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## THE 25<sup>TH</sup> ANNUAL *Church & Charity Law Seminar*<sup>TM</sup> Thursday, November 8<sup>th</sup>, 2018

### RECENT DEVELOPMENTS IN THE LAW

#### WELCOME

Welcome to the 25<sup>th</sup> Annual *Church & Charity Law Seminar*<sup>TM</sup>, which is designed to assist churches and charities in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability. Although the topics presented are directed at churches and charities, many aspects of the presentations will also be of interest to not-for-profits. For legal and accounting professionals, this seminar is eligible for **5 substantive hours LSO CPD credits** and CPA PD requirements.

The Annual *Church & Charity Law Seminar*<sup>TM</sup>, held every year since 1994, is presented by **Carters Professional Corporation (Carters)**, a law firm with offices in Toronto, Ottawa and Orangeville, and experienced in advising churches, charities and not-for-profits across Canada, both locally as well as internationally. The firm is assisted by several expert speakers this year.

#### CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and/or pre-paid handout package at the "Information Centre" on the main level and then help yourself to complimentary coffee and muffins in the Gym.

If you NEED TO PAY the registration fee, please proceed to the "UNPAID AND NEW REGISTRATION" desk as you enter the building. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a handout package from one of our greeters for more information.

#### LUNCH

While complimentary coffee and tea are provided throughout the day and muffins are provided in the morning, lunch is not included unless shown on your name tag. Our caterer will have assorted sandwiches, salads, assorted cookies, fruit, coffee, tea, water, pop and juice for those who have purchased tickets. The Church has requested that **food and beverages** be consumed only in the Gym, Foyers and overflow areas, **not** in the Auditorium please.

#### IMPORTANT REMINDERS

Please silence all cell phones and electronic devices. We ask that no photos, videos or recordings be made during the seminar as per our Privacy Policy. For re-cycling purposes, please return your name tag (after removing your receipt), along with your Evaluation Form, before you leave. **Two police officers will be on duty at 3:30 pm to direct traffic in order to and facilitate departure.**

#### RESOURCE MATERIALS

Included in this handout package are copies of today's presentation materials. These materials, along with numerous other articles, seminar materials, and newsletters of interest to churches and religious charities, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity & NFP Law Updates* are available free of charge at our websites at [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca), [www.carters.ca](http://www.carters.ca), and [www.antiterrorism.ca](http://www.antiterrorism.ca). Copies of *Church Law* and *Charity & NFP Law Bulletins* are on display at the Carters booth in the entrance Foyer.

Copies of the booklet entitled "2018 Legal Risk Management Checklist for Charities" are available for \$2.00 during breaks, and at no charge on our website at <http://www.carters.ca/pub/checklist/CRMchklistNov18.pdf>.

#### CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, e-mail us at [info@carters.ca](mailto:info@carters.ca) with "mailing list" in the subject line. Alternatively, please add your name and e-mail address to our Sign-Up List at the Carters booth indicating your consent to receive firm newsletters and information about future seminars. A limited number of copies of the [October 2018 edition](#) of the *Charity & NFP Law Update* are available at the Carters booth today.

#### QUESTION PERIOD

This year, the question period is at 3:25 pm. A question sheet is provided at the back of this handout and should be left at the front podium in the Auditorium. Unfortunately, not all questions can be answered due to time constraints.

#### ACKNOWLEDGEMENTS AND THANKS

We gratefully acknowledge and thank the pastors, leadership, and congregation of the **PORTICO Community Church** for the use of their facilities. We would like to also acknowledge and thank Tony Manconi, Director General of the Charities Directorate of the CRA; Kenneth Goodman, The Public Guardian & Trustee of Ontario; Murray Baird, Assistant Commissioner General Counsel, Australian Charities and Not-for-profit Commission; and Ken Hall, Robertson Hall, for their contribution as our guest speakers at this year's seminar, as well as the lawyers who have volunteered their time for this event. We also wish to thank our many sponsors listed below who help to keep the cost of this seminar as low as possible.

Carters Professional Corporation

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THE 25<sup>TH</sup> ANNUAL  
***Church & Charity Law Seminar™***  
Thursday, November 8<sup>th</sup>, 2018

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**AGENDA**

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7:30 a.m.	Check-In (Coffee, Tea, Juice and Muffins provided)	
8:30 a.m.	Opening Remarks and National Anthem	
8:40 a.m.	Essential Charity and NFP Law Update	Jacqueline M. Demczur
9:05 a.m.	The Coming of the ONCA (WE HOPE) and What to Start Thinking About	Theresa L.M. Man
9:30 a.m.	Charities and Politics: Where Have We Been and Where Are We Going	Ryan M. Prendergast
9:55 a.m.	Drafting By-laws: Pitfalls to Avoid	Esther S.J. Oh
10:20 a.m.	Morning Break (Coffee and Tea provided) (30 minutes)	
10:50 am	Critical Privacy Law Update	Esther Shainblum
11:05 a.m.	Clearing the Haze: Managing Cannabis in the Workplace in Ontario	Barry W. Kwasniewski
11:30 am	Recent Freedom of Religion Decisions from the Supreme Court of Canada	Terrance S. Carter and Jennifer M. Leddy
12:05 p.m.	What is Happening in Church & Charity Law in Australia? Sharing Ideas from Down Under	Murray Baird, Australian Assistant Commissioner General Counsel
12:25 p.m.	Lunch Break (50 minutes)	
1:15 p.m.	Acknowledgements	
1:25 p.m.	Lessons Learned from Claims to the Courtroom	Kenneth Hall and Sean S. Carter
2:05 pm	The Evolution and Empowerment of Charities in Ontario from the Perspective of the PGT	Kenneth Goodman, The Public Guardian & Trustee of Ontario
2:45 p.m.	Tips for Avoiding Common Errors: A Charities Directorate Perspective	Arlene Proctor, Manager of the Assisted Compliance Section, Charities Directorate of the CRA
3:25 p.m.	Question Period [Not all questions can be answered due to time constraints]	
3:30 p.m.	Program Ends	

Please see **Speaker Biographies** on the following pages, and take a moment to complete the **Evaluation Form** included at the back of this handout to help us make the next Annual *Church & Charity Law™* Seminar even better.

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## **SEMINAR HOSTS**

**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:

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

## **PROTECTION FROM REGULATORY OFFENCES FOR CHURCHES AND CHARITIES**

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).

## **SEMINAR SPONSORS**

Carters would like to thank the following companies for their sponsorship of the Annual *Church & Charity Law Seminar*™ that helps to keep the registration fee to a minimum:

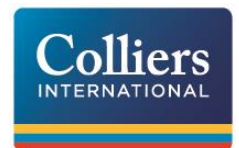
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- **BDO Canada LLP**, Natalie G. Saarimaki, 519-941-0681, [www.bdo.ca](http://www.bdo.ca)
- **GMS Chartered Professional Accountants Professional Corporation**, 905-919-3543, [www.gmscpa.ca](http://www.gmscpa.ca)
- **LexisNexis Canada Inc.**, 1-800-668-6481, [store.lexisnexis.ca](http://store.lexisnexis.ca)
- **Robertson Hall Insurance**, 1-800-640-0933, [www.robertsonhall.com](http://www.robertsonhall.com)
- **Abundance Canada**, 1-888-212-7759, [www.abundance.ca](http://www.abundance.ca)
- **Thomson Reuters**, 1-800-387-5164, [store.thomsonreuters.ca](http://store.thomsonreuters.ca)
- **Guardian Capital Advisors**, 1-800-253-9181, [www.guardiancapital.com](http://www.guardiancapital.com)

## **SEMINAR RESOURCE EXHIBITORS**

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

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| <ul style="list-style-type: none"><li>• <b>Abundance Canada</b>, <a href="http://www.abundance.ca">www.abundance.ca</a></li><li>• <b>BDO Canada LLP</b>, <a href="http://www.bdo.ca">www.bdo.ca</a></li><li>• <b>Colliers International</b>, <a href="http://www.collierscanada.com/en/services/not-for-profit-advisory-group">www.collierscanada.com/en/services/not-for-profit-advisory-group</a></li><li>• <b>Hogg, Shain &amp; Scheck</b>, <a href="http://www.hss-ca.com">www.hss-ca.com</a></li><li>• <b>GMS Chartered Professional Accountants Professional Corporation</b>, <a href="http://www.gmscpa.ca">www.gmscpa.ca</a></li><li>• <b>Guardian Capital Advisors</b>, <a href="http://www.guardiancapital.com">www.guardiancapital.com</a></li><li>• <b>LexisNexis Canada Inc.</b>, <a href="http://store.lexisnexis.ca">store.lexisnexis.ca</a></li></ul> | <ul style="list-style-type: none"><li>• <b>Robertson Hall Insurance</b>, <a href="http://www.robertsonhall.com">www.robertsonhall.com</a></li><li>• <b>Thomson Reuters</b>, <a href="http://store.thomsonreuters.ca">store.thomsonreuters.ca</a></li><li>• <b>Canada Revenue Agency, GST/HST Outreach Program</b></li><li>• <b>Canadian Council of Christian Charities</b>, <a href="http://www.cccc.org">www.cccc.org</a></li><li>• <b>Christian Legal Fellowship</b>, <a href="http://www.christianlegalfellowship.org">www.christianlegalfellowship.org</a></li><li>• <b>Imagine Canada</b>, <a href="http://www.imaginecanada.ca">www.imaginecanada.ca</a></li></ul> |
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## **NEW TORONTO OFFICE**

Carters is pleased to announce the opening of its new Toronto office on November 30, 2018 to support its growing team in providing expanded services for our clients in Toronto. The new office is located at 67 Yonge Street, Suite 1402, Toronto, Ontario.

## **UPCOMING CARTERS' SEMINARS OF INTEREST**

**COMING SOON – Thursday, February 14, 2019 - Ottawa Region Charity & Not-for-Profit Law Seminar** hosted by Carters at the Centurion Conference Centre in Ottawa, Ontario. More details will be available soon at [www.carters.ca](http://www.carters.ca).

**Carters Webinars: 2019 Spring Series** - Details to follow at [www.carters.ca](http://www.carters.ca).

## **SAVE THE DATE 2019**

**The 26<sup>th</sup> Annual Church & Charity Law Seminar™** will tentatively be held on **Thursday November 7, 2019**. More details will be available in the New Year at [www.carters.ca](http://www.carters.ca).

