

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

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# THE 2022 OTTAWA REGION *Charity & Not-for-Profit Law Webinar* *Continues Virtually* Thursday, February 17<sup>th</sup>, 2022

## WELCOME

Welcome to the 2022 Ottawa Region *Charity & Not-for-Profit Law Webinar*, which is designed to assist charities and not-for-profits in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability. This year marks the 15<sup>th</sup> Anniversary of the Ottawa Region *Charity & Not-for-Profit Law Webinar*. For legal and accounting professionals, this Webinar is eligible for 3 substantive hours of **Law Society of Ontario** Continuing Professional Development credits and **Chartered Professional Accountants** Professional Development requirements.

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

## ACKNOWLEDGEMENTS AND THANKS

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

## FORMAT OF THE WEBINAR

Presentations will be 20 minutes in length. The special presentations by our guest speakers, Senator Omidvar and Melissa Shaughnessy will be 30 minutes in length, including Q&A. Questions for the other speakers will be answered during a question period at the end of the Webinar. Questions can be entered in the Question Box feature of the Webinar. Unfortunately, not all questions can be answered due to time constraints.

## CARTERS RESOURCE MATERIALS

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

## CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, e-mail us at [info@carters.ca](mailto:info@carters.ca) with "mailing list" in the subject line. Alternatively, please click on the link on the Webinar Event Resources tab to add your name and e-mail address to our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the January 2022 edition of the [Charity & NFP Law Update](#) through our website.

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## WEBINAR SPONSORS

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

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

## SECTOR RESOURCE MATERIALS

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

- **Canada Revenue Agency, Charities Directorate**
- **Canada Revenue Agency, GST/HST Outreach Program**
- **Canadian Centre for Christian Charities**, <https://www.cccc.org>
- **Imagine Canada**, <https://www.imaginecanada.ca/en> and Advocacy Hub: <https://imaginecanada.ca/en/public-policy>
- **ONN (Ontario Nonprofit Network)**, <https://theonn.ca>, and <https://nonprofitresources.ca/>
- **Canadian Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>, and see also Will Power (A new national bequest campaign from the CAGP Foundation), <https://www.willpower.ca>
- **STEP Canada, Ottawa Branch**, <https://step.ca/>

## ABOUT CARTERS

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

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

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

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

### **EVALUATION**

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

### **SAVE THE DATE 2023**

The **Ottawa Region 2022 Charity & Not-for-Profit Law Seminar** will tentatively be held on **Thursday, February 16, 2023**. More details will be available in the New Year at [www.carters.ca](http://www.carters.ca).

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### **GENERAL DISCLAIMER**

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

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## SPEAKER BIOGRAPHIES



**[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, 2022), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a former member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and NFP Law Sections.



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



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



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



**[Melissa Shaughnessy](#)**. Melissa joined the Charities Directorate with the Canada Revenue Agency in April 2005. Since then, she has held several different positions within the Directorate, as an applications examiner, policy advisor, audit manager and strategic advisor to the Director General. Melissa was appointed to her current position as the Director of the Compliance Division in 2021. Prior to joining the CRA, Melissa worked in the field of psychometrics at the Royal College of Physicians and Surgeons, and as a Special Advisor at the House of Commons. Melissa holds a Bachelors degree with a major in Psychology from Queen's University.



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



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



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

### ADDITIONAL LAWYERS AT CARTERS



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



**[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. He is ranked as a leading expert by *The Best Lawyers in Canada*. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



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



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



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



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



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



**[Martin U. Wissmath](#)**, B.A., J.D. – Called to the Ontario Bar in 2021, Martin joined Carters after finishing his articling year with the firm. In addition to his legal practice, he assists the firm's knowledge management and research division, providing in-depth support for informative publications and client files, covering a range of legal issues in charity and not-for-profit law. His practice focuses on employment law, privacy law, corporate and information technology law, as well as the developing fields of social enterprise and social finance. Martin provides clients with legal advice and services for their social-purpose business needs, including for-profit and not-for-profit organizations, online or off-line risk and compliance issues.

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THE 2022 OTTAWA REGION  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 17<sup>th</sup>, 2022*

## LIST OF POWERPOINTS

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- ◆ **Essential Charity & NFP Law Update**  
Jacqueline M. Demczur, B.A., LL.B.
- ◆ **Financial Reporting and Audit Requirements for Charities and NPOs**  
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Employment Standards and Contracts Update**  
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **Bill S-216 – ‘Resource Accountability’ and the Vulnerable Sector**  
The Honourable Ratna Omidvar, C.M., O.Ont., Senator for Ontario (audio only)
- ◆ **Transition Challenges under the ONCA**  
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **Online Privacy and Cybersecurity Issues for Charities and NFPs**  
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **The Disbursement Quota for Charities: Issues to Consider**  
Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **The Charities Directorate’s Approach to Compliance**  
Melissa Shaughnessy, Director of the Compliance Division, Charities Directorate, CRA

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THE 2022 OTTAWA REGION  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 17<sup>th</sup>, 2022*

# **ESSENTIAL CHARITY & NFP LAW UPDATE**

**By Jacqueline M. Demczur, B.A., LL.B.**

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>The 2022 Ottawa Region Charity &amp; Not-for-Profit Law Webinar</h2> <p>February 17, 2022</p>
<h3>Essential Charity &amp; NFP Law Update</h3> <p>By <b>Jacqueline M. Demczur, B.A., LL.B.</b> jdemczur@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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### OVERVIEW (Current as of February 14, 2022)

2021 Federal Budget Highlights	Bill S-216	Disbursement Quota Consultation
CRA Update & News	ACCS	Provincial Legislation Update
Federal Corporate Update	Provincial Corporate Update	General Case Law Review

All information in this PowerPoint is current as of February 14, 2022, but is subject to change. To sign up for our firm e-newsletter, click on the “Subscribe to our NEWSLETTER” button at [www.carters.ca](http://www.carters.ca)

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## A. 2021 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget 2021 was tabled on April 19, 2021
  - Bill C-30 implementing legislation was assented to on June 29, 2021
- Proposed consultation on amendments to increase the disbursement quota
- Proposed Enhanced Anti-terrorism Provisions in *Income Tax Act* (“ITA”) and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, including
  - Immediate revocation of charitable status of qualified donees listed as terrorist entities (e.g. Proud Boys, a neo-fascist organization)
  - Provisions expanding FINTRAC’s powers
- Provided temporary financial support to Canada’s social sector, including charities and non-profits

- Expanded definition of “ineligible individuals” to include listed terrorist entities and their directors, trustees, officers and like officials, including individuals who controlled or managed, in any manner whatever, a listed terrorist entity “including a period prior to the date on which the entity became a listed terrorist entity”
- Amended ITA to allow for suspension of charity’s receipting privileges due to false statements
  - Previously the CRA was limited to revoking registration for false statements
- On February 4, 2022, the Department of Finance released draft legislative proposals implementing some of the measures from the 2021 federal budget, including:
  - Proposed change to ss 188(1.2) of ITA clarifying that a charity’s “winding-up period” (related to calculation of tax owed when charitable status revoked) can begin immediately after day it became a listed terrorist entity

## B. BILL S-216, EFFECTIVE AND ACCOUNTABLE CHARITIES ACT

- Bill S-216 was introduced by the Honourable Senator Ratna Omidvar on November 24, 2021, after its predecessor, Bill S-222, died on the Order Paper when Parliament was dissolved on August 15, 2021
- The bill proposes changes to several provisions in the *Income Tax Act* governing charities, including eliminating the “own activities” test and the related concepts of “direction and control”
- The direction and control regime prohibits charities from making gifts to non-qualified donees for charitable purposes
- The proposed legislation would introduce a new regime of resource accountability
- Bill S-216 has passed through the Senate and completed its first reading in the House of Commons

For more discussion, see presentation by Honourable Senator Ratna Omidvar’s presentation: “Bill S-216 – ‘Resource Accountability’ and the Vulnerable Sector”

## C. DISBURSEMENT QUOTA (“DQ”) CONSULTATION

- The Department of Finance ran the DQ consultation from August 6 until December 2, 2021
- The DQ is the minimum amount charities are required to spend on charitable programs or gifts to qualified donees
- Key questions for consideration included:
  - Should the disbursement quota be raised to produce additional funding for charities, and to what extent?
  - What additional tools should be available to the CRA to enforce the DQ rules?
- See Carters’ submission on DQ Consultation <https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>
- Also see presentation by Terrance S. Carter, “The Disbursement Quota for Charities: Issues to Consider”

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## D. CRA UPDATE & NEWS

- CRA updated two Guidances:
  - RC4081 GST/HST Information for Non-Profit Organizations (updated on December 10, 2021)
  - RC4082 GST/HST Information for Charities (updated on December 6, 2021)
- As of October 18, 2021, organizations with “My Business Account” can online request authorized representatives (e.g. accountants, lawyers) to view tax information
- See presentation by Melissa Shaughnessy, Director of the Compliance Division of the Charities Directorate
- The Office of the Taxpayers’ Ombudsperson is reviewing CRA’s compliance activities and audit selection process. Charities may participate in their questionnaire until March 31, 2022: <https://www.canada.ca/en/taxpayers-ombudsperson.html>

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## E. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

- The Advisory Committee on the Charitable Sector (“ACCS”) was established in 2019 as forum for federal government to engage with the charitable sector
- ACCS released Report #1 on March 12, 2021; Report #2 on April 28, 2021; and Report #3 on July 15, 2021
- Important recommendations from the Reports include:
  - Amend the ITA to remove the “own activities” test (to allow for “resource accountability”)
  - Allow all appeals to go to the Tax Court of Canada instead of some going to the Federal Court of Appeal
  - Improve relations with Indigenous communities, Indigenous-led charities and other stakeholders
  - Create a permanent “Home in Government” for the charitable and non-profit sector

