

The logo for Carters Professional Corporation, featuring the word "CARTERS" in a large, white, serif font on a dark blue background. Below it, in smaller white capital letters, are the words "BARRISTERS", "SOLICITORS", and "TRADEMARK AGENTS".

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THE 2021 ANNUAL *Church & Charity Law™* Webinar *Continues Virtually* Thursday, November 4th, 2021

WELCOME

Welcome to the 2021 28th Annual Church & Charity Law™ Webinar, designed to assist churches and charities, as well as the broader faith community in understanding developing trends in the law in order to reduce exposure to legal liability. Although the topics presented are directed to churches, charities and the broader faith community, many aspects of the presentations will also be of interest to not-for-profits as well. For legal and accounting professionals, this Webinar is eligible for **4.0 substantive hours Law Society of Ontario** Continuing Professional Development credits and **Chartered Professional Accountants** Professional Development requirements.

The Annual *Church & Charity Law Seminar™* has been held every year since 1994. This year it is being presented again this year as a Webinar due to COVID-19. The Webinar is presented by **Carters Professional Corporation (Carters)**, a law firm with offices in Toronto, Ottawa and Orangeville, and experienced in advising churches, charities and not-for-profits across Canada, both domestically as well as internationally.

ACKNOWLEDGEMENTS AND THANKS

We gratefully acknowledge and thank Tony Manconi, Director General of the Charities Directorate of the CRA, Kenneth Goodman, The Public Guardian & Trustee at the Attorney General Office of Ontario; as well as Kenneth Hall of Robertson Hall Insurance Inc. for their contributions as our guest speakers at this year's webinar, as well as the lawyers at Carters who have volunteered their time in preparing for this Webinar.

FORMAT OF THE WEBINAR

Presentations will be 20 minutes in length, including Q&A. The special presentations by our guest speakers, Tony Manconi and Kenneth Goodman will be 30 minutes in length, including Q&A. . Questions can be entered in the Question Box feature of the webinar. Unfortunately, not all questions can be answered due to time constraints.

CARTERS RESOURCE MATERIALS

Today's electronic handout package, including the PowerPoint presentations and various resource materials, are available online during the webinar and can be downloaded for your use. These materials, along with numerous other articles, Webinar materials, and newsletters of interest to churches and charities, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity & NFP Law Updates* are available free of charge at our websites at www.charitylaw.ca, www.churchlaw.ca, www.carters.ca, and www.antiterrorismlaw.ca. As well, a link is being provided to the current recently updated version of the 2021 Legal Risk Management Checklist for Ontario-Based Charities as an advance copy before it is posted on our website.

CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, please e-mail us at info@carters.ca with "mailing list" in the subject line. Alternatively, please click on the on the webinar event resources button to sign up to our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the October 2021 edition of the [Charity & NFP Law Update](#) through our website.

Carters Professional Corporation

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WEBINAR SPONSORS

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

- **GMS Professional Corporation**, 905-919-3543, www.gmscpa.ca
- **Robertson Hall Insurance**, 1-800-640-0933, churchinsurance@robertsonhall.com, www.robertsonhall.com
- **Thomson Reuters**, 1-800-387-5164, **Error! Hyperlink reference not valid.** <https://store.thomsonreuters.ca/en-ca/home>
- **LexisNexis Canada Inc.**, 1-800-668-6481, <https://store.lexisnexis.ca/en> **Error! Hyperlink reference not valid.**
- **Adam & Miles LLP**– 416-502-2201, www.adamsmiles.com

SECTOR RESOURCE MATERIALS

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

- **Canada Revenue Agency, Charities Directorate**
- **Canada Revenue Agency, GST/HST Outreach Program**
- **Canadian Centre for Christian Charities**, <https://www.cccc.org>
- **Imagine Canada**, <https://imaginecanada.ca/en> and Advocacy Hub <https://imaginecanada.ca/en/public-policy>
- **ONN (Ontario Nonprofit Network)**, <https://theonnn.ca> and <https://nonprofitresources.ca/>
- **Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>

ABOUT CARTERS

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

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

EVALUATION

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

UPCOMING EVENTS IN 2021 AND 2022

Carters ONCA Webinar – Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips will be held on **Wednesday, December 8, 2021**. [Registration](#) and [Details](#) are available online.

The Ottawa Region Charity & Not-for-Profit Law Seminar or Webinar will tentatively be held on **Thursday, February 17, 2022**. More details will be available soon at www.carters.ca.

The 2022 Annual Church & Charity Law Seminar or Webinar™ will tentatively be held on **Thursday November 10, 2022**. More details will be available in the New Year at www.carters.ca.

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GENERAL DISCLAIMER

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

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SPEAKER BIOGRAPHIES



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



Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent – Managing Partner of Carters. Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2021), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a past member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.



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*TM.



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. Since joining the Office of the Public Guardian and Trustee, Mr. Goodman has guided the policies and practices of the Charitable Property Program. 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 - Over the past 35 years, Ken has pioneered comprehensive insurance programs for Christian churches charities across Canada with Church & Charity Protection Plus. With over 7,000 insured organizations and almost 14,000 claims over the past three decades, Ken has unparalleled expertise in identifying, reducing, eliminating and covering risk through effective insurance protection. His staff work with over 40 national denominational and professional associations, including a 25-year association with the Canadian Centre for Christian Charities. Through speaking engagements, webinars and publications, his commitment is to educate and equip board members and ministry leaders by providing practical advice in avoiding preventable claims.



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



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



Tony Manconi, B.A. – Tony Manconi was appointed as Director General of the Charities Directorate with the Canada Revenue Agency (CRA) on July 25, 2016. He is responsible for the overall management of the federal regulation of registered charities under the *Income Tax Act*. Mr. Manconi began his career in the Public Service in 1988, at the Secretary of State, now known as Heritage Canada. In 1996, he joined Employment and Social Development Canada undertaking various levels of program management responsibilities, and in 2005 transferred to the Canada Revenue Agency as the Director General of the Collections Directorate. Mr. Manconi holds a Bachelor's degree from Carleton University with a combined major in Law and Economics.



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



[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. 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. Ryan is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*.



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

ADDITIONAL LAWYERS AT CARTERS



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



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



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



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



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



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



Lynne Westerhof, B.A., J.D., Student-at-law – Lynne graduated from the University of Toronto, Faculty of Law in June 2021. During law school she was a participant in the Donald G. H. Bowman National Tax Moot, President of the U of T chapter of the Christian Legal Fellowship, and a Division Leader and Caseworker in family law at Downtown Legal Services. Lynne worked as a summer student for Social Capital Partners where she researched the legal context of employee ownership trusts and did additional research for a tax professor about non-profit social enterprises. Prior to law school, Lynne received a Bachelor of Arts with a major in English from the University of British Columbia.

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Thursday, November 4th, 2021

LIST OF POWERPOINTS

© 2021 Carters Professional Corporation

- ◆ **Essential Charity & NFP Law Update**
Esther S.J. Oh, B.A., LL.B.
- ◆ **Transitioning to the ONCA for Churches and Charities**
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **Mergers and Acquisitions: What are the Options?**
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Key Issues in Drafting Employment Contracts**
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **New Developments in Brand Identity & Protection for Churches and Charities**
Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent
- ◆ **Insurance Issues Involving Volunteers for Churches and Charities**
Kenneth Hall, Robertson Hall Insurance Inc.
- ◆ **Impact Investing for Churches and Charities: The New Frontier in Philanthropy** - Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **Donor Advised Funds for Churches and Charities**
Jacqueline M. Demczur, B.A., LL.B.
- ◆ **Terms and Conditions for Websites: What the Small Print Really Means**
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **When Does the PGT Intervene with a Charity: What Directors and Officers Need to Know** - Kenneth Goodman, The Public Guardian & Trustee at the Attorney General Office
- ◆ **The Charities Directorate's Approach to Compliance**
Tony Manconi, B.A., Director General of the Charities Directorate of the Canada Revenue Agency

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ESSENTIAL CHARITY & NFP LAW UPDATE

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

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Essential Charity & NFP Law Update

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OVERVIEW (Current as of November 2, 2021)

2021 Federal
Budget

CRA
Update

ACCS

Corporate
Update

COVID-19 –
Ontario
Updates

General
Case Law
Review

All information in this PowerPoint is current as of November 2, 2021, but is subject to change. To sign up for our firm e-newsletter, click on the “Subscribe to our NEWSLETTER” button at www.carters.ca

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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

1. Federal: Import and Export under CNCA

Corporate Update

- **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

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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

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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

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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

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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

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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.)

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- 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)

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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

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- 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

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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

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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

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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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THE 2021 ANNUAL
Church & Charity Law™ Webinar
Continues Virtually
Thursday, November 4th, 2021

TRANSITIONING TO THE ONCA FOR CHURCHES AND CHARITIES

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


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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Annual Church & Charity Law™ Webinar Continues Virtually November 4, 2021</p>		
<p>Transitioning to the ONCA for Churches and Charities</p> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td data-bbox="259 833 645 891"> <p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p> </td> <td data-bbox="645 833 1224 891"> <p>Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca</p> </td> </tr> </table>		<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca</p>
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<p>OVERVIEW</p> <ul style="list-style-type: none"> STATUS OF ONCA PRACTICAL STEPS FOR TRANSITION FOR REFERENCE OVERVIEW OF KEY ELEMENTS OF ONCA <ul style="list-style-type: none"> • This presentation does not cover the following <ul style="list-style-type: none"> – Special act corporations – they need special case-by-case review – Share capital social clubs under Part II of OCA – they will have 5 years to continue under the ONCA, the Ontario <i>Business Corporations Act</i> or the <i>Co-operative Corporations Act</i> <p>www.charitylaw.ca www.carters.ca</p>

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**FINALLY
YES FINALLY ...
HERE!**

**The Beginning of a
New Era**

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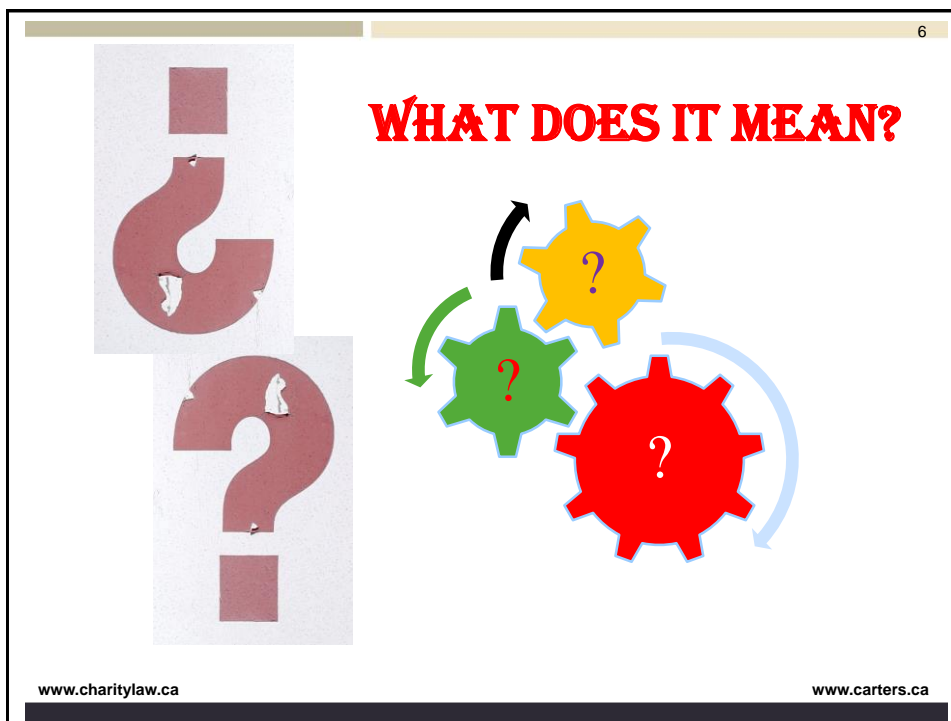
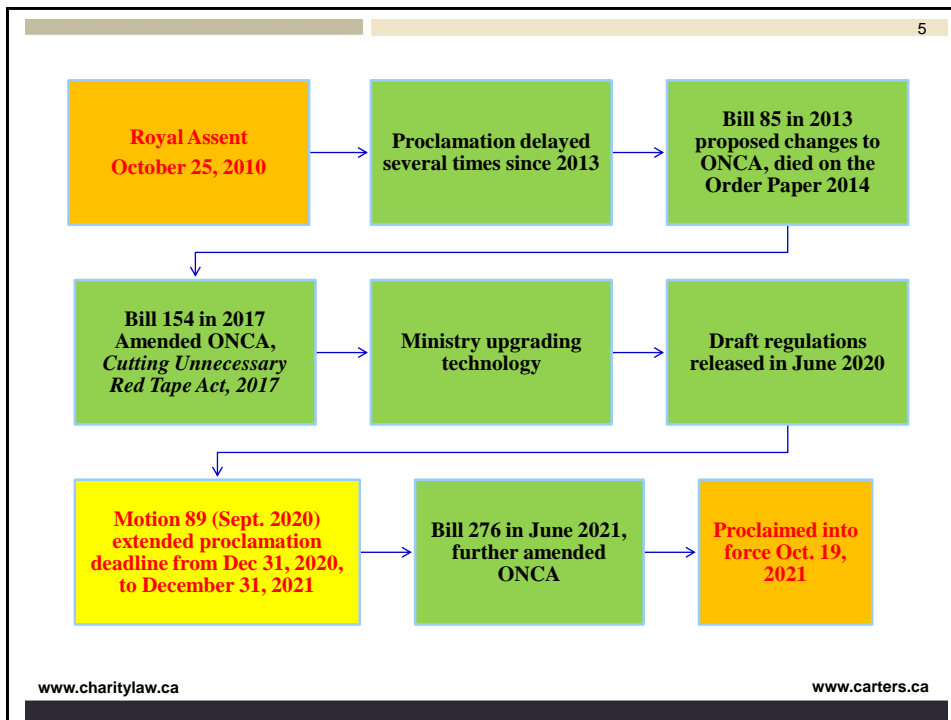
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A. ONCA IS FINALLY HERE

- Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was proclaimed into force on October 19, 2021
- ONCA now applies to non-share capital membership corporations under Part III of Ontario *Corporations Act* (“OCA”)
- New online Ontario Business Registry
- VERY LONG history of ONCA to this point (next slide)

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B. IMPLICATIONS OF ONCA PROCLAMATION

- ONCA applies to all Part III OCA corporations automatically upon proclamation
- If do nothing –
 - Corporation will not be dissolved
 - LP, SLPs, by-laws and special resolutions will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years of proclamation to comply with the ONCA - will result in uncertainty

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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

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- Optional transition process within 3 years of proclamation to make necessary changes to current governing documents
 - adopt articles of amendment
 - adopt ONCA-compliant by-law
- Prudent to go through the transition process
- End result – After the transition process, corporation will be governed by
 - LP, SLPs, articles of amendment – consider consolidating them in restated articles
 - ONCA-compliant by-law

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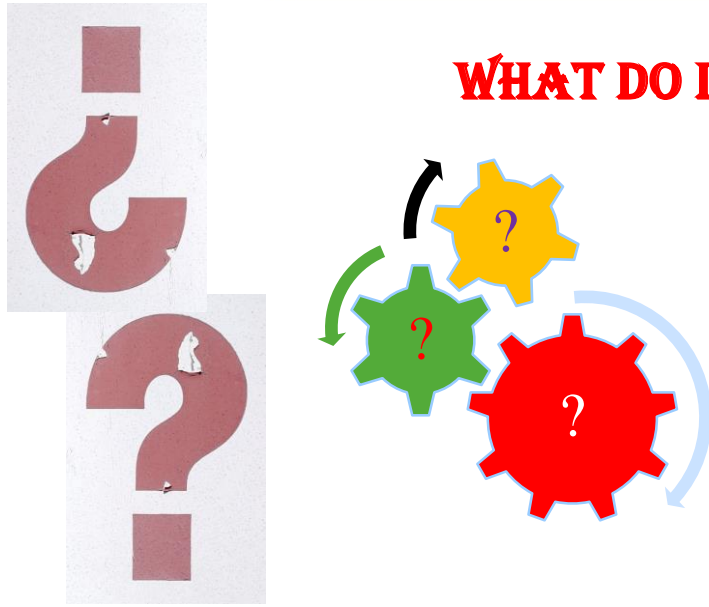
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Current documents	If do nothing after proclamation of ONCA		Optional transition during first 3 years after proclamation
	During first 3 years after proclamation	At end of 3 rd year	
LP SLPs	- LP and SLPs continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	Adopt articles of amendment Goals: - Ensure comply with ONCA - Certainty and no mess
By-laws Special resolutions	- By-laws continue to govern even if inconsistent with ONCA - ONCA applies to areas not addressed in the by-laws	Provisions inconsistent with ONCA will be deemed amended to comply with the ONCA => uncertainty and messy	Adopt new ONCA-compliant by-law or amend by-law to comply with ONCA Goals: - Ensure comply with ONCA - Certainty and no mess

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WHAT DO I DO?

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C. HOW TO GET READY FOR ONCA TRANSITION

1. Collect

COLLECT GOVERNING DOCUMENTS

- Confirm corporation is actually under the OCA
- Collect LP, SLPs, by-laws (including amendments)
- Letters patent, supplementary letters patent
- Obtain microfiche copies from Ministry
- All by-laws, including amendments
- Amending by-laws
- Members' resolutions and board resolutions
- Are by-laws valid? Were they properly adopted?
- Collect governance related documents - e.g., organizational charts, policies, manuals

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2. Review

REVIEW GOVERNING DOCUMENTS

- Do they reflect current governance process? If not, what is current governance process?
- Are changes desired? What are they?
- Are there new provisions to be inserted?
- Write them down, come up with a wish list

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3. Study

STUDY KEY ONCA FEATURES

- To determine how current governance structure will be impacted by the ONCA
- ONCA framework
 - Rules in the Act
 - Some details in the Regulations (still to come)
 - 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 permitted by ONCA
- See overview of rules in second part of this presentation

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4. Compare

COMPARE ONCA VS CURRENT GOV. DOCS.

- Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
- If inconsistent with ONCA mandatory requirements
 - Need to adjust governance structure and process to comply
- If inconsistent with ONCA default requirement
 - Consider whether to opt out
- If ONCA provides options
 - Decide which option to adopt
- Consider what else to include

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5. Prepare

PREPARE NEW ONCA DOCUMENTS

- Prepare articles of amendment
 - To amend LP and SLPs
 - Consider consolidating in restated articles
- Prepare ONCA-compliant by-law
 - By-law will need to be replaced or substantially revised because the ONCA is very different from OCA
 - OCA contained very few rules, ONCA provides many detailed rules
 - Generally easier to start with fresh ONCA by-law than to amend current by-law
 - Some changes may require detailed consideration and consultation with members
 - Some changes may only be administrative

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6. Approve & File

APPROVAL AND FILINGS

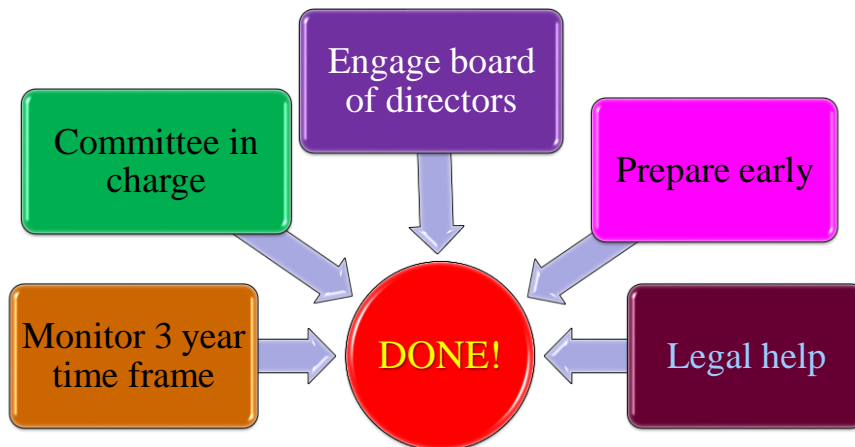
- Board and members to adopt articles and by-law
- Need special resolution of members to approve articles of amendment (*i.e.*, 2/3 of votes cast)
- File articles of amendment with the Ministry (but not by-laws), Ministry will issue certificate of amendment
- Registered charities - file articles and by-law with Canada Revenue Agency, Charities Directorate
- May require other filings – *e.g.*, funders, umbrella organizations
- Update corporate records; Board, staff and volunteer training

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D. KEY TAKEAWAYS



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FOR REFERENCE – **WHAT ARE THE ONCA RULES?**



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E. OVERVIEW - KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

Incorporation	Incorporation as of right with only 1 incorporator
	Certificate of incorporation issued - no more LPs
By-laws	No need to file by-laws or financial statements
	Default by-law will apply if no by-laws adopted within 60 days after incorporation
Powers	Corporations have powers of a natural person
	ONCA does not apply to corporations sole "except as is prescribed"

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2. Public Benefit Corporations (PBCs)

PBCs include (1) Charitable corporations



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

Change status

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

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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

Liquidation and dissolution of a non-PBC

Net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)

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Consequences of being a PBC	<p>Not more than 1/3 of the directors may be employees of the corporation or its affiliates</p> <hr/> <p>Higher thresholds for dispensing with appointing an auditor or person to conduct review engagement</p> <hr/> <p>On dissolution of charitable corporations - net assets must be distributed to a Cdn. corporation that is a registered charity with similar purposes, or to the government</p> <hr/> <p>On dissolution of non-charitable corporations - net assets must be distributed to a PBC with similar purposes, to Cdn. corporation that is a registered charity with similar purposes, or to government</p> <hr/>
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3. Financial Review

Thresholds	<p>Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting</p> <hr/> <p>There are rules for exemption (see tables on next 2 slides)</p> <hr/>
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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. Directors

Number & Qualifications	Minimum 3 directors
	Articles may provide maximum & minimum range
	Directors not need to be members
Election and appointment	Directors elected at AGMs
	Ex-officio directors possible
	Directors may appoint directors between AGMs (1 year term, 1/3 cap)
	If different member groups elect x directors to the Board, must structure members as separate classes

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Term	Maximum 4 year term of directors
	No limit on maximum number of terms
	Staggered terms for directors possible
	Removal of any director by majority vote of members (mandatory), except ex officio directors
	Directors must consent in writing to take office

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Objective standard of care for directors and officers	Act honestly and in good faith with a view to the best interests of the corporation
	Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
Reasonable diligence defence for directors	Not liable if fulfilled their duty if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
	Defence includes good faith reliance on financial statements and reports of professionals
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5. Members	
Basic concepts	Corporation must have members
	By-laws must set out conditions for membership
	Default rule is 1 vote per member (subject to articles)
Classes	Must set out the classes of members
	If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class
Default rules to terminate members	Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination
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May allow directors, members or committee to discipline members or terminate	Articles/by-laws must set out circumstances and the manner in which the power may be exercised
	Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard
	Member may apply for compliance or restraining order if power misused
Class veto votes	ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, <i>i.e.</i> class veto
	Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation
	Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died
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Extensive rights	Requisition members' meeting (by 10% of voting right)
	Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
	Submit proposal to nominate directors (by 5% of voting right)
	Access corporate records (e.g., membership list)
	Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)
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6. Members' Meetings

Notice of meeting	10 to 50 days before the meeting
Record date	Directors may fix "record date" of no more than 50 days before members' meeting (to determine who are members for the meeting)
Voting	Optional proxy votes, voting by mail, voting by telephonic or electronic means
Proxyholders	May limit proxyholders to members
Circulation of financials	FS, auditor/review engagement report, & information required by articles or by-laws must be given to members upon request at least 21 days (or as prescribed in regulations) before AGM

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MERGERS AND ACQUISITIONS: WHAT ARE THE OPTIONS?

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<p align="center">Mergers and Acquisitions: What are the Options?</p> <p align="center">By Ryan M. Prendergast, B.A., LL.B. rprendergast@carters.ca 1-877-942-0001</p> <p align="center">© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td data-bbox="259 833 645 882"> CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001 </td> <td data-bbox="645 833 1222 882"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
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<div></div> <div>2</div>
<p>A. WHY DO CHARITIES CONSIDER “MERGERS”?</p> <ul style="list-style-type: none"> • Common ground <ul style="list-style-type: none"> – Charities may have similar charitable purposes, overlapping staff, overlapping boards, share charitable assets or common beneficiaries • Acquiring expertise or expansion <ul style="list-style-type: none"> – Smaller charities may join with a larger charity if the smaller charity offers expertise, or the larger charity's administrative support helps a smaller charity expand • “Suggestions” from funders <ul style="list-style-type: none"> – Charities predominantly funded by the provincial government may be required to merge with another similarly funder entity under provincial legislation <p>www.charitylaw.ca www.carters.ca</p>

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B. WHAT ARE THE OPTIONS?

1. Mergers, Amalgamations, Consolidations

- Merger is term of art, not a legal term
- No one-size-fits all option
- The best option depends on many factors, for example:
 - What is the income tax status of the entities?
 - What would the eventual board and membership structure look like?
 - Is third party approval or consent required?
 - Can the option chosen be achieved under the applicable corporate legislation?

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2. Are There Alternatives?

