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THE 2023 *Carters Annual Charity & Not-for-Profit Law Webinar* Thursday, November 9, 2023

WELCOME

We are pleased to welcome you to the **2023 Carters Annual Charity & Not-for-Profit Law Webinar**, being held virtually again this year, as requested by the overwhelming majority of previous attendees.

The Webinar today will provide an overview of recent developments and practical advice on legal issues that impact charities and not-for-profits. In this regard, Carters has been serving the charity and not-for-profit sector, inclusive of the broader faith community, every year since 1994 through seminars and webinars, making this our 30th Anniversary!

This webinar is eligible for **3.5 substantive hours** towards the annual **Law Society of Ontario (LSO) CPD** and **CPA Professional Development** requirements.

ACKNOWLEDGEMENTS AND THANKS

We gratefully acknowledge and thank **Robert Lefebvre, Supervisor – Background Clearance Unit Ottawa Police Services** as our guest speaker, as well as the many lawyers at Carters who have volunteered their time in preparing for this Webinar.

FORMAT OF THE WEBINAR

Presentations will be 20 to 25 minutes in length. The special presentation by our guest speaker, Robert Lefebvre, along with one of our lawyers, Esther Oh, toward the end of the webinar will be 35 minutes in length, including Q&A. Questions can be entered in the Question Box feature of the webinar at any time and will be addressed at the end of the day. 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 churches and charities, including back issues of our *Charity and NFP Law Bulletins*, *Church Law Bulletins*, and *Anti-terrorism and Charity Law Alerts*, as well as our updated November 2023 *Legal Risk Management Checklists* are all available free of charge on our website at www.carters.ca as well as in the Event Resources tab on this website

CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, please e-mail us at info@carters.ca with "mailing list" in the subject line. Alternatively, please click on the webinar event resources button to sign up for our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the October 2023 edition of the [Charity & NFP Law Update](#) through our website.

WEBINAR SPONSORS

Carters would like to thank the following companies for their sponsorship of the **2023 Carters Annual Charity & Not-for-Profit Law Webinar** that helps to underwrite costs associated with the Webinar, including contracting EventStream Inc., who are helping to ensure that the Webinar runs smoothly and professionally.

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SECTOR RESOURCE MATERIALS

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

- **Canadian Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>, and **CAGP Foundation**, <https://www.cagpfoundation.org/>
- **Canadian Centre for Christian Charities (CCCC)**, <https://www.cccc.org>
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- **LexisNexis Canada Inc.**, 1-800-668-6481, , <https://store.lexisnexis.ca/en>
- **ONN (Ontario Nonprofit Network)**, <https://theonnn.ca>, and <https://nonprofitresources.ca/>

ABOUT CARTERS

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

- | | |
|---|--|
| • Charitable Registration | • CRA Charity Audits and Appeals |
| • Charity and Not-For-Profit Incorporation | • Director and Officer Liability |
| • Religious Organization Incorporation | • Governance Policies and Advice |
| • Corporate Maintenance and Filings | • Investment Policies and Provincial Investment Laws |
| • Donor Advised Funds | • Fundraising and Gift Planning |
| • Social Enterprise and Finance | • Legal Risk Management Audits |
| • Transition to ONCA | • Privacy Policies and Audits / Anti-Spam |
| • Amalgamations and Mergers | • Policies on Anti-Bribery, Anti-Terrorism and Anti-Money Laundering |
| • Dissolution and Wind-Up | • Human Rights Compliance and Litigation |
| • Membership Discipline and Disputes | • Investment Powers |
| • National and International Structures | • Religious Denominational Structures |
| • Public Policy Dialogue and Development Activities | • Vulnerable Person Policies |
| • Endowment and Gift Agreements | |
| • Gift Acceptance Policies | |

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

Churches and charities often face 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 Carter at Carters (1-877-942-0001).

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. Complete the fillable pdf form and send by email as an attachment (In Adobe: File → Send File to seminars@carters.ca).



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GENERAL DISCLAIMER

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SPEAKER BIOGRAPHIES



[Sepal Bonni](#), B.Sc., M.Sc., J.D., Trademark 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.



[Terrance S. Carter](#), B.A., LL.B, TEP, Trademark 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, 2023), 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 Not-for-Profit Law Sections.



[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 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*.



[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*.



[Jacqueline M. Demczur](#), B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*, *The Best Lawyers in Canada*, and *Chambers and Partners*. 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 Charity & Not-for-Profit Law Seminars.



[Barry W. Kwasniewski](#), B.B.A., LL.B. – Mr. Kwasniewski is a partner with the firm and joined Carters' Ottawa office in 2008 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.



Robert Lefebvre, Supervisor – Background Clearance Unit, Ottawa Police Services – Mr. Lefebvre has over 20 years of service with the Ottawa Police, including 12 years as Background Unit Manager.. He was seconded to RCMP's Canadian Criminal Real Time Identification Services. Robert led several key projects, including streamlining fingerprint services for immigration, and innovating Canadian federal government screening background processes.



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, is ranked by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*, and received the 2022 OBA AMS/John Hodgson Award of Excellence in Charity and Not-For-Profit Law. She is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is a former member of the Technical Issues Working Group of the CRA Charities Directorate, a member and former chair of the CBA Charities and Not-for-Profit Law Section and the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.



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.carters.ca and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Charity & Not-for-Profit Law Seminars* and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



Ryan M. Prendergast, B.A., LL.B. - Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan has co-authored papers for the Law Society of Ontario, and has written articles for *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.carters.ca. Ryan has been a regular presenter at the annual *Charity & Not-for-Profit Law Seminars*, 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. She has been ranked by *Chambers and Partners*. 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



Cameron A. Axford, B.A., J.D. Cameron is an associate whose practice focuses on Carter's knowledge management, research, and publications division. He articulated with Carters from 2022 to 2023 and joined the firm as an associate following his call to the Ontario Bar in June 2023. Cameron graduated from the University of Western Ontario in 2022 with a Juris Doctor, where he was involved with Pro Bono Students Canada and participated in the BLG/Cavalluzzo Labour Law Moot. Prior to law school, Cameron studied journalism at the University of Toronto, receiving an Honours BA with High Distinction. He has worked for a major Canadian daily newspaper as a writer.



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.



Urshita Grover, H.B.Sc., J.D. – Urshita was called to the Ontario Bar in June 2020 after completing her articles with Carters. Urshita worked as a research intern for a diversity and inclusion firm. Urshita has volunteered with Pro Bono Students Canada, and was an Executive Member of the U of T Law First Generation Network. Urshita was able to gain considerable experience in both corporate commercial law as well as civil litigation. Building on this background, Urshita is able to integrate her wide range of experience into a diverse and practical approach to the practice of charity and not-for-profit law for her clients.



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.



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 (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose."



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.



THE 2023
*Carters Annual Charity &
Not-for-Profit Law Webinar*
Thursday, November 9, 2023

AGENDA

8:30 a.m.	Online Login	https://kastio.com/2023-carters-charity-and-nfp-law-webinar
9:00 a.m.	Opening Remarks	Terrance S. Carter & Sepal Bonni
9:10 a.m.	Essential Charity & NFP Law Update	Adriel N. Clayton
9:30 a.m.	Alternative Minimum Tax and New Trust Reporting Rules for Charities	Theresa L.M. Man
9:55 a.m.	Things Charities & NFPs Should Do but Don't	Ryan M. Prendergast
10:15 a.m.	<i>Fireside Chat #1:</i> Contract Essentials for Charities & NFPs: Make Sure You're Protected	Esther Shainblum and Barry W. Kwasniewski
10:40 a.m.	Break (20 minutes)	
11:00 a.m.	Donor Advised Funds: What You Need to Know in 2023	Jacqueline M. Demczur
11:20 a.m.	Top Five Hot Topics in Real Estate for Charities & NFPs	Nancy E. Claridge
11:40 a.m.	New Qualifying Disbursement Regime for Charities: What Does it Mean in Practice	Terrance S. Carter
12:00 p.m.	Fireside Chat #2 Vulnerable Sector Checks: What Charities and NFPs Need to Know	Robert Lefebvre, Supervisor – Background Clearance Unit, Ottawa Police Services and Esther S.J. Oh
12:35 p.m.	Question Period for Presenters (15 minutes)	
12:50 p.m.	Concluding Remarks and Draw Prizes	
12:55 p.m.	Program Ends	

Please see **Speaker Biographies** in the electronic handout package and take a moment to complete the **Evaluation Form** that will be sent to you after the webinar to help us make the next *Annual Charity & Not-for-Profit Law Webinar/Seminar* even better.

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Thursday, November 9, 2023

LIST OF POWERPOINTS

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- ◆ **Essential Charity & NFP Law Update**
Adriel N. Clayton, *B.A., J.D.*
- ◆ **Alternative Minimum Tax and New Trust Reporting Rules for Charities**
Theresa L.M. Man, *B.Sc., M.Mus., LL.B., LL.M.*
- ◆ **Things Charities & NFPs Should Do but Don't**
Ryan M. Prendergast, *B.A., LL.B.*
- ◆ **Contract Essentials for Charities & NFPs: Make Sure You're Protected**
Esther Shainblum, *B.A., LL.B., LL.M., CRM,*
and Barry W. Kwasniewski, *B.B.A., LL.B.*
Fireside Chat
- ◆ **Donor Advised Funds: What You Need to Know in 2023**
Jacqueline M. Demczur, *B.A., LL.B.*
- ◆ **Top Five Hot Topics in Real Estate for Charities & NFPs**
Nancy E. Claridge, *B.A., M.A., LL.B.*
- ◆ **New Qualifying Disbursement Regime for Charities: What Does it Mean in Practice**
Terrance S. Carter, *B.A., LL.B., TEP, Trademark Agent*
- ◆ **Vulnerable Sector Checks: What Charities and NFPs Need to Know**
Robert Lefebvre, Supervisor – Background Clearance Unit, Ottawa Police Services
and Esther S.J. Oh, *B.A., LL.B.*
Fireside Chat

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THE 2023
*Carters Annual Charity &
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Thursday, November 9, 2023

ESSENTIAL CHARITY & NFP LAW UPDATE

By Adriel N. Clayton, B.A., J.D.

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<h2 style="text-align: center;">Essential Charity & NFP Law Update</h2> <p style="text-align: center;">By Adriel N. Clayton, B.A., J.D. aclayton2@carters.ca 1-877-942-0001</p> <p style="text-align: center;">© 2023 Carters Professional Corporation</p>	
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INTRODUCTION & OVERVIEW

Federal
Legislation
Update

CRA Update

Provincial
Legislation
Update

Case Law
Update

- The information in this PowerPoint is current as of November 7, 2023, but is subject to change
- For more information on topics listed below or to receive monthly updates on charity & not-for-profit law in Canada, please sign up for Carters' e-newsletter by clicking on the "Subscribe" button at www.carters.ca
- The latest Charity & NFP Law Updates for [September 2023](#) and [October 2023](#) can be viewed by clicking on the respective links

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A. FEDERAL LEGISLATION UPDATE

1. Federal Budget 2023

- The 2023 Federal Budget was tabled on March 28, 2023 (“Budget 2023”)
 - [Bill C-47 \(An Act to implement certain provisions of the budget tabled in Parliament on March 28, 2023\)](#) received Royal Assent on June 22, 2023, and contains provisions relevant to charities described below and explained in more detail in [Charity & NFP Law Bulletin No. 521](#)
 - [Legislative Proposals Relating to the Income Tax Act and the Income Tax Regulations \(Budget 2023 and other proposals\)](#), released on August 4, 2023 (“Aug 4/2023 Draft Legislation”), has further relevant provisions described below
- The 2023 Federal Budget provided no new major regulatory changes affecting the charitable and NFP sector
- There are significant tax issues, however, involving revisions to **alternative minimum tax**, as discussed by Theresa Man in her presentation to follow next, so stay tuned

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- Budget 2023 sets out the Federal Government’s vision to combat financial crime with a plan for legislative amendments to the *Criminal Code* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA)
- There is to be a parliamentary review of the PCMLTFA launched in 2023, which “will include a public consultation that will examine ways to improve Canada’s Anti-Money Laundering and Terrorist Financing (AML/ATF) Regime”
- The public consultation part of this review took place between June 6, 2023 and August 1, 2023
- The CBA made a [submission](#) in response to this public consultation, which submission included a section dealing with the problematic impact of terrorist financing legislation on Canadian registered charities
- Budget 2023 also provides that the Government’s review of the digitalization of money will continue, as the Government seeks to “protect Canadians from the risks of crypto-asset markets”

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2. Update Regarding Disbursement Quota Rules (“DQ”)

a) New Changes to the Disbursement Quota as of January 1, 2023

- Bill C-32, *Fall Economic Statement Implementation Act, 2022* (“Bill C-32”) received Royal Assent on December 15, 2022, and amended the ITA to increase the DQ rate from 3.5% to 5% for property held by a charity in excess of \$1 million not used directly in charitable activities or administration
- Applies to taxation years beginning on or after January 1, 2023

b) Administration and Management Expenses

- Bill C-32 added s. 149.1(1.1)(d) to the ITA to provide that administration and management expenditures are deemed **not to satisfy** DQ requirements
- Guidance from the CRA on the administration and management expenses is expected at some point

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c) DQ Obligation Reduction

- S. 149.1(5) of the ITA previously allowed the CRA to deem a specified amount expended by a charity to be an amount expended by a charity on its own charitable activities in satisfaction of the DQ
- Bill C-32 amended this to allow the CRA to instead deem a charity’s DQ obligation to be reduced upon application by the charity

3. Bill C-32 and Trust Reporting Requirements for Charities

- Onerous reporting obligations for charities with internal “express trusts” were introduced by Bill C-32 in December 2022
- See “Alternative Minimum Tax and New Trust Reporting Rules for Charities” presentation by Theresa Man for details

