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THE 2023 *Carters Spring Charity & Not-for-Profit Law Webinar* Thursday, March 2, 2023

WELCOME

Carters is pleased to welcome you to the **2023 Carters Spring Charity & Not-for-Profit Law Webinar**, being held virtually this year in response to the preference of the vast majority of previous attendees.

Featuring all new materials, the 2023 *Carters Spring Charity & Not-for-Profit Law Webinar* will provide an overview of recent developments and practical advice on legal issues that impact charities and not-for-profits.

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 **Cathy Taylor, Executive Director**, Ontario Nonprofit Network; **Sharmila Khare**, Director General, Charities Directorate, Canada Revenue Agency and **Robert Delaney**, Director of the Policy, Planning and Legislation Division, Charities Directorate, Canada Revenue Agency for their contributions as our guest speakers, as well as the lawyers at Carters who have volunteered their time in preparing for this Webinar.

FORMAT OF THE WEBINAR

Presentations will be 20 minutes in length, including Q&A. The special presentations by our guest speakers, Cathy Taylor, Sharmila Khare together with Rob Delaney, will be 25 and 35 minutes in length, respectively, including Q&A. Questions can be entered in the Question Box feature of the webinar. Unfortunately, not all questions can be answered due to time constraints.

CARTERS RESOURCE MATERIALS

Today's electronic handout package, including the PowerPoint presentations and various resource materials, are available online during the webinar and can be downloaded for your use. These materials, along with numerous other articles, Webinar materials, and newsletters of interest to churches and charities, including back issues of *Charity and NFP Law Bulletins*, *Church Law Bulletins*, and *Anti-terrorism and Charity Law Alerts* are available free of charge at our website at www.carters.ca.

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 on the webinar event resources button to sign up to our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the February 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 Spring Charity & Not-for-Profit Law Webinar** that helps to underwrite costs associated with the Webinar, including contracting EventStream Production who are helping to ensure that the Webinar runs smoothly and professionally.

- **Robertson Hall Insurance**, 1-800-640-0933, churchinsurance@robertsonhall.com, www.robertsonhall.com
- **Thomson Reuters**, 1-800-387-5164, <https://store.thomsonreuters.ca/en-ca/home>
- **LexisNexis Canada Inc.**, 1-800-668-6481, <https://store.lexisnexis.ca/en>

SECTOR RESOURCE MATERIALS

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

- **Association of Fundraising Professionals (AFP)** Greater Toronto Chapter, <https://afptoronto.org/>
- **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 Advocacy Hub <https://imaginecanada.ca/en/public-policy>, and About Sector <https://imaginecanada.ca/en/About-the-sector>
- **ONN (Ontario Nonprofit Network)**, <https://theonnn.ca>, and <https://nonprofitresources.ca/>

ABOUT CARTERS

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

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



[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.



[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.



[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*.



Cathy Taylor, Executive Director, Ontario Nonprofit Network (ONN) has been with ONN since June 2012. Throughout her 20 years working in the nonprofit sector, including as the founding Executive Director of the Volunteer Centre of Guelph/Wellington, she has been passionate about collaboration and leadership in the sector. Cathy works with sector colleagues from across Ontario and Canada, as well as private sector and government officials, to create an enabling policy environment for nonprofit organizations. Cathy's roots are in the environmental movement and she has been active in municipal politics. She holds a degree in political studies and history from Queen's University, and attended the Maytree-York University Executive Directors Leadership program.



[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.



[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.



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*.



Sharmila Khare - Sharmila Khare was appointed to the position of Director General of the Charities Directorate on May 16, 2022. Prior to joining the Canada Revenue Agency, Sharmila worked with the Department of Finance, where she held progressively more senior positions including Advisor to the Executive Director at the World Bank and Chief of Charities. Sharmila holds a Combined Honours B.A. in Mathematics and Economics from Glendon College and a M.A. in Economics from McMaster University. She has completed additional graduate diplomas and certificates in public administration, public sector leadership and international development including a Non-Profit Management Certificate from Mount Royal University.



Rob Delaney - Rob became the Director of the Policy, Planning and Legislation Division of the Charities Directorate in May 2022. He previously worked in the Directorate as an Audit Advisor and served as the Directorate's Director of Compliance between 2014 and 2019, where he redesigned the Directorate's approach to compliance which included the launch of the Charities Education Program. Rob holds a Bachelor of Business Administration from Acadia University and has over 25 years experience with the Canada Revenue Agency. The majority of his career spent in the Compliance Programs Branch where he began as an auditor and served as a Director in Business Intelligence.

ADDITIONAL LAWYERS AT CARTERS



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.



Sean S. Carter, B.A., LL.B. - Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken (Toronto office) for three years. He is ranked as a leading expert by *The Best Lawyers in Canada*. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



Nancy E. Claridge, B.A., M.A., LL.B. - Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of corporate and commercial law, anti-terrorism, charity, real estate, and wills and estates, in addition to being the 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*.



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



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.



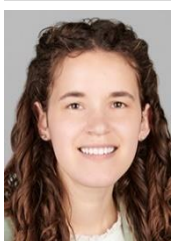
Jennifer M. Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff 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." Ms. Leddy is recognized as a leading expert by *Lexpert*.



Esther S.J. Oh, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management. Ms. Oh has written articles for *The Lawyer's Daily*, www.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.



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.



Lynne Westerhof, B.A., J.D. – Lynne is a charity and not-for-profit law associate whose practice focusses on tax law, charitable status applications, corporate governance matters, legal risk management, and counter-terrorism financing law as it applies to the provision of humanitarian aid. She articulated with Carters from 2021 to 2022 and joined the firm as an associate following her call to the Ontario Bar in June 2022. In addition to her work assisting charities and not-for-profits, Lynne assists with Carter's knowledge management, research, and publications division.



Cameron A. Axford, B.A., J.D., Student at Law - Cameron graduated from the University of Western Ontario in 2022 with a Juris Doctor. While studying at law school, he was involved with Pro Bono Students Canada in the Radio Pro Bono program and participated in the BLG/Cavalluzzo Labour Law Moot. Prior to law school, Cameron studied journalism at the University of Toronto and Centennial College, receiving a BA with High Distinction from the former. He has worked for a major Canadian daily newspaper as a writer. Cameron has experience doing volunteer work for social development programs in Nicaragua and in leadership roles in domestic philanthropic initiatives.

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THE 2023
***Carters Spring Charity &
Not-for-Profit Law Webinar***
Thursday, March 2, 2023

LIST OF POWERPOINTS

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- ◆ **Essential Charity & NFP Law Update**
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Transitioning Under the ONCA: More Complicated Than You Think**
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **The Lowdown on Liability Waivers for Charities and NFPs**
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **Developing Trends in Charity and NFP Sector as Seen by ONN**
Cathy Taylor, Executive Director, Ontario Nonprofit Network (ONN)
(Audio only)
- ◆ **CRA Draft Guidance on Qualifying Disbursements: A Work in Progress**
Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **Preparing for a Cyber Attack and Data Breach – Why Charities & NFPs Need an Incident Response Plan**
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **Leasing 101: What Charities & NFPs Need to Know Before Signing**
Adriel N. Clayton, B.A. (Hons), J.D.
- ◆ **Policy Development at the Charities Directorate**
Sharmila Khare, Director General, Charities Directorate, CRA and Robert Delaney, Director of the Policy, Planning and Legislation Division, Charities Directorate, CRA
(Audio only)

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ESSENTIAL CHARITY & NFP LAW UPDATE

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


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2

OVERVIEW



- All information in this PowerPoint is current as of February 27, 2023, but is subject to change
- 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

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3

A. BILL C-32, FALL ECONOMIC STATEMENT IMPLEMENTATION ACT, 2022

1. Overview

- The 2022 Federal Budget was tabled on April 7, 2022. Most of its proposed changes affecting charities were implemented by Bill C-19 and Bill C-32
 - Bill C-19 (*Budget Implementation Act, 2022, No. 1*) received Royal Assent on June 23, 2022 and amended the *Income Tax Act* (ITA) to allow charities to make qualifying disbursements to qualified donees and grantee organizations
 - Bill C-32 (*Fall Economic Statement Implementation Act, 2022*) was introduced in the House of Commons on November 4, 2022 and received Royal Assent on December 15, 2023