- Charities can work with other charities or qualified donees without having to become a single legal entity, e.g., partnership, joint venture
- Charities that wish to work with non-charities must continue to meet the requirements of the *Income Tax Act* (Canada) (ITA) concerning direction and control
 - Registered charities cannot simply fund or support programs of a non-qualified donee
 - They must continue to meet the “own activities” test

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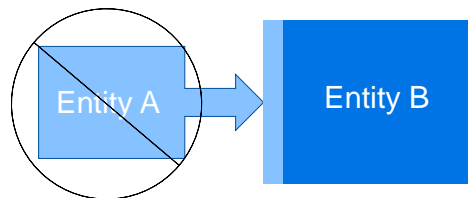
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C. MERGERS, AMALGAMATIONS, CONSOLIDATIONS IN-DEPTH

1. Merger

- Also referred to as an asset merger, asset acquisition or simply a merger
- A transfers assets to B, then dissolve A
- Possible for a charity to carry out an asset acquisition with a non-qualified donee
- If transfer is between two registered charities, transferor charity would also need to voluntarily revoke its charitable status before dissolution



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• Process

- Entity A and B would need to enter into a transfer agreement to transfer the assets and liabilities
 - Possible to transfer all of the assets and liabilities, including employees and contracts; or
 - Pick and choose which assets and/or liabilities to be transferred
- Assets and liabilities would then be transferred, such as moving funds in bank accounts, registering title, changing employee contracts, *etc.*
 - Timing and process involved to complete the transfer may vary
- After transfer, consideration needs to be given to dissolution of the transferor

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- Advantages of an asset merger
 - Limitation of exposure to liabilities
 - Pick and choosing which assets and/or liabilities to be transferred may restrict the exposure of transferee to liabilities
 - Timing
 - Transfer can be completed rather quickly
- Disadvantages
 - Transfer process
 - Potentially labour intensive transfer process
 - Liability for transfer
 - Dissolving corporation will usually cease having assets
 - Potential for lack of on going directors' and officers' insurance

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2. Amalgamation

- Amalgamation is a corporate procedure which allows two or more corporations to continue as one corporation under the applicable corporate legislation
- A and B would be “amalgamated” to form entity AB

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graph BT
    A[Entity A] --> AB[New Amalgamated Entity AB]
    B[Entity B] --> AB
    
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- Both entities must be in same jurisdiction, e.g. CNCA only permits amalgamation of CNCA corporations
- If amalgamation between two registered charities, charity A and charity B do not cease to exist or dissolve from the Canada Revenue Agency's (CRA) perspective
 - CRA will need to be informed of the amalgamation and approval obtained
 - Charity A and charity B may choose which charitable registration number to keep for the amalgamated entity, and then discontinue the use of the other charitable registration number
- In general, it is not possible for a registered charity to be amalgamated with a non-registered charity

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- Process
 - Entity A and B would need to enter into an amalgamation agreement
 - Amalgamation agreement
 - Name of the amalgamated corporation
 - Purposes of the amalgamated corporation
 - Membership
 - Names and addresses of the first directors
 - Any other details for the subsequent management and working of the amalgamated corporation
 - Amalgamation agreement must be submitted to the members of each of the amalgamating corporations
 - Provincial amalgamation may require review by PGT

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- Advantages of an amalgamation
 - Simple process
 - Assets and liabilities deemed to be those of the amalgamated corporation
 - No dissolution or application for charitable status
 - Neither corporation legally dissolves but charitable status of one corporation dissolved
- Disadvantages
 - Exposure to liability
 - All of the assets of the amalgamated corporation are available to satisfy all of the existing or contingent liabilities of both entities
 - Full disclosure process
 - Each party must disclose fully all of its assets and current and in particular liabilities

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3. Consolidation

- Form new entity C, transfer assets and operations of both A and B to C, then wind up and dissolve A and B
- If a consolidation is between two registered charities, then the new corporation must obtain charitable status before it can receive the assets from the two charities

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- Process

- Entity C is created to receive a transfer of the assets of Entities A and B
 - Afterwards Entity A and Entity B would dissolve
- New corporation C is created which would apply for charitable status from CRA
- The process of incorporation and application itself would take approximately a year to complete
 - This option is the longest and most complex among the three options

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- Advantages of a consolidation

- Reduced liability exposure
 - “Fresh start” from liabilities associated with its programs and day to day operations
- Public perception
 - Neither corporation is being subsumed into the other

- Disadvantages

- Additional time required and expense
- Additional approvals

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D. DUE DILIGENCE PROCESS AND SELECT ISSUES

1. Due Diligence Process

- Necessary for all the parties to fully disclose to the others all of their assets and current and potential liabilities
 - Review documents, including governing corporate documents, contracts, insurance, employment, real property and other documents to see what deficiencies and liabilities are evident;
 - Consider the results of the review with regard to the options; and
 - Prepare a strategic plan to proceed with option chosen and to manage the remaining areas of risk

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2. Select Issues for Review

- Program Liability
 - Identify potential areas of liability and ongoing obligations in relation to past program related liability
 - Determine whether there is any potential ongoing liability remaining, and if there is, if there is appropriate insurance and/or indemnities in place
 - Potential liability for past programs would need to be examined in relation to the applicable limitations periods
- Charitable and CRA Compliance
 - Review whether either party has been in compliance with requirement of *Income Tax Act* (Canada) and CRA
 - If prior audits review audit outcomes

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- Employment Issues
 - Section 9 of the *Employment Standards Act, 2000* (ESA), an amalgamation or asset acquisition of the corporations will not be deemed to give rise to a termination of employment, which would otherwise trigger termination and severance pay obligations under the ESA
 - Deemed continuance of employment will occur so long as the employees continue to be employed upon substantially the same terms and conditions as their present employment
 - Consents will be required from any employees where there is a change in role, compensation, etc.
 - Employees who are terminated if redundant will need appropriate termination packages

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- Intellectual Property Issues
 - Trademarks are very important assets and need to be properly managed and protected
 - As part of amalgamation, asset transfer, or consolidation, IP assets of parties should be reviewed
 - Review applicable trademark licenses for parties to see if any assignments or corrections need to be done
 - If new branding is being created for newly established consolidated or amalgamated entity, registering a trademark offers significantly enhanced protection

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- Review of Service Contracts or Agreements
 - Contracts or agreements with third-parties would continue without need for assignment or assumption
 - In other options, review needs to be done to determine impact of asset acquisition or consolidation
- Review of Insurance Policies
 - Review and retain all past insurance policies, in the event that a claim is ever made arising from historical operations of any of the corporations
 - Consider if and how any new insurance may be able to also respond to any historical claims
 - Consult with brokers retained to act on behalf of all parties

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- Externally and Internally Restricted Fund
 - Examination of both the internally and externally restricted funds will form an important part of the amalgamation process
 - If amalgamation chosen, amalgamation agreement should identify externally restricted funds and agree that there will be compliance with the terms
 - In consolidation or asset transfer, restrictions will need to be tracked and complied with between the parties

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THE 2021 ANNUAL
Church & Charity Law™ Webinar
Continues Virtually
Thursday, November 4th, 2021

KEY ISSUES IN DRAFTING EMPLOYMENT CONTRACTS

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


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 BARRISTERS SOLICITORS TRADEMARK AGENTS	The Annual Church & Charity Law™ Webinar Continues Virtually November 4, 2021
Key Issues in Drafting Employment Contracts	
By Barry W. Kwasniewski, B.B.A., LL.B. bwk@carters.ca 1-877-942-0001	
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A. INTRODUCTION	
1. Overview	
<ul style="list-style-type: none">• The COVID-19 Pandemic has renewed discussion about employment contracts for churches and charities<ul style="list-style-type: none">– Required to take a closer look at employment contracts to determine employees' legal rights• Because employment laws change so frequently, employment contracts need to be kept up-to-date• The employment laws discussed in this presentation relate to Ontario, so it's important to consult with employment lawyers in other provinces as necessary	
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B. THE IMPORTANCE OF WRITTEN EMPLOYMENT CONTRACTS

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

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The key provisions of an employment contract should include

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

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C. ONTARIO LEGAL FRAMEWORK

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

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

**NOTICE OF
TERMINATION**

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee’s benefits for the same number of weeks as the notice required

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

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D. THE IMPORTANCE OF CONTRACTUAL TERMINATION PROVISIONS

Waksdale v Swegon North America, 2020 ONCA 391 (June 17, 2021)

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

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

**TERMINATION
OF
EMPLOYMENT**

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E. THE IMPORTANCE OF REMOTE WORK PROVISIONS

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

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F. TEMPORARY LAYOFFS

1. The Law in Ontario

- The ESA allows for temporary layoff of employees for certain limited time periods, without the temporary layoff deemed to be a termination
- Nevertheless, courts in Ontario have ruled that – unless there is a written employment contract that clearly states that the employer has the right to temporarily layoff an employee – the temporary layoff will be considered to be a termination without cause (unless the employee agrees to the temporary layoff)
 - Under a termination without cause, the employee is entitled to termination compensation

Employment Standards Act, s 56(2) ... a temporary layoff is,

- a. a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;
- b. a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,
 - i. the employee continues to receive substantial payments from the employer,
 - ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
 - iii. the employee receives supplementary unemployment benefits,
 - iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
 - v. the employer recalls the employee within the time approved by the Director, or
 - vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee;

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2. Pandemic-Related Amendments to ESA

- In May 2020, the Ontario government passed regulations under the ESA which provided that all temporary layoffs due to COVID-19 are deemed to be Infectious Disease Emergency Leave (“IDEL”)
- In accordance with IDEL, the following are not constructive dismissal if occurring during COVID-19 period (March 1, 2020 – January 1, 2022)
 - Temporary reduction / elimination of an employee's work hours for reasons related to the designated infectious disease
 - Temporary reduction of an employee's wages for reasons related to the designated infectious disease

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- Goal of IDEL to protect employers from expensive employee lawsuits from COVID-19 related temporary lay-offs, but subsequent litigation concluded with vastly different results
 - ***Cuotinho v Ocular Health Centre, 2021 ONSC 3076*** (27 April 2021) → Despite IDEL, an employee placed on temporary leave could in fact sue for wrongful dismissal
 - ***Taylor v. Hanley Hospitality, 2021 ONSC 3135*** (7 June 2021) → IDEL took away the right of employees on temporary leave to sue for constructive dismissal
- Important for charities and not for profits to consider adding temporary layoff clauses to employment contracts

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G. KEY TAKEAWAYS

- Properly drafted employment contracts help limit potential liability to employees and effectively manage financial and human resources
- Remember to review and update employment contracts which are used on a regular basis so that they remain current and legally enforceable

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Thursday, November 4th, 2021

NEW DEVELOPMENTS IN BRAND IDENTITY & PROTECTION FOR CHURCHES AND CHARITIES

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Annual Church & Charity Law™ Webinar Continues Virtually November 4, 2021</p>		
<p>New Developments in Brand Identity & Protection for Churches and Charities</p> <p>By Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent sbonni@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="1"><tr><td data-bbox="259 833 645 882">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="645 833 1222 882">Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca</td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
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<p>A. BRANDING</p> <p>1. What is Brand Identity?</p> <ul style="list-style-type: none">• The elements that are created by your church or charity portray your image and identity to the public• The visual elements that identify and distinguish your organization from others• The image and reputation of your organization as it is perceived by the public• It is what an individual first thinks of when he or she sees the organization's name and logos <p>www.charitylaw.ca</p> <p>www.carters.ca</p>	2
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2. Why is a Successful Brand Important?

