</li> <li>• <b>PERSONAL INJURY</b> Libel, slander, defamation, invasion of privacy, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>NEGLIGENT ACTS, ERRORS, OMISSIONS, MISSTATEMENTS, BREACHES OR NEGLIGENCE OF DUTY, etc.</b></li> </ul> <p>EXAMPLES:</p> <ul style="list-style-type: none"> <li>- Wrongful Dismissal</li> <li>- Other Employment Practices</li> <li>- Discriminatory Practices</li> <li>- Discipline Proceedings</li> <li>- Financial Mismanagement</li> <li>- Breaches of Insurable Contracts</li> </ul>

**Commercial General Liability(CGL) and Directors and Officers (D&O) Liability**  
These two forms of liability protection work hand in glove; each covering both the organization entity, and its directors and officers; and covering the full range of normal insurable liability risks.

**All Liability Insurance policies are created equally**

**WRONG!**

- Some policies have geographical or territorial restrictions, vs. worldwide coverage
- Some policies limit legal defense costs within the amount of coverage, thereby eroding the available amount to pay awards or settlements; others provide defense in excess of the policy amount
- Some policies limit defense and coverage for Compensatory damages only; others cover ALL insurable civil defense and damages including Compensatory, Punitive, Exemplary and Multiplied damages

*(continued next slide)*

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- Some have restrictive conditions for stacking of policy limits, reporting requirements, etc., some do not
- Some are "claims-made" (recommended for D&O if retro); some are "occurrence-form" (recommended for Abuse)
- Not all policies are the same! Unfortunately the "fine print" can mean the difference between full coverage and zero coverage if certain risks are excluded, no matter how high the amount of coverage it says on your policy!
- Check with your broker or agent, ask lots of questions, and make sure your organization is insured with an insurance provider who understands your unique risks and coverage needs

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Based on unique risks and types of programs, operations and ministries, some organizations may require additional types of important liability protection, including:

- **Professional Liability;** for Medical, Legal, Financial and other professional services
- **Fiduciary Liability;** if the organization/trustees sponsor Pension Plan
- **Media Liability;** if the main object is Broadcasting, Telecasting, Publishing or Internet Streaming
- **Privacy Breach Liability** and/or full **Cyber Liability;** including privacy breaches (electronic or hard copy) disclosing *Personal Information* held by the organization
- **Worldwide Liability;** for Short-Term Mission Trips and for Missions, Relief and Development Operations
- **Auto, Aircraft or Watercraft Liability;** if owned or leased

**Liability Insurance 101 newsletter available upon request**

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**So How Much is enough, when it comes to Liability protection?**

In light of the increasing size and frequency of liability awards in Canadian courts and our experience with Churches and Charities across Canada, we currently recommend the following minimum amounts for any organization:

**\$15,000,000 Commercial General Liability, or combined General Liability and excess Umbrella Liability, to cover against Third Party Bodily Injury claims.**

**\$5,000,000 Occurrence Form Abuse Liability. Avoid claims-made Abuse coverage!**

**\$2,000,000 to \$5,000,000 Directors and Officers Liability, depending on the scale of your financial operations and your staff size.**

**Disclaimer:** The above amounts are recommended based on recent civil court awards and settlements for risk exposures to certain types of claims. However your organization may have risk factors requiring higher amounts of coverage.

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**Umbrella Liability Coverage**

Most Property & Casualty insurance companies in Canada have maximum Commercial General Liability coverage capacity of between \$2,000,000 to \$5,000,000 per claim occurrence and annual aggregate, regardless of number of claims in a policy period



A separate, "excess" policy known as Umbrella Liability may be available to "top up" your primary General Liability coverage (and Auto Liability coverage, if any)

Umbrella policy wordings are on a "follow form" meaning that they provide excess protection in excess of most risks covered in organization's primary General Liability policy wordings and limit of coverage

For example, a \$10,000,000 Umbrella Liability policy in excess of an organization's \$5,000,000 General Liability policy, now provides the organization with \$15,000,000 combined protection for insurable Bodily and Personal Injury awards and settlements

**The single biggest and most practical step any organization and board can take to address insurable risk, is to purchase optional Umbrella Liability protection!**

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**5 Real World Claims**

**Charities and Not-For-Profits  
in Canada**



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### 1 - Slip and Fall Claim



Most common form of liability claim – 70% of all claims

Most claims settled in the tens or hundreds of thousands of \$\$\$

Under Occupiers Liability Acts, owner or tenant has responsibility at law for safe condition and supervision of building premises and property

**FACTS:** New immigrant to Canada falls in icy church parking lot after Sunday morning service, is taken by ambulance to hospital, suffers subsequent stroke, sues church and settles out of court of \$2,900,000

#### Sources of Insurance Coverage:

Commercial General Liability (and Umbrella Liability) covering Bodily Injury

Or alternatively if no lawsuit, a First Party no-fault Medical Payment Rider or Group Accident Policy, covering Medical Expense, Loss of Income, etc.

