

Updating Charities and Not-For-Profits on recent legal developments
and risk management considerations

JUNE 2018

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[Summer 2018 Carters Charity & NFP Webinar](#)

Legal Issues in Fundraising on Social Media presented by Terrance S. Carter.

Hosted by Carters Professional Corporation on Wednesday July 18, 2108.

Click [here](#) to register or for On Demand/Replay.

25th Annual Church & Charity Law™ Seminar

[SAVE THE DATE](#) - Thursday November 8, 2018

Hosted by Carters Professional Corporation in Greater Toronto, Ontario.

Guest speakers include **Tony Manconi**, Director General, Charities Directorate, Canada Revenue Agency and **Ken Goodman**, Public Guardian and Trustee of Ontario. Details will be posted soon at www.carters.ca.

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RECENT PUBLICATIONS AND NEWS RELEASES

SCC Upholds Denial of Accreditation of Trinity Western Due To Mandatory Covenant

By [Terrance S. Carter](#), [Jennifer M. Leddy](#) and [Adriel N. Clayton](#)

On June 15, 2018, the Supreme Court of Canada (“SCC”) released two significant decisions, [Law Society of British Columbia v Trinity Western University](#) and [Trinity Western University v Law Society of Upper Canada](#), concerning Trinity Western University’s (“TWU”) legal battle to receive accreditation for its proposed law school from the Law Society of British Columbia and the Law Society of Upper Canada (together the “Law Societies”). In its decisions, the SCC upheld the Law Societies’ decisions to deny TWU accreditation on the basis that TWU students would be required to sign a faith-based Community Covenant obligating them to adhere to certain behavior. This *Church Law Bulletin* reviews the SCC’s decisions and provides a commentary on their impact for faith-based organizations.

For the balance of this *Bulletin*, please see [Church Law Bulletin No. 55](#).

CRA News

By [Esther S.J. Oh](#)

Changes to A-Z Index on CRA Charities Directorate webpage

Over the past several months, the Canada Revenue Agency’s (“CRA”) Charities Directorate has been updating its online [alphabetical index of topics](#). As mentioned in the CRA’s [Twitter](#) account, the new tool provides a “new user-friendly format [that] allows you to use keywords and filters that make the answers to your questions easier to find.” The search tool can be used by entering search terms which will then filter through the contents of the 389 entries in the index. For example, a search for the term “CED” will lead to Guidance CG-014, Community economic development activities and charitable registration.

Legislation Update

By [Terrance S. Carter](#)

Bill C-74, Budget Implementation Act, 2018, No. 1 Receives Royal Assent

On June 21, 2018, [Bill C-74, Budget Implementation Act, 2018, No. 1](#) (“Bill C-74”) received Royal Assent. Bill C-74 implements certain measures proposed in the 2018 Federal Budget (“Budget 2018”), some of which impact the charitable and not-for-profit sector, as discussed in [March 2018 Charity & NFP Update](#)

and in [Charity & NFP Law Bulletin No. 417](#). The amendments introduced by Bill C-74 include amended definitions of “eligible donee” under s. 188(1.3) of the *Income Tax Act* (“ITA”) and of “qualified donee” under s. of the 149.1(1) ITA.

Federal Safe Food for Canadians Regulations Published

On May 30, 2018 new *Safe Food for Canadians Regulations* (the “Regulations”) were published in the [Canada Gazette](#). Subdivision C of the Regulations contains a prohibition on the purchase, sale, conveyance and import of fresh fruits and vegetables from one province to another, but it also contains an exception for registered charities as defined in s. 248(1) of the ITA as well as clubs, societies or associations described in s. 149(1)(l) of the ITA.

Pre-Budget Consultations for 2019 Budget

On June 4, 2018, the House of Commons Standing Committee on Finance (the “Committee”) published a [News Release](#) launching its annual pre-budget consultations in advance of the 2019 Federal Budget. The 2019 Federal Budget focuses on the theme of “Economic Growth: Ensuring Canada’s Competitiveness.” Written submissions and recommendations can be made [online](#) to the Committee until Friday, August 3, 2018.

