

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

## MAY 2019

### SECTIONS

Recent Publications and News Releases	2
In the Press	16
Recent Events and Presentations	16
Upcoming Events and Presentations	17
Contributors	19

### HIGHLIGHTS

Implications of Ontario Budget Cuts for Ontario Not-For-Profits
CRA News
Legislation Update
Corporate Update
Canada Introduces Digital Charter and Proposes Reforms to PIPEDA
Federal Court of Appeal Overturns Heffel Decision on Gifts of Cultural Property
Primer on Donor Advised Funds and Current Issues
BC Court Grants Oppression Remedy under <i>Societies Act</i>
Refusal to Grant Injunction Regarding Alberta Schools Act Upheld by Appeal Court
Ontario Court of Appeal Affirms Patients' Right to Effective Referral
Ontario Court Orders Damages Relating to 'Revenge' Videos Posted Online
Act Now: Canada's Trademark Law Changes are Less Than a Month Away
Former President of Corporation Found Liable for CASL Violations
Special Senate Committee Update
Jane Burke-Robertson Award of Excellence in Charity and Not-For- Profit Law

### [Spring 2019 Carters Charity & NFP Webinar Series](#)

Hosted by Carters Professional Corporation on Wednesdays starting April 17, 2019  
Click here for [online registration](#) for one or more sessions.

### **26th Annual Church & Charity Law Seminar™**

**SAVE THE DATE - Thursday November 7, 2019**

Hosted by Carters Professional Corporation in Greater Toronto, Ontario.  
Details will be posted soon at [www.carters.ca](http://www.carters.ca)

### **Get on Our Mailing List:**

To automatically receive the free monthly *Charity Law Update*,  
Click [here](#) or send an email to [info@carters.ca](mailto:info@carters.ca) with "Subscribe" in the subject line.

## **RECENT PUBLICATIONS AND NEWS RELEASES**

### **Implications of Ontario Budget Cuts for Ontario Not-For-Profits**

By [Terrance S. Carter](#), [Barry W. Kwasniewski](#), and [Ryan M. Prendergast](#)

On April 11, 2019, the Ontario Government released the 2019 Budget (“Budget”), which included a number of financial measures that will result in a reduction in provincial government funding for many not-for-profits in Ontario. The Ontario Nonprofit Network (“ONN”) recently released a summary of the Budget, which provided the ONN’s perspective and views on the Budget for the not-for-profit sector in Ontario.

Any material reduction in government funding may have serious consequences concerning the viability of impacted charities and other not-for-profits. Boards of organizations facing either a reduction or an elimination of government funding will be faced with serious decisions and choices concerning the continued operation of their programs, or possibly even the continued existence of the organization itself. The purpose of this Bulletin is to provide an overview of some of the more important issues that charities and other not-for-profits facing imminent reduction or elimination of provincial government funding may need to consider.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 448](#).

### **CRA News**

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

#### **New Information Webpages on Supporting Canadian Journalism**

The Canada Revenue Agency (“CRA”) has created [new information pages](#) regarding the measures that were proposed in support of Canadian journalism in the 2019 Federal Budget (“Budget 2019”), as discussed in [Charity & NFP Law Bulletin No. 443](#), and subsequently introduced in Bill C-97, as reviewed in the [April 2019 Charity & NFP Law Update](#). The main webpage, “Support for Canadian Journalism – General”, provides links to further information regarding the three proposed measures: qualified donee status; the refundable labour tax credit; and the digital news subscription tax credit. Further, the main webpage provides a general overview, in a question-and-answer format, of the new “Qualified Canadian Journalism Organization” status, including the requirements which an organization must meet in order to benefit from any of the three proposed measures.

## **CRA Launches Online Consultation on Educational Initiatives for Charitable Sector**

On May 14, 2019, the CRA [announced](#) that they have established an online consultation process to receive feedback that will “inform the direction of future communications and outreach products” and allow the CRA to more effectively communicate with those in the charitable sector. The CRA is seeking comments and ideas regarding the following topics: communications, outreach and social media; educational videos; graphic online tools; and future outreach and educational products. The online consultation is available on the [CRA Engage website](#) and will be open until June 30, 2019.

## **CRA List of Charities Webpage Moved in Preparation of Charities IT Modernization Project**

On May 14, 2019, the CRA also [announced](#) that the [“List of charities” webpage](#) has been moved and slightly changed in preparation for the launch of the Charities IT Modernization Project (“CHAMP”), which, as discussed in the [September 2018 Charity & NFP Law Update](#), will occur next month in June 2019. The new webpage provides access to a registered charity’s T3010 Registered Information Return information for the last five fiscal periods, while those seeking T3010 information beyond the five-year period can request further information using an [online form](#). Once in place, CHAMP will provide several new e-services, including the replacement of Form T2050, Application to Register a Charity under the ITA, with an online application, online filing of the T3010, Registered Charity Information Return, and the ability to update charities’ information and correspond with the Charities Directorate online through “My Business Account.”

