

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

APRIL 2021

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RECENT PUBLICATIONS AND NEWS RELEASES

Government Responds to Recommendations of Senate Report on Charities & NFP Sector

By [Terrance S. Carter](#) and [Esther S.J. Oh](#)

The Federal Government published a detailed [response letter](#) on March 30, 2021 to the Senate’s special report on the charitable and non-profit sector. In this regard, as discussed in [Charity & NFP Law Bulletin No. 451](#), the Special Senate Committee on the Charitable Sector (“Committee”) had earlier released its final report, [Catalyst for Change: A Roadmap to a Stronger Charitable Sector](#) (“Report”), on June 20, 2019. The Report was the result of a year-long study and included 42 recommendations to the Government of Canada, officially adopted by the Senate of Canada on November 30, 2020, (“Recommendations”), with a focus on key themes to strengthen the charitable and non-profit sector, while proposing measures to update the legal framework. The Committee was formed in 2018 to examine the impact of federal and provincial laws and policies governing registered charities, non-profit organizations and other similar groups, and to examine the impact of the voluntary sector in Canada.

The 20-page letter from the Minister of National Revenue reviews and responds to all of the 42 Recommendations. This *Bulletin* provides an overview of the Government’s extensive response to the Report and highlights comments of particular interest.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 491](#).

CRA News

By [Jennifer M. Leddy](#)

CRA Updates Charitable Activities Webpage

On April 1, 2021 the Charities Directorate of the Canada Revenue Agency (“CRA”) updated its “[Charitable activities](#)” webpage, by succinctly stating that charitable activities include: 1) a charity carrying on its own activities either through its own staff, volunteers and directors or through intermediaries, 2) making gifts to qualified donees (usually other registered charities) and 3) conducting public, policy and development activities. It also draws attention to two CRA Guidances on carrying on charitable activities through an intermediary outside and inside Canada, which were updated on November 27, 2021: Guidance CG-002, *Canadian registered charities carrying on activities outside Canada* and Guidance CG-004, *Using an intermediary to carry on a charity’s activities within Canada*. Both

Guidances are discussed in [Charity & NFP Law Bulletin No. 484](#). The webpage also includes information on election advertising and third-party registration with Elections Canada.

Budget 2021 Proposes Expanded Audit Authority for the CRA

The [2021 Federal Budget](#) (“Budget 2021”) released on April 19, 2021 proposes to expand the scope of the CRA’s authority to audit taxpayers, including charities and not-for-profits. Amendments to the *Income Tax Act* (“ITA”) and *Excise Tax Act* (“ETA”), among other legislation, have been proposed in response to the Federal Court of Appeal’s decision in *Canada (National Revenue) v Cameco Corporation*. That decision called into question the CRA’s authority to require persons to answer all proper questions and to provide all reasonable assistance relating to the administration or enforcement of the ITA, as well as the extent to which CRA officials can require oral responses to questions.

Budget 2021 proposes to amend the ITA and ETA to require taxpayers to make their books and records available to CRA officials and to “give them all reasonable assistance to inspect the records, books, accounts and vouchers and answer all proper questions orally or in writing, in any manner specified by the [CRA officials].” The proposed amendments would also give CRA officials the authority to require persons to respond to their questions orally or in writing.

Virtual Web Assistant Now Available on Charities and Giving Webpage

As announced in the CRA’s Spring 2021 email newsletter, the CRA’s virtual web assistant, “Charlie the Chatbot”, is now available on the [Charities and Giving](#) and [Contact Us](#) webpages. Charlie the Chatbot will answer various frequently asked questions that users type into a chat window about tax filing, and has been expanded to help individuals navigate the Charities Directorate’s webpages about applying for charitable registration, filing returns, and education resources. At the time of writing, Charlie the Chatbot remains a pilot project for the CRA, and may not be able to answer all questions users ask.