- Motivates donors, the public, volunteers, employees and members to increase their commitment to the church or charity
 - People prefer working, volunteering, and giving to well-known brands
- Distinguishes one organization from another and helps to eliminate confusion
- Creates equity and brand value, which can lead to the possibility of licensing opportunities
- For a church or charity that does not sell products or services, your brand is your lifeline

3. A Reminder - What is a Trademark?

- Canadian and international laws recognize certain aspects of brands as protectable forms of *intellectual property*
- A trademark is any mark used for the purpose of distinguishing goods and services from others
- Names, logos, or slogans are part of your organization's brand known as *trademarks*
- Trademarks legally protect your brand and grant your organization exclusive rights to their use in the public
- Trademarks can consist of:
 - A single word - **OXFAM**
 - A combination of words – **WORLD VISION**
 - A logo - 
 - A slogan - **BE THE CHANGE**
 - A sound - **MGM's "lion roaring" sound**

4. What are the Functions of a Trademark?

- Indicates the source or origin of goods and services
- Serves as a shortcut in judging the quality of services, the credibility of information, and the reputation of the organization – it is the organization's way of saying “you can trust us” to the public
- Creates goodwill and brand awareness
- It captures the public’s attention and helps to get an organization’s message heard
- Distinguishes one organization from another and helps to eliminate public confusion

5. How to Obtain Trademark Protection?

- Trademark rights can be obtained:
 - Through **registration** under Canada’s *Trademarks Act*
 - Several advantages to registration – discussed in more detail below
 - Through legitimate **use**
 - Unregistered trademark rights are governed by the common law in Canada (known as common law rights)
 - This protection arises automatically from actual legitimate use of the mark in association with goods and services
 - Generally, ownership of a mark goes to the first-to-use the mark

6. Advantages of Trademark Registration

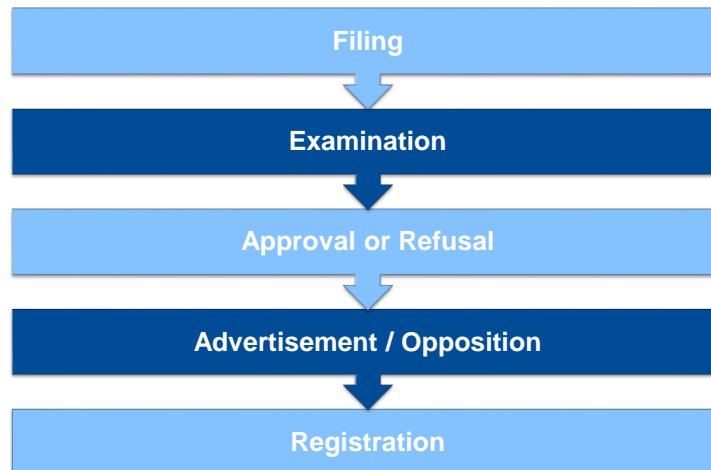
- Although a trademark does not need to be registered to be protectable, registration of a trademark provides significant benefits for the trademark owner
- Generally speaking, trademark registrations reward owners by increasing the value of their brand and by providing stronger enforcement rights through the *Trademarks Act* which better enables their brand and organization to grow
- Therefore, the purpose of trademark law is twofold:
 - To help the public distinguish between the goods and services of one owner from those of others and therefore to prevent public confusion and unfair competition; and
 - To protect the owner's investment and reputation

- There are several advantages to registering a trademark, including:
 - A presumption of ownership and validity
 - Exclusive rights to use the trademark in association with the registered goods and services
 - A registration is a public, searchable claim to rights in a trademark which may deter third parties from filing and using a similar trademark
 - ® alerts others to your registration
 - With an unregistered trademark, owner must show extensive use, reputation, and goodwill in the mark to rely on these rights - there is no presumption of ownership

- The registration is effective throughout Canada
- Suing for trademark infringement, which can be done only on the basis of a registered trademark, is generally easier (and less costly) than suing for passing off of unregistered trademark rights
- Failure to register can result in costly and lengthy court battle
- A registered trademark has equity - it becomes an asset of the trademark owner and can be sold or licensed
- Registration of a corporate name or business name does not itself give trademark protection
- Therefore, **register** your key trademarks including, corporate names, business names, and logos if used as trademarks

B. TRADEMARK REGISTRATION

1. Trademark Registration Process



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2. Biggest Obstacles in Trademark Registration

- Are you entitled to use the mark? Will anyone oppose the application based on prior use?
- Is there a confusingly similar prior registered trademark?
- Is the trademark clearly descriptive?
- Is the trademark **distinctive**?
 - This is currently the biggest challenge and the focus of the remainder of this seminar

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C. NEW EXAMINATION CRITERION – DISTINCTIVENESS

1. What is Distinctiveness?

- Distinctiveness is the essence and cardinal requirement of a trademark - to distinguish the origin of the trademarked goods and services back to one single source
- Section 2 of the *Trademarks Act* states that a “distinctive” mark is a mark that **actually distinguishes** – or is **adapted to distinguish** – the goods or services in association with which it is used from goods and services of others
- In many jurisdictions, a trademark’s distinctiveness has long been assessed during the examination process – however, this wasn’t the case in Canada until June 2019

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2. Distinctiveness in Examination

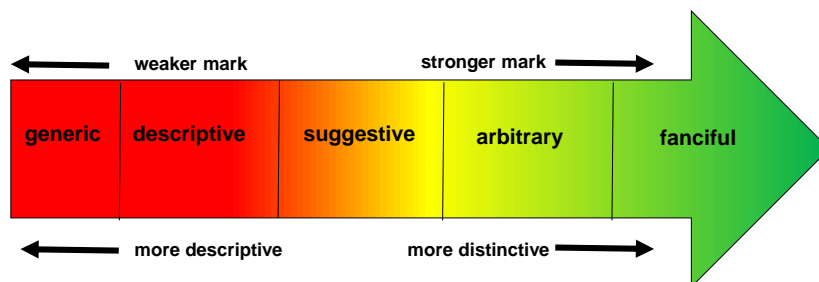
- Applications are being examined for distinctiveness and the Registrar will raise an objection if a trademark is “not inherently distinctive”
- The Trademark Examination Manual does not have clear direction on the question of distinctiveness, but states:
Trademarks possess some inherent distinctiveness when nothing about them refers the consumer to a multitude of sources when assessed in relation to the associated goods or services. Where a trademark may refer to many sources, it is considered to have no inherent distinctiveness.
- In other words, the trademark must refer a consumer to one particular source
- This new standard of review has profoundly changed trademark law
- It has now been applied for many months and has given rise to many objections making it difficult for applicants – and their agents!

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3. Spectrum of Distinctiveness



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4. How does the Trademarks Office Assess Distinctiveness?

- The Trademarks Office considers the following questions:
 - Does the trademark tell the public what the goods or services are, or describe them or a property which is commonly associated with them?
 - If yes, the trademark should remain free for use by third parties to describe their goods or services and is therefore not registrable
 - Does research show that third parties are using the same trademark in association with similar goods and services?
 - If yes, the trademark is likely to have **no inherent distinctiveness** as the public would not respond to the trademark as identifying only one source
 - If no, the trademark *may* possess some inherent distinctiveness
 - While the fact that other members of the public are not currently using the same trademark is not determinative, it is one of the factors considered in assessing distinctiveness
 - The ultimate question is whether other parties should be free to use that same trademark in association with their goods and services

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5. Examples of Not Inherently Distinctive Trademarks

The Examination Manual includes a list of marks that are generally considered to **lack** distinctiveness:

- Geographical names
- Generic designs (grapes for wine)
- Names of colours (YELLOW with tennis balls)
- One or two letter or number marks
- English/French descriptive words (TASTY FRITES for fries)
- Names, honorifics, or multiple surnames
- Laudatory words and phrases (ULTIMATE, AUTHENTIC, ORIGINAL, QUALITY)
- Provides generic information (CONTENTS ARE HOT)
- A combination of unregistrable elements (BEST CARROTS)
- Trademarks that are clearly descriptive of the goods/services or primarily a surname

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6. Responding to Not Inherently Distinctive Objections

- **The best solution** → Do not get an objection!
 - When selecting new trademarks, consider the “not inherently distinctive” criterion and ensure trademarks are distinctive to avoid this objection
 - To help increase the distinctiveness of a pre-existing trademark that may be considered “not inherently distinctive”, additional words could be added to the mark, and/or, a design element could be included with the words, together with a unique font
 - Since design marks are *generally* more distinctive than word marks, they may be easier to register and also to enforce against third parties, provided that the design component is *the prominent feature of the mark*

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7. Examples of Trademarks that Have Some Inherent Distinctiveness



In association with legal services



In association with dentistry services



In association with home security and home automation services



In association with automotive services



In association with lances

PLUSEXTRAMEILLEURE

EXTRAMOSTBESTEST

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- However, where a trademark application receives a “not inherently distinctive” objection, legal arguments can be submitted to demonstrate that the mark has at least some inherent distinctiveness
- Another option is to submit evidence that the mark has **acquired distinctiveness** - a trademark that is not inherently distinctive can acquire distinctiveness through continuous and constant use
 - To establish this acquired inherent distinctiveness, it must be demonstrated that the trademark became known to the public as coming from a specific source

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D. KEY TAKEAWAYS

- Churches and charities should be proactive in protecting their trademarks with a trademark registration
- When filing for a trademark registration, the new “not inherently distinctive” needs to be taken into account
- Those marks with a higher degree of inherent distinctiveness will not only avoid problems in prosecution, but also likely be afforded a greater scope of protection in the long term

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INSURANCE ISSUES INVOLVING VOLUNTEERS FOR CHURCHES AND CHARITIES

By Kenneth Hall,
Robertson Hall Insurance Inc.

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Insurance Issues Involving Volunteers for Churches and Charities

Insurance Issues



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Volunteer Insurance Issues



- Volunteerism and Charitable Work
- The Legal Perspective: Cheap Employees or Legal Agents?
- The Organization's Perspective: Empowering Volunteers Safely
- The Volunteer's Perspective: How Am I Protected?
- An Insurance Checklist for Your Organization and Volunteers
- Other Volunteer Risk Management Considerations
- A Final Caution

Doing Good Work in Communities We Serve

*At the heart of most
charitable work is the
spirit of volunteerism*



vol·un·teer

A definition from the
Cambridge Dictionary



- volunteer
- noun [C]
- a person who does something, especially helping other people, willingly and without being forced or paid to do it:

"Volunteers are unpaid – not because they are worthless, but because they are priceless"



- Successful organizations including churches, faith charities, community organizations, and special purpose charities know how to **attract, motivate, manage, and protect** volunteers
- Healthy volunteerism is a two-way relationship that values both the charitable purpose in serving others and the volunteer
- The variety of roles filled by volunteers is as diverse as the number of not-for-profit and charitable organizations in existence, from the board room, to the mail room, to the streets, to overseas; and can include the young or old, the unskilled and inexperienced or the professional

The Legal Perspective



To the Charity

- Valued but essentially just "Cheap Employees" carrying out work that would otherwise require the expenditure of donor dollars for paid workers

In Law

- Legal Agents of organization, like employees, management, and directors
- Appointing a volunteer is like handing "keys to the Cadillac" to the valet in the parking lot in terms of damages from their negligence and your vicarious legal liability that can cause reputational harm, result in lawsuits against directors, and jeopardize a charity's assets
- Potential source of various tort, employment practices, workplace safety obligations and liability for their injury, harm or maltreatment

The Organization's Perspective



How do we empower our volunteers effectively, responsibly and safely?

- *So that they are not harmed?*
- *So their negligence doesn't land us in court?*
- *So they don't harm our charitable work and reputation?*

The Volunteer's Perspective



How am I protected?

- *If injured, due to the organization's negligence, or because of my own fault?*
- *If I am sued, or included as a defendant in a lawsuit while acting within the scope of my duties for the organization?*

Insurance Checklist for Organization



Must Haves:

- A General Liability Insurance Policy containing a minimum \$5,000,000 coverage amount per occurrence, including:
 - "Volunteers" as *Additional Named Insureds*, to provide them with coverage if named in a lawsuit and for personal legal defense costs
 - Coverage Territory for on- and off-premises activities, including Worldwide
 - Non-Owned Automobile Liability to cover organization's potential liability for use of personal owned vehicles
 - Voluntary Medical Payments Rider
 - Abuse Liability coverage, including criminal defense cost reimbursement for wrongful accusation against workers
 - Incidental Medical Malpractice to cover Good Samaritan acts
- An Umbrella Liability Policy to provide excess coverage, over and above your General Liability Policy and Auto Insurance Policy coverage limits

Insurance Checklist for Organization

continued



- Non-Profit Directors and Officers Liability Insurance Policy with a minimum \$2,000,000 coverage amount per claim, including
 - Volunteers as Additional Named Insureds while serving on committees and/or acting at the direction of the board, including for civil liability awards, settlements and/or defense costs
 - Employment Practices Liability coverage including with respect to non-paid workers being terminated, and for actual or alleged humiliation, harassment and discrimination in a civil suit
YES, volunteers have sued for termination reputational damages!
 - Coverage for defense of actions related to boards of inquiry or administrative tribunals (e.g., Human Rights Tribunals)*

*Note: Generally speaking, fines, penalties and monetary judgments in a human rights proceeding are not insurable, however defense costs may be covered in some policies.

Insurance Checklist for Organization

continued



- A Group Accident Policy to provide coverage for injuries and expenses incurred by volunteers carrying out work on behalf of the organization in “no-fault” situations (i.e. organization not negligent), including:
 - Reimbursement of Medical Expenses
 - Reimbursement of Dental Expenses
 - Accident Loss of Income / Weekly Indemnity
- Mandatory individual or group Emergency Travel Medical Insurance for activities and trips out-of-province or out-of-country, for staff and volunteers

Insurance Checklist for The Volunteer



- Mirrors the organization’s “must have” checklist in many respects
- Reflects legitimate concerns of a conscientious volunteer, the kind of volunteer your organization should want to have representing it to the communities you serve, the kind you want to recruit and keep:
- *If asked to serve as a volunteer, I would want to know the following coverage has been arranged by the organization for my protection:*
 - General Liability and Directors and Officers (aka D&O) Liability Insurance, including “Volunteers” as Additional Named Insureds
 - Abuse Liability coverage including criminal defense cost reimbursement for wrongful accusation against volunteer workers
 - Incidental Medical Malpractice coverage for Good Samaritan acts
 - No-Fault Group Accident Insurance for volunteers, especially those performing physical labour on behalf of organization
 - Emergency Travel Medical Insurance for travel by volunteers, including on short-term mission trips

Insurance Checklist for The Volunteer

continued



- *If serving as a volunteer, I would also want to be given useful insurance tips by the sponsoring organization for my own protection, including:*

- Checking with my insurance broker or agent to ensure that the usage of my personal vehicle on behalf of the church, charity, or not-for-profit - including the transportation of passengers - is allowed and will not result in the denial or limitation of coverage in an accident or claim

Note: As the registered vehicle owner in law, I will always have the primary liability risk for any claims resulting from the use of my vehicle, regardless of who is driving, regardless of what purpose for which it is being operated, and regardless of what insurance coverage the sponsoring organization may have.

