

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

JANUARY 2020

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RECENT PUBLICATIONS AND NEWS RELEASES

The CRA's Guidance on Journalism: Clarifying Tax Credits, QCJOs and RJOs

By [Terrance S. Carter](#) and [Ryan M. Prendergast](#)

Following up on the federal government's announcement in the *2018 Fall Economic Statement* and its commitment in the 2019 Federal Budget, the Canada Revenue Agency ("CRA") released its new [*Guidance on the income tax measures to support journalism*](#) ("Guidance") on December 20, 2019. The Guidance provides further information on the various tax measures introduced by the federal government to support local Canadian journalism through a new category of qualified donees for registered journalism organizations, and clarifies the requirements for designation as a "qualified Canadian journalism organization." This *Charity & NFP Law Bulletin* provides a brief overview of the Guidance.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 459](#).

Advisory Committee on the Charitable Sector Holds December Meetings

By [Jacqueline M. Demczur](#)

The Advisory Committee on the Charitable Sector ("ACCS") [met in Ottawa](#) on December 17 and 18, 2019 to identify priority themes to inform its work. As discussed in the [August 2019 Charity & NFP Law Update](#), the ACCS, which was first announced in the federal government's 2018 Fall Economic Statement, is comprised of [members](#) from the charitable sector, the CRA, and the Department of Finance. It 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 December meeting, ACCS members discussed the importance of fostering the charitable sector and the federal government's relationship. The members recognized that, despite the CRA's regulatory role, it could also contribute to "a modern vision that supports the important work of the sector." Considering the diversity of the members' backgrounds and expertise, the members also identified the following as priority themes to inform the ACCS' work: (1) evolving the institutional framework to effectively advance public purposes and maximize sector impact; (2) ensuring financial sustainability within the charitable sector; and (3) establishing modern governance for the charitable sector. In arriving at these priority themes, the ACCS had also taken into consideration the recommendations in the Special Senate Committee on the Charitable Sector's report, as discussed in [Charity & NFP Law Bulletin No. 451](#), as

well as a desire to foster accountability and transparency. Looking forward, members of the ACCS also considered how to include other voices through their work. The next ACCS meeting is expected to be held in spring 2020.

Legislation Update

By [Terrance S. Carter](#)

Provisions of *Budget Implementation Act No. 1, 2019* Now In Force

As of January 1, 2020, a number of provisions of *Budget Implementation Act No. 1, 2019*, including amendments to the *Income Tax Act* (Canada) (“ITA”) dealing with Canadian journalism organizations, have come into force. For more information on the new regime for Canadian journalism organizations, see [Charity & NFP Law Bulletin No. 417](#) and [Charity & NFP Law Bulletin No. 459](#).

Proposed Changes to Employee Stock Option Regime Delayed

On December 19, 2019, the Federal Government issued an [Update](#) indicating that the previously proposed changes to the tax treatment of employee stock options under the ITA would be delayed, as the Ministry of Finance continues to review the input received during the consultations that closed on September 16, 2019. As a result, the proposed changes did not come into force on January 1, 2020. The Update also states that more details regarding the proposed changes will be provided in Budget 2020. For more information regarding the proposed changes to the tax treatment of employee stock options and how it may affect donations to qualified donees, see the [August 2019 Charity & NFP Law Update](#).

2020 Budget Consultations in Ontario

On December 18, 2019, the Ontario Government launched its [2020 Budget Consultations](#), seeking input on “how the government can improve quality of life for people across the province, while also attracting business investment, creating jobs and improving critical public services such as healthcare and education.” The consultations will be open until Feb 11, 2020.

The [2020 Pre-Budget Consultations](#) by the Standing Committee on Finance and Economic Affairs of the Legislative Assembly of Ontario were held between January 17 and 24, 2020.

Ontario Regulations under the *Connecting Care Act, 2019*

Effective December 2, 2019, new Ontario [Regulation 376/19](#) under the *Connecting Care Act, 2019* (“CCA”) came into effect, prescribing the provision by Ontario Health, the new provincial agency created

to manage the delivery of healthcare in Ontario, of certain shared services, such as human resource management and finance and administration, to the local health integration networks (or “LHINs”), approved agencies under the *Home Care and Community Service Act, 1994*, and placement co-ordinators designated under the *Long-Term Care Homes Act, 2007*. Additional information is available on the Ontario Health [website](#).

Also, effective January 1, 2020, new Ontario [Regulation 390/19](#) under the CCA prescribed Ontario Telemedicine Network as an organization which may be subject to a transfer order pursuant to subsection 40(1) of the CAA. Additional information about transfer orders issued by Ontario Health is also available on the Ontario Health [website](#).

Alberta Senate Election Act

[Bill 13, Alberta Senate Election Act](#), which received Royal Assent on July 18, 2019, amended the Election Finances and Contributions Disclosure Act by introducing new provisions dealing with restrictions on advertising contributions and expenses, including a prohibition on registered charities from making senatorial selection advertising contributions. The amendments also provide restrictions on the disposition of advertising account funds and require that funds remaining in an advertising account, as defined under the Act, either be donated to a registered charity, returned to the third party contributors if they can be identified or, as applicable, paid to the Chief Electoral Officer for deposit into the General Revenue Fund.