## **Legislation Update**

By [Terrance S. Carter](#)

### **Prince Edward Island *Lobbyists Registration Act* in Force**

On April 1, 2019, Prince Edward Island’s [Lobbyists Registration Act](#) was proclaimed into force after receiving Royal Assent on December 20, 2017, as previously discussed in the [February 2018 Charity & NFP Law Update](#). The Act applies to “in-house lobbyists”, who are generally employees paid to lobby public-office holders for their employer at least 50 hours every three months, and “consultant lobbyists”, who are paid by clients to lobby on behalf of that client. Pursuant to the Act, consultant lobbyists, in-house lobbyists employed by persons or partnerships, and a senior officer of organizations that employ in-house lobbyists are now required to file a return with the Registrar once every six months. The Act outlines the content requirements of the return for each filing individual in subsections 4(4), 6(4) and 7(4) respectively, and creates an offence for those who do not file returns, with a penalty of up to \$25,000.

## **New Brunswick Updates *Minimum Wage for Counsellor and Program Staff at Residential Summer Camps Regulation***

On March 28, 2019, [New Brunswick Regulation 2019-3, \*Minimum Wage for Counsellor and Program Staff at Residential Summer Camps Regulation\*](#) (the “Minimum Wage Regulation”), was filed under the *Employment Standards Act*, and came into force on April 1, 2019, repealing the similar New Brunswick Regulation 2011-55. The Minimum Wage Regulation raises the minimum wage for “counsellors and program staff” employed at residential summer camps that have given notice to the Director in writing that they are charitable or non-profit organizations, provided that they operate during June, July, August or September and provide board and lodging for their counsellors and program staff. While minimum wage for counsellors and program staff will rise twice between April 1, 2019 and April 1, 2021, it is set equal to the weekly minimum wage payable under section 8 of the New Brunswick’s *Minimum Wage Regulation* as of April 1, 2022.

## **Corporate Update**

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

### **Update on the ONCA**

The website of the Ministry of Government and Consumer Services is still indicating that the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) is targeting to be in force in early 2020. Once the ONCA is in force, the ONCA will automatically apply to all non-share capital corporations incorporated under Part III of the Ontario *Corporations Act* (“OCA”). Although it is optional for corporations to undertake a transition process within three years of the in force date to amend their governing documents to comply with the rules in the ONCA, it is generally prudent for corporations to undertake the transition process in order to avoid uncertainty of their documents by: (a) filing articles of amendment to amend provisions in their letters patent or supplementary letters patent; and (b) adopting a new ONCA compliant by-law.

For corporations that have simple governance structures (such as where the directors and the members are the same persons, or where the membership is very small), it is possible for them to start preparing for the transition process closer to the in force date, or even during the three-year transition period. However, for corporations that have complex governance structures, multiple classes of members, or unusual governance processes, it would be prudent for them start early in the preparation to ensure that there is sufficient time to finalize the transition documents and obtain membership approval.

By way of background, since the ONCA received Royal Assent on October 25, 2010, the Ontario charitable and not-for-profit sector has patiently waited for it to be proclaimed into force. After various delays and amendments to the ONCA, the Government of Ontario's most recent indication, as reported in the [January 2018 Charity & NFP Law Update](#), was that it is targeting proclamation in early 2020, and that further details will be provided by the Ministry of Government and Consumer Services closer to the coming-into-force date.

When the ONCA is in force, it will automatically apply to all Part III OCA corporations. Corporations may undertake an optional transition process to bring their governing documents to comply with the rules in the ONCA. If no transition process is taken, any provisions in their letters patent, supplementary letters patent, by-laws, or special resolutions that are inconsistent with the ONCA will be deemed at the end of three years to be amended to comply with the ONCA. The problem with this deeming approach is that it will be difficult to determine which provisions are deemed to be amended and in what way. In order to avoid the deeming uncertainty from arising, it would be beneficial to take the optional transition steps.

### **BC Public Benefit Companies Introduced through Bill M 209**

In May 2018, a private member's Bill M 216, *Business Corporations Amendment Act, 2018* ("Bill M 216") was introduced and passed second reading in British Columbia, that sought to create a new category of corporations known as "benefit companies" through amendments to the BC *Business Corporations Act*. Bill M 216 died on the order paper when the BC Legislature prorogued in January 2019. However, the bill was quickly reintroduced in April 2019 as [Bill M 209, Business Corporations Amendments Act \(No. 2\), 2019](#) ("Bill M 209") with some minor amendments. Bill M 209 received Royal Assent on May 16, 2019 and will come into force by regulation of the Lieutenant Governor in Council.

Bill M 209 will amend the BC *Business Corporations Act* by inserting a new Part 2.3 to introduce "benefit companies" as a new category of corporations. As outlined in the [August 2018 Charity & NFP Law Update](#), benefit companies are companies that pursue social and environmental goals, rather than just profit. They must include a "benefit statement" in their articles indicating that "this company is a benefit company and, as such, is committed to conducting its business in a responsible and sustainable manner and promoting one or more public benefits". Bill M 209 defines "public benefit" to mean "a positive effect, including of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature, for the benefit of (a) a class of persons, other than shareholders of the company in their capacity as shareholders, or a class of communities or organizations,

or (b) the environment, including air, land, water, flora and fauna, and animal, fish and plant habitats.” Benefit companies must also include a provision in their articles that specifies the specific public benefits they will promote, and sets out commitments to conduct their business in a “responsible and sustainable manner” and to promote their specified public benefits. A BC company may become a benefit company by special resolution of its shareholders to alter its notice of articles to include the benefit statement. Similarly, when ceasing to be a benefit company, a special resolution of its shareholders will be required.