Federal Budget 2021: Impact on Charities and Not-for-Profits

By [Terrance S. Carter](#), [Theresa L.M. Man](#), [Ryan M. Prendergast](#), [Esther Shainblum](#), [Luis R. Chacin](#) and [Sean S. Carter](#)

After COVID-19 led to the cancellation of the 2020 Federal Budget, Finance Minister Chrystia Freeland tabled the [fifth budget](#) of the Liberal Federal Government (“Budget 2021”) on April 19, 2021. Released thirteen months into the pandemic, Budget 2021 is comprised of four parts focussing on various priorities:

Finishing the Fight Against COVID-19; Creating Jobs and Growth; A Resilient and Inclusive Recovery; and Fair and Responsible Government.

This *Charity & NFP Bulletin* provides a summary and commentary on provisions proposed in Budget 2021 that impact the charitable and the not-for-profit (“NFP”) sectors. Budget 2021 includes a number of legislative proposals that could impact the operations of charities, such as a consultation to amend the disbursement quota set out in subsection 149.1(1) of the *Income Tax Act* (“ITA”), as well as proposed amendments to the ITA to prevent terrorist abuse of charitable status, together with revisions to the ITA definition of “ineligible individuals”. Additionally, in an effort to support Canada’s recovery in the wake of the pandemic, Budget 2021 proposes to provide temporary support to Canada’s social sector, including charities, non-profits, and “social purpose organizations”, by providing financial support and funding through various programs and funds.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 492](#).

Corporate Update

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

Amending Regulations Proposed to Give Effect to Bill C-25 Provisions in CNCA

The [Regulations Amending Certain Regulations Administered by the Department of Industry](#) (“Amending Regulations”) were published in the Canada Gazette on March 27, 2021, and contain proposed amendments to the Canada Not-for-profit Corporations Regulations (“CNCR”) among others. By way of background, Bill C-25, An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profits Corporations Act and the Competition Act (“Bill C-25”) received Royal Assent on May 1, 2018, and introduced various amendments to the Canada Not-for-profit Corporations Act (and other acts), as discussed in the [May 2018 Charity & NFP Law Update](#). The Amending Regulations have been proposed in order to enable certain provisions introduced through Bill C-25 to become operational. These provisions include amendments to the CNCR concerning the time periods for which the Director must keep and produce certain corporate documents, as well as technical regulatory amendments to the CNCR, such as fixing time periods, changes to the name granting rules, and fixing typographical errors. If approved, the Amending Regulations would come into force on July 1, 2021 at the earliest.

Corporations Canada Introduces New Refund Policy

Corporations Canada has stated that it now refunds fees charged for services delivered to federal not-for-profit corporations in accordance with Innovation, Science and Economic Development Canada's new Remission Policy, in an [announcement](#) released on April 1, 2021. Refunds will be issued for services costing \$200 or more when Corporations Canada has failed to respond within its service standard period plus a grace period. The service standard period varies, based on the service provided and the method of delivery (*i.e.* online or non-online). Where a corporation is eligible for a refund, Corporations Canada will provide a reimbursement, using the original method of payment, of 50% of the service cost. For non-online services, corporations will be contacted for account information in order for the refund to be processed.

Ontario Extends Relief for Members' and Directors' Electronic Meetings to End of 2021

As reported in the [October 2020 Charity & NFP Law Update](#), the Ontario government provided temporary relief to *Corporations Act* ("OCA") and *Co-operative Corporations Act* ("CCA") corporations in relation to holding electronic meetings of directors and members in response to the COVID-19 pandemic. In this regard, the OCA and CCA were amended on May 12, 2020, relaxing the rules in the statutes to permit electronic meetings of directors and members to be held during the "temporary suspension period", regardless of contrary provisions in a corporation's constating documents. While the temporary suspension period was already extended to May 31, 2021, the Ontario government has again further extend the temporary suspension period under the OCA and CCA, effective until December 31, 2021, through the filing of [O Reg 544/20, Extension of Temporary Suspension Period](#) and [O Reg 543/20 Extension of Temporary Suspension Period](#), respectively. However, the timelines for annual general meetings is not extended.