## **CARTERS OFFICE LOCATIONS**

### Toronto Location

67 Yonge Street  
Suite 1402  
Toronto, Ontario, Canada M5E 1J8  
Tel: (416) 594-1616  
Fax: (416) 675-3765

### Ottawa Office

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

### Orangeville Office

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

## **GENERAL DISCLAIMER**

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

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## SPEAKER BIOGRAPHIES



**Murray Baird**, B.A., LL.B., FAICD Assistant Commissioner General Counsel Australian Charities and Not-for-profits Commission (ACNC) formerly Senior Partner of Moores Legal Melbourne Australia specialising in Not-for-profit law and governance. Murray is responsible for legal, policy, registrations, compliance and reporting functions of the ACNC and was part of the leadership team responsible for establishing the Australian charity regulator from its inception. He regularly gives evidence on charity law and regulation to government enquiries and participates as a speaker in national and international conferences on charity law, governance and regulation. Murray also has practical experience in charity governance through several positions on school, church and other charity boards.



**Terrance S. Carter**, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2019), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca). [tcarter@carters.ca](mailto:tcarter@carters.ca)



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



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



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



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



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





**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 (CCCC). 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." [jleddy@carters.ca](mailto:jleddy@carters.ca)



**Theresa L.M. Man**, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers* in Canada. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is vice chair of the CBA Charities and Not-for-Profit Law Section. Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS* and *Charity & NFP Law Bulletin*. [tman@carters.ca](mailto:tman@carters.ca)

**Arlene Proctor** - is the Manager of the Assisted Compliance Section, Compliance Division, Charities Directorate, Canada Revenue Agency. Arlene has 27 years of experience with Canada Revenue Agency. In 2013, she relocated to Ottawa and joined the Compliance Division of the Charities Directorate as an Audit Advisor, and later assumed the role of Senior Audit Advisor. Prior to this, Arlene worked in a variety of compliance positions with the CRA at the Charlottetown Tax Services Office. She has managed the Charities Education Program (CEP) since its launch in November 2017, and has overseen the successful completion of over 500 CEP visits. Arlene holds a Bachelor's degree from the University of Prince Edward Island and a Chartered Professional Accountant designation (CPA, CGA). Arlene has previously presented CEP at the Churches, Charities and Not-for-Profits: Knowledge Hub in May 2018.



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



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



**Esther Shainblum**, B.A., LL.B., LL.M., CRM - From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses (VON) 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. Ms. Shainblum practices in the areas of charity and not-for-profit law, health law, and privacy law. [eshainblum@carters.ca](mailto:eshainblum@carters.ca)

### ADDITIONAL LAWYERS AT CARTERS

**Nancy E. Claridge** –Orangeville office.

1-877-942-0001 – extension 231, Email: [nclaridge@carters.ca](mailto:nclaridge@carters.ca)

**Adriel N. Clayton** –Orangeville office.

1- 877-942-0001 – extension 232, Email: [aclayton2@carters.ca](mailto:aclayton2@carters.ca)

**Kristen D. Morris** –Orangeville office.

1-877-942-0001 – extension 248, Email: [kmorris@carters.ca](mailto:kmorris@carters.ca)

**Michelle E. Baik**, Toronto office.

1-877-942-0001 – extension 282, Email: [mbaik@carters.ca](mailto:mbaik@carters.ca)

**Sepal Bonni** –Ottawa office.

1-866-388-9596 – extension 306, Email: [sbonni@carters.ca](mailto:sbonni@carters.ca)

**Luis R. Chacin Vera**, Orangeville office

1-877-942-0001 – extension 255, Email: [lchacin@carters.ca](mailto:lchacin@carters.ca)

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## LIST OF POWERPOINTS

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- ♦ **Essential Charity and NFP Law Update**  
Jacqueline M. Demczur, B.A., LL.B.
- ♦ **The Coming of the ONCA (WE HOPE) and What to Start Thinking About**  
Theresa L.M. Man
- ♦ **Charities and Politics: Where Have We Been and Where Are We Going**  
Ryan M. Prendergast
- ♦ **Drafting By-laws: Pitfalls to Avoid**  
Esther S.J. Oh
- ♦ **Critical Privacy Law Update**  
Esther Shainblum
- ♦ **Clearing the Haze: Managing Cannabis in the Workplace in Ontario**  
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- ♦ **Recent Freedom of Religion Decisions from the Supreme Court of Canada**  
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- ♦ **Lessons Learned from Claims to the Courtroom**  
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Kenneth Goodman, The Public Guardian & Trustee of Ontario
- ♦ **Tips for Avoiding Common Errors: A Charities Directorate Perspective**  
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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

## ESSENTIAL CHARITY AND NFP LAW UPDATE


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

[jdemczur@carters.ca](mailto:jdemczur@carters.ca)  
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TOLL FREE: 1-877-942-0001

Toronto (416) 675-3766 Ottawa (613) 235-4774  
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Toronto – November 8, 2018**

## Essential Charity and NFP Law Update

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

[jdemczur@carters.ca](mailto:jdemczur@carters.ca)  
1-877-942-0001

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Toronto Ottawa Orangeville  
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### A. OVERVIEW (Current as of November 5, 2018)

- 2018 Federal Budget Highlights
- Update on Political Activities by Charities
- Special Senate Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Tax Decisions, Rulings, and Interpretations
- Corporate Update – Federal and Provincial
- Social Investments in Ontario
- Remuneration of Directors Update in Ontario
- Employment Law Update in Ontario
- Other Ontario Legislation Updates
- Case Law of Interest

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### B. 2018 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget 2018 presented on February 27, 2018
- There were a number of important changes proposed in the Budget, including:
  - Universities: Definition of “qualified donee” (“QD”) simplified so that universities outside of Canada that are qualified to be QDs are no longer required to also be listed in Schedule VIII of *Income Tax Act*
  - Municipalities: Allows Minister of National Revenue to determine whether they may qualify to be “eligible donees” on case by case basis
  - Trusts: Additional reporting requirements for some trusts related to beneficial ownership, but charities and NFPs are exempt from them for now

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- Journalism: Government is going to review over the next year whether charitable, non-profit journalism may be possibly recognized
- Financial Support: Funding of various charitable and NFP initiatives, generally to be made over a five year period
- Political Activities: It was indicated that clarification was going to come from the CRA on political activity restrictions in response to the May 2017 Report on political activities. (Update: Many developments in this area throughout 2018! See next slide for highlights)

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### C. UPDATE ON POLITICAL ACTIVITIES BY CHARITIES

- On July 16, 2018, the Ontario Superior Court of Justice decision in *Canada Without Poverty v AG Canada* struck down ITA provisions restricting the amount of non-partisan political activities that charities may undertake
- On September 14, 2018, Government released draft legislative proposals proposing to remove 10% limits on non-partisan political activities by charities
- On October 2, 2018, the CRA released for consultation a draft guidance, “Charities and Public Policy Advocacy”
- On October 25, 2018, the Government proposed new measures in Bill C-86 to allow a charity to carry out unlimited “public policy dialogue and development activities” in support of its charitable purposes
- See presentation by Ryan Prendergast for details

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### D. SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to examine the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada
- The Special Committee has heard from various witnesses on ongoing basis starting in April 2018
- An online questionnaire will be available up to November 16, 2018 for charities and NFPs to answer questions about the challenges facing the sector
  - Access the questionnaire at:  
<https://sencanada.ca/en/forms/cssb-your-voice-matters/>
- Its study and resulting report on how Canada can better assist the charitable and NFP sector is to be completed by December 31, 2018, but possibly later

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## E. RECENT CRA PUBLICATIONS AND PROGRAMS

- On January 12, 2018, the CRA updated its T4063 Guide to state that the Charities Directorate will not review applications submitted with draft governing documents, but will treat them as incomplete and return them to the applicant
- On February 15, 2018, CRA reminded qualified donees that they have until March 31, 2019 to update their official donation receipts with the CRA's new website URL, which is "canada.ca-charities-giving"
- On February 28, 2018, the CRA posted a video, "Gift Certificates and Gift Cards", outlining when and how registered charities can issue official donations receipts for gift card or gift certificate donations

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- On March 1, 2018, the CRA announced that September 2017 initiative of assigning new business numbers to internal divisions of charities will not be proceeding, *i.e.* status quo is to continue
  - Plan was to give separate business numbers to internal divisions to access CRA's online services via Charities IT Modernization Project ("CHAMP")
  - This step is no longer required, meaning practice of derivative business numbers will continue
- On September 18, 2018, the CRA announced that public release of CHAMP, scheduled for November 2018, will be delayed until June 2019
  - Once in place, CHAMP will provide several new e-services, *e.g.* T2050 and T3010 filings

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## F. TAX DECISIONS, RULINGS AND INTERPRETATIONS

- On December 18, 2017, the Tax Court of Canada ("TCC") released decision in *Lichtman v The Queen*
  - Issue was clergy residence deduction eligibility of three ordained Orthodox Jewish rabbis teaching Judaic studies in Jewish school
  - Court held applicants were not eligible because:
    - 1) their activities were not specialized ministry in their religious context
    - 2) "congregation" in its religious context relates to synagogues and not schools
  - Those applying for the deduction must be clergy members whose activities constitute "ministering" to a "congregation"

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- On June 12, 2018, the TCC released decision in *McCuaig Balkwill v The Queen* regarding fair market value ("FMV") of donated wine to be sold at auctions hosted by charities
  - Issue was how to appropriately value wine, *i.e.* \$23,600 (position of charities issuing receipts) vs. \$4700 (CRA's view based on actual auction prices)
  - TCC held that FMV of donated wine should not be based LCBO's Private Ordering pricing, which is a monopoly, and relied on the CRA's expert instead
  - TCC made clear other methodologies possible in determining wine's FMV, provided they are supported with evidence and accurately applied
  - Charities receiving non-cash donations should keep in mind various FMV methodologies and keep full evidence of how calculations reached

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## G. CORPORATE UPDATE - FEDERAL

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

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## H. CORPORATE UPDATE - PROVINCIAL

- On November 14, 2017, Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, received Royal Assent, amending 3 key statutes for the NFP sector:
  - Ontario Not-for-Profit Corporations Act, 2010* ("ONCA")
  - Ontario Corporations Act* ("OCA")
  - Charities Accounting Act* (to be discussed later)
- Ontario government targeting early 2020 for proclamation of the ONCA, with more details on the ONCA in presentation by Theresa Man
- Reminder: Upcoming December 10, 2018 deadline for OCA corporations to prepare updated registers of their ownership interests in real property