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4. Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*

- Following the Taliban's return to power in Afghanistan in August 2021, Canadian charities and NFPs were prohibited from providing aid due to restrictions under broad anti-terrorist legislation
- In response, the Federal Government adopted [Bill C-41](#) on June 20, 2023 to amend the anti-terrorist financing provisions in section 83.03 of the *Criminal Code*
- The amendments now permit Canadian organizations to provide humanitarian aid and other assistance to those in need, subject to requirements as set out in the amendments to the *Criminal Code*, as discussed in our [AML/ATF and Charity Law Alert No. 53](#)

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a) **Modification of the Offences of Terrorist Financing in the *Criminal Code***

- Subsections 83.03(1) and (2) of the *Criminal Code* make it an indictable offence to make available property or financial or other related services for terrorist purposes or for use by terrorist groups
- Bill C-41 modifies the ATF offences by adding that terrorist financing activities may not be done “**wilfully and without lawful justification or excuse**”
- Examples of “lawful justifications” in Bill C-41 are contained in sections 83.03-83.0392 of the *Criminal Code*
 - (1) a blanket exception to terrorist financing offences that allows for “humanitarian assistance activities”, subject to certain stated criteria
 - (2) a narrower exception for certain listed activities that are dependent on an organization applying for and receiving an authorization from the Federal Government to carry out certain activities in a geographic area controlled by a terrorist group

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b) Blanket Exception for “Humanitarian Assistance Activities”

- This exception is self-initiating and does not require a person (or organization) to apply to the Federal Government for permission, but must meet the following criteria:
 - The anticipated activities will be carried out “for the sole purpose of carrying out humanitarian assistance activities”;
 - The anticipated activities will be conducted under the auspices of “impartial humanitarian organizations”;
 - The anticipated activities will be carried out “in accordance with international law”; and
 - Reasonable efforts will be used to “minimize any benefit to terrorist groups”
- Guidelines from the Federal Government are expected later this year

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c) Exception for Certain Activities when an Authorization is Granted

- To be eligible to apply for an authorization, there are three qualification requirements:
 - A person seeking an authorization from the Government must either be in Canada or be a Canadian outside of Canada (“eligible person”)
 - The activity must be carried out “in a specified geographic area that is controlled by a terrorist group”
 - The activity or specified class of activities must be providing or supporting the provisions of:
 - health services
 - education services
 - assisting individuals in earning a livelihood
 - promoting or protect human rights
 - services related to immigration

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5. Senate Committee on Human Rights Report

- The Standing Senate Committee on Human Rights published a report, *Combatting Hate: Islamophobia and its Impact on Muslims in Canada*, on November 2, 2023
- The evidence heard by Committee included, “evidence of Muslim charities being disproportionately scrutinized by the CRA without evidence that they presented any additional risk”
- The report contains 13 recommendations, including some which would have an impact on the regulation of charities
 - E.g. That the “Department of Justice introduce legislation to establish an independent civilian body to review decisions of the CRA Charities Directorate and provide timely decisions on appeals”
- More details to come in our November 2023 *Charity & NFP Law Update*

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B. CRA UPDATE

1. Qualifying Disbursements and the Draft Guidance

- See “New Qualifying Disbursement Regime for Charities: What Does it Mean in Practice” by Terrance Carter

2. Warning about Tax Shelter

- The CRA is taking action to combat tax schemes that promise to reduce taxes by increasing audits of promoters, improving information gathering, educating taxpayers on recognizing schemes, and investing in promoter compliance
- Beware of fraudulent practices, such as promising significant tax reductions (e.g. disguised as financial products or business opportunities) or promising substantial returns on small investments
- Participants and promoters of these schemes face severe consequences, e.g. penalties, court fines of up to 200%, jail time, and additional taxes

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3. CRA Releases View on Directed Gifts to Municipalities

- The CRA released CRA View 2022-0945221E5 on February 1, 2023 concerning amounts collected by a charity and provided to a municipality that were to be directed to a non-profit organization
- The CRA was asked for comments concerning a municipality receiving donated funds collected by a registered charity, which was then to be directed to the non-profit organization, *i.e.* a non-qualified donee (“non-QD”) recipient
- A charity had proposed to assist the non-QD by collecting funds and issuing donation receipts on the non-QD’s behalf. The collected funds would be donated by the charity to the municipality; the charity would then “suggest” that the municipality could provide those funds to the non-QD, as part of a municipal program

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- The CRA stated that the ITA does not contain specific rules relating to the use of funds by municipalities
- The CRA also stated that registered charities may be subject to revocation if they accept a gift, the granting of which was expressly or implicitly conditional on the charity making a gift to another person, club, society, association or organization other than a qualified donee
- It is a question of fact whether a gift has been made to a qualified donee
- The CRA said that donations can be received and receipted by a qualified donee, such as a municipality, provided that the municipality retains discretion as to how the donation is to be spent



Key Takeaway: CRA stated that where a municipality merely acts as a conduit by collecting funds from donors (including registered charities) on behalf of an organization that is legally or otherwise entitled to the funds, the municipality is not in receipt of a gift

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C. PROVINCIAL LEGISLATION UPDATE

1. Alberta

- Alberta's new *Trustee Act* came into force on February 1, 2023 and contains new provisions regarding charitable trusts and non-charitable purpose trusts, and sets out provisions, for example, regarding the court's power to vary charitable trusts and to order the sale of property of charitable trusts

2. British Columbia

- [Bill 19](#), *Societies Amendment Act, 2021* amended the British Columbia *Societies Act* on October 28, 2021 to address directors and members registers, proxy voting, notice provisions, by-law requirements, and conflicts of interest

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3. New Brunswick

- New Brunswick adopted [Bill 19](#), *Fiduciaries Access to Digital Assets Act* (Royal Assent on December 16, 2022), which grants trustees rights to access digital assets and also imposes fiduciary obligations in relations to these assets

4. Ontario

- Three year transition period to the Ontario Not-for-Profit Corporations Act, 2010 ("ONCA") expires on October 18, 2024
 - For an overview about the ONCA transition process, see "[Transitioning under the ONCA : More Complicated Than You Think](#)" by Theresa Man
- On June 8, 2023, Ontario's Omnibus [Bill 91, *Less Red Tape, Stronger Economy Act, 2023*](#) received Royal Assent

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- Bill 91 amends s. 27.2 of the *Trustee Act* to clarify that delegated investment managers will be permitted to invest in mutual funds, pooled funds and segregated funds under variable insurance contracts
- The Bill also amended the ONCA and the OCA, as of October 1, 2023, to facilitate certain virtual processes:
 - Virtual and hybrid meetings and voting
 - Electronic notices and delivery of other documents
 - Electronic records storage and remote examination

5. Saskatchewan

- Saskatchewan's new *Non-profit Corporations Act, 2022* and *Non-profit Corporations Regulations, 2022* came into force on March 12, 2023 except for a select few subsections concerning manual signatures on certain security certificates

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D. CASE LAW UPDATE

Fletcher's Fields Limited v The Ontario Rugby Union, 2023 ONSC 373 (January 16, 2023)

- Fletcher's Fields Limited ("FFL") was incorporated as a for-profit company under the OCA, but operated as an NFP dedicated to promoting and developing rugby in the GTA
 - FFL held six rugby fields in trust for the clubs for the purpose of playing rugby and for social events connected with rugby
- FFL's corporate documents were amended to say that its affairs would be carried on without the purpose of gain for its shareholders and that there should be no distributions among shareholders by way of dividend, property, profit, etc.
- By 2021, FFL had been experiencing financial difficulties and sold the six rugby fields for \$21.5 million
- FFL's governing documents did not contain provisions regarding distribution of assets upon dissolution

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- \$11.65 million was donated to the Canadian Rugby Foundation
- FFL brought application to court for direction about how to distribute remaining proceeds
- Court found that FFL held the funds as a trustee for a specific, non-charitable purpose trust for the promotion and playing of the sport of rugby
- Even though FFL's corporate documents said shareholders (rugby unions and clubs) could not receive property from FFL, the court required FFL to equally distribute remaining net proceeds to shareholders in accordance with the OBCA



Takeaway: This case shows the willingness of the courts to protect the spirit and intent of the intended purpose of a trust, including one which is non-charitable in nature, as the impact of this decision was that funds went to the shareholders – organizations with the intended purpose of promoting rugby

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**Human Concern International v. His Majesty the King,
Application for Leave to SCC (February 2, 2023)**

- Human Concern International ("HCI") applied to the Tax Court of Canada ("TCC") for a postponement of a one-year suspension of receipting privileges received from the CRA
- The TCC denied the application, and the matter was appealed to the Federal Court of Appeal ("FCA")
- FCA dismissed the appeal on the grounds that HCI had "not raised any error that would warrant this Court's intervention"
- HCI applied for leave to appeal from the Supreme Court of Canada ("SCC"), and the SCC dismissed this application



Takeaway: Charities will generally face an uphill battle when requesting a court to postpone the application of a sanction (e.g. a suspension or a penalty) given the high threshold of having to prove that it would be "just and equitable" to do so

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ACTRA Performers' Rights Society v Re:Sound, 2023 ONSC 3533 (July 14, 2023)

- Under CNCA s. 253, oppressive behavior may include the exercise of the powers of the directors or officers of a corporation that unfairly disregards the interests of a shareholder, creditor, director, officer or member
- The ACTRA Performers' Rights Society (the "Plaintiff" and a federal NFP corporation) brought an oppression claim against Re:Sound, another federal NFP corporation of which the Plaintiff was a member, and against individual directors personally, for not fulfilling its mandate to implement, advocate for, and properly enforce tariffs set by the Copyright Board of Canada
- The Plaintiff alleged that these directors (senior employees of major record labels in Canada) preferred the interests of their employers over the best interests of Re:Sound

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- The individual defendants brought a motion before the court asking that the claims against them be struck and the action against themselves dismissed
- At the current stage of the matter, the court only needed to be satisfied that the oppression claim against the individual defendants was not doomed to fail



Takeaway #1: Directors and officers of NFP corporations under the CNCA can be personally named in an oppression claim brought by a member and directors and officers may need to take steps to defend themselves in court



Takeaway #2: The case is also a reminder to members and certain other stakeholders of not-for-profit corporations of the remedies available under the CNCA when the leadership of a corporation strays from their duty to pursue the purpose of the corporation

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THE 2023
*Carters Annual Charity &
Not-for-Profit Law Webinar*
Thursday, November 9, 2023


ALTERNATIVE MINIMUM TAX AND NEW TRUST REPORTING RULES FOR CHARITIES


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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>Carters Annual <i>Charity & Not-for-Profit Law</i> Webinar November 9, 2023</p>								
<p align="center"> Alternative Minimum Tax and New Trust Reporting Rules for Charities (current as of Nov. 7, 2023) </p> <p> [Postscript – Slide 23 - One day after this presentation, the CRA announced on Nov. 10, 2023, providing relief from trust reporting for charities] </p> <p align="center"> By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001 © 2023 Carters Professional Corporation </p> <table border="0"> <tr> <td data-bbox="259 833 645 872"> CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001 </td> <td data-bbox="645 833 1224 872"> <table border="0"> <tr> <td>Toronto</td> <td>Ottawa</td> <td>Orangeville</td> </tr> <tr> <td>www.carters.ca</td> <td>www.charitylaw.ca</td> <td>www.antiterrorismlaw.ca</td> </tr> </table> </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	<table border="0"> <tr> <td>Toronto</td> <td>Ottawa</td> <td>Orangeville</td> </tr> <tr> <td>www.carters.ca</td> <td>www.charitylaw.ca</td> <td>www.antiterrorismlaw.ca</td> </tr> </table>	Toronto	Ottawa	Orangeville	www.carters.ca	www.charitylaw.ca	www.antiterrorismlaw.ca
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	<p align="right">2</p> <p align="center"> \$\$\$\$\$\$\$ TAX TIME \$\$\$\$\$\$\$ </p> <ul style="list-style-type: none"> • Proposed Changes to Alternative Minimum Tax Affecting Charities • New Trust Reporting Rules for Charities
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PROPOSED CHANGES TO ALTERNATIVE MINIMUM TAX AFFECTING CHARITIES

What is this??

How does this
affect my
charity?

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Draft Changes to Alternative Minimum Tax Affecting Charities

What legislation contains changes to the Alternative Minimum Tax (AMT)?

- Draft Legislation proposed amendments to the *Income Tax Act* (ITA) on alternative minimum tax (“AMT”) for high-income individuals (not corporations), certain estates and trusts

Draft
legislation
Aug 2023

➔

May be in
budget
bill?

- Changes will negatively impact the making of future transformational gifts by high net worth donors to charities
- AMT changes are effective for taxation years that begin after 2023

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What is AMT?

- AMT is not new
- This is to ensure that every individual pays at least a minimum amount of tax

Two ways
to calculate
tax liability

Taxpayers are required to calculate their tax liability under the “regular” method and under the AMT

If a taxpayer has claimed preferential tax deductions resulting in a lower tax liability under the regular method, then they will have to pay the higher AMT

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Proposed changes to the AMT

- These changes will increase the income level required for taxpayers to be subject to the AMT but also cause those who are subject to the AMT to pay more taxes

Currently

AMT applies a flat 15% tax rate on an adjusted taxable income in excess of a \$40,000 exemption

Proposed changes

The \$40,000 income exemption is proposed to be raised to \$173,000, which will be indexed to inflation, and the tax rate of 15% will increase to 20.5%

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Other proposed changes to AMT affecting charitable gifting	The basic minimum non-refundable tax credits will be reduced by 50% (which include donation tax credits)
	Capital gains on gifts of publicly listed securities will be included at a 30% rate (instead of currently such donations being tax free)
	Capital gains on gifts of other capital property to charities will be increased to 100% inclusion rate
	The proposed changes will not apply to graduated rate estates
	AMT does not apply to corporations
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<ul style="list-style-type: none"> • If enacted, these changes will significantly reduce the tax benefits to donors who are subject to the AMT when they donate publicly listed securities and capital property to charities • Imagine Canada and CAGP have both made submissions voicing concerns that the proposed amendments could deter high-value charitable donations and undermine the vital work of the charitable sector • CAGP's submission was endorsed by 180 signatories and sent to Finance on Sept 25, 2023 • Donors may have to pursue alternate tax planning methods, which could negatively impact the resources available to charities to carry on their important work in Canada and around the world 	
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NOW WHAT?