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### 2 - Abuse Liability Claim

Our client organizations are primarily from the evangelical Christian faith community

Over 85 cases of individual or multiple victims, representing hundreds of total victims

90% of our client organizations have an approved abuse prevention plan

**FACTS:** Organization receives Statement of Claim from victim's lawyer alleging childhood abuse perpetrated by leader at church-run camp in the 1970's and 1980's.

Organization unable to locate General Liability or Abuse Liability policy in place at time of the alleged abuse

Currently defending this uninsured claim

No Statute of Limitation for claim. Importance of keeping insurance policy documentation in perpetuity!

#### Source of Insurance Coverage:

Commercial General Liability with no Abuse Exclusion; or stand-alone Abuse Liability coverage, preferably Occurrence-Form coverage



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### 3 - Social Media Claim

Rise of use of social media in Charities and NFP's including examples of the "good, the bad and the ugly"



**FACTS:** Teenaged youth leader at a summer camp (themselves under 18 years of age) posts on Instagram picture of child in their camp group cropped from camp's Instagram account, with a caption containing profane language and extremely derogatory of the child and their behaviour

The organization did have a Social Media Policy in place ✓ signed by the youth leader and has subsequently placed them on notice legally.

The camp did not have a Photo/Video Permission Form ✗ signed by parents/guardians to place the images of minors (or adults) on their website or social media accounts.

Legal action has been threatened by the parents against both the camp organization and leader on behalf of their child

#### Source of Insurance Coverage:

Commercial General Liability policy under Personal Injury assuming no exclusions in policy with respect to website or other electronic content.

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### 4 - Employment Practices Claim

Churches and charities are workplaces too!

#MeToo Movement has raised awareness of workplace harassment

Board members need to understand their responsibilities as Employers, including ESA Standards, Workplace Safety including Ontario Bill 132, and in Common Law

**FACTS:** Administrator at Christian school guilty of sexually harassing multiple female staff members is eventually fired, after threatened lawsuit by staff. Fired employee then sues school and its directors for Wrongful Dismissal.

#### Source of Insurance Coverage:

Directors & Officers Liability covers Wrongful Dismissal including employment-related Humiliation, Harassment and Discrimination in a civil liability claim, however only if the D&O policy includes full Employment Practices coverage.

Note: D&O Liability does not pay what an employer otherwise owes by law, including both ESA standards and under Common Law.



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### 5 - Short Term Mission Trip Claim



Significant trend in short term mission trip sponsorship from national denominations and missionary societies, to local churches and smaller special purpose charities - less than 24,200 in 1979 to over 1,760,000 travellers in 2006!

Importance for charities sponsoring expat missionaries or short-term mission trips to require several types of concurrent insurance for participants and the organization for full protection, including:

- Worldwide Third Party Liability coverage (General Liability and D&O Liability)
- Mandatory individual or group Travel Emergency Medical Insurance
- Special Risk coverage for Kidnap, Ransom & Evacuation, depending on area of travel

**FACTS:** Both a church and mission-sending organization as co-sponsors of a short-term mission trip are sued for lack of supervision for injury to a youth who suffers quadriplegia, as result of a fall from a balcony where group is staying.

#### Source of Insurance Coverage:

Commercial General Liability (and excess Umbrella Liability) policy under Bodily Injury, assuming the policy has Worldwide Coverage Territory.

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## Thank You!

We hope this presentation helps provide your organization and leaders with general information regarding liability risk and insurance for charities and not-for-profits

#### Disclaimer:

The information contained in this presentation has been compiled by Robertson Hall Insurance Inc. to assist charitable organizations and leaders to better understand insurance and risk management; and to help reduce foreseeable and preventable liability risks associated with programs, operations and events. However, your organization may have risks and liability insurance requirements that are unique to your premises and your activities which are not addressed by this presentation and should be specifically reviewed with a qualified professional.

