CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW UPDATE

AUGUST 2020

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: NANCY E. CLARIDGE,
RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

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

AUGUST 2020

SECTIONS

HIGHLIGHTS

COVID-19 UPDATE

- Overview of the Canada Emergency Wage Subsidy ("CEWS")
- COVID-19 Corporate Update
- Legislation Update
- End of Temporary Lay-offs from Work for COVID-19 Emergency
- Ontario Nonprofit Network Publishes Report on Charities and COVID-19

OTHER CHARITY AND NFP MATTERS

- Archdiocese Found Vicariously Liable in Mount Cashel Sexual Abuse Appeal
- CRA News
- Corporate Update
- B.C. Supreme Court Rules Societies' Bylaw Must Authorize Voting Methods
- Tax Court Allows Not-For-Profit to Claim Input Tax Credit in Operating Virtual Library
- Uniform Law Conference of Canada Adopts New Uniform Crowdfunding Act
- Ontario Launches Consultations on Privacy
- Inclusion in Best Lawyers in Canada 2021

RECENT PUBLICATIONS AND NEWS RELEASES

COVID-19 UPDATE

Overview of the Canada Emergency Wage Subsidy ("CEWS")

By Terrance S. Carter, Barry W. Kwasniewski and Luis R. Chacin

The Canada Emergency Wage Subsidy program ("CEWS") was first introduced on April 11, 2020, in Bill C-14, *COVID-19 Emergency Response Act, No. 2* as a 75% wage subsidy up to a maximum of $847 per week for three 4-week periods starting on March 15, 2020 and ending on June 6, 2020, subject to additional periods ending no later than September 30, 2020 as prescribed. On May 15, 2020, the CEWS was amended by way of regulations to include new eligible entities and to extend the program for another three 4-week periods ending on August 29, 2020. On July 27, 2020, with the Royal Assent of Bill C-20, *An Act respecting further COVID-19 measures* ("Bill C-20"), the government introduced substantial changes to the scope and eligibility criteria of the CEWS, retroactive to July 5, 2020, and extended the program for another three 4-week periods ending November 21, 2020, with the possibility of an additional 4-week period ending no later than December 31, 2020. This *Bulletin* provides an up-to-date overview of the CEWS to assist charities and not-for-profits.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 477.

COVID-19 Corporate Update

By Theresa L.M. Man

Corporations Canada Extends Periods Under CNCA and CCA

To better assist federally incorporated not-for-profits and provide some flexibility with certain aspects of corporate maintenance, the *Time Limits and Other Periods Act (COVID-19)* was enacted on July 21, 2020, when Bill C-20 received Royal Assent. As discussed in *COVID-19 Resource for Charities & NFPs: Bill C-20 Enacts Time Limits And Other Periods Act (COVID-19)*, Bill C-20 replaced the federal government's previous Bill C-17, which did not progress beyond first reading at the House of Commons, and contains identical provisions to those in Bill C-17 with respect to the *Time Limits and Other Periods Act (COVID-19)*.

The new Act allows the Minister under various Acts, including the *Canada Not-for-profit Corporations Act* ("CNCA") and *Canada Cooperatives Act* ("CCA"), to make orders to extend or suspend time limits retroactive to March 13, 2020 for: (i) calling and providing notice of meetings of members; (ii) placing annual financial statements before members at annual meetings, and (iii) providing copies of annual financial statements to members and directors. The Minister may also further extend a suspension or extension, as long as the total suspension or extension does not exceed six months. However, the powers of the Minister cannot be exercised after September 30, 2020, and suspensions or extensions cannot continue after December 31, 2020. In this regard, on August 5, 2020, the Minister of Innovation, Science and Industry issued an order on July 31, 2020 (retroactive to March 13, 2020) to extend the deadlines for calling annual general meetings ("AGMs") and presenting financial statements for CNCA and CCA corporations to the shorter of (i) 21 months after the previous AGM and no more than 12 months after the last financial year-end; or (ii) December 31, 2020.

Prior to the issuance of the order, all CNCA corporations that wished to delay calling an AGM had to apply to Corporations Canada individually to obtain permission to do so. The application had to be made at least 30 business days before the date the corporation would send the notice calling its AGM under normal circumstances. However, by the time the order was announced by Corporations Canada on August 5, 2020, the majority of CNCA corporations with December 31 year ends which were not able to hold the AGM by the December 31 deadline would have already applied for permission to delay their AGMs. Nevertheless, the power of the Minister now being able to grant relief for all CNCA corporations without the need for each of them to apply for relief is a welcome step.

CNCA corporations that are not able to call an AGM within the required timeframe under the CNCA may apply to Corporations Canada to extend the time for calling an AGM if members will not be prejudiced under Corporations Canada's normal polices are met.