Nova Scotia’s Plastic Bags Reduction Act

On October 30, 2019, Nova Scotia’s [Plastic Bags Reduction Act](#) received Royal Assent and will come into force one year from that date. This legislation prohibits businesses from providing plastic checkout bags. The definition of “business” under the Act provides that it “does not include a charity.” The regulations under this Act will prescribe the amount of the fines payable by any person who contravenes the Act or the regulations.

Yukon’s New Liquor Act

On November 27, 2019, Yukon’s New [Liquor Act](#) received Royal Assent. Part 5 of this new Act contains a number of special provisions for how registered charities and not-for-profits may apply for the different classes of permits for the sale of liquor or the sale of tickets that may be exchanged for liquor. On the date set by [proclamation](#) of the Commissioner in Executive Council, this legislation will repeal the current *Liquor Act*, RSY 2002, c 140.

Corporate Update

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

ONCA Coming into Force Delayed

As most recently reported in the [May 2019 Charity & NFP Law Update](#), the Ontario Ministry of Government and Consumer Services had been targeting “early” 2020 for the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) to be brought into force. An [update](#) from the Ministry on December 31, 2019, indicates that the launch date is now expected to move “beyond early 2020,” with no specific timeframe announced. It indicates that the Ministry is upgrading technology to support changes introduced through the ONCA and to improve service delivery. The Ministry will provide further details closer to when the ONCA comes into force. Once the ONCA is in force, Ontario not-for-profit corporations will have three-years to transition into the ONCA by amending their governing documents as may be necessary to comply with the new legislation.

Updated Policies on Corrections of Articles or a Certificate for Business and Not-for-Profit Corporations

In an [announcement](#) on December 12, 2019, Corporations Canada indicated that it had updated its [policy on corrections of articles or a certificate](#) for corporations governed by the *Canada Not-for-profit Corporations Act* (“CNCA”). Policy revisions include: (1) providing new templates for submitting requests for correction, with model statements for applicants to select or modify as needed, and a declaration for signature (it is no longer necessary to include a statement explaining the error or an accompanying statutory declaration); (2) permitting the corporation’s professional representative to sign the declaration where the error is an obvious one; and (3) providing simplified policy language with examples to explain what is meant by obvious errors, non-obvious errors, and errors attributable to Corporations Canada. The requirements for corrections remain the same, meaning that corrections must reflect the original intent and cannot prejudice members or creditors.

Corporations Canada Makes Changes for Online Services to Not-for-Profits

In an effort to encourage the use of digital services, Corporations Canada has adopted a “[digital-first approach](#)” to its forms for CNCA corporations. In this regard, for online filing services offered by Corporations Canada, PDF forms will no longer be available for download on their website so that only online forms may be used, including Form 4001 – Articles of Incorporation, Form 4003 – Change of Registered Office Address, Form 4004 – Articles of Amendment, Form 4006 – Changes Regarding

Directors, and Form 4022 – Annual Return. However, the PDF forms will be available upon request. Where online filings services are not available, the PDF forms will continue to be available on Corporations Canada’s website.

On the same date, Corporations Canada also introduced new [service fees and service standards](#) for CNCA corporations and federal cooperatives. While certain service fees have risen, the fees are lower for online services for the annual return. As well, the following online services are now free of charge: (a) amendments to a corporation’s minimum and maximum number of directors, (b) amendments to the province of a registered office address, and (c) uncertified copies of documents are now free of charge. Corporations Canada’s service standards (*i.e.* the timeframe for expected delivery of services) have also generally increased, except service for cancelled or corrected certificates.

Lastly, express service at an additional cost of \$100 is now available for (i) online incorporations and amendments within 4 business hours, and (ii) same day services for amalgamations, continuances, letters of satisfaction and revivals by email or mail.

Certain Amendments to Ontario’s *Co-operative Corporations Act* in Force

Ontario’s Budget Bill 138, *Plan to Build Ontario Together Act, 2019*, received Royal Assent on December 10, 2019. As reported in the [November 2019 Charity & NFP Law Update](#), Bill 138 amends the *Co-operative Corporations Act* by removing certain restrictions concerning conducting business with non-members; amending the conditions for exemption from certain audit provisions; repealing filing debt obligations and financial statement and auditors’ report filing obligations; and adding new membership requirements for co-operative corporations whose primary object is to provide employment to its members. While Bill 138 contains various amendments to the *Co-operative Corporations Act* that will come into force on proclamation, many of a technical nature, the above-noted provisions were brought into force when Bill 138 received Royal Assent.

New Brunswick’s *Cooperatives Act* Proclaimed in Force

New Brunswick’s Bill 35, *Cooperatives Act*, which received Royal Assent on June 14, 2019, was proclaimed into force on January 1, 2020 pursuant to [Order in Council 2019-247](#). New Brunswick’s new *Cooperatives Act* replaces the province’s *Co-operative Associations Act* and associated regulations, all of which had not undergone any substantial updates since its introduction in 1978. As previously reported in the [September 2019 Charity & NFP Law Update](#), the new *Cooperatives Act* modernizes New Brunswick’s cooperatives regime to bring it in line with the modern corporate law approach and best practices in other

Canadian jurisdictions. It also modernizes the cooperatives administrative processes, reduces administrative red tape, and enhances cooperatives' access to capital.