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **LESSONS LEARNED FROM CLAIMS TO THE COURTROOM PART 2: THE COURTROOM**

**By Sean S. Carter, B.A., LL.B.**

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## Lessons Learned from Claims to the Courtroom Part 2: The Courtroom

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### OVERVIEW

- Know Your Venue and Prepare
- The Changing Landscape in Insurance and Coverage Disputes
- Charities and Not-for-Profits in Litigation
- Preparing Your Narrative

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### A. KNOW YOUR VENUE AND PREPARE

*"Location, Location, Location...": why where the dispute proceeds can have a profound impact on the nature of the case, strategy and potential outcome.*

- Ontario Superior Court of Justice:  
Small Claims Court; Simplified Procedure;  
...the good, the bad and the ugly
- Human Rights Tribunal of Ontario: a pyrrhic victory at best if you are a respondent
- Private Binding Arbitration and more: there are other options!

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- **Factors to consider when considering venue**
  - Ability to recover your legal costs (and disbursements) and under what circumstances; also what restrictions/limits may exist
  - Length of time to adjudication and options to address interim relief;
  - What type of relief (including damages or adjudicative regulation) is available (e.g. are you asking the court for just monetary damages; do you want to claim for 'declaratory' relief; are equitable remedies helpful, etc.)
  - The need for confidentiality, enforceability and what appeal routes are available

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- Know the rules of procedure and how stringently they are enforced in your venue
- Understand what law is being applied and in what context
- **Also remember...**
  - "We're not in Kansas anymore..." : preparing for multiple jurisdictions (within Canada and internationally), don't assume you will be able to apply Ontario law in an Ontario Courtroom
  - You will *not* always have the choice concerning what venue you will be subject to, but understanding the limits which may lead to a potentially completely different strategy is applied for the same case, if the venue is different

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- **Sample of important lessons learned over a decade of cases**
  - Great majority of cases (though different for each venue) settle at "production"/discovery stage; adapt strategy accordingly
  - Litigation and dispute resolution is a human process that seeks justice; uncertainty must be assumed and plan accordingly in all aspects
  - 99% of the time, neither party leaves completely satisfied (and often that is the type of judgment a judge will purposively render)
  - Before commencing litigation, be realistic and proactive regarding costs (which can eclipse damages), and the toll litigation takes on people and the organization

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## B. THE CHANGING LANDSCAPES IN COVERAGE AND RESULTING CONFLICTS

- Make your insurer/insurance agent your partner in liability reduction, understand what products and coverage are available, and keep the channels of communication open
- Know your policy terms, its limits, and ensure that re-assessment happens when programs, ministries, or situations change
- Denial of coverage – like much of life – “it happens” on an increasing basis, so prepare for a potential dispute while seeing if it can be avoided
- Policy terms (particularly exceptions) are expanding, but can seem ‘harmless’ – getting legal help in explaining consequences could be critical in understanding limits and the basis for potential denial (e.g. denial of directors and officers coverage re ‘intentional torts’)

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## Managing the Important Relationship...

- A divergence of interest between an insurer and an insured can arise during litigation – ensure you keep abreast of developments and monitor litigation (e.g. how damages are allocated can impact coverage)
- Be prepared if facts arise during discovery that could impact/change the insurer’s stance on recovery
- Keep an open dialogue with your lawyer (even if appointed by the insurer), and understand your role in instructing legal counsel and carriage of the case
- A disagreement with an insurer doesn’t need to devolve into a dispute; take proactive measures, respect the differing and ‘dovetailing’ of interests and responsibilities

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## C. CHARITIES AND NOT-FOR-PROFITS IN LITIGATION

- Charities and not-for-profits are just as vulnerable to litigation as any corporation
- Not only can a charity, not-for-profit, or its officers/directors be the subject of litigation, but there are particular vulnerabilities (just two examples):
  - Courts generally do not like unnecessary litigation by charities or not-for-profits – particularly internal matter, which is reflected in cost awards and judgments
  - *Charities Accounting Act*, R.S.O. 1990, c.C.10: ss.6 and 10... surprise – a whole separate mechanism for redress to the civil courts and a plethora of remedies (including public inquiry)

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- Cases (criminal and civil) where charities or not-for-profits have been involved in litigation throughout the past year and the consequences

- *SLPP et al. v. Brown et al.* – using the *Charities Accounting Act* to accelerate process of challenging (among other things) the remuneration of officers; ‘shotgun’ approach to naming respondents and remedies sought; ultimately dismissed and hundreds of thousands of dollars in legal costs awarded to respondents.
- Case of *Jeremiah Perry* (C.W. Jeffreys Collegiate) July 2018 – 15 year old child drowns while on field trip to Algonquin park – teacher criminally charged, civil actions a strong likelihood (early stages)

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- UK House of Commons International Committee Report 2018 – finds that the sexual abuse of vulnerable women and girls by aid workers is “endemic” with perpetrators moving easily around sector
- *Doucet v. Royal Winnipeg Ballet*, 2018 ONSC 4008 – class action certified by former students re sexual abuse/misconduct
- *K.M. v. Marson*, 2018 ONSC 3493 – vulnerable student successfully sues teacher and school board for sexual abuse – general and aggravated damages of \$250,000 (plus)

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## D. PREPARING YOUR NARRATIVE: “Lucy... You Got Some ‘Splainin to do!”