Update on Provincial Emergency Relief for AGM and Annual Return Filing Deadlines

As discussed in the April 2020 *Charity & NFP Law Update*, various governments have implemented temporary emergency relief measures to assist and provide some flexibility with timing for annual general meetings ("AGM") and reporting deadlines. These relief measures are constantly in a state of flux, and are subject to change. The following update is current as of August 29, 2020.

Temporary measures in Alberta providing relief under COVID-19 were previously in place suspending the deadline to hold AGMs and file annual returns. Filing deadlines were reinstated on August 15, 2020,

60 days after the province's termination of its state of public health emergency. AGMs must now be held after August 14, 2020, depending on when the organization's AGM was scheduled prior to the COVID-19 pandemic. Annual return filing timelines have also been reinstated as of August 15, 2020, and filing must be done after the AGM.

In British Columbia, societies may now delay their AGMs beyond March 31, 2021, to a date approved by the Registrar of Companies, though no later than November 1 of the calendar year immediately following the calendar year in which an AGM would otherwise be required to be held under the *Societies Act*. Societies may also hold virtual or hybrid directors' and members' meetings, even where their bylaws, incorporating legislation, and regulations state otherwise.

In Manitoba, AGMs that are required to be held on or after March 31, 2020, and before September 1, 2020, are now required to be held no later than September 30, 2020, and may be held electronically, even where the corporation's by-laws do not allow.

In Newfoundland and Labrador, the deadline to hold AGMs under the *Corporations Act* has been extended by six months for AGMS that were to be held between May 8, 2020 and October 31, 2020. The deadline to file corporate annual returns has also been extended by six months for corporations with anniversary dates of incorporation between May 8, 2020 and October 31, 2020.

In Nova Scotia, where an AGM cannot be held in person during the declared state of emergency, it may instead be held electronically, even where the corporation's by-laws do not allow. Alternatively, AGMs may be deferred for a period of up to 90 days after the end of the declared state of emergency, provided that notice of such meeting is provided at least 7 days in advance.

In Ontario, the declared emergency was terminated pursuant to Bill 195 as of July 24, 2020, as discussed in the *Legislation Update*. Corporations may hold members' meetings during the COVID-19 pandemic electronically despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise. As well, they may delay holding their 2020 AGMs during the now-terminated state of emergency. If the AGM was originally required to be held during the state of emergency in Ontario (*i.e.* March 17, 2020 to July 24, 2020), the AGM can be delayed until no later than the 90th day after the day the state of emergency is terminated (*i.e.* October 22, 2020). If the AGM was originally required to be held within 30 days after the state of emergency is terminated (*i.e.* after July 24, 2020), the AGM can be delayed to no later than the 120th day after the day the emergency is terminated (*i.e.* November 21, 2020). Annual returns must be filed with tax/information returns with the CRA (whether or not they are

filed with the returns with CRA or filed separately with the ministry). As such, their filing deadline is delayed until the time when they file their tax/information returns with the CRA.

In Québec, corporations will have the flexibility to hold their AGMs through electronic means or means that enable all members to communicate with each other immediately.

In Saskatchewan, AGMs may be held by electronic means, provided that their articles or bylaws do not prohibit electronic meetings, and further provided that participants are able to adequately communicate with each other during the meeting.

In the Yukon, societies may hold their AGMs partially or entirely by telephone or electronic means, despite their by-laws not permitting electronic meetings, between March 17, 2020 and the day that is 90 days after the end of the state of emergency in the Yukon (which is currently set to terminate on September 10, 2020, unless otherwise extended). Societies may file their annual reports up to 90 days after the end of the state of emergency.

Legislation Update

By Terrance S. Carter and Luis R. Chacin

Ontario Bill 195, *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*

Ontario's new *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* ("ROA-2020") came into force by proclamation of the Lieutenant Governor in Council on July 24, 2020. With the ROA-2020's coming into force, the COVID-19 declared emergency under the *Emergency Management and Civil Protection Act* ("Emergency Act") is terminated and Ontario Regulation 50/20 Declaration of Emergency is revoked. ROA-2020 continues orders made under sections 7.0.2 and 7.1 of the Emergency Act in relation to COVID-19. On August 20, 2020, continued orders under the ROA-2020 were extended until September 22, 2020, with two exceptions: the Education Sector order was extended only until August 31, 2020 and the Limitation Periods order will end on September 14, 2020, on which date the suspended time periods will resume running.

At this time, all public health units in the province are in Stage 3 and, pursuant to the continued order in Ontario Regulation 364/20 *Rules for Areas in Stage 3*, social gatherings for weddings, funerals or religious services, rites or ceremonies are still limited to 50 people if the gathering is held indoors (provided the number of persons occupying any room in the building or structure while attending the gathering do not

exceed 30 per cent of the capacity of the particular room), or 100 people if the gathering is held outdoors. Also, all persons attending the gathering must comply with public health guidance on physical distancing.

