

The Annual *Church & Charity Law*™ Webinar Continues Virtually November 4, 2021

Essential Charity & NFP Law Update

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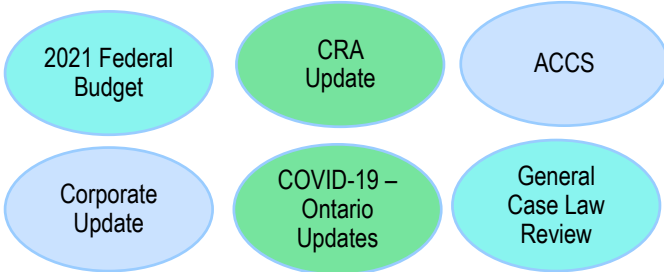
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OVERVIEW (Current as of November 2, 2021)



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A. 2021 FEDERAL BUDGET HIGHLIGHTS

2021
Federal
Budget

- Federal Budget 2021 was tabled on April 19 2021
 - Bill C-30 implementing legislation was assented to on June 29, 2021
- Proposed consultation on amendments to increase the disbursement quota (consultation closed Sept 30, 2021)
 - See Carters’ submission on DQ Consultation <https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>
- Proposed Enhanced Anti-terrorism Provisions in *Income Tax Act* (“ITA”) and *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, including
 - Immediate revocation of charitable status of qualified donees listed as terrorist entities (e.g. Proud Boys, a neo-fascist organization)
 - Provisions expanding FINTRAC’s powers

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- Expanded definition of “ineligible individuals” to include listed terrorist entities and their directors, trustees, officers and like officials including individuals who controlled or managed in any manner whatever, a listed terrorist entity “including a period prior to the date on which the entity became a listed terrorist entity”
- Amended ITA to allow for suspension of charity’s receipting privileges due to false statements
 - Previously CRA was limited to revoking registration for false statements
- Provided temporary financial support to Canada’s social sector, including charities and non-profits

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B. CRA UPDATE

CRA Update

- New CRA Guidances & Amendments posted on November 27, 2020:
 - New Guidances: “Relief of Poverty and Charitable Registration” (CG-029) & “Advancement of Education and Charitable Registration” (CG-030)
 - Revisions to CRA Guidances on Charities Using Intermediaries (CG-002 & CG-004)
- As of October 18, 2021, organizations registered with “My Business Account” can confirm requests online for authorized representatives (e.g. accountants, lawyers) to view tax information
- See presentation by Tony Manconi, Director General of the Charities Directorate of the CRA, for other updates from CRA

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C. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

ACCS

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

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

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D. CORPORATE UPDATE Corporate Update

1. Federal: Import and Export under CNCA

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

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2. Ontario: Electronic Meetings under OCA and ONCA

- Temporary relief to Ontario *Corporations Act* (“OCA”), *Co-operative Corporations Act* (“CCA”) and ONCA corporations in relation to holding electronic meetings of directors and members in response to the COVID-19 pandemic has been extended to September 30, 2022
 - The rules in all three statutes were amended to permit electronic meetings of directors and members to be held during the temporary period
 - regardless of contrary provisions in a corporation’s constating documents

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

- On October 19, 2021, the ONCA came into force
 - See Theresa Man’s presentation “Transitioning to the ONCA for Churches and Charities”
- The Ontario Business Registry was launched on the same day the ONCA came into force
 - Registrations and filings previously submitted by mail or fax (which took six weeks or longer to complete) can now be done instantly online
 - Annual corporate returns can be completed electronically
 - Registry is integrated with CRA’s system enabling the identification of a NFP by a single business number, further streamlining administrative processes

E. COVID-19 ONTARIO UPDATES

COVID-19 –
Ontario Updates

1. Reopening Regulations

- Ontario entered Step 3 of the province’s “Roadmap to Reopen” on July 16, 2021
- When Ontario enters Step 3 of the “Roadmap Exit Step,” on March 28, 2022, most restrictions will be eliminated, including requirement for indoor face coverings in most areas

2. Infectious Disease Emergency Leave (“IDEL”) and Infectious Disease Emergency Leave Pay (“IDELP”)

- IDEL provides unpaid, job-protected leave for non-unionized employees who have been temporarily laid off due to COVID-19 — can claim until January 1, 2022
- IDELP allows workers up to \$200 a day and three paid days off for reasons of an infectious disease, such as COVID-19 — can claim until December 31, 2021

3. Vaccines, Policies & Passports in Ontario

- COVID-19 vaccination policies became mandatory for high-risk settings as of September 7, 2021
- COVID-19 passport system commenced on September 22, 2021 for certain non-essential venues
 - Facilities where a wedding, a funeral or a religious service, rite or ceremony takes place (and others) may opt in to a vaccine passport system even if not required to do so
 - If opted in, social distancing not required but signs must be posted at all entrances to inform the public that proof of vaccination is required prior to entry
- Some public health units are recommending that all employers adopt COVID-19 vaccination policies — for a consideration of legal issues for employers, please see Charity & NFP Law Bulletin No. 503