There is no formal continuance process for cooperatives in New Brunswick. All existing co-operative associations that were incorporated or continued under the previous *Co-operative Associations Act* are automatically deemed to be continued as a cooperative under the new Act. Their letters of incorporation, directors and by-laws in force on January 1, 2020 have also automatically been deemed as valid articles of incorporation, directors and by-laws in force under the new Act, despite any inconsistencies with the new Act's provisions. However, continued cooperatives will need to file articles of amendment for the articles of incorporation and by-laws within 18 months of the cooperative's deemed continuance (*i.e.* by June 30, 2021) to ensure that those documents are in compliance with the new Act and its regulations. Failure to do so may result in the dissolution of the cooperative.

Voluntary Association's Constitution and By-Laws Found to be Contractual

By [Jacqueline M. Demczur](#) and [Esther S.J. Oh](#)

The Court of Appeal for Ontario ("Court of Appeal") released its decision in [Aga v Ethiopian Orthodox Tewahedo Church of Canada](#) on January 8, 2020. The decision concerns an appeal of a case brought by five former members (the "Appellants") of the congregation of the Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral (the "Congregation"). The Court of Appeal described the Congregation as "a voluntary association governed by a Constitution and By-Laws" and "a local branch of the Ethiopian Tewahedo Orthodox Church, which has parishes around the globe." The Appellants, who had been expelled as members of the Congregation, had earlier brought an action before the Superior Court against the Ethiopian Tewahedo Orthodox Church of Canada St. Mary Cathedral, an Ontario corporation (the "Church Corporation"), which the Court of Appeal also identified as a member of the Congregation.

In the Court of Appeal's decision, the Court of Appeal considered its jurisdiction to determine the affairs of a voluntary association, and reviewed whether, given the Congregation's status as a voluntary association, the motions judge was correct in holding there was no underlying contract between the Appellants, as members, and the Congregation. The motions judge's earlier finding that there was not a contract issue was based on her determination that the Appellants were not members of the Church Corporation and, therefore, resulted in her finding that there was no genuine issue requiring a trial. This

Church Law Bulletin provides a summary of the Court of Appeal case and the Court of Appeal's reasoning behind its decision.

For the balance of this Bulletin, please see [Church Law Bulletin No. 57](#).

Tax Court Decision on Split Receipting and Donative Intent Upheld on Appeal

By [Ryan M. Prendergast](#)

On December 5, 2019, the Federal Court of Appeal (“FCA”) released its decision in [Markou v Canada](#), an appeal by four individuals (the “Appellants”) who had previously lost an appeal over tax reassessments in the Tax Court of Canada (“TCC”) case of *Markou v The Queen*, discussed in the [April 2018 Charity & NFP Law Update](#). The Appellants had participated in a leveraged donation program (the “Program”) that issued donation tax receipts to the Appellants after they had transferred funds to a charity. These funds were mainly funded with a loan obtained from parties related to the program sponsor which, in some cases, were up to 85% of the total amounts transferred to the charity, with the remainder being paid by the participants with their own funds. The donation tax credits had been disallowed by the Minister of National Revenue (“Minister”) because the transferred amounts were not gifts within the meaning of section 118.1 of the ITA.

At the trial level, the TCC had upheld the Minister's reassessments on the basis that the Applicants lacked the requisite donative intent. In this regard, the TCC also upheld the TCC and FCA decisions in *Maréchaux v The Queen* (“*Maréchaux*”), a separate preceding case that also rejected appeals over reassessments under the same Program because the parties lacked donative intent. However, in this appeal, the Appellants argued that the TCC had erred in concluding that no part of the total amount was given with donative intent. In particular, they argued that, in certain cases, a valid gift could be made where the donor received a benefit or consideration from the donee, such as in the case of split gifts. They further argued that “it is possible to make a “profitable” gift’ due to the favourable tax consequences that some gifts provide.”

The FCA found that the decision turned purely on the issue of *stare decisis*, i.e. the principle that courts must follow previously established legal precedent when deciding on similar cases. In this regard, the FCA did not distinguish between this case and *Maréchaux*, and therefore found that the TCC in this case was bound by the decision in *Maréchaux*. As such, it stated that “the Tax Court judge was also bound to hold that ‘no part of [the interconnected transaction] can be considered a gift that the appellant[s] gave in

the expectation of no return.” Further, it could not overrule the *Maréchaux* decision, as the TCC had not overlooked binding precedents or ignored relevant statutory authority. As such, the FCA held that the TCC was bound to uphold the Minister’s decision concerning the reassessment.