Individuals who fail to comply with an order under the ROA-2020 face a fine of up to $100,000; directors and officers of corporations face fines up to $500,000 and prison terms up to one year; corporations are liable up to a $10,000,000 fine if convicted of failure to comply with an order. Each day of non-compliance with an order is a separate offence, and courts may increase the maximum fines by an amount equal to the financial benefit that was acquired by or that accrued to the non-compliant person as a result of the commission of the offence.

ROA-2020 also provides relief measures for corporations with regard to the statutory time limits for holding annual general meetings and annual reporting deadlines. For additional information see *Corporate Update*, above. For further details on the ROA-2020 and the continued orders under the act, see *COVID-19 Resource for Charities & NFPs: End of COVID-19 Emergency in Ontario under New Reopening Legislation*.

Ontario Bill 175, *Connecting People to Home and Community Care Act, 2020*

On July 8, 2020, Ontario's Bill 175, *Connecting People to Home and Community Care Act, 2020* ("CPHCC-2020") received Royal Assent. As discussed in the February 2020 *Charity & NFP Law Update*, CPHCC-2020 amends Ontario's health system intended to modernize the delivery of home and community care services.

CPHCC-2020 has three schedules. Schedule 1 makes a number of changes to the *Connecting Care Act, 2019* ("CCA-2019"), replacing references to "integrated care delivery systems" with "Ontario Health Teams", which is the terminology used for such groups of health care providers and organizations. CPHCC-2020 also opens the door for Ontario Health to authorize a health service provider or Ontario Health Team to govern the funding and oversight of home and community care services. Other changes include expanded investigative and supervisory powers applying to prescribed home and community care services, new enforcement and penalty provisions, and a complaints and appeals process. The complaints and appeals process also came into force when the CPHCC-2020 received Royal Assent. Schedule 2 of the CPHCC-2020 amends the *Ministry of Health and Long-Term Care Act* to maintain the Minister's power to enter into agreements with Indigenous organizations to provide for home and community care services for Indigenous communities. This power and right currently exists under the *Home Care and Community Services Act, 1994*, which Schedule 3 of the CPHCC-2020 repeals as of the date of Royal

Assent. Schedule 3 also makes consequential amendments to other healthcare legislation. Except as otherwise noted, most provisions enacted by CPHCC-2020 will come into force at a future date by proclamation of the Lieutenant Governor.

End of Temporary Lay-offs from Work for COVID-19 Emergency

By Barry W. Kwasniewski

Ontario's declared emergency in response to the COVID-19 pandemic ended on July 24, 2020, with the coming into force of the *Re-opening Ontario (A Flexible Response to COVID-19) Act, 2020* ("ROA-2020"). The termination of the declared emergency has effects on various temporary relief measures, including the Infectious Disease Emergency Leave ("IDEL"), as prescribed by Ontario Regulation 228/20 ("O. Reg. 228/20") under the *Employment Standards Act, 2000* ("ESA"). The end of the declared emergency in Ontario means that the "COVID-19 Period", as defined in O. Reg. 228/20, would include the period from March 1, 2020 to September 4, 2020 (six weeks after the end of the declared emergency). As explained in *COVID-19 Resource of Charities and NFPs: New Infectious Disease Emergency Leave Provides Relief to Ontario Employers*, employees on temporary lay-offs due to COVID-19 related reasons are, in essence, deemed to be on IDEL during the COVID-19 Period. As such, the relief provisions of O. Reg. 228/20 that deemed employees to be on IDEL if their hours of work and/or wages were reduced or eliminated for reasons related to COVID-19, during the COVID-19 Period, will expire on September 4, 2020.

However, the effect of the relief provisions of O. Reg. 228/20 was that any reduction or termination in work hours and/or wages during the COVID-19 Period would not count toward the temporary lay-off calculation. Therefore, any employee whose work hours and/or wages have not been restored by September 4, 2020 may be temporarily laid off starting the week after September 4, 2020 under the standard temporary lay-off provisions under the ESA. What this means for employers is that, after September 4, 2020, the employer may be able to temporarily lay off employees for up to 13 weeks in a 20-week period, which can be extended up to 35 weeks in a 52-week period if certain conditions under the ESA are met. Any temporary layoff longer than 13 weeks (or 35 weeks, as applicable) will be deemed a termination of employment subject to the notice of termination and severance pay provisions of the ESA.

Further, based on case law decided before the COVID-19 pandemic, it is possible that a court could rule that a temporary reduction or elimination of hours of work or a temporary reduction in wages due to

COVID-19 after September 4, 2020 may entitle an employee to damages for constructive dismissal. This could potentially be the result should any employees not accept being on temporary lay-off and decide to sue for wrongful dismissal.