Other Risk Management Considerations



Other Risk Management Considerations



- Implementing and maintaining a formal **abuse prevention policy**, procedures and screening for ALL volunteers working with minors and vulnerable adults, including:

- Targeted, selective recruitment vs. "take all comers"
- Completed and signed volunteer applications
- Criminal record checks (including VSV's for vulnerable sector)
- Effective supervision and oversight, including a two-adult rule for on- or off-premises programs and events, and for operations outside of Canada including short-term mission trips

The above are REQUIRED by the handful of remaining insurers still providing abuse liability coverage for churches and charities

REMEMBER: Effective abuse prevention policies and procedures are a legal duty of care requirement of your board of directors; to protect the most vulnerable in your care, and protect your workers, paid or unpaid, from false allegations!

Other Risk Management Considerations

continued



- Implement and maintain **other policies** as may be applicable to your organization's unique operations and ministries, including:
- Lifestyle Expectations*
- Statement of Faith*
- Transportation – screening of drivers, to ensure their personal auto insurance policy covers required usage of their vehicle on behalf of your organization, and to verify that they have sufficient personal coverage (\$2,000,000 or more Third Party Liability coverage) to avoid unnecessary claims against the organization.
- Workplace Safety, Discrimination, Harassment and Violence
- Work from Home
- Personal Devices Usage
- Social Media Usage
- Confidentiality with respect to Participants, Donors, and Clients

*Check with your lawyer to determine what lifestyle and/or faith compliance covenant can, or should, be required for volunteers

Other Risk Management Considerations

continued



- Distributing a **Volunteer Handbook** outlining the organization's most important policies and procedures, training requirements, and expectations of volunteers
- With respect to volunteers serving as Directors or Officers on a church or other charity board, providing a **Board Member Binder** to help new members do their job well and with due diligence in meeting their fiduciary and statutory obligations; including copies of the following:
 - Important policies and procedures, including Employment Practices, Abuse Prevention Plan, and other documents specific to the organization's operations
 - Governance documents and charitable objects, including corporate by-laws and by-law amendments if incorporated; or declaration of trust and constitution, if not
 - Most recent annual comparative financial statements and past year's board minutes and resolutions, for context and understanding
 - Insurance documentation, including D&O Liability as required by bylaws, board resolution, and/or not-for-profit corporation act

Other Risk Management Considerations

continued



- Ensure **workplace safety standards** are met with respect to tasks carried out by your volunteers, on or off premises, including communicating their right to refuse unsafe work, and to report to your safety officer, safety committee, management or board if threatened with violence, or if their personal safety is at risk
- Avoid high risk tasks performed by volunteers who are minors or non-professionals, including work involving extension ladders, roofing, plumbing, electrical or the use of heavy machinery
- Avoid requiring, pressuring or expecting unpaid volunteer duties by your paid employees in addition to their employment tasks and work hours, otherwise such accumulated extra time can be considered in a termination severance package calculations
- Avoid referring to volunteer activity in employment terms, or providing volunteers with regular compensation (other than periodic reimbursement of valid personal expenses incurred on behalf of your charity) to avoid having them deemed employees and owing severance obligations if terminated

Other Risk Management Considerations

continued



Volunteer Workplace Safety and Training – Helpful Links

- The Canadian Code for Volunteer Involvement

<https://volunteerstrathcona.ca/wp-content/uploads/2013/07/CodeEng.pdf>

- Putting the Code Into Action

https://volunteer.ca/vdemo/researchandresources_docs/Volunteer_Canada_Putting_the_Code_Into_Action.pdf

Other Risk Management Considerations

continued



Miscellaneous risk management recommendations including:

- Require partner organizations or other groups with volunteers on your premises provide you with proof of their liability insurance, including abuse liability and adherence to abuse prevention measures related to their staff or volunteers working with vulnerable persons in their programs on your premises
- Keep formal records of who you appoint as your volunteers, including contact details, when appointed, in what role(s), and how screened; should your organization ever be sued by them, or because of their negligent and/or criminal acts while allegedly acting within their duties for your organization, especially if they were not in fact your appointed volunteer!
- Don't forget to inform your insurance broker or agent at the time of application for coverage - and as your operations may change - of new or expanding programs, ministries, and events involving volunteers, to avoid uninsured claims due to non-disclosure or a lack of proper coverage by failing to give your insurance provider all the information they need to give you effective coverage advice

Insurance, Risk Management and Volunteers: *A Final Caution*



REMEMBER, volunteers are a two-edged sword for charities, they are both cheap employees and they are legal agents.

So be careful who you deputize!

Intentional, formal, effective and safe appointment of volunteers can greatly enhance the impact of your organization's charitable work in your congregation and in the communities that you serve

However, having volunteers working or speaking on your behalf who are not formally appointed, screened, supervised or properly removed from their duties if violating your standards and policies, can do irreparable harm to your organization's reputation, cause unnecessary lawsuits, and affect your future insurance premiums and coverage eligibility

Demonstrate the same duty of care in appointing and managing your volunteers, as you would for paid employees; they are your legal agents, and their safety is your board's responsibility

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Disclaimer

Disclaimer:

The content in this webinar is for general information purposes only, for Canadian churches and charities. Check with your agent or broker for specific information regarding your insurance policy and optional coverages available. Check with your lawyer and legislation in the province(s) in which you operate for the full provisions of any applicable laws related to volunteers, and volunteer worker safety.

Presenter:

Kenneth A. Hall, B.A, is President of Robertson Hall Insurance Inc. He specializes in customized insurance and risk management advice for over 7,000 churches and charities across Canada through the Church and Charity Protection Plus program www.robertsonhall.com

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IMPACT INVESTING FOR CHURCHES AND CHARITIES: THE NEW FRONTIER IN PHILANTHROPY

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 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>The Annual <i>Church & Charity Law™</i> Webinar Continues Virtually November 4, 2021</p>		
<p align="center">IMPACT INVESTING FOR CHURCHES AND CHARITIES: THE NEW FRONTIER IN PHILANTHROPY</p> <p align="center">By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent tcarter@carters.ca 1-877-942-0001</p> <p align="center">© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td> <td> www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	www.carters.ca www.charitylaw.ca www.churchlaw.ca
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<p>A. SETTING THE STAGE</p> <p>1. What is Impact Investing?</p> <ul style="list-style-type: none"> • Many charities, including religious charities, are interested in “impact investing” but are not sure what it involves • “Impact investing” generally refers to investments made with the intention to achieve a measureable social or environmental impact, as well as a financial return to the investor (e.g. a dual purpose) • Impact investing is often used interchangeably with “<u>social investing</u>”, “<u>social finance</u>” and “<u>program related investing</u>” • Social responsible investing (“SRI”) and environmental, social and governance investing (“ESG”) are somewhat different from impact investing in that SRI and ESG investing tend to be more passive strategies for investments in public equities through the use of screens and/or ESG factors <p>www.charitylaw.ca www.carters.ca</p>

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2. Different Forms of Impact Investing by Charities

- Charities can become involved in impact investing in one of two ways:
 - Demand Side - where the charity seeks out investment capital by issuing debt, e.g. promissory notes or social impact bonds, in order to attract capital to pursue a charitable purpose, including funds for supply side impact investing, but requires compliance with applicable securities legislation
 - Supply Side - where the charity uses its charitable resources to make investments in third parties (both charities and non-charities, e.g. non-qualified donees) in order to achieve a charitable purpose
- Supporters of a charity may be interested in making either a loan or a donation to the charity in order to create a “charitable impact investment fund”

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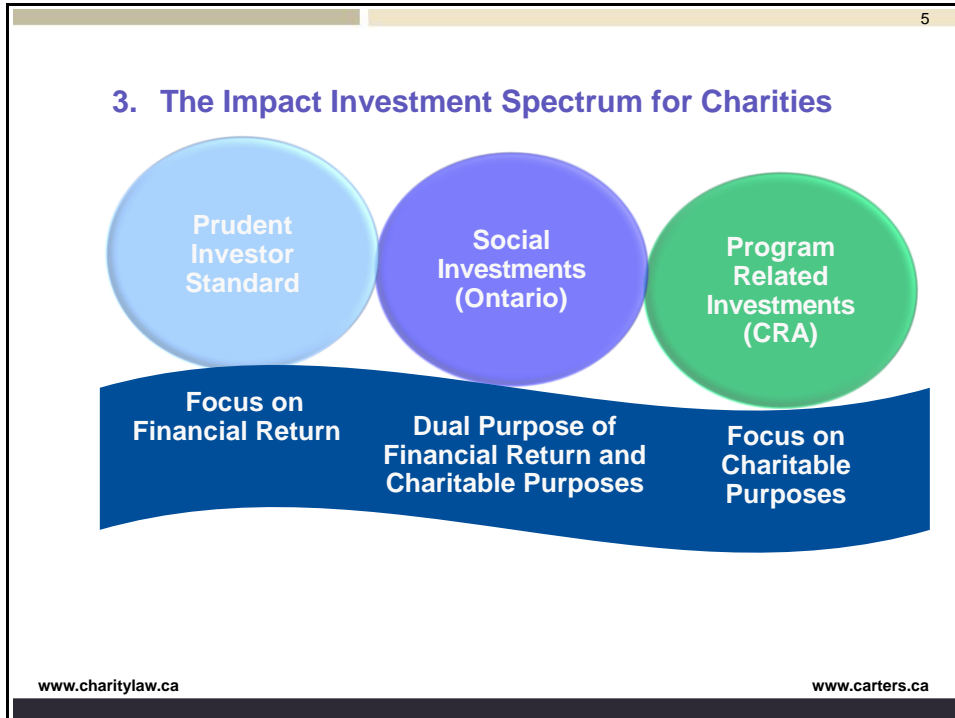
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- A donation to a charity will result in a donation tax receipt whereas a loan to a charity will not, unless the loan is subsequently forgiven by the holder of the debt
- The focus of this presentation is on supply side impact investing by charities
- Supply side impact investing by a charity with a third party can take the form of:
 - A loan (both secure and unsecure)
 - An equity interest (e.g. shares or partnerships interests)
- While impact investing is an important development, it has legal considerations which the charity and its advisors should be aware of
- The starting point is to understand the different options for impact investing and the applicable regulatory regimes

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B. THE LEGAL FRAMEWORK FOR IMPACT INVESTING BY CHARITIES

1. Knowing What Investment Power Applies

- Provinces have jurisdiction over charities and charitable property
- Generally, the *Trustee Act* in each province or territory applies (CCQ in Quebec)
- Situations where the provincial *Trustee Acts* may not apply:
 - The letters patent, articles of incorporation or articles of continuance of a charity state that the *Trustee Act* does not apply
 - A different investment power is set out in special legislation creating the charity
 - A special purpose trust in a will or gift agreement establishes a different investment power from that contained in the *Trustee Act*

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2. “Prudent Investor” Form of Impact Investing

a) Standard of Care

- Ont. *Trustee Act* states that when investing trust property, a trustee (e.g. a director of a charity) must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments
- Most other provinces provide for a similar standard of care, but some use a prudent person standard

b) Authorized Investments

- Ont. *Trustee Act* states that a “trustee may invest trust property in any form of property in which a prudent investor might invest”
- Investment in mutual funds and pooled funds are permitted
- Similar approach taken in most other provinces

c) Mandatory Investment Criteria

- Ont. *Trustee Act* states that seven mandatory criteria must be considered, among others “that are relevant to the circumstances”
 - Includes “an asset’s special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries”
 - Arguable this criteria provides for some scope to make impact investments as part of an investment strategy to pursue financial returns for the charity
- Similar approach in most other provinces

d) Mandatory Diversification Obligation

- Ont. *Trustee Act* requires that trustees must diversify to an extent appropriate to the requirements of the trust and general economic and investment market conditions
- Similar provisions in most other provinces