While Bill M 209 contains the same general key features as the previous Bill M 216, some amendments have been made to those provisions. For example Bill M 209 no longer contains the proposal to require a company to change its name to include “Benefit Company” or “B.Co.” upon becoming a benefit company.

Once in force, BC will be the first jurisdiction in Canada to provide a legal framework for benefit companies to pursue social and environmental goals, rather than just profit. As a form of social innovation, benefit companies will allow for mission-focused companies in BC to focus on their social missions, while simultaneously growing their capital by providing investors with certainty about the mandate of the company.

## **Canada Introduces Digital Charter and Proposes Reforms to PIPEDA**

By [Esther Shainblum](#)

On May 21, 2019, Innovation, Science and Economic Development Canada Minister Navdeep Bains announced the Government of Canada’s intention to make significant changes to Canada’s privacy regime. Launching Canada’s new [Digital Charter](#) (“Digital Charter”), Minister Bains advised that the Digital Charter is intended to lay the foundation for modernizing privacy rules in Canada, rebuilding Canadians’ trust and providing a framework for future governance of the digital landscape. As part of the launch of the Digital Charter, Minister Bains also announced plans to modernize the *Personal Information Protection and Electronic Documents Act*, Canada’s private sector privacy legislation, which will in part implement the principles of the Digital Charter and contribute to their achievement.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 449](#).

## Federal Court of Appeal Overturns Heffel Decision on Gifts of Cultural Property

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

On April 16, 2019, the Federal Court of Appeal (“FCA”) released its decision in [Canada \(AG\) v Heffel Gallery Limited](#), an appeal of a judicial review decision concerning gifts of cultural property.

As discussed in the [August 2018 Charity and NFP Law Update](#), the lower court considered the Canadian Cultural Property Export Review Board’s (“Board”) interpretation of “outstanding significance” and “national importance” under paragraph 11(1)(b) of the *Cultural Property Export and Import Act* (“Act”). By way of background, this case involved an application by Heffel Gallery Limited (“Heffel Gallery”), an art auction house, to the Board for an export permit to ship a painting to London, UK. The Board denied the application on grounds that the painting did not meet the export permit requirements under section 11 of the Act, as it was of “outstanding significance” and “national importance,” pursuant to subsections 11(1) and (3).

Heffel Gallery brought an application for judicial review to the Federal Court of Canada, which declared the Board’s decision as unreasonable because the national importance test was met by works “of such a degree of national importance that its loss to Canada would significantly diminish the national heritage” through a “direct connection to Canada.” This decision was significant to charities, as the test for outstanding significance and national importance is the same criteria used to determine whether an item that is donated to a registered charity is a donation of cultural property, and therefore receiptable under the *Income Tax Act* (“ITA”).

On appeal of the Federal Court of Canada decision, the FCA first outlined the Board’s interpretation of “outstanding significance”, indicating that it considered, among other things, the number of works by the artist in Canada, the general importance of the artist, and the opportunities to view and study the artist’s work in Canada. It also outlined the Board’s interpretation of “national importance”, indicating that the Board considered whether the loss of the work would diminish Canada’s “national heritage” and that it concluded that a work could be of national importance “even if the object or the creator has no direct connection with Canadian history or Canada.”

The FCA then considered whether the Board’s interpretation of paragraph 11(1)(b) of the Act was reasonable. In this regard, the FCA looked to the composition of the Board, the specific wording in paragraph 11(1)(b), as well as subsection 4(2) of the Act, which allows the Governor in Council to include objects or classes of objects in the *Canadian Cultural Property Export Control List* “regardless of their

places of origin.” Having found the Board’s interpretation of paragraph 11(1)(b) to be reasonable, the FCA then considered whether the Board’s determination that the artwork was of national importance was reasonable. It examined the criteria considered by the Board and found the Board’s decision to be reasonable, as it fell “within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.”

The FCA stated that the court’s standard of review in this case was “reasonableness”, and that courts are required to abide by the principle of deference. It held that the lower court was required to defer to the Board, as the Board was the administrative decision maker and “[held] the ‘upper hand’ with regard to the interpretation of its home statute.” Rather than approaching the Board’s decision with deference, the FCA found that the lower court had adopted its interpretation and measured it against that of the Board, and deemed the Board’s interpretation to be unreasonable for not conforming to the court’s interpretation. The FCA therefore overturned the lower court’s ruling and held that it had erred in its conclusion that the Board’s interpretation was unreasonable for being overly broad.