- What a judge will most often inquire about:
  - What protections or policies were in place before the incident? (are they ‘empty’ or implemented)
  - Did they have any warning or should they have known?
  - When it happened – how did they react and was there reasonability attached to it?
  - Can they prove it; and were actions taken in good faith/in line with equities of situation?
  - What steps were taken to mitigate/reduce impact or damages?

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- Involve litigation counsel and your insurer (potentially) at early stages of a potential claim
  - Work to avoid coverage denial
  - Understand proactive duties regarding preservation of evidence (which can turn into negative inferences or worse...)
  - Prepare for contingencies and beware of those that assure absolute success
  - As soon as possible, create a written record and proactively seize the narrative as early as possible


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**Last Thoughts...**

- Working towards a narrative of due diligence, vigilance, implementation of policies, be prepared with a war chest and or insurance coverage
- You can TAKE CONTROL of managing the risk... it can never be eliminated, especially since so much of the charitable and not-for-profit sector reaches out to vulnerable persons in our society. However, you can reduce that liability or risk to an acceptable level for your organization.
- Litigation and related claims are an increasing reality for the charity and not-for-profit sector. With proactive due diligence and strategy, a potentially crippling claim can be absorbed with minimum repercussions for your purpose and programs

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **TIPS FOR AVOIDING COMMON ERRORS: A CHARITIES DIRECTORATE PERSPECTIVE**

**By Tony Manconi, B.A.  
Director General of the Charities Directorate**

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### Errors related to official donation receipts

Content	Control
<ul style="list-style-type: none"> <li>the name of Canada Revenue Agency and website <a href="http://canada.ca/charities-giving">canada.ca/charities-giving</a></li> <li>the city, town or municipality where the receipt was issued</li> <li>a statement that it is an "official receipt for income tax purposes"</li> <li>the date the donation was received, if different from the date the receipt was issued</li> </ul>	<ul style="list-style-type: none"> <li>receipts are not issued in sequential order</li> <li>listing of receipts contains gaps in the numbers</li> <li>exact duplicate copies of receipts are missing</li> </ul>

### How to avoid these errors?

- Know the requirements of an official receipt:
  - Consult the Charities Directorate's webpages at [canada.ca/charities-giving](http://canada.ca/charities-giving); or
  - Consult Regulation 3501 of the Income Tax Act

Receipts for cash gifts must have the following:	Receipts for non-cash gifts (gifts in kind) must also include:
<ul style="list-style-type: none"> <li>a statement that it is an official receipt for income tax purposes</li> <li>the name and address of the charity as on file with the Canada Revenue Agency (CRA)</li> <li>a unique serial number</li> <li>the registration number issued by the CRA</li> <li>the location where the receipt was issued (city, town, municipality)</li> <li>the date or year the gift was received</li> <li>the date the receipt was issued</li> <li>the full name, including middle initial, and address of the donor</li> <li>the amount of the gift</li> <li>the amount and description of any advantage received by the donor</li> <li>the eligible amount of the gift</li> <li>the signature of an individual authorized by the charity to acknowledge gifts</li> <li>the name and website address of the CRA</li> </ul>	<ul style="list-style-type: none"> <li>the date the gift was received (if not already included)</li> <li>a brief description of the gift received by the charity</li> <li>the name and address of the appraiser (if the gift was appraised)</li> </ul> <p>*The amount of a non-cash gift must be its fair market value at the time the gift was made.</p>

### Incomplete or incorrect Form T3010, Registered Charity Information Return

- Missing or incorrect amounts reported
- Missing complete director information
- Financial statements are not filed with Form T3010
- Information return is not filed on time

### How to avoid filing an incomplete or incorrect return?

- Refer to our website [canada.ca/charities-giving](http://canada.ca/charities-giving)

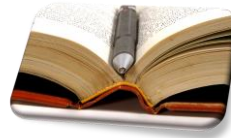
### How to avoid filing an incomplete or incorrect return? (cont'd)

- Contact the Charities Directorate by telephone at 1-800-267-2384;
- As of June 2019, file online
  - **It will be faster and easier, will reduce opportunities for errors, will automatically update your charity's entry on the List of Charities, and more!;**
- Include financial statements with your return; and
- **File on time!**  
That's within 6 months of your fiscal year-end.

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### Inadequate books and records

- Lack of supporting documents:
  - for amounts reported on Form T3010; and
  - for the valuation of gifts in kind.