Ontario Bill 276 Proposes Amendments, Including Temporary Relief, to ONCA

Ontario's [Bill 276, Supporting Recovery and Competitiveness Act, 2021](#) proposes similar relief for electronic meetings under the Ontario *Not-for-Profit Corporations Act* ("ONCA"). Bill 276, was introduced on April 15, 2021, and has been referred to the Standing Committee on General Government on April 26, 2021. Bill 276 proposes amendments to the OCA and ONCA in anticipation of the proclamation of the ONCA before the end of 2021. This includes amendments to permit corporations to hold electronic meetings during the temporary suspension period until December 31, 2021, regardless of contrary provisions in a corporation's constating documents.

While not pertaining to the temporary suspension period, the Bill also makes various ‘housekeeping’ amendments to give effect to the removal of class voting and non-voting members’ rights as a result of Motion 89, as discussed in the [September 2020 Charity & NFP Law Update](#).

Federal Court Confirms CRA’s Discretion Regarding ATIP Requests

By [Esther Shainblum](#) and [Luis R. Chacin](#)

The decision of the Federal Court in [3412229 Canada Inc. v. Canada \(Revenue Agency\)](#), released on December 16, 2020, provides a review of Access to Information and Privacy requests (or “ATIP requests”) made under the federal *Access to Information Act* (“ATIA”), the exemptions that the CRA may rely on and the discretion CRA may exercise in redacting or withholding information in response to an ATIP request. This case is relevant to charities and not-for-profits seeking to access information held by the CRA by way of an ATIP request submitted in the course of an audit.

In [3412229 Canada Inc. v. Canada \(Revenue Agency\)](#), the applicants were a group of closely held numbered companies that had been the subject of a CRA audit in relation to their offshore investments. During and following the audit, the applicants made a number of ATIP requests pursuant to the ATIA and, in response, the CRA disclosed a large number of the requested documents to the applicants, while also claiming various exemptions over some of the documents and information disclosed.

After numerous complaints to the Office of the Information Commissioner and judicial proceedings challenging the CRA’s disclosure decisions, with mixed success, the applicants gained access to the previously withheld information under the evidentiary disclosure regime available in civil and tax litigation proceedings. However, the applicants also sought judicial review challenging the CRA’s decisions to exempt various documents and information from disclosure in response to the various ATIP requests and sought an order directing the CRA to conduct further investigation of its records to obtain additional documentation.

Of note to charities and not-for-profits, the CRA had relied on section 16(1)(b) of the ATIA, which states:

16 (1) The head of a government institution may refuse to disclose any record requested under this Part that contains

[...]

(b) information relating to investigative techniques or plans for specific lawful investigations;

In this regard, the applicants acknowledged the CRA’s discretionary ability to exempt records containing information relating to “investigative techniques or plans for specific lawful investigations”, but argued that the CRA’s reliance on this section to exempt “virtually all” records flowing from an audit was contrary to the ATIA because, as established by the Supreme Court of Canada precedent in *R v. Jarvis*, 2002 SCC 73, there is a distinction between an “audit”, which seeks to impose tax liability, and an “investigation”, which seeks to impose penal liability. As such, the applicants argued that the discretion of the CRA to withhold disclosure of documents and information pursuant to section 16(1)(b) of the ATIA would not be applicable in the case of an audit, only in the case of an investigation.

The Court rejected the applicant’s argument and agreed with the CRA, pointing to subsection 16(4) of the ATIA, which defines the term “investigation” as including an investigation that “pertains to the administration or enforcement of an Act of Parliament”. Since a tax audit pertains to the administration and enforcement of the ITA, which is federal legislation, the Court concluded that a tax audit is caught by the definition of “investigation” and, therefore, the CRA can rely on the exemption in section 16(1)(b) of the ATIA to redact information related to either audit techniques used by the CRA to identify taxpayers or guide its auditors in applying a specific ITA provision or a risk assessment tool used to evaluate and manage the risks of an ongoing audit.