4. Ontario Legislation to Limit COVID-19 Liability

- On November 20, 2020, *Supporting Ontario's Recovery and Municipal Elections Act, 2020* received Royal Assent and came into force, providing protection from liability for "persons" (including charities and other not-for-profits) operating during the COVID-19 pandemic
- The Act protects the person from liability from acts or omissions resulting in an individual being or potentially being infected with or exposed to COVID-19 on or after March 17, 2020, provided:
 - The person made a good faith effort to act in accordance with public health guidance and any applicable federal, provincial or municipal law relating to COVID-19; and
 - The person was not grossly negligent

- However, the protection from liability under the Act does not apply with respect to acts or omissions that occurred while a law required the person's operations to close, in whole or in part
- The Act also protects a person from vicarious liability for the acts or omissions of another person protected under the Act, but does not apply to limit claims launched by employees against their employers, subject to provisions of the *Workplace Safety and Insurance Act*
- Given the remaining potential for liability that will still exist where there is a finding of gross negligence, charities and NFPs should continue to monitor and ensure compliance with a public health-related guidance and laws when carrying out their activities

F. GENERAL CASE LAW REVIEW

General
Case Law
Review

1. *Bose v. Bangiya Parishad Toronto*, 2021 ONSC 59 (Jan 6, 2021)

- Dismissal of an appeal of a decision recognizing that the members of one NFP were *de facto* members of another charity
- This case involves the Prabasi Bengal Cultural Association (“Cultural Org.”), and the Bangiya Parishad Toronto (“Religious Corp.”)
 - For several decades, the two organizations had a common board of directors
 - When a dispute arose, a minority of the Religious Corp.’s board purported to nullify the election of the board and purported to form a new board for the Religious Corp. (independent of the Cultural Org.)

- The Religious Corp. had not enacted its own by-laws or admitted its own members, therefore it wasn’t possible to call meeting of the members of the Religious Corp.
- The Court recognized that the Religious Corp.’s members were the members of the Cultural Org.
 - Religious Corp. had treated members of the Cultural Org. as its members for decades, and the members of the Cultural Org. had regarded themselves as members of the Religious Corp
 - Court ordered Cultural Org. members to hold a meeting to elect whom they wished to run their organizations, as the most practical and democratic option under s. 297 of the OCA
- This case underscores importance of complying with corporate law requirements (adopting and complying with by-laws) and respecting the rights of members adopting by-laws and complying)

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

- Five members (“Appellants”) were expelled from Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (“Church”) a “voluntary association”
- Appellants alleged Church failed to follow their own internal procedures in expulsion and that their right to natural justice and freedom to practice their religion as set out in s. 2(a) of the *Charter* was violated
- The motions judge dismissed the case and found alleged breaches of procedural fairness could not be remediated, as there was no underlying contract between the parties

- On appeal, the Ontario Court of Appeal found there was evidence of an underlying contract between the Church and the Appellants
- On subsequent appeal, the Supreme Court of Canada (“SCC”) found that the Court of Appeal erred in finding a contract, since there was no objective intention to create a contract nor was there a legal relationship that was intended to be enforceable by the courts
 - Voluntary associations may have rules, including a constitution and by-laws, however, these rules do not in and of themselves give rise to contractual relations among their members
 - Affirmed established case law: courts have jurisdiction to intervene in decisions of voluntary associations only where a legal right is affected

3. *Redeemer University College v Canada (Employment, Workforce Development and Labour)*, 2021 FC 686 (June 29, 2021)

- Redeemer University applied for funding from the 2019 Canada Summer Jobs program, which included a new question regarding measures to provide a workplace free of harassment and discrimination
- Redeemer provided all of the requested information but was determined ineligible based on information found on its website from 2011-2012 and 2014-2015
 - The response did not disclose the decision was based on this information found on the internet
- Federal Court found that Minister breached procedural fairness when rejecting Redeemer's application
- This case is a reminder that charities are entitled to procedural fairness when applying for federal funding

4. *Right to Life Association of Toronto v. Canada (Employment, Workforce, and Labour)*, 2021 FC 1125 (October 22, 2021)

- Canada Summer Jobs program ("CSJ") eligibility requirements included a new attestation that an organization respects "individual human rights, *Charter* rights and reproductive rights"
- The Right to Life Association of Toronto and Area sought judicial review after its application for funding for was denied because it did not make the attestation
- The Federal Court found that the attestation was reasonable in the context of CSJ funding application
 - The Applicant's *Charter* rights to freedom of religion and expression were only minimally impaired
- *Charter* rights are not absolute and courts may become involved with balancing of competing rights, in various contexts

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

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

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