It is also important to note that employees continue to have the right to be away from work on unpaid IDEL for as long as the event that triggered the entitlement to the leave lasts. For example, in the context of COVID-19, section 50.1 of the ESA provides that employees may take IDEL if they will not be performing the duties of their position because of any of the following reasons:

i. The employee is under individual medical investigation, supervision or treatment related to COVID-19.

ii. The employee is following a COVID-19 related order issued under sections 22 or 35 of the *Health Promotion and Protection Act*.

iii. The employee is in quarantine, isolation (voluntary or involuntary), in compliance with official health instructions or directions related to COVID-19.

iv. The employee is under a direction given by his or her employer in response to the employer's concern that the employee might expose other individuals in the workplace to COVID-19.

    a. For example, this would include the employer directing the employee to stay at home for a period of time if the employee has recently travelled internationally and the employer is concerned the employee may expose others in the workplace to COVID-19.

v. The employee is providing care or support (including care for a child whose school or day care is closed due to COVID-19) to certain individuals listed under subsection 50.1(8) of the ESA.

vi. The employee is directly affected by travel restrictions related to COVID-19 while outside Ontario and, under the circumstances, cannot be reasonably expected to travel back to Ontario.

After the above-listed triggering event is over, the employee's entitlement to IDEL would end and their normal obligations to be at work would resume.

Ontario Nonprofit Network Publishes Report on Charities and COVID-19

By Esther S.J. Oh

The Ontario Nonprofit Network ("ONN"), together with the Assemblée de la Francophonie de l'Ontario ("AFO"), jointly released *Risk, resilience, and rebuilding communities: The state of Ontario nonprofits three months into the pandemic* (the "Report") in August 2020. The Report follows a June 2020 survey conducted by ONN and AFO that was conducted to understand the impact of the COVID-19 pandemic on Ontario's 58,000 nonprofits and charities, and the effectiveness of the public policy and supports provided by the provincial and federal governments. A total of 1,131 charities and nonprofits in Ontario had participated in the June 2020 survey.

The Report indicates that both federal and provincial government support have fallen short of providing the necessary help for charities and nonprofits to recover from the pandemic, as they "failed to recognize the size, scope, and economic impact of the nonprofit sector and have therefore fallen far short of what is needed to help nonprofits through the crisis and into recovery." The Report calls for action by governments at all levels to assist nonprofits and charities to survive and continue to service their communities into 2021, especially given the possibility of a second wave of COVID-19 infections.

The Report also provides five recommendations, as follows: (1) creation of a "nonprofit sector stabilization fund" by the provincial government in support of the nonprofit sector given massive revenue losses and to prevent permanent job losses and closures; (2) acceleration of the deployment of pandemic pay and other support by the provincial government; (3) increased flexibility by the federal government to ensure the Canada Emergency Wage Subsidy (CEWS) is more responsive to charities and nonprofits; (4) federal and provincial government investment in rural broadband internet to better support small businesses in small communities across Ontario; and (5) federal and provincial government creation of a nonprofit sector advisory table to inform planning for the economic recovery, with representation from all nonprofit sectors.

The Report will be of interest to those in the charitable and not-for-profit sector, as it provides helpful insights into the challenges faced by Ontario's nonprofits and charities, as well as the impacts on the pandemic on the sector, its workers, volunteers and the communities they serve. The Report's observations include the impacts of the pandemic including the COVID-related mental health needs, increased intimate partner violence, and the growing realization that marginalized communities (particularly low-income households and racialized communities) have suffered disproportionate effects.

OTHER CHARITY AND NFP MATTERS

Archdiocese Found Vicariously Liable in Mount Cashel Sexual Abuse Appeal

By Sean S. Carter, Jennifer M. Leddy and Terrance S. Carter

On July 28, 2020 the Court of Appeal of Newfoundland and Labrador released an important decision in *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's* (the "Appeal Decision"), overturning a trial decision and holding the Roman Catholic Episcopal Corporation of St. John's Newfoundland (the "Archdiocese") vicariously liable for sexual and physical abuse committed by a civilian employee and members of the Christian Brothers Institute Inc. ("Christian Brothers") against four former residents of the Mount Cashel orphanage in St. John's in the late 1940s and 1950s.

This *Bulletin* provides a brief overview of the court's decision with respect to its findings on the Archdiocese's vicarious liability. It is an important decision because it is an example of the danger in assuming that an organization has mitigated its liability to the fullest extent possible by simply focusing on its internal policies with respect to the conduct of its employees, members and volunteers. In this regard, many organizations may assume that they are adequately protected because they have taken steps to protect against liability for the direct actions of that organization or its employees. However, this Appeal Decision demonstrates that vicarious liability can be interpreted and applied to find that an organization may become liable for unauthorized acts of employees, volunteers or members of other organizations, particularly when it concerns vulnerable persons, depending on the facts and the relationship between organizations.