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- e) Delegation of Investment Decision Making
 - Ont. *Trustee Act* permits trustees (e.g. the board of a charity) to delegate investment decision making
 - However, there needs to be an investment policy and agency agreement in place, and an investment manager must be selected and monitored in accordance with statutory requirements, and reflect the standard of what a prudent investor would do
 - Similar provisions in most other provinces
- f) Prohibition on Sub-delegation
 - Ont. *Trustee Act* provides that a delegated investment manager may not further delegate investment decision making
 - This can prove to be problematic for investment managers who want to invest in mutual funds or pooled funds
 - This prohibition generally does not apply in other provinces

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g) Liability Protection of Trustees

- Ont. *Trustee Act* provides that a trustee will not be liable for losses if the investment decision conformed to an investment plan (comprising reasonable assessments of risk and return) that a prudent investor would adopt under comparable circumstances
- Similar provisions in most other provinces
- This statutory protection is an important factor for volunteer directors of charities who are inherently risk adverse
- Ont. *Trustee Act* also provides that if a Trustee is liable for a loss from investment of charitable funds, a court in assessing damages, payable by the Trustees, may take into account the overall performance of the investments

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3. “Social Investment” Form of Impact Investing in Ontario

- a) Option of “Social Investments” (Dual Purpose) in Ontario
 - In 2017 the *Charities Accounting Act* in Ontario (CAA) was amended to permit all charities in Ontario to make “social investments”
 - “Social investments” involve applying or using charitable property to both (dual purpose):
 - Directly further the purposes of the charity, and
 - Achieve a “financial return”
 - “Financial return” is defined as an outcome that is better, in financial terms than expending all of the property”
 - Since a social investment must directly further the purpose of the charity, the social investment must relate to the stated charitable purposes of the charity included in its incorporating documents

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b) Duties of Trustees in Making “Social Investments”

- Must ensure that social investment is in the interest of the charity, including adequate information, it’s impact on the operations of the charity’s short and long term needs, safeguard; and impact on reputations of the charity
- Review the investment periodically after making a social investment
- Both before and after making a social investment, determine whether advice should be obtained (not clear though what type of advice is required)

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c) Limitations on Expenditure of Capital

- Social investments may not be made in relation to trust property that is subject to a limitation on capital unless trustees expect that the social investment will not contravene that limitation or the terms of the trust to permit such investment
- Therefore, important to review existing endowment agreements, and endowment templates for future endowment agreements to avoid contravention, as well as possible breach of trust

d) No Delegation of Power to Make Social Investments

- Charities may not delegate decision making power with regard to making social investments
- Therefore the board of a charity is required to make all decisions concerning social investments

e) Liability Protection for Trustees

- Protection of trustees (directors) from liability for losses from social investments is limited to only when trustees “acted honestly and in good faith” in accordance with the duties, restrictions and limitations that apply under the CAA and terms of the trust
- As well, there is no provision in the CAA allowing for an assessment of damages against the Trustees based on an “overall performance” of the investments as there is under the Ont. *Trustees Act*

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4. CRA Program Related Investments

- a) What are Program Related Investments (PRIs)?
Described in CRA Guidance CG-014 Community Economic Development Activities and Charitable Registration
- PRIs are defined by CRA as investments that “directly further” the charitable purposes of the charity
 - PRIs, are not available for advancement of religion, so religious charities would need to have other charitable purposes, like relief of poverty
 - A PRI may generate a financial return, though they are not made for that purpose
 - A PRI usually involves the return or potential return of capital but is not a requirement
 - A PRI may also yield revenue, such as interest, but the yield can be below market rates
 - A charity can make a PRI with both “qualified donees”, e.g. other registered charities, or non qualified donees

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- Common forms of PRIs listed by CRA include loans, loan guarantees, share purchase and lease of building
 - PRIs may overlap with social investments in Ontario referenced above
 - As such, social investments may also require compliance with the CRA requirements for a PRI
 - legal advice should be sought in this regard
- b) Requirements to engage in PRIs
- Need a policy to describe how PRIs will further the purposes of the charity
 - The charity must maintain “direction and control” over the PRI when engaged in PRIs with non-qualified donees
 - Must ensure that any private benefit is no more than incidental
 - Must prepare and maintain adequate books and records to prove compliance
 - Must also have an exit plan

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- c) Accounting for PRI
 - PRIs are excluded from the asset base for the calculation of the 3.5 disbursement quota (“DQ”)
 - PRIs, though, are not considered by CRA to be charitable expenditures in meeting the 3.5% DQ except with the loss of capital or lost opportunity cost
- d) What Happens if PRI Requirements No Longer Met?
 - If the requirements for a PRI are no longer met, then either exit the PRI or the investment would need to meet prudent investor standard of a regular investment
 - In this regard, it is important to make sure that regular investments do not become a business of the charity and/or a “collateral unstated non-charitable purpose”

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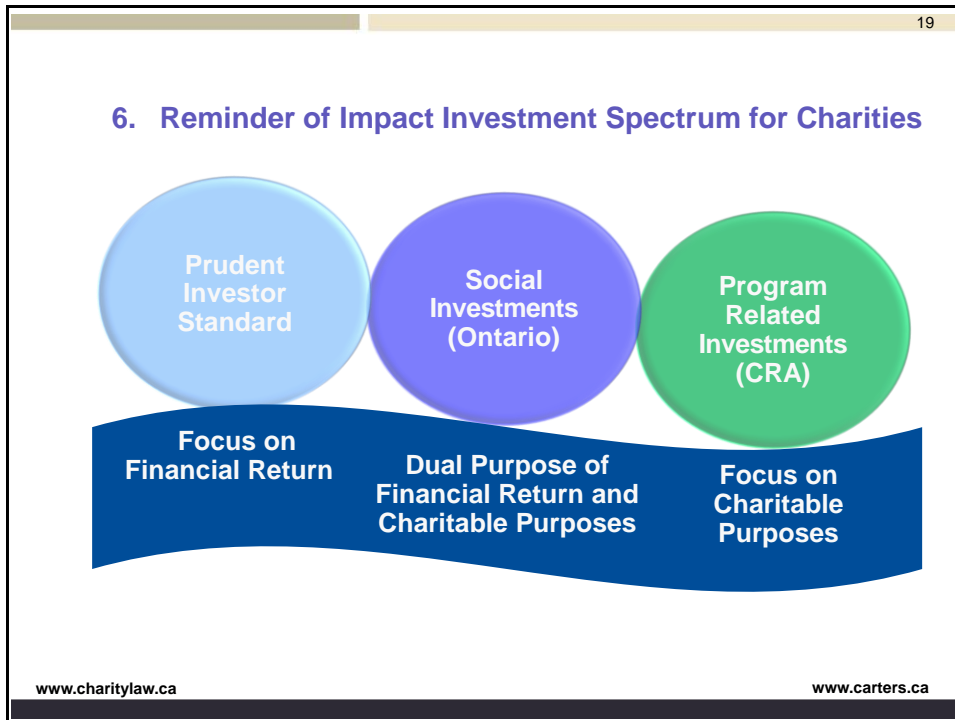
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5. Other Factors to Consider when Engaging in Impact Investing

- a) Under the *Income Tax Act*
 - Restriction on acquisition of control of corporations by public and private foundations (e.g. cannot acquire more than 50% of issued shares, but shares can be gifted provided they don’t acquire more than 5%)
 - Non-qualified investment rules for private foundations
 - Excess corporate holdings regime for private foundations
 - Limitations on registered charities being able to invest in limited partnerships
 - Related business rules if investments become a business
- b) Under the Ont. *Charities Accounting Act* (CAA)
 - 20% “substantial interest” threshold permitting the PGT to require financial statements and seek court intervention
 - Commingling of restricted funds must comply with rules under CAA regulations

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C. RESOURCE MATERIALS

- OBA Institute paper entitled "The Investment Spectrum for Charities, Including Social Investments" dated February 6, 2018, at <https://www.carters.ca/pub/seminar/charity/2018/oba/OBA%20Paper%20Investment%20Spectrum.pdf>
- Handout from Charity & NFP Webinar Series entitled "The Expanding Investment Spectrum for Charities, Including Social Investments" dated March 28, 2018, at <https://www.carters.ca/pub/webinar/2018/Investment-Spectrum-for-Charities.pdf>
- Charity & NFP Law Bulletin No. 426 entitled "Guidance on Social Investments Released by the Ontario PGT" dated August 30, 2018, at <https://www.carters.ca/pub/bulletin/charity/2018/chylb426.pdf>
- Guidance of the Public Guardian and Trustee: Charities and Social Investments dated April 9, 2018 at <https://www.carters.ca/pub/article/charity/2018/PGT-Guidance-with-Cover.pdf>
- Estate Planners Council of London Handout entitled "Investment Challenges and Opportunities for Charities, Including Social Investments and Donor Advised Funds" dated October 21, 2019 at <https://www.carters.ca/pub/seminar/charity/2019/Estate-Planners-Council-of-London-Handout-2019-10-21.pdf>
- Chapter 16, "Provincial Investment Power Issues" in *Corporate and Practice Manual for Charities and Not-For-Profit Corporations* (Thomson Reuters), by Jane Burke-Robertson, Terrance S. Carter, Theresa L.M. Man at <https://store.thomsonreuters.ca/en-ca/products/corporate-and-practice-manual-for-charities-and-not-for-profit-corporations-30842800>

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DONOR ADVISED FUNDS FOR CHURCHES AND CHARITIES

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OVERVIEW OF TOPICS	
<ul style="list-style-type: none">• Introduction• History, Development and Current Size• What is a DAF at Law?• Current Issues Associated with DAFs• How to Work with DAFs• Conclusion	
<ul style="list-style-type: none">– For more information, see the May 6, 2019 paper, “Primer on Donor Advised Funds and Current Issues”: https://www.carters.ca/pub/seminar/charity/2019/Paper-Primer-or-Donor-Advised-Funds-and-Current-Issues-Jacqueline-Demczur-2019-05-06.pdf	
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A. INTRODUCTION

- Donor Advised Funds (“DAFs”) have attracted much attention over the last few years
- DAFs that are properly set up and operated can be helpful in facilitating gifts for the charitable sector
- The flexibility in structuring DAFs is one reason why their use has grown significantly in Canada over the last 20+ years
- However, misconceptions exist about what DAFs are at law, how they are legally established and administered, and the level of donor control over them
- If DAFs are not operated properly, they may continue to generate unnecessary scrutiny from regulators

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B. HISTORY, DEVELOPMENT AND CURRENT SIZE

1. What is a DAF Anyway?

- A DAF is established when a donor creates a fund through a gift to a DAF charity and a receipt is issued
- Donations can be cash, securities or other investments, insurance proceeds, or bequests, with income generated by the DAF’s capital being gifted to qualified donees
- DAF donors have unique role of making non-binding suggestions regarding asset distribution
- However, compliance with the *Income Tax Act* (ITA) and CRA’s policies is the DAF charity’s sole responsibility
- Imperative that all DAF parties understand how DAFs work, both legally and functionally, in order to avoid unexpected problems or challenges in the future

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2. History, Development and Current Size of DAFs

- 1931 & 1952: First DAFs in community foundations
- 1991: Fidelity Charitable Gift Fund established in US
- 2004: Financial services firms in Canada start DAF-holding foundations
- 2006 and 2007: ITA amendments eliminate capital gains tax on donations of publicly traded securities
- 2018: Estimated 15,765 DAFs worth \$5.7 billion CAD, with \$356,000 CAD average fund account size
- Faith-based DAFs grown to \$1.967 billion in 2018
- DAF flow rate (grants) was 85.5% in 2018
- DAFs to continue growing in popularity in Canada: Potential \$7.5 billion (2023) to \$10.3 billion (2026)

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3. Who are the Key “Players” in DAFs?

- a) Donors – Attracted to DAFs because of “control”, flexibility and relative anonymity
- b) DAF Charity (“Sponsors”) – Community foundations, in-house foundations of financial institutions, independent DAF charities and single issue focused charities
- c) Registered charities – Recipients of gifts from DAFs
- d) The CRA – Regulator of registered charities
- e) Others - Financial advisors and financial institutions

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4. Why are DAFs so Popular Now?

- DAFs may be a practical and appealing alternative for donors who do not have the ability, interest or time to operate their own private family foundations
- Donor is not involved with burden of establishing and managing the DAF, but can still have ongoing advisory role
- Relatively inexpensive to establish a DAF in comparison to a private foundation, so it is accessible to a greater number of potential donors
- DAF donors may enjoy the ability to remain anonymous, given that the DAF charity is interfacing between them and recipient charities of gifts from the DAFs

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C. WHAT IS A DAF AT LAW?

1. What is a Charitable Gift?

- A gift is a voluntary transfer of property to another without compensation/consideration
- Donor cannot retain control of gift once it is given to the recipient, with excessive ongoing donor control over gifted property potentially defeating the gift
- This means any donor input over DAF's use or management must be completely non-binding
- The disqualification of a gift may have serious implications under tax law

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2. What is a Donor-Restricted Charitable Gift?