The FCA’s decision comes on the heels of amendments to the ITA proposed in Budget 2019, discussed in [Charity & NFP Law Bulletin No. 443](#). On the one hand, the FCA’s decision and affirmation that “national importance” need not require a direct connection to Canada means that the national importance test will continue to apply to exports of cultural property under the Act. On the other hand, Budget 2019 will remove the “national importance” requirement for the enhanced tax incentives for donations of cultural property under the ITA. These Budget 2019 provisions were included in Bill C-97, *Budget Implementation Act, 2019, No. 1*, which most recently passed second reading and was referred to Committee on April 30, 2019. If passed, works that are not directly connected to Canada may still qualify as gifts of cultural property under the ITA.

## **Primer on Donor Advised Funds and Current Issues**

By [Jacqueline M. Demczur](#)

The topic of donor advised funds (“DAFs”) has generated a considerable amount of attention in the past few years, receiving both praise as well as criticism. While some of this criticism may warrant further review and consideration, many of the concerns regarding DAFs, particularly here in Canada, are either unfounded or exaggerated.



The following paper was presented at the 2019 CBA Charity Law Symposium in Toronto on May 6, 2019, and addresses the history, development and current extent of DAFs; identifies the various parties involved in DAFs today; reviews and examine the key legal aspects of establishing and functionally operating DAFs; provides an overview of the current issues associated with these funds; as well as equips the reader with some practical advice when advising clients, whether charity recipients or donors, on the establishment of DAFs and their ongoing operation.

For the balance of the paper, click [here](#).

## **BC Court Grants Oppression Remedy under *Societies Act***

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

On May 14, 2019, the Supreme Court of British Columbia released its judgment in [Chouman v. Omar Al-Farooq Islamic Society](#). The respondents, which operate the Masjid Omar Al-Farooq Vancouver Mosque (the “Mosque”), included three organizations governed by the BC [Societies Act](#), namely, the Omar Al-Farooq Islamic Society, the Othman Bin Affan Islamic Society and the Omar Al-Farooq Islamic Foundation, a registered charitable corporation, (together, the “Societies”), as well as five individuals purporting to act on behalf of the Societies. The petitioners, Abdul Quadir Chouman and Ahmed Mohamoud, sought various remedies against the respondents for terminating their membership and directorship in the Societies, alleging oppressive and unfairly prejudicial behaviour within the meaning of section 102 of the *Societies Act*.

The petitioners argued that two of the individual respondents, who were directors, members and moderators of the Societies (the “Ibrahims”), attempted to gain control of the Societies by removing the petitioners as directors and members. The petitioners alleged that on February 12, 2018, the Ibrahims, knowing that Mr. Chouman was in hospital and Mr. Mohamoud was out of the country, called a membership meeting but did not comply with the applicable notice requirements in the by-laws for the Societies. While each of the Societies had its own by-law, given their similarities, the court treated the by-laws as one in its reasons. The membership meeting was adjourned due to lack of quorum, but the petitioners were not notified of the adjourned meeting date. At a subsequent meeting held on March 18, 2019, which Mr. Mohamoud attended in person and Mr. Chouman attended by proxy, resolutions were adopted removing the petitioners as members and directors of the Societies. The Ibrahims were only able to obtain a voting majority by rejecting the signed proxy given by Mr. Chouman appointing Mr.

Mohamoud to speak and vote on his behalf, on the basis that a typographical error regarding the date of the meeting disqualified the proxy.

While it is beyond the scope of this article to fully describe all of the disagreements between the petitioners and the Ibrahims, the petitioners alleged that after removing the petitioners as directors and members, the Ibrahims began to transfer the assets of the Societies and that Abdusalam Ibrahim was using the Societies' funds to pay for his personal legal fees. The petitioners alleged that Abdusalam breached his fiduciary duty of loyalty and good faith to the Societies, which he owed to the Societies as a director, and that by removing the petitioners as directors and members of the Societies, the Ibrahims acted solely in their own interests and not in the interest of the Societies.

In response, while the Ibrahims acknowledged that there were technical breaches of applicable corporate law requirements, they argued that in the context of small societies "mere failure to adhere to technical formalities does not justify the imposition of the oppression remedy."

In finding that the respondents' conduct amounted to oppression and unfairly prejudicial and/or illegal conduct towards the petitioners, the court stated that the respondents could not excuse their failure to follow the Societies' by-laws by calling their behavior a mere failure to adhere to technical formalities. In granting all of the remedies sought by the petitioners, including their reinstatement as members and directors of the Societies and requiring the respondents to produce an accounting of the Societies' financing within seven days of the date of the court order in relation to the Societies' funds, assets and expenditures, the court noted that subsection 102(2) of the BC *Societies Act* grants the court broad remedial powers.

This case serves as an important reminder to charities and other not-for-profit corporations that it is essential to comply with corporate law requirements outlined in the general operating by-law of an organization, and to do so in a reasonable and fair manner. Otherwise, decisions made at a meeting of members or directors can be subject to legal challenge and are vulnerable to being overturned.

## **Refusal to Grant Injunction Regarding Alberta Schools Act Upheld by Appeal Court**

By [Jacqueline M. Demczur](#)

On April 29, 2019, the Alberta Court of Appeal (the "Court") released its decision in [PT v Alberta](#), upholding the Court of Queen's Bench of Alberta's [dismissal](#) on June 27, 2018, of two interim injunction applications in relation to a constitutional challenge with respect to the Alberta *School Act* (the "Act").