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### What are books and records and how to maintain them adequately

- There are 3 categories of books and records :
  - **Organizational:** governing documents, bylaws, meeting minutes, reports, policies, etc.
  - **Financial:** copies of official donation receipts, ledgers, bank statements, financial statements, investment agreements, payroll records, etc.
  - **Source documents:** emails, agreements, contracts, invoices, etc.

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### What are books and records and how to maintain them adequately (cont'd)

- A charity can keep electronic records (subject to certain conditions).
- A charity is responsible for keeping books and records, as well as maintaining, retaining, and safeguarding these records.
- Keep books and records at an address in Canada (that is on file with the CRA)
- Know the retention requirements

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### Errors with respect to the use of resources

- Engaging in non-charitable activities or activities outside its approved purposes
- Lack of direction and control over activities outside Canada
- Gifting to non-qualified donees
- Conferring undue benefits on a member of the charity or a board member (director, trustee or like official)

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### What you should know about the use of resources of a registered charity

- Resources can only be used in two ways:
  - for its own activities; or
  - for making gifts to qualified donees
- A charity must maintain direction and control over its resources at all times. Refer to:
  - [Guidance CG-002, Canadian registered charities carrying out activities outside Canada and](#)
  - [Guidance CG-004, Using an intermediary to carry out a charity's activities within Canada](#)

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### What you should know about the use of resources of a registered charity (cont'd)

Qualified donees include:

- a registered charity (including a registered national arts service organization)
- a registered Canadian amateur athletic association
- a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged
- a registered Canadian municipality
- a registered municipal or public body performing a function of government in Canada
- a registered university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada
- a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift
- Her Majesty in right of Canada, a province, or a territory
- the United Nations and its agencies

Her Majesty in right of Canada, a province, or a territory, and the United Nations and its agencies are qualified donees that do not have to be registered to be recognized as such.

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### What you should know about the use of resources of a registered charity (cont'd)

- Resources cannot be used for the benefit of an individual who is not at arm's length with the organization.

A benefit can include:

- a reimbursement of personal expenses;
- free use of property, goods, or services owned by the organization/charity; or
- an allowance.

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### Missing T4, T4A, or T4A-NR slips

- Slips were not issued to individuals receiving salaries, benefits, honorariums, and scholarships
- Registered charities that are employers have payroll obligations just like any other entity that is an employer.
- Get to know your obligations, visit [canada.ca/taxes](http://canada.ca/taxes)

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### Questions?

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# **The 2019 Ottawa Region *Charity & Not-for-Profit Law* Seminar**

**February 14, 2019**

## **LEGAL CHALLENGES IN SOCIAL MEDIA FOR CHARITIES AND NFPs**


**By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent**

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**The 2019 Ottawa Region  
Charity & Not-for-Profit Law  
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**February 14, 2019**

**Legal Challenges in Social Media  
For Charities and NFPs**

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**A. OVERVIEW**

- The topics in this presentation include:
  - What is Social Media?
  - Legal Challenges in Social Media
    - Privacy and Data Challenges
    - CASL Challenges
    - Intellectual Property Challenges
    - CRA Regulatory Challenges
    - Employment Challenges
    - Advertising and Influencer Marketing Challenges
    - Crowdfunding Challenges
  - Managing the Legal Challenges



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**B. WHAT IS SOCIAL MEDIA?**

**1. Setting The Stage**

- Social media consists of websites and internet applications that enable users to create online communities where they can share content, including user-generated content, or network with others



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**2. Social Media Enables Social Networking**


- Social media builds on and encompasses the full breadth of online communication, creating new business models and becoming a key method for building a brand for any organization, including charities and NFPs
- Social media is an advertising, marketing and public relations tool, and is in an ongoing state of flux
- Charities and NFPs typically use social media to:
  - promote their brand directly or encourage followers (and "influencers") to share their customer or supporter experience with their own followers (i.e., friends, family and others)
  - promote a campaign to raise funds for a particular project or cause (e.g., crowdfunding)

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**Examples of popular social media:**




**PINTEREST**  
SOCIAL SITE THAT IS NO. 1 IN DISCOVERY  
LARGEST OPPORTUNITIES




**TWITTER**  
MICRO BLOGGING SOCIAL SITE THAT LIMITS EACH POST TO 140 CHARACTERS  
THERE ARE OVER 67 MILLION TWITTER USERS IN THE U.S.