- Unrestricted gifts (charity decides how to apply to its charitable purposes) vs. restricted gifts (donor restrictions limit charity's ability to use the gift)
- Special purpose charitable trusts are type of donor-restricted charitable gift, e.g. a charity within a charity, with time restrictions, use restrictions or both
- A charity must identify these restrictions, recognize their legal consequences, and ensure ongoing compliance with them
- Failure to do so may potentially expose the charity and its board to allegations of breach of trust

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3. What is a Gift for Income Tax Purposes?

- Donors seeking tax benefits need to ensure donations are gifts at common law and under the ITA
- The CRA has adopted traditional common law definition of a gift, although there are some differences, e.g. split receipting
- Only gifts that meet ITA requirements can be properly receipted by a registered charity
- Improper receipting can potentially lead to CRA sanctions and penalties, revocation of charitable status, designation of ineligible individuals, poor donor relations, and bad press
- If a gift is found to fail, the CRA will reassess the donor's income tax returns that relied on the donation receipt for the invalid gift

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4. How Does This All Relate to a DAF?

- DAFs are distinct funds within structure of DAF charities
- Original gift setting up a DAF could be unrestricted or subject to one or more donor restrictions
- Key is donor advised “feature” impressed on the gift at its inception, *i.e.* donor’s ability to offer ongoing “advice”
- This feature is not a donor restriction *per se*
- That said, DAF charity has both practical and moral obligations to follow donor advice, although it alone owns the DAF fund
- From outset, donors must be informed their input is advisory only and the charity makes all DAF decisions
- This is imperative in order that all DAF donations will be true gifts at law and then properly receiptable

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D. CURRENT ISSUES ASSOCIATED WITH DAFs

1. Disbursement-Related Issues

- The disbursement quota (“DQ”) is the minimum amount that a registered charity is required to spend each year on its own charitable programs or on gifts to QDs
- Whether 3.5% DQ requirement under the ITA is met determined on an aggregate, not fund-by-fund basis,
- Concern DAF charities “sit on” DAF assets indefinitely
- Some suggest minimum disbursements for each DAF, and selectively imposing different DQ rate on DAFs and/or all restricted charitable funds
- Careful study is necessary as quick action to fix one problem may impact broader charitable sector

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- June 2019 Report of the Special Senate Committee on the Charitable Sector (the “Report”) made DQ-related recommendations (#36 and #37) for review by the Advisory Committee on the Charitable Sector
- Federal Budget 2021 then proposed launching public consultations about potential DQ increase in 2022
- Numerous charitable sector representatives have since prepared and filed submissions on the potential DQ increase to the Government
- For more information, see Charity Law Bulletin #498 and the September and October 2021 Church & Charity Law Updates at www.charitylaw.ca
- Charities will need to monitor the progress and outcome of these public consultations

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2. Are Some DAFs Really Gifts at Law?

- A more pressing concern is ongoing “control” donors have over DAFs after gifts are made – this is often a key “selling point” but can lead to “disconnect” in how DAFs legally (versus functionally) work
- Too much donor control raises question of whether there is a legal gift and if it is receiptable under the ITA

3. Lack of Transparency and Accountability

- These concerns with DAFs have led to suggestion that DAF charities provide additional information on T3010s: (1) number of DAFs held in the year; and (2) total DAF assets and total distributions to QDs
- Unclear though if this is appropriate or even necessary

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E. HOW TO WORK WITH DAFs

1. Need to Properly Establish and Manage DAFs

- Need proper understanding by all parties of what DAFs are at law and how they are to be appropriately administered on day to day basis
- Documents creating a DAF must clearly state that
 - It is the DAF charity which administers the fund
 - DAF charity reserves right to not follow donor advice
- Charity must properly manage its DAFs by ensuring, among other things: (1) compliance with donor restrictions; (2) separate tracking/managing of DAFs; (3) proper investment of each DAF's assets; and (4) no commingling of restricted funds with general funds

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2. Practical Advice in Establishing DAFs

- Do your homework! **If** DAFs cannot be established/administered legally, they should not be done at all
- Some key due diligence steps include:
 - develop written gift acceptance policies
 - utilize checklists to ensure consistent treatment
 - ensure good communication with DAF donors
 - prepare appropriate DAF gift agreements
 - know how to manage/administer DAFs correctly in accordance with ITA obligations
- Ensure that the charity, not the donor runs the DAF process, utilizing consistent procedures as set out in policy and applicable gift agreements

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- Be vigilant – Charity to be aware of potential issues regarding DAFs and ways to mitigate these risks, e.g.:
 - avoid referring to DAFs as “accounts”
 - avoid referring to donors as “clients”
 - avoid engaging in marketing/communications that suggest a DAF “belongs” to the donor, the donor makes all decisions in relation to the DAF, or the DAF is the donor’s own “private foundation”

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F. KEY TAKEAWAYS

- DAFs that are properly set up and operated can be very helpful in facilitating gifts for the charitable sector
- However, both charities and donors should clearly understand the legal requirements of DAFs before getting involved in them
- A DAF that does not comply with all legal requirements may potentially invalidate any gifts made to it, which would then preclude (or later invalidate) any charitable donation receipt issued for these gifts
- DAFs will continue to grow in number and value, so charities and donors, together with their legal counsel, need to be aware of their legal underpinnings and how to operate them properly

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Continues Virtually
Thursday, November 4th, 2021

TERMS AND CONDITIONS FOR WEBSITES: WHAT THE SMALL PRINT REALLY MEANS

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


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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<p>The Annual Church & Charity Law™ Webinar Continues Virtually November 4, 2021</p>		
<p>Terms and Conditions for Websites: What the Small Print Really Means</p> <p>By Esther Shainblum, B.A., LL.B., LL.M., CRM eshainblum@carters.ca 1-877-942-0001</p> <p>© 2021 Carters Professional Corporation</p> <table border="0"> <tr> <td data-bbox="259 833 645 872"> CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001 </td> <td data-bbox="645 833 1222 872"> Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville www.carters.ca www.charitylaw.ca www.churchlaw.ca
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<p>A. INTRODUCTION</p> <ul style="list-style-type: none"> • Website Terms and Conditions (“T&C”) are not boring! • T&C can do some things that you might actually find quite exciting, such as: <ul style="list-style-type: none"> – limiting your church/charity’s liability – protecting its intellectual property and the content of its website – controlling the conduct of website users • It is a good idea to have website T&C in place if your church/charity has a website or an app and/or operates in cyber “space” <p>www.charitylaw.ca www.carters.ca</p>

B. WHAT ARE WEBSITE TERMS AND CONDITIONS?

- T&C (or also referred to as Terms of Use or Terms of Service), actually constitute a contract between an organization and the users of its website
- T&C set out the rules that users must agree to comply with if they wish to use your church/charity's website
- The specific provisions can vary depending on the type of organization or the goods/services being provided but there are certain key provisions that should generally be included to protect the church/charity and its assets from liability, reputational damage and loss

C. WHAT ARE THE BENEFITS?

Benefit #1 – Limiting Liability

- One of the most important reasons to have website T&C is to help shield a church/charity against liability for claims made against it by website users
- Basic T&C provisions that should be on the website:
 - **Disclaimers** – the user agrees that:
 - they use the website at their own risk
 - there are no assurances regarding accuracy, quality, reliability, safety or ownership of content of or information obtained through the website, including third party content
 - no guarantee that the website will operate smoothly or without interruption

5

– Limitation of Liability – the user, for self and for

- the church/charity is **not liable** for any error, inaccuracy, harmful components (e.g. viruses or malware) or unreliability of website content.
- church/charity is **not liable** for any loss or damage the user may incur due to use of or reliance on the website content, information provided through the website, third party content or third party services e.g. hosting
- User for self and personal representatives **releases and discharges** the church/charity from any claims or liability

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– Indemnity – a related provision, in which the user agrees to

- indemnify the church/charity for any liability, claims, damages *etc.* incurred as a result of the user's use of the website, online conduct/ misconduct on the part of the user
- Although this provision is one sided in favour of the church/charity, it is important to have as part of the T&C in the event of possible litigation

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Benefit #2 – Privacy Compliance

- Website T&C can align with and link to the church/charity's privacy policy and reinforce the church/charity's personal information management practices so that:
 - the church/charity is open and transparent about how it collects, uses, discloses and stores personal information in accordance with privacy best practices
 - the church/charity is compliant with any applicable privacy law or privacy best practices
 - the user consents to the church/charity's privacy policy - accomplishing two objectives with one action
 - the user consents to the church/charity's collection, use, disclosure and storage of their personal information

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- if applicable, the user also agrees to the collection, use, disclosure and storage of their personal information by any third party service provider e.g. cloud storage or to process donations
- the church/charity mitigates the risk of liability relating to its collection, use, disclosure or storage of personal information
- The user would also agree that the church/charity can communicate with them electronically (subject to meeting the requirements of *Canada's Anti Spam Legislation*)
- The T&C can be combined with the church/charity's privacy policy or they can be kept separate

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Benefit #3 – Protecting Intellectual Property and Website Content

- Website T&C can protect the church/charity's intellectual property ("IP") from infringement, copying or loss of value
- All churches and charities have IP, e.g. designs, logos, images, branding, trademarks, copyrights or other content of website
- IP is a charitable asset (see presentation by Sepal Bonni) and therefore the board of directors of the church/charity has a duty to protect it from loss, infringement or reproduction so that its value is preserved

- In the IP provisions of the T&C, the user would agree that:
 - all website content and IP is owned by or licensed to the church/charity, the IP is the exclusive property of the church/charity or its licensors and the IP is protected by applicable laws
 - the user will only use the website content/IP for personal, non-commercial use and in compliance with the T&C
 - the user will not copy, reproduce, create derivative works or make any other use of the IP without prior written permission of the church/charity

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- If applicable, the T&C can outline how IP shared on the website can be used by third parties
 - for example, a church/charity may allow a third party to distribute some content provided it is not used for commercial purposes, the content is not altered, and the owner of the work is referenced
 - if this is the case, the T&C would include a license to the IP that includes the stipulations noted above

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Benefit #4 – Rules for Acceptable Use

- T&C can help a church/charity to protect itself from misuse or abuse by users of the website or its content
- Mitigate the risk of liability if users do anything unacceptable on or to the website. Examples include:
 - **Permitted Users** – users agree to any limitations or restrictions set out in the website, such as minimum age requirements for users
 - **User Representations** – users confirm that e.g:
 - they meet any minimum age requirements
 - any registration information they provided is true
 - they will not use the website for any illegal or unauthorized purpose
 - **Prohibited Activities** – the user agrees not to use the website or any of its content in a manner that would harm the church/charity or anyone else or that violates any laws e.g:

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- violating other users' privacy
- viewing, saving, distributing, sending, posting offensive, explicit, violent, inappropriate, disrespectful, harassing, intolerant materials
- malicious activities e.g. spreading viruses or hate mongering
- circumventing or attempting to breach security systems or networks
- infringing IP on the website

• Users would also agree to hyperlink conditions, and controls on what they are permitted to upload and post

• The church/charity should have the right to suspend or terminate the user's access to the website for prohibited activities, violation of the T&C or at any time in the church/charity's discretion

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Benefit #5 - Jurisdiction

- The internet is global and websites can be accessed from anywhere
- In order to avoid having the laws of another jurisdiction imposed upon them if there is a dispute arising out of the website or T&C, churches/charities should:
 - use the T&C to specify that the website is governed by the law of their particular province (governing law)
 - provide that any dispute arising out of the website or T&C will be governed by the laws of that province (choice of forum)
- The T&C could also clarify that the church/charity makes no representation that the website complies with the laws of any other jurisdiction

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D. ACCEPTANCE OF THE TERMS AND CONDITIONS – CLICK-WRAP VS. BROWSE-WRAP

- How do you obtain user consent to online/electronic T&C?
- Two main options:
 - Click-wrap agreement - user must click a button or check off a box to signify their acceptance of the T&C
 - Browse-wrap agreement - user is not expected to take any action to signify their intention to agree to be bound by T&C. Simply using the website is deemed to be acceptance of T&C by the user

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- Preferable to use a click-wrap format - users must tick off a box that says that they agree to the T&C
- Requiring the user to take an active step to demonstrate consent is more likely to be seen as constituting meaningful consent than browse-wrap, in which consent is inferred from use of the website
- Also easier to demonstrate that the T&C were clearly brought to the user's attention with click-wrap
- Therefore click-wrap T&C are more likely to be enforceable but are not always used

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E. KEY TAKEAWAYS

- Boards of directors and management of church/charity should use T&C to protect the church/charity and its assets from liability, reputational damage and loss
- Churches/charities with an internet presence should have website T&C and work with their legal advisor
- Church/charity T&C should include key provisions:
 - Disclaimer, Limitation of Liability, Indemnity
 - Personal Information/Privacy
 - IP
 - Rules for Acceptable Use
 - Jurisdiction
- The website T&C should be coupled and aligned with a robust enterprise privacy policy and anti-spam policy
- T&C are not boring!