Although the decision turned on the precedent set in *Maréchaux*, the FCA further discussed gifts in *obiter*, particularly in light of the Appellants’ argument that “it is possible to make a “profitable” gift’ due to the favourable tax consequences that some gifts provide.” To that point, the FCA stated that the argument was based on an inaccurate reading of *The Queen v Friedberg*. In that case, Mr. Friedberg had purchased cultural property at a bargain price donated it at its fair market value, and received tax benefits in excess of his original acquisition costs, which the FCA indicated was permissible. The FCA stated that a tax benefit received by a person making a gift, in and of itself, does not invalidate the gift, but where that person anticipates tax benefits in excess of the value of their “gift”, they cannot be said to have made a gift with donative intent, as “impoverishment is an essential element of a gift under both the civil law and the common law.”

This case, along with the lower level decision and *Maréchaux*, demonstrate that courts and the Minister will not tolerate “gifts” in leveraged donation programs where individuals expect to “profit” off of a donation by receiving tax benefits greater than the donation itself. In such circumstances, what may have been anticipated as a gift may not, in fact, be a gift where the donor is not impoverished and donative intent is lacking.

Federal Court of Appeal Holds that Atheism is not a Religion

By [Jennifer M. Leddy](#)

On November 29, 2019, the Federal Court of Appeal delivered its judgment in [Church of Atheism of Central Canada v Canada \(National Revenue\)](#). The Church of Atheism of Central Canada (“CACC”), a federal corporation that was incorporated for the purpose of “preach[ing] Atheism through charitable activities,” had applied to the CRA for charitable status. However, the Minister of National Revenue (“Minister”) denied CACC’s application on the basis that it did not meet the requirement for registration under the ITA and did not meet the three court-established elements that are fundamental to “religion.” CACC appealed the Minister’s decision, arguing that it violated its freedom of conscience and religion and equality rights, as well as violated multicultural heritage provisions under sections 2(a), 15 and 27, respectively, of the *Canadian Charter of Rights and Freedoms* (“Charter”).

The court first considered and dismissed CACC's *Charter* claims. In particular, while previous courts had found that section 2(a) of the *Charter* protected the right to practice atheistic beliefs, the court found that the Minister's refusal to grant charitable registration did not "interfere in a manner that is more than trivial or insubstantial with the appellant's members' ability to practise their atheistic beliefs." On the contrary, CACC's purpose and activities could continue to be carried out without registration. With respect to equality rights under section 15 of the *Charter*, the Court followed existing case law in finding that section 15 did not apply to CACC because section 15 only applies to individuals. Concerning section 27 of the *Charter* on multicultural heritage, the court followed precedent in finding that section 27 is an interpretative not a substantive provision that can be violated.

The court then considered whether CACC met the requirements for advancing religion as a charitable purpose, noting that the courts have held that to be a religion it is necessary to have been already recognized as a religion by the courts or to have the same fundamental characteristics of recognized religions, including (1) faith in a higher unseen power such as a God, entity, or Supreme Being; (2) worship of the higher unseen power; and (3) a particular and comprehensive system of faith and worship. Since Atheism had not been previously recognized as a religion, the Minister considered whether it met the three elements of religion as determined by the courts. The Minister determined that Atheism did not have any of the three elements. In particular, the Minister found that the "worship of energy" did not meet the requirement that there be belief in a higher unseen power such as a God, Supreme Being, or entity, and that it could not meet the second element of worshipping a higher unseen power if it didn't exist.

Significantly, the court agreed with CACC that a higher unseen entity and reverence of that entity is not always required, such as in the case of Buddhism, which is a recognized religion. However, the court found that Atheism did not meet the third element of a particular and comprehensive system of faith and worship. While CACC had argued that its "doctrine of mainstream science" fulfilled this element, the court agreed with the Minister that mainstream science is neither particularly specific nor precise. While CACC had also argued that religions should not be required to have an authoritative book (*e.g.* the Bible), the court left that matter for a future court to decide. The court therefore found that CACC was not advancing religion, and that it was reasonable for the Minister to deny CACC charitable status on that ground.

While CACC had also argued that it was a religious self-help group that fit within the charitable purpose of "certain other purposes beneficial to the community", the court found that CACC's activities were for

their members only and were not rehabilitative or therapeutic. It therefore also found the Minister's denial of charitable status on that ground to be reasonable, and dismissed CACC's appeal.

It should be noted that the court's finding is not inconsistent from that of *R.C. v District School Board of Niagara*, discussed in [Church Law Bulletin No. 45](#), in which the Human Rights Tribunal of Ontario held that atheism was a "creed" under the *Ontario Human Rights Code*, but which nonetheless did not equate atheism with religion. However, while that decision is limited to the protection afforded by the *Ontario Human Rights Code*, this court decision applies more broadly and provides helpful insight into both the CRA's and the court's understanding of religion in the charitable sense.

This case is significant because the court agreed with CACC that "the requirement that the belief system have faith in a higher Supreme Being or entity or reverence of said Supreme Being is not always required when considering the meaning of religion." The court also reiterated that charitable registration is a privilege, and not a right, that functions as an indirect tax subsidy to encourage work carried out by registered charities.