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- On November 14, 2017, the following important amendments to the OCA came into force:
  - Meetings of members may be held by telephone or electronic means
  - Members may remove a director from office by majority vote, instead of 2/3rds
  - A person may be a director without being a corporate member, although written consent will be required to be a director
- Then, on January 13, 2018, these amendments came into effect:
  - Corporations have the capacity of a natural person
  - Directors and officers are now subject to a statutory objective standard of care

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## I. SOCIAL INVESTMENTS IN ONTARIO

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

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

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- The Guidance recommends that a charity should base its decision to make a social investment on:
  - its charitable purposes and assets (assets may be considered although the CAA does not specifically reference them as consideration for trustees making social investments)
  - the rules and duties that apply to social investing
  - its governing documents, and
  - its directors' or trustees' general fiduciary obligations
- The Public Guardian and Trustee, Ken Goodman, will speak more on this issue and others

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## J. REMUNERATION OF DIRECTORS UPDATE IN ONTARIO

- On April 1, 2018, amendments to Regulation 4/01 ("Regulation") of the CAA came into force, providing some relief from common law rules concerning the remuneration of directors by authorizing "charitable corporations" to pay directors and "connected persons"
- Amendments require charities to consider any accompanying guidance which may be prepared
- In May 2018, the OPGT released its guidance
- It provides that a director can be paid for certain services provided to a charity subject to the charity's fulfillment of certain requirements (see next slide)
- It also states that directors cannot be paid for: (1) being a director or employee; or (2) fundraising/real property transactions, which also applies to connected persons

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

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## K. EMPLOYMENT LAW UPDATE IN ONTARIO

- On October 23, 2018, Bill 47, *Making Ontario Open for Business Act, 2018* ("Bill 47") was introduced
- Bill 47 amends many of the changes that had been introduced last November 2017 in Bill 148, *Fair Workplaces, Better jobs Act, 2017* such as
  - Freezing minimum wage at \$14/hour until at least October 2020 so that there is no increase to \$15/hour in January 2019
  - Replacing the combined 10 days of personal emergency leave per year, 2 of which are paid, with separate unpaid leaves: 3 days for personal illness, 2 for bereavement, and 3 for family responsibilities
  - Removal of equal pay for equal work provisions relating to employment status
- If passed, changes will come into force January 1, 2019

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## L. OTHER ONTARIO LEGISLATION UPDATES

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

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

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

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## M. CASE LAW OF INTEREST

- The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (January 31, 2018)
  - Two applications were brought challenging the constitutional validity of policies of the College of Physicians and Surgeons of Ontario, which required physicians, even those who object to certain medical procedures (e.g. abortions, medical assistance in dying), to provide patients with referrals
  - Court held that the policies infringed the physicians' right to freedom of religion, but was justified as a reasonable limit under the *Charter*
  - The Court held that there must be a balancing of the right to freedom of religion against the right of patients to equitable access to health care

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- John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60 (Mar. 16, 2018)
  - Plaintiffs had been abused by teachers as residents of an orphanage linked to the Roman Catholic Episcopal Corporation of St. John's (the "Archdiocese"), with plaintiffs claiming the Archdiocese was vicariously liable for this abuse.
  - Court held that the Archdiocese was not vicariously liable, as the orphanage and Archdiocese were separate corporate entities that operated without blurring these boundaries
  - Vicarious liability for the actions of an employee or subordinate requires that there is a close connection between the defendant and the enterprise which gave rise to the tortious conduct

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

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- *Abrams v Judean Benevolent & Friendly Society, 2018 CarswellOnt 12595* (June 6, 2018)
  - Plaintiff sued the Society for breach of contract regarding purchase of cemetery plots for his family, when the plaintiff discovered, years later, that one plot already had someone buried in it
  - The Society argued that this plot’s reservation was cancelled when the plaintiff’s son ceased being a Society member, as its current bylaws allow only members to be buried in the plots
  - The Society was found to have breached the contract given its inability to prove that the current bylaws were same as those in place at time of purchase
  - Records, including historical records, regarding rights of members should be maintained

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- *PT v Alberta, 2018 ABQB 496* (June 27, 2018)
  - Constitutional challenge to Alberta’s Bill 24 to be heard by Court of Appeal in December 2018
  - *Schools Act* amended by Bill 10 (2015) and Bill 24 (2017) to empower voluntary student organizations, with focus on vulnerable minorities, e.g. LGBTQ+, with enhanced protections, e.g. prohibition on informing parents about child’s involvement in a “gay-straight” or “queer-straight alliance”
  - June case involved unsuccessful interim injunction seeking stay of information prohibition clause and prohibiting Minister of Education from defunding or de-accrediting schools for non-compliance with the related attestation clause in the *Schools Act*

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- Wall Decision
  - On May 31, 2018, the Supreme Court of Canada (“SCC”) upheld religious autonomy in *Wall* decision: 2018 SCC 26
  - Court will not interfere in religious doctrine matters, and procedural rules requiring doctrinal interpretation
- Trinity Western University Decisions (“TWU”)
  - On June 15, 2018, the SCC upheld the denial of accreditation regarding TWU’s law school due to TWU’s mandatory covenant in decisions: *LSBC v TWU*, 2018 SCC 32; *TWU v LSUC*, 2018 SCC 33
  - The SCC indicated that whether a state actor (e.g. Law Society of BC) may review a mandatory covenant of an institutions will depend on the facts and a reasonable balancing of harms and benefits
- See presentation by Terrance Carter & Jennifer Leddy

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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

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


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

tman@carters.ca  
1-877-942-0001

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TOLL FREE: 1-877-942-0001

Toronto (416) 675-3766 Ottawa (613) 235-4774  
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Church & Charity Law  
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## The Coming of the ONCA (WE HOPE) and What to Start Thinking About

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

tman@carters.ca  
1-877-942-0001

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### OVERVIEW

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

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### A. STATUS OF ONCA

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

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

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

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### B. OVERVIEW OF ONCA TRANSITION PROCESS

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

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

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## C. OVERVIEW OF KEY ELEMENTS OF THE ONCA

### 1. Incorporation and Corporate Powers

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

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### 2. Public Benefit Corporations (PBCs)

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



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

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

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

### 3. Financial Review

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

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

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

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

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

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## 7. Members' Meetings

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

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## 8. Members' Rights and Remedies

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

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

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## 9. Conflict of Laws

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

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## D. PRACTICAL STEPS FOR TRANSITION

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

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

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


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## CONCLUSION

- Monitor ONCA/Bill 154
- Have A Committee In Charge Of The Process
- Engage Board Of Directors
- Prepare Early
- Seek Legal Help

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**THE 25<sup>TH</sup> ANNUAL CHURCH &  
CHARITY LAW SEMINAR  
November 8, 2018**

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

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

rprendergast@carters.ca  
1-877-942-0001

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**A. OVERVIEW OF TOPICS**

- Timeline of Previous Legislation and CRA Policies
- Brief Overview of Existing Legislative Rules and Political Activities Audits
- Review of Recent Initiatives to Modernize the Rules
- Current Legislative Amendments Applying to Registered Charities and the Conduct of Political Activities and What's on the Horizon

See *Charity & NFP Law Bulletins* on this topic at [www.carters.ca](http://www.carters.ca)

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**B. TIMELINE OF PREVIOUS LEGISLATION AND  
CRA POLICIES**

**1. 1986 Amendments to the *Income Tax Act* (Canada)**

- The *Income Tax Act* (Canada) was first amended in 1986 following the Federal Court of Appeal decision in *Scarborough Community Legal Services v. The Queen* in 1985
  - Case dealt with an appeal from a decision by CRA to refuse to register Scarborough Community Legal Services because it was participating in activities of a political nature
  - Court upheld the decision

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- In response, the *Income Tax Act* (Canada) was amended in 1986 to permit charities to engage in a limited amount of political activities
- Explanatory notes indicated that:
  - "... it is appropriate for a charity to use its resources, within defined limits, for ancillary and incidental political activities in support of its charitable goals..."; and
  - That "... a charity may, without restriction, provide information and express its views in briefs to government to change laws or policies."

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**2. Administrative Policy Changes in Response to  
New Legislation**

- Prior to *Scarborough Community Legal Services*, CRA's administrative policy concerning political activities by registered charities was *Information Circular 78-3*, which was withdrawn after protest
- 2 years after the 1986 *Income Tax Act* (Canada) amendments, CRA issued *Information Circular 87-1* "Registered Charities – Ancillary and Incidental Political Activities", which was not replaced until 2003

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- *Policy Statement* CPS-011 "Political Activities" was released on September 2, 2003 (the "Policy Statement")
  - Release followed 2 years of collaborative dialogue between the Government of Canada and charitable sector
  - The Policy Statement recognized that:
    - "Canadians benefit from the efforts of charities and the practical, innovative ways they use to resolve complex issues related to delivering social services. Beyond service delivery, their expertise is also a vital source of information for governments to help guide policy decisions. It is therefore essential that charities continue to offer their direct knowledge of social issues to public policy debates"

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## C. BRIEF OVERVIEW OF EXISTING LEGISLATIVE RULES AND POLITICAL ACTIVITIES AUDITS

### 1. Pre-2012 Legislative Provisions and Administrative Policies

- Subsections 149.1(6.1) and (6.2) of the *Income Tax Act* ("ITA") currently provides that where a charitable organization devotes **substantially all** of its resources to charitable activities carried on by it and
  - It devotes part of its resources to political activities,
  - Those political activities are ancillary and incidental to its charitable activities, and
  - Those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,
 the organization shall be considered as devoting that part of its resources to charitable activities carried on by it

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- Issues with pre-2012 legislative provisions and administrative policies
  - ITA never defined "political activities", "substantially all" or "resources"
  - How to calculate the "resource" limit?
  - How to track volunteer and donated "resources"?
- "Substantially all" means 90% or more
  - Therefore, subject to certain exceptions, a charity that devotes no more than 10% of its total "resources" in a year to political activities will be operating within the "substantially all" requirement
  - Conversely, a charity that devotes more than the allowable limit may be considered by CRA to be operating to achieve a political objective

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- Policy Statement clarified activities undertaken by a registered charity can be separated into three categories:
  - Charitable activities (permitted without limits)
  - Political activities (permitted up to prescribed limits)
  - Prohibited activities (never permitted)
- An activity is presumed a "political activity" if a charity:
  - Explicitly communicates a call to political action
  - Explicitly communicates to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed or changed, or
  - Explicitly indicates in its material that the intention of the activity is to incite, organize or put pressure on the government to retain, oppose or change the law, policy or decision of any level of government in Canada or another country