Specifically, the appellants, who consist of parents, private schools (including faith-based schools), and school boards, sought a stay of the “notification limitation provisions” (“NLP”) as well as the “attestation requirement provisions” (“ARP”) in the Act, which, if such a stay was granted with respect to the ARP, would prohibit the Minister of Education from defunding or de-accrediting schools for non-compliance with the Act.

By way of context, the Act was amended by Bill 10 in 2015, and then by Bill 24 in 2017, to empower voluntary student organizations with a focus on vulnerable minorities such as LGBTQ+ students. Specifically, enhanced protections were introduced in Bill 24, such as the NLP, which prohibits exposing a student’s involvement in ‘gay-straight alliances’ and ‘queer-straight alliances’ (“GSAs”) to their parents or peers under section 16.1 of the Act. Further, the ARP under section 45.1 of the Act requires private schools, which in Alberta must submit annual declarations to the Minister in order to receive funding and accreditation, to attest their compliance with the Act when making such declarations. The appellants argued that compliance with such provisions was contrary to their constitutional rights under the *Canadian Charter of Rights and Freedoms* – namely the right to freedom, expression and association (section 2) as well as the right to life, liberty and security of a person (section 7). Accordingly, the appellants raised a constitutional challenge, together with applications for an interim injunction to delay the legal effects of Bill 24 until the constitutional challenge was decided. Both applications of interim injunctions were denied in the Court of Queen’s Bench by the chambers judge (the “Judge”).

The Court held that the Judge had not erred in declining to grant an injunction regarding the NLP, as the Judge had reasonably found that the appellants did not establish irreparable harm (which is one component of a three-part test for granting injunctions) due to a failure to provide “credible evidence to prove that sexually explicit material has been disseminated in a GSA.” Further, the Court found the Judge had reasonably concluded that the benefits of GSAs, which were shown to “result in positive effects for the LGBTQ+ and other students”, constituted the “presumed good of the legislation” and, accordingly, the Court declined to interfere with such decision.

The majority of the Court also found that the Judge had not erred in declining to grant injunctive relief with respect to the ARP. The majority recognized that the appellants had demonstrated “that there is now a real and non-speculative risk that at least some appellant schools will lose funding” due to a Ministerial Order stating that funding for 2019-2020 would be withheld in the event that a school did not comply with said ARP. However, the majority also found the evidence demonstrating the benefits of the GSAs with

respect to “protecting the safety and privacy interests of individual children” to be “more compelling than the new evidence of schools’ termination of funding for non-compliance with the legislation.” As such, the Court also declined to interfere with the Judge’s decision on this issue.

Although the dismissal of appeals with respect to these injunctions may not be a welcome decision to many faith-based schools in Alberta and parents of students at these schools, the Court clarified that its decision does not affect the main action itself, *i.e.* the constitutional validity question with respect to the Act. As such, faith-based schools should continue to monitor the developments in this case, which has been expedited by the Court.

## **Ontario Court of Appeal Affirms Patients’ Right to Effective Referral**

By [Jennifer M. Leddy](#)

On May 15, 2019, the Court of Appeal for Ontario released its decision in [Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario](#), dismissing the appeal from the Divisional Court with regard to the constitutional validity of two policies of the College of Physicians and Surgeons of Ontario (“CPSO”), requiring physicians, even those who object on the basis of religion or conscience, to provide patients with an “effective referral” for services and resources, such as abortion and medical assistance in dying (the “CPSO Policies”). An effective referral in the CPSO Policies is defined as “a referral made in good faith, to a non-objecting, available and accessible physician, other health care professional, or agency.”

For the balance of this *Bulletin*, please see [Church Law Bulletin No. 56](#).

## **Ontario Court Orders Damages Relating to ‘Revenge’ Videos Posted Online**

By [Sean S. Carter](#)

On November 2, 2018, the Ontario Superior Court of Justice delivered its decision in *Jane Doe 72511 v Morgan* confirming the privacy tort of public disclosure of private facts which had been previously recognized in Ontario in *Jane Doe 464533 v N.D.* (the “N.D. Case”). This decision reflects the increasing willingness of the civil courts, particularly in Ontario, to affirm the importance of privacy interests in emerging venues and platforms, particularly as the use of social media and online platforms becomes more prevalent.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 450](#).

## Act Now: Canada's Trademark Law Changes are Less Than a Month Away

By [Sepal Bonni](#)

The significant changes to Canada's trademark law are quickly approaching, as the changes are set to take effect on June 17, 2019. These changes will affect most charities and not-for-profits and have been discussed in [Charity Law Bulletin No. 360](#), as well as the [November 2018 Charity & NFP Law Update](#).