CRA Technical Interpretation Regarding Loanbacks by a Qualified Donee

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

On October 7, 2019, the CRA released its technical interpretation *CRA View 080187117*, in which it addressed the question of whether subsections 110.1(6) and 118.1(16) of the ITA apply to reduce the fair market value of a gift in two scenarios. In the first scenario, a corporation makes a gift to a private foundation and, within 60 months after making the gift, the private foundation loans funds to the same corporation (where the corporation makes interest-only payments in accordance with a loan agreement) and to an individual who does not deal at arm's length with the corporation. In the second scenario, a private foundation loans funds to multiple corporations which do not deal at arm's length with each other (with interest-only payments made by the corporations pursuant to the terms of various promissory notes) and, within 60 months after the issuance of the promissory notes but prior to repayment, the corporations make gifts to the private foundation. In both scenarios, the loans are repaid within 60 months after the time of the gifts.

These scenarios are in relation to the application of complex loanback rules involving gifts to private foundations. In general, a loanback occurs when a donor makes a gift to a qualified donee and within 60 months of making the gift any of the following situations occur: (i) the qualified donee holds a non-

qualifying security of the donor that it acquired after the time that is 60 months before the gift was made, and (ii) the donor (or a person or partnership not dealing at arm's length with the donor) uses the qualified donee's property under an agreement that was made or modified after the time that is 60 months before the gift was made and the property was not used by the qualified donee in its charitable activities. Under these situations, the fair market value of the gift for income tax purposes would be reduced by the fair market value consideration for the non-qualifying security or the fair market value of the property used. A non-qualifying security is, generally, a security where the owner of the security is not at arm's length with the issuer of the security.

The CRA document explains the application of these complex loanback rules to two scenarios referred to above. The CRA confirmed that both these scenarios would be caught by these rules so that the fair market value of the gift involved in each scenario would be reduced by reason of the fact that, within 60 months of the time of the gift, the donor or non-arm's length person uses property of the charity under an agreement that was made or modified after the time that is 60 months before the time of the gift.

The CRA stated that where multiple non-arm's length donors are involved, the applicable ITA provisions would apply to each donor separately. As well, where multiple non-arm's length donors each make a gift to a qualified donee and an amount is loaned by the qualified donee to one or more of these donors, the total amount of the loans will be taken into account to reduce the fair market value of the gift made by each of the donors. In these scenarios, the CRA indicates that the fair market value of a gift would be reduced by the unpaid balance at the time of the gift, of any loan advanced by the private foundation to the donor (or to non-arm's persons or partnerships) prior to the time of the gift pursuant to an agreement entered into in the 60 months prior to the time of the gift. These rules also apply to new loans provided by the private foundation to the donor (or to non-arm's persons or partnerships) within 60 months after the time of the gift.

Finally, the CRA clarified that the fact that a borrower pays interest pursuant to the terms of the loan agreements is not relevant in these scenarios and that the ITA rules do not provide for the reinstatement of a gift in the event the property used by the donor (or non-arm's persons) is returned (or repaid) to the qualified donee.

CRA Technical Interpretation on Prescribed Rates and Undue Benefits

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

The CRA released its technical interpretation, Document 2017-0683831I7, on December 5, 2019, in which it considered subsection 189(1) regarding non-qualifying investments of a private foundation (“NQI”) and subsections 188.1(4) and (5) regarding undue benefit provisions under the ITA. The technical interpretation addressed the question of whether a loan advanced by a charity to a person at prescribed rates could result in an undue benefit. Although the technical interpretation is not particularly determinative, it does provide a helpful explanation of the process undertaken by the CRA in analyzing the questions at hand.

In this case, a registered charity that is a private foundation had advanced a loan to individuals or businesses (*i.e.* a debtor) at a prescribed rate of interest “because of the debtor’s relationship with the private foundation or the foundation’s board of directors.” The foundation requested clarification from CRA concerning whether a private foundation could be subject to a penalty for undue benefits pursuant to the ITA where subsection 189(1) does not apply to such debt owing by the debtor.

The CRA stated that under subsection 189(1), where certain debts owing by a taxpayer to a private foundation and where, at that time, those debts are a NQI of the foundation, then “the taxpayer is required to pay a tax for the year equal to the amount that is the interest that would be payable on the debt based on rates prescribed from time to time during the taxation year less any interest paid on the debt by the taxpayer not later than 30 days after the end of the taxation year.” In providing its comments, the CRA also reviewed the definition of NQI under subsection 149.1(1) of the ITA, which generally defines a NQI of a private foundation as “a debt owing to the foundation, or a share held by a private foundation that is issued by certain persons who are in a position to control or influence the operations of the foundation, as well as a right held by the foundation to acquire such a share.” Specifically, in the context of debt, the NQI definition refers to a debt (which excludes a pledge or undertaking to make a gift) that can be owing to the foundation either by certain persons outlined in subparagraph (a)(i) of the definition of NQI under subsection 149.1(1) of the ITA, or by corporations controlled by certain entities outlined in paragraph (b) of subsection 149.1(1). Certain corporations are excluded from the NQI definition, as outlined in paragraphs (d)-(f), inclusive. The CRA’s summary of the above subsections in the technical interpretation is set out below for ease of reference:

Specifically, in the context of debt, the NQI definition refers to a debt (other than a pledge or undertaking to make a gift) owing to the foundation by a person (other than an excluded corporation)

- 1) who is a member, shareholder, trustee, settlor, officer, official, or director of the foundation;
- 2) who has contributed, or is a member of a group of non-arm's length persons who have contributed, more than 50% of the foundation's capital; or
- 3) who does not deal at arm's length with any person described in (1) or (2).