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- A charity may engage in political activities provided that:
  - The activities are non-partisan (as discussed below)
  - The issue in question is connected (ancillary) to the charity's purposes
  - The activities are subordinate (incidental) to the charity's purposes
  - The charity's views are based on a well reasoned position
  - The activities fall within expenditure limits under the ITA
- According to subsections 149.1(6.1) and (6.2) of the ITA "partisan political activity" involves the "direct or indirect support of, or opposition to, any political party or candidate for public office"

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### 2. Post-2012 Legislative Provisions Policies

- Starting with the May 29, 2012 Federal Government budget ("Budget 2012"), various amendments were made to the ITA and new resources were allocated to CRA
  - Budget 2012 stated
    - "Concerns have been raised that some charities may be exceeding these limitations and that there is currently no requirement for a charity to disclose the extent to which it receives funding from foreign sources for political activities"
  - Comments were in reference to media coverage concerning the debate in the Senate around alleged donations to Canadian charities by foreign donors purportedly for political activities

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- The 2012 ITA amendments did not make significant changes to the rules permitting political activities
- Moreover, no changes were made to Policy Statement
- Budget 2012 amendments included, e.g., new definition of "political activities" to stop gifts for political purpose, suspend registered charities for failing to file for excessive political activities
- Budget 2012 allocated \$8 million (which was expanded to \$13.1 million) to CRA to "enhance its education and compliance activities with respect to political activities by charities"
  - As a result, CRA stated it would conduct 60 audits related to the political activities of charities over a four year period

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## D. REVIEW OF RECENT INITIATIVES TO MODERNIZE THE RULES

### 1. Winding Down of the Political Activities Audit Program for Charity and Consultation with Sector

- On January 20, 2016, Minister of National Revenue, Diane Lebouthillier, announced the winding down of CRA's review of registered charities' political activities
  - A news release from the Government of Canada stated the political activities audit program showed substantial compliance with the rules regarding charities' involvement in political activities and that of the 30 completed audits, only 5 resulted in revocation, the determination of which "were primarily based on factors beyond their involvement in political activities"

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

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

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

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

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

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## E. CURRENT LEGISLATIVE AMENDMENTS

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

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

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

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

- On October 25, 2018, the Department of Finance Canada tabled a Notice of Ways and Means motion which set out various amendments to the ITA, including those relating to political activities from the September Proposed Amendments, which had been revised as a result of public consultation
- On October 29, 2018, Bill C-86 received first reading
- Important to note many of these amendments are retroactive to 2008 or 2012 as applicable, and therefore will impact suspended audits

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- Amendments to the ITA in Bill C-86
  - Bill C-86 includes the amendments to subsections 149.1(6.1), (6.2) and (6.201) to remove the “substantially all” test
  - Keeps the prohibition on charities from devoting their resources to the “direct or indirect support of, or opposition to, any political party or candidate for public office”, which “shall not be considered to be constituted and operated exclusively charitable purposes”
  - Removes suspension for non-compliance with the “substantially all” test but permits suspension for devotion of resources to partisan activities
  - Largely undoes the 2012 ITA amendments

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

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

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

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- Issues to Consider with Bill C-86
  - While removal of the quantitative limits on non-partisan political activities is welcome, there are factors under the new regime that will need to be clarified in a guidance from CRA
    - The new definition of “charitable activities” requiring that public policy dialogue and development activities be **“carried on in furtherance of a charitable purpose”**
    - This means that public policy dialogue and development activities must still be connected to a charitable purpose, *i.e.*, they cannot be a purpose in and of themselves

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- An administrative policy will be needed to provide a definition for “public policy dialogue and development activities”
- It will still not be possible for a charity to have a political purpose
- The courts have determined political purposes to be those that seek to:
  - Further the interest of a political party or support a political party or candidate for public office, or
  - Retain, oppose, or change the law, policy, or decision of any level of government in Canada as well as/or any foreign country
- As a separate matter, charities that engage in “public policy dialogue and development activities” may be required to register under lobbying legislation

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## CONCLUDING THOUGHTS

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

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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

## DRAFTING BY-LAWS: PITFALLS TO AVOID


By Esther S. J. Oh, B.A., LL.B.

estheroh@carters.ca  
1-877-942-0001

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By Esther S.J. Oh, B.A., LL.B.

estheroh@carters.ca  
1-877-942-0001

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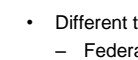
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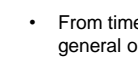
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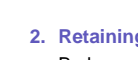
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### 3. Avoiding Frequent By-law Amendments

- Some NFPs may be in the habit of amending their by-law every year. However, this practice should be avoided for the following reasons:
  - Complexities and inconsistencies can easily occur with frequent amendments to a by-law
  - On-going amendments to by-laws divert resources of the NFP away from its purposes

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### 4. Transparency and Collaboration When Seeking Membership Approval Over By-law Amendment

- For open membership corporations, appropriate communication and consultation can be done with members prior to presenting a by-law amendment
- For suggestions on steps that can be taken to seek membership approval over a by-law amendment in a collaborative manner, please see webinar material dated November 9, 2017 entitled "Corporate Documents and Procedures to Help Avoid Governance Disputes" at [www.carters.ca](http://www.carters.ca)

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## C. LEGAL CONSIDERATIONS

### 1. Importance of Working With Legal Counsel To Ensure Accuracy and Coherency of By-laws

- A by-law that is clearly drafted, self-explanatory, and compliant with applicable legal requirements can help to avoid confusion and potential disputes regarding the by-law
- NFP corporations are encouraged to work with their respective legal counsel when preparing a new by-law or amending an existing by-law

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### 2. Importance of Following Correct Procedures at Board and Membership Meetings To Approve By-law

- When amending by-laws, it is important to obtain the necessary approvals outlined in an existing by-law, including the following:
  - Director approval requirements
  - Membership approval requirements
  - Notice of membership meetings to be given
  - Approvals or consultations required from a third party, such as a founding member or a denomination for a local church (if applicable)



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## D. GENERAL DRAFTING PITFALLS TO BE AVOIDED

### 1. Pitfalls To Be Avoided By All NFPs

The following slides provide selected examples of drafting pitfalls that are of general application to all NFPs

- Avoid using a boilerplate by-law that was originally developed for a for-profit corporation
  - A by-law should reflect the unique governance and operational needs of the NFP and should also reflect the applicable laws that apply to the NFP
- Avoid inaccurate and/or outdated descriptions of director and/or membership qualifications in the NFP's by-law
  - e.g. where a corporation operates as a closed membership corporation, the by-law should reflect the same

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- A closed membership structure can be established by requiring that membership is restricted to only those persons who are directors
- All applications for membership should be made subject to approval by the board of directors
- Avoid lack of clarity on requirements that apply where members are subject to one-year terms
  - Where NFPs have one-year terms for members, the by-law should clearly indicate when membership term begins and ends and the deadline by which annual membership fees if applicable must be paid to preserve voting rights

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- Avoid lack of consistency between provisions within the by-law and provisions within the letters patent/articles of incorporation
  - e.g. In some cases, by-laws contain purposes that have been updated over the years, but are different from the purposes in the original letters patent or articles of incorporation
- Avoid lack of consistency between the policies of the NFP and the by-law
  - e.g. Conflict of interest provisions within a board policy need to be consistent with the Conflict of interest provision in the by-law

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## 2. Importance of Transition Provisions

- Amendments to an existing by-law may involve changes to by-law provisions that are completely different from those in an existing by-law
- Where this applies, it is important that the new by-law outline a clear procedure to be followed to help the NFP transition to the new by-law requirements
  - For example, a new by-law might outline the following changes to director terms:
    - A change to the term to be served by directors from a one year term (in the existing by-law) to a three year term (under the new by-law)
    - A change to the maximum term to be served by directors, from *no* maximum term (under the existing by-law) to a maximum term of three consecutive terms (under the new by-law)

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- In this example it is essential that the by-law contain a transition provision outlining how terms and maximum terms for directors are to be calculated
  - The transition provision could indicate that on the date that the new by-law is adopted, each existing director will stand for election to the board and will be deemed to start the first year of the new three year term
  - The transition provision could also indicate that on the date that the new by-law is adopted, each director elected to the board is deemed to start the first term (of a maximum three possible terms) to be served by each director set out in the new by-law

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- i.e. each director elected on the date the new by-law is adopted can serve for a maximum of three consecutive three year terms (i.e. 9 consecutive years) according to the new term and maximum term outlined in the new by-law
- Without a clear transition provision that sets out how the director terms are to be calculated under the new by-law, considerable confusion can arise when trying to determine the terms that may be served by the elected directors on the date the by-law is adopted
  - This is of particular importance where individuals have already served on the board for several years immediately before adoption of the new by-law

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- Amendments to an existing by-law might also include a change that is fundamental to the governance of the members
  - It is essential that the new by-law must outline the steps to be followed to transition from the provisions of the existing by-law to the new requirements under the new by-law
  - For example, under an existing by-law an NFP might have three classes of members. However, the NFP might want to restructure its membership to reflect only one class of members under the new by-law



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- In that case, it would be important to ensure that the new by-law contains a transition provision outlining what is to occur with members who are in the membership classes that will be eliminated under the new by-law
  - As one option, the NFP might want to indicate that the members in membership class #2 and #3 (which are outlined in the existing by-law but are being removed under the new by-law) will become members under membership class #1 (which is being retained under the new by-law)



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- Without transition provisions outlining a clear process to be followed, an NFP's governance could experience uncertainty and confusion
- Lack of clarity on how to transition to a new by-law can also invite legal challenges on the validity of the new by-law, the status of the directors and the status of members under the new by-law



## E. SPECIFIC DRAFTING PITFALLS TO BE AVOIDED UNDER THE CNCA

### 1. Careful Review of Mandatory, Default and Optional Clauses Under the CNCA

- Rules that apply under the CNCA and the regulations are highly complex
- Under the CNCA, there are different types of rules that apply to by-laws, which are set out in both the CNCA and the regulations under the CNCA
  - Mandatory rules that cannot be overridden by the articles or by-law
  - Default rules, that apply automatically where the by-laws for an NFP are silent on a given issue
    - Default rules can be overridden by provisions within the articles or by-laws



- Optional rules which can be included within the by-laws of an NFP
  - Optional rules would not apply if the by-laws of the NFP are silent on those issues
- In order to avoid having to regularly consult the lengthy CNCA provisions and regulations to understand the requirements that apply to their NFP, the following can be done:
  - Prepare a comprehensive by-law that contains:
    - Key CNCA provisions on mandatory rules
    - The NFP's desired default provisions
    - The NFP's desired optional provisions
  - This can help to streamline matters and avoid considerable confusion