Mandatory Breach Reporting under Alberta's Health Information Act Coming into Force

On May 8, 2018, Alberta’s Lieutenant Governor’s [Order in Council 120/2018](#) set August 31, 2018 as the date for the coming into force of the [mandatory breach notification requirements](#) pursuant to the Health Information Amendment Regulation enacted under *Alberta's Health Information Act* (“HIA”) previously passed under the *Statutes Amendment Act, 2014* in May 2014. Once in force, Alberta’s health custodians will be required to notify individuals whose health information has been subject to a privacy breach, as well as notify the Information and Privacy Commissioner and the Minister of Health if there is a risk of harm to the individual. The regulations set out the factors that must be considered by health custodians in determining whether there is a risk of harm to an individual. These factors include whether there is a reasonable basis to believe that the information has been or may be accessed by or disclosed to a person, that it has been or will be misused, that it could be used for identity theft or fraud, that it will cause embarrassment or harm, that it will damage the individual’s reputation, or that it could adversely affect the provision of a health service to the individual.

Corporate Update

By [Theresa L.M. Man](#)

Consultation on Proposed Service Fees

On May 31, 2018, Corporations Canada began [public consultations](#) to update its fee schedules for services provided under the *Canada Business Corporations Act* (“CBCA”), the *Canada Cooperatives Act* (“CCoA”) and the *Canada Not-for-profit Corporations Act* (“CNCA”). Fees for services under the CBCA and the CCoA have not changed since 2001 and under the CNCA since 2011. The [consultation document](#) contains tables of current and proposed fees. It also indicates that the proposed changes will better align the fees with the costs of delivering these services and will allow Corporations Canada to achieve the government’s objectives of encouraging the use of low-cost services delivery methods. For the non-profit sector under the CNCA, a number of services (such as filing annual returns and copies of corporate documents) will be free or have a reduced fee when requested online. However, other services (such as applications for restated articles and certificates of arrangements) will increase. The consultation will remain open for public comment until July 13, 2018.

New Interactive Tool on Corporations Canada’s Website

On June 5, 2018, Corporations Canada [launched](#) a new interactive online by-law builder tool to help boards of trade incorporated under the *Boards of Trade Act* (“BOTA”) create by-laws. While the responsibility for the final document remains with the relevant board of trade that uses this new feature, the interactive tool offers a number of advantages: it combines BOTA’s requirements and good corporate governance practices, is intended to promote the standardization of practices in the sector, and allows boards of trade to customize suggested options or put in their own provisions.

Tax Court Rules on the Appropriate Methodology for Valuing Wine Donations

By [Ryan M. Prendergast](#)

On June 12, 2018, the Tax Court of Canada (“TCC”) dismissed an appeal concerning a taxpayer’s reassessment by the CRA in [McCuaig Balkwill v The Queen](#), regarding the fair market value of donated wines to be sold at auctions hosted by charities. The issue before the TCC was the determination of the appropriate valuation methodology. The taxpayer had donated 21 bottles of wine of “different labels and vintages” to two charities which valued the donated bottles at \$23,600.00 and issued corresponding tax receipts to the appellant. The CRA reassessed the donations and determined that the fair market value of

the wine was \$4,700.00, reflecting the approximate amounts raised by the charities for the same bottles at auction.

On appeal before the TCC, each party relied on its own expert. The taxpayer's expert, a qualified appraiser of personal property specializing in wine, provided a valuation as of 2016, when the report was prepared, based on online list prices from sellers around the world. This report found that the donated wines had an approximate value of \$5,500.00, which, adding estimated markups, levies, taxes, tariffs, duties, freight transportation costs typically charged by Liquor Control Board of Ontario ("LCBO")'s Private Ordering program, resulted in a fair market value of approximately \$17,200.00. The appraiser's testimony did not indicate how to extrapolate the 2016 valuation back to the relevant years of 2005 and 2006, when the actual donations took place, but it stated that the overall LCBO resulting prices can be assumed to have been in excess of three times the global wine market list price for years prior to 2016. It was important in this decision that none of the wines are available at the LCBO.

The CRA's expert, a qualified appraiser of personal property specialized in fine art, relying on known sales at wine auctions available to the taxpayer in 2005 and 2006, with data on actual auction sales in the United States, arrived at an aggregate fair market value of the donated wines of approximately \$2,650.00 at the relevant time.

The TCC relied on the definition of "fair market value" adopted by the Federal Court of Appeal in *Canada (Attorney General) v. Nash* in the following terms:

the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell.

Recognizing that there are "actual, normal, functioning, lawful, and available real markets" in which an Ontario resident may sell a bottle of wine, the TCC found no weight should be given in this case to a proxy market based on the LCBO's Private Ordering pricing, which is a virtual, single seller monopoly. It further held that the provincial regulatory restrictions on the sale of wine in the province do not affect the adopted definition of "fair market value" requiring an open and unrestricted market, as the experts did not opine on whether these restrictions had any negative impact on prices obtained using Ontario markets available to the taxpayer.