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- Create a more supportive environment for earned income by charities by revising CRA’s guidance CPS-019 “What is a related business?”, including eliminating the “linked and subordinate” test
- Improve accessibility of CRA services to charities (particularly those serving vulnerable populations);
- ACCS made recommendations to Finance Canada’s consultation on the DQ dated August 31, 2021, including:
  - Improved data collection on the T3010 Registered Charity Information Return forms
  - Compliance be based on existing “education first approach”
  - Inclusion of “program related investments” in meeting DQ obligations

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## F. PROVINCIAL LEGISLATION UPDATE

**Bill 9, *Non-Profit Sector Appreciation Week Act, 2021***

- Bill 9 received royal assent on Dec 9, 2021 and declares the third week of February each year as Non-Profit Sector Appreciation Week

**Bill 13, *Supporting People and Businesses Act, 2021***

- Bill 13 provides, among other amendments, for a definition of “volunteer” and that volunteers will not be required to pay a fee for a criminal record check or criminal record and judicial matters check
  - However, the fee exemption does not apply to vulnerable sector checks
- Bill 13 received royal assent on Dec 2, 2021

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## Bill 27, *Working for Workers Act, 2021*

- Royal assent was given on Dec 9, 2021 and amends the Employment Standards Act
- Bill requires employers with ≥25 employees to have a “Disconnect From Work Policy”
- Non-Compete Agreements are also prohibited in most employment contracts
  - For more details on Bill 27, see presentation by Barry W. Kwasniewski “Employment Standards and Contracts Update”

## Bill 43, *Building Ontario Act (Budget Measures), 2021*

- Bill 43 received royal assent on December 9, 2022 and enacts various measures announced in the 2021 Ontario Fall Economic Statement
- One of the bill’s changes amends the Assessment Act to exempt from property taxes land leased and occupied solely by a university if certain conditions are met

## G. FEDERAL CORPORATE UPDATE

### 1. Import and Export under the *Canada Not-for-Profit Corporations Act* (“CNCA”)

- **Import** - On July 7, 2021, Corporations Canada (“CC”) updated its policies to add Alberta and New Brunswick legislation to the list of pre-approved provincial legislation for continuance from those acts to the CNCA
  - List previously included Ontario, Manitoba, Newfoundland & Labrador and Saskatchewan
- **Export** - CC also updated its policies to add the B.C. and New Brunswick legislation to the list of pre-approved provincial legislation that CNCA corporations can be exported to
  - List previously included Alberta, Manitoba, Saskatchewan and Newfoundland & Labrador

## 2. Online Filing Centre

- As of January 19, 2022, to access Corporations Canada's Online Filing Centre, a person or their registered intermediary must first log into My ISED Account
- Some services can be accessed from the Online Filing Centre without requiring a login to the My ISED Account, such as getting a certificate of compliance and ordering a corporate profile

## 3. 10-Year Review of CNCA

- Minister of Innovation, Science and Industry published a report on November 23, 2021 about its statutory review of the CNCA
- Generally, consultation found the CNCA continues to be a modern corporate statute and offered suggestions for reform, including reform of audit and reporting obligations

## H. ONTARIO CORPORATE UPDATE

### 1. Ontario *Not-for-Profit Corporations Act* (ONCA) and Ontario Business Registry

- On October 19, 2021, the ONCA came into force, which started the 3 year transition period for existing corporations under the Ontario *Corporations Act* ("OCA")
  - See Theresa L.M. Man's presentation "Transition Challenges under the ONCA" and December 8, 2021 presentations about ONCA for details  
<https://www.carters.ca/pub/seminar/charity/2021/ONCA>
- The Ontario Business Registry was launched on the same day the ONCA came into force
  - Registrations and filings previously submitted by mail or fax (which took six weeks or longer to complete) can now be done instantly online
  - Electronic filing of annual returns and notices of change also now possible
  - Registry is integrated with CRA's system enabling the identification of a NFP by a single business number

## 2. Electronic Meetings under OCA and ONCA

- Temporary relief to Ontario *Corporations Act* (“OCA”), *Co-operative Corporations Act* (“CCA”) and ONCA corporations in relation to holding electronic meetings of directors/members in response to the COVID-19 pandemic has been extended to September 30, 2022

- The rules in all three statutes were amended to permit electronic meetings of directors and members to be held during the temporary period

- This is the case regardless of contrary provisions in a corporation’s constating documents

## 3. Updated Not-for-Profit Incorporator’s Handbook

- In conjunction with the ONCA’s proclamation, the Ministry of the Attorney General updated its *Not-for-Profit Incorporator’s Handbook*, which provides general information and guidelines about incorporating not-for-profits and charitable corporations

## 4. Proposed Permanent Changes to ONCA

- Draft permanent changes were released by the Ministry of Government and Consumer Services on January 4, 2022, proposing the following:

- Allow corporations to hold virtual or hybrid meetings by default unless constating documents provide otherwise

- Allow votes and elections to be conducted virtually unless the corporation opts out in constating documents

- Permit notices to directors and members be sent by electronic means

## I. GENERAL CASE LAW REVIEW

### 1. *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 (May 21, 2021)

- Church, a voluntary association, expelled 5 members who then alleged Church did not follow internal practices and violated their s. 2(a) *Charter* rights
- Motions judge found no underlying contract between parties, which the Ont. Court of Appeal reversed on appeal
- Supreme Court of Canada further reversed this decision, finding no objective intention to create contract or enforceable legal relationship between parties
  - Rules of voluntary associations do not necessarily result in contractual relations among members
  - Courts will only intervene in decisions of voluntary associations where a legal right is affected

- *Aga* was subsequently cited in other cases, including:
  - ***Chinook Park-Kelvin Grove-Eagle Ridge Community Association v Minor Hockey Association of Calgary***, 2021 ABQB 532 (July 14, 2021) which cited *Aga* for the proposition that membership is not automatically contractual
    - Court concluded that when members of Hockey Calgary agreed to be bound by a common set of rules, this did not evidence an underlying objective intention to create legal relations
  - ***Hon v Liao***, 2022 ABQB 43 (January 13, 2022), which also cited *Aga* for the proposition that membership is not automatically contractual
    - Court found that the general contract principles were present and did evidence an objective intention to enter into legal relations

## 2. *Canada (National Revenue) v Miller, 2021 FC 851 (Aug 19, 2021)*

- Mr. Miller did consulting work for a client in Europe under an oral contract (there were no written contracts for services or invoices)
- CRA audited Mr. Miller for the tax years of 2007-2016 and sought a court order to have Mr. Miller to provide them with the information CRA requested
- Federal court found that under the ITA CRA can compel the production of any information that should be documented in books and records, even if a transaction was originally an oral agreement
- In a CRA audit, charities should be prepared to make reasonable efforts to accurately respond to requests for documents and information that fall within the scope of subsection 231.1(1) of the ITA

## 3. *Delta Patriots Cricket Club v West Coast Cricket Organization, 2021 BCCA 433 (Nov 17, 2021)*

- West Coast Cricket Organization (“Cricket BC”) faced scrutiny over its by-laws after a dispute arose between Delta Patriots Cricket Club and another cricket organization
- Cricket BC’s by-laws did not comply with BC’s corporate legislation, the *Societies Act*, because they allowed more than one vote for certain members and allowed certain unincorporated groups to be members
- The lower court found it did not have authority to order an annual general meeting where the non-compliant provisions could temporarily remain in force. Instead, it struck out and read down portions of the by-laws to comply with the Act
- The Court of Appeal agreed with the lower court and dismissed the appeal
- Case important to show need to keep by-laws compliant with governing legislation

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THE 2022 OTTAWA REGION  
*Charity & Not-For-Profit Law Webinar*

*Thursday, February 17<sup>th</sup>, 2022*

# FINANCIAL REPORTING AND AUDIT REQUIREMENTS FOR CHARITIES AND NPOs

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

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The 2022 Ottawa Region <i>Charity &amp; Not-for-Profit Law</i> Seminar February 17, 2022</p>
<p><b>Financial Reporting and Audit Requirements for Charities and NPOs</b></p> <p>By Ryan M. Prendergast, B.A., LL.B.</p> <p>rmp@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>Common Issues with Financial Reporting</li><li>Financial Reporting Requirements under the CNCA/ONCA</li><li>Unique Issues for Charities/NPOs</li><li>Key Takeaways</li></ul> <p>www.charitylaw.ca <span style="float: right;">www.carters.ca</span></p>	

## A. COMMON ISSUES WITH FINANCIAL REPORTING

- Audits are too expensive – we never do it
- Our financial statements are always available after the AGM
- Our bookkeeper has been preparing our financial statements for years
- Our audit committee approves the financial statements, our board has nothing to do with it
- CRA doesn't ask for audited financial statements with our T3010 so we don't prepare them
- We prepare two sets of financials so our funder is unaware of surpluses from other programs

## B. FINANCIAL REPORTING REQUIREMENTS UNDER THE CNCA/ONCA

- The balance of this presentation reviews financial reporting issues for incorporated registered charities and non-profit organizations ("NPOs") in Ontario or federally
  - Registered charities and NPOs established in other jurisdictions will want to note any differences applicable to where they are incorporated
- Registered charities or NPOs established as unincorporated associations or trusts may require separate advice
- This presentation does not deal with books and records requirements under the *Income Tax Act* (Canada) or statutory rights to information for incorporated registered charities or NPOs

- There is often confusion concerning whether registered charities or NPOs need to appoint an auditor, need financial statements, or whether they need to be subject to an audit or not
- For incorporated registered charities and NPOs, whether the entity needs to appoint a public accountant/auditor and the level of financial review concerning the financial statements to be provided to their membership is a **legal issue** and not an accounting issue
- Both the *Canada Not-for-profit Corporations Act* (“CNCA”) and the *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”) require similar rules, with some differences as will be discussed