Stay tuned whether the proposed changes to the AMT will be revised

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Really ?

Really ?

????????

NEW TRUST REPORTING FOR CHARITIES

[Postscript – Slide 23 - One day after this presentation, the CRA announced on Nov. 10, 2023, providing relief from trust reporting for charities]

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Internal Express Trust Reporting for Charities

What legislation contains this requirement?

- Bill C-32 –
 - Implemented certain provisions of the Fall Economic Statement and the April 2022 Federal Budget
 - Released in November 2022, Royal Assent on December 15, 2022
- Long history of draft legislation



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What is the requirement affecting charities?

New trust reporting for express trusts

- New trust reporting required for internal express trusts held by charities – by filing T3 returns within 90 days from trust's year end

Information included in the reporting

- Reporting must include – the names, addresses, dates of birth, jurisdiction of residence and taxpayer identification numbers ("TINs" as defined in subsection 270(1)) of each person that is a trustee, beneficiary, or settlor of the trust

Failure to file

- Failure to file a T3 return could face serious penalties for each express trust, being the greater of \$2,500 or 5% of the value of the trust property

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Subsection 150(1) - Have to file

- Subsection 150(1) stipulates the tax return requirements and the filing dates for different categories of taxpayers
- Trusts are required under paragraph 150(1)(c) to file a return within 90 days from the trust's tax year end

Subsection 150(1.1) exceptions - Not have to file

- Subsection 150(1.1) sets out exceptions to subsection 150(1) – i.e., where the filing of a tax return is not required

Exception to exceptions - Have to file

- Subsection 150(1.1) amended to make it subject to new subsection 150(1.2)
- New subsection 150(1.2) provides that the exceptions under subsection 150(1.1) do not apply to an express trust that is resident in Canada, unless the trust meets one of the exceptions listed in new paragraphs 150(1.2)(a) to (o) – such as
 - Registered charities and non-profit organizations established as trusts
 - Trusts that hold less than \$50,000 in assets throughout the taxation year (provided that their holdings are confined to cash, government debt obligations and listed securities)
- However, do not apply to internal trusts held by registered charities where the trusts are set up as express trusts

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Why the new trust reporting requirement?

- To provide disclosure of beneficiaries of previously unreported express trusts, as required by the Organization for Economic Co-operation and Development (“OECD”) that Canada is a member of

What does the new reporting mean to charities?

- T3 returns must be filed within 90 days from trust's year end for all express trusts, unless an exemption applies
- There are exemptions for express trusts set up as registered charities and non-profit organizations
- BUT - there is no exemption for internal express trusts held by charities

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What are express trusts?

- The term “express trust” is not defined in the ITA
- CRA accepts that an express trust is generally a trust created with the settlor’s express intent, usually made in writing
- CRA takes the view that an “express trust is generally described as one where the person creating it (the settlor) has expressed his or her intention to have property held by one or more persons (the trustees) for the benefit of one or more persons (the beneficiaries)”

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How are internal express trusts of charities created?

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Clear Restrictions imposed by donors

- Internal trusts that are created expressly by donors would meet the definition at law to be “express trusts”
- Internal express trusts in charities are often created expressly by donors as special purpose charitable trusts – i.e., when a donor gifts property to be held “in trust” for a specific charitable purpose rather than for the general charitable purposes of the charity
- Often also referred to as - “donor restricted trust fund”; “charitable trust property”; “special purpose fund”; “restricted fund”

Examples

- endowment funds, scholarship funds, building funds,
- Donor advised funds (DAF) where the donors impose express restrictions on the DAF that are over and above the general direction that the gift be held in the DAF

Lack of meaningful purpose to require charities to file trust returns for express internal trusts

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All express internal trust funds are already included in the financial statement of charities

All express internal trust funds are reported in annual T3010s filed by charities

For some charities (e.g., universities and foundations), they may potentially have thousands of internally held express trust funds - compliance with reporting would create significant challenge in examining and compiling an accurate list of express trusts

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Solution - Government response?

- Submissions have been made from the sector to Finance and CRA voicing concerns, including Imagine Canada, Philanthropic Foundations Canada, and Community Foundations of Canada
- No indication of ITA amendment or CRA administrative policy to clarify that the new trust reporting does not apply to internal express trusts held by charities
- August 4, 2023 ITA draft budget implementation legislation added an exemption for express trusts held by the Canadian Wheat Board – but not express trusts held by charities

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What should charities do to comply with the trust reporting? **[IF no solution from Finance or CRA]**

- Charities and their professional advisors in the coming months will have to commence significant due diligence steps in order to prepare T3s for express trusts that the charities hold after December 30, 2023 for filing T3s within 90 days thereafter
- Time is running out
- A lot of preparation may be required – depending on the nature and size of the charity

Considerable preparation time will be required by impacted charities to ensure compliance with the new trust reporting requirements, including

- ▶ Understand the details and application of the new rules
- ▶ Review records
- ▶ Determine whether any of the internal trust funds held are “express trusts”
- ▶ Ascertain necessary information for identified “express trusts” required to be set out in the new T3s - e.g., the names of all donors (settlers) for each express trust, and donors’ taxpayer identification numbers
- ▶ Consider what to do if they do not have the said information
- ▶ Consult accounting and legal professionals

Resources

- *Charity & NFP Law Bulletin No. 522*, June 29, 2023
<https://www.carters.ca/pub/bulletin/charity/2023/chylb522.pdf>
- *Charity & NFP Law Update – August 2023*
<https://www.carters.ca/pub/update/charity/23/aug23.pdf>
- *Charity & NFP Law Update – September 2023*
<https://www.carters.ca/pub/update/charity/23/sep23.pdf>
- *Charity & NFP Law Update – October 2023*
<https://www.carters.ca/pub/update/charity/23/oct23.pdf>
- Article by Tim Cestnick in *The Globe and Mail* on July 6, 2023 <https://www.theglobeandmail.com/investing/personal-finance/taxes/article-new-canadian-tax-changes-create-unmanageable-burden-for-charities/>

**WHAT
DO I
DO?**

Stayed tuned
whether relief
will be coming
from Finance
or CRA

Post Script - CRA Announcement on Nov. 10, 2023 Providing Relief from Filing

- One day after this presentation, CRA sent an email announcement on November 10, 2023, indicating that it will not require registered charities to file T3 returns for internal trusts
- The announcement reminded charities that the T3010 they file must include aggregate information about the charities' property, including internal trusts

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THE 2023
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Thursday, November 9, 2023

THINGS CHARITIES & NFPs SHOULD DO BUT DON'T

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<p>INTRODUCTION & OVERVIEW</p> <ul style="list-style-type: none"> • The focus of this presentation involves common areas of non-compliance for not-for-profit corporations ("NFPs"), whether they be registered charities or non-profit organizations • Not-for-profits are often volunteer based but must comply with a complex corporate and tax regulatory framework • Is your organization "guilty" of some of the issues discussed in this presentation? If so, you're in very good company! • Few organizations are perfect but there is always room for improvement <p>www.carters.ca www.charitylaw.ca</p>

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- The following slides are divided into the following topics
 - Corporate/Tax Filings
 - Financial Statement/Financial Review Issues
 - Directors/Members Meeting Issues
 - Corporate Maintenance
- These topics are not organized by areas of importance or urgency, but rather practical observations on a wide range of issues
- These issues are not covered in depth but provide tips to help stay compliant

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A. CORPORATE/TAX FILINGS

1. *Corporations Information Act (Ontario)* (“CIA”) Annual and Initial Returns

- Not-for-profit corporations incorporated in Ontario or federal not-for-profit corporations operating in Ontario (*i.e.*, extra-provincial corporations) have various filing obligations that are not set out in the *Not-for-profit Corporations Act, 2010* (Ontario) (“ONCA”)
 - Annual Returns
 - ONCA corporations (even those that haven’t yet transitioned from the *Corporations Act* Ontario) to the ONCA must file an annual return within six months after the end of the corporation’s taxation year

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- Previously, Ontario not-for-profit corporations that were registered charities were exempt because they could file a worksheet with their T3010 with Canada Revenue Agency and CRA would share this with Ontario to fulfil their annual return requirements under the CIA
- CRA has **stopped** doing this since **May 15, 2021** but many registered charities remain unaware that this is the case
- Ontario not-for-profits can file their annual return on the Ontario Business Registry (“OBR”)
 - Need to be familiar with the OBR
 - Make sure you have your company key if not already obtained

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– Initial Returns

- Extra-provincial corporations that carry on business in Ontario must file an initial return under the CIA within 60 days after the date the corporation begins to carry on business
 - Many federal not-for-profit corporations assume because they are not incorporated in Ontario means that they have no CIA filing requirements but this is not correct
- Non-compliance with these filing obligations can lead to penalties or potentially administrative dissolution if left unattended

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2. Filing Corporate Returns for Federal Not-for-profit Corporations

- Federally incorporated not-for-profit corporations under the *Canada Not-for-profit Corporations Act* (“CNCA”) are also required to file an annual return
 - Many federal not-for-profit corporations that are registered charities assume that because they have filed their T3010 with CRA there is no other filing requirement
 - An annual return must be filed with Corporations Canada within 60 days of the “anniversary date” of the corporation
 - This is completely unrelated to the financial year of the corporation – the “anniversary” is the date of incorporation, amalgamation or continuance

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- On June 14, 2023, Corporations Canada announced that it would begin the dissolution process for CNCA corporations starting July 2023 for those that have not filed annual returns for three years
 - Dissolution, *i.e.*, loss of legal status, can also lead to revocation of charitable status for federal not-for-profit corporations that are registered charities
- The annual return requires the CNCA corporation to provide the date for the last annual meeting of members and whether the corporation is “soliciting” or “non-soliciting” under the CNCA

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- Federal not-for-profit corporations that are “soliciting corporations” under the CNCA are required to file their financial statements with Corporations Canada
 - Corporations Canada has begun to contact soliciting corporations that have not filed financial statements - non-filing of financial statements can also result in **dissolution**
 - Many federal not-for-profit corporations that file their financial statements with their T3010 assume they have completed this obligation
 - CRA does not share financial statements with Corporations Canada – a separate filing is required
 - Soliciting corporation status can apply to non-charities as well

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- Both soliciting and non-soliciting corporations are required to file their by-laws with Corporations Canada
 - Section 153 of the CNCA requires by-laws to be filed 12 months after the day on which the members confirm or amend the by-law, amendment or repeal
 - Many federal not-for-profit corporations either never file their by-laws or only file them after incorporation and never file amended or subsequent
- Ontario not-for-profit corporations have no filing requirement of by-laws
- While not a legal obligation, both federally and provincially incorporated registered charities should consider providing their by-laws to CRA

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B. FINANCIAL STATEMENTS/FINANCIAL REVIEW ISSUES

1. Signature on Approved Financial Statements

- Both the ONCA and the CNCA require the directors to approve the financial statements and the approval is to be evidenced by the signature of one or more directors
 - Financial statements are very rarely signed anywhere
 - Public accountants assisting the corporation are usually unaware of this requirement
 - Consider that the financial statements may be made public as is the case for registered charities

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2. Notice Provided to the Auditors

- Both the CNCA and ONCA require that notice of meetings of members, any meeting, not just the annual meeting, must be given to the public accountant/auditor/person conducting an audit or a review engagement (“auditors”)
 - For larger charities and NFPs it is not unusual for the auditors to attend the annual meeting to present the financial statements, but not every meeting
 - For smaller charities and NFPs typically the auditors do not attend and the presentation of financials is left to the treasurer
 - Given the cost of the attendance of the auditor this rarely happens in practice

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- If an audit committee is utilized, both the ONCA and CNCA have composition requirements for such committees
 - Both ONCA and CNCA require that a majority of the committee must not be officers or employees of the corporation or of any of its affiliates
 - Audit committees must have at least 1 director under the ONCA and at least 3 under the CNCA
 - As well, the ONCA and CNCA require that notice of meetings of the audit committee be given to the auditors
 - The auditor does not have to attend but must attend if a member of the audit committee requests it

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3. Having Financial Statements Subject to the Correct Level of Financial Review

- Both the CNCA and ONCA have specific levels of financial review applicable whether the corporation is “soliciting” or “non-soliciting” in the case of the CNCA or “public benefit” or “non-public benefit” in the case of the ONCA
- Many charities and NFPs either incorrectly self-assess which category they fall into and as a consequence whether they are required to have an audit or review engagement, or assume CRA has jurisdiction in this area when it does not
- The following slides provide an overview of these requirements

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CNCA Financial Review Chart

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	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)
	Non-Designated	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
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.
Non-Soliciting	Designated	\$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.