In this regard, the TCC accepted the evidence from the CRA's expert as the only valuation available for the relevant period, but since it could not order CRA to reassess using a lower value than what it had already used in the reassessments, it dismissed the appeal.

Being asked to provide additional guidance, the TCC held that this decision does not preclude the donation of a wine bottle to have a fair market value equal to the purchase price available at an LCBO store, and that there may be other methodologies acceptable to the court in other circumstances, such as actual data for comparable wines that are not identical labels and vintages to the ones donated, or even the LCBO's Private Ordering methodology, provided it is fully supported with evidence and accurately applied. Charities receiving non-cash donations, such as bottles of wine, should therefore bear in mind the various methodologies available in calculating fair market value and maintain evidence that fully supports any such calculations.

Supreme Court Upholds Religious Autonomy in Wall Decision

By [Terrance S. Carter](#), [Sean S. Carter](#) and [Theresa L.M. Man](#)

On May 31, 2018, the SCC released its decision in [Highwood Congregation of Jehovah's Witnesses \(Judicial Committee\) v Wall](#) ("Wall") concerning the courts' jurisdiction to review the decision of the Highwood Congregation of Jehovah's Witnesses ("Congregation") to expel Mr. Wall from membership. The Wall decision overturns the Alberta Court of Queen's Bench and the Alberta Court of Appeal's decisions, which had both held that courts had the jurisdiction to review decisions made by religious groups regarding the discipline or expulsion of members where such decision was made in a manner that did not reflect principles of natural justice. While the SCC did not entirely rule out the courts' jurisdiction over decisions made by religious groups and other voluntary associations over membership matters on the basis of procedural fairness, it held that this jurisdiction was restricted to a defined set of circumstances.

For the balance of this *Bulletin*, please see [Church Law Bulletin No. 54](#).

Reporting Obligations for Directors, Trustees and Like Officials and Timing Issues

By [Jacqueline M. Demczur](#)

The CRA requires registered charities to file [Form T3010](#), Registered Charity Information Return Charities ("T3010") with six months of the end of each fiscal year. For charities with a fiscal year-end date of December 31st, this means that a T3010 will need to be filed by June 30th. In addition to the T3010,

registered charities in Ontario must also submit at the same time either a Charities RC232WS – Director/Officer Worksheet and Ontario *Corporations Information Act* Annual Return (“RC232WS”), or a [Charities RC232](#) – Ontario *Corporations Information Act* Annual Return Worksheet (“RC232”) with a [Form T1235](#), Director/Trustees and Like Officials Worksheet (“T1235”).

The RC232WS and T1235 require charities to identify the dates when directors, trustees and like officials began and finished acting in these roles. This may raise complications where the directors, trustees and like officials have changed during the charity’s fiscal period, raising questions regarding which individuals to list, including whether charities should list directors, trustees and like officials serving at the charity’s year-end or at the time of filing.

For charities that file the T1235, the form states that “each director/trustee and like official who, at any time during the fiscal period of this return, was a member of the charity's board of directors/trustees” must be listed on the form. This means that all individuals who were directors, officers or like officials at any point in time during the applicable fiscal year will need to be listed on the T1235. However, this is different for corporations filing RC232WS. Charities that file this form, rather than the T1235, must set out the required information for the corporation “as of the date of delivery.” Therefore, only those individuals who are directors, officers or like officials at the time of filing need to be included in the RC232WS.

Charities with a financial year end of December 31st that have yet to file their T3010 with the CRA are reminded of the upcoming June 30th deadline, and of the importance of filing on time. Given the above, it will be important for charities to consider how they report their directors, officers, and like officials for the purposes of the T1235 or RC232WS, as the listing of directors is public information and inaccurate T3010s are often an issue raised by CRA during audits of charities.

Ontario Court Dismisses s. 6 CAA Application for Financial Disclosure

By [Ryan M. Prendergast](#)

On June 6, 2018, the Ontario Superior Court of Justice released its decision in [Faas v CAMH](#), in which it considered an application by and the Faas Foundation and its principal, Andrew Faas (“Faas”) under s. 6(3) of the *Charities Accounting Act* (“CAA”) for a court order directing the Public Guardian and Trustee (“PGT”) to investigate how a public foundation and registered charity, the Centre for Addiction and Mental Health Foundation (“CAMH”), used donation funds from Faas. Faas brought the application in relation to a Donor Investment Agreement (“DIA”) for a \$1 million donation to CAMH to develop a

mental health program, Well@Work. The donations would be paid in three equal instalments over a three-year period while Well@Work was developed. While the first instalment was paid in 2015, no further payments were made.