## 1. What Do We Mean When We Refer to a Public Accountant/Auditor?

- The CNCA requires the appointment of a “public accountant”
- The ONCA requires the appointment of an “auditor”
- For the purposes of the CNCA, this means they must be a member in good standing of an institute or association of accountants of a province, and meet any qualifications under any enactment in a province to be able to conduct an audit engagement or review engagement
  - In Ontario this means permitted to conduct an audit or review engagement of the corporation under the *Public Accounting Act, 2004*
- They must also be “independent”

- Auditor/public accountant has the right to attend every meeting of the members at the expense of the corporation and to be heard on matters relating to the their duties
- A director or member, including non-voting members, can give notice to the public accountant/auditor or **former** public accountant/auditor to attend at a meeting at the expense of the corporation and answer questions relating to their duties
- The public accountant/auditor has the authority under both the ONCA and CNCA to demand from current and **former** directors, officers, employees access to the information they need in order to conduct an audit or review engagement

## 2. Audit, Review Engagement, Compilation – What’s the Difference?

- Audit
  - An audit engagement is the process of engaging an independent public accountant to examine the accounting records and other evidence supporting the financial statements; to prepare financial statements; and to render a professional opinion that the financial statements present a fair picture of the organization's financial position and its activities during the period in which the audit was carried out
- For more details see link to Corporations Canada glossary <https://www.ic.gc.ca>

- Review Engagement

- If an audit is not mandatory, financial statements may be prepared through a review engagement. A review engagement is the process of engaging an independent public accountant to prepare financial statements on a review basis. The accountant will not express an opinion on the fairness of the financial statements, but will only provide a limited assurance that the financial information is plausible and conforms to generally accepted accounting principles

- Compilation

- Compilation is the process by which unaudited financial information is compiled to produce financial statements that are based on information provided by the organization. A compilation does not provide any assurances as to the accuracy or veracity of the financial statements since there has been no audit or review engagement done

- Neither the CNCA or ONCA mandate a compilation

### 3. When Do We Have to Appoint a Public Accountant/Auditor? What Do They Have to Do?

- CNCA

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
<b>Soliciting</b>	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	<b>Non-Designated</b>	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	<b>Non-Designated</b>	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.
<b>Non-Soliciting</b>	<b>Designated</b>	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

- ONCA

Type of Corp/Gross Annual Revenues	Requirements for an Auditor	Audit/Review Engagement	
<b>Public benefit corporation</b>	\$100,000 or less	May, by extraordinary resolution (80 per cent), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80 per cent)
	More than \$100,000 and less than \$500,000	May dispense with an auditor and have someone else conduct a review engagement. This dispensation requires an extraordinary resolution (80 per cent)	May elect to have a review engagement instead of an audit by extraordinary resolution (80 per cent)
	\$500,000 or more	An auditor must be appointed annually	Audit is required
<b>Non- public benefit corporation</b>	\$500,000 or less in annual revenue	May, by extraordinary resolution (80 per cent), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80 per cent)
	More than \$500,000 in annual revenue	May, by extraordinary resolution (80 per cent), 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 per cent)

- What is soliciting/non-soliciting under the CNCA?

- 3 year rolling status and what would be included in the \$10,000 threshold

- CNCA requires that all corporations categorized into soliciting and non-soliciting corporations

- If a corporation receives more than \$10,000 in its last financial period from public sources, it will become a soliciting corporation
- 3 year status - from the AGM in the following financial year until the 3<sup>rd</sup> AGM

- Public sources
  - (a) Requests for donations or gifts from persons who are not
    - Members, directors, officers, or employees of the corporation at the time of the request
    - Legal or common law spouse of the above persons
    - Children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above persons
  - (b) Grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government
  - (c) Donations or gifts received from a soliciting corporation

- What is public benefit/non-public benefit corporation under the ONCA?
  - PBC is defined as:
    - (a) A charitable corporation; or
    - (b) A non-charitable corporation that receives more than \$10,000 or other prescribed amount in a financial year,
      - (i) In the form of donations or gifts from persons who are not members, directors, officers or employees of the corporation; or
      - (ii) In the form of grants or similar financial assistance from the federal government or a provincial or municipal government or an agency of any such government

- Charitable corporations will always be PBCs, regardless of the amount or source of their revenue
- Non-charitable corporations will only be PBCs if they meet the criteria set out in the ONCA
  - Receives more than \$10k from:
    - In gifts or donations from persons not connected to the NFP; or
    - In grants or financial assistance from government
- The definition of PBC turns on the meaning of “charitable corporation”, which is defined in section 1(1) of the ONCA as a corporation incorporated for the relief of poverty, advancement of education, advancement of religion, or other charitable purposes

#### 4. Who Appoints the Auditor/Public Accountant?

- Generally, the appointment, removal, and determination of remuneration is done by the **corporate members**, *not* the board
- Under sections 181 of the CNCA and 68 of the ONCA, the auditor/public accountant is appointed at each annual meeting by the members
  - If no appointment occurs, the incumbent auditor remains until a successor is appointed
- Their remuneration is fixed by the members, unless the resolution permits the board to do so
- Note that a court can also appoint an auditor/public accountant

#### 5. Who Approves the Financial Statements?

- The financial statements are approved by the board of directors, not the audit/finance committee or another committee of the board
  - Section 83 of the ONCA and 178 of the CNCA require the board to approve the financial statements, and the approval must be evidenced by the signature of one or more directors of the board
  - Financial statements should not be circulated under either the ONCA or CNCA unless they are signed by one or more board members and include the report of the public accountant/auditor

## 6. What If We Have an Audit Committee?

- Section 194 of the CNCA and section 80 of the ONCA permit not-for-profit corporations to establish an audit committee
  - Under the CNCA, the committee must be made up of not less than three directors, a majority of whom are not officers or employees
  - Under the ONCA, directors do not have to be on the audit committee but a majority of the committee cannot be officers or employees of the corporation
- The duty of the audit committee is to review the financial statements before the board approves them
- The public accountant/auditor is entitled to attend any meeting of the audit committee and can call meetings of the audit committee

## 7. What is Presented to the Members and How?

- At every annual meeting, the board is obligated to “place before the members”:
  - The financial statements;
  - The report of the auditor/public accountant; and
  - Any further information respecting the financial position of the corporation and the results of its operations required by the articles or the by-laws (or any unanimous member agreement in the case of the CNCA)

- What about before the annual meeting?
  - Under the CNCA, between 21 to 60 days before an AGM a corporation must send a copy or summary of financial information or a copy of a publication of the corporation reproducing the information contained in the documents or summary **to each member**, other than a member who, **in writing**, declines to receive such documentation.
    - A corporation that sends a summary to a member shall also inform that member of the procedure for obtaining a copy of the documents free of charge
    - Alternatively, if the by-laws permit, give members notice that the documents are available at the registered office of the corporation and that any member may, on request, obtain a copy free of charge at the office or by prepaid mail

- Under the ONCA, not less than 21 days, or a prescribed number of days (5 days), before each AGM, a corporation must give a copy of the financial statements, auditors report, and anything else required, to all members **who have informed the corporation that they wish to receive a copy**
- As such, the default is the corporation does not need to circulate financial statements to members unless they opt-in, unlike the CNCA which requires an opt-out
- Note 21 days under the ONCA is distinct from the default notice of meeting period of 10 to 50 days

## 8. Who Else Gets the Financial Statements?

- Under the CNCA, soliciting corporations must file their financial statements, the report of the public accountant, if any, and any further information required with Corporations Canada
  - The filing must be done annually not less than 21 days before AGM
- Note that these are public and can be requested online through the Corporations Canada website
- The “Director” under the CNCA can also request copies of the same
- The ONCA **does not** require financial statements to be filed with anyone
- Note financial statements must also be included with T3010 or T2

## 9. Audited Financial Statements and Review Engagements are So Expensive! What Good are They?

- Provide the required financial disclosure to members and the public in the case of registered charities, or those that are soliciting corporations/public benefit corporations that are not registered charities
- Both the ONCA and CNCA provide a reasonable diligence defense for directors that rely on the financial statements presented by an officer or by the public accountant/auditor

## C. UNIQUE ISSUES FOR CHARITIES/NPOS

### 1. Financial Review Requirements for CRA

- CRA is not the authority concerning financial review for incorporated charities
  - CRA recommends that if a charity has income over \$250,000 the financial statements be professionally audited
  - CRA suggests that the charity's treasurer should sign any financial statements that have not been professionally prepared
  - Under the Income Tax Act (Canada), CRA can suspend receiving privileges or revoke status of registered charities that fail to file a complete and accurate T3010, which may include whether the financial statements have inaccuracies

### 2. Issues for Ontario Charities

- O. Reg. 4/01 of the *Charities Accounting Act* (Ontario) provides a limited exception to the common law prohibition against directors of charitable corporations receiving any direct or indirect remuneration
- Where this exception applies and a director receives compensation from the charity, O. Reg. 4/01 requires that the directors ensure that information respecting payments made in a given year is noted in the corporation's financial statements for that year, and placed before its members at an annual meeting of the members

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- PGT guidelines state that:
  - The information should appear in the notes to the financial statements;
  - The director in question should be named;
  - If someone connected to a director contracts with the charitable corporation, it is not necessary to name the connected person, i.e., the notes could say, a party connected to the named director;
  - The nature of the business transaction should be mentioned in broad terms, i.e., whether it is for a good, service, or facility that was provided; and
  - It is not necessary to specify the amount paid to the director or the connected person
    - See <https://www.publications.gov.on.ca>

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### 3. NPO Filing Requirements

- NPOs that are incorporated are required to file a T2 information return with CRA
- This includes financial statement information and any notes to the financial statements and the report of the auditor/public accountant, if they were prepared
- Some NPOs may be required to file a T1044 NPO information return if:
  - It received or is entitled to receive taxable dividends, interest, rentals or royalties totaling more than \$10,000 in the fiscal period
  - It owned assets valued at more than \$200,000 at the end of the immediately preceding fiscal period
  - It had to file an NPO information return for a previous fiscal period