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ONCA Financial Review Chart

Type of Corp/Gross Annual Revenues		Requirements for an Auditor	Audit/Review Engagement
Public benefit corporation	\$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
Non- public benefit corporation	\$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)

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4. Keeping Records in Accordance with the *Charities Accounting Act* (Ontario) (“CAA”)

- Prior to regulations under the CAA in 2001, trust property, such as restricted purpose gifts, had to be kept in separate trust accounts and could not be co-mingled
- Section 3 of O. Reg. 4/01 both clarified allows trust funds to be combined for investment purposes where it advances their “administration and management”
- Subsection 3(5) of O. Reg. 4/01 requires specific records to be kept but many charities are unaware
 - These regulations can apply to both provincially and federally incorporated charities, even common law charities

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5. Having an Investment Policy that Complies with the *Trustee Act* (Ontario)

- *Trustee Act* (Ontario) can apply to both charities in Ontario and non-profit organizations in Ontario that hold charitable property
- These entities have investment authority under the *Trustee Act* (Ontario), but an investment plan or policy needs to be in place that complies with the requirements of the *Trustee Act* (Ontario)
- Many investment policies utilized by charities discuss matters relevant to their investment advisors, but not the requirements of provincial investment law for charitable property

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C. DIRECTORS/MEMBERS MEETING ISSUES

1. Holding Annual Meetings within the Prescribed Time Period

- Both the ONCA and CNCA set out prescribed time periods for the holding of annual meetings
- Generally speaking, the annual meeting must be held within six months of the end of the fiscal period
 - Needs to be done to meet necessary approvals for financial statement and tax returns and distribution to the members
 - Some corporations have had the habit of doing this on a biannual or triannual basis
 - Sometimes the inability to have financial statements available within the 6-month window puts them offside

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2. Keeping Minutes of Meetings

- Charities and NFPs have an obligation to keep minutes of meetings from both corporate and tax legislation
 - Some charities and NFPs keep minutes, but there are some instances where no minutes have been kept
 - Where minutes are kept, the corporation may assume that minutes of committees are not necessary
 - Both the ONCA and CNCA require minutes to be kept of committees of directors or members
 - Some corporations believe “in camera” meetings do not require minutes
 - All meetings of directors, members, and committees must have minutes

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3. Holding Electronic Meetings Properly

- Since the COVID-19 pandemic, holding meetings electronically through many platforms, Zoom, Teams, *etc*, have become more common place
- Both the CNCA and ONCA allow for meetings by electronic means or electronic participation at meetings
 - However, these statutes have specific requirements that must be met in order for meetings to be valid
- “Email” meetings are not valid, but still used by some charities and NFPs – but meetings need to be contemporaneous and allow all participants to communicate adequately

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- Under the CNCA, regulations require that meetings held by electronic means must require a method for the “vote to be gathered in a manner that permits their subsequent verification” and “permits the tallied votes to be presented to the corporation without it being possible for the corporation to identify how each member or group of members voted”
 - In practice this means that Zoom or other platforms will need to be used in conjunction with another platform that allows for anonymized votes
- The ONCA had this requirement but was amended in the summer of 2023

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4. Being Aware of Special Meeting Requirements under the ONCA

- Both the CNCA and ONCA provide for different voting thresholds
 - “Ordinary resolutions” majority
 - “Special Resolutions” approval by two-thirds of the votes cast
- Certain matters under the ONCA require a special resolution, *e.g.*, changes to the corporations name, *etc.*
- “Special resolution” is defined under the ONCA as being submitted to a “special meeting” implying that it cannot be done at an annual meeting

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D. CORPORATE MAINTENANCE ISSUES

1. Knowing Where Key Documents are Located

- Do you know where my articles are?
 - It’s not unusual for the lawyer to be asked by various parties for a copy of the charity or NFP’s articles of incorporation, amendments, by-laws, amendments to the by-laws, *etc.*
 - The ONCA and CNCA include legal requirements for not-for-profit corporation to keep various corporate records, including their articles and by-laws and other related registers

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2. Keeping Registers of Directors/Officers/Members

- As noted above, not-for-profit corporations have various filing obligations
 - Many charities and NFPs assume that by completing some of the filings related to who is on the board, *i.e.*, who are the directors, there are no other obligations
 - Both the ONCA and CNCA include requirements for charities and NFPs to keep registers of directors, officers and members
 - These registers must contain prescribed information and be kept up to date
 - Even NFPs with no members, *i.e.*, closed-membership corporations need to keep a register of “members”, *i.e.*, the directors

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3. Keeping Corporate Profiles Up to Date

- It is true that director information must be kept up to date with both corporate and tax regulators
 - Many charities and NFPs will update either Corporations Canada/Ministry of Government Services or CRA and assume different levels of government share records
 - This is **not** the case! Registered charities can and should keep both CRA and their applicable corporate regulator up to date
- Some charities file their T3010 and include changes to directors only once a year and assume this is sufficient
 - From a corporate law standpoint, charities and NFPs must provide notices of change within 15 days of changes to the board, not just once a year

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4. Keeping Signed Directors Consents

- Both the ONCA and CNCA include requirements for individuals elected as directors to consent to doing so
 - However, the ONCA requires that the consent must be “in writing”
 - As such, new directors of ONCA corporations should sign a written consent and those records should be kept with the books and records of the corporation

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5. Fixing the Number of Directors where there is a Minimum and Maximum

- Under the ONCA and CNCA, the articles can provide for a fixed number of directors, *e.g.*, 5, or a minimum and maximum, *e.g.*, 3 and 6, etc.
- However, many charities and NFPs never “fix” the number of directors where the articles provide for a range
- This is important to do, as it is used to determine quorum and other purposes for a valid meeting or how many directors are to be elected

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E. KEY TAKEAWAYS



- This sampling of things to do is not exhaustive
 - These are just examples of issues in practice that get forgotten



- Compliance for charities and NFPs is complicated – many charities and NFPs are “guilty” of some of these examples, even large well-funded ones



- Every charity and NFP can improve
 - Keeping good corporate records and being compliant with these legal obligations can help:
 - Stop issues arising on a CRA audit;
 - Help mitigate legal claims; and
 - Avoid governance battles between the board and membership

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THE 2023
*Carters Annual Charity &
Not-for-Profit Law Webinar*
Thursday, November 9, 2023

CONTRACT ESSENTIALS FOR CHARITIES & NFPs: MAKE SURE YOU'RE PROTECTED

By Esther Shainblum, B.A., LL.B., LL.M., CRM,
and Barry W. Kwasniewski, B.B.A., LL.B.

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INTRODUCTION AND OVERVIEW

- Poorly drafted or unbalanced contracts can place charitable and not-for-profit (NFP) assets of an organization at risk
- This presentation will address some of the key elements, issues and processes that charities and NFPs should be aware of when entering into, negotiating and executing contracts

- Context
- Preliminary Considerations
- Key Contract Considerations
- Key Takeaways

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A. CONTEXT

- Despite the fact that they are non-commercial entities, charities and NFPs frequently engage in a wide range of commercial/business activities in the course of their operations
- For example, they may retain IT providers, web designers, bookkeepers, fundraisers or consultants, acquire goods or services or provide goods or services to another organization
- These arrangements can be mission critical to the charity or NFP, whether in terms of the dollar value of the contract or the nature of the services in question

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- Yet, many charities and NFPs rely on trust/goodwill/relationships in agreeing to arrangements, are hesitant to “push back” on contract terms, and instead just sign on the dotted line
- In reality, to manage the risks associated with these arrangements, charities and NFPs need to ensure that they are entering into balanced, well-drafted, written agreements that are negotiated as fully as possible
- Further, directors of charities have a fiduciary duty to protect the charity from inappropriate risk
- This often means engaging legal counsel to identify, address and manage contract-related risk
- Legal counsel should be involved in the process as early as possible

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B. PRELIMINARY CONSIDERATIONS

1. Agreements Should be in Writing

- In a perfect world, we could “seal every deal” with a verbal agreement and a handshake and know that they would be fully honoured and implemented
- In the real world, it is not good practice to rely on oral agreements
- They are risky and difficult, if not impossible, to enforce – how do you prove the terms in order to enforce them?
- A well written contract actually protects both parties – the written contract itself is evidence of the actual terms that were agreed to

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- As charities are accountable to the CRA, to the Public Guardian and Trustee (Ontario) or the Attorney General in other provinces and to their stakeholders, their contracts should always be in writing
- Charities' auditors may also be concerned if agreements are not written
- Note that some types of contracts are required by law to be in writing, such as those affecting real property, including leases

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2. The Essential Elements of a Contract Must be Present for it to be Binding and Enforceable

- There must be a meeting of the minds between the parties demonstrating they both understand and agree to the essentials of the deal – clarity of terms is essential
- Consideration - something of value must be exchanged between the parties, such as cash, goods or a promise to do something
- There must be an agreement to enter into the contract - typically evidenced by both parties signing a written contract
- Each party must be legally competent - Human parties cannot be minors and must be of sound mind
- Corporate parties must be correctly identified

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C. KEY CONTRACT CONSIDERATIONS

- The following is a high level overview of some key contract considerations that charities and NFPs need to be aware of when drafting and negotiating contracts:

1. Key Definitions

- Key terms need to be defined for clarity
- Defined terms are capitalized and should be used consistently throughout
- Well drafted contracts use defined terms for clarity, consistency and to avoid excess verbiage

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2. Who are the Parties/ Signatories?

- Are the parties individuals, corporations or unincorporated associations (UAs)?
- If the party is a corporation, the correct legal name or registered business name must be used
- If the party is a corporation, the board of directors must authorize the corporation to enter into the agreement, either by a specific resolution approving the contract or by approving a delegation of authority policy that authorizes management to make such decisions
- A representation and warranty should be obtained to this effect from the other party in the contract

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- If the party is a corporation, does the person signing have authorization to execute on behalf of the corporation? -this should be confirmed on the signature page
- If the party is a UA, an individual must sign since the UA does not have the legal capacity to enter **into** or be bound to a contract
- An individual signing in their individual capacity should obtain authority to contract on behalf of the UA or may be held to have contracted themselves personally
- Alternatively, an individual may sign as a trustee for the UA

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3. Clarity on Business Terms is Essential

- As mentioned above, the contract must show that there is a meeting of the minds between the parties
- The contract must clearly set out the goods, services, scope of work, deliverables, milestones, schedule, invoicing, remuneration etc. that are being agreed to
- Some of these can be in schedules or statements of work appended to the contract and subject to its terms
- In most situations lawyers are not to advise on business terms of the contract

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4. Term of the Contract

- The contract must be clear on when it starts and when it ends – certainty of contract
- Is it open ended or is there a fixed term?
- Can it be renewed or extended and on what basis?
- If so, are business terms determined in advance for a renewal or extension or is that to be negotiated later?
 - On what basis?
 - What if it fails?
- Automatic renewal clauses should be approached with caution because, if the agreement renews automatically, that can present a risk to the organization

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5. Termination of the Contract

- Having a contract without an effective and enforceable termination clause can result in potential liability for non performance - *Monterosso v. Metro Freightliner Hamilton 2023 ONCA 413*
- Can the contract be terminated early and if so on what basis?
 - Can the parties terminate at will or only upon default of the other party?
 - How much prior notice is required, if any?
 - Will a defaulting party have the opportunity to remedy its default?
 - What obligations do the parties have during the notice period?

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- What are the consequences of termination?
 - Are there penalties?
 - Some IT contracts require payment in full for the balance of the contract if it is terminated early
- What property or information must be delivered or returned to the contracting parties, such as work product, data and confidential information provided during the term of the contract?
- Disputes over termination rights and obligations are among the most frequently litigated matters
- Having detailed termination clauses will reduce the risk of litigation

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6. Other Obligations of the Service Provider

- The contract should set out the service provider's obligations such as:
 - Covenanting to provide the services according to a certain standard
 - Covenanting to comply with certain laws, regulations, policies etc. in the performance of its obligations under the contract
 - Covenanting to screen, oversee and be liable for the acts of its employees/contractors
- Large organizations frequently resist such covenants because they have template agreements that they do not like to modify

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7. Intellectual Property (IP)

- The contract should clarify who owns any IP created, used or modified in the course of performing the contract
- This is essential in protecting a charity's or NFP's brand and IP assets (as well as the assets of the other party)
- The contract may provide for the licensing of IP to one or both parties or to third parties
- IP is among the most important assets of a charity or NFP and therefore need to be carefully protected in any contract

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8. Confidential Information

- Confidential information generally refers to a party's confidential business, financial, operational, legal and similar information
- The contract should address whether one party has the obligation to protect the other party's confidential information, or whether they have a mutual obligation to each other
- This often turns on whether services are being provided by one party to the other or whether it is more of a collaborative relationship, e.g. an MOU

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- Among other things, the party assuming the obligation should have to protect the other party's confidential information, not be permitted to use it for any purpose other than to perform its obligations under the agreement, and should be liable for breaches of the confidentiality obligations by its employees or other representatives
- The issues of liabilities and penalties for breach should be addressed in the agreement
- Confidential information provided to a party during the term of the contract should have to be returned or destroyed upon termination of the agreement or request of the other party

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9. Privacy and Personal Information

- Personal information means information about an identifiable individual and can refer to information about employees, volunteers, clients, donors and other stakeholders
- Every contract should require each party to protect personal information but is most important when personal information will be processed by both parties or by either party on behalf of the other
- Examples include contracts with cloud service providers or outsourcing of back office services such as payroll, bookkeeping or donor management

- These covenants are particularly important when dealing with extremely sensitive information, such as health or personal financial information
- The agreement should impose requirements to comply with applicable privacy laws and to implement appropriate safeguards to protect personal information, among other covenants
- Penalties for breach should be imposed
- Personal information obtained by a party during the term of the contract should have to be returned or destroyed upon termination of the agreement or request of the other party
- The contract should address where personal information will be stored – within or outside Canada

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10. Indemnities

- These are very common and usually highly negotiated clauses
- An indemnity means that one party agrees to compensate the other party if it causes the other party to incur a loss or damages
- Indemnities are important because they allow a party to protect itself from damages and lawsuits caused by the other party
- When purchasing goods or services, a charity or NFP should be indemnified by the provider for any losses or damages the provider, its products or services may cause