As a donor, the DIA did not provide Faas with any access to CAMH's internal information or work product, oversight of the program, or any involvement in program design or implementation. The DIA also required CAMH to report to Faas annually on the progress of Well@Work. While CAMH complied with its reporting requirement, Mr. Faas began to express dissatisfaction with the Well@Work's program development, making various demands concerning the program design and implementation, and for greater disclosure of information, including an accounting of the program. As he believed that CAMH was "not going to be able to deliver on the three-year plan," Mr. Faas also demanded a new grant proposal from CAMH with terms conforming more closely to his own vision for the program. Faas subsequently demanded CAMH to refund the first instalment of the donation. CAMH refused, claiming that the funds had been spent on developing Well@Work.

The court stated that s. 6(3) of the CAA provides courts with the discretion to make an order that a registered charity be investigated by the PGT where it is "of the opinion that the public interest can be served by an investigation of the matter complained of." As such, it found that the threshold was whether the public interest would be served by a PGT investigation, and examined the jurisprudence surrounding s. 6 of the CAA to determine what the public interest was and when a PGT investigation would serve the public interest, finding that "public interest" is to be "construed in the context of the statute in which [it is] found." Further, it noted the narrow mandate of the PGT, focused on financial management, and that courts can only order an investigation but cannot direct the PGT on as to how the investigation is to be conducted. In this regard, a s. 6 PGT investigation could not be used as "a mechanism by which a donor can gain information about the recipient of its funds."

As s. 6(3) investigations are at the cost of the public, the court also stated that courts must be mindful of the disruptiveness and high cost of such investigations, and that an investigation should only be ordered "on reasonable and probable grounds and not on the basis of conjecture, surmise, or groundless accusations," or to investigate administrative wrongdoings rather than financial matters. As such, in order for an investigation to serve the public interest, there must be mischief to the public at large rather than a "personality-driven dispute."

Faas' application was not with regard to CAMH's failure to use the donated funds for CAMH's charitable objects. The court instead found that the application questioned whether the donation was used "in a way that conforms with Mr. Faas' personal vision of the funded program," which it held was a private rather than public interest. Specifically concerning Faas' demands for an accounting to ensure proper spending of the donated funds, the court held that it was based on conjecture, as no mischief was identified and there was no apparent misuse of funds. Based on its review of jurisprudence surrounding s. 6 of the CAA, the court found that Faas' application fell outside the scope of the PGT's jurisdiction, and held that "[a]bsent evidence of financial misdeeds, Faas has no particular right to a detailed accounting of CAMH's program and its use of funds."

This case reinforces the principle that courts are reluctant to interfere in a charity's operations unless the public interest is being affected. Although the application in this case was not successful, this case should nonetheless serve as a reminder to charities of the importance of ensuring that donated funds are used to further their charitable objects, and to donors that s. 6(3) investigations will not be ordered lightly. In this case, Faas was ordered to pay \$130,000 in costs for making an application in what the court considered to be a private interest rather than a public interest.

BC Court Holds Land Transfer to be Gift Rather Than Trust

By [Adriel N. Clayton](#)

On May 15, 2018, the Supreme Court of British Columbia released its decision in [Okanagan Equestrian Society v North Okanagan \(Regional District\)](#) concerning a dispute over the use of land ("Land") that was transferred by the Vernon Jockey Club ("Jockey Club") to the City of Vernon, British Columbia ("City"). Although the facts of the case are complex and the court considered ten separate issues, at the heart of the matter was a contract dispute between the City and the Okanagan Equestrian Society ("Society"), which currently owns all shares of the Jockey Club and therefore has control over the Land. The Jockey Club had transferred the Land to the City in 1964 subject to conditions for its future use, subsequently set out in an agreement executed in 1965 ("1965 Agreement"). The 1965 Agreement was to preserve the Jockey Club's charter by maintaining its right to conduct horse racing and ensuring that the City maintained the racetrack. The Society argued that the 1964 transfer and the 1965 Agreement created a charitable trust, while the City argued that the transfer was a gift, with no charitable trust created.