The NQI definition also refers to a debt owing to the foundation by a corporation (other than an excluded corporation) controlled by

- a) the foundation,
- b) any person or group of persons referred to in (1), (2) or (3) above,
- c) the foundation and any other private foundation with which it does not deal with at arm's length, or
- d) any combination of (a), (b) and (c);

An excluded corporation for purposes of the NQI definition is (1) a limited-dividend housing company; (2) a corporation all of the property of which is used by a registered charity in its administration or in carrying on its charitable activities; or (3) a corporation all of the issued shares of which are held by the private foundation.

With respect to the meaning of "undue benefits", the CRA referenced subsection 188.1(5), indicating that: an undue benefit conferred on a person (beneficiary) by a registered charity includes "a disbursement by way of a gift; and the amount of any part of the income, rights, property or resources of the registered charity that is paid, payable, assigned or otherwise made available for the personal benefit of" certain persons listed in that subsection. Further, the CRA stated that "an undue benefit also includes any benefit conferred on a beneficiary by another person, at the direction or with the consent of the charity that would, if it were not conferred on the beneficiary, be an amount in respect of which the charity would have a right." Exclusions are also outlined in subsection 188.1(5).

The CRA went on to explain that an undue benefit does not include a disbursement or a benefit to the extent that it is a gift made or a benefit conferred in the course of a charitable act in the ordinary course of the charitable activities of a charity. This exclusion would apply unless it could be reasonably considered that the eligibility of the beneficiary related solely to the relationship of that person to the charity. An

undue benefit also does not include a gift to a qualified donee or reasonable consideration or remuneration for property acquired by or services rendered to the charity.

In addition, the CRA advised that the determination of whether or not a charity has conferred an undue benefit can only be made on a case-by-case decision based on all the facts and circumstances surrounding that specific situation, and would include a review of the underlying documentation.

In this case, the CRA concluded that, “given that subsection 189(1) of the Act and subsection 188.1(4) of the Act apply to different parties, each of these provisions must be considered independently of each other.” In this regard, the CRA indicated that the fact that a taxpayer is not subject to the subsection 189(1) tax in respect of a loan received from a registered charity, in and of itself, does not preclude the charity from being assessed a subsection 188.1(4) penalty where the facts and circumstances establish that the loan is an undue benefit conferred on that taxpayer.

Termination Clause Found to be Void and Unenforceable by the Court of Appeal

By [Barry W. Kwasniewski](#)

On December 17, 2019, the Court of Appeal for Ontario (the “Court”) released its decision in [Rossman v Canadian Solar Inc](#) (“*Rossman*”), holding that the motions judge did not err in finding the termination clause in an employment agreement (the “Termination Clause”) to be void and unenforceable. In this case, the Court reiterated several important employment law principles, which included highlighting the importance of the need of certainty for employees to know when their employers may terminate an employment relationship, and also giving reasons for the distinction made by the courts in interpreting employment contracts as being different from other commercial agreements. In finding the Termination Clause to be void and unenforceable, the Court agreed with the motions judge that (i) on its face, the Termination Clause showed an intention to contract out of the notice provisions of the *Employment Standards Act, 2000*; and (ii) the Termination Clause was clearly ambiguous, despite the presence of a saving provision. This *Bulletin* provides a review of the principles outlined by the Court, and its reasoning in *Rossman*, which will have relevancy to charities and not-for-profits.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 460](#).

The Federal Court Establishes the Test for a Site-blocking Order

By [Sepal Bonni](#) and [Sean S. Carter](#)

In [Bell Media Inc v GoldTV.Biz](#) the Federal Court issued a ground-breaking “site-blocking” order requiring third party Internet Service Providers (“ISPs”) to block access to certain websites operated by anonymous defendants that distribute infringing television and motion picture content. The decision by the Federal Court is important for copyright owners, as it is the first time a site-blocking order has been issued by the Federal Court, and therefore offers a new remedy for copyright holders to prevent access to infringing content.

The order arose after the plaintiffs, three Canadian media companies, filed a copyright infringement action against a number of anonymous developers that operate an unauthorized streaming service that allows users to access television and motion picture content online. After attempts to enforce prior injunctions against the website operators were ignored, the plaintiffs sought a site-blocking order to compel third party ISPs to block customers from accessing the infringing content. Although there is established case law to allow a remedy which compels innocent third parties to provide documents and information for the purposes of a lawsuit, this type of injunctive relief to provide an avenue of redress for those who wish to compel innocent third parties to block access to a website was not previously established in Canadian law.