For the balance of this *Bulletin*, please see *Church Law Bulletin* No. 58.

CRA News

By Jacqueline M. Demczur

Advisory Committee on the Charitable Sector Holds June Meeting

As reported by the Canada Revenue Agency ("CRA") on July 17, 2020, the Advisory Committee on the Charitable Sector ("ACCS") held a virtual meeting on June 22, 2020 to identify priority areas for the ACCS to focus on. As a committee comprised of members from the charitable sector, the CRA, and the Department of Finance, the ACCS was formed to "engage in meaningful dialogue with the charitable

sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do."

At the virtual meeting, ACCS members took part in exercises to identify priorities, and confirmed the charity-related regulatory and legislative issues to focus on going forward. They identified five working groups to examine priorities, including:

- Modernizing the regulatory framework in Government as it relates to the charitable sector;
- Supporting the work of charities serving vulnerable populations;
- Exploring charity-related regulatory and legislative issues faced by Indigenous Peoples and organizations;
- Examining the regulatory approach to charitable purposes and activities, including its impact on charities working with non-qualified donees, and charities engaging in revenue-earning activities; and
- Improving data collection and analysis related to the charitable sector.

In addition to identifying these priorities, the ACCS also expressed support for efforts in the charitable sector to meet needs with emergency funding and infrastructure, and discussed backing these efforts.

Corporate Update

By Theresa L.M. Man

Corporations Canada Announces Streamlined Online Incorporation

Corporations Canada announced in July 2020 that it would begin providing a new streamlined service for online incorporation of not-for-profits whereby it is optional to submit a NUANS report when filing for incorporation. This means that those who want to incorporate online can propose and submit a corporate word name during the incorporation process. The proposed name would be approved as part of the process. Corporations Canada indicates that this new online service is intended to make incorporation easier and quicker, saving time and effort in the process.

It is important to note that although this process would save the cost to obtain a NUANS report, there are significant disadvantages by not obtaining a NUANS ahead of time: (i) it is prudent to exercise due diligence in conducting appropriate name searches before incorporation to determine whether the

proposed name is suitable for use; (ii) without obtaining a NUANS report, even if a suitable name was found, the incorporator(s) would not be able to reserve the proposed name for 90 days during the valid period of the NUANS report, which in turn would mean that the proposed name could be used by another corporation that happens to file before the incorporator(s); and (iii) the incorporator(s) would not be able to seek the pre-approval of Corporations Canada by applying for a name decision ahead of time to avoid surprises at the time of filing for incorporation, which would in turn hold up the incorporation process.

B.C. Supreme Court Rules Societies' Bylaw Must Authorize Voting Methods

By Esther S.J. Oh

The decision in *Farrish v Delta Hospice Society* was an oral ruling regarding a petition brought pursuant to the *Societies Act* in B.C. seeking relief with respect to a proposed meeting of the Delta Hospice Society ("Society"), a not-for-profit operating under the *Societies Act* (B.C.) (the "Act"). The Society operated a hospice and carried out related charitable programs involving the provision of care and support for individuals in the last stages of life. The petitioners had brought the hearing of the petition forward on an urgent basis, as they were seeking relief with respect to a proposed meeting of the members of the Society scheduled for three (3) days after the hearing. The court recognized that differing views on euthanasia and medical assistance in dying ("MAiD"), legalized in Canada in 2016, were at the core of the disagreement at the Society, although the court stated "it is not [the court's] role on this application to resolve that debate."

The Board of Directors of the Society ("Board") had sent out notice of a membership meeting to be held on June 15, 2020 ("2020 AGM") and directed that a membership vote on amendments to the Society's constitution and bylaw would take place by mail-in ballot. The Society's then-current governing documents did not reflect a position for or against MAiD. As such, the Board (of whom a majority did not support MAiD) called the 2020 AGM to obtain membership approval over significant changes to the constitution and bylaw prohibiting MAiD. The proposed changes also allowed the Board, in its sole discretion, to refuse new membership applications ("Proposed Amendments").

In anticipation of the 2020 AGM, both factions (for and against MAiD) encouraged membership applications at the Society to increase the number of members to vote in favour of their respective positions on the Proposed Amendments. The petitioners sought to challenge the Board's actions leading up to the scheduling of the 2020 AGM on two grounds. Firstly, the petitioners sought a declaration that

the mail-in ballot voting process set out in the Notice of the 2020 AGM was not allowed. Secondly, the petitioners argued that the Board had wrongly refused membership to many applicants (who did not support the Board's position), while granting membership to other applicants (who supported the Board's position) in breach of the Society's bylaw and the Act.