The court first looked for the intention of the parties to create a trust and found that the registered title documents from the 1964 transfer and the 1965 Agreement itself did not reference or create a trust. It then considered whether the parties could have retroactively created a trust through the 1965 Agreement and whether a trust could be derived from a gift. Quoting from *Waters' Law of Trusts in Canada*, it stated that “a person can do nothing to give away what that person has already given away, by whatever means the person attempts to do that.” It therefore held that, in an attempt to transfer a gift with conditions attached to the City, the Jockey Club had engaged the common law of contract rather than the law of trusts. Notable, the court found that “the parties did not conduct themselves as if the 1965 Agreement created a trust.”

The court then considered the “three certainties” of a valid trust – the certainty of intention, subject matter, and objects. While the 1965 Agreement indicated the City’s intention to develop the land into a general recreational area, the court found no certainty of intention, as there was no clear scope of the proposed development. The court also found no certainty of subject matter, as the 1965 Agreement obliged the City to keep “the track presently found on said lands” in good order, but that track had been replaced by a differently-shaped, larger track occupying two additional parcels of land. In this regard, the court held that “while there may have been certainty of subject matter in 1965, the same cannot be said at the time of the hearing in 2017.” Finally, the court found no certainty of objects, as the 1965 Agreement was worded such that it was impossible to determine for whom the City would have been holding the land in trust.

The court also considered the Society’s argument that the 1964 transfer and the 1965 Agreement created a charitable purpose trust in accordance with the four “heads” or categories of charity set out in *Pemsel v Special Commissioners of Income Tax*. Of the four, the court stated that only the fourth head of charity, “certain other purposes beneficial to the community, not falling under any of the preceding heads,” could be relevant in this case. It then determined whether the preservation of the Jockey Club’s charter was reasonably analogous to other charitable objects that fell under the fourth head, whether “certain accepted anomalies” fairly covered this object, and whether the income and property in question could be applied for purposes outside the scope of charity, including private advantage.

The court found that the language of the 1965 Agreement did not demonstrate an intention to create a charitable purpose trust, particularly because the language did not prohibit the City from using the Land to generate income, for example through a lease. Further, it found that the aspirational, non-mandatory nature of the wording merely set out a recognition of the City’s intention to develop the lands into a general recreational area and left the purposes of the development to the City’s sole discretion. It therefore found

that the preservation of the Jockey Club’s charter was not an object that benefitted the community and served no greater purpose for the public good. Based on its reasoning above, it found no charitable purpose trust created, found that the 1964 transfer represented a gift and that no trust was created through the 1965 Agreement, and dismissed the Society’s arguments on this basis.

This case upholds the principle that a trust cannot be retroactively created where a valid gift has already been made. Further, it is a reminder of the importance of proper drafting of gifts agreements and/or trusts documentation to accurately reflect the intentions of a donor, particularly where the subject matter of a gift or trust is high in value, such as with land. If the donor’s intention is to create a charitable purpose trust, the applicable *inter vivos* or testamentary documentation should be carefully drafted to reflect this intention. Where that intention is unclear and cannot be readily demonstrated, courts may refuse to enforce the transaction as a trust.

Government Signals Changes to PIPEDA Needed

By [Esther Shainblum](#)

On June 19, 2018, the [House of Commons Standing Committee on Access to Information, Privacy and Ethics](#) (the “Committee”) made available the Government of Canada’s [response](#) to the Committee’s report (the “Report”), discussed in the [March 2018 Charity & NFP Law Update](#), regarding the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). In its response, the Government of Canada acknowledged that changes to Canada’s privacy regime are needed and it addressed the 19 recommendations of the Report under the four following themes:

- i) consent under PIPEDA, confirming that consent will continue to form the basis of Canadian privacy legislation but agreeing that the consent regime can be enhanced and clarified, particularly around issues such as social media and the protection of minors’ information online, and to ensure that Canada’s consent regime remains progressive and aligned with internationally recognized standards;
- ii) online reputation and respect for privacy, noting that the risks in this area particularly impact young people and that there are divergent views on matters such as the right to de-indexing and erasure and questioning whether PIPEDA is the right mechanism for addressing de-indexing and erasure given its limited application to the commercial context;

- iii) agreeing that PIPEDA’s enforcement mechanism can be improved and indicating that the government will look at various models of compliance and enforcement options, possibly including providing of the Office of the Privacy Commissioner of Canada with increased enforcement powers (“OPC”); and
- iv) impact of the GDPR, advising that the Government is “working closely with the European Commission to understand the requirements for maintaining Canada’s adequacy standing under the EU GDPR” and indicating that the Government’s approach reflects the EU’s concept of “essential equivalence” rather than a one-to-one incorporation of GDPR principles into the Canadian regime.