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## D. KEY TAKEAWAYS

- Financial statements are used not only by members and regulators, but even third-parties, e.g., Charity Intelligence, etc., to evaluate registered charities or NPOs
- Financial statements also required by grant making organizations, and audited financial statements may be necessary to apply for grants
- Members and directors have statutory rights to financial information that directors cannot ignore
- Properly prepared financial statements are not the work of lawyers, but, it is important to be aware of the legal requirements under the ONCA and CNCA with respect to the public accountant/auditor and their legal duties

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THE 2022 OTTAWA REGION  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 17<sup>th</sup>, 2022*

# **EMPLOYMENT STANDARDS AND CONTRACTS UPDATE**

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

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 <p><b>CARTERS</b> BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p><b>The 2022 Ottawa Region Charity &amp; Not-for-Profit Law Webinar February 17, 2022</b></p>
<p><b>Employment Standards and Contracts Update</b></p> <p><b>By Barry W. Kwasniewski, B.B.A., LL.B.</b> bwk@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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<p><b>A. INTRODUCTION</b></p> <p><b>1. Overview</b></p> <ul style="list-style-type: none"><li>• The COVID-19 Pandemic and updated employment standards legislation (in Ontario) has renewed discussion about employment contracts and conditions for charities and not-for-profits<ul style="list-style-type: none"><li>– Required to take a closer look at employment contracts and policies to determine employees' legal rights</li></ul></li><li>• Because employment laws change so frequently, employment contracts and policies need to be kept up-to-date</li><li>• The employment laws discussed in this presentation relate to Ontario, so it's important to consult with employment lawyers in other provinces as necessary</li></ul>	
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## B. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

- In the absence of a written employment contact, the employer and the employee may have very different opinions about what conditions of employment they agreed to
- In drafting employment contracts, employers must ensure that the terms do not violate any of the minimum standards set out in their provincial labour legislation

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The key provisions of an employment contract should include:

1. The position being offered and accepted, as well as a job description;
2. The compensation that will be paid, including the right to receive any bonuses or commissions and the formula of determining these forms of compensation;
3. Whether the employment is for a fixed-term or is indefinite;
4. Specifics regarding vacation time and sick leave and whether such time accrues from year to year;
5. Whether there will be a probationary period after hiring;
6. Possible changes in job or location;
7. Protection of the employer's intellectual property and confidential information and whether there will be any post-employment obligations (non-competition, non-solicitation clauses);
8. Pregnancy and Parental Leave policies;
9. Employment termination provisions

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### C. ONTARIO LEGAL FRAMEWORK

- Most Ontario employers are governed by the Ontario *Employment Standards Act, 2000* (the “ESA”)
  - ESA sets out the minimum employment standards
    - Standards cannot be lessened, even by an agreement between an employer and an employee
  - Minimum obligations touch on a number of issues:
    - Minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence and termination obligations

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- ESA minimum termination notice or pay in lieu of notice requirements:
 

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks
- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee’s benefits for the same number of weeks as the notice required

NOTICE OF TERMINATION

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- Severance Pay
  - Regulated by ESA
    - Only applies to employees who have been employed with the same employer for 5 years or more; and
    - Employer has a global payroll of at least \$2.5 million per year
  - Based upon number of years and months of service
    - Maximum amount of severance pay is equal to 26 weeks of pay

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## D. THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

***Waksdale v Swegon North America*, 2020 ONCA 391 (June 17, 2020)**

- Contractual termination clause must comply with O Reg 288/01 under the ESA to be valid and enforceable
  - O Reg 288/01: an employee can only be deprived of termination notice of pay and severance pay if employee was “guilty of willful misconduct, disobedience or willful neglect of duty that is not trivial and has not be condoned by the employer”
  - Court will declare employment contracts which go beyond O Reg 288/01 standards to have invalid and unenforceable termination clauses

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- Both for cause and without cause termination clauses in contracts should be considered as a whole
  - If one clause is invalid, then the entire clause is unenforceable
- Leave to appeal the case to the Supreme Court of Canada denied
- Case not applied outside Ontario

**TERMINATION  
OF  
EMPLOYMENT**

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### E. THE IMPORTANCE OF REMOTE WORK PROVISIONS

- Historically, the general expectation was that work would be carried out at the employer's premises
  - As a result, case law about work location considers relocation rather than remote work
- Working remotely is now much more common
- If an employer wants employees to work at its premises, not remotely, this should be made clear in the employment contract
  - Clear provisions will reduce the risk of constructive dismissal claims if an employee unilaterally decides to work remotely

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## F. CHANGES TO ESA

- Bill 27, *Working for Workers Act, 2021* received royal assent on December 2, 2021 amending the ESA
- Two changes are most significant:
  - 1) Mandatory Right-to-Disconnect Policies
  - 2) Prohibition of Non-Competition Agreements
- Details set out on the following slides

## 1. Mandatory Right-to-Disconnect from Work Policies

- Bill 27 requires employers with  $\geq 25$  employees (including charities and not-for-profits) to establish a written policy for disconnecting from work
- Section 21.1.1
  - In this Part, “disconnecting from work” means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.
- Subsection 21.1.2(1)
  - An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy.

- Employers with  $\geq 25$  employees on January 1 of any year must have a written policy on disconnecting from work in place by March 1 of that year
  - Copy of policy must be provided to employees
- Employers with  $\geq 25$  employees on January 1, 2022 have until June 2, 2022 to have a written policy in place
- Policy developed in context of COVID-19 pandemic and issues of employee burnout, mental health challenges, and concerns about employees' inability to disconnect at the end of the workday

## 2. Content of Disconnect from Work Policies

- Section 21.1.2(4) of the ESA states that a disconnect from work policy shall contain the “information as may be prescribed”
  - As of yet, there is no regulation passed pursuant to this section describing requirements, though a regulation may be passed in the near future
- Policy must address:
  - Restraint on work-related communications between the workplace and the employee
  - Objective of freeing the employee from performance of work

### 3. Prohibition of Non-Compete Agreements

- Bill 27 added Part XV.1 to the ESA, addressing Non-Compete Agreements (“NCAs”)
- After October 25, 2021, employers are prohibited from entering into NCAs with their employees with some limited exceptions
  - Purpose is to allow for freer movement of workers between employers
- Section 67.1
  - “non-compete agreement” means an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the employment relationship between the employee and the employer ends.

### 4. Main Exceptions to Prohibition on NCAs

- There are two main exceptions to the prohibition on NCAs
  - a) **For Executives**
    - In some limited circumstances involving “executives” – usually an organization’s most senior executive employees – NCAs may be allowed
    - Section 67.2(5)
      - “executive” means any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position;

## b) For the Sale of a Business

- In subsection 67.2(3), the ESA provides that an NCA can be entered into if:
  - There is a sale of a business or part of a business; and
  - As a part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale and, immediately following the sale; and
  - The seller becomes an employee of the purchaser

## G. KEY TAKEAWAYS

- Properly drafted employment contracts help limit potential liability to employees and effectively manage financial and human resources
- Remember to review and update employment contracts which are used on a regular basis so that they remain current and legally enforceable
- Charities and Not-for-profits must check their employment contract templates
- Employers with  $\geq 25$  employees must establish a written policy for disconnecting from work by June 2, 2022
- Non-Compete Agreements entered into after October 25, 2021 are prohibited except in limited circumstances

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***Charity & Not-For-Profit Law Webinar***

*Thursday, February 17<sup>th</sup>, 2022*

# **TRANSITION CHALLENGES UNDER THE ONCA**

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

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<p><b>Transition Challenges under the ONCA</b></p> <p><b>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.</b> tman@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="259 833 645 891">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="652 833 1209 891">Ottawa Toronto Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca
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**FINALLY .....**

**YES FINALLY ...**

**HERE!**



**Beginning  
of a New  
Era 😊**

## A. ONCA IS FINALLY IN FORCE

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now applies to non-share capital membership corporations under Part III of Ontario *Corporations Act* (“OCA”)
- New online Ontario Business Registry (OBR) also launched on October 19, 2021
- This presentation does not cover special issues, e.g.
  - Special act corporations – they need special case-by-case review
  - Share capital social clubs under Part II of OCA – they will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

So ...  
 what does it mean to  
 me?

5

## B. IMPLICATIONS OF ONCA PROCLAMATION

### Automatic application of ONCA

- ONCA applies to all Part III OCA corporations automatically upon proclamation

### Effect of doing nothing

- Corporation will not be dissolved BUT the following governing documents will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years of proclamation to comply with the ONCA - will result in uncertainty
  - Letters patent (“LP”)
  - Supplementary letters patent (“SLPs”)
  - By-laws
  - Special resolutions

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### Optional transition process

- Can take transition process within 3 years of proclamation to make necessary changes to current governing documents:
  - Adopt Articles of Amendment
  - Adopt ONCA-compliant by-law
- Prudent to go through the transition process

### End result

- After the transition process, corporation will be governed by
  - LP & SLPs, as amended by Articles of Amendment – consider consolidating them in Restated Articles
  - ONCA-compliant by-law
- For more details, see materials from webinar entitled “*Moving Forward with the ONCA*” held on December 8, 2021  
<https://www.carters.ca/pub/seminar/charity/2021/ONCA/Handout2021.pdf>

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### C. ONCA Framework

- 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 permitted by ONCA

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# Transition Steps ...