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4

2. Changes to the Disbursement Quota

- Bill C-32 introduced the following changes to the disbursement quota (DQ), which came into effect on January 1, 2023:
 - Increased the DQ rate from 3.5% to 5% for applicable property (*i.e.* property not used directly in charitable activities or administration) where the value of that property exceeds \$1 million
 - Clarified that expenditures on administration and management of a charity do not satisfy the DQ
 - Allows the CRA to deem that a charity's DQ obligation is reduced (rather than the earlier process which allowed the CRA to deem that a charity had met the DQ)
 - The CRA is permitted to release information about applications to reduce a charity's DQ obligation
 - Charities may no longer accumulate property for a particular purpose such that the income earned from this property is not counted in the DQ calculation

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5

3. Changes to Trust Reporting Requirements



Bill C-32 introduced changes originally announced in Budget 2021 that amend subsection 150(1.1) and add subsection 150(1.2) to the ITA so that charities with internal trusts (such as endowments) may be required to file separate T3 information returns for these trusts if they do not fall under a list of exceptions in 150(1.2)



Changes come into effect for taxation years ending **after** December **30**, 2023 (*i.e.* taxation years ending **on** December **31**, 2023 or any time after that)



The exact effect of this legislation remains unclear, as it has been the CRA's long-term administrative policy not to require separate T3s for internal trusts of charities, such as endowments

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6

4. Addition of New CRA Audit Powers

- Bill C-32 amended section 231.1 of the ITA to expand the audit and examination powers given to authorized persons (generally, the CRA) in relation to the administration and enforcement of the ITA
- Now, an authorized person may – in relation to the administration and enforcement of the ITA – require a taxpayer or any other person to
 - participate in a video-conference or other form of electronic communication
 - give verbal responses to questions related to the administration or enforcement of the ITA
 - answer questions in writing, in any form specified by the authorized person
- These amendments came into force upon Royal Assent, on December 15, 2022

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7

B. CRA UPDATE

1. Qualifying Disbursements

- In response to amendments to the ITA allowing charities to make qualifying disbursements, the CRA published draft guidance CG-032 *“Registered charities making grants to non-qualified donees (draft)”* on November 30, 2022




– Deadline for feedback was January 31, 2023

– The draft guidance will be discussed in more detail in Terrance S. Carter’s presentation *“CRA Draft Guidance on Qualifying Disbursements: A Work in Progress”*


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8



The CRA Charities Directorate has said that it is currently updating the T3010, Registered Charity Information Return (and accompanying guide T4033) to reflect the rules regarding making grants to non-qualified donees which they expect to make available in Spring 2023



Until the T3010 and T4033 are updated, charities are not required to report their granting activities, though they are required to keep adequate books and records with enough information for the CRA to assess whether the charity is operating in accordance with the ITA

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9

2. Update Regarding Disbursement Quota Rules

Amendments to the DQ came into effect on January 1, 2023

The CRA announced on February 21, 2023 that over the coming months it will be updating its website, forms, and other publications to reflect these new rules

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10

3. Statement from Taxpayers' Ombudsperson

- Following the Taxpayer's Ombudsperson's appearance before the Standing Senate Committee on Human Rights to discuss the progress of his office's review of the CRA's treatment of Muslim charities, the Ombudsperson provided a statement on November 21, 2022, stating that:

- it would be impossible to validate certain aspects of the CRA's practices because of legislation (e.g. s. 241 of the ITA) and CRA policy (e.g. practice not to disclose risk assessment process because of national security concerns)

- some participants told his office they felt they had been unfairly selected and/or intimidated, but these allegations could not be verified without access to complete taxpayer files

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11

C. PROVINCIAL LEGISLATION

- Alberta's new *Trustee Act* came into force on February 1, 2023 and contains new provisions regarding charitable trusts

- Saskatchewan's new *Non-profit Corporations Act, 2021* will come into force on March 12, 2023 except for a select few subsections concerning manual signatures on certain security certificates
 - The *Non-profit Corporations Regulations, 2022* under this act will come into force on the same day

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12

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA")
 - Reminder that the three year transition period expires on October 18, 2024
 - For more details see presentation "*Transitioning under the ONCA: More Complicated Than You Think*" by Theresa Man

- New Brunswick adopted Bill 19, *Fiduciaries Access to Digital Asset 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
 - It will be interesting to see if other provinces adopt similar legislation related to digital assets going forward

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13

D. CASE LAW

1. *Leduc Society for Christian Education et al. v The King*, 2022 TCC 114 (October 5, 2022)

- A group of registered Christian education charities in Alberta, all of whom operated publicly-funded Christian schools (the “Schools”) collected fees from families and issued official tax receipts for 100% of these fees
 - School boards in Alberta may offer alternative education programs, and fees may be charged, but only for non-instructional costs
- The Minister of National Revenue brought penalties against the Schools for issuing receipts for these fees on the basis this was not in accordance with the ITA
- The court found that the fees were a contractual condition of enrolment and that the families were receiving a benefit in return, therefore a charitable receipt could not be issued

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14

2. *Fortius Foundation v Canada (National Revenue)*, 2022 FCA 176 (October 19, 2022)

- A charity received notice from the CRA of its intention to publish a notice in the Canada Gazette revoking its charitable registration
- The charity brought a motion before the Federal Court of Appeal for interim relief to enjoin the Minister of National Revenue from publishing the notice of its revocation until after the charity had the opportunity to pursue an internal appeal process with the Minister
- The court was not convinced that the charity had provided sufficient evidence that there would be irreparable harm if the notice was published. It further found that the balance of convenience favoured the Minister because of the public’s legitimate interest in the enforcement of the ITA
- This case demonstrates that it is extremely difficult to persuade the court to delay the publication of a notice of revocation even while a charity is disputing the decision to revoke

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15

3. *Fletcher's Fields Limited v The Ontario Rugger Union*, 2023 ONSC 373 (January 16, 2023)

- Fletcher's Field Limited ("FFL") was incorporated as a for-profit company under the Ontario *Corporations Act*, but operated as a not-for-profit dedicated to the promotion and development of rugby in the GTA.
 - The Ontario Rugger Union ("ORU") and its rugby clubs (there were five clubs at the time of the court decision) were shareholders of FFL
 - 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 the shareholders by way of dividend, property, profit, etc.

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16

- By 2021, FFL had been experiencing financial difficulties and sold the six rugby fields and sold the fields for \$21.5 million
- FFL's governing documents did not contain any provisions regarding how assets were to be distributed upon dissolution
- \$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 fields as a trustee for a specific, non-charitable purpose trust for the promotion and playing of the sport of rugby

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- Even though FFL's corporate documents said that shareholders (ORU and the clubs) could not receive property from FFL, the court required FFL to equally distribute remaining net proceeds to its shareholders in accordance with the Ontario *Business Corporations Act*
- 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 effect of this decision was that funds went to the ORU and the clubs – organizations with the purpose of promoting rugby

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18

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

- Human Concern International ("HCI") had applied to the Tax Court of Canada ("TCC") for a postponement of the one-year suspension of receipting privileges HCI had received from the CRA. The TCC dismissed the application, so HCI applied to the Federal Court of Appeal ("FCA")
- The FCA dismissed HCI's 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")
- The SCC dismissed HCI's application for leave to appeal
- This case highlights that charities will generally face an uphill battle when requesting a court to postpone the application of a sanction, given the high threshold to prove that to do so would be "just and equitable"

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5. *Howley v. Cape Breton University Board of Governors*, 2023 NSSC 34 (February 6, 2023)

- A Member of a university's Board of Governors (the "Board") sought judicial review of two decisions by the Board to exclude him from an *in camera* portion of a Board meeting on October 22, 2021
- The Board was the incorporated entity governing the university, and had been formed by a special act which gave it the power to make by-laws, rules and ordinances for the regulation of its own meetings, procedures, and orders of business
- In March 2021, the Board adopted a policy that certain topics (such as personnel issues) would be treated *in camera* and that certain portions of each Board meeting would be held *in camera*

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The Member was the president of the university's faculty association and was therefore not considered to be an "external board member"

The Board held a portion of the October 22, 2021 meeting *in camera* such that only external board members could attend and issued a decision that the Member could not attend this *in camera* portion

The Court found that the decision to exclude the member was reasonable since the Board was following its own policy (and the Court had not been asked to review the reasonableness of the policy itself) and acted in accordance with its governing documents and legislation