## 2. Rights Given to Non-Voting Members Under CNCA

- Under the CNCA, complex rules apply when an NFP has more than one class of members
- If an NFP has two or more classes of members, members of each class of members will be entitled to vote separately as a class if the corporation wants to make certain changes, regardless of whether the membership class is a voting class or non-voting class
- Separate class votes are required for:
  - Fundamental changes (such as amalgamation, the sale, lease or exchange of all or substantially all of the property of a corporation, other than in the ordinary course of its activities)
  - Certain changes to the rights attached to a class or group of members
- Having one class of members (or a closed membership structure) can help to simplify by-law and governance

### 3. Avoiding Complexity of Proxy Voting Under the CNCA

- The CNCA sets out various methods for absentee voting, where a member may vote at a meeting without attending the meeting in person or electronically
- Some NFPs may be inclined to permit members to vote by proxy
  - Given that the CNCA and the regulations contain very detailed rules that apply, NFPs may wish to reconsider inclusion of proxy voting rights for members if an NFP lacks the infrastructure to comply with the highly complicated requirements that apply



#### 4. Appointment of Directors by Board

- As an optional provision, the CNCA states that the board may appoint directors between annual meetings, provided there is a clause in the articles authorizing the directors to do so
- The number of appointed directors must not exceed one third of the directors elected at the previous annual meeting of members ("AGM")
- The appointed directors can only hold office until the close of the next AGM
- Where an NFP has director terms that are 2 or 3 years, including a clause in the articles permitting the board to appoint up to one third of the directors can result in confusion since the appointed directors can only serve until the close of the next AGM

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**F. SPECIFIC DRAFTING “PITFALLS” UNDER THE OCA**


- Only limited comments are provided regarding pitfalls that can commonly occur with respect to by-laws for Ontario corporations established under the OCA at this time, since the OCA is expected to be replaced by the ONCA in the next few years
- All OCA corporations are required to have a by-law. However, many OCA corporations do not have a general operating by-law at all
  - This inadvertent omission might occur because there is no repository for OCA corporations to file a by-law with the Ontario Ministry of Government Services after incorporation
  - In contrast, under the CNCA, federal corporations are required to file by-laws within 12 months after the members have confirmed them

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- Unlike federal corporations established under the CNCA, OCA corporations are required to have a fixed number of directors
  - A number of OCA corporations have bylaws that reflect a range in the number of directors, which is not permitted
- Proxy voting rights for members is mandatory under the OCA
  - This is commonly omitted from the bylaws of OCA corporations giving the impression that proxy voting is not permitted

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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

## CRITICAL PRIVACY LAW UPDATE


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

[eshainblum@carters.ca](mailto:eshainblum@carters.ca)  
1-877-942-0001

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**25<sup>th</sup> Annual  
Church & Charity Law  
Seminar™**  
**Toronto – November 8, 2018**

## Critical Privacy Law Update

By Esther Shainblum, B.A., LL.B., LL.M., CRM  
eshainblum@carters.ca  
1-877-942-0001

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### INTRODUCTION

- Significant developments in privacy law in 2018
- Important changes both globally and in Canada that:
  - Could change how churches, charities and NFPs in Canada operate; and
  - Should change how they understand their obligations around privacy, transparency and accountability
- Growing global emphasis on privacy and increasing stakeholder awareness and expectations that churches, charities and NFPs must take into account
- The following is a very brief overview

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### 1. Facebook and Cambridge Analytica

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

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### 2. The General Data Protection Regulation ("GDPR")

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

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- Why should churches, charities and NFPs in Canada care about the GDPR?
- GDPR applies to organizations not established in the EU if they process personal data of EU residents to offer them goods or services (whether or not a fee is charged) or if they monitor the behaviour of EU residents within the EU
- Merely having a website accessible in the EU will not constitute "offering goods or services." It must be apparent that the organization "envisages services to data subjects" in the EU

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- Factors include offering services in a language or currency of a member state or mentioning users who are in the EU
- Monitoring behaviour of EU residents while in the EU - any organization using permanent cookies on its website will be subject to the GDPR if it has users in the EU
- Failure to comply with GDPR can lead to fines of 4% of worldwide turnover or €20 million, whichever is higher
- If you think your church, charity or NFP may be subject to the GDPR, obtain legal advice

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### 3. Mandatory Breach Reporting

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

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

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

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### 4. New OPC Guidelines

- In 2018 OPC published two new guidance documents to improve compliance with privacy obligations:
  - "Guidelines for obtaining meaningful consent" – effective January 1, 2019 ("Consent Guidance")
  - "Guidance on inappropriate data practices" – effective July 1, 2018 ("Data Guidance")
- Consent Guidance sets out seven principles to guide organizations in their consent processes, including:
  - Provide information about privacy in a clear, comprehensive, understandable and accessible manner
  - Allow individuals to control the amount and the timing of detail they receive – e.g. layered format
  - Use innovative and interactive forms and tools to obtain consent

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- Data Guidance identifies a series of principles to protect individuals from inappropriate data practices
- Only collect, use or disclose PI for purposes that a reasonable person would consider appropriate in the circumstances (as per s.5(3) of PIPEDA)
- No-Go Zones, including collection, use or disclosure that is unlawful, unethical or likely to cause harm
- Churches, charities and NFPs should not assume they are exempt from PIPEDA
- These are best practices regarding consent and appropriate data practices in Canada - churches, charities and NFPs should adhere on a voluntary basis

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### 5. The US-Mexico-Canada Agreement ("USMCA")

- Chapter 19, "Digital Trade", deals with protection of PI, cross-border transfers of PI and data localization
- Underlying theme of privacy protections as potential barriers to trade runs throughout Chapter 19
- Requirement that each party must have a legal framework that protects PI of users of digital trade and key principles that should be included in a party's legal framework – but very low threshold for compliance
- Highlight on two specific provisions:
  - Article 19.11 - forbids a party from prohibiting or restricting the cross-border transfer of information, except in limited circumstances
    - Problem – Inconsistent with provisions in Alberta PIPA and Quebec Private Sector Privacy Act

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- Also inconsistent with GDPR, which permits transfer of personal data outside the EU only to countries that can ensure an adequate level of protection or subject to appropriate safeguards
- Data transfer restrictions are used when there are concerns about the level of protection personal information will receive when transferred outside national boundaries
- Article 19.12 - the "data localization" provision, prohibits a party from requiring companies to use or locate computing facilities in its territory as a condition of doing business there
  - Problem - Inconsistent with BC FIPPA, Nova Scotia PIIDPA, Federal Bank Act, which all require certain types of information to be stored in Canada

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- BC Freedom of Information and Privacy Association states that the USMCA conflicts with existing provincial legislation and puts the privacy of British Columbians at risk
- Canada Revenue Agency (CRA) requires Canadian registered charities to keep their books and records at their Canadian address – Article 19.12 could make it more difficult for them to store books and records on the cloud as it is less likely that cloud service providers will have computing facilities located in Canada

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## CONCLUSION

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

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November 8, 2018**

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


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

[bwk@carters.ca](mailto:bwk@carters.ca)  
1-877-942-0001

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

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

**bwk@carters.ca**  
**1-877-942-0001**

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### OVERVIEW

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

See *Charity & NFP Law Bulletin #431* at [carters.ca](http://carters.ca)

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### A. OVERVIEW OF FEDERAL LEGISLATION

#### 1. General Background

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

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

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#### 2. Federal Act Penalties and Restrictions

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

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

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## B. OVERVIEW OF ONTARIO LEGISLATION

- The recreational cannabis regime is governed in Ontario through several acts (and their regulations) including:
  - Ontario Cannabis Act, 2017, SO 2017, Schedule 1
  - Ontario Cannabis Retail Corporation Act, 2017, SO 2017, c 26, Schedule 2
  - Smoke-Free Ontario Act, 2017, SO 2017, c 26, Schedule 3
- Originally, recreational cannabis would be available in Ontario through a government operated retail model similar to the LCBO
  - However, Bill 36, Cannabis Statute Law Amendment Act, 2018 ("CSLAA") was introduced on September 27, 2018 and came into force on October 17, 2018

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- The CSLAA replaced the retail model above with a new system whereby private retail stores will be permitted as of April 1, 2019, subject to licensing and approval by the Ontario government
- Until April 1, 2019, individuals in Ontario can only access recreational cannabis online, through the Ontario Cannabis Store ("OCS")
  - The OCS only delivers orders to addresses within Ontario, and requires visitors to verify their age before entering the website
- Link to OCS: <https://ocs.ca/>
- Link to CSLAA: <https://www.ontario.ca/laws/statute/s18012>

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## C. MEDICAL USE OF CANNABIS IN CANADA

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

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## D. RECREATIONAL CANNABIS IN THE WORKPLACE IN ONTARIO

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

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

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

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### 2. Ontario Occupational Health and Safety Act

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

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### 3. Employer Rights Regarding Performance of Duties

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

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### 4. Challenges of Employers Regarding Cannabis Impairment

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

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

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### E. WORKPLACE CANNABIS POLICIES

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

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

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

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## F. REGULATING OFF-DUTY EMPLOYEE CONDUCT

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

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## G. ACCOMMODATING MEDICAL USE OF CANNABIS

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

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

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

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

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## H. EMPLOYEE ADDICTION TO CANNABIS

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

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

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## I. CONCLUSION

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

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

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**THE 25<sup>TH</sup> ANNUAL CHURCH &  
CHARITY LAW SEMINAR  
November 8, 2018**

**RECENT FREEDOM OF RELIGION  
DECISIONS FROM THE SUPREME  
COURT OF CANADA**

By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent  
tcarter@carters.ca 1-877-942-0001


and

By Jennifer M. Leddy, B.A., LL.B.  
jleddy@carters.ca 1-877-942-0001

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**25<sup>th</sup> Annual  
Church & Charity Law  
Seminar™**  
**Toronto – November 8, 2018**

**Recent Freedom of Religion Decisions  
from the Supreme Court of Canada**  
By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent  
tcarter@carters.ca  
and  
Jennifer M. Leddy, B.A., LL.B.  
jleddy@carters.ca  
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**A. INTRODUCTION**

- The Supreme Court of Canada ("SCC") delivered two decisions involving freedom of religion this year:
  - Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 (31 May 2018) ("**Wall**"), and
  - Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (with the companion decision in *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33) (15 June 2018) ("**Trinity Western**")
- This presentation provides an overview of these two SCC decisions and their impact on freedom of religion
- See Bulletins on both decisions at [www.carters.ca](http://www.carters.ca)