On the first issue, the court noted that while section 84(5) of the Act provides that the bylaw of a society "may" authorize "voting by mail", the Society chose not to authorize this in its bylaw. As such, the optional method of voting by mail was not authorized under the Society's bylaw.

With reference to B.C.'s Ministerial Order No. MO116 that was issued due to the COVID-19 pandemic ("MO116"), the Society's counsel argued that since MO116 provided membership meetings to be held by telephone and electronic means, but was silent on the method of voting, "mail-in ballot" should be allowed under MO116. The court held that since MO116 does not explicitly authorize the use of mail-in ballots, the Society's bylaw (which does not permit mail-in ballots either) would apply.

On the second issue, the Society's bylaw merely contained generic wording stating that "…on acceptance by the directors [a person] is a member." As such, on the issue of the Board's rejection of membership applications that were not in support of its position, the court found that, "unless the criteria for membership are set out in the bylaw, the directors do not have the discretion to deny membership on some other basis that they themselves determine."

The court found that membership had historically been dealt with on an open basis, such that anyone who applied and paid the application fee was granted membership, and that it was only after the 2020 AGM, that "this practice changed to address the various applications that arose from the competing membership campaigns." Interestingly, the court held that the Board's open basis approach to membership was binding on the Board's admission and rejection of members in the period of time leading up to the 2020 AGM. The court therefore ordered the Society to cancel the 2020 AGM; to provide the petitioners with a list of all persons whose membership applications had been rejected since the 2019 AGM; and to include all of those rejected persons in the register of members within 14 days. It also ordered that the Society seek the court's direction before giving notice to the Society's members of any future meeting.

The Society appealed to the Court of Appeal for British Columbia and on June 25, 2020 the Society's appeal was allowed, with a stay granted on the lower court's order to include rejected applicants as members of the Society. The appeal court also ordered that, as a condition of the stay, the Society was prohibited from accepting any new members until the hearing of the appeal. The appeal was set for August

17, 2020, but was not available as of the date of publication. While the appeal court's comments will be binding in B.C. and of great interest, the comments made by the lower court in this case to date underscore the importance of including membership qualification requirements within the bylaw for a not-for-profit. While it is often the case for not-for-profits to adopt generic boilerplate by-laws that may often not reflect their governance needs (as the Society did) it is important that by-laws reflect the legal requirements, as well as the unique operational needs and practices of each not-for-profit.

Tax Court Allows Not-For-Profit to Claim Input Tax Credit in Operating Virtual Library

By Ryan M. Prendergast

The Tax Court of Canada released its decision in *Canadian Legal Information Institute v The Queen* on July 17, 2020, concerning an appeal by the Canadian Legal Information Institute ("CanLII") from tax assessments made by the Minister of National Revenue (the "Minister") under the *Excise Tax Act* ("ETA"). CanLII, a not-for-profit corporation, operates an online law library with free public access, and claimed input tax credits ("ITCs") under subsection 169(3) of the ETA.

The Minister denied the ITCs on the basis that CanLII's service was an exempt supply pursuant to section 10 of Part VI of Schedule V of the ETA because it was provided for no consideration. CanLII, however, argued that it had made a taxable supply, as it received consideration for its services from the Federation of Law Societies of Canada ("FLSC"). The FLSC paid an annual levy to CanLII pursuant a governance agreement. That agreement required CanLII to provide the FLSC with an annual report recommending a dollar amount needed for the following year's operations. The FLSC then had the option to pay this amount, or to pay a different amount to CanLII.

With respect to the ITCs, CanLII incurred operating expenses from various third-party services providers in relation to operating the virtual library including, for example, website operation and maintenance fees, case law access fees, and computer code storage fees. CanLII, as an HST registrant, collected GST on these expenses and then claimed ITCs on them. The court therefore considered whether CanLII could claim these ITCs under subsection 169(3) of the ETA.

The court first determined whether CanLII made a taxable supply in operating its virtual library. Pursuant to subsection 169(3), the court found that CanLII would be entitled to ITCs if it "acquired property or a service for consumption, use or supply in the course of its commercial activities." The Minister argued that CanLII's business involved making exempt supplies because all or substantially all of its services

were made for no consideration, and that FLSC's discretionary payments did not constitute consideration, as they were not made pursuant to a legal obligation.