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- But providers' standard contracts often do not reflect this and often provide for the reverse, seeking to cause the client or customer (the charity or NFP) to bear all the risk
- Indemnities can be subject to intense negotiation and the risk to charities and NFPs can be mitigated in certain circumstances
- Charities and NFPs should not sign a contract containing an indemnity without first obtaining legal advice as they may be assuming too much liability, thus placing the assets of the charity or NFP at risk

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11. Limitation of Liability

- These are common clauses that set a limit or “cap” on the maximum amount that a party will have to pay to the other in the event of a breach of contract or third party lawsuit
- Providers’ standard contracts often limit their liability to the amount of fees paid to them under the contract or to a fixed maximum amount
- Liability may also be limited by excluding certain types of damages, such as punitive damages, loss of profit, loss of reputation or loss of goodwill so that the charity or NFP will not be compensated at all for such losses

- Negotiation can result in increasing or eliminating caps or exclusions, or by having no limit on certain types of claims such as those related to breach of privacy, for example
- Again, charities and NFPs should obtain legal advice before agreeing to a limitation of liability clause
- Agreeing to a provider’s standard limitation of liability clause may mean that the charity or NFP is placing the assets of the charity or NFP at risk

12. Insurance

- For many contracts it is important for the provider a charity or NFP is dealing with to carry appropriate liability insurance coverage
- The specifics of the coverage should be set out in the contract - types of insurance (general liability, professional errors and omissions, cyber-liability, workers compensation, *etc.*), and monetary limits
- Insurance coverage adds an additional layer of protection in the event the other party is unable to pay contractual indemnity obligations
- In some contracts the charity or NFP can be added as an Additional Insured on the other party's liability insurance

13. General Matters

- General matters, so-called “boilerplate” clauses, are not merely filler and can have significant implications
- These includes clauses such as:
 - Which jurisdiction will govern the contract – an Ontario charity does not want to be stuck litigating in a foreign jurisdiction
 - Entire agreement – essentially erases all pre-contract documents and understandings unless specifically included
 - Force majeure – when and for how long parties will be excused from complying with the agreement

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- How, to whom and when notices must be delivered to the other party during the contract
 - Whether and how the contract can be amended
 - Whether and how the contract can be assigned and by whom
 - How the agreement is to be signed and delivered, e.g. electronic signature and delivery
- These clauses should be carefully reviewed to ensure they fit the circumstances and negotiated and revised as needed

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D. KEY TAKEAWAYS

-  Charitable as well as NFP assets can be placed at risk by poorly drafted or unfair contracts
-  There are many types of clauses that can present pitfalls
-  Charities and NFPs should seek legal advice for contracts, especially when they are mission critical and/or include indemnities and limitation of liability clauses
-  Directors have a fiduciary duty to ensure that charitable as well as NFP assets are not being placed at risk by inappropriate or unbalanced allocation of liability in agreements

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THE 2023
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DONOR ADVISED FUNDS: WHAT YOU NEED TO KNOW IN 2023

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>Carters Annual <i>Charity & Not-for-Profit Law</i> Webinar November 9, 2023</p>
<p>Donor Advised Funds: What You Need to Know in 2023</p> <p>By Jacqueline M. Demczur, B.A., LL.B. jdemczur@carters.ca 1-877-942-0001</p> <p>© 2023 Carters Professional Corporation</p>	
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<div></div> <div>2</div>
<p>INTRODUCTION & OVERVIEW</p> <ul style="list-style-type: none"> • There continues to be lots of interest in donor-advised funds (“DAFs”) throughout the charitable sector - from charities, donors, financial institutions/advisors and regulators, e.g. Canada Revenue Agency (“CRA”) • So it is timely to again review current DAF issues • A more detailed review of DAFs is set out in my paper, “<i>Primer on Donor Advised Funds and Current Issues – Revisited</i>”, May 15, 2023 https://www.carters.ca/pub/seminar/charity/2023/Paper-Primer-on-Donor-Advised-Funds-and-Current-Issues-Revisited-2023-05-12.pdf • This presentation will review: <ul style="list-style-type: none"> – What are DAFs and Why are They so Popular? – What a DAF is at Law, including Recent Case Law? – Survey of Current Legal Issues Related to DAFs – Practical Considerations when Working with DAFs
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A. CONTEXT OF DAFS – WHAT IS A DAF?

- A DAF is a type of charitable giving vehicle, established when a fund is created by a donor through an initial donation to a registered charity (“DAF Holding Charity”)
- The gifts by the donor (usually single person or family) to the DAF are irrevocable, and charitable donation receipts are issued for them by the DAF Holding Charity
- The DAF Holding Charity then gifts amounts from a DAF (which could include capital if the DAF is not perpetually endowed, as well as income) to either:
 - Qualified donees (e.g. registered charities), or
 - Grantee organizations (subject to the new qualifying disbursement rules)

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- In a DAF, the donor is given the unique role of making non-binding suggestions to the DAF Holding Charity regarding the distribution of assets from the DAF to qualified donees or grantee organizations
- Despite donor advice, all administrative, operational and governance matters (including compliance with *Income Tax Act* [“ITA”] and CRA policies) are the **sole responsibility** of the DAF Holding Charity
 - This is because DAFs are the property of the DAF Holding Charity alone, **not** the donor
- Failure by a DAF Holding Charity to properly hold and maintain DAFs in compliance with tax/trust law could erode donor confidence and result in potential liability and credibility damage for the Charity

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B. WHY ARE DAFs SO POPULAR NOW?

- DAFs are a practical and appealing alternative for donors who do not have the ability, interest or time to operate their own private foundations
- Relatively inexpensive to establish a DAF with a DAF Holding Charity versus operating a private foundation
- More anonymity and flexibility in structuring for donor

Some DAF Holding Charities do not impose minimum initial donations, or they can be as low as \$5,000, with ongoing fees also being moderate

Private foundations (unless established to facilitate flow through donations to qualified donees) are generally established with at least a \$1-\$2 million capital asset base, with ongoing annual operational costs

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C. WHAT IS A DAF AT LAW?

1. It is a charitable gift

- A voluntary transfer of property owned by a donor to a donee, for which the donor receives no consideration

2. It could also be a donor restricted charitable gift

- Unrestricted charitable gifts must be applied to a charity's charitable purposes, but no donor restrictions
- Restricted charitable gifts are subject to restrictions imposed by the donor from the outset, which constrain or limit a charity's use of the gift in the future

3. It can be a gift for income tax purposes

- CRA accepts the common law definition of a gift
- A gift meeting all ITA requirements can be receipted

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D. HOW DOES THIS ALL RELATE TO A DAF?

- Original gift from the donor establishing a DAF in a DAF Holding Charity could be unrestricted or it could be subject to one or more donor restrictions, e.g. how long capital to be held, what income to be used for, etc.
- DAFs will then have a donor-advised “feature” added to the gift, providing donor (and possible successor “fund advisors”) with ability to offer ongoing advice to the DAF Holding Charity on aspects of the DAF
 - However, this donor advised feature does not impose a legal obligation on DAF Holding Charity to act as the donor directs, although there is a moral obligation for the Charity to consider these suggestions

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- A DAF Holding Charity must clearly inform its donors from the outset that their advice/input/suggestions are advisory only and all decisions related to the DAF are ultimately made by the Charity
 - This is imperative so that all DAF donations are true gifts at law and can be properly receipted under ITA
 - This reflects that the DAFs is the Charity’s own charitable property over which it must exercise ongoing direction and control
 - If there is excessive on-going control by the donor over the gifted property, it may lead to the CRA considering the gift to be defeated or negated

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The Joseph Lebovic Charitable Foundation v Jewish Foundation, 2022 ONSC 4012 (“Lebovic Case”)

- After the death of the original DAF donor, the donor's brother assumed responsibility as the DAF's fund advisor with the Jewish Foundation of Greater Toronto (“JFGT”)
- Brother brought motion to prevent JFGT from spending a small portion of funds from the DAF contrary to his requests
- Court found the brother lacked grounds for his motion – stating that unless restrictions are imposed at the time a gift is made, a donor is not able to later direct how any charitable gifts are spent by the recipient charity

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E. CURRENT ISSUES ASSOCIATED WITH DAFs

1. Disbursement-Related Issues – “Languishing” Assets in DAFs

- The 2019 Report of the Special Senate Committee on the Charitable Sector recommended that consideration be given to:
 - “means of ensuring that donations do not languish in donor-advised funds, but are instead used to fund charitable activities in a timely fashion.”
- This recommendation has been criticized conflating DAFs in Canada with certain features of US DAFs
- DAFs in the US can be used as a loophole for private foundations to avoid minimum payout requirements

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- However, in Canada, there are:
 - Annual disbursement quota requirements, being the minimum calculated amount that a registered charity is required to spend each year (please see next slide)
 - Inter-charity transfer rules which prohibit transfers between non-arms' length charities for the purpose of avoiding minimum payout obligations
- Given these requirements, it is not clear why specific concerns about DAFS languishing are being raised in the Canadian context
- As a comparison, endowments and other restricted gift agreements provide donors with immediate tax benefits while asset distribution takes place over time

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2. Disbursement Quota ("DQ") Increase as of January 1, 2023

	Property* in excess of \$25,000 (foundations) or \$100,000 (charitable orgs) up to \$1 million	Property* in excess of \$1 million
DQ Rate	3.5%	5%

- However, a DAF Holding Charity meets its DQ obligations in any given year on **an aggregate basis**, not a **fund-by-fund** basis
- Some have questioned if individual DAFs should be required to disburse sufficient income each year
- Meeting new 5% DQ could be challenge for charities with endowments or other restricted funds – may need costly court order to be able to encroach on capital or realized capital gains

* "Property" refers to the value of a charity's property not used for charitable activities or administration

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- In Canada, it is estimated that only 10% of DAFs hold assets over \$1 million
 - So if a DQ were in theory imposed at an individual DAF level (not aggregate), a DAF Holding Charity would have lower overall DQ obligation given 3.5% DQ rate for assets under \$1 million, but would result in excessive administrative costs
- Average granting rate from DAFs in 2021 was 9.8% of assets, which is well in excess of the 5% DQ imposed on amounts above \$1 million (2023 CAGP Report)
- Bill C-32 also provides that (1) admin and management expenses cannot satisfy DQ obligations (2) charities can apply for reduction in DQ obligations but this could be made public
- T3010s may be amended by CRA in the future to gather more DAF related information, but not clear what information will be solicited or when such changes will be implemented

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3. Qualifying Disbursements –Gifts to Grantee Organizations

- ITA was amended effective June 2022 to allow registered charities to make qualifying disbursements to grantee organizations if 3 requirements are met:
 - a) the disbursement furthers one of its charitable purposes
 - b) the disbursement is exclusively applied to charitable activities to further its own charitable purposes
 - c) documentation is maintained to demonstrate (a) and (b)
- DAF Holding Charities with sole charitable purpose of making gifts to qualified donees cannot make gifts to grantee organizations - a new charitable purpose(s) will be required, which takes time, money and regulator approval
- Draft CRA Guidance imposes additional requirements: (1) focus on risk matrix and (2) accountability tools
- Still waiting for final CRA Guidance
- See “New Qualifying Disbursement Regime for Charities: What Does it Mean in Practice?” presentation by Terrance Carter for more details

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4. Anti-Directed Giving Provision

- Paragraph 168(1)(f) of the ITA states that a registered charity that accepts a gift “the granting of which was expressly or implicitly conditional” on it making a gift to “another person, club, society, association or organization other than a qualified donee” may have its registered charitable status revoked
- Not clear what is meant by “implicitly conditional”
- Could a donation to a DAF followed by a donor request a gift be made from the DAF to a local non-profit organization as a qualifying disbursement trigger this provision?
- Need further clarity in the legislation and future CRA guidance(s)
- See “New Qualifying Disbursement Regime for Charities: What Does it Mean in Practice?” presentation by Terrance Carter for more details

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5. Impact of Alternative Minimum Tax

- Budget 2023 proposed alternative minimum tax (“AMT”) changes, *i.e.* alternative method to calculate income tax liability for high income individuals so that they pay higher tax than would pay under “regular” tax rules
- Key proposed changes: (1) 30% of capital gains on donations of publicly listed securities included in the AMT (currently not included) (2) 50% of donation tax credits (among others) will not reduce AMT payable
- If changes become law, they take effect January 1, 2024 - could impact high net-worth donors’ giving patterns, *e.g.* significant donations to DAFs following special events, such as property or business sales with substantial capital gains
- See “Alternative Minimum Tax and New Trust Reporting Rules for Charities” presentation by Theresa Man for more details

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6. Uncertainty of New Trust Reporting Rules

- A DAF (and all donations made to it) may be donor-restricted charitable gifts held in trust by the DAF Holding Charity
- The addition of subsection 150(1.2) to the ITA, in effect for taxation years ending after December 30, 2023, may require some DAFs to file “T3s” as internal express trusts of a charity
- While CRA’s long-standing administrative policy is not to require charities to obtain separate charitable status for their internal express trusts
- It is unclear what information it may now expect charities to file re: these “express” trusts
- See “Alternative Minimum Tax and New Trust Reporting Rules for Charities” presentation by Theresa Man for more details

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7. Importance of Granting Policies

- Need to ensure DAF gifts made to qualified donees are not offside of the ITA which could result in complaints, audits and/or penalties and sanctions
- Some DAF Holding Charities place limitations on the type of qualified donees able to receive gifts from their DAFs, e.g. geographic, religious, cultural/philosophical or program-based
 - Make all of these restrictions clear to donors in granting policy or guidelines, which should then be cross-referenced in the DAF agreement itself
- But not enough to have such a granting policy, there also needs to be ongoing monitoring and enforcement by the DAF Holding Charity