Special Senate Committee Update

By [Jacqueline M. Demczur](#)

In June 2018, the Special Senate Committee on the Charitable Sector (“Committee”) continued its study on the impact of federal and provincial laws and policies on the charitable and not-for-profit sector through two meetings with witnesses held on June 4 and 11, 2018. The Committee also held an additional *in camera* meeting on June 18, 2018 to consider a draft agenda for future business. At the [June 4th meeting](#), witnesses from Service Canada, Statistics Canada, Volunteer Canada, and various academics discussed issues related to volunteering. The witnesses presented findings from a number of studies and discussed topics including the demographics of volunteers, the development of a youth service program, the evolution of volunteering, and reasons people do or do not volunteer.

At the [June 11th meeting](#), witnesses from various departments and agencies of the Government of Canada, such as Global Affairs Canada and Employment and Social Development Canada, discussed the contribution of charities and non-profit organizations to government service delivery and policy consultation. The witnesses provided an overview of various government volunteer programs and other initiatives that engaged the volunteer sector, and discussed methods and issues in funding not-for-profits and alignment with the government’s priorities.

Reduced Employee Benefits After Age 65 Found to be Discriminatory

By [Barry W. Kwasniewski](#)

On May 18, 2018, the Human Rights Tribunal of Ontario (“HRTO”) released its interim decision in [Talos v Grand Erie District School Board](#), in which the HRTO ruled that subsection 25(2.1) of the Ontario Human Rights Code (“Code”) was unconstitutional, as being contrary to the equality rights protections included in the *Canadian Charter of Rights and Freedoms* (“Charter”). Subsection 25(2.1) of the Code, in conjunction with the *Employment Standards Act, 2000* (“ESA”), and its regulations, allows employers the discretion to terminate benefits for workers age 65 and older. It should be noted that this decision is not a general declaration of constitutional invalidity, as the jurisdiction of the HRTO, as decided in earlier case law, does not permit the HRTO to issue such declarations. However, the HRTO can refrain from applying the impugned section of the Code if, in its view, the section offends the *Charter*. Nonetheless, this decision is important insofar as it serves as an indication of the HRTO’s stance towards the reduction of employee benefits for employees over the age of 65.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 424](#).

UK Charity Fined £100,000 for Personal Data Breach

By [Esther Shainblum](#)

On June 7, 2018, the Information Commissioner’s Office (“ICO”) of the United Kingdom published a [monetary penalty notice](#) fining a charity, the British and Foreign Bible Society (“Bible Society”), in accordance with s. 55A of the UK’s *Data Protection Act 1998* (“DPA”), after a 2016 cyber-attack compromised the Bible Society’s computer network. The Bible Society is a “data controller” under s. 1(1) of the DPA, and must comply with data protection principles regarding personal data that it controls as a data controller. The data protection principles require data controllers to ensure, among other things, that “appropriate technical and organizational measures [are] taken against unauthorized or unlawful processing of personal data...” to maintain an appropriate level of security relative to the harm that could result from a data breach and relative to the nature of the data.

In 2009, the Bible Society created a service account intended for internal use, allowing users to log on to the network remotely and access network files. However, the account username and password were identical, and protection was therefore weak. As a result, attackers were able to access the network between November 16 and December 1, 2016, by guessing the weak password and username combination.

An attacker subsequently installed ransomware on the network, encrypting 1 million shared files, including files with personal data. This data included details for 1,020 payment cards, 27,800 bank accounts, and contact information for 417,000 of the Bible Society's supporters. While this information was retrieved by the Bible Society through a backup, files were obtained by the attacker, possibly including personal data.

The ICO found that the Bible Society had failed to implement appropriate technical and organizational measures for ensuring that the personal data on its network could not be accessed or processed by an attacker in contravention of the PDA. In addition to the weak password, the ICO found that the Bible Society did not have sufficient oversight of its network and systems; did not identify possible network risks when implementing the service account for remote access; did not remove all of the shared files from the network to a secured location with limited access; and did not enable 'on access scanning' that would have detected the ransomware when it was first deployed instead of the next day.