This case demonstrates that if a court is to be asked to find that a not-for-profit corporation was acting reasonably and fairly, as a prerequisite the not-for-profit should be complying with its policies, by-laws, and governing legislation

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THE 2023
*Carters Spring Charity &
Not-for-Profit Law Webinar*
Thursday, March 2, 2023

TRANSITIONING UNDER THE ONCA: MORE COMPLICATED THAN YOU THINK

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


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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Carters Spring Charity and Not-for-Profit Law Webinar</h2> <p>March 2, 2023</p>		
<h3>Transitioning under the ONCA : More Complicated Than You Think</h3> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001</p>			
<p>© 2023 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="264 834 644 874">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="644 834 1222 874">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
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2	
	<h2>ONCA</h2> <ul style="list-style-type: none">■ Beginning of a New Era■ New legislation■ New rules■ New documents required• Can be COMPLICATED!!
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A. ONCA IS FINALLY IN FORCE

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now applies to non-share capital membership corporations under Part III of *Ontario Corporations Act* (“OCA”)
- New online Ontario Business Registry (“OBR”) also launched on October 19, 2021
- This presentation does not cover special rules for special act corporations and share capital social clubs
- This presentation is a general overview of the process to comply with the ONCA – called “ONCA Transition” process

New legislation

So...

What does it mean to me?

5

B. IMPLICATIONS OF ONCA PROCLAMATION

Automatic application of ONCA

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

Effect of doing nothing

- Corporation will not be dissolved
- The following governing documents will continue to govern for 3 years until October 18, 2024, even if inconsistent with ONCA
 - Letters patent (“LP”)
 - Supplementary letters patent (“SLPs”)
 - By-laws
 - Special resolutions
- Starting on October 19, 2024, inconsistent provisions (with a few exceptions) will be deemed to be amended to the extent necessary to comply with ONCA - will result in uncertainty – **complicated guessing game**

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Optional transition process

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

End result

- After the transition process, corporation will be governed by
 - LP & SLPs, as amended by Articles of Amendment – consider consolidating them in Restated Articles
 - ONCA-compliant by-law

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D. ONCA Framework

Rules in Act	Rules in Regulations under the ONCA
ONCA	
Provisions in articles	Provisions in by-laws

- ONCA is modeled after rules for public for-profit companies
- Lots of rules in ONCA that were not in the OCA
- **Complicated rules and how the rules work with each other**

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9		
Three Types of Rules in ONCA		
Mandatory Rules	Cannot be overridden by the articles or by-laws	Corporations must follow these rules
Default Rules	Apply automatically if articles/by-laws silent	Corporations may override the default rules Overriding provisions may be set out in articles or by-laws – depending on the rules in question
Optional Rules	Options for corporations to opt in to have certain optional rules apply	Corporations may opt in to the options available Opt-in provisions may be set out in articles or by-laws – depending on the rules in question
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New documents required
So...
More paperwork?

-10

11

C. ONCA TRANSITION DOCUMENTS

#1 Need ONCA-Compliant By-law

- Current by-law will likely
 - Have provisions that do not comply with ONCA
 - Have gaps in the by-law that do not address some of the new ONCA rules
- Need to know how the ONCA rules works in order to know
 - What rules must be followed
 - What rules may be overridden, how to override, and where to put overriding provisions (articles vs by-law)
 - What rules can be opted in, and where to put the opt-in provisions (articles vs by-law)
 - What else to include in by-law?
- Question – amend current by-law or draft a fresh by-law?
- **Complicated, not just following a template**

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#2 Articles of Amendment and Optional Restated Articles

- Simply adopting an ONCA-compliant by-law is not sufficient
- LP and SLPs need to be amended to comply with new ONCA requirements – by Articles of Amendment
 - Set out the following in the articles
 - Number of directors
 - Number of membership classes and voting rights
 - Dissolution clause needs to comply with new rules in the ONCA
 - Add “special provisions”
 - Default “special provisions”
 - Other provisions may be required to co-ordinate with mechanisms in the by-law

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13

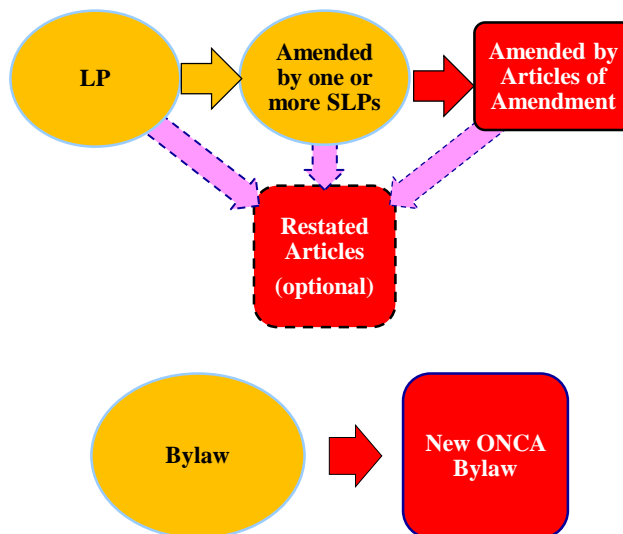
- After amendment by Articles of Amendment, corporation will need to flip back and forth between the following documents
 - LP
 - LP as amended by SLPs in the past
 - LP as amended by Articles of Amendment
- Can consolidate all these into Restated Articles of Incorporation
 - Will replace LP, all SLPs, and Articles of Amendment
 - Need to carefully consider how to consolidate
 - Additional filing fees and processing time
 - Certain default provisions will be automatically inserted into the articles – may need to anticipate them when doing Articles of Amendment
- **Complicated, not just filling out forms**

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Transition Documents



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*What do I DO to
transition??*

•15

16

E. STEPS TO TRANSITION UNDER ONCA

COLLECT GOVERNING DOCUMENTS

Confirm corporation is actually under the OCA

Collect LP, SLPs, by-laws (including amendments)

Collect governance related documents - e.g., organizational charts, policies, manuals

REVIEW GOVERNING DOCUMENTS

Do they reflect current governance process? If not, what is current governance process?

Are changes desired? Write them down, come up with a wish list

STUDY KEY ONCA FEATURES

Determine how current governance structure will be impacted by the ONCA

Understand the ONCA framework and rules in the ONCA and Regulations

Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

17	
PREPARE ARTICLES OF AMENDMENT AND RESTATED ARTICLES	<p>Articles of Amendment – to amend LP and SLPs</p> <p>Optional to prepare Restated Articles of Incorporation – to consolidate provisions in LP, SLPs and Articles of Amendment</p>
PREPARE ONCA-COMPLIANT BY-LAW	<p>By-law will need to be replaced or substantially revised because the ONCA is very different from OCA</p> <p>Generally easier to start with fresh ONCA by-law than to amend current by-law</p> <p>Some changes may require consideration and consultation with members, some changes may only be administrative</p>
APPROVAL AND FILINGS	<p>Board and members to adopt articles and by-law</p> <p>File Articles of Amendment (and Restated Articles) with the Ministry (but not by-laws), Ministry will issue Certificate of Amendment (and Certificate of Restated Articles)</p> <p>Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate</p>
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<h2>Company key and filing/processing problems</h2> <ul style="list-style-type: none"> • There are glitches with the forms and online filing process • Need to write to the Ministry to request the “company key” <ul style="list-style-type: none"> – Company key will be mailed to the head office on record with the Ministry – What if head office location on record with the Ministry is not up-to-date? • Need formal email address for each corporation 	
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Consent from Ontario Public Guardian and Trustee ("PGT")

- For charities - need to obtain consent from PGT under certain situations for charities

(a) Revisions to purposes

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

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

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- There may be situations where “after acquired” clause may not be appropriate
 - Such as updating old language in the purposes
 - Need to write to PGT in advance to obtain their written consent to waive the after acquired clause
 - Indicate in the Articles of Amendment that consent has been obtained (not need to file a copy)
 - Retain the consent letter in the records of the charity

(b) Other situations where PGT’s consent is required

- Rules on PGT’s consent if corporate name includes the word “Foundation” or “Charity”
- PGT’s consent is required if PGT has requested notification of any application for changes with respect to the corporation

OH!!!

So...

What else is there?