The court stated that "all that would be required in order for a fee to constitute consideration for the taxable supply of the services would be a contractual obligation." It found that, pursuant to the governance agreement, once the FLSC had determined the annual amount to be paid to CanLII, it was then obligated by operation of law to pay that amount to CanLII for the supply of the virtual library, and that such payment was not discretionary. It also found that a direct link existed between the levy paid by the FLSC and CanLII's supply of the virtual library. FLSC's funding was therefore not intended for multiple uses, but rather "to enable CanLII to achieve its sole goal of operating a virtual library in a business like manner", which included contracting with third-party suppliers. The court found that CanLII's services had been made in consideration of its commercial activities, and that its supply of services were therefore taxable supplies. It therefore held that CanLII was entitled to claim its ITCs, amounting to $745,690.89 for the assessment periods between April 1, 2013 and June 30, 2015.

This decision demonstrates that courts may apply a broad interpretation to how "consideration" is defined in excise tax matters. Charities and not-for-profits that are HST registrants and receive funding should therefore, with the assistance of professional advice, carefully determine whether that property or service was acquired for consumption, use or supply in the course of commercial activities, as this may constitute consideration for a taxable service and may enable those charities or not-for-profits to claim ITCs.

Uniform Law Conference of Canada Adopts New Uniform Crowdfunding Act

By Terrance S. Carter and Luis R. Chacin

At its Annual General Meeting, on August 12, 2020, the Uniform Law Conference of Canada ("ULCC") adopted the *Uniform Benevolent and Community Crowdfunding Act, 2020* (the "Uniform Crowdfunding Act, 2020") to replace the *Uniform Informal Public Appeals Act* previously adopted by the ULCC in 2011. For background information, including a review of the 2019 Consultation Paper from the ULCC, which included a number of new provisions adopted in the Uniform Crowdfunding Act, 2020, see *Charity & NFP Law Bulletin* No. 455.

The introduction to the Uniform Crowdfunding Act, 2020 reiterates the distinction highlighted in the 2019 Consultation Paper between the fundraising efforts carried out by organized charities and similar bodies on a continuing basis from the kind of informal fundraising through public appeals covered by the Uniform

Crowdfunding Act, 2020. As such, the Uniform Crowdfunding Act, 2020 provides for the application of trust law to all public appeals, with special guidance in relation to surpluses, and contains a list of powers available to the fundraisers to properly administer the funds raised through the informal public appeal. The Uniform Crowdfunding Act, 2020 also allows for judicial oversight where appropriate, and recognizes the important role of Internet-based crowdfunding platforms.

The Uniform Crowdfunding Act, 2020 addresses a number of issues raised in response to the 2019 Consultation Paper, including certain issues raised in a submission from the Charities and Not-For-Profit Law Section of the Canadian Bar Association. Of interest to registered charities, the Uniform Crowdfunding Act, 2020 provides for a "right to halt the appeal" where if an appeal has been initiated without the consent of a qualified donee for whose benefit the appeal was initiated, the qualified donee, through an authorized representative, would be able to demand that the appeal be halted and the appeal organizer or intermediary would have to comply with the demand. Where the appeal organizer or the intermediary fail to comply with an objection by a qualified donee, the Uniform Crowdfunding Act, 2020 would provide the right to apply to court for injunctive relief.

As well, the Uniform Crowdfunding Act, 2020 would not apply to a public appeal conducted by a qualified donee or a public appeal through an intermediary, provided that the intermediary stipulates and effectively pays the funds directly to a qualified donee, and the qualified donee did not object to the appeal. Further, the qualified donee for whose benefit a public appeal was initiated, as well as, amongst others, the Public Guardian and Trustee or comparable official of the provincial enacting jurisdiction, would be permitted to commence court proceedings to enforce the terms of trust of the public appeal.

At this time, only Saskatchewan has adopted comparable public appeals legislation, which was applied to the administration and distribution of funds raised in response to the Humboldt Broncos incident in 2018, discussed in the January 2019 *Charity & NFP Law Update*. However, other provinces may (and should) consider adopting legislation to address the increasing prevalence of online crowdfunding.

Ontario Launches Consultations on Privacy

By Esther Shainblum

On August 13, 2020, the Ontario Ministry of Government and Consumer Services ("MGCS") announced a public consultation to "create a legislative framework for privacy in the province's private sector" (the "Consultation"). According to the MGCS press release, the increased reliance on digital platforms that

has resulted from the COVID-19 outbreak has led to the Consultation and there is "a strong need to build public and consumer confidence and trust in the digital economy".

The Consultation, which is framed as a collaboration between the provincial government and the people of Ontario, is seeking feedback on the following eight privacy issues:

- Increased transparency about how personal information is being used by businesses and organizations;
- Allowing individuals to revoke consent at any time, and adopting an "opt-in" model for secondary uses of their information;
- Introduce a "right to erasure" or "the right to be forgotten";
- Introduce individual data portability rights;
- Increased enforcement powers for the Information and Privacy Commissioner, including the authority to impose penalties;
- New requirements for data that has been de-identified and derived from personal information;
- Enable the establishment of data trusts for privacy protective data sharing; and
- Expanding the scope and application of the law to include non-commercial organizations, including not-for-profits, charities, trade unions and political parties.