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8. Successor Fund Advisors of DAFs

- A DAF Holding Charity may receive recommendations about gifts from the DAF from successor fund advisors
- Where the DAF agreement is silent, a donor's attorney (under power of attorney) or executor may have ability to act as successor fund advisor
- The DAF agreement (or cross-referenced policies in the agreement) should address various scenarios:
 - What to do if donor does not designate a successor
 - How many successor fund advisors can be appointed
 - Multiple successors giving contrary recommendations
 - Whether successor fund advisors must only be individuals, e.g. not a corporation or a group of unrelated people

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9. Impact of "Anonymous" Donations from DAFs

It is possible for donors to a DAF to remain anonymous when the DAF Holding Charity subsequently makes a gift to a charity out of that DAF

The recipient charity may find it difficult to keep the donor informed about the effectiveness of the DAF gift

The recipient charity may also not have the information it needs to determine if it should decline the gift (e.g. because of concerns about foreign interference or conflicts of interest)

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F. PRACTICAL ADVICE FOR CHARITIES WITH DAFs

- **Do your homework**
 - Do due diligence so that your charity knows how to manage DAFs correctly based on trust/tax law
- **Create templates**
 - Develop and implement written gift acceptance and granting policies for DAFs and other gifting vehicles
 - Prepare template DAF agreements of various kinds
- **Ensure your charity runs the process**
 - Your charity – not the donor or their legal counsel – should be in control in establishing DAFs, utilizing consistent procedures as set out in the gift agreements and all related policies

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- **Be Vigilant**
 - Avoid language suggesting that (1) DAFs belong to the donor, (2) donors are “clients” with “accounts” and (3) a DAF is a donor’s own private foundation
- **Identify Opportunities**
 - DAFs represent opportunities for ongoing connection and engagement with donors
 - DAFs could also be a new way for a charity to attract more gifts and potentially larger ones from donors
 - Donors may appreciate the flexibility of DAFs
 - A DAF could be structured so that the donor advice could request gifts be made to different programs within the charity from one year to the next

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THE 2023
*Carters Annual Charity &
Not-for-Profit Law Webinar*
Thursday, November 9, 2023

TOP FIVE HOT TOPICS IN REAL ESTATE FOR CHARITIES & NFPs

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	Carters Annual Charity & Not-for-Profit Law Webinar November 9, 2023
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INTRODUCTION & OVERVIEW	
<ul style="list-style-type: none">• Today we are going to talk briefly about some of the hot topics in real estate for charities and not-for-profits (“NFPs”)• Top Five Hot Real Estate Topics:<ol style="list-style-type: none">1. GST/HST and the Sale/Purchase of Real Property2. Leasing of Commercial Properties3. Vendor Take Back Mortgages – Self Financing4. Underused Housing Tax (“UHT”) & Vacant Home Tax (“VHT”)5. Preparing for Financing Transactions	
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1

GST/HST AND THE SALE/PURCHASE OF REAL PROPERTY

- **What is the GST/HST?**
 - The goods and services tax (GST) is a tax that applies to many supplies of goods and services made in Canada
 - The GST also applies to many supplies of real property (for example, land, buildings, and interests in such property) and intangible personal property such as trademarks, rights to use a patent, and digitized products downloaded from the Internet and paid for individually

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- Some provinces harmonized their provincial sales tax with the GST to implement the harmonized sales tax (HST) in those provinces
- Generally, the HST applies to the same base of property (for example, goods) and services as the GST
- GST/HST registrants who make taxable supplies (other than zero-rated supplies) in the participating provinces collect tax at the applicable HST rate
- GST/HST registrants collect tax at the 5% GST rate on taxable supplies they make in the rest of Canada (other than zero-rated supplies)

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• Does a charity or NFP have to register for GST/HST?

- You have to register for the GST/HST if:
 - You provide taxable supplies in Canada
 - You are not a small supplier - \$250,000 gross revenue test and \$50,000 taxable supplies test
- You cannot register for GST/HST purposes if you provide only exempt supplies
- You may voluntarily register for GST/HST purposes if you provide taxable property and services in Canada or you are a small supplier
- Do not confuse registration for the purposes of claiming a Public Service Body rebate
 - Do you collect GST/HST and claim input tax credits (“ITCs”)? or do you claim the Public Service Body rebate?

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- Most property and services that charities supply are exempt from GST/HST, while there is a limited list of exempt supplies by NFPS
- When property or services are exempt, it means that, even if the organization is a GST/HST registrant, it does not charge GST/HST on them
 - Also, the organization generally cannot claim ITCs for the GST/HST paid or payable on property and services it acquired to make its exempt supplies
- Generally, most sales, leases, or other supplies of real property made by a charity or NFP are exempt from GST/HST
- It is the responsibility of the Seller of real property to determine whether the sale is GST/HST exempt or not
- This may require some research to determine how the property was historically used and treated by the charity or NFP

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- Reference should be made to **Schedule V** (Exempt Supplies), **Part V.1** (Supplies by Charities) of the **Excise Tax Act** (Canada) for charities and Schedule V (Exempt Supplies), Part VI (Public Sector Bodies) for NPOs
- A supply made by a charity of any property or service [is exempt], but not including a supply of
 - A residential complex, or an interest therein, where the supply is made by way of sale
 - Real property where the supply is made by way of sale to an individual or a personal trust, other than a supply of real property on which is situated a structure that was used by the charity as an office or in the course of commercial activities or of making exempt supplies

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- Real property where the supply is made by way of sale and, immediately before the time tax would first become payable in respect of the supply if it were a taxable supply, the property is used (otherwise than in making the supply) primarily in commercial activities of the charity
- Real property in respect of which an election under section 211 of the Act is in effect at the time tax would become payable in respect of the supply if it were a taxable supply
- Similar language applies to Public Sector Bodies which includes NFPs (section 25)
- If unsure, it is strongly recommended that the charity or NFPs obtain appropriate GST/HST tax advice or obtain an advance ruling from CRA, as an error in determining the tax status could be very costly

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- If the sale of real property is a taxable supply, the charity must determine if it must collect the tax or if the buyer is a GST/HST registrant and will self-assess
- Important to verify registration as of date of sale and to obtain an indemnification from the Buyer as part of the closing documents
- CRA has an easily accessible website to check the status of a GST/HST registration
 - Must correctly enter information or there will be no confirmation provided
 - <https://www.canada.ca/en/revenue-agency/services/e-services/digital-services-businesses/confirming-a-gst-hst-account-number.html>

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- If purchasing a property, a charity or NFP must determine in advance whether the real property is exempt and whether the Buyer is responsible for paying GST/HST
- If the Buyer must pay GST/HST, it must be paid on closing and therefore factored into the financing required for closing
- Buyer can apply for the Public Service Body Rebate to recoup some, but not all, of the GST/HST paid
 - 50% of GST or the federal portion of HST
 - differing amounts for each province with HST, e.g. 82% for Ontario and 50% for New Brunswick

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LEASING OF COMMERCIAL PROPERTIES

- Important to do appropriate due diligence before “sealing the deal”
 - Does the local zoning support the intended uses? or would a minor variance be required?
 - Are there restrictive covenants on title that would interfere with the organization’s operations?
 - Does the landlord’s lease with other tenants prevent certain activities?
 - What is the physical condition of the property?
 - What improvements would be necessary to carry out the organization’s functions?
 - Can it meet CRA’s test for personal benefit?

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- Need to understand the difference between a lease and a licence
 - A lease generally confers exclusive possession
 - A license generally confers temporary and limited possession
- Need to understand the difference between a “net” lease and a “gross” lease
 - In a net lease, the tenant pays “base rent” and “additional rent”, which will include all expenses related to the lease
 - May need to negotiate amendments to additional rent clauses
 - In a gross lease, the tenant pays one lump sum and the landlord is responsible for all lease expenses

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- Where the charity is the landlord, consideration needs to be given to what constitutes “fair market rent”

- As qualified donees, registered charities may not confer a private benefit to non-qualified donees
- Failure to charge fair market value rent to non-qualified donee tenants could result in penalties being assessed in the event of a CRA audit
- Fair market value rent is the value that the property would be rented for at a given time, usually based on similar properties in the same or a similar area
- Recommended to keep records of how you arrived at fair market value rent in the event of a CRA audit

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VENDOR TAKE BACK MORTGAGES

- With the high prices of real property and the rising interest rates, many sales today will not happen without the Seller assisting in the financing through a Vendor Take Back Mortgage (“VTB”)
- Charities must take into consideration their trust obligations when negotiating the VTB
- VTB may not confer a personal benefit on a non-qualified donee, consider:

Interest
Rate

Repayment
Terms

Amortization

Renewal/
Extension
Rights

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- Structure of the VTB must address the Buyer's intended purpose of the property
 - Is flexibility in granting partial discharges necessary?
 - Will other registrations require priority over the VTB?
 - Is other/more traditional financing required (likely in priority to the VTB)?
- Discuss the options available on default – is that something desirable for the organization?
- Does the organization have the resources to manage and monitor the VTB?

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UNDERUSED HOUSING TAX & VACANT HOME TAX

- The introduction of the Underused Housing Tax federally and the Vacant Home Tax (Empty Home Tax) in some municipalities is creating additional administrative burdens on unsuspecting land owners, including charities and NPOs
- UHT, introduced in 2021 Federal Budget, imposes a 1% tax on vacant and underused residential real estate owned by certain non-residents and non-Canadians
 - Although registered charities are generally exempt from the new federal UHT requirements, they may still be affected where they indirectly hold reportable residential property through other entities in their structures, such as trusts or nominee corporations

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- Similarly, the Toronto and Vancouver taxes impose filing obligations even if the tax may not be payable
 - Currently Toronto is at 1% and Vancouver is at 3%
- Failure to file the required declaration will result in the property being deemed to be vacant
- Further, failure to declare or making a false declaration in Toronto may result in a fine of \$250 to \$10,000 with similar fines in Vancouver
- Recent announcement by the Minister of National Revenue extended the UHT filing deadline for 2022 to April 30, 2024 without being charged interest or penalties
- This will coincide with the 2023 UHT filing, so both returns will be due at the same time

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PREPARING FOR FINANCING TRANSACTIONS

- Negotiation of new credit facilities is only the first step in securing new financing
- Lots of preparation by the organization is necessary to ensure a smooth closing for a financing transaction
 - Review of governing documents (Articles of Incorporation, Articles of Amendment, Letters Patent, Supplementary Letters Patent, By-laws)
 - Ensure there is proper authority for borrowing
 - Identify requirements for approval
 - Identify procedures for executing documents
 - Ensure minute books and corporate filings are up to date

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- Ensure there is sufficient time to give notice and hold required meetings of either members or the board of directors to authorize financing
- Review assets to be used as security for the financing
 - Does title to real property reflect the current name of the organization?
 - Are there outstanding encumbrances that should be discharged?
 - Are there any defects in title that will need to be addressed?
- Carefully review instructions sent to legal counsel to ensure they match the commitment signed with the lender

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KEY TAKEAWAYS



GST/HST:

- Determine tax status of property early
- Engage tax professionals or obtain an advance ruling from Canada Revenue Agency in order to ensure the GST/HST status is properly captured



Leasing:

- Due Diligence Before the Lease is Essential
- If you are the tenant, make sure the property is right for you
- If you are the landlord, make sure the terms do not run afoul of charity law



VTBs:

- Use cautiously
- The VTB terms must comply with charity law, as well as fit within the organization's management resources



UHT/VHT:

- Don't be caught unaware
- Although most entities will not be caught by the tax, failure to file declarations could prove costly



Financing:

- Early review is key
- Ensure there is sufficient time to review governing documents and complete all procedural steps before closing

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THE 2023
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Thursday, November 9, 2023

NEW QUALIFYING DISBURSEMENT REGIME FOR CHARITIES: WHAT DOES IT MEAN IN PRACTICE

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	Carters Annual Charity & Not-for-Profit Law Webinar November 9, 2023
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INTRODUCTION & OVERVIEW
<ul style="list-style-type: none">• Setting the Stage• Brief Explanation of the Qualifying Disbursement Regime• Overview of CRA Draft Guidance• Issues to Consider with Qualifying Disbursements• Reporting Qualifying Disbursements• Comparing the Qualifying Disbursement Quota Regime to the Own Activities Regime<ul style="list-style-type: none">– For a more detailed commentary see the <i>Charity & NFP Law Bulletin No. 519</i> https://www.carters.ca/pub/bulletin/charity/2023/chylb519.pdf– Information is current as of November 7, 2023, but subject to change
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A. SETTING THE STAGE

- Many registered charities will need to **work with other organizations** from time to time in order to achieve their charitable purposes
- When those other organizations are Canadian registered charities or other types of **qualified donees** listed under the *Income Tax Act* (ITA), (for example, Canadian amateur athletic associations, registered foreign universities, municipalities in Canada, municipal and public bodies performing a function of government in Canada, registered journalism organizations, etc.), then for income tax purposes this will not be an issue because a Canadian registered charity is able to make gifts to other qualified donees
- However, when a registered charity is having to work with an organization that is **not a qualified donee** under the ITA, like a non-profit organization, inside or outside of Canada, then **compliance issues** become more challenging

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- As a result of amendments to the ITA on June 23, 2022 (Bill C-19), there is now a **new option of making qualifying disbursements** to non-qualified donees in the form of either a “gift” or “otherwise making resources available” as discussed below
- The CRA released a Draft Guidance on November 30, 2022 “*Registered Charities making grants to non-qualified donees CG-032*” (“Draft Guidance”) with the final version expected sometime later this fall
- This presentation explains the following:
 - **What** the new Qualifying Disbursement Regime **involves and issues to consider**
 - **How** the new Qualifying Disbursement Regime **compares** to the existing Own Activities/ Direction & Control Regime (“Own Activities Regime”)
 - **Some practical comments** throughout on how to navigate the new Qualifying Disbursement Regime for those registered charities that may want to consider this option