Given the number of individuals whose personal data was affected, the nature of the personal data, and the potential consequences of a breach, the ICO found that the contravention was of a serious nature. Further, as the attacker accessed financial data that could expose the data subjects to identity theft or financial harm, as well as sensitive personal information that would have allowed it to infer the religious beliefs of the subjects, the ICO found that the contravention was likely to cause substantial damage or distress to the data subjects. Although the ICO also found that the Bible Society did not intentionally contravene the DPA, it found that the inadequacies were a matter of serious oversight and that the Bible Society ought reasonably to have known of the risk of a ransomware attack, of the vulnerability of the data on an open network, that such attack would cause substantial distress to the data subjects, and that the Bible Society should have ensured that the personal data was appropriately protected. The ICO therefore fined the Bible Society £100,000 for its contravention of the DPA.

Although this case takes place in the context of UK law, it is a reminder that attacks and data breaches can happen to any organization, including charities and not-for-profits. Regardless of their status as charities or other not-for-profits, all organizations should take steps to ensure that they have appropriate physical, technical and administrative safeguards in place to protect personal information in their custody or control. This case demonstrates that charities and not-for profits can face significant financial penalties for privacy breaches, whether they are subject to and have breached a statute (such as PIPEDA or the British Columbia *Personal Information Protection Act*), as in the UK case, or whether they are found

liable in tort as the result of a lawsuit brought against them. This case is therefore a reminder to all charities and not-for-profits of the importance of ensuring that they put in place appropriate safeguards to protect the personal data in their possession.

Anti-Terrorism/Money Laundering Update

By [Terrance S. Carter](#), [Nancy E. Claridge](#) and [Sean S. Carter](#)

Regulations Addressing Virtual Currencies Published

On June 9, 2018, proposed *Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2018* (the “Proposed Regulations”) were published in the [Canada Gazette](#). The accompanying statement from the Department of Finance Canada (the “Statement”) states that regulatory changes are required to address the deficiencies identified by the Financial Action Task Force’s (“FATF”) evaluation of Canada’s Anti-Money Laundering and Anti-Terrorist Financing regime in 2015-16, discussed in [Anti-terrorism and Charity Law Update No.47](#), as well as to implement the legislative efforts to strengthen this regime through amendments introduced in the *Economic Action Plan 2014 Act, No. 1* and the *Budget Implementation Act, 2017, No. 1*.

Recognizing that the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the “*Proceeds of Crime Act*”) was not originally conceived for financial services and institutions in the digital world, the Statement highlights the following changes introduced by the Proposed Regulations: new customer due diligence requirements and beneficial ownership reporting requirements; new regulations for businesses dealing in virtual currency; updated schedules to the regulations; regulation of foreign money service businesses; and a number of technical amendments. The Statement also indicates that the proposed amendments would help improve the efforts of the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”).

In this regard, the Proposed Regulations state that virtual currencies “are vulnerable to abuse for money laundering and terrorist activity financing purposes because they allow greater levels of anonymity, or in some cases complete anonymity, when compared to traditional non-cash payment methods.” As such, the Proposed Regulations introduce new requirements to financial entities, money services businesses, real estate brokers, accountants and other persons and entities, such as registered charities running a lottery scheme in the permanent establishment of a casino in certain circumstances described in the *Proceeds of*

Crime Act, to keep “large virtual currency transaction records” indicating the receipt of amounts of \$10,000 or more in virtual currency in a single transaction.

Charities and not-for-profits accepting donations in virtual currency, or otherwise considering fundraising or investing options available to them with regard to virtual currencies should carefully monitor these Proposed Regulations and any associated developments in the coming months.

Amendments to the Criminal Code in Bill C-74, Budget Implementation Act, 2018, No. 1

Bill C-74 introduces a new Part XXII.1 to the *Criminal Code* establishing a new remediation agreement regime that will come into force on September 19, 2018 (ninety days after June 21, 2018, the date on which Bill C-74 received Royal Assent). A remediation agreement is defined as an “agreement, between an organization accused of having committed an offence and a prosecutor, to stay any proceedings related to that offence if the organization complies with the terms of the agreement.” The term organization is defined as a body corporate, society, company, firm, partnership, or an association of persons.

The amendment also includes a Schedule to Part XXII.1 which provides a list of offences in respect of which a remediation agreement may be entered into subject to court approval, including offences under the *Corruption of Foreign Public Officials Act*, namely bribing a foreign public official (section 3) and maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official (section 4). In this regard, it applies to offences alleged to have been committed by an organization outside Canada.