Anyone can participate in the Consultation through the online survey or the yet to be confirmed virtual Town hall sessions. Technical experts and industry organizations may also participate through written submissions on Ontario's Regulatory Registry.

This Consultation may signal that legislative change is ahead in Ontario. The province does not currently have privacy legislation that governs the Ontario private sector and, as has been discussed previously in this publication, the federal private sector privacy legislation – the *Personal Information Protection and Electronic Documents Act* – only applies to private sector organizations to the extent that they are engaged in "commercial activities". This means that there is currently no privacy legislation that applies to Ontario's charities and not-for-profits or to other organizations that are not engaged in "commercial activities". In addition, PIPEDA only applies to the personal information of employees of federal works, undertaking or businesses, which are enterprises that fall within the legislative authority of the federal

government, such as telecommunications, banking, airlines and broadcasting. New Ontario private sector privacy legislation would likely address those gaps.

In light of the Consultation and the prospect of up to date private sector privacy legislation in Ontario, it will be interesting to see whether the federal government moves ahead with its plans to modernize PIPEDA that were signalled in the proposed Digital Charter, discussed in *Charity & NFP Law Bulletin* No. 449. Charities and not-for-profits with operations in Ontario should consider participating in the Consultation and monitor any subsequent reports and developments from the MGCS about the province's legislative framework for privacy.

The Consultation is open until October 1, 2020.

Inclusion in Best Lawyers in Canada 2021

Theresa L.M. Man, Jacqueline M. Demczur, Esther S.J. Oh, Ryan M. Prendergast and Terrance S. Carter of Carters Professional Corporation have been recognized as leaders in the area of Charity and Not-For-Profit Law by *The Best Lawyers in Canada* for 2021.

IN THE PRESS

Charity & NFP Law Update – June 2020 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Business Restructuring During COVID-19: Estate Freezes written by Nancy E. Claridge and Luis R. Chacin was featured on the Ontario Bar Association website on June 10, 2020.

B.C. Court Reverses Decision on Return of Charitable Gift written by Esther S.J. Oh was featured in The Lawyer's Daily on July 13, 2020 and is available to those who subscribe.

Direction and Control: Current Regime and Alternatives written by Terrance S. Carter and Theresa L.M. Man was featured on the Canadian Bar Association Charities & Not-for-Profit Law: COVID-19 Articles and Newsletters webpage on July 29, 2020.

RECENT EVENTS AND PRESENTATIONS

CNCA 10 Years In: Lessons Learned and Pitfalls to Avoid was presented by Theresa L.M. Man and Terrance S. Carter at the CSAE Trillium 15th Annual Summer Summit - Virtual Event on July 23, 2020.

UPCOMING EVENTS AND PRESENTATIONS

The 2020 Annual Church & Charity Law™ Webinar hosted by Carters Professional Corporation will be held on Thursday, November 5, 2020 in Greater Toronto, Ontario. Details are available online.

CONTRIBUTORS

Editor: Terrance S. Carter
Assistant Editors: Nancy E. Claridge, Ryan M. Prendergast, and Adriel N. Clayton

Sepal Bonni, B.Sc., M.Sc., J.D., Trademark 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 articled and practiced with a trademark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trademark prosecution before the Canadian Intellectual Property Office, as well as trademark portfolio reviews, maintenance and consultations.

Terrance S. Carter, B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2020), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners.* Mr. Carter is a member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.

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 articled 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 government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Business Law and IT 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 an assistant editor of *Charity & NFP Law Update*. After obtaining a Master's degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award. Nancy is recognized as a leading expert by *Lexpert*.

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

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

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 (CCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose." Ms. Leddy is recognized as a leading expert by *Lexpert*.

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

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

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

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

Martin Wissmath, B.A., J.D. – Martin graduated from Osgoode Hall Law School at York University in 2020. While studying at Osgoode, Martin participated in the Parkdale Community Legal Services clinic intensive in the fall of 2019, volunteering in the Immigration Division. Martin also participated in mooting and negotiation competitions, along with volunteering as an upper year representative for the Osgoode Labour and Employment Law Society. Prior to law school, Martin obtained a journalism certificate from Langara College in Vancouver after graduating with an interdisciplinary major from the University of British Columbia. He worked as a reporter and photographer at local newspapers in Alberta and B.C.

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 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.

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
Heidi N. LeBlanc J.D.	hleblanc@carters.ca

STUDENT-AT-LAW

Martin Wissmath B.A., J.D.	mwissmath@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