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**B. RELIGIOUS AUTONOMY IN THE WALL DECISION**

**1. Facts**

- Mr. Wall was a member of the Congregation who had been "disfellowshipped" after the Congregation's Judicial Committee determined that he was not sufficiently repentant for having failed to observe the accepted scriptural standards of the Congregation
- Mr. Wall later made an application for judicial review, claiming that his property and civil rights were prejudiced because the decision to disfellowship him had caused him to be shunned by his family as well as by other Jehovah's Witnesses, which had resulted in significant loss in his business income as a real estate agent

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- Both the Alberta Court of Queen's Bench and the Alberta Court of Appeal held that courts have the jurisdiction to review decisions made by religious groups regarding the discipline or expulsion of members where such decision is made in a manner that does not reflect principles of natural justice
- At the Court of Appeal, Mr. Wall had alleged that before his expulsion he was not provided with the details of the allegations against him or an explanation of the discipline process that he would face. Mr. Wall also alleged he was not advised whether he could retain counsel for purposes of the meeting with the Judicial Committee or whether there would be a record of the proceedings, nor did he receive written reasons

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**2. The SCC's Ruling**

- The SCC stated that the central question in the appeal was "when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness"
- The SCC unanimously held that the Congregation's decision to expel Mr. Wall could not be reviewed by a court under judicial review for three reasons:
  - First, judicial review is a public law concept restricted to public decision makers (not private parties) where there is "an exercise of state authority and where that exercise is of a sufficiently public character"
    - The Congregation was not exercising statutory authority, plus its decision was not of sufficiently public character

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- Second, where no underlying legal right is present, there is no free-standing right to procedural fairness concerning certain decisions made by religious groups and other voluntary associations
  - Courts have jurisdiction to consider a religious group or voluntary association's adherence to its own procedures and, in certain circumstances, the fairness of those procedures where there is "a legal right which a party seeks to have vindicated," such as wrongful dismissal, property or contractual right
  - Mr. Wall had no property right in maintaining his client base or "a right to the business of the members of the Congregation", or contractual right because there was no written constitution

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- Third, even where judicial review would otherwise be available, courts should only consider issues that are justiciable
  - The SCC stated that decisions of justiciability are contextual, and courts should ask whether they have the “institutional capacity and legitimacy to adjudicate the matter”
  - Considering the relevance of religion to the question of justiciability, the SCC referred to its decision in *Syndicat Northcrest v Amselem*, which held that: “[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion”

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- The SCC added that the court may also lack the legitimacy and institutional capacity to even review a religious group’s procedural rules where those rules may require the interpretation of religious doctrine
- It therefore upheld its previous findings that courts do not have the legitimacy or institutional capacity to deal with the merits of a religious tenet
- Regarding the right to freedom of religion under the *Canadian Charter of Rights and Freedoms* (“*Charter*”), the SCC held that the *Charter* does not apply directly to private litigation, but rather only to legislative, executive and administrative branches of government

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### 3. Commentary

- While the *Wall* decision narrows the scope of the court’s jurisdiction by identifying the types of fact situations over which it will not exercise jurisdiction, it does not provide much clarity over instances in which the court will intervene. Rather, it simply identifies three situations when the court will not intervene
- First, it is clear that judicial review is restricted to public decision makers where there is an exercise of state authority of a sufficiently public character
  - an impact on a broad segment of the public, in and of itself, is not sufficient to make a decision public, but rather it must involve questions about the rule of law and the limits of an administrative decision maker’s exercise of power

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- As such, the SCC affirmed the principle that religious groups and other voluntary associations are private, non-governmental bodies rather than state actors or public bodies, and therefore these entities have autonomy to make decisions as private bodies free from the statutory constraints that are imposed on public bodies
- Second, the *Wall* decision provides clarity on the court’s stance concerning the justiciability of decisions made by religious groups
  - Matters concerning religious doctrine are beyond the scope of the court’s jurisdiction and will not be subject to review

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- However, a dispute is not necessarily non-justiciable simply because it has a religious aspect to it. Rather, the non-justiciability of such disputes is constrained to matters involving religious doctrine, including where procedural rules involve the interpretation of religious doctrine
  - Courts may still review procedural rules that are “based on a contract between two parties, even where the contract is meant to give effect to doctrinal religious principles”
- Third, the *Wall* decision provides clarity on the limitation of courts to review decisions made by religious groups and other voluntary associations for procedural fairness.

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- Courts should not interfere in decisions of religious and voluntary associations, even where procedural fairness and the principles of natural justice are alleged to have been breached unless a legal right has been violated
  - In this regard, the SCC held that “[w]hat is required is that a *legal right of sufficient importance* – such as a property or contractual right – be at stake” [Emphasis added]
  - In order to provide clarity on this point, the SCC identifies various examples of legal rights, including civil and property rights, contractual rights, and underlying legal rights, such as wrongful dismissal.

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- Considerations for Not-for-Profit Corporations:
  - The *Wall* decision did not explicitly reference corporate legislation since the Congregation was not incorporated and did not have a written constitution, by-laws or rules
  - However, some new corporate legislation, such as the *Canada Not-for-profit Corporations Act* (as well as the pending Ontario *Not-for-Profit Corporations Act, 2010*), permit not-for-profit corporations to discipline a member through their constating documents, provided that “the circumstances and the manner in which that power may be exercised” is set out in the articles and bylaws of the corporation

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- As such, the courts would generally have the ability to review whether the discipline procedures set out in the constating documents of the corporation and the applicable underlying corporate legislation have been complied with where a member of a corporation has been disciplined, no matter what the reason was for the discipline in the first place
- Therefore, the *Wall* decision should be seen as relatively narrow in scope as it is limited to decisions made by religious organisations or other voluntary associations that do not have an enforceable “contract” or written agreement, such as a written constitution, letters patent, articles of incorporation, by-laws, or rules that would otherwise create a legal relationship of a contractual nature with their members

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- Organizations that have established legal relationships with their members, akin to that of a contract, should recognise that rights associated with such relationships, when contravened, may be subject to legal review for failure to follow the procedures of the organization
- This would be in addition to the jurisdiction of the courts to review decisions that may impact other legal rights of the individual in question, such as matters of wrongful dismissal, or a property or contractual right
- The SCC’s attempt to clarify matters in the limited facts of the *Wall* decision has left open questions that will themselves likely require further clarification and be expanded upon by the SCC and lower courts

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## C. TRINITY WESTERN’S CONVENANT

### 1. Facts

- Trinity Western University (“TWU”) is a private evangelical Christian university in British Columbia (“BC”) that had proposed opening a law school
- Like all students and faculty of the university, those of the law school would have been required to sign a faith-based community covenant that included, among other requirements, abstinence from sexual intimacy outside marriage between a man and a woman (the “Community Covenant”)
- The law societies of BC and Ontario (“Law Societies”) both denied accreditation to TWU’s proposed law school on the basis that it was discriminatory to the LGBTQ community

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- The effect of the Law Societies denial of accreditation was that graduates of the proposed TWU law school would not be presumed fit to be granted licenses to practice law in BC or Ontario but have to individually apply for a certificate of qualification from the Federation of Law Societies of Canada
- TWU brought applications for judicial review of the Law Societies’ decisions
- The Ontario Court of Appeal upheld the decision of the law society of Ontario while the B.C. Court of Appeal ruled in favour of TWU
- Both decisions were appealed to the SCC and heard together

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- The decisions in the SCC were split 7-2 in favour of the Law Societies but two of the Judges who concurred with the majority result wrote separate reasons

### 2. The SCC’s Majority Ruling

- The majority held that, while the Law Societies’ decisions not to accredit TWU’s proposed law school infringed TWU’s religious freedom under the *Charter*, the decisions were reasonable because they proportionately balanced:
  - The deleterious effects on religious freedom with
  - The Law Societies’ statutory objectives of protecting the public interest by ensuring diversity and equality in the profession

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- Statutory objectives of the Law Societies
  - The majority found that the Law Societies' statutory objectives are, broadly speaking, to "uphold and maintaining the public interest in the administration of justice", which includes "upholding a positive public perception of the legal profession"
  - For the majority, the statutory objectives must be considered "in determining the requirements for admission to the profession including whether to approve a particular law school"
- Freedom of Religion
  - The majority followed established precedent that in order to establish a claim for infringement of freedom of religion a claimant must demonstrate:
    - That he or she "sincerely believes in a practice or belief that has a nexus with religion" and

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- That the impugned state conduct "interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief"
- In this case, the majority found that members of TWU's community have a sincere belief that studying in an evangelical Christian community contributes to their spiritual development, and that the universal adoption of the Community Covenant contributes towards creating an environment that allows TWU students to grow spiritually

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- Further, by interpreting the public interest in a manner that precludes accreditation of TWU's law school, the Law Societies interfered with the TWU community members' rights to grow spiritually through the study of law in an evangelical Christian environment in which students follow certain religious codes of practice
- Accordingly, TWU community members' religious rights were infringed by the Law Societies' decisions

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- The majority found that the Law Societies proportionally balanced the *Charter* protection of freedom of religion with their statutory objectives, as they did not significantly limit religious freedom, but rather only limited TWU's ability to open a law school with a mandatory Community Covenant, which the majority found restricted the conduct of others, including those of different religious beliefs
  - The majority found this limitation to be: "of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary, for prospective TWU law students"

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### 3. The SCC's Dissenting Opinion

- The dissenting opinion of two Justices found that:
  - "the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit [...] because they meet minimum standards of competence and ethical conduct"
  - Since TWU's proposed law school did not raise concerns of fitness of its graduates, the only defensible exercise of the Law Societies' statutory discretion was to accredit the school

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- The dissenting minority further stated that:
  - The purpose of TWU's admissions policy was to establish a code of conduct that supported its religious community rather than to exclude anybody
  - That no single group had been singled out, and
  - That "the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society"

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#### 4. Commentary

- While the majority decision held that the infringement of freedom of religion was not significant enough to warrant overturning the decisions of the Law Societies not to accredit TWU's law school, the *Trinity Western* decision does not necessarily mean that religious freedom in Canada is in serious peril
- The *Trinity Western* decision does not preclude the creation of a faith-based law school
- The SCC noted that the Law Society of BC "was prepared to approve the law school if TWU agreed to remove [...] portions of the Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman'"

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- With respect to the Community Covenant itself, the majority recognized the Community Covenant's role in creating an environment that supported students' spiritual growth, stating that:
  - "TWU has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices"
  - However, the majority also held that "[t]he Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community [...]", with the effect of restricting the conduct of others