Although unopposed by most ISPs, one ISP (Teksavvy) opposed the order on various grounds, including arguing that the court did not have the requisite jurisdiction to issue the site-blocking order. In conducting its analysis, the court reached into both the law of the United Kingdom (“UK”) and Canada to justify the court’s jurisdiction to grant the site-blocking order, pursuant to its equitable powers to issue injunctions. Canadian law to issue injunctive relief (or the power to order a party to carry out an action or refrain from it) includes the judicial discretion to order it where it is “just and convenient,” relying on both jurisprudence from the UK, and the decision of the Supreme Court of Canada (“SCC”) in *Google Inc v Equustek Solutions Inc* (“Google”), discussed in the [August 2017 Charity & NFP Law Update](#). In *Google*, the SCC referred to its basic injunctive relief powers when it found used this jurisdiction to order the tech giant Google (the non-party respondent) to delist from its search engine all websites associated with infringing content. What had not previously been specific relief that a party could request under injunctive relief was this “site blocking” order, and in this way, the SCC is taking established equitable principles and remedies and applying them to the modern context.

The court had to develop a test for this new type of injunctive relief, and gave lengthy reasons for ultimately granting the site-blocking order. In particular, the court applied the standard test for interlocutory injunctions (*i.e.*, there is a serious issue to be tried; that irreparable harm will result if the injunction is not granted; and that the balance of convenience favours the plaintiffs). However, in determining the balance of convenience, the court considered a variety of factors that had been applied in similar copyright infringement cases in the UK, including [*Cartier International AG v British Sky Broadcasting Ltd.*](#) (“*Cartier*”), to ensure the order was proportional. The eight factors considered were necessity, effectiveness, dissuasiveness, complexity and cost, barriers to legitimate use or trade, fairness, substitution, and safeguards.

The court noted that the “necessity” factor in *Cartier* was tied to the “irreparable harm” and therefore considered it as part of the irreparable harm analysis. In the final element of the test, the court used the remaining factors set out in *Cartier* as a framework in determining the “balance of convenience” in the test for injunctive relief. Using this approach, the court found there was a serious issue to be tried, that the plaintiffs would incur irreparable harm given that the defendants were unknown and there was a strong case of ongoing infringement, and that the balance of convenience favoured the plaintiff given that the need to prevent the harm outweighed any impact of the order on the ISPs or Canadian customers.

Interestingly, this decision shows the court’s willingness to work with existing equitable relief and the need to find new and relevant ways to apply it in the context of new technology and culture. This case may well be a steppingstone to using this equitable remedy to fashion other types of specific orders that are important for copyright owners, especially when online infringers are unknown, or are located in foreign jurisdictions. Corporations, whether they are charities, not-for-profit, or for-profit should carefully consider how this may both impact their operations, both from the perspective of inadvertent infringement (including by employees or volunteers); and, how it provides an established way for copyright holders to protect themselves online by requesting the court to impose this new “site blocking” injunctive remedy.

Alberta Court of Appeal Rules that Charter Applies to Freedom of Expression by Students on University Campus

By [Jennifer M. Leddy](#) and [Terrance S. Carter](#)

On January 6, 2020, the Alberta Court of Appeal (the “Court”) released its decision in [*UAlberta Pro-Life v Governors of the University of Alberta*](#), which found that the *Charter* applies to how the University of

Alberta (the “University”) sets conditions which affect the freedom of expression by its students on campus. This summary is only a very brief overview of a complicated decision with extensive reasons.

On March 3 and 4, 2015, a student association, UAlberta Pro-Life (“Pro-Life”), with the approval of the University, organized an on-campus demonstration. On both dates, the event attracted groups of counter-protestors, including University students, faculty, staff, and the general public, who objected to the Pro-Life event on the basis that it was “not conducive to maintaining ‘safe spaces’ on University campus.”

Pro-Life submitted a complaint to the University alleging that a number of individual counter-protestors were in breach of the University Code of Student Behaviour. However, after an internal investigation, the University decided not to take disciplinary action against any of the counter-protestors. As well, in early 2016, when Pro-Life requested permission for another demonstration, the University required Pro-Life to pay \$17,500 for the cost of security, with \$9,000 to be deposited in advance of the event, and suggested, in the alternative, that Pro-Life hold the event “in an indoor location like a classroom,” which would presumably reduce the level of security required.

After exhausting the University’s internal appeal channels, Pro-Life applied to the Alberta Court of Queen’s Bench for judicial review challenging both the decision not to take disciplinary action against the counter-protestors (the “Complaint Decision”) and the decision regarding the cost of security (the “Security Costs Decision”). The Alberta Court of Queen’s Bench dismissed the application with respect to both decisions.

The Court of Appeal dismissed the appeal with regard to the Complaint Decision. However, regarding the Security Costs Decision, the court held that the University’s regulation of freedom of expression of students on campus should be considered a form of “governmental action” subject to the *Charter*.

The court stated that the University was subject to the *Charter* because education by means of free expression has been the core purpose of the University since it was established by the government and the grounds of the University are physically designed to ensure that students learn, debate and share ideas in a community space that is “hospitable to a pursuit of the truth about all things without a prescribed pre-definition of truth before the pursuit begins.”

Recognizing the degree of deference available to the University under the frameworks of “proportionality” and “reasonableness” established by the Supreme Court of Canada in its decisions in *Dore*, *Loyola High School* and *Trinity Western University*, the Court stated that this decision “does not threaten the ability of

the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources.”