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B. BRIEF EXPLANATION OF THE QUALIFYING DISBURSEMENT REGIME

1. Before Bill C-19 Amended the ITA on June 23, 2022

Canadian registered charities could only use their resources **in one of two ways** under the ITA:

1. **Conducting their own activities** by devoting their resources to charitable activities carried on by their own staff and volunteers or through intermediaries under direction and control
2. Making gifts to qualified donees ("QDs")

If a charity wanted to work with an organization that was **not a QD**, it had to demonstrate that it was conducting **its own activities by exercising direction and control** over the non-QD organization concerning how it utilized any funds or other resources provided by the charity

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2. Bill C-19 Introduced the Option of Qualifying Disbursement Regime

ss. 149 (1) of ITA "*qualifying disbursement* means a **disbursement** by a charity, by way of **a gift** or by **otherwise making resources available**, (a) subject to subsection (6.001), to a **qualified donee**, or (b) to a **grantee organization**, if

- (i) the disbursement is in **furtherance of a charitable purpose** (determined without reference to the definition charitable purposes in this subsection) **of the charity**,
- (ii) the charity **ensures** that the disbursement is **exclusively applied to charitable activities** in furtherance of a charitable purpose of the charity, and
- (iii) the charity **maintains documentation sufficient to demonstrate**
 - (A) **the purpose** for which the disbursement is made, and
 - (B) that the disbursement is exclusively applied by the grantee organization **to charitable activities** in furtherance of a charitable purpose of the charity;"

"grantee organization" includes a person, club, society, association or organization or prescribed entity, but does **not include a qualified donee**;

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3. After Bill C-19 Became Law on June 23, 2022, Canadian Registered Charities Now Have Two Regimes to Choose From:

1. Conducting **their own activities** by devoting their resources to charitable activities carried on by their own staff and volunteers or through intermediaries **under direction and control**

Therefore, charities are **no longer restricted** to just conducting their own activities or making gifts to qualified donees – they can now make qualifying disbursements by way of **gifts or by making resources available to QDs and non-QD grantee organizations**

2. Make **qualifying disbursements** by way of **gifts or “otherwise making resources available”** to both QDs and non-QD grantee organizations

The Draft Guidance focuses on **qualifying disbursements** by way of gifts or otherwise making resources available to non-QD grantee organizations

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C. OVERVIEW OF CRA DRAFT GUIDANCE

- The following comments concerning about the Draft Guidance are based upon those portions of the Draft Guidance that may continue in some form in the final version of the Guidance

1. Sections 1 - 3: Introduction, Definitions and General Requirements

- Definitions from the Draft Guidance:
 - **“charity”** includes all three types of registered charities: **charitable organizations, public foundations, and private foundations**, and also includes applicants for registration
 - **“grants”** refers to **transfers of both monetary and non-monetary resources**, or otherwise making resources available, to a non-qualified donee (grantee)
 - **“grantee” is a non-qualified donee** and is defined in the *Income Tax Act* to include “a person, club, society, association or organization or prescribed entity, but does not include a qualified donee”
 - A grantee is an individual or organization that the charity works with to further its charitable purposes

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- Explains how “granting” under the Qualifying Disbursement Regime differs from “direction and control” under the Own Activities Regime, *e.g.*
 - Relationship with grantee can be a **collaboration**, rather than hierarchical
 - Allows the **grantee autonomy** to carry on its own programs
 - The charity can support the existing activities of the grantee
 - Does **not need to exercise** “direction and control” over charity’s “own activities”
 - Focus on **risk and accountability** rather than “own activities”
- Charity can continue to carry on its “own activities” through an intermediary using direction and control, if it wishes to
- **A charity may convert its relationship** with a grantee (*e.g.* from direction and control to a grant) but must note this change in its books and records, presumably with an explanation of why
- Charity needs to clearly show in its books and records when it is making a grant and when it is exercising direction and control

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2. Sections 4-6: Making Grants to Grantees and Accounting Requirements

- The Draft Guidance indicates that the CRA **recommends the following steps** in the grant making process to meet accountability requirements in the ITA:
 - Establish how the grant furthers the charity’s charitable purposes
 - Assess the grant’s overall risk level: high, medium, or low risk by utilizing a detailed risk assessment matrix
 - Consider the accountability tools that the CRA recommends the charity implement, based on the grant’s risk level, including evaluation of the history, reputation, staff and volunteers of the grantee
 - Determine how to apply the accountability tools to mitigate risk and meet the CRA’s accountability requirements

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- Accountability requirements may be met in the grant making process by:
 - **Assessing risks** involved with the grant by referring to the risk matrix chart of low, medium and high risk
 - **Identifying accountability tools** to combat the risk, including due diligence review, description of grant activity, written agreements, monitoring and reporting, transfer schedules and separately tracked funds
 - **Applying the accountability tools** so identified, with the Draft Guidance providing a detailed description of each
- A charity making a grant must maintain adequate books and records to allow the CRA to determine if there is compliance
 - Charity should be able to obtain from the grantee any grant documents in original or electronic format
 - Failure to keep adequate books and records exposes the charity to sanctions, including revocation

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3. Section 7: Special Topics

- The last section of the Draft Guidance goes over several “special topics” that are **related to grant making**, consisting of:
 - Anti-terrorism Considerations – charity must not support terrorist activities by making a grant to an individual or group engaged in or supporting terrorist activities – refers to [CRA checklist for Charities avoiding terrorist abuse](#)
 - Directed Donations and Acting as a Conduit (described below)
 - Pooled Grants with Multiple Organizations (described below)
 - Granting Charitable Goods (described below)
 - Reporting Grants in the T3010 Registered Charity Information Return (described below)
 - Granting of Real Property (e.g., land and buildings) – this is considered high risk and the charity must have adequate documentation to ensure that property will be used only for charitable activities that further its charitable purpose

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D. ISSUES TO CONSIDER WITH QUALIFYING DISBURSEMENTS

1. Need to Review Charitable Purposes of the Charity

- A qualifying disbursement is all about furthering the **charitable purpose of the donor charity** and cannot be done if it is outside of the donor charity's charitable purposes
- Therefore, it is essential **to review the charitable purposes** of the donor charity before considering making a qualifying disbursement
- Foundations that have only a single purpose of making gifts to QDs will not be able to make qualifying disbursements to grantee organizations since grantee organizations are not QDs
 - Therefore, foundations with a single purpose of only making gifts to QDs will need to review and update their charitable purposes if they are intending to make Qualifying Disbursements
 - It will be important to see if the final form of the Guidance will provide a simplified process to do so

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2. Imposition of Extensive Additional Requirements

"Risk" is mentioned **62 times** in the Draft Guidance but is not mentioned at all in s 149.1 of the ITA

No clear indication of what the **"risk"** is that is to be avoided, so it is difficult to know how to assess risk factors

Focus on Risk Matrix

Risk matrix says that grants outside Canada and **over \$25,000** are **high risk** but no explanation is provided to explain why \$25,000 is a high risk threshold as it is arbitrary

Risk Matrix is **very similar** to onerous Financial Action Task Force (**FATF**) and **US Treasury Risk Matrix** for purpose of anti-terrorist financing avoidance

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• Accountability Requirements

- “**Accountability**” is mentioned **46 times** in the Draft Guidance but is not mentioned at all in section 149.1 of the ITA
- Suggested accountability tools are similar to the requirements for “**expenditure responsibility**” for US private foundations and are therefore complicated
- The accountability tools are similar to the requirements in **proposed ITA regulations** that were removed from Bill C-19 so they should not apply
- Hopefully, the final form of the Guidance will have a less onerous approach to the issue of “accountability”
- However, there would appear to be **more onerous requirements** of accountability with the Qualified Disbursement Regime as described, in the Draft Guidance than there is with the Own Activities Regime

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• Pooled Grants with Multiple Organizations

- Before a charity can make a pooled grant with one or more non-qualified donees, it will be expected to have in place significant documents, including **written agreements** (“ideally”, or if not feasible, then document reasons why not feasible in books and records), and **interim and final reports** (clearly showing that resources were used in furtherance of charity’s purposes)
- Otherwise, the Draft Guidance recommends approaching pooled grants cautiously
- In light of this, will many charities want to make pooled grants?

• Charitable Goods

- Charitable goods (*i.e.* goods that can only reasonably be used for charitable purposes, such as medical supplies) will **be subject to specific “accountability tools”**, including written agreements and final reports on how goods were used
- These requirements are **more onerous** than for “charitable goods” under the direction and control regime in CRA’s CG-002 Guidance

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3. Confusing Defined Terms of “Grants” & “Grant Making”

- The Draft Guidance states that it focuses “on making grants to grantees”, but the terminology of “**grants**” and “**grant making**” are **not terms** that are used in the ITA
- The ITA uses the terms “qualifying disbursements” and “grantee organizations”

Language in Draft Guidance	Language in ITA
“grant” refers to transfers of both monetary and non-monetary resources , or otherwise making resources available, to a non-qualified donee (grantee)	qualifying disbursement means a disbursement by a charity, by way of a gift or by otherwise making resources available to a qualified donee, or a grantee organization

- Courts expect charities to **comply with legislation** as opposed to a CRA guidance, so these differences are important to keep in mind as they could have significance on a CRA audit that was subsequently reviewed by a court

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4. Unclear Explanation of “Otherwise Making Resources Available”

- The ITA clearly indicates that a charity can make “gifts” to non-QDs as well as “otherwise making resources available” to non-QDs but **does not explain what the phrase “otherwise making resources available” means in practice**
- The Draft Guidance makes reference to charities “transferring” monetary and **non-monetary resources** but does not use the phrase “otherwise making resources available” except in the initial definition of “grant”
- **It is not clear** whether the concept of “transferring” non-monetary resources in the Draft Guidance is intended to mean:
 - (a) the charity is **gifting non-monetary resources** to a non-QD or
 - (b) the charity is **making available non-monetary resources** to a non-QD, such as use of space, staff, administration services, volunteers, or use of branding
- This uncertainty will be important to consider when preparing agreements needed in order to make a “grant” to a non-QD

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5. Some Qualifying Disbursements Do Not Meet Disbursement Quota Obligations

- The Draft Guidance does not mention the disbursement quota (“DQ”) or how qualifying disbursements are treated for purposes of meeting the DQ
- **Only** qualifying disbursements that are **gifts** to QDs and non QDs **can be used to meet the DQ obligations** of the granting charity
 - Many charities may find this confusing to track or difficult to comply with in light of the increased DQ of 5% for investment property in excess of \$1 million
- Qualifying disbursements made by “**otherwise making resources available**” to either QDs or non-QDs **will not be counted towards the 5% DQ**, which means that making space, staff and volunteers available, as well as engaging in micro-finance loans and other types of impact investing are **not DQable**

Building Space

Staff & Volunteers

Micro-finance Loans

Impact Investing

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6. Does not Reflect The Wording in ITA About Directed Gifts

- New paragraph 168(1)(f) of the ITA states that the CRA can revoke a charity’s charitable registration if it accepts a gift “**the granting of which was expressly or implicitly conditional on the charity [...] making a gift to another person, club, society, association or organization other than a qualified donee**”
 - e.g. Charity A accepting a gift that is “expressly or implicitly conditional” on Charity A making a gift to Non-Charity B
- The Draft Guidance states that paragraph 168(1)(f) of the ITA is “**intended to prevent a charity from acting as a conduit**” but does not provide any explanation concerning what it considers a “conduit” to be “conduits” are relate
- The Draft Guidance is also **not clear what an express or implicit conditional** gift is, since conditional gifts have particular meaning at common law
- The directed gift provision, though, **does not appear to apply** to a charity carrying out its **own activities** through **an intermediary** under the charities direction and control because it is not a “gift” to a non QD

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E. REPORTING QUALIFYING DISBURSEMENTS

- A charity that makes a qualifying disbursement to a grantee will need to **include on its annual T3010** the following information for each grantee organization that receives in excess of \$5,000 in the taxation year:
 - The **name** of the grantee organization;
 - The **purpose** of each qualifying disbursement; and
 - The **total amount** disbursed by the charity to each grantee organization
- The charity must be able to determine the **fair market value of non-cash gifts** that are made to grantees on its T3010
- In May 2023, the CRA updated the [T3010 Registered Charity Information Return](#) to report grants made to non-qualified donees
- It also introduced the new [T1441 Qualifying Disbursements: Grants to Non-Qualified Donees](#) requiring detailed information about these grants

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- The T3010 asks:
 - If the charity has made qualifying disbursements via grants to non-qualified donees
 - If any of these grants totaled more than \$5,000 in cash and non-cash grants in one fiscal period
 - The number of grantees receiving grants totaling \$5,000 or less
 - The total amount paid to grantees totaling \$5,000 or less in a fiscal period
- The T1441, which records all grants individually, must include:
 - The number of grantees that received grants totaling more than \$5,000
 - Report each grant separately, even if it's to the same grantee
 - The name of the grantee
 - The purpose of the grant
 - The total amount of cash and non-cash disbursements separately
 - The country where grant activities were carried out, (unless permission is obtained due to safety concerns)
- The CRA has updated T4033, [Completing Form T3010 Registered Charity Information Return](#), to assist charities in completing these forms

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F. COMPARING THE QUALIFYING DISBURSEMENT QUOTA REGIME TO THE OWN ACTIVITIES REGIME

- Since registered charities can now choose between the two regimes when working with non QDs, what are the differences?