**FACEBOOK**  
MOBILE IS FACEBOOK'S CASH COW  
1.15 BILLION DAILY ACTIVE USERS  
AGE 25 TO 34 AT 28.7% OF USERS IS THE MOST COMMON AGE DEMOGRAPHIC



**INSTAGRAM**  
SOCIAL SHARING APP ALL ABOUT PICTURES AND VIDEO OF SECONDARY VIDEOS  
MANY BRANDS ARE PARTICIPATING THROUGH THE USE OF #HASHTAGS AND POSTING PICTURES



**SNAPCHAT**  
APP FOR SENDING VIDEOS AND PICTURES THAT DISAPPEAR AFTER BEING VIEWED  
10+ BILLION VIDEO VIEWS DAILY  
ROUGHLY 70% OF USERS ARE FEMALE



**LINKEDIN**  
BUSINESS ORIENTED SOCIAL NETWORKING SITE  
BRANDS THAT ARE PARTICIPATING ARE CORPORATE BRANDS  
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**C. LEGAL CHALLENGES IN SOCIAL MEDIA**

**1. Privacy and Data Challenges**

**a) Personal Information, Data and Social Media**

- "Personal information" is defined by the Personal Information Protection and Electronic Documents Act ("PIPEDA") as "any information about an identifiable individual" (e.g. name, address, social insurance number, as well as photos or videos of individuals)
- It does not include anonymous or non-personal information (i.e. big data)
- Social media gives a false sense of security, a perception that "it is just me and my online friends"
- The reality is that whatever is posted on the Internet could become virtually impossible to erase




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- The privacy issues that arise with the use of social media are a significant concern
- The rapid pace of online sharing of information has called into question how social media impacts an individuals' privacy
- The information posted on social media may breach applicable privacy law
- Also, large data sets are often collected without meaningful consent and later monetized




HELLO? I WOULD LIKE TO REPORT AN OUTRAGEOUS PRIVACY BREACH.

I FOUND THIS BOOK ON MY DOORSTEP WHERE MY NAME, FULL ADDRESS AND PHONE NUMBER ARE ALL DISPLAYED IN CLEAR TEXT!!

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- Facebook's Terms of Service (April 19, 2018) state: "You own the content you create and share on Facebook"
- However, it also includes a number of necessary "consents" and "permissions" to use the service: "To provide our services, . . . you give us permission to use your name and profile picture and information about actions you have taken on Facebook next to or in connection with ads, offers, and other sponsored content that we display across our Products, without any compensation to you. For example, we may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid us to display its ads on Facebook."



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- Further, Facebook's Data Policy (April 19, 2018) states:



"We use the information we have about you -including information about your interests, actions and connections- to select and personalize ads, offers and other sponsored content that we show you"

"We use the information we have (including your activity off our Products, such as the websites you visit and ads you see) to help advertisers and other partners measure the effectiveness and distribution of their ads and services"

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**b) Donor Information**


- Donor information constitutes personal information that must be protected by the charity, specially in the context of using social media
- Donor information may include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, videos, financial information, name of business, place of employment, preferred donation restrictions and even health information
- PIPEDA specifically prohibits "the selling, bartering or leasing of donor, membership or other fundraising lists"
- If a donor list is obtained from a third party, ensure no computer program was used for scraping websites or generating a list of electronic addresses (address harvesting) in contravention of PIPEDA

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**c) Posting Photos/Videos of Children on Social Media**


- Images of identifiable individuals, including children, are personal information
- Charities and NFPs use pictures of children to promote their programs and campaigns or to share with parents and other stakeholders in social media
- It is usual practice to request the consent from the child's parent or guardian
- However, there is no definitive case law yet on whether a waiver signed by a parent is binding on a minor as a matter of public policy, so best to assume that it does not
- Charities and NFPs are expected to have effective procedures to protect the personal information of children



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- The Office of the Privacy Commissioner of Canada ("OPC") has guidelines regarding the personal information of minors
- Examples from the OPC include:
  - Limit/avoid collection from children
  - Obtain consent from parents of children under 13
  - Make sure default privacy settings are appropriate for the age of users
  - Verify that real names are not used as usernames
  - Have contractual protections in place with online advertisers to prevent the tracking of users and monitor those online advertisers
- However, any consent by parents on behalf of a minor for the collection of personal information may be unenforceable



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## 2. CASL Challenges

- Canada's Anti-Spam Legislation ("CASL") includes a prohibition on sending commercial electronic messages ("CEM") unless the sender has the express or implied consent of the receiver and the message contains prescribed information
- A CEM is generally an electronic message that encourages participation in broadly defined "commercial activity"
- Generally, CASL does not apply to social media, *i.e.*, tweets or posts on a Facebook profile
  - However, it can apply if caught by the definition of "electronic address", *e.g.*, Direct Messaging on Twitter, Facebook messenger, LinkedIn, *etc.*