+8

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## D. STEPS TO TRANSITION UNDER ONCA

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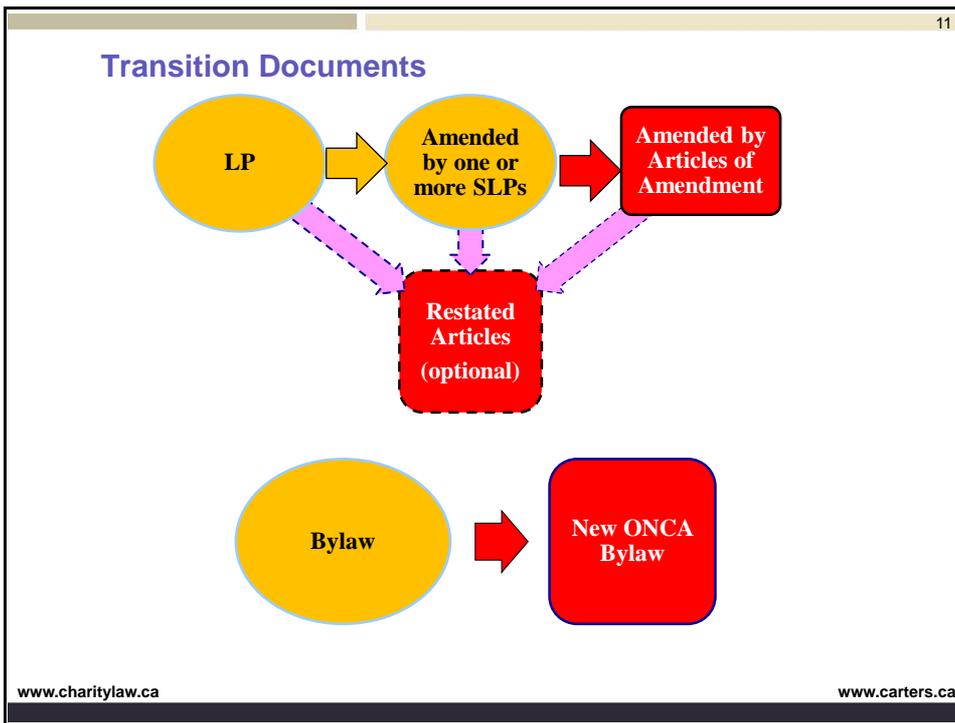
<b>COLLECT GOVERNING DOCUMENTS</b>	<p>Confirm corporation is actually under the OCA</p> <hr/> <p>Collect LP, SLPs, by-laws (including amendments)</p> <hr/> <p>Collect governance related documents - e.g., organizational charts, policies, manuals</p>
<b>REVIEW GOVERNING DOCUMENTS</b>	<p>Do they reflect current governance process? If not, what is current governance process?</p> <hr/> <p>Are changes desired? Write them down, come up with a wish list</p>
<b>STUDY KEY ONCA FEATURES</b>	<p>Determine how current governance structure will be impacted by the ONCA</p> <hr/> <p>Understand the ONCA framework and rules in the ONCA and Regulations</p> <hr/> <p>Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?</p>

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<b>PREPARE ARTICLES OF AMENDMENT AND RESTATED ARTICLES</b>	<p>Articles of Amendment – to amend LP and SLPs</p> <hr/> <p>Optional to prepare Restated Articles of Incorporation – to consolidated provisions in LP, SLPs and Articles of Amendment</p>
<b>PREPARE ONCA-COMPLIANT BY-LAW</b>	<p>By-law will need to be replaced or substantially revised because the ONCA is very different from OCA</p> <hr/> <p>Generally easier to start with fresh ONCA by-law than to amend current by-law</p> <hr/> <p>Some changes may require consideration and consultation with members, some changes may only be administrative</p>
<b>APPROVAL AND FILINGS</b>	<p>Board and members to adopt articles and by-law</p> <hr/> <p>File Articles of Amendment (and Restated Articles) with the Ministry (but not by-laws), Ministry will issue Certificate of Amendment (and Certificate of Restated Articles)</p> <hr/> <p>Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate</p>

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## E. TRANSITIONING CHALLENGES – SOME EXAMPLES

### #1 Articles of Amendments/Restated Articles process

- Simply adopting an ONCA-compliant by-law is not sufficient
- LP and SLPs need to be amended to comply with new ONCA requirements – by Articles of Amendment
  - Set out the following in the articles:
    - Number of directors
    - Number of membership classes and voting rights
  - Dissolution clause needs to comply with new rules in the ONCA
  - Add additional provisions

- After adoption of Articles of Amendment, corporation will need to flip back and forth between the following documents
  - LP
  - As amended by SLPs in the past
  - As amended by Articles of Amendment
- Can consolidate all these into Restated Articles of Incorporation
  - Needs to carefully consider how to consolidate
  - Additional filing fees and processing time
  - Certain default provisions will be automatically inserted into the articles – may need to anticipate them when doing Articles of Amendment

## #2 Company key and filing/processing problems

- There are glitches with the forms and online filing process
- Need to write to the Ministry to request the “company key”
  - Company key will be mailed to the head office on record of the Ministry
  - What if head office location on record with the Ministry is not up-to-date?
- Needs formal email address for each corporation
- Glitches with the form and filing process

## #3 Consent from Ontario Public Guardian and Trustee (“PGT”)

- Needs to obtain consent from PGT under certain situations
- (a) Revisions to purposes**
  - If a charitable corporation wants to update its purposes set out in the LP/SLPs, they must be amended by Articles of Amendment
  - Articles of Amendment form will automatically insert “after acquired” clause, regardless of the changes being made, unless the Public Guardian and Trustee (“PGT”) has provided written consent to waive it
  - This does not apply to non-charitable corporations

- Implications of having “after acquired” clause:
  - Funds and other property acquired before the Articles of Amendment can only be used for the purposes before the amendment (will include all income received from a Will, deed or other trust made before the Articles of Amendment became effective, regardless of when the funds or property are received by the charity)
  - Funds and other property acquired after the Articles of Amendment can only be used for the purposes as changed by the Articles of Amendment

- There may be situations where “after acquired” clause may not be appropriate
  - Such as updating old language in the purposes
  - Needs to write to PGT in advance to obtain their written consent
  - File the consent with the Articles of Amendment
  - Retain the consent letter in the records of the charity
- **(b) Other situations where PGT’s consent is required**
  - PGT’s consent is required to use the term “Foundation” in the corporate name
  - If the PGT has requested notification of any application for changes with respect to the corporation

## #4 Some ONCA corporations might be better off continuing to CNCA

- *Canada Not-for-Profit Corporations Act (CNCA)* became law in 2011
- Instead of preparing articles and new by-laws to comply with the ONCA, Ontario corporations may become a federal corporation by:
  - Export out of Ontario -> file *Authorization to Continue Out of the NFPCA* with Ontario Ministry
  - Import into CNCA ->
    - File *Articles of Continuance* with Corporations Canada
    - Adopt CNCA-compliant by-law

- Rules in the CNCA are very similar to those in the ONCA
- Examples of key differences
  - ONCA generally has lower thresholds requiring audit/review engagement
  - ONCA corporations are subject to the PGT's jurisdiction
  - CNCA does not permit *ex officio* directors
  - CNCA allows members in different classes (including non-voting members) veto class voting rights for certain fundamental changes
  - CNCA corporations do not need to get PGT's approval for any corporate changes

- Examples of corporations that may be good candidates to go federal
  - Corporations that carry on activities in different provinces
  - Corporations that have members in different provinces and want to hold members' meetings in different provinces from time to time
  - Operational issues – umbrella organization, consistent operation of network of related corporations, etc.

- Examples of corporations that may not want to go federal
  - Attractive features of the ONCA – *ex officio* directors
  - Multiple membership classes
  - Operational Issues – network of related corporations under a federal umbrella organization
  - Prohibitions – some organizations are required to be incorporated provincially in Ontario
  - Corporate process – can the corporation obtain the necessary membership approval to effect such as a fundamental corporate change?
- Needs case by case review

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*Thursday, February 17<sup>th</sup>, 2022*

**ONLINE PRIVACY AND  
CYBERSECURITY ISSUES FOR  
CHARITIES AND NFPs**

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<p><b>Online Privacy and Cybersecurity Issues for Charities and NFPs</b></p> <p>By Esther Shainblum, B.A., LL.B., LL.M., CRM <a href="mailto:eshainblum@carters.ca">eshainblum@carters.ca</a> 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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<p><b>OVERVIEW</b></p> <ul style="list-style-type: none"><li>• Charities and Not-for-Profits (NFPs) with online operations face a number of risks that they need to manage actively</li><li>• Organizations operating online should have appropriate policies and procedures in place to manage the associated privacy and cybersecurity risks</li></ul>	
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## A. CONTEXT

- Like their for-profit counterparts, charities and NFPs are increasingly operating in the digital/online landscape, including:
  - Public facing websites
  - Online presence/social media
  - Online donation forms
  - Cloud-based platforms for core business processes, such as video conferencing, donor management and payment processing (e.g. Zoom, Blackbaud, Stripe)
- The COVID pandemic has heightened reliance on the Internet

## B. CYBER SECURITY ISSUES

- Cyber Threat Actors (Canadian Centre for Cyber Security)

Cyber Threat Actor	Motivation
Cyber Criminals	Profit
Nation States/ Advanced Persistent Threats	Geopolitical
Insider Threats – Malicious or Negligent	Disgruntled
Hackers/ Terrorist	Ideology
Thrill Seekers	Satisfaction

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- IBM Security and The Ponemon Institute's Cost of a Data Breach Report 2021:
  - The average total cost of a data breach increased significantly over 2020 (10%)
  - Canada had the third highest average total cost of a data breach at \$5.4 million, a 20% increase over 2020
  - The average cost of a breach was \$1 million higher when remote work was a factor
  - The top two attack vectors were compromised credentials and phishing
  - Customer personal information was the most common type of record compromised and had the highest average cost per lost or stolen record

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- 2021 Palo Alto Networks Canada Ransomware Barometer:
  - Ransomware gangs are thriving in Canada
  - The average ransom paid by Canadian businesses was \$458,247
  - 58% of organizations paid the ransom, 14% paid more than once
  - Ransomware attacks have long term impacts on organizations, some taking as long as 6 months to recover

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## C. DUTIES AND OBLIGATIONS OF DIRECTORS

- Under the *Canada Not-for-Profit Corporations Act* and the *Ontario Not-for-Profit Corporations Act*, directors and officers of charities and NFPs are required to:
  - Act honestly and in good faith with a view to the best interests of the company; and
  - Exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances
- Charitable directors are also subject to high fiduciary duties to protect and conserve charitable property and can be found personally liable for any loss that the corporation suffers as a result of a breach of fiduciary duty

- Directors of charities can be found liable in tort for negligent mismanagement if their carelessness in the oversight of the corporation's operations leads to injury
- Therefore, if directors and officers fail to put sufficiently robust measures in place to protect personal information, they could face personal liability
- In order to avoid liability, directors must be able to demonstrate that they took appropriate steps to identify, manage and mitigate privacy and cybersecurity risks
- "Business Judgment Rule" – The courts will not second-guess directors who acted prudently and on a reasonably informed basis. Perfection is not required.