F. ONCA ISSUES TO CONSIDER?

- Rules in the ONCA and OCA are very different
- ONCA has many more rules than OCA
- Many governance areas may require changes
- For example - Do you know these rules in the next few slides? **For your bed-time reading tonight 😊**
 - Extensive membership rights provided in ONCA
 - Must follow ONCA prescribed process in order to discipline or terminate members
 - Rules for membership meetings
 - Rules for board term, election ...
 - Public benefit corporations
 - When to do an audit vs review engagement vs compilation

For Reference:
*Examples of common
 ONCA issues to consider*

25

Membership

Issues to consider	<p>Choice of broad-based membership or limited membership</p> <hr/> <p>Must clearly set out membership qualifications and their rights</p> <hr/> <p>Must have clear membership admission process</p> <hr/> <p>Must have clear membership removal process that complies with ONCA requirements</p> <hr/> <p>Must have clear membership records</p> <hr/>
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26

Membership (examples of key rules)

Basic concepts	<p>Corporation must have members</p> <hr/> <p>By-laws must set out conditions for membership</p> <hr/> <p>Default rule is 1 vote per member (subject to articles)</p> <hr/>
Classes	<p>Must set out the classes of members</p> <hr/> <p>If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class</p> <hr/>
Default rules to terminate members	<p>Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination</p> <hr/>

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May allow directors, members or committee to discipline members or terminate	Articles/by-laws must set out circumstances and the manner in which the power may be exercised
	Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard
	Member may apply for compliance or restraining order if power misused
Extensive rights	Requisition members' meeting (by 10% of voting right)
	Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
	Submit proposal to nominate directors (by 5% of voting right)
	Any member can nominate candidates for election to the board from the floor of AGMs
	Access corporate records (e.g., membership list)
	Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)
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Membership Meetings (examples of key rules)	
AGMs	Must be held within 15 months of last AGM but not later than 6 months of year end (same as old OCA rules)
Notice of meeting	Must be sent 10 to 50 days before the meeting
Record date	Directors may fix "record date" of no more than 50 days before members' meeting (to determine who are members for the meeting)
Voting	Optional proxy votes, voting by mail, voting by telephonic or electronic means
Proxyholders	May limit proxyholders to members
Circulation of financials	FS, auditor/review engagement report, & information required by articles or by-laws must be given to members upon request at least 21 days (or as prescribed in regulations) before AGM
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Directors (examples of key rules)	
Number & Qualifications	Minimum 3 directors
	Articles may provide maximum & minimum range; or a fixed number
	Directors not need to be members
Election and appointment	Directors elected at AGMs (cannot be elected outside AGMs)
	May have <i>ex officio</i> directors
	Directors may appoint directors between AGMs (1 year term, 1/3 cap)
	If different member groups elect x directors to the Board, must structure members as separate classes
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Term	Length of a term is maximum 4 years
	No limit on maximum number of terms
	May have staggered terms for directors
	Elected directors (not <i>ex officio</i> directors) may only be removed by simple majority vote of members (mandatory)
	Directors must consent in writing to take office
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31

Objective
standard of
care for
directors and
officers

Act honestly and in good faith with a view to the best interests of the corporation

Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances

Reasonable
diligence
defence for
directors

Not liable if fulfilled their duty if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances

Defence includes good faith reliance on financial statements and reports of professionals

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32

Public Benefit Corporations (PBCs)

PBCs include



(1) Charitable corporations

* Means having purposes recognized to be charitable at common law

* Whether it is a registered charity is irrelevant

(2) Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from the following sources => Need to monitor revenue sources and level annually

(i) Donations or gifts from persons who are not members, directors, officers or employees of the corporation

(ii) Grants or similar financial assistance from the federal, provincial or municipal government or government agency

Change
status

If a non-charitable corporation reaches threshold, it will be deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year

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Consequences of being a PBC	Not more than 1/3 of the directors may be employees of the corporation or its affiliates
	Higher thresholds for dispensing with appointing an auditor or person to conduct review engagement
	On dissolution of <u>charitable PBCs</u> - net assets must be distributed to a <u>Canadian corporation that is a registered charity with similar purposes</u> , or to the government
	On dissolution of <u>non-charitable PBCs</u> - net assets must be distributed to a <u>PBC with similar purposes</u> , to a <u>Canadian corporation that is a registered charity with similar purposes</u> , or to government
Liquidation and dissolution of a non-PBC	Net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)
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Financial Review	
Options	Audit
	Review engagement
	Compilation
Choice of options - factors	PBC or non-PBC
	Revenue threshold in the year
	Membership approval
Thresholds	Normal rule - members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting
	There are rules for exemption (see tables on next 2 slides)
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35

Rules for PBCs

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

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36

Rules for Non-PBCs

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

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THE 2023
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Thursday, March 2, 2023

THE LOWDOWN ON LIABILITY WAIVERS FOR CHARITIES AND NFPS

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 BARRISTERS SOLICITORS TRADEMARK AGENTS	Carters Spring Charity and Not-for-Profit Law Webinar March 2, 2023
The Lowdown on Liability Waivers for Charities and NFPs	
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OVERVIEW	
<ul style="list-style-type: none">• Introduction• What is a Liability Waiver?• Enforceability of Liability Waivers• Best Practices for Liability Waiver Enforceability• Liability Waivers and Minors• Liability Insurance• Key Takeaways	
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3

A. INTRODUCTION

- Liability waivers may be used by charities and NFPs in providing products and services to the public or when recruiting members or volunteers, particularly in high risk situations
- Liability waivers, though, are often the subject of civil litigation, as their purpose is to require a person to give up their legal rights to sue for injury, property damage or death
- Drafting and processing of liability waivers must be done very carefully to maximize the chances of legal enforceability

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B. WHAT IS A LIABILITY WAIVER?

- Written contract between the signee and the organization providing services, activities, programs
- Common risk management tool
- If well drafted, can provide full legal defence to civil claims
- Sometimes necessary to acquire liability insurance
- *Volenti non fit injuria* – “to a willing person, injury cannot be done”
- It is in essence an onerous type of contract which asks signatories to waive basic legal rights, including the right to sue
- Consider the following examples dealing with the enforceability of liability waivers from caselaw

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C. ENFORCEABILITY OF LIABILITY WAIVERS

1. Primary Cases where Liability Waiver Enforced

Isildar v. Kanata Diving Supply
[2008] O.J.
No. 2406
(OSCCJ)

- Reported on in [Charity & NFP Law Bulletin No. 178](#)

- Case provides guidance on key elements of well-drafted liability waiver

FACTS:

- Mr. Isildar had died while partaking in a recreational scuba program
- The court found that the liability release (waiver) and assumption of risk agreement that he had signed were properly drafted, and enforceable
- As a result, the lawsuit by surviving relatives was dismissed

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- *Isildar* established a three-step legal test for the validity of liability waivers (para 634):

1. Is the waiver valid in the sense that the plaintiff knew what they were signing?

- Did the presenting party take reasonable steps to ensure the nature of the document was known by the signatory

2. What is the scope of the waiver and is it worded broadly enough to cover the conduct of the defendant which resulted in the injury?

3. Are there any factors making enforcement of the waiver unconscionable?

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- The court found that Mr. Isildar was aware of the risks of partaking in a scuba diving program and knowingly waived his legal rights
- The defendants explained this sufficiently and presented the opportunity for participants to ask questions about the waiver
- The language of the waiver was broad enough to release the defendant from exposure to claims in both contract and tort, specifically contemplated the harm that befell Mr. Isildar, and sheltered them against claims from his heirs

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- The court also ruled that the waiver was not “unconscionable”
- The court followed earlier case law, stating that liability waivers for competent adults do not diverge from community standards of commercial morality to render them unconscionable or contrary to public policy
 - See later comments about liability waivers and minors

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Levitta v. Crew and True North Hockey Canada
2015 ONSC 5316

FACTS:

- Discussed in [Charity & NFP Law Bulletin No. 375](#)
- Mr. Levitta, a hockey player in an adult recreational league, was injured during a game by an opposing player
- Both the opposing player, who was blamed for Mr. Levitta's injuries, and the league were sued
- The court dismissed argument that the waiver was unenforceable
- The waiver clearly addressed the inherent risks of playing ice hockey and the type of injury which Mr. Levitta suffered (a broken leg)

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Other Cases where Liability Waiver Enforced