The University alleged that the content of the expression of Pro-Life was “designed to be controversial”, “evoke a vigorous and emotional response”, and sought “public controversy”. However, recognizing that the tone and content of the expression is relevant in determining whether any conditions imposed constitute a reasonable and proportional limitation, the Court held that this consideration could not justify a complete suppression of the event as would be the case with the cost barrier imposed in this situation. The Court also suggested that, as a matter of reasonable and proportional limitation, the University could propose alternative pamphlets or displays that would be less provoking as a condition of the University providing appropriate security for the event. This was “not to suggest any specific answer for this situation if something like it comes up again. It is to suggest that if the University had the burden of establishing the limitation, it would have a full opportunity to do so.”

It is important to note that this decision extends only to the University’s regulation of freedom of expression of students on its grounds, which should be considered a form of “governmental action” subject to the *Charter*. The Court did not decide that all of the University’s activities are subject to the *Charter*. In addition, the judgment is only binding in Alberta.

Anti-Terrorism/Money Laundering Update

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

US *Global Fragility Act of 2019*

On December 20, 2019, the US *Global Fragility Act of 2019* (the “GFA”) was signed into law as part of the US budget bill, [Further Consolidated Appropriations Act, 2020](#), establishing for the first time a comprehensive approach to the US’ diplomatic, development and security efforts, involving all relevant Federal departments and agencies in coordination with relevant international and multilateral development and donor organizations, to address the root causes of violence and instability around the world. The GFA requires the President of the US, in coordination with the Secretary of State, the Administrator of the United States Agency for International Development (“USAID”) and other high-ranking officials, to establish and implement a 10-year Global Fragility Strategy to help stabilize conflict-affected areas and lead international efforts to prevent extremism and violence. The President will also be required to select certain countries as “priority countries” for the purposes of implementing the Global Fragility Strategy

and report to Congress every two years. The GFA will also replace the Relief and Recovery Fund with a new Prevention and Stabilization Fund to support stabilization of areas affected by armed conflict, and establishes the Complex Crises Fund to support programs and activities to prevent or respond to emerging or unforeseen events overseas.

EU Renews its Terrorist List

On January 13, 2020, the Council of the European Union renewed its EU terrorist list, which sets out persons, groups and entities subject to restrictive measures, including the freezing of assets in the European Union. This sanctions regime is separate from the European Union regime implementing United Nations Security Council resolutions 1267 (1999), 1989 (2011) and 2253 (2015) and targeting Al-Qaida and ISIL/Da'esh. The European Union also has its own sanctions regime with respect to ISIL/Da'esh and Al-Qaida and persons and entities associated or supporting those organizations.

OSFI Ceases Publishing Lists of Designated Persons

After regulatory amendments which came into force in March 2019 removed the monthly reporting requirement of federally regulated financial institutions under Canada's sanctions regime, the Office of the Superintendent of Financial Institutions ("OSFI") has [recently ceased publication of lists of designated persons](#). However, OSFI has stated that the lists are still available from other public sources accessible online, such as Global Affairs Canada's [Listed Persons website](#) and Public Safety Canada's [Listed Terrorist Entities website](#).

Charities Legislation & Commentary, 2020 Edition Now Available

Co-Edited by Terrance S. Carter, Maria Elena Hoffstein, and Adam Parachin (LexisNexis Butterworths, December 2020)

The 2020 Charities Legislation & Commentary, co-edited by Terrance S. Carter, M. Elena Hoffstein and Professor Adam Parachin, was published on December 5, 2019, and is now available. This consolidation provides an updated tool to facilitate charity law research by setting out excerpts from, and in some cases the entire text of approximately 145 key federal and Ontario statutes and 75 regulations that apply to charities current to August 10, 2019. Order the book by clicking [here](#).

IN THE PRESS

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

RECENT EVENTS AND PRESENTATIONS

Charities and Not-for-Profit – Year-End Wrap Up and More was presented by Terrance S. Carter at the AJAG Professional Development on December 10, 2019 in Markham, Ontario.

UPCOMING EVENTS AND PRESENTATIONS

[Ontario Bar Association’s Institute](#) will be held on Tuesday, February 4, 2020 in Toronto, Ontario. Terrance S. Carter will present an information session on **Essential Trademark Issues for Charity and Not-For-Profit Lawyers**.

[CSAE Winter Summit](#) will be held on Thursday, February 6, 2020 in Alliston, Ontario. Terrance S. Carter will present a session on **The Changing Compliance Landscape for Charities and NFPs**.

[CPA Canada Not-for-Profit Forum 2020](#) will be held on Monday, February 10, 2020, in Vancouver, B.C. Terrance S. Carter will participate in a panel discussion that will cover the most significant issues and opportunities in the not-for-profit sector. Others on the panel include Alison Brewin from Vantage Point and Paul Nazareth from the Canadian Association of Gift Planners.

[The 13th Annual Ottawa Region Charity & NFP Law Seminar](#), hosted by Carters Professional Corporation in Ottawa, Ontario, will be held on Thursday February 13, 2020. Guest Speaker includes **Tony Manconi**, Director General of the Charities Directorate of the CRA. [Brochure](#) and [online registration](#) are available on our website. Early bird deadline expires on February 3, 2020.

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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, 2019), 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. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.



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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.



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