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- As such, the majority decision of the SCC would suggest that an aspirational code of conduct, rather than a mandatory covenant, may have resulted in a different decision from the SCC and possibly from the Law Societies themselves
- The codes of conduct of most faith based organizations would probably not be affected by the decisions in TWU
- In TWU the Charter applied to the decisions of the Law Societies because they, unlike most private faith based organizations, are state actors
- Faith based organizations have both the protections and obligations of provincial human rights legislation

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#### D. CONCLUSION

- These two decisions of the SCC impact two separate aspects of the freedom of religion under the *Charter*
  - The *Wall* decision upheld the autonomy of religious organizations in disciplining their own members in accordance with the tenets of their own faith
  - The *Trinity Western* decision, may be confined to its narrow ruling that mandatory codes of conduct that require adherence by others with different religious beliefs or no beliefs are unlikely to be upheld. This is quite different from expecting employees or recipients of services from faith based institutions to respect (not adhere to) the institutions' beliefs

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**THE 25<sup>TH</sup> ANNUAL CHURCH &  
CHARITY LAW SEMINAR  
November 8, 2018**

**WHAT IS HAPPENING IN CHURCH  
AND CHARITY LAW IN  
AUSTRALIA?: SHARING IDEAS  
FROM DOWN UNDER**

**By Murray Baird, B.A., LL.B., FAICD  
Assistant Commissioner General Counsel  
Australian Charities and Not-for-profit Commission (ACNC)**

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## What is happening in Church and Charity Law in Australia? : Sharing ideas from Down Under

25th Annual Church and Charity Law™ Seminar  
Thursday November 8, 2018  
Murray Baird  
Assistant Commissioner General Counsel  
Australian Charities and Not-for Profits Commission



- New independent agency
- Separate from Australian Taxation Office
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### OBJECTS



### RELATIONSHIP WITH REVENUE



- Co-located
- Independent
- Respect for boundaries
- Seamless for Customers

### WHAT THE ACNC DOES

Registers new charities

Maintains a charity register

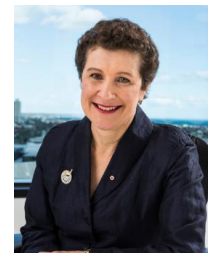
Regulate charities (reporting and compliance)

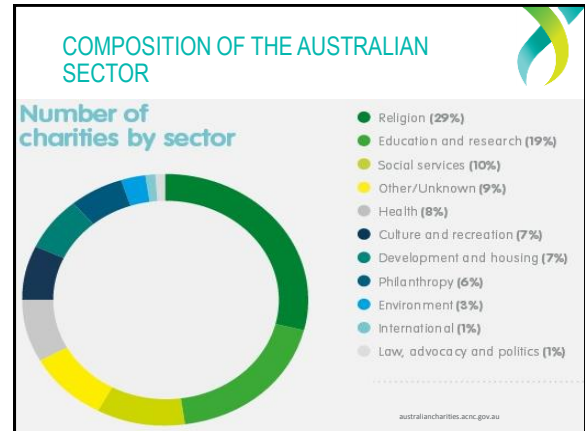
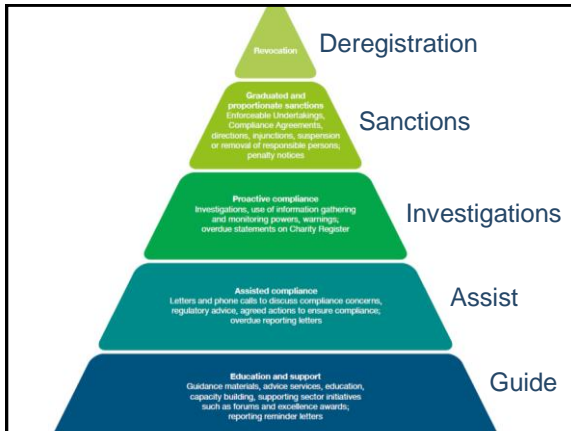
Provides advice, guidance and education

Reduces red tape for charities

### FRIEND OR FOE?

"The ACNC begins with a presumption that charities act honestly and prudently. However, we will take decisive action when a charity acts dishonestly and puts public trust and confidence at risk."





### What ACNC expects from Charities

- Maintain **charity status**
- Keep **records**
- **Report** annually (AIS)
- **Notify** of changes
- **Comply with** Governance Standards



### BASIC RELIGIOUS CHARITIES

- Purely religion without welfare, education etc.,
- No Governance Standards;
- No financials
- Royal Commission into institutional abuses;
- Five year review of ACNC legislation

### ADVOCACY

- Charities can express views to further charitable purpose;
- Debate on issues is fundamental to our democracy;
- No purpose of support or opposition for political party or candidate



### CHARITIES AND POLITICAL ADVOCACY

- Aid/Watch (2010) – “campaigning for change in the way overseas aid is delivered by advocating change in government activity and policy”
- “...there is no general doctrine which excludes from charitable purposes “political objects”.
- “the generation of public debate concerning the efficiency of foreign aid directed to the relief of poverty itself is a purpose beneficial to the community.
- agitation for legislative and political changes is implicit in the system of law and constitutional processes ”



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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

## LESSONS LEARNED FROM CLAIMS TO THE COURTROOM PART 1: THE CLAIMS

By Kenneth Hall, President – Robertson Hall Insurance

[khall@robertsonhall.com](mailto:khall@robertsonhall.com)  
1-800-640-0933

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Orangeville (519) 942-0001  
[www.carters.ca](http://www.carters.ca) [www.charitylaw.ca](http://www.charitylaw.ca)

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

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### By the numbers

16 Minutes to present Important Information for your Leaders

8 Myths exploded about Lawsuits, Risk and Insurance

4 Real World Liability claims suffered by client organizations, no names!



### Myth # 1 - Churches, Charities and Not-For-Profits don't get sued!

WRONG!



By the numbers

- Robertson Hall Insurance insures over 7,500 churches and charities across Canada
- In the decade between 2008 - 2017, we saw 696 legal actions commenced against our own client organizations and directors
- These actions include civil court liability awards, out-of-court settlements, claims involving legal defense costs only, medical payment claims and human rights tribunal proceedings
- Of those actions, two civil liability claims were in excess of \$10,000,000

### By the numbers ... continued

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

ANSWER:

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

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

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

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

### Myth #2 – There is High Risk, Low Risk and No Risk

MOSTLY WRONG!

Organizations and leaders can effectively assess and mitigate risk

Risk Management 101

- **Identify** the risks of your organization's operations and ministries
- **Reduce** those risks through effective prevention and safety
- **Eliminate** risks that are not reasonable or necessary
- **Transfer** risks (i.e. through Insurance, Waivers, etc.)

However there is no such thing as "No Risk"



### Myth #3 - Insurance means an Insurance Company

WRONG!

- Insurance is first and foremost a risk-sharing concept, a tradition existing among communities and societies for many centuries, long before the modern commercial insurance industry existed
- It has been prevalent among many European and North American faiths, including the Mennonite community well into the 20<sup>th</sup> century
- It continues to exist today among individuals, organizations, governments and corporations who create private risk pools and insurance captives; side by side with the commercial for-profit life and general insurance companies we utilize each day to provide safety and security for our lives, our property and our future income.



Whether private, public or commercial the concept is the same...

**The resources of the many (i.e. premiums) pay for the misfortunes (i.e. claims) of the few, including fires and multi-million \$ lawsuits; misfortunes that could bankrupt an individual, business or charity**

**Myth #4 – Insurance is like a bank account; equal premiums in, equal claims payments out, for every policyholder!**

**WRONG!**



- Many people will pay premiums for term life, disability, homeowner's, auto, commercial and other forms of insurance, who will never have a claim ... fortunately
- Otherwise there is no money to pay large claims for those less fortunate!
- The average church or charity may pay just a few thousand dollars of insurance premiums each year; however it would take the annual premiums of 1,000 organizations just to pay one major building fire claim; or 2,000 organizations to pay one major liability award or settlement

And that assumes none of those other thousands of organizations has any claims at all, large or small!

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**Responsibilities of a Policyholder**

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

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

**Ongoing, including at renewal time-**

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

**In the event of a Claim-**

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

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

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**What "triggers" a Liability claim?**



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

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

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**Myth #5 - A Third Party claimant can't take legal action (sue) after 2 years**

**PARTLY WRONG!**



- For many types of civil liability matters or wrongs (also known as "torts") including bodily injury and property damage, the basic limitation period in many provinces including Ontario is 2 years from the date of the tortious act, injury or occurrence; or from when the claimant first became aware a claim could be made.

**However there are Exceptions!**

- For some forms of civil actions there is no statute of limitations, including by victims of childhood abuse!
- These exceptions underscore the importance for child and youth-serving churches and charities to keep documentation on file in perpetuity – subject to privacy laws - including liability insurance policy documentation; employee and volunteer screening, criminal record checks; and accident and abuse incident reports

**This documentation could make a big difference to your organization and future leaders in a lawsuit many years from now!**

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**Myth #6 – We only need one type of Liability policy**

**WRONG!**

Any Church, Charity or Not-For-Profit and its leaders need at least two (2) basic types of Liability policy –

**Commercial General Liability and Directors and Officers (D&O) Liability**

These two forms of liability protection work hand in glove; each covering both the organization entity, and its directors and officers; and covering the full range of normal insurable liability risks.

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

- Professional Liability; for Medical, Legal, Financial and other professional services
- Fiduciary Liability; if they sponsor Pension Plans
- Media Liability; if the main object is Broadcasting, Telecasting, Publishing or Internet Streaming
- Cyber Liability; including Privacy Breaches potentially disclosing Personal Information held by the organization
- Worldwide Liability; for Short-Term Missions and long-term Missions, Relief and Development
- Auto, Aircraft and Watercraft Liability; if owned or leased

**NOTE: Liability Insurance 101 newsletter available upon request**

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**Myth #7 - Big charities have big lawsuits; small charities have small ones**



**WRONG!**

- Of our 2 client organizations with liability claims in excess of \$10,000,000, both were against smaller charities with operations considered lower risk, and both had annual operating revenues less than \$150K!
- ALL organizations need to carry sufficient liability limits based on what they do, whether big or small. Sometimes the largest organizations such as a foundation with millions of dollars in equity and investment income have lower risk; while very small charities operating on a shoe-string budget have the highest risk!
- Remember, higher amounts of liability protection are much costlier for organizations with a higher volume of activities, versus those with less programs, ministries, activities, members and participants
- A large church for example, with thousands of members, a Christian school, day care, fleet of vehicles, etc., might pay \$10,000+ in premium for the same Umbrella Liability coverage amount, as a small church paying \$500.
- However the very same accident, injuries or fatalities happening at a small organization will result in the very same lawsuit and the same court award or settlement, as at a large organization!