- *Loychuck v Cougar Mountain Adventures Ltd.*, [2011] B.C.J. No. 254 ([Charity & NFP Law Bulletin No. 251](#)) – Zipline injury waiver found to be enforceable
- *Quilichini v Wilson's Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd.*, 2017 SKQB 10 ([Charity & NFP Law Bulletin No. 404](#)) – Go-kart injury waiver found to be enforceable
- *Arif v Li*, 2016 ONSC 4579 ([Charity & NFP Law Bulletin No. 391](#)) – Rock climbing injury waiver found to be enforceable

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2. Case where Liability Waiver *Not* Enforced

Peters v Soares, 2019 BCSC 189

FACTS:

- Discussed in [Charity & NFP Law Bulletin No. 444](#)
- The liability waiver was contained in a club membership agreement for the defendant martial arts academy
- The waiver did not make mention of risk of injury during competitions
- The plaintiff was injured during a competition and alleged negligence on the part of the academy
- The court stated that the waiver did not extend to competitions as it only mentioned a risk of injury during classes
- “releases only cover matters specifically in the contemplation of the parties at the time the release was given”

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12

D. BEST PRACTICES FOR LIABILITY WAIVER ENFORCEABILITY

- Liability waivers may reduce risks of lawsuits and liability, if best practices are followed, including:

1. Use clear and precise language and include relatives of participant as parties excluded from making claims if damage is suffered by the participant

2. Make waivers available in advance of registration

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13

3. Use reasonable steps to bring the waiver to the attention of the signatory, including:

- a) Posting a copy to the organization's website
- b) Make the signing of the waiver mandatory for registration and do not accept payment until the waiver is signed
- c) Ensure the signatory has time to read the waiver
- d) Make it available in other languages
- e) Highlight most significant elements of document
- f) If online, ensure the signatory clicks "I agree" using appropriate programs

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- 4. Ensure a comprehensive description of event, risks, and waiving of legal claims
- 5. Include indemnity clause for harm done to other participants, and costs incurred by the organization
- 6. Include liability waiver for medical treatment
- 7. Include a media release waiver
- 8. Include waiver of liability for organization AND its employees, volunteers, officers, directors and members
- 9. Ensure waivers are properly organized and stored for later reference

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E. LIABILITY WAIVERS AND MINORS



- Parents often sign liability waivers on behalf of their minor children
- However, longstanding Ontario case law brings the validity of these waivers into question
- Liability waivers are likely unenforceable when signed on behalf of minors
- Parental indemnities are also likely unenforceable
- Some insurers still require organizations they insure to use them for dissuading claims and for claim settlement negotiation purposes

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F. LIABILITY INSURANCE




- A waiver is not a replacement for liability insurance
- Events with any risk of injury or property damage require liability insurance to provide organization with legal liability protection
- This can prevent the organization and its members, employees, volunteers, officers and directors from being liable for monetary damages and legal costs
- Serious personal injury claims can be in the millions of dollars
- Speak to your insurance broker to secure the level and type of liability insurance that is appropriate for your organization


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G. KEY TAKEAWAYS

- 

If an organization uses liability waivers, make sure they are customized to its specific programs, activities and events
- 

Once the liability waiver is properly drafted, make sure that those responsible for obtaining the waiver, from participants follow protocols to secure informed consent
- 


Liability waivers are not a substitute for following good safety practices and event management, which are also important factors in overall risk management
- 

If you are unsure if your event, program or activity is covered by liability insurance, ask your broker or insurer to give you a response in writing
- 

Finally, if unsure about the wording of your liability waiver, seek legal counsel

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THE 2023
*Carters Spring Charity &
Not-for-Profit Law Webinar*
Thursday, March 2, 2023

CRA DRAFT GUIDANCE ON QUALIFYING DISBURSEMENTS: A WORK IN PROGRESS

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Carters Spring Charity and Not-for-Profit Law Webinar</h2> <p>March 2, 2023</p>		
<h3>CRA Draft Guidance on Qualifying Disbursements: A Work in Progress</h3> <p>By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent tcarter@carters.ca 1-877-942-0001</p> <p>© 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"> 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
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2

OVERVIEW








- Background to Draft Guidance
- Changes to the ITA Introducing Qualifying Disbursement
- Brief Overview of Qualifying Disbursements
- Summary of the Draft Guidance
- Issues to Consider with the Draft Guidance
- Key Takeaways

- For more detailed commentary, please see *Carters Charity and Not-for-Profit Bulletins 519 and 518*, and see as well the submission by the [Canadian Bar Association to the CRA](#) dated February 6, 2023

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A. BACKGROUND TO DRAFT GUIDANCE

-  Charitable sector expressed concerns about the many problems with the CRA's "own activities" and "direction and control" regime
-  Reforms were proposed through Bill S-216 and an anticipated standard of "resource accountability" rather than a requirement of direction and control
-  Budget 2022 purported to make amendments to the *Income Tax Act* (ITA) in the "Spirit of Bill S-216"
-  Bill C-19 (Budget Implementation Act, 2022, No. 1) introduced "qualifying disbursements" that charities can make to "grantee organizations"
-  In its original form, Bill C-19 included proposed onerous regulations, especially with regards to required documentation for qualifying disbursements

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-  Lobbying by the charitable sector resulted in the removal of the onerous regulations from Bill C-19 in June 2022 prior to the Bill receiving Royal Assent
-  The CRA Draft Guidance "Registered charities making grants to non-qualified donees" was released on November 30, 2022
-  The deadline for comments on the Draft Guidance was January 31, 2023
-  The Draft Guidance will likely change before it is finalized some time later in 2023

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B. CHANGES TO THE ITA INTRODUCING QUALIFYING DISBURSEMENT

- On June 23, 2022, Bill C-19 amended the ITA to allow charities to make qualifying disbursements (disbursements by way of a “gift or otherwise making resources available”) to qualified donees or to “grantee organizations” (organizations that are not qualified donees, e.g. not registered charities) if:
 - (i) the disbursement is in furtherance of a charitable purpose 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 (i) and (ii)
- The Draft Guidance focusses mainly on (iii) above i.e. documentation required for qualifying disbursements to non-qualified donees

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C. BRIEF OVERVIEW OF QUALIFYING DISBURSEMENTS

Before Bill C-19 received Royal Assent, Canadian registered charities could only use their resources in one of two ways:

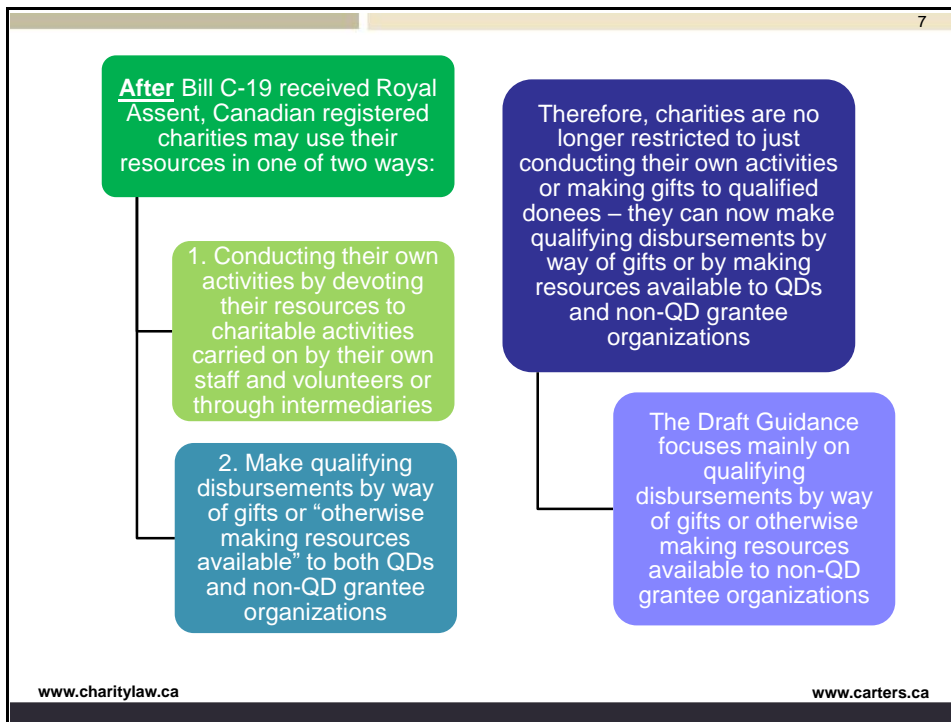
1. Conducting their own activities by devoting their resources to charitable activities carried on by their own staff and volunteers or through intermediaries