Key changes that will impact charities and not-for-profits include:

- The removal of the current "use" requirements. Trademark applicants will not be required to have first used the trademark, whether in Canada or abroad, before registration. This has led to trademark squatting and trolling.
- A streamlined international application process. Applicants and registrants will be able to register trademarks internationally in any of the 102 *Madrid Protocol* member countries without needing to file applications in each country.
- Adoption of the Nice Classification of goods and services. Applicants will need to classify goods and services in accordance with one of 45 classes.
- The government fees to file a trademark application will significantly increase to \$330 CAD per application for one class of goods or services, plus an additional \$100 CAD for each additional class, as opposed to the current flat government filing fee of \$250 CAD regardless of the number of classes of goods and services.
- Trademarks are going to be examined for distinctiveness, making it more difficult to register non-distinctive trademarks.
- The term of registration and renewal will be reduced from 15 years to 10 years.

As previously indicated, charities and not-for-profits should prepare now for the above-noted changes in the following ways:

- Carefully review trademark portfolios now to ensure that any outstanding trademark applications are filed while filing fees remain modest and prior to third parties poaching trademarks.
- Ensure all used variations of a trademark are properly protected. File new applications for variations of trademarks that are currently used and not registered.
- For existing registrations, ensure all appropriate goods and services are included in the registrations.
- To save on filing fees in the future, consider expanding the scope of coverage of existing registrations to goods and services that the marks will be used in association with in the future.
- Renew any trademark registrations now to avoid per class renewal fees.
- Actively monitor trademark filings through trademark watching services in order to enforce trademark right and to stop trademark squatters and trolls.

The Canadian Intellectual Property Office (CIPO) has [indicated](#) that in order to avoid delays, communications with the Trademarks Office should be filed **in advance of June 13, 2019** and that it will temporarily deactivate most of its online services between June 13, 2019 and June 17, 2019 for system

upgrades and enhancements. It is therefore vital that charities and not-for-profits are proactive and take any necessary action now in advance of June 13, 2019.

## **Former President of Corporation Found Liable for CASL Violations**

By [Ryan M. Prendergast](#)

On April 23, 2019, the Canadian Radio-television and Telecommunications Commission released its Compliance and Enforcement Decision [CRTC 2019-111](#), which held that: 1) a business and its subsidiaries, nCrowd, had violated paragraphs 6(1)(a) and 6(2)(c) of Canada’s Anti-Spam Legislation (“CASL”); 2) its President and CEO at that time, Mr. Brian Conley, was liable for such violations under section 31; and 3) the administrative monetary penalty (“AMP”) of \$100,000 issued against Mr. Conley was justified. Paragraph 6(1)(a) of CASL prohibits a business from “sending or causing or permitting to be sent to an electronic address a commercial electronic message” unless the recipient has given consent to receive such commercial electronic messages (“CEMs”), while paragraph 6(2)(c) requires a CEM to “set out an unsubscribe mechanism” pursuant to the requirements set out in section 11 of CASL.

In finding that nCrowd had violated paragraph 6(1)(a), the Commission found that nCrowd had failed to demonstrate that proper consent had been obtained with respect to an email list containing 1,928,015 addresses as: it did not provide a valid date on which consent was allegedly obtained; there were generic addresses on the list where it was unlikely that those address users would have consented to a “daily deals company such as nCrowd”; and it did not provide the steps it had taken to obtain consent to send CEMs to the emails on its list. Further, the Commission found that nCrowd violated paragraph 6(2)(c), as the CEMs lacked a proper unsubscribe mechanism, and noted that there were some complaints indicating that nCrowd had not complied with some of the requirements set out in CASL: the unsubscribe links in the CEMs did not function, the unsubscribe requests were not given effect within 10 days of the request being made, and the complainants needed to take further action to effect their requests. nCrowd also did not demonstrate that it had policies or procedures in place with respect to the unsubscribe process.

The Commission found that Mr. Conley, who was the President and CEO of the corporation at the time of the violations, “acquiesced” to the commission of the violations committed by nCrowd and was therefore personally liable as per section 31 of CASL. Since CASL does not provide a definition of “acquiesce”, the Commission defined it “as agreeing to something tacitly, silently, passively, or without protest” based on its ordinary meaning and Canadian jurisprudence. The Commission held that it was not

reasonable to believe that Mr. Conley had no knowledge of the violations given that: Mr. Conley had “experience with email distribution platforms (having invented one)”; such platform was an important marketing tool for nCrowd; Mr. Conley was involved in acquiring the email list as a part of nCrowd’s “major acquisition” of another company; and that evidence indicated that Mr. Conley had knowledge of CASL generally.

Lastly, the Commission found that the AMP of \$100,000 issued against Mr. Conley was reasonable, taking into consideration factors that are set out in subsection 20(3) of CASL, which include: the purpose of the penalty; nature and scope of the violation; the person’s ability to pay the penalty; and more. Some of the factors cited by the Commission as justification for the amount of AMP included, amongst others: the AMP could promote compliance by Mr. Conley with CASL in future endeavors; the violations were serious; Mr. Conley, who had a net worth exceeding \$1 million, was able to pay the amount; and the fact that Mr. Conley had not provided any evidence to support his claim that he was unable to pay the penalty.