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- Consent under CASL - express or implied
- Express consent does not expire. However, consent may be withdrawn at any time
- Implied consent may be found when:
  - There is an "existing business relationship"
  - The receiver has "conspicuously published" his or her address or was otherwise disclosed to the sender, such as through a business card, without prohibiting CEMs and the CEM relates to the recipient's business
  - As provided for in regulations or elsewhere in CASL
- Consent by parents on behalf of minor children to receive email or text messages may also be unenforceable
- CASL prescribes significant monetary penalties of up to \$10,000,000 for violations



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## 3. Intellectual Property Challenges

- Register and enforce intellectual property ("IP")
  - There are different types of IP, including patents, trademarks, copyrights and industrial designs
  - A charity's or NFP's brand is one of its most important assets
  - With social media, branding reaches a large audience around the world in an instant
  - Failing to register trademarks prior to using them online can lead to third parties poaching and registering those marks prior to the owner
  - Charities and NFPs should be pro-active in protecting their marks



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- Registration of a corporate name or business name does not by itself give trademark protection
- Once registered, ensure marks are properly used on social media
  - e.g.* train staff on proper usage, proper markings, and consistent usage
- Ensure IP of others is not infringed
  - Social media can expose a charity or NFP to liability for infringing the IP rights of others, due to postings by employees and third parties, which may include trademarked or copyrighted material
  - Essential to identify and secure copyright of social media content through assignments and/or licences



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## 4. CRA Regulatory Challenges

- CRA will review online content, including the materials to which a charity links, to see if it accords with the information provided in its application
- Relevant considerations for charities:
  - Does social media content indicate programs outside of the stated charitable purposes of the charity?
  - Does the charity's social media provide a link to, and by implication agree or endorse, problematic materials or prohibited activities? *e.g.* "direct or indirect support of, or opposition to, any political party or candidate for public office"



Canada Revenue Agency

Agence du revenu du Canada

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## 5. Employment Challenges

- Employees might reveal confidential information intentionally or inadvertently
- Employees might use trademarks incorrectly, leading to dilution and weakening of a charity's or NFP's brand
- Employees might infringe the IP of others, breach CASL or other contractual obligations
- Both on-duty and off-duty conduct may justify discipline and dismissal of an employee
  - Connecting a personal mobile device on a workplace computer may allow the employer to access the employee's personal information



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- Social media background checks
  - Generally, what a potential candidate has shared “publicly” online is also available to the employer and it may include Google search results, social media, personal websites and other content, even if not job-related
  - An employer accessing information that is not reasonably appropriate in the circumstances may raise the question of whether the decision not to hire an individual was based on grounds of discrimination under provincial human rights legislation
  - Therefore, use caution when conducting social media background checks



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## 6. Advertising and Influencer Marketing Challenges

- Social media marketing terms and policies are constantly changing and adapting
- “Viral” marketing techniques in social media present a number of challenges in terms of privacy and CASL
  - For example, “refer-a-friend” campaigns where followers share personal information of their friends
- On September 13, 2018, *Ad Standards* updated its Disclosure Guidelines with a list of Do’s and Don’ts for “Influencer Marketing”, including the use of disclosure hashtags such as #ad or #sponsored and the disclosure of compensation given to an influencer
- A Charity or NFP relying on a social media influencer should ensure that these guidelines are met in order to better protect the charity’s or NFP’s reputation

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## 7. Crowdfunding Challenges

- Crowdfunding involves raising funds by appealing to a “crowd” (broad group or network) of small donors or customers, using the Internet and social media
- Crowdfunding is more commonly used for specific projects with a time-limited campaign strategy
- Crowdfunding generally involves three elements: the campaigner, the crowd, and the platform
- There are a variety of types of crowdfunding, including reward-based, equity-based, debt-based or even software value token (initial coin offerings)



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- Crowdfunding platforms establish their own terms of use and the charity’s or NFP’s only option is to either accept those terms or not, with no bargaining power
- Some popular crowdfunding platforms are: [www.gofundme.com](http://www.gofundme.com) and [www.canadahelps.com](http://www.canadahelps.com)
- Crowdfunding may also be subject to informal public appeals legislation (e.g. Saskatchewan’s *Informal Public Appeals Act*)
  - This legislation has been applied to crowdfunding campaigns (e.g. Humbolt Broncos)
  - It does not apply, however, to registered charities
  - The Uniform Law Conference of Canada’s model legislation from 2012 has only been adopted in Saskatchewan



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## D. MANAGING THE LEGAL CHALLENGES