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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D. SUMMARY OF THE DRAFT 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” differs from “own activities (‘direction and control’) 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
- 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
 - Consider the accountability tools that the CRA recommends the charity implement, based on the grant’s risk level
 - Determine how to apply the accountability tools to mitigate risk and meet the 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 (described below)
- Granting Charitable Goods (described below)
- Reporting Grants in the T3010 Registered Charity Information Return for each grantee receiving grants in excess of \$5,000 – charity must show the purpose and total amount of each grant, as well as the name of grantees
- Granting of Real Property (e.g., land or 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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E. ISSUES TO CONSIDER WITH THE DRAFT GUIDANCE

1. Confusing Defined Terms of “Grants” and “Grant Making”

- The Draft Guidance states that it focuses “on making grants to grantees”, but the terminology of “grants”, “grant making” and “grantees” 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 <u>transfers</u> of both monetary and non-monetary resources, or otherwise making resources available, to a non-qualified donee (grantee).	<u>qualifying disbursement</u> means a <u>disbursement</u> by a charity, by way of a <u>gift</u> or by <u>otherwise making resources available</u> to a qualified donee, or a grantee organization

- Courts expect charities to comply with legislation as opposed to tax guidance, so these differences could have significance

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2. Imposition of Extensive Additional Requirements

- **Focus on Risk Matrix**
 - “risk” is mentioned 62 times in the Draft Guidance but is not mentioned at all in s 149.1 of the ITA
 - no indication of what the “risk” is that is to be avoided, so it is difficult to know how to assess risk factors
 - 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
 - risk matrix is very similar to US Treasury Risk Matrix for purpose of anti-terrorist financing avoidance under US law
- **Accountability Requirements and Tools**
 - “accountability” is mentioned 46 times in the Draft Guidance but is not mentioned at all in s 149.1 of the ITA
 - Suggested accountability tools are similar to the requirements for “expenditure responsibility” for US private foundations
 - the accountability tools are similar to the requirements in proposed ITA regulations that were removed from Bill C-19.

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- **Pooled Grants**
 - Before a charity can make a pooled grant with a non-qualified donee, 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 CG-002

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3. Unclear Explanation of “Otherwise Making Resource Available”

- The ITA clearly indicates that a charity can make “gifts” to non-QDs and can also “otherwise or “mak[e] resources available” to non-QDs
- 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 will be important when preparing agreements needed in order to make a “grant” to a non-QD

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4. Some Qualifying Disbursements do not Meet Disbursement Quota Obligations

The Draft Guidance does not mention the disbursement quota (“DQ”) or address how qualifying disbursements are treated for purposes of meeting the QD

Only qualifying disbursements that are gifts 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 certain 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 DQ, which would include making space or staff available, as well as making micro-finance loans and other types of impact investing

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5. Does not Reflect ITA Wording About Directed Gifts

- 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”
 - Such a gift is generally referred to in the Draft Guidance as a “directed donation”
- 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 an explanation regarding:
 - What it considers a “conduit” to be, or
 - How the ideas of “directed donations” and “conduits” are related
- It is also not clear in the Draft Guidance under what circumstances a charity will be considered to have made an express or implicit conditional gift, since conditional gifts have particular meaning at common law and the wording in the ITA will take precedent over the Draft Guidance

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6. Does not Address Charitable Purposes of Charities that only Make Gifts to Qualified Donees

- The Draft Guidance does not address how charities that have a single charitable purpose of making gifts to qualified donees may make qualifying disbursements to non-qualified donees
- Since qualifying disbursements need to be made to non-qualified donees “in furtherance of a charitable purpose of the charity,” it means that passive funding charities will not be able to make qualifying disbursements to grantee organizations because to do so would not further their charitable purpose
- It would be helpful if the Guidance would include sample wording of charitable purposes that could be used by charities in order to make qualifying disbursements

F. KEY TAKEAWAYS



The introduction of qualifying disbursements in the ITA represents a very important change in the law for charities in Canada, and a finalized Guidance from the CRA will set the standard for the approach charities will need to take in applying these recent amendments to the ITA



In the short term, charities will want to exercise caution and consult with their legal counsel before relying on the Draft Guidance in planning how to make qualifying disbursements



Hopefully, the CRA will carefully consider the feedback received from the charitable sector in looking to make the final version of the Guidance truly in “the spirit of Bill S-216”

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THE 2023
*Carters Spring Charity &
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Thursday, March 2, 2023

PREPARING FOR A CYBER ATTACK AND DATA BREACH – WHY CHARITIES & NFPS NEED AN INCIDENT RESPONSE PLAN

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Preparing for a Cyber Attack and Data Breach – Why Charities & NFPs Need an Incident Response Plan By Esther Shainblum, B.A., LL.B., LL.M., CRM eshainblum@carters.ca 1-877-942-0001 © 2023 Carters Professional Corporation	
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2

OVERVIEW



- Introduction
- Cyber Threat Actors
- All Organizations are Vulnerable
- Why an Incident Response Plan (IR Plan)?
- Duties and Obligations of Directors
- Framework for Development of IR Plan/Team
- Some Key Elements of an IR Plan

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A. INTRODUCTION

- A cybersecurity incident is a matter of “when” not “if”
- Charities and Not-for-Profits (NFPs) need to be ready to respond appropriately and effectively to an incident when it occurs
- Canadian Centre for Nonprofit Digital Resilience – NFPs face many of the same cybersecurity threats as other Canadian organizations including ransomware attacks, phishing attacks, and data breaches. Other threats, including accidental or natural hazards (e.g. fires, floods), can put digital information and systems at risk
- Having a tested incident response plan (IR Plan) in place will allow a charity or NFP to better handle, respond to and recover from a cybersecurity incident
- An effective IR Plan can significantly reduce costs associated with cyber security incidents and help protect an organization’s reputation and stakeholder trust

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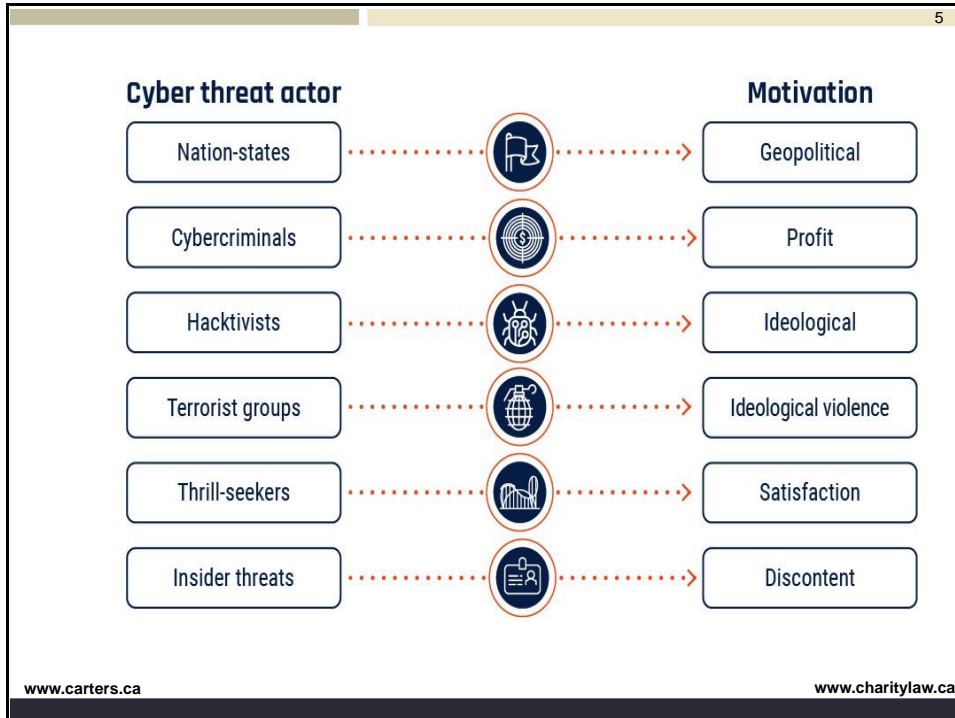
B. CYBER THREAT ACTORS