This decision serves as a reminder to charities and not-for-profits that emails to donors and supporters should be sent with care, as communications that are CEMs will generally trigger obligations under CASL. Even registered charities, which are generally exempt from the CEM requirements provided that the CEMs are sent with the primary purpose of fundraising, may be caught under CASL if the nature of its communications do not fall within the scope of the CASL exemption. Violations under CASL can trigger not only corporate liability, but directors and officers could also be held personally liable for such violations.

## **Special Senate Committee Update**

By [Terrance S. Carter](#)

As discussed in the [October 2018 Charity & NFP Law Update](#), the Special Senate Committee on the Charitable Sector (the “Committee”) launched an e-consultation with an online questionnaire for charities (the “e-consultation”) to complete to help the Committee better understand the challenges faced by the charitable and not-for-profit sector. On May 17, 2019, the Committee released its [partial findings](#) of the e-consultation.

The partial findings were based on the responses of 695 charitable and non-profit organizations across Canada. The e-consultation found that charitable and non-profit organizations were generally small, with approximately 65% of the respondents indicating that their organizations had 10 or fewer employees, and

one-third of the respondents indicating that their organizations had only one to five employees. With respect to volunteers, the e-consultation found that organizations with no paid employees were most likely to indicate that they were “very concerned” with finding and keeping volunteers. The e-consultation also found that 51% of respondents did not collect data on senior management diversity, and 56% of respondents did not gather data on employee diversity.

The Committee’s published findings are based only on the results from the e-consultation, and are only partial findings to date. As the Committee has completed its consultation process, it is now in the process of preparing its full report, which is expected to be released in September 2019.

## **Jane Burke-Robertson Award of Excellence in Charity and Not-For-Profit Law**

The CBA biannual [Jane Burke-Robertson Award of Excellence in Charity and Not-For-Profit Law](#) was awarded on May 6, 2019 at the CBA Charity Law Symposium to Terrance S. Carter. The award, which is named in memory of the late Jane Burke-Robertson in recognition of her many contributions to Canadian charity and not-for-profit law and commitment to the CBA, recognizes lawyers who have made a noted contribution and/or achievement in the development of charity and not-for-profit law in Canada.

## **IN THE PRESS**

[Charity & NFP Law Update – April 2019 \(Carters Professional Corporation\)](#) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

[An Introductory Summary of Legal issues in Social Media for Charities and Not-for-Profits](#), authored by Terrance S. Carter, was a featured article in the inaugural issue of AMPLIFY published by Guardian Endowment Services.

## **RECENT EVENTS AND PRESENTATIONS**

The first four sessions of the [Spring 2019 Carters Charity & NFP Webinar Series](#) are available as “On Demand/Replay”:

- [Legal Challenges in Social Media for Charities and NFPs](#) was presented by Terrance S. Carter on Wednesday, April 17, 2019 – [On Demand/Replay](#).



- [Protecting Your Brand in the Digital Age](#) was presented by Sepal Bonni on Wednesday, May 1, 2019 – [On Demand/Replay](#).
- [Clearing the Haze: Managing Cannabis in the Workplace in Ontario](#) was presented by Barry W. Kwasniewski on Wednesday, May 15, 2019 – [On Demand/Replay](#).
- [Charities and Politics: Where Have We Been and Where Are We Going](#) was presented by Ryan M. Prendergast on Wednesday, May 29, 2019 – [On Demand/Replay](#).

**Canadian Mental Health Association & Elder-Abuse Ontario** hosted a session on **Protecting Your Finances** on Friday, May 3, 2019. Nancy E. Claridge was a special guest speaker.

**Primer on Donor Advised Funds and Current Issues** was presented by Jacqueline M. Demczur at the **CBA Charity Law Symposium**, hosted by the Canadian Bar Association Charity & Not-for-Profit Law Section on Monday, May 6, 2019. Click here for the [paper](#) and the presentation [handout](#).

[Healthcare Philanthropy: Check-Up 2019](#) was co-hosted by Carters and Fasken in Toronto on Wednesday, May 22, 2019, in Toronto. Terrance S. Carter was moderator and the topics covered included:

- **The Coming of the ONCA (We Hope) and What to Start Thinking About** by Theresa L.M. Man, Partner, Carters Professional Corporation
- **Critical Privacy Update for Charities** by Esther Shainblum, Associate, Carters Professional Corporation
- **Essential Charity Law Update (Including Case Law Update)** by Brittany Sud, Associate, Fasken
- **PPDDAs Have Arrived (The Evolution of Political Activities)** by M. Elena Hoffstein, Partner, Fasken

## UPCOMING EVENTS AND PRESENTATIONS

[Spring 2019 Carters Charity & NFP Webinar Series](#) will be hosted by Carters Professional Corporation on Wednesdays during the month of June. [Click to Register](#) for one or more of the remaining individual sessions listed below:

- **The Coming of the ONCA (We Hope) and What to Start Thinking About** by Theresa L.M. Man on Wednesday, June 5, 2019 from 1:00 to 2:00 pm ET

- **Critical Privacy Update for Charities and NFPs** by Esther Shainblum on Wednesday, June 12, 2019  
from 1:00 to 2:00 pm ET

[STEP National Conference](#) will be held on June 6 to June 7, 2019, in Toronto, Ontario. Terrance S. Carter will be co-presenting with Elena Hoffstein and Brenda Lee-Kennedy on the topic of **Evolving Trends in Philanthropy and Planned Giving** on June 6.