- Directors can show that they met the duty of care and made an informed, reasonable decision by, for example:
  - Demonstrating that they had information available to them and how they considered it
  - Obtaining expert advice on privacy and cybersecurity
  - Ensuring that the organization is compliant with privacy laws/best practices
  - Confirming that the organization has appropriate safeguards in place to protect personal information and to prepare for and respond to privacy breaches and cyber attacks
  - Obtaining regular reports from management on cybersecurity and privacy issues
  - Obtaining insurance to cover these risks

- Directors and officers of charities and NFPs should look to *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) for guidance
- PIPEDA applies to any private sector organization that collects, uses, or discloses personal information in the course of “commercial activities”
- PIPEDA does not generally apply to charities and NFPs as most of the activities that they regularly engage in do not qualify as “commercial activities”
- However, the Office of the Privacy Commissioner of Canada (“OPC”) recommends that charities and NFPs follow the fair information principles in Schedule 1 to PIPEDA as best practices

- Compliance with the fair information principles in Schedule 1 would likely position charities and NFPs to demonstrate that they acted in accordance with the duty of care
- Schedule 1 principles include (not exhaustive):

– An organization is responsible for personal information under its control

– An organization is responsible for personal information that has been transferred to a third-party for processing

– Organizations must implement policies and practices, including procedures to protect personal information and training and communicating to staff information about the organization's policies and practices

– Personal information must be protected by security safeguards appropriate to the sensitivity of the information

– Organizations must protect personal information in any format against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification

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- The nature of the safeguards must vary depending on the sensitivity of the information. More sensitive information should be safeguarded by a higher level of protection
- The methods of protection should include:
  - (a) \_\_\_\_\_  
Physical measures; such as alarms, locked doors, locked cabinets, access cards;
  - (b) \_\_\_\_\_  
Organizational measures; such as policies, training, security clearances, “need to know” access; and
  - (c) \_\_\_\_\_  
Technological measures; such as passwords, encryption and other measures discussed today

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### D. CYBERSECURITY MEASURES

- Most charities and NFPs probably do not have the financial resources to implement sophisticated security systems using artificial intelligence, machine learning and automation
- However, as per Schedule 1, charities and NFPs with online operations do need to put in place appropriate measures to mitigate the risk of data loss, privacy breach or cyber attack and there are a number of measures within reach. Some examples, not exhaustive:
  - Continuous education, training and testing of staff as first line of defense
  - Identify and address vulnerabilities and gaps
  - Back up all critical data off-site/off-line/not accessible

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- Have up-to-date anti-virus and anti-malware software in place
- Require strong and complex passwords for all accounts/devices and require them to be changed routinely
- Move toward “Zero Trust” approach – Treat every user inside or outside as untrusted. Implement Multi Factor Authentication for every user and provider/vendor before accessing key areas. (Castle wall vs. key to every door)
- Limit employee access to personal information on a “need to know” basis. Develop a culture of vigilance against internal threats, e.g. screening, access controls and data segregation, oversight and monitoring

- Carefully screen and select vendors
- Consider endpoint security solution to protect mobile/remote devices
- Have clear privacy breach and security incident response protocols in place, ensure that staff is informed of them and test and update them
- Obtain adequate cyber insurance coverage to cover costs of incident response, legal and other advice and even the cost of ransom in some cases

## E. PRIVACY COMPLIANCE ONLINE

- Charities and NFPs also need to comply with privacy laws/best practices even when operating online. Some examples, not exhaustive:

- Charities and NFPs should have a robust enterprise privacy policy explaining what personal information they collect, why, how it will be used, who it will be shared with and how it will be protected. It should be posted on the organization's website, be regularly reviewed and updated, be understandable and user friendly, and be backed up by an appropriate privacy compliance program/procedures

- Organizations must obtain consent for the collection, use, or disclosure of personal information at or before the time of collection (privacy policy) and limit the collection of personal information to what is necessary for the purposes identified

- Consent processes need to be understandable, user friendly and easily accessible from all devices

- Consent should generally be express, but implied consent can be used in strictly defined circumstances. Consider "clickwrap" consent where user has to take positive action to signify consent rather than "browsewrap", where consent is inferred/deemed

- Charities and NFPs should limit/avoid collecting personal information from children and should obtain consent from parents or guardians of children under the age of 13

- The organization should have robust website terms and conditions to reinforce its privacy policy/practices, limit its liability, protect its intellectual property and other assets from loss and reputational damage and control the conduct of website users

- Organizations should have a social media policy and an acceptable use policy to control use/misuse of social media and technology resources by staff and volunteers so as to minimize risk of loss/reputational damage

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- Organizations should have strong privacy safeguards in contracts with third parties, including the right to audit privacy compliance
- They should be transparent and open with stakeholders about use of third party vendors/ providers
  - Charities and NFPs utilizing cloud-based platforms, portals or otherwise transmitting personal information to service providers must use contractual or other means to provide a comparable level of protection for personal information being processed <https://www.priv.gc.ca/en/privacy-topics/technology/online-privacy-tracking-cookies/online-privacy/cloud-computing>
  - If personal information will be going outside of Canada, organizations must use clear and understandable language at the time of collection to advise individuals that their information may be processed in a foreign jurisdiction and may be accessed by authorities in that jurisdiction <https://www.priv.gc.ca/en/privacy-topics/employers-and-employees/outsourcing>

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### KEY TAKEAWAYS

- Charities and NFPs operating online must:
  - Recognize that they are potential cyber targets
  - Empower and educate staff/volunteers to recognize and avoid attacks
  - Build a culture of vigilance against both external and internal threats
  - Identify gaps and weaknesses
  - Proactively implement and update cybersecurity measures
  - Build a culture of privacy and training
  - Abide by basic privacy law and best practices
  - Develop clear privacy policies and back them up with a strong privacy compliance program
  - Develop incident response plans
  - Obtain cybersecurity insurance

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# THE DISBURSEMENT QUOTA FOR CHARITIES: ISSUES TO CONSIDER

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<p><b>The Disbursement Quota for Charities: Issues to Consider</b></p> <p><b>By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent</b> tcarter@carters.ca 1-877-942-0001</p> <p>© 2022 Carters Professional Corporation</p>	
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**OVERVIEW**

- A. What is the Disbursement Quota?
- B. How to Comply with the DQ
  - 1 Calculate the DQ Obligation
  - 2 Track Gifts to QDs and Charitable Expenditures
  - 3 Track DQ Shortfalls and Excesses
  - 4 Possibly Ask for DQ Reduction, if Necessary
- C. What are the Concerns with Change to the DQ?
- D. Key Takeaways

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## A. WHAT IS THE DISBURSEMENT QUOTA?

- “Disbursement quota” (DQ) is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that charitable funds are used for charitable purposes and are not simply accumulated indefinitely by charities
- A requirement under the *Income Tax Act* (“ITA”)
- The purpose of the DQ
  - Limit excessive or undue capital accumulation
  - Ensure significant resources devoted to charitable purposes and activities
  - Administrative efficiency – via increased transparency/disclosure

## 1. Brief Timeline of the DQ

### 1976

- First introduced

### 1984, 2004, 2010 Reforms

- Significant reforms

### 2004 Reforms

- Made rules become more complex but reduced the 4.5% DQ to 3.5%

### April 19, 2021

- Federal Budget proposes there be a public consultation with charities to potentially increase the DQ and update the tools at the CRA's disposal to enforce the DQ

### August 6 - December 2, 2021

- Department of Finance holds “Consultation on Boosting Spending by Charities in Our Communities”

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## 2. What is the Importance of the DQ?

- Calculating whether a charity has a DQ obligation and then complying with any DQ obligation is an essential part of a charity's responsibilities under the ITA
  - Charities need to be aware of requirements and how to calculate their DQ obligation to ensure compliance
  - However, T3010 does not actually show if a charity has met its DQ obligation
  - Continuous failure to meet the DQ may lead to the revocation of a charity's registration
  - Failure to complete T3010 with correct information can give rise to sanctions (suspension of receipting privilege), as well as revocation
- CRA states it is incumbent upon all charities to report and comply with DQ obligations
- Charities need to exercise appropriate due diligence
- Charities should also be prepared for possible additional challenges that may occur if the DQ rate is increased

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## 3. The DQ Calculation

Set out in subsection 149.1(1) of the ITA

3.5% DQ applies to property owned by the charity at any time in the preceding 24 months not used directly in charitable activities or administration

Threshold amounts for the 3.5% DQ:

- \$100,000 (for charitable organizations)
- \$25,000 (for public and private foundations)

Further details are set out in *Income Tax Regulations* 3701 and 3702

- Also see CRA's "Disbursement Quota Calculation" <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/annual-spending-requirement-disbursement-quota/disbursement-quota-calculation.html>

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## B. HOW TO COMPLY WITH THE DQ

### 1. Calculate the DQ Obligation

#### a) Determine the Asset Base for the DQ Calculation

- The asset base consists of “all or a portion” of property (e.g. investments, land, buildings) owned by the charity that is not used directly in charitable activities or administration for the charity as a whole
- Calculation applies for the preceding 24 months
- Limited guidance about how to prorate in circumstances where a portion of the property is not used for charitable activities, e.g. a church rents out a portion of its building to a for-profit day care centre
- A charity may request permission to accumulate funds to make a major expenditure (e.g. buying a building) and if approved, the amount accumulated can be excluded from the asset base