### 1. Implementing a Social Media Policy

- There is no “one size fits all” policy; it will need to be adapted to the needs of the charity or NFP, including posting rules, advertising, employee’s and other stakeholder’s use of social media
- In some cases, a short paragraph with a hyperlink to the full policy may be appropriate
- Amongst other things, a social media policy may include:
  - A broad definition of social media which captures the use of email and Internet for sharing of content
  - Designation of authorized individuals with access to the charity’s or NFP’s social media accounts and who are permitted to post “official” content

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- A requirement that authorized individuals posting on social media on behalf of the charity or NFP comply with all other policies on Privacy, IP, and CASL
- A requirement that no social media posting may include personal information without consent, including images of identifiable individuals
- Rules for “re-tweeting”, “hyperlinking” and “liking” without attracting liability
- As a general rule, prohibit the use of images of identifiable children or, at the very least, obtain consent from the child’s parents or guardians
- A provision to reserve the right to edit or delete content that does not adhere to the social media policy or the terms of use of the website, as applicable




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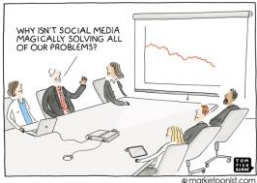
- A prohibition against postings which are obscene, harassing, bullying, offensive, derogatory, defamatory or otherwise potentially scandalous comments and/or inappropriate language or images including sexually explicit or other material or links deemed inappropriate and which could discredit or cause embarrassment to the charity or NFP
- Rules for the use of proprietary information belonging to the charity or NFP on social media
- Clear indication that content creators grant your charity or NFP a world-wide, royalty-free, non-exclusive licence to publish, display, reproduce, modify, edit or otherwise use materials they share on your page



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- Regarding the use of personal social media by employees or volunteers encourage the use of a personal disclaimer such as, *"The views expressed on this website (or page) are mine alone and do not necessarily reflect the views of [name of particular charity or NFP]"*
- Charities and NFPs should take inventory of their existing online presence and how they can take control of their data, including IP and personal information of employees, donors, supporters and volunteers




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### 2. Implementing a Technology Use Policy


- Outline acceptable practices regarding using the charity or NFP's IT systems for accessing social media and cross reference with other policies as appropriate
- For example, the policy may provide that:
  - The charity or NFP may monitor the use of its IT systems and as such, should not be used for personal purposes
  - If the IT systems are used for personal use, then the individual acknowledges that they have no expectation of privacy in connection with that use
  - Use of personal IT systems is not subject to monitoring, so it is clearly the preferred means of personal communication for employees



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- Use of personal IT systems (such as personal cell phones) for accessing social media during work hours, should be limited to pressing circumstances
- If the charity or NFP reimburses the employee for the cost of a cell phone or laptop, the device should be deemed to be owned by the charity or NFP and, as such, subject to being monitored or searched
- As well, when such device is no longer needed by the employee for "business" purposes, it should be returned to the charity or NFP and none of its content should be copied




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### 3. Implementing a Privacy Policy

- Organizations that are subject to PIPEDA should reflect the 10 principles in the Model Code as well as GDPR
- Amongst other things, the public privacy policy should outline the following:
  - How personal information will be used, collected, and disclosed, including a document retention policy
  - How personal information is safeguarded
  - The process for making and handling complaints and requests for personal information
  - The process for dealing with, reporting and communicating data breaches
  - Identify the Privacy Officer and include contact information

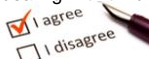


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### 4. Implementing a CASL Compliance Policy

- Due diligence defence under CASL will help mitigate against liability, or reduce the imposition of a penalty by the CRTC
- What should a CASL compliant policy include?
  - Establish internal procedures for compliance with CASL, including training and record keeping, specially as it pertains to consent;
  - Establish auditing and monitoring mechanisms for the compliance program(s), including a process for employees to provide feedback to compliance officer;
  - Establish procedures for dealing with third parties




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## 5. Implementing an Intellectual Property Policy

- Protect IP before posting it online
  - Avoid a costly branding blunder by completing the necessary due diligence ahead of time
  - Conduct trademark clearance searches to ensure marks are not encroaching on others' marks before using them on social media
  - Register all trademarks, copyrights, and domain names to avoid poaching by third parties
  - Ensure that all posts on social media comply with the appropriate agreements regarding any assignment or licence over IP-protected content




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## E. CONCLUSION

- Although social media has many benefits, it is important to remember that discretion and common sense should be used when posting on social media
- A proactive approach to minimize potential risks should be taken before a charity or NFP embarks on any social media campaign, including a review of applicable terms of use
- The primary way to manage the risks associated with social media is to ensure that the various policies discussed above are implemented and reviewed on a regular basis




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