This new regime is a reminder to charities and not-for-profits with operations outside Canada to consider reviewing their internal policies and procedures and any practices that involve dealings with foreign officials. This has become particularly important since, as discussed in the [November 2017 Anti-Terrorism/Money Laundering Law Update](#), the facilitation payments exemption in the *Corruption of Foreign Public Officials Act* was repealed last Fall.

IN THE PRESS

[Charity & NFP Law Update – May 2018 \(Carters Professional Corporation\)](#) was featured on *Taxnet Pro*TM and is available online to those who have OnePass subscription privileges.

RECENT EVENTS AND PRESENTATIONS

[Spring 2018 Carters Charity & NFP Webinar Series](#) are available as On Demand/Replay:

- [The Expanding Investment Spectrum for Charities, Including Social Investments](#) presented by Terrance S. Carter – [On Demand/Replay](#)
- [The Impact of Bill 148 on Charities and Not-for-Profits](#) by Barry W. Kwasniewski - [On Demand/Replay](#)
- [Recent Changes in Corporate Law Affecting Federal and Ontario Corporations](#) by Theresa L.M. Man - [On Demand/Replay](#)
- [Critical Privacy Issues Involving Children’s Programs](#) by Esther Shainblum - [On Demand/Replay](#)
- [Remuneration of Directors of Charities: What’s New?](#) by Ryan M. Prendergast - [On Demand/Replay](#)
- [Drafting Bylaws: Pitfalls to Avoid](#) by Esther S.J. Oh – [On Demand/Replay](#)

Healthcare Philanthropy Seminar, co-hosted by Carters Professional Corporation and Fasken, was held on Friday, June 8, 2018 in Toronto. Two of the topics that were covered are:

- [Due Diligence In Gift Documentation](#) by Theresa L.M. Man, Partner, Carters Professional Corporation
- [Legal Issues In Fundraising On Social Media](#) by Terrance S. Carter, Managing Partner, Carters Professional Corporation

UPCOMING EVENTS AND PRESENTATIONS

[2018 CSAE Trillium Summer Summit](#) will be held on July 12, 2018 in London, Ontario. “Your Association’s Brand and Reputation: Why it Matters?” will be the topic covered by Terrance S. Carter and Sepal Bonni.

New [Summer 2018 Carters Charity & NFP Webinar](#) hosted by Carters Professional Corporation on Wednesday July 18, 2018. [Legal Issues in Fundraising on Social Media](#) will be presented by Terrance S. Carter on Wednesday July 18, 2018 at 1:00 pm ET.

25th Annual Church & Charity Law™ Seminar - [SAVE THE DATE](#) - Thursday November 8, 2018.
Hosted by Carters Professional Corporation in Greater Toronto, Ontario. Guest speakers include **Tony Manconi**, Director General, Charities Directorate, Canada Revenue Agency and **Ken Goodman**, Public Guardian and Trustee of Ontario. Details will be posted soon at www.carters.ca.

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Michelle E. Baik, i.B.B.A., J.D. - Called to the Ontario Bar in 2015, Michelle has joined Carters' Litigation Practice Group. Michelle has broad experience in civil litigation having articulated and been an associate with an insurance defence boutique law firm in Toronto. She worked as Legal Counsel for one of the largest banks in Canada. Michelle obtained a degree in International Bachelor of Business Administration from the Schulich School of Business, and her J.D. degree from the University of Windsor. Michelle's practice areas include general civil, commercial and not-for-profit related litigation, administrative law, insurance defence litigation, loss transfer claims, and personal injury litigation.



Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent - Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articulated and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance issues.



Terrance S. Carter, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2018), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorism.ca.



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



Nancy E. Claridge, B.A., M.A., L.L.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity & NFP Law Update*. After obtaining a Masters 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.



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



Jacqueline M. Demczur, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert* 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*.



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



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."



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



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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*TM Seminar, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source.



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



Luis R. Chacin, LL.B., M.B.A., LL.M. - Luis graduated from Osgoode Hall Law School in 2017 with a Master of Laws in Canadian Common Law. Prior to this, he worked in the financial services industry in Montreal and Toronto for over 9 years, assisting both individual and institutional clients. Having previously worked as legal counsel in Venezuela, Luis has a broad perspective on both the civil and the common law traditions. He is involved in fundraising activities for various organizations and is interested in real estate, investments and taxation issues, particularly as they pertain to charities and non-profit corporations.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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