[CSAE Trillium Summer Summit](#) will be held on July 11, 2019, in Windsor, Ontario. Terrance S. Carter will be presenting on the topic of **Legal Check-Up: Top 10 Tips to Effective Legal Risk Management for NPOs and Charities**.

## CONTRIBUTORS

Editor: Terrance S. Carter

Assistant Editors: Adriel N. Clayton and Ryan M. Prendergast



**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, 2019), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorism.ca](http://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.



**Luis R. Chacin**, LL.B., M.B.A., LL.M. - Luis was called to the Ontario Bar in June 2018, after completing his articles with Carters. Prior to joining the firm, Luis worked in the financial services industry in Toronto and Montreal for over nine years, including experience in capital markets. He also worked as legal counsel in Venezuela, advising on various areas of law, including pensions, government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Corporate and Commercial Law.



**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 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 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.



**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*<sup>TM</sup>.



**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 vice chair of the CBA Charities and Not-for-Profit Law Section. Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS* and *Charity & NFP Law Bulletin*.



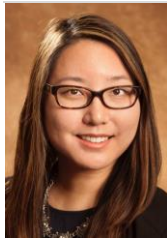
**Esther S.J. Oh, B.A., LL.B.** – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for [www.charitylaw.ca](http://www.charitylaw.ca) and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law Seminar*<sup>TM</sup>, 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](http://www.charitylaw.ca). Ryan has been a regular presenter at the annual *Church & Charity Law Seminar™*, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source.



**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.



**Christina Shum, B.M.T., J.D** – Ms. Shum graduated from Osgoode Hall Law School in 2018 and is Student-at-Law at Carters. While attending Osgoode, Christina interned at International Justice Mission where she provided research on bonded labour laws, and summered at CGI where she focused on contractual matters in IT law. She also volunteered as a community mediator and was Vice-President of Osgoode’s Women’s Network and Co-President of the Osgoode Peer Support Centre. Prior to attending law school, Christina obtained her Bachelors of Music Therapy from the University of Windsor and her Associate diploma in piano performance from the Royal Conservatory of Music.

## ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

**Links not Working:** If the above links do not work from your mail program, simply copy the link text and paste it into the address field of your internet browser.

**Get on Our E-Mailing List:** If you would like to be added to our electronic mailing list and receive regular updates when new materials are added to our site, click [here](#) or send an email to [info@carters.ca](mailto:info@carters.ca) with “Subscribe” in the subject line. Feel free to forward this email to anyone (internal or external to your organization) who might be interested.

**Privacy:** We at Carters know how important your privacy is to you. Our relationship with you is founded on trust and we are committed to maintaining that trust. Personal information is collected solely for the purposes of establishing and maintaining client lists; representing our clients; and to establish and maintain mailing lists for the distribution of publications as an information service. Your personal information will never be sold to or shared with another party or organization. For more information, please refer to our [Privacy Policy](#).

**Copyright:** All materials from Carters are copyrighted and all rights are reserved. Please contact us for permission to reproduce any of our materials. All rights reserved.

**Disclaimer:** This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish the 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.

## CARTERS PROFESSIONAL CORPORATION SOCIÉTÉ PROFESSIONNELLE CARTERS

### PARTNERS:

Terrance S. Carter B.A., LL.B. (Counsel to Fasken)	tcarter@carters.ca
Jane Burke-Robertson B.Soc.Sci., LL.B. (1960-2013)	
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M.	tman@carters.ca
Jacqueline M. Demczur B.A., LL.B.	jdemczur@carters.ca
Esther S.J. Oh B.A., LL.B.	estheroh@carters.ca
Nancy E. Claridge B.A., M.A., LL.B.	nclaridge@carters.ca
Jennifer M. Leddy B.A., LL.B.	jleddy@carters.ca
Barry W. Kwasniewski B.B.A., LL.B.	bwk@carters.ca
Sean S. Carter B.A., LL.B.	scarter@carters.ca
Ryan M. Prendergast B.A., LL.B.	rprendergast@carters.ca

### ASSOCIATES:

Esther Shainblum, B.A., LL.B., LL.M., CRM	eshainblum@carters.ca
Sepal Bonni B.Sc., M.Sc., J.D.	sbonni@carters.ca
Adriel N. Clayton, B.A. (Hons), J.D.	aclayton2@carters.ca
Luis R. Chacin, LL.B., M.B.A., LL.M.	lchacin@carters.ca
Melissa S. Tessler, B.A., J.D.	mtessler@carters.ca

### STUDENT-AT-LAW

Christina Shum, B.M.T., J.D.	cshum@carters.ca
------------------------------	------------------

### Toronto Office

67 Yonge Street, Suite 1402  
Toronto, Ontario, Canada  
M5E 1J8  
Tel: (416) 594-1616  
Fax: (416) 594-1209

### Orangeville Office

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

### Ottawa Office

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