Own Activities Regime	Qualifying Disbursement Regime
<ul style="list-style-type: none"> Focus on the charity being the directing mind with an intermediary carrying out instructions received from the charity 	<ul style="list-style-type: none"> Focus on supporting the activities of the grantee organization in achieving its purposes, not those of the donor charity
<ul style="list-style-type: none"> More of a hierarchical top down relationship 	<ul style="list-style-type: none"> More of a collaborative relationship of mutual co-operation and respect
<ul style="list-style-type: none"> The funds or resources are not gifted, instead they are transferred to an intermediary as an extension of the charity by means of a contractual agreement 	<ul style="list-style-type: none"> The funds or resources are either gifted or are otherwise made available to the grantee and become the property of the grantee organization to use for its own programs
<ul style="list-style-type: none"> The applicable regulatory due diligence is in the form of ongoing direction and control by the charity over the activities of the intermediary 	<ul style="list-style-type: none"> The applicable regulatory due diligence is in the form of applying a risk matrix and following extensive accountability requirement rather than providing ongoing direction and control

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Own Activities Regime	Qualifying Disbursement Regime
<ul style="list-style-type: none"> An agreement is needed to reflect direction and control over own activities of the charity e.g. contract for service or co-operative participation 	<ul style="list-style-type: none"> For qualifying disbursements above \$5,000.00, a grant agreement will be needed to address a significant degree of risk assessment and accountability requirements
<ul style="list-style-type: none"> As the intermediary is acting as an extension of the charity under the direction and control of the charity, the charity may be exposed to liability by the intermediary 	<ul style="list-style-type: none"> Since the grant involves giving the funds to a grantee organization to support programs of the grantee, the charity will be less exposed to liability risk
<ul style="list-style-type: none"> Charitable programs done through an intermediary will count toward the disbursement quota of the charity 	<ul style="list-style-type: none"> Qualifying disbursements in the form of "otherwise making resources available" will not count towards the disbursement quota of the charity
<ul style="list-style-type: none"> Contracting with an intermediary to allow the intermediary to purchase land is subject to significant restrictions 	<ul style="list-style-type: none"> Gifting of real estate needs to be carefully documented but is generally less restrictive
<ul style="list-style-type: none"> Contracting with an intermediary in Canada "may" attract HST/ GST (need expert HST advice) 	<ul style="list-style-type: none"> Making a qualifying disbursement to a grantee in Canada will not attract HST/GST
<ul style="list-style-type: none"> Less onerous reporting requirements in T3010 	<ul style="list-style-type: none"> More onerous reporting requirements in T3010

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G. KEY TAKEAWAYS



The new Qualifying Disbursement Regime is an **important new option** for registered charities to consider



However, there are **complexities and significant due diligence requirements** that must be carefully reviewed before deciding to make a qualifying disbursement to a grantee organization



Whether or not a registered charity should embark on making a qualifying disbursement to a grantee organization or choose to continue with the Own Activities Regime is a **decision that should be carefully reviewed with legal counsel** for the registered charity



It is Important to **stay tuned** to see what the CRA will provide for in it's final form of the Draft Guidance

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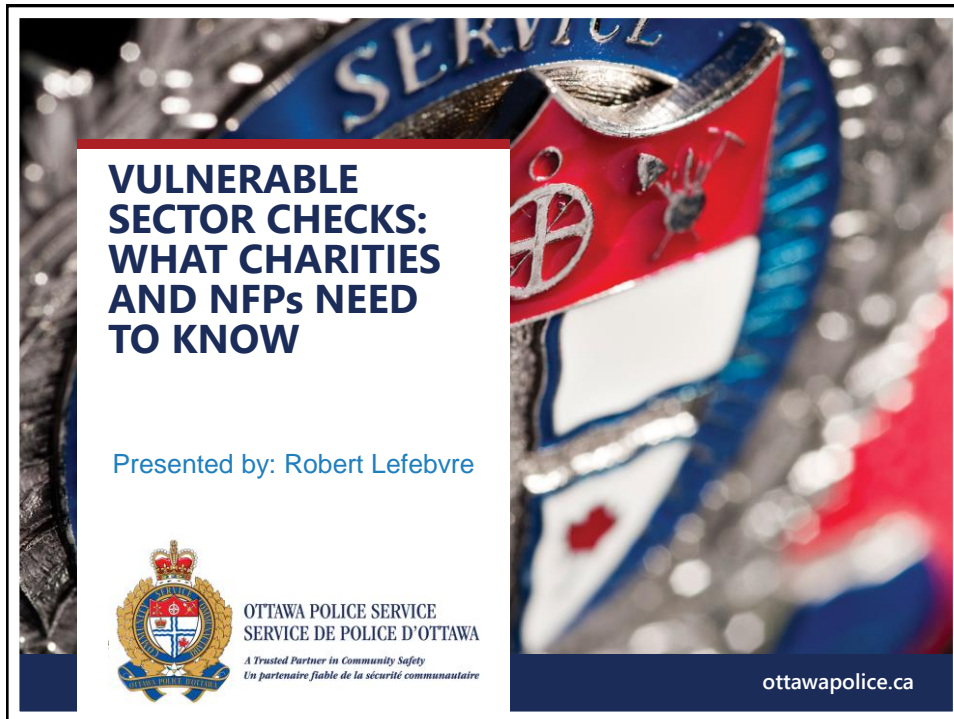
THE 2023
*Carters Annual Charity &
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Thursday, November 9, 2023

VULNERABLE SECTOR CHECKS: WHAT CHARITIES AND NFPs NEED TO KNOW

**By Robert Lefebvre, Supervisor – Background Clearance Unit,
Ottawa Police Services
and Esther S.J. Oh, B.A., LL.B.**

1-877-942-0001

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DISCUSSION POINTS



- Criminal Record Check – level 1
- Criminal Record & Judicial Matter Verification- level 2
- Vulnerable Sector Check – level 3

TYPES OF RECORD CHECKS AND WHAT WILL BE VERIFIED BY THE POLICE SERVICE



- ❖ Criminal Record Check ("CR") – level 1
 - Verifies criminal convictions
- ❖ Criminal Record & Judicial Matter Verification ("CRJM") - level 2
 - Verifies criminal convictions
 - Verifies outstanding charges in front of the Court
 - Judicial orders (probations – warrant)
 - Notable Police contact
- ❖ Vulnerable Sector Check ("VSC") – level 3
 - Verifies criminal convictions
 - Verifies outstanding charges in front of the Court
 - Judicial orders (probations – warrant)
 - Notable Police contact
 - Pardon sexually based offences

2

WHO DETERMINES THE REQUIREMENT?



- Organizations can self identify that they work with members of the Community that are Vulnerable
- Organizations should send potential employees to their local police agency for verifications
- The employer shall determine the proper level of background check accordance with the Criminal Records Act
- The Police Service still has the right to question organizations when it determines the type of background that is requested by the hiring organization

3

DEFINITION



Vulnerable Sector

- A vulnerable person is defined in section 6.3 of the *Criminal Records Act*, as a person who, because of age, a disability, or other circumstances, whether temporary or permanent are (a) in a position of dependence on others or (b) are otherwise at a greater risk than the general population of being harmed by a person in a position of authority or trust relative to them
- These are measures that were put in place to ensure people convicted of sexually-based offences do not work with the vulnerable sector
- If a pardon has been granted, the criminal history information about an individual convicted of a sexually based offence is retrievable by law enforcement only for the purposes of a Vulnerable Sector search

4

Who shall not be VSC Screened ?



- ❑ Here is a list of positions that would definitely not qualify for VSC sector screening, including but not limited to:

Hospital Administrators – HR - Finance
 School Board Employees (working at the school board)
 IT Staff
 Sales Staff
 Finance – Tax
 Construction Workers
 Janitorial Staff not working in a school
 Clerical Staff (Reception – office environment)
 Members of Boards of Directors
 The applicants that fall under the list above would
 require only a CRC or a CRJM

"A point of contact is NOT a position of trust"

5

VSC RESULTS



- The Police Service cannot confirm the results of the VSC inconclusive match, since this is a sealed record
- The Police Service only sees the following message when an inconclusive match is received

** FOR SCREENING OF APPLICANTS APPLYING FOR POSITIONS WORKING
** WITH VULNERABLE PERSONS, SUBMIT FINGERPRINTS ON FORM C-216C
** AND CONSENT FORMS TO THE RCMP IDENTIFICATION SERVICES IN OTTAWA.
** NO INFORMATION RELATING TO THIS MESSAGE MAY BE DISCLOSED.

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QUESTIONS



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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>Carters Annual <i>Charity & Not-for-Profit Law</i> Webinar November 9, 2023</p>		
<p>Vulnerable Sector Checks: What Charities and NFPs Need to Know - Brief Comments from a Practitioner's Perspective</p> <p>By Esther S.J. Oh, B.A. LL.B. estheroh@carters.ca 1-877-942-0001</p> <p>© 2023 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="645 833 1224 891"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca		

2		
<p>A. INTRODUCTION</p> <ul style="list-style-type: none"> • There is no statutory legal requirement to carry out vulnerable sector checks (VSCs) on employees and volunteers working with vulnerable persons in Ontario • However, vulnerable sector checks are an essential due diligence step to help screen individuals who may not be well suited to work with vulnerable persons <ul style="list-style-type: none"> – VSCs help to screen applicants with criminal convictions involving violence or abuse in order to protect vulnerable persons from potential abuse – By protecting vulnerable persons from harm, this in turn, can help protect the organization from potential liability 		
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- VSCs are normally required by insurance companies as a condition of abuse coverage (although VSCs should be restricted to individuals with duties that involve providing services to vulnerable persons)
- VSCs are a snapshot of the records of the police concerning an individual **at a given moment in time**
 - Not all perpetrators of abuse have a criminal record
 - Incidents involving abuse can be perpetrated by individuals who are first-time abusers (some perpetrators have not been caught yet)
 - VSC findings can change at any time and therefore new VSCs should be obtained periodically
- A VSC should **not** be relied on **by itself** to screen individuals who will work with vulnerable persons

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B. IMPORTANCE OF DETAILED SCREENING PROCEDURES WITHIN POLICY TO PROTECT VULNERABLE PERSONS

- VSCs should be **one step** in a **comprehensive screening** procedure for volunteers and employees who wish to work with vulnerable persons, including but not limited to:
 - Detailed written application form,
 - Verification of multiple references,
 - Interview(s) with the applicant, and
 - Other screening measures
- Comprehensive screening requirements should be set out in a child protection policy and/or a vulnerable persons policy which also outlines procedures to be followed to protect children and other vulnerable persons from potential harm

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C. POLICE RECORDS CHECK REFORM ACT (ONTARIO)

- In Ontario, the *Police Records Check Reform Act* came into force on November 1, 2018
 - All adults (18 years of age and over) who wish to become employed or volunteer in positions involving duties to assist vulnerable persons should be required to obtain a VSC
 - Minors (under the age of 18) who reside within Ontario cannot legally obtain a VSC or other police record check
 - The only exception is where the minor is applying to work or volunteer with the vulnerable sector with a federal, provincial or municipal government agency of Canada
 - Where this applies, an application for a criminal record and judicial matters check may be submitted (not a VSC)
- However, upon becoming eighteen (18) years of age an individual can apply to obtain a vulnerable sector check

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D. APPLYING FOR VSC IN ONTARIO

- Police services throughout Ontario have different procedures and requirements for VSC applications

- Applications may be submitted in person, online or by mail, subject to requirements at police service
 - Fees and acceptable methods of payment will vary
 - Some police services will provide a lower fee for applicants for volunteer positions (as opposed to applicants for employment positions)
- Applicants normally need to provide information confirming the person is applying to work or volunteer with vulnerable persons as part of their duties at the charity or NFP
- Generally speaking individuals will be required to provide valid government issued I.D. and other information
- Police services have different processing times
- Results will normally be provided to each individual (not the charity or NFP) by email, by mail, or in person

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- In order to obtain a VSC, individuals must apply at the police service where the individual resides
- Each individual must apply for their own Police Record Check
- Where fingerprints are required to verify the identity or information concerning an individual or where an individual has a criminal record, further instructions will be provided by the police on steps to be taken

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E. PRIVACY CONSIDERATIONS

- Given the sensitive nature of the information contained in VSCs, NFPs should use appropriate administrative, technical and physical safeguards to protect VSCs:
 - Technical safeguards include using strong passwords, firewalls and anti-malware scanners
 - Physical safeguards include restricting office access, locking rooms and locking drawers or cabinets where the VSCs are kept
 - Administrative safeguards include restricting access to the VSCs on a “need-to-know” basis
- Other privacy considerations also apply to the obtaining of consents from employees and volunteers to acquire and store the VSCs, which are beyond the scope of this presentation
 - Legal advice is recommended

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F. OPERATING IN OTHER PROVINCES

- Where a charity or NFP operates in different provinces across Canada, the charity or NFP should be aware that:

- Each regional police service within each of the provinces may have different requirements that apply to applications for VSCs

- Each province also has separate provincial legislation outlining requirements that apply to the reporting of abuse of children

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Book List

[Charities Legislation & Commentary, 2024 Edition](#) (newest edition coming in December 2023)

[Branding & Copyright for Charities & Non-Profit Organizations](#), 3rd Edition;

[The Management of Non-Profit and Charitable Organizations in Canada](#), 5th edition (newest edition coming in December 2023)

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Resource Materials

- **Canadian Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>, and **CAGP Foundation**, <https://www.cagpfoundation.org/>
- **Canadian Centre for Christian Charities (CCCC)**, <https://www.cccc.org>
- **Imagine Canada**, <https://imaginecanada.ca/en> and their **Advocacy Hub** <https://imaginecanada.ca/en/public-policy> and **About the Sector** <https://imaginecanada.ca/en/About-the-sector>
- **ONN (Ontario Nonprofit Network)**, <https://theonn.ca> and <https://nonprofitresources.ca/>

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