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#### b) Average Value Over Set Number of Valuation Periods

- The value of a charity’s asset base included in its DQ obligation is averaged over 2 to 8 valuation periods (chosen by the charity) which can only be changed with CRA’s written permission
- Example:
 

Charity A	{	<ul style="list-style-type: none"> <li>– 2 valuation periods over two year period (annual valuation)</li> <li>– Receives \$1 million of investment assets in fourth quarter of 2021</li> <li>– No other assets not used directly for charitable programs or administration in 2020 and 2021</li> </ul>
Charity B	{	<ul style="list-style-type: none"> <li>– 8 valuation periods over two year period (quarterly valuations)</li> <li>– Receives \$1 million of investment assets in fourth quarter of 2021</li> <li>– No other assets not used directly for charitable programs or administration in 2020 and 2021</li> </ul>

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- Calculation showing different valuation periods:

	Amounts received for periods in 2020				Amounts received for periods in 2021				DQ Base for 2022	DQ Obligation (base x 3.5%)
Charity A, value of property – annual valuation	Period 1: Jan – Dec 2020				Period 2: Jan – Dec 2021				\$1 million / 2 periods = \$500K	\$17,500
	\$0				\$1 M					
Charity B, value of property – quarterly valuation	Q1: Jan - Mar	Q2: Apr - Jun	Q3: Jul - Sep	Q4: Oct - Dec	Q1: Jan - Mar	Q2: Apr - Jun	Q3: Jul - Sep	Q4: Oct - Dec	\$1 million / 8 periods = \$125K	\$4,375
	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$1 M		

- Charity A has a DQ obligation that is 4x greater than Charity B for the same amount of investment assets

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### c) Apply the 3.5% Calculation

- The average value of property not used for charitable activities or administration of the charity for the 24 months before the beginning of the fiscal year is to be entered on line 5900 of the T3010
  - The applicable amount before the end of the fiscal period is entered on line 5910 in order to calculate the DQ obligations for the following fiscal year
- The DQ obligation is 3.5% of the amount on line 5900

**Line 5900 x 3.5% = DQ obligation**

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## 2. Track Gifts to QDs and Charitable Expenditures

### a) Gifts to QDs

- “Qualified Donee” (“QD”) is defined in subsection 149.1(1) of the *Income Tax Act* and includes (among others):
  - A registered charity
  - Government of Canada, a province or a municipality
  - A registered municipal or public body performing a function of government in Canada
- Current law does not allow charities to make gifts to non-QD’s even if those organizations pursue the same purposes as the charity
- If proposed legislation Bill S-216 is enacted, gifts to non QD’s will be possible in furthering the charitable purpose of the charity, provided that “resource accountability” is followed. See Senator Omidvar’s presentation for details
- Enter gifts to all QDs on line 5050 of T3010

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### b) Gifts to QDs that are Non-Arm’s Length

- Either of two rules will apply when gifts to QDs are made between non-arm’s length charities:
 

Anti-Avoidance Rule

{

- A charity that receives a gift from a **non-arm’s length charity** must use 100% of the gift on its own charitable activities or gifts to QDs in the fiscal period the gift was received or in the following fiscal period
  - Failure to do so could result in a 110% tax on the unused amount or the revocation of the receiving charity’s registered status

Designated Gift

{

- Alternatively, the donor charity may make a **designated gift** (a gift that is not counted in meeting the donor charity’s own DQ obligation)
  - The recipient charity does not have to spend 100% of the **designated gift** by the end of the next fiscal period

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## c) Inter Charity Transactions to Avoid

- Anti-avoidance rules expanded to include situations where a registered charity entered into a transaction (which may include an inter-charity gift) where it “may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities”
- Applies regardless of whether the two charities are at arm’s length
- 110% penalty applies
- If an inter-charity transfer is involved, both charities are jointly and severally, or solitarily liable for the penalty
- Both charities risk revocation

## d) Charitable Expenditures

- Expenditures on charitable activities include (per CRA):
  - Running a charity’s day-to-day programs
  - Occupancy costs (such as rent, mortgage payments, hydro, repairs, and insurance) for the building(s) used to carry on charitable activities
  - Most salaries
  - Education and training for staff and volunteers
- Do not include expenditures for management, administration or fundraising
- There can be an allocation when there are expenditures that are considered partly charitable and partly management and administration, provided that such allocation is done consistently and on a reasonable basis
  - Keep track of those allocations throughout the fiscal year
- Enter the amount of all charitable expenditures on line 5000 of the T3010

## e) Program Related Investments

- Program Related Investments (“PRIs”) are impact investments or social investments that directly further the investor charity’s charitable purpose
  - *E.g.* purchase of shares in a micro finance bank to achieve charity’s purpose of relief of poverty.
- PRIs used for charitable activities are not included in a charity’s asset base for calculating the DQ obligation
- However, PRIs are generally not considered by the CRA to be a charitable expenditure and therefore do not count toward meeting the DQ obligation, except in limited circumstances where:
  - Unable to recover part or all of the principal of a PRI
  - Lost opportunity cost (*e.g.* lost income)

## 3. Track DQ Shortfalls and Excesses

### DQ Excess

- Occurs when a charity spends more on charitable activities or gifts to QDs than its DQ for that year
- Can be carried forward for five years or carried back one year

### DQ Shortfall

- Occurs when a charity spends less on charitable activities or gifts to QDs than its DQ for that year
- Can be met using excess from past five years or from next year
- Continuous shortfalls may lead to revocation of a charity's registration.

#### 4. Possibly Ask for DQ Reduction, if Necessary

- If a charity is not able to meet its DQ after applying available excess from previous five years or creating a DQ excess in the next year and carrying it back a year, it may apply for a reduction from the CRA
- Reduction, though, is available only where the shortfall is due to circumstances beyond a charity's control
- Generally, a charity will not receive approval from the CRA until the information return for the following fiscal period is received by the CRA
- If a reduction is granted, the charity must amend its T3010 to include the reduction on line 5750

### C. WHAT ARE THE CONCERNS WITH CHANGE TO THE DQ?

#### 1. Insufficient Data

- The T3010 offers an incomplete picture on whether the DQ has been met by a charity in any given year
- Is there sufficient data to show that increasing the DQ will result in more funds to the community?

#### 2. Overly Complicated Compliance

- Old (pre-2010) versions of the DQ rules were very complicated and imposed a large administrative burden on charities
- Will new DQ rules be challenging for charities to calculate or follow?

## 3.

### **Terms/Restrictions of Endowment**

- Need to be mindful of terms/restrictions of endowment funds held by charities
- What if endowment funds held by charities do not permit encroaching capital or realized capital gains?
  - If investment returns is less than the DQ%, can charities encroach on capital or realized capital gains?
  - Some endowments are structured by donors to prevent the charities from encroaching on capital or realized capital gains – will require court order to allow the charity to dip into capital or realized capital gains to meet DQ
  - Court applications are costly and time consuming, and no guarantee courts will grant the order sought

## 4.

### **Low Investment Market Return**

- Charities may opt for a higher risk / higher return investment strategy to generate more income, but they must ensure they continue to comply with the “prudent investor” standard in provincial trustee legislation (e.g. Ontario’s *Trustee Act*)

## 5.

### **DQ at Fund vs Charity Level?**

- Will DQ need to be met at the fund (asset) level rather than at the charity level?
- If so, there would be a large administrative burden for some charities that hold hundreds of individual funds
- Funds may be subject to donors’ restrictions, which may create complexities in tracking which funds will require court authorized relief from restrictions on expenditures of capital or realized capital gains

## D. KEY TAKEAWAYS

- Calculating whether the charity has a DQ obligation and then complying with any DQ obligation is an essential part of a charity's responsibilities under the ITA
- Correctly completing the T3010 with required information is an important obligation of the charity
- Given the high public profile nature of the DQ consultation by the Department of Finance, the CRA may need to give greater scrutiny to DQ compliance on audits
- Charities need to be aware of some of the nuances of the DQ calculation, such as valuation periods, anti-avoidance rules, and DQ shortfalls & excesses
- If changes are made to the DQ rate, charities should take proactive steps to identify challenges that may occur and find ways to address any shortfalls

## Select Resource Material of Submissions to Finance, re: DQ

- Carters (Charity & NFP Bulletin 498)  
<https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>
- Canadian Bar Association – 2 submissions  
<https://www.cba.org/CMSPages/GetFile.aspx?guid=a8cc9301-1546-4097-b9ce-c95dbd4b28fa>  
<https://www.cba.org/CMSPages/GetFile.aspx?guid=d792277a-1f41-4174-aa54-e2ad00a53c31>
- Advisory Committee To The Charitable Sector  
<https://www.carters.ca/pub/article/charity/2021/ACCS-Submission.pdf>
- Imagine Canada  
<https://imaginecanada.ca/sites/default/files/disbursement-quota-submission-Imagine-Canada.pdf>
- Pemsel Foundation (research series)  
<https://www.pemselfoundation.org/disbursement-quota-research-series/>