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**WHEN DOES THE PGT
INTERVENE WITH A CHARITY:
WHAT DIRECTORS AND
OFFICERS NEED TO KNOW**

By Kenneth Goodman,
The Public Guardian & Trustee at the Attorney General Office

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Ministry of the
Attorney General

Office of the Public Guardian and Trustee Charitable Property Program



When does the Public Guardian and Trustee Intervene with a Charity?

Church and Charity Law, 2021

1

Mandate of the Public Guardian and Trustee



- Plays a role in helping to protect charitable assets in Ontario;
- Affords advice and assistance to the courts; and
- Can take steps to ensure that charitable property is used for the charitable purposes intended by the donor.

2



Fulfilling Mandate



PGT carries out its mandate by:

1. Protecting charitable property in court proceedings;
2. Acting on complaints regarding misapplication of charitable property or breach of fiduciary duties of directors or trustees; and,
3. In limited circumstances, reviewing Ontario applications for incorporation of charitable organizations and corporate- change documents;

3



OPGT & Charities

Charities interact with the OPGT in three circumstances:

1. OPGT is inquiring into the charity on the basis of a complaint (external or self-initiated);
2. Charity is seeking an order under s.13 of the Charities Accounting Act; or,
3. OPGT approval is required for an application under the Ontario Not for Profit Corporations Act.

4



Estate Litigation & Fiduciary Duties

- The OPGT also participates in litigation matters when there is a charitable interest that no one else can protect;
- We do not protect named charities as directors of charities have a fiduciary duty to protect the charitable interests in bequests.

5



OPGT Areas of Inquiry

The Public Guardian and Trustee can inquire into allegations that:

- charitable property is not being used for the purposes for which it is intended;
- those responsible for the administration of charitable property are in breach of their fiduciary duties;
- Charity is being administered improperly, putting charitable property at risk.



6



Charities Accounting Act

- The Legal Framework:
 - Section 2 requires trustees/directors holding charitable property to respond to PGT requests for information;
 - Section 3 allows the PGT to demand the trustees/directors pass their accounts;
 - Section 4 allows the PGT to bring an application against the charity and trustees/directors

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Examples of Inquiries

- Director is employed by the charity without Court authorization;
- Director has contracted with the charity without compliance with Section 2.1 of Ontario Regulation 4/01 or Court order;
- Charity has used funds for (charitable or non-charitable) activities outside of its purposes.
- Charity has 'borrowed' from restricted purpose funds for other uses.

8



Responding to the PGT

- It is important to keep the OPGT advised of the charity's actions. An extension of the time maybe granted for valid reasons.
- An organized, comprehensive response that provides context when needed, will help our office to better understand the charity's rationale.
- Silence, vague, defensive answers and inconsistent information will cause closer review and scrutiny.
- The approach of the OPGT in reviewing complaints about charitable organizations is to work with charities to correct errors and to avoid problems in the future.

9



Responding to the PGT

- Charities are entitled to obtain professional advice, such as from a lawyer or accountant, before forwarding the information;
- Even if while seeking the assistance of professionals, the charity should continue to gather all relevant information to avoid unnecessary delays in responding;
- The worst response is no response.

10



S.13 – Obtaining Court Orders

- Section 13 of the *Charities Accounting Act* provides a simplified procedure to obtain a Court Order without having to go to Court or commencing formal Court proceedings.

11



S.13 – Obtaining Court Orders

- Charities do not have to appear in Court or prepare an Application Record or factum to obtain a Court order, which is deemed to be a Court order under s. 13.
- However, charities do have to obtain the written consent of the Public Guardian and Trustee and of every other person who would have been required to be served in a proceeding to obtain the order.

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Examples of s.13 Orders

- A charity seeking to make payments to a director in situations where s. 2.1 of Ontario Regulation 4/01 does not apply, such as;
 - paying a director as an employee;
 - Contracting with a director where the board has 4 or fewer members;
 - Payments to a director for real estate transactions
 - Payments to a director for fundraising expenses

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Example of s.13 Orders

- A charity has a restricted fund that can no longer be used for its charitable purpose and needs Court approval to use the fund for another, similar purpose.
- A charity has failed to reach its Disbursement Quota and requires access to capital from a perpetual fund.

14



Process

- The OPGT's procedure manual for s. 13 applications can be found on the OPGT website or OPGT publications site (see last slide)

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Process

- The applicant submits the required documents to the OPGT's office for review;
- OPGT responds with any required changes such as more information within the affidavit or a change to the draft order;
- Once the application is completed, if the OPGT consents, we will obtain the order and forward it to you.

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Please Remember To

- Contact the OPGT first to discuss the order you are seeking. At that point counsel can screen the issue to determine if it is a suitable subject matter for a s.13 order;
- Submit draft documents rather than executed ones, in case the OPGT requires amendments.

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ONCA

- On October 19, 2021, the Not-for-Profit Corporations Act came into force;
- The Ontario Business Registry, an online system for applying for articles of incorporation or a change to corporate articles, also started on October 19, 2021.
- The new system reduces the OPGT's role in incorporation or corporate change applications.

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PGT Involvement under ONCA

- Ontario Regulation 394/21, Names and Filings, stipulates when the OPGT is involved in corporate applications when:
 - A charitable corporation wishes to change its purposes but does not want to use the 'after-acquired clause' (sections 24 & 27);
 - The applicant wishes to use the term 'Foundation', if the word suggests the corporation is a charity, or the word 'Charity' in the name of the corporation (sections 2.7 & 2.8);
 - If the OPGT has requested notification of any application for changes with respect to the corporation (sections 26 & 33).

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The 'After Acquired' clause

- Required for charities who wish to change their purposes;
- Stipulates that charities must use the funds they currently hold for the original purposes;
- Reflects charity law in Ontario which must be followed whether or not the clause is included;

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Restricted Words: Charity and Foundation

- OPGT approval is required:
 - When the term Foundation is used if it suggests the corporation is a charity
 - When the word Charity is used in the name of the corporation;

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Restricted Word: Foundation

- For a corporation to use the term foundation, if it implies the corporation is a charity, it must:
 - Include the OPGT's foundation clause;
 - Comply with the other naming provisions;
 - Have wholly charitable purposes

22



Restricted Words: Charity

- In order to receive OPGT approval for the use of the term 'Charity', the corporation's purposes must be wholly charitable;
- The use of the term must also comply with the other naming requirements found in the regulation

23



OPGT has notified Service Ontario of concerns

- Sections 26 and 33 stipulate that the approval of the OPGT is necessary when our office has contacted Service Ontario to indicate we have conducted or are conducting an inquiry into the charity into whether:
 - The corporation, an officer director or incorporator has misused charitable property;
 - An officer, director or incorporator has breached their fiduciary duties in relation to charitable property.
 - The OPGT has notified Service Ontario that our approval is necessary to revive the corporation.²⁴



Not-for-Profit Incorporator's Handbook (the Handbook)

- The Handbook has recently been updated to reflect the changes in the legislation and processes.
- You can find a copy or a link at the OPGT Publications page, OPGT webpage, or by emailing us to request a copy. (see final slide)

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Contact Information



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Internet: www.ontario.ca/OPGT
OPGT Publications:
<https://www.publications.gov.on.ca/the-office-of-the-public-guardian-and-trustee>**

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THE CHARITIES DIRECTORATE'S APPROACH TO COMPLIANCE

By Tony Manconi,
Director General of the Charities Directorate

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Approach to compliance

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

Compliance overview

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

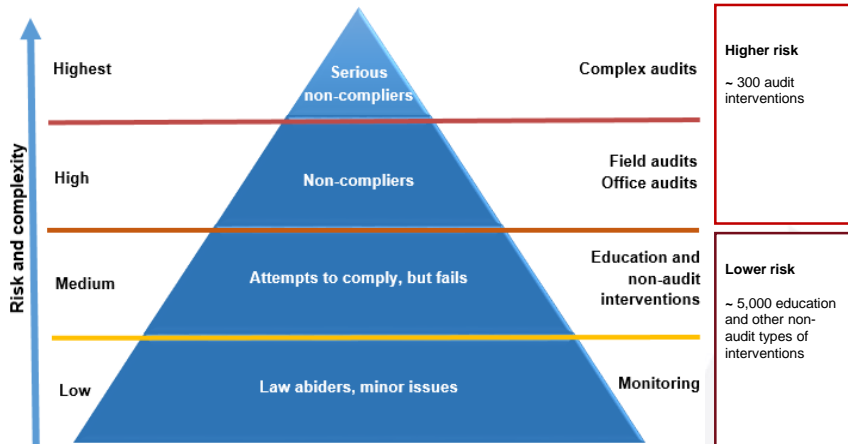
3

Compliance objectives

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

4

Addressing non-compliance: a balanced approach



5

Compliance risk approach

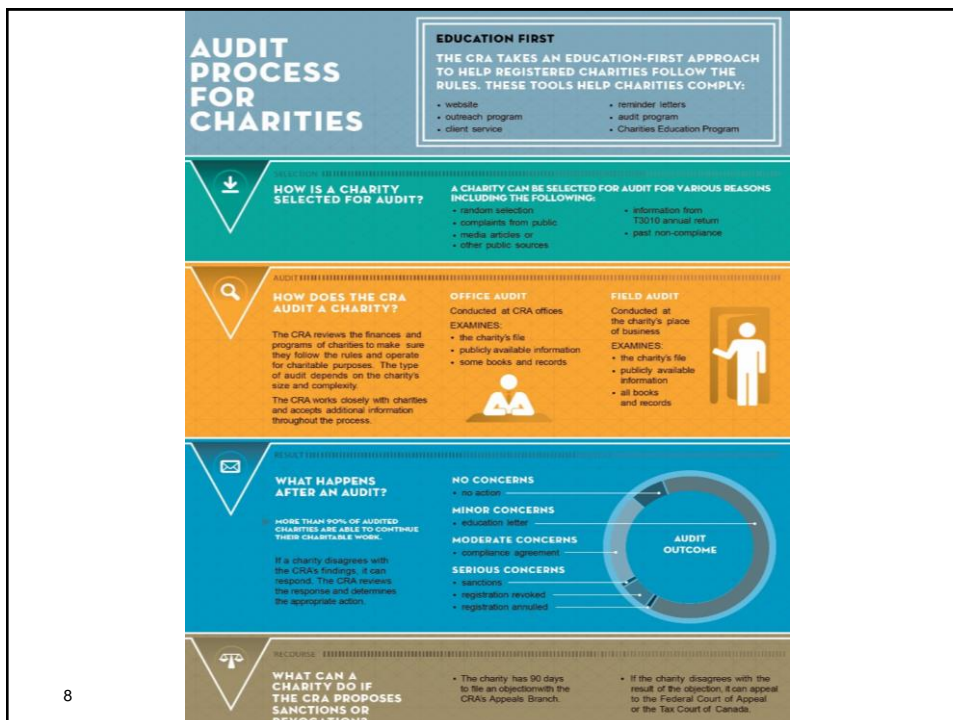
- Balancing our compliance program enables us to proactively promote voluntary compliance and to interact with a greater number of charities.
- **Lower risk non-compliance**
 - Represents the greatest proportion of charities engaging in non-compliance.
- **Higher risk non-compliance**
 - Represents a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

6

Compliance activities and interventions

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

7



8

How is a charity selected for audit?

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

9

What happens when the audit is finished?

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

10

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

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

11

What recourse does a charity have after an audit?

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

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What audit information is available to the public?

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

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Statistics on audit results compared by year

Outcomes	2018-2019	2019-2020	2020-2021
No change /no further action	6	2	1
Education letters issued	160	131	90
Compliance agreements	76	43	37
Voluntary revocations	4	4	5
Penalties/suspensions	1	0	0
Notices of Intention to Revoke issued	18	7	0
Annulments	1	1	1
Other (includes other audit activities such as pre-registration and Part V audits)	13	20	8
Total	279	208	142
Revocations as a result of an audit	21	4	4

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Going forward ...

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

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Helpful Resources

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

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WE ARE HERE TO HELP !

- Not sure about the rules?
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Resource Materials

(see our Event Resources Page on the webinar platform)

- **Canada Revenue Agency, Charities Directorate**
- **Canada Revenue Agency, GST/HST Outreach Program**
- **Canadian Centre for Christian Charities,**
<https://www.cccc.org>
- **Imagine Canada,** <https://imaginecanada.ca/en> and
 Advocacy Hub <https://imaginecanada.ca/en/public-policy>
- **ONN (Ontario Nonprofit Network),** <https://theonncanada.ca>
 and <https://nonprofitresources.ca/>
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