- Canadian Centre for Cyber Security (CCCS) defines cyber threat actors as “groups or individuals who, with malicious intent, aim to exploit weaknesses in an information system or exploit its operators to gain unauthorized access to or otherwise affect victims’ data, devices, systems, and networks”
- Cyber threat actors can target vulnerabilities from anywhere in the world and can even be inside an organization
- The following slide are the types of cyber threat actors identified by CCCS

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C. ALL ORGANIZATIONS ARE VULNERABLE

- Cyber threat surface - Service arrangements, supply and vendor chains, the increased deployment of internet connected devices, remote working, information flow and human error can all be targeted by cyber threat actors to gain access to an organization's information systems
- The Ponemon Institute's "Cost of a Data Breach Report 2022" reported that ransomware caused 11% of breaches, destructive malware caused 17%, 19% were caused by supply chain attacks and human error caused 21% of breaches
- Phishing, business email compromise and third party software vulnerabilities were among the most common attack vectors

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- According to Ponemon, in 2022 it took an average of 207 days to identify a breach and 70 days to contain the breach – “data breach lifecycle”
- The shorter the data breach lifecycle, the less expensive the breach
- The average time to identify and contain ransomware and destructive malware attacks was significantly higher than average
- Phishing, business email compromise and supply chain attacks also took longer to identify and contain
- The global average cost of a data breach reached an all time high in 2022, with Canada being the third highest at \$5.64 million USD per data breach, an increase of 4.4% from 2021

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D. WHY AN INCIDENT RESPONSE PLAN (IR PLAN)?

Ponemon 2022 - Developing and testing IR plans is one of the most effective ways to mitigate the cost of a data breach

Ponemon 2022 - Organizations that had regularly tested IR teams/plans in place reported significantly lower average costs of a data breach – average of 58% lower or \$2.66 million USD

83% organizations reported more than one cyber incident

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E. DUTIES AND OBLIGATIONS OF DIRECTORS

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

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- Directors of charities and not-for-profits can be found liable in tort for negligent mismanagement if their carelessness in the oversight of the corporation's operations leads to injury
- Directors and officers who fail to put sufficiently robust measures in place to protect personal information could face personal liability
- In order to avoid liability, directors must be able to demonstrate that they took appropriate steps to identify, manage and mitigate privacy and cyber security risks

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To show they met the duty of care, directors and officers of charities and not-for-profits should take steps to ensure that the organization puts in place appropriate safeguards to protect personal information and to prepare for and respond to privacy breaches and cyber attacks [not exhaustive]

→




“Business Judgment Rule” – The courts will not second guess directors who acted prudently and on a reasonably informed basis. Perfection is not required.

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F. FRAMEWORK FOR DEVELOPMENT OF IR PLAN/TEAM

- Basic principles/activities an organization can apply to develop an IR Plan team [based on National Institute of Standards and Technology (NIST) framework, SANS Institute Handbook and CCCS]
- Not “one size fits all” – organizations must customize to their own individual risk exposures and tolerances
- But provides flexible framework for developing IR Plan and teams

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1. Prepare

- Organizations must understand their individual business context, resources and cyber security risks

This phase includes – Inventory of data and information systems – *e.g. location of data, critical functions, resources, who has access to what, prioritize critical data assets*

Risk assessment – *e.g. identify risks and gaps*

Develop policies and procedures – *e.g. IT governance, reporting*

Develop IR Plan strategy – *e.g. how to identify and contain a breach, roles and responsibilities, communications plan*

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- Establish response team – *cross functional e.g. IT, executive, communications, legal*
- Train and educate employees – *e.g. anti-phishing, testing, drills, central point of contact*
- Put in place appropriate physical, administrative and technological safeguards to limit or contain the impact of a potential cybersecurity event, *e.g.:*

- *Hardware, software*

- *Regular backups*

- *Physical security/workplace policies*

- *Identity management and access control measures*

- *Asset tracking and endpoint management of devices*

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2. Detect/Identify Cyber Security Incident



- As per Ponemon, timely discovery of cyber security incidents is crucial to responding and keeping damage and costs down
- The shorter the data breach lifecycle, the less expensive the breach
- The organization must put in place functions/mechanisms/supports that will allow it to gather data from various sources to find anomalies and deviations
 - e.g. continuous monitoring, audits, firewalls, intrusion detection systems, anti-virus alerts, client complaints
- Analyze to determine whether an event is a threat – not every event is a cyber security incident
- If identified as a threat – activate IR Plan

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3. Respond/Contain/Eradicate

- Implement IR Plan team to contain impact of cyber security incident and prevent further damage
- Must take proper steps and involve the right people – acting hastily or in panic can make it more difficult to contain, preserve evidence and recover
- Identify root cause, remove threats – short and long term fixes
- Includes: e.g. activating IR Plan, retaining legal counsel to preserve privilege, contacting external forensic investigators/IT security consultants, contacting insurer, isolating affected workstations/systems, disabling connectivity, shutting down employee access, restoring systems from backup

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4. Recover/Understand/Lessons Learned

- Timely recovery to normal operations is essential to reduce impact of the cyber security incident.
Includes:
 - Ensure that the threat was eradicated
 - Ensure integrity of system has been fully restored
 - Determine scope of the incident, what data/information was compromised, whether there are any legal obligations (e.g. breach notification) or contractual rights/obligations that must be enforced or fulfilled
 - Take steps to patch/address/replace the vulnerability that led to the breach in the first place

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- Identify areas for improvement in systems, security controls
- Preserve evidence and document the entire incident including when and how the breach was detected, all steps taken to eradicate it, what data was affected etc.
- Breach notification if legally required or if deemed advisable (legal advice)
- Analyze/discuss lessons learned – amend IR Plan as needed to correct flaws and prepare for next time

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G. SOME KEY ELEMENTS OF AN IR PLAN




Emergency contact list – who should be contacted in event of a breach and who does what (e.g. contacting forensics team, legal, consultants etc.)




Technical steps such as how to do system restore from backup, process for disconnecting from the internet, who decides



Diagrams/descriptions of the IT system



Processes for preserving evidence such as logs and timestamps




Make sure everyone has a hard copy as well as an electronic copy for obvious reasons

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H. TEST IR PLAN




- Important to do regular testing exercises of the IR Plan to build “muscle memory” and resilience
- Tabletop exercise – have all IR Plan team members gather to discuss possible breach scenarios and responses
- Walk through simulation – walk through the plan to see if it works – call the different phone numbers, see how long it would take to find the appropriate people, how long it would take them to accomplish their assigned tasks
- Realistic – create a simulated threat or interruption, see how the IR Plan works, debrief and generate feedback about how the IR team functions
- May need outside experts/facilitators to assist with testing, debrief, feedback


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I. KEY TAKEAWAYS

- 

Experiencing a cyber security threat is “when” not “if”
- 


Directors and officers of charities and not-for-profits need to ensure that the organization puts in place IR Plans to respond to privacy breaches and cyber attacks
- 

Key steps include Prepare, Detect, Respond and Recover – there is no one-size-fits-all solution, charities and NFPs must tailor their IR Plan to their own needs and risk exposures
- 

Regular testing of its IR Plan will allow a charity or NFP to better handle, respond to and recover from a cybersecurity incident

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THE 2023
*Carters Spring Charity &
Not-for-Profit Law Webinar*
Thursday, March 2, 2023

LEASING 101: WHAT CHARITIES & NFPS NEED TO KNOW BEFORE SIGNING

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Carters Spring Charity and Not-for-Profit Law Webinar</h2> <p>March 2, 2023</p>
<h3>Leasing 101: What Charities & NFPs Need to Know Before Signing</h3> <p>By Adriel N Clayton, BA (Hons), JD aclayton2@carters.ca 1-877-942-0001</p> <p>© 2023 Carters Professional Corporation</p>	
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2

REAL PROPERTY IS IN SHORT SUPPLY...



YOU GET A LEASE! AND YOU GET A LEASE!
AND YOU GET A LEASE!

EVERYBODY GETS
LEASES!