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#### A Note about *Judicial inflation*



The increasing cost of things over time is not limited to products and services only.

It's true of civil liability damage awards by courts over time too!

Judgements for some categories of non-auto personal injuries have increased by double over the past 20 years but Liability policy limits of coverage to pay those future damages are not indexed.

Court awards made years or decades in the future for accidents occurrences that take place now, especially those not subject to the usual 2-year Statute of Limitations such as child abuse and other harm to minors, may be astronomically higher as time goes on.

Your organization and future leaders will be stuck with the liability insurance policy coverage amounts you choose today.

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#### So How much is enough, when it comes to Liability protection?



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

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

**\$5,000,000 Occurrence Form Abuse Liability**

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

#### Note about Umbrella Liability coverage:

Although most liability insurance companies have maximum Commercial General Liability capacity of between \$2,000,000 to \$5,000,000 per risk, per occurrence and annual aggregate, a separate Umbrella Liability policy may be available to "top up" your General Liability coverage (and Auto Liability).



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

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#### Myth #8 – All Liability insurance policies are the same



##### WRONG!

- Some policies have geographical or territorial restrictions, vs. worldwide
- Some policies limit legal defense costs within the amount of coverage, thereby eroding the available amount to pay awards or settlements; others provide defense in excess of the policy amount
- Some policies limit defense and coverage for Compensatory damages only; others cover ALL insurable civil defense and damages including Compensatory, Punitive, Exemplary and Multiplied damages
- Some have restrictive conditions for stacking of policy limits, reporting requirements, etc., some do not
- Some are "claims-made" (recommended for D&O if retro); some are "occurrence-form" (recommended for Abuse)
- Not all policies are the same! Unfortunately the "fine print" can mean the difference between full coverage and zero coverage if certain risks are excluded, no matter how high the amount of coverage it says on your policy!
- Check with your broker or agent, ask lots of questions, and make sure your organization is insured with an insurance provider who understands your unique risks and coverage needs.

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#### 4 Real World Claims Churches, Charities and Not-For-Profits in Canada



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#### 4 Real World Claims

##### Churches, Charities and Not-For-Profits in Canada

##### 1 - Slip and Fall Claim



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

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

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

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

##### Sources of Insurance Coverage:

Commercial General Liability (and Umbrella Liability) covering Bodily Injury

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

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##### 2 - Abuse Liability Claim

Our client organizations are primarily from the evangelical Christian faith community

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

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

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

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

Currently defending this uninsured claim

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

##### Source of Insurance Coverage:

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



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### 3 – Employment Practices Claim

Churches and charities are workplaces too!

#MeToo Movement has raised awareness of workplace harassment

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

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

#### Source of Insurance Coverage:

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

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



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### 4 – Short Term Mission Trip Claim



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

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

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

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

#### Source of Insurance Coverage:

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

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## Thank You!

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

#### Disclaimer:

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

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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

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


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

[scarter@carters.ca](mailto:scarter@carters.ca)  
1-877-942-0001

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Toronto (416) 675-3766 Ottawa (613) 235-4774  
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By Sean S. Carter, B.A., LL.B.

[scarter@carters.ca](mailto:scarter@carters.ca)  
1-877-942-0001

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### OVERVIEW

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

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### A. KNOW YOUR VENUE AND PREPARE

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

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

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

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

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

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

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

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## Managing the Important Relationship...

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

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

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

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

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

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

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

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

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

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## Last Thoughts...

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

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

**By Kenneth R. Goodman, B.A., LL.B.  
The Public Guardian & Trustee of Ontario**

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

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

Kenneth R. Goodman  
Ontario Public Guardian and Trustee


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## Introduction

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

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## Charity Law



- Charity law is mostly judge-made.
- The Charities Accounting Act (CAA)
  - Unique to Ontario;
  - Allows the Attorney General, on the advice of the PGT, to make Regulations;
  - Provides an opportunity for improvements to the law to make it easier for charities to do their good work.

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## Changes: 1997 - 2018



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

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## Benefits to Charities #1



- More flexibility in fulfilling your charitable purposes;
  - Running small businesses for income;
  - Better investment opportunities for higher returns;
  - Renting unused space in buildings owned by the charity;
  - Social Investments authorized.

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## Benefits to Charities #2



- Clarification of the law and easier compliance;
  - Charities can make some decisions independently; court orders no longer necessary;
  - Two guidance publications;
  - Court orders without going to court.

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### Benefits to Charities #3



- Less reporting to the PGT;
  - Saves time & effort;
  - Saves money;
  - Simpler reporting when reporting is necessary.

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### Section 13 of the CAA, 1997



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

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### Section 13 of the CAA, 1997



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

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### Section 13 of the CAA, 1997



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

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### Wills reporting rule removed, 2000



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

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

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

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

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

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### Pre-Approved Objects, 2001

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

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### Pre-Approved Objects, 2001

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

15

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

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

16

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

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

17

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

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

18

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

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

19

### Charitable Gifts Act Repealed, 2009

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

20

### Charitable Gifts Act Repealed, 2009

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

21

### Accumulations Act Provisions, 2009



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

22

### Charities can Invest in Land, 2009



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

23

### Charities can Invest in Land, 2009



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

24

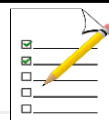
## Updated Reporting Requirements, 2014



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

25

## PGT Reporting Requirements



- Charities incorporated in Ontario must provide the PGT with any changes to:
  - Incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, Private Act,)
  - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers.
- Charities not incorporated in Ontario must provide the PGT with:
  - A copy of the incorporating document or other document that brought the organization into existence (Letters Patent, articles of incorporation, constitution, trust deed etc.);
  - The street and mailing addresses of the organization and the names and addresses (street and mailing) of its directors, trustees, and officers;
  - Any changes to the first two requirements.

26

## Social Investments 2017

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

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## Social Investments 2017

- In late 2017, ss. 10.2 – 10.4 were added to the CAA to clarify the rules around social investments;
- The OPGT also publishes guidance on social investing.  
Link to the Guidance of the Public Guardian And Trustee: Charities and Social Investment:  
<http://www.carters.ca/pub/article/charity/2018/Guidance-of-the-PGT-Charities-and-Social-Investment-2018-11-05.pdf>

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## Payments to Directors 2018

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

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## Payments to Directors 2018

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

30

## Payments to Directors 2018

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

31

## Special Provisions, 2018

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

32

## Upcoming and Unfolding

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

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

- The underlying duties of charities, directors and trustees remain in place. These duties include:
  - Be reasonable, prudent and judicious with the charitable property;
  - Use the charity's property only to carry out the charitable purposes;
  - Avoid Conflict-of-Interest situations or follow the law when there is a conflict;
  - Act Gratuitously;
  - Account for the charity's funds, act in person and make all major decisions;
  - Invest according to the charity's incorporating documents or, if they do not contain provisions, according to the Trustee Act.

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## Contact Information

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

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

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## Other Information

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

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

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# THE 25<sup>TH</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR November 8, 2018

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

By Arlene Proctor, Manager of the Assisted  
Compliance Section, Charities Directorate of the  
Canada Revenue Agency (CRA)

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## Errors related to official donation receipts

### Content

- the name of Canada Revenue Agency and website [canada.ca/charities-giving](http://canada.ca/charities-giving)
- the city, town or municipality where the receipt was issued
- a statement that it is an "official receipt for income tax purposes"
- the date the donation was received, if different from the date the receipt was issued

### Control

- receipts are not issued in sequential order
- listing of receipts contains gaps in the numbers
- exact duplicate copies of receipts are missing

2

## How to avoid these errors?

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

Official donation receipt for income tax purposes

Charity or qualified donee name \_\_\_\_\_ Receipt issued \_\_\_\_\_ DD/MM/YYYY  
 Address \_\_\_\_\_ Charitable registration #: 000000000 RR 0000\* Location issued \_\_\_\_\_ City, Prov.  
 Donated by \_\_\_\_\_ (first and last name and initial)  
 Address \_\_\_\_\_  
 Donation received \_\_\_\_\_ Amount of gift \_\_\_\_\_ A  
 (date) (fair market value of property)  
 Value of advantage by \_\_\_\_\_ B Eligible amount of gift \_\_\_\_\_ C  
 (date) (fair market value)  
 Description of property received \_\_\_\_\_  
 Fair market value appraised by \_\_\_\_\_  
 Address of appraiser \_\_\_\_\_  
 Description of advantage \_\_\_\_\_  
 Authorized signature: \_\_\_\_\_  
 Canada Revenue Agency - [canada.ca/charities-giving](http://canada.ca/charities-giving)

3

### Receipts for cash gifts must have the following:

- a statement that it is an official receipt for income tax purposes
- the name and address of the charity as on file with the Canada Revenue Agency (CRA)
- a unique serial number
- the registration number issued by the CRA
- the location where the receipt was issued (city, town, municipality)
- the date or year the gift was received
- the date the receipt was issued
- the full name, including middle initial, and address of the donor
- the amount of the gift
- the amount and description of any advantage received by the donor
- the eligible amount of the gift
- the signature of an individual authorized by the charity to acknowledge gifts
- the name and website address of the CRA

### Receipts for non-cash gifts (gifts in kind) must also include:

- the date the gift was received (if not already included)
  - a brief description of the gift received by the charity
  - the name and address of the appraiser (if the gift was appraised)
- \*The amount of a non-cash gift must be its fair market value at the time the gift was made.

4

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

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

5

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

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



6

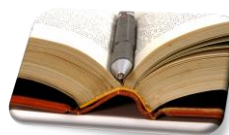
### How to avoid filing an incomplete or incorrect return? (cont'd)

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

7

### Inadequate books and records

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



8

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

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

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

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

10

### Errors with respect to the use of resources

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

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

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

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

Qualified donees include:

- a registered charity (including a registered national arts service organization)
- a registered Canadian amateur athletic association
- a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged
- a registered Canadian municipality
- a registered municipal or public body performing a function of government in Canada
- a registered university outside Canada that is prescribed to be a university, the student body of which ordinarily includes students from Canada
- a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift
- Her Majesty in right of Canada, a province, or a territory
- the United Nations and its agencies
- Her Majesty in right of Canada, a province, or a territory, and the United Nations and its agencies are qualified donees that do not have to be registered to be recognized as such.

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

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

A benefit can include:

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

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

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

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### Questions?

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