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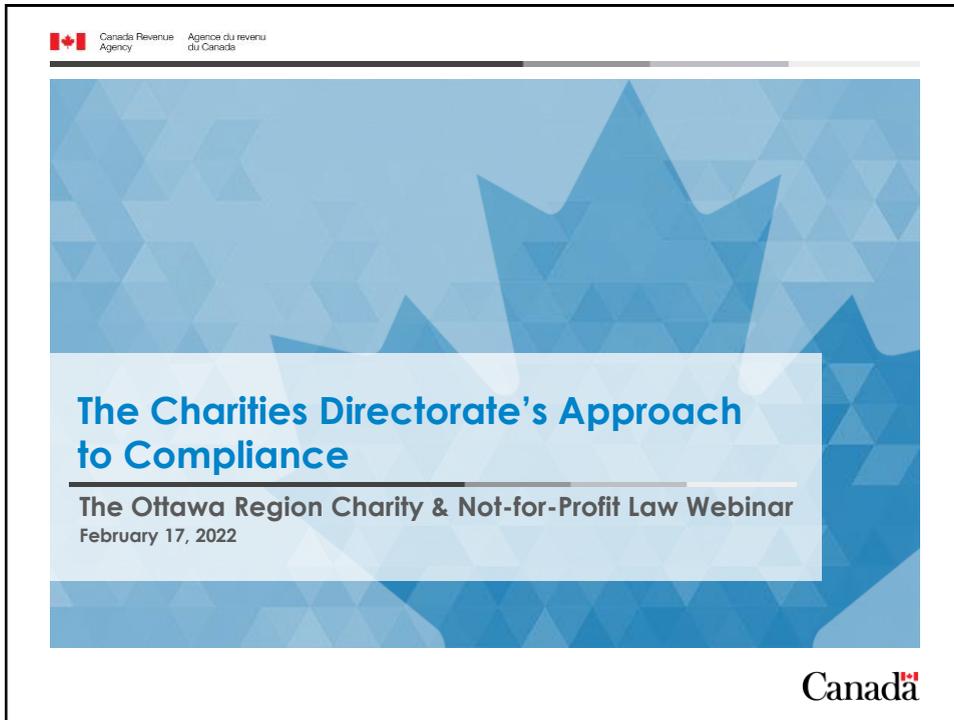
THE 2022 OTTAWA REGION  
***Charity & Not-For-Profit Law Webinar***

*Thursday, February 17<sup>th</sup>, 2022*

# **THE CHARITIES DIRECTORATE'S APPROACH TO COMPLIANCE**

**By Melissa Shaughnessy  
Director of the Compliance Division,  
Charities Directorate, Canada Revenue Agency**

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The slide features a blue geometric background with a large, faint outline of the Canadian maple leaf. In the top left corner, the CRA logo and name are displayed in both English and French. The main title is centered in a white box, and the event details are listed below it. The Canada wordmark is positioned in the bottom right corner.

Canada Revenue Agency / Agence du revenu du Canada

## The Charities Directorate's Approach to Compliance

The Ottawa Region Charity & Not-for-Profit Law Webinar  
February 17, 2022

Canada

## Approach to compliance

- Overview
- Objectives
- Addressing non-compliance
- Audit process
- Going forward
- Helpful Resources

## Compliance overview

- **Mission:** to promote compliance with income tax legislation and regulations relating to registered charities through education, quality service, and responsible enforcement.
- Compliance program uses a multi-streamed approach involving various **audit** and **non-audit** interventions based on the level of risk a charity has of being non-compliant.
- Adopted the compliance pyramid approach to determine when it is best to take an education or audit approach.
- Early education is used to resolve minor non-compliance issues before they become more serious.
- Audits are reserved for more isolated, serious or complex cases of non-compliance.

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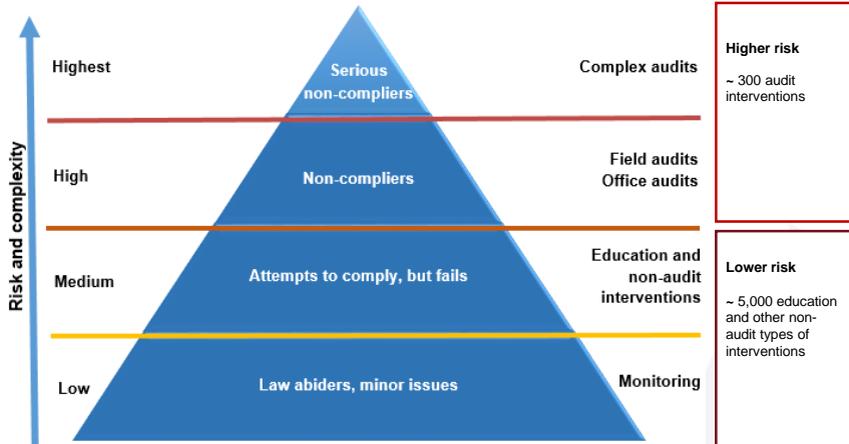
## Compliance objectives

- Our objectives are:
  - Appropriate program balance
  - Quality outputs and service
  - Investing in our people
- These strategic objectives support the CRA's priorities of compliance, service, innovation, accountability, and people.

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## Addressing non-compliance: a balanced approach



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## Compliance risk approach

- Balancing our compliance program enables us to proactively promote voluntary compliance and to interact with a greater number of charities.
- **Lower risk non-compliance**
  - Represents the greatest proportion of charities engaging in non-compliance.
- **Higher risk non-compliance**
  - Represents a smaller proportion of charities that are at a much higher risk of engaging in more complex and serious acts of non-compliance.

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## Compliance activities and interventions

- Some interventions in support of the core mandate of enforcing, encouraging, and assisting registered charities to comply with the requirements of the legislation set out in the Income Tax Act are:
  - Educational interventions
    - outreach and education
    - letter writing campaigns, onsite/virtual visits like the Charities Education Program (CEP)
  - Audit interventions
    - office and field audits

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## How is a charity selected for audit?

- A charity can be selected for audit for various reasons including the following:
  - referral from another area of the CRA
  - complaints from the public
  - articles in the media or other publicly available sources
  - review of specific legal obligations under the Income Tax Act
  - information from their T3010 annual information return
  - follow-up on a previous compliance agreement

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## What happens when the audit is finished?

- A letter is sent to the charity outlining the results:
  - Its activities are in line with the Income Tax Act; or
  - Audit uncovers that the charity is not following the Income Tax Act.
- Generally, a charity will have 30 days to reply to concerns, although it can request an extension.

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## What types of letters might a charity receive after it has been audited?

- We take an education-first approach.
- Where possible, we will give the charity the chance to correct its non-compliance through education or a compliance agreement before resorting to other measures such as sanctions or revocation.
- Only a very small proportion of audits result in serious consequences like sanctions or revocation.
- The facts will determine which of the following compliance outcomes will occur:
  - **education letters**
  - **compliance agreements**
  - **sanctions**
  - **revocation of registration**

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## What recourse does a charity have after an audit?

- The charity is given the chance to make representations to the Appeals Branch of the CRA by filing an objection.
- The charity has to file its objection no later than 90 days after the date of the final letter it received from the Charities Directorate.
- The CRA's Appeals Branch is responsible for the objection process, and its mandate is to review the decision fairly and transparently.
- The charity must set out the reasons for the objection and all the relevant facts.
- If the charity disagrees with the decision about its objection, it has the right to appeal to the Federal Court of Appeal or the Tax Court of Canada, depending on the type of appeal.

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## What audit information is available to the public?

- As an **exception to the general rules** around taxpayer confidentiality, the Income Tax Act allows certain information about charities to be released to the public.
- When the CRA revokes or annuls a charity's registration or when it imposes a sanction, it posts this information in the [List of charities](#).
- Under the Income Tax Act, the CRA can release a copy of the letter(s) it sent to the charity outlining the reasons for its decision.
- This is to make sure the CRA's decision about the charity is transparent.

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## Statistics on audit results compared by year

Outcomes	2018-2019	2019-2020	2020-2021
No change /no further action	6	2	1
Education letters issued	161	131	90
Compliance agreements	80	44	37
Voluntary revocations	4	4	5
Penalties/suspensions	2	1	0
Notices of Intention to Revoke issued	21	7	0
Annulments	1	1	1
Other (includes other audit activities such as pre-registration and Part V audits)	13	20	8
<b>Total</b>	<b>288</b>	<b>210</b>	<b>142</b>
Revocations as a result of an audit	24	4	4

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## Disbursement quota (DQ) requirements

- Charities must continue to meet the legal requirements for registration including their DQ.
- The compliance program uses audit and non-audit approaches to assist charities in complying and to address serious concerns.
- It is incumbent on all charities to report and monitor their DQ obligations when completing their information return.
- There are many tools available to assist charities in understanding and meeting their DQ obligations. Further information can be found at: [Annual spending requirement \(disbursement quota\)](#)

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## Going forward ...

- Digital solutions doing audits
- Focussing on specific and current non-compliance issues
- Allocating resources to meet current needs
- Evolution of the compliance risk model
- Disbursement quota

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## Helpful Resources

- [Contact us](#) – MyBA, mail, fax, or phone
- [Educational videos](#) and other communications products like infographics
- Upcoming [charities information webinars](#)
- [Electronic Mailing List](#)
- [Our Website](#) – [www.canada.ca/charities-giving](http://www.canada.ca/charities-giving)

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## WE ARE HERE TO HELP

- Not sure about the rules?
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Contact a representative Monday to Friday  
(except statutory holidays) between 9 a.m. and 5 p.m., local time:

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

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## Questions?

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## Sector Resource Materials

- **Canada Revenue Agency, Charities Directorate**
  
- **Canada Revenue Agency, GST/HST Outreach Program**

## Sector Resource Materials

- **Canadian Centre for Christian Charities,**  
<https://www.cccc.org>
- 
- Canadian Centre for Christian Charities**  
*Supporting ministries in a complex world*
- **Imagine Canada,** <https://www.imaginecanada.ca/en>
    - Advocacy Hub:  
<https://imaginecanada.ca/en/public-policy>



## Sector Resource Materials

- **ONN (Ontario Nonprofit Network),**  
<https://theonn.ca>,  
<https://nonprofitresources.ca/>
- **Canadian Association of Gift Planners (CAGP),**  
<https://www.cagp-acpdp.org/> and see also  
**Will Power** (A new national bequest campaign from the  
CAGP Foundation), <https://www.willpower.ca>
- **STEP Canada, Ottawa Branch,**  
<https://step.ca/>