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3

A. ARE YOU SIGNING A LEASE OR LICENSE?

1. Property Rights

License:

A personal right between the licensor and licensee, *i.e.* the licensor does not receive any interest in the property

Lease:


Confers an interest in the property, i.e. a property right, binding on the property owner and on other persons

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4

- *Example:* I own land and give you the right to use and occupy my building
 - If occupation is via *license*, then when I sell the property to a third party, you cannot enforce a personal right (between me and you) against that third party
 - If occupation is via *lease*, the property right is capable of binding the third party purchaser
 - If your lease is registered on title, it would be binding on the third party purchaser



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Say hello to your new landlord



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2. Nature of Possession

- Lease:
 - *Generally confers exclusive possession for tenants*
 - *i.e. tenants are given “quiet possession” of the leased premises, to the exclusion of others including the landlord, subject to certain terms*
 - Terms of lease may provide situations where landlord can enter premises, e.g. to make emergency repairs or on tenant default
- License:
 - No exclusive possession is conferred, and licensor may move the tenant elsewhere in the premises, or licensee may share space with another party

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3. Period/Term of Agreement

- Lease:
- Generally for a set period of time (e.g. 5 years)
 - Some leases may confer rights to the tenant to extend the lease for a further period(s)
 - Generally no right to terminate early, unless “with cause”, e.g. if the tenant defaults
- License:
- Term tends to be for shorter or very specific periods of time, e.g. 6 months or “every Saturday and Sunday between 9:00am and 2:00pm”
 - Parties may be able to terminate on short notice, e.g. 1 month’s notice

B. WHAT TYPE OF LEASE ARE YOU SIGNING?

1. Nature of Leased Property

- Residential Lease
 - Lease of a rental unit in a house or residential complex for the purpose of housing
 - In Ontario, governed by the *Residential Tenancies Act*
 - Must be on the government’s standard form lease document as of April 30, 2018
- Commercial Lease
 - Lease between landlord and a “business” tenant, generally for commercial property (e.g. industrial building, unit in an office building, shopping plaza unit)

9

- Land Lease/Ground Lease
 - Tenant leases vacant land and moves or constructs building on lands
 - *E.g.* mobile home, Pearson airport, University of Toronto's 245 College Street residence
 - Landlord maintains ownership of land, while tenant maintains ownership of building (at least for the term of the lease)
 - Some leases allow or require tenant to remove building on termination, while others provide that property will become landlord's on termination



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2. Rent Structure


- Triple Net or "Net Net Net" Lease
 - Tenant pays all expenses related to the lease, including the "three nets", *i.e.* property taxes, building insurance and maintenance
 - Landlord maintains structural components of the building, *e.g.* walls and roof
 - If tenant pays this, it is an "absolute net lease"
 - Rent is broken up into two components
 - Basic/Minimum Rent: base dollar per square foot rent solely for the right to occupy the property
 - Additional Rent: everything else incurred by landlord to operate the property

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- Gross Lease
 - All inclusive – tenant pays one lump sum “gross rent” that includes everything, so there are no hidden fees
 - Gross rent is much higher to ensure that all landlord’s expenses are covered
- Modified Gross Lease
 - Like a gross lease, but terms state that tenant is responsible to pay for certain items separately, e.g. utilities, taxes, insurance
- Percentage Lease
 - Rent based on a stated percentage of tenant’s revenue



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C. WHAT IS THE PROPERTY ZONED FOR?

- As a tenant, it is important to investigate municipal zoning before leasing a property
 - Many leases include a clause that indicate that the Landlord makes no representation that the property is zoned for the tenant’s permitted use
- A zoning search will confirm whether a charity or NFP can carry on its permitted use on the leased premises
 - E.g. a place of worship may not be permitted in a shopping plaza
 - Failure to comply with zoning may result in municipal order to cease operations on the leased premises
- Minor variance may be required, but can be costly

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D. HOW MUCH IS THE RENT?

- As qualified donees, registered charities may not confer private benefits to non-qualified donees

1. Charity Landlords – Fair Market Value (FMV) Rent

- Charities that are landlords must therefore charge FMV rent for leases
 - Failure to do so could result in penalties, sanctions, and even loss of charitable status in the event of a CRA audit
 - Exception – leases to other qualified donees (e.g. other registered charities)
- FMV is the value that the property would be rented for at a given time, usually based similar rental properties in the same or a similar area

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- FMV can take into consideration many factors
 - Going market rate
 - Services provided by tenant, e.g. lawn maintenance
 - Structures built by tenant and left for landlord on termination, e.g. additions to the property
- It is important for the charity to keep written records of how it arrived at FMV rent in order to justify the amount in the event of a CRA audit



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2. Charity Tenants – Leasehold Improvements

- Leasehold improvements are an important factor to consider for charities as tenants
- Leasehold improvements are enhancements to the leased premises made by the tenant not specific to their operations
 - e.g. paint, signage, drywall partitions, counter space, flooring, installing a driveway
- Compare to trade fixtures, which are owned and used by tenant specific to their operations, are physically attached to the property and can be removed without causing material damage
 - e.g. built-in stoves and ovens in a soup kitchen
- Many leases contain a clause stating that leasehold improvements become property of the landlord on termination

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- See [CRA Policy Statement CPS-006, “Registered charities making improvements to property leased from others”](#)

- Where leasehold improvements increase property value, any personal benefits to landlord must be offset by reasonable consideration to the charity, for example:



- Ensure that improvements are removed on termination
- Landlord to pay tenant FMV of improvements on termination
- Tenant to be granted discounted rent or a “tenant improvement allowance”

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17

E. A SELECTION OF KEY CLAUSES



1. Right to Extend vs Renew

- Generally extensions and renewals have the same practical effect – the landlord tenant relationship continues for a further specified period
- Extending a lease allows the lease to continue beyond the initial termination date
 - Rights in the lease that are “personal” to the tenant may continue
 - e.g. leases frequently state that expansion rights and rights of first refusal are personal to the tenant
- Renewals terminate the original lease and create a new lease, with a temporary “break” between leases
 - Rights “personal” to the tenant are not renewed unless otherwise stated in the lease

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2. Assignment and Subletting

- There are much easier ways to get out of a lease...



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- Assignments involve a third party assignee taking over remainder of lease and taking the place of previous tenant and their relationship with landlord
 - Leasehold interest is assigned to new tenant
 - Helpful when tenant has no intention to return, e.g. if moving or dissolving
 - Keep an eye out for clauses requiring assignor to remain liable after assignment
- Subletting involves the tenant maintaining the landlord-tenant relationship
 - New renter is the “sub-tenant” (i.e. the tenant’s tenant)
 - Original tenant also becomes new “sub-landlord”

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- Tenant is not released from their obligations under the lease, and continues to retain lease with landlord and pay rent to landlord
- Useful when downsizing, e.g. subletting a portion of the leased premises
- Also useful where tenant may want to temporarily vacate premises and resume tenancy later
- Landlord’s consent (sometimes “not to be unreasonably withheld”) is generally required



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3. Registering Notices of Lease on Title

- Many leases prohibit registration of leases on title, either entirely or without landlord's prior written consent
- Registration helps tenants by providing notice to future purchasers of property (*i.e.* successor landlords) and lenders of the existence of the lease
 - With some exceptions, registration guarantees "priority" of lease over subsequent instruments
 - *e.g.* If a mortgage is registered *before* a notice of lease, the lender may terminate the leasehold interest. If registered *after*, the lease has priority and the lender must honour the tenant's leasehold interest
- Landlords tend to oppose registration, as notices constitute an encumbrance on title
 - Details of lease may also be made public, which can affect their negotiating power

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4. Use Clauses

- Permitted Use clauses set out and limit the business and activities that tenants may carry on in the leased premises, and can be broad or specific
 - *E.g.* "general office use" vs "the operation of a Baptist day camp for children between 3 and 10"
 - Important to discuss and fully understand nature of activities to be carried out by tenant, *e.g.* see *JCP Drugs Ltd. v. Daniels Leslieville Corp.*
- Exclusive Use clauses allow one tenant in the rental complex to carry on a particular use exclusively
 - More applicable in a business context, *e.g.* limiting a shopping plaza to one supermarket
 - Important to ensure that permitted use does not conflict with exclusive uses granted by landlord

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F. KEY TAKEAWAYS



Open discussion and communication between landlords and tenants is an essential key to success



Before signing any agreement, all parties should discuss and understand the nature of the rights being granted to ensure the correct form of agreement is used and that the correct terms are included



It is important that tenants conduct due diligence prior to signing in order to ensure that the property can be used as intended



Registered charities and other qualified donees need to be mindful of the rent that they are charging or paying, and ensure that no private benefit is being conferred – this should be well documented

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