The Court found that the CRA had reasonably exercised its discretion to withhold the information by considering that the negative consequences of disclosure would outweigh the public interest in disclosing the information. The CRA had a legitimate interest in protecting the investigative techniques that could be used in future audits, as well as the risk assessment tool being used for a specific ongoing audit.

In dismissing the application for judicial review, the Court also considered the mandatory prohibitions against disclosure in subsection 24(1) and Schedule II of the ATIA, which make reference to section 241 of the ITA, pursuant to which the CRA is not permitted to disclose third-party taxpayer information. The Court agreed with the CRA and, supported by the precedent of the Supreme Court of Canada in *Slattery (Trustee of) v. Slattery*, [1993] 3 SCR 430, found that subsection 24(1) of the ATIA provides a mandatory exemption that reflects “the importance of ensuring respect for a taxpayer’s privacy interests” and “[o]nly in exceptional situations does the privacy interest give way to the interest of the state”.

Ontario Superior Court Reluctant to Interfere in Sikh Temple Membership Dispute

By [Ryan M. Prendergast](#)

Ontario's Superior Court ruled that even a technical irregularity in following its by-laws should not invalidate the decision of a religious organization to make decisions about its membership. Affirming recent jurisprudence, [Dhaliwal v Singh](#), is an October 7, 2020 judgment that upheld a Supreme Court of Canada precedent that courts should not interfere in questions of membership in a religious organization except where there is an underlying legal dispute to decide. The applicant was a director of a non-profit organization, Nanaksar Satsang Sabha of Ontario ("Nanaksar"), that operated a Sikh temple in Brampton. After his membership was terminated and he was removed as a director due to allegations of misappropriating funds, the applicant sued for court intervention to declare his removal invalid and to have both his membership and directorship reinstated. The court dismissed the application.

Nanaksar had three directors: the applicant, Lakhvir Dhaliwal; a respondent, Gurmeet Singh; and Gurmukh Hunjan, a third director, and Nanaksar's president — initially a respondent in this case (but died March 3, 2020). According to the respondents, who had surveillance footage, Dhaliwal pocketed donation money without their consent on four occasions in January and February, 2019. The respondents sent the applicant a letter on May 12, 2019, advising him that, pursuant to Nanaksar's by-laws, they were removing his membership and office as Treasurer, requesting that he return keys, documents and property. The letter noted that Dhaliwal could make written submissions and had 15 days before the final decision. Dhaliwal contended that he was authorized to pocket the donation to pay some debts of Nanaksar by Hunjan; the respondents denied any such authorization was given. Dhaliwal sent a response letter, stating they had "no authority" to terminate his membership or remove him as Treasurer. He refused to return anything. Dhaliwal did not attend a May 27th, 2019 meeting, where a resolution was passed terminating his membership, and a second resolution passed replacing him as a director. Under Nanaksar's by-laws, to be a director required membership.

Dhaliwal argued "that Hunjan and Singh, illegitimately and wrongfully terminated the applicant's membership, acted in bad faith and contrary to the principles of natural justice, procedural fairness, and good governance." According to Dhaliwal's reading of Nanaksar's by-laws, the respondents failed to provide him with proper — seven days' — notice of the May 27th meeting, as they only sent him a text message on May 22nd, five days prior. He also submitted evidence of instructions he received from Hunjan

relevant to the four occasions on which he pocketed the donation money. Further, a failure to call an Annual General Meeting since 2015 precluded the election of directors, Dhaliwal argued.

The respondents argued that they complied with Nanaksar's by-laws. They also argued that "Questions of membership in religious or voluntary associations are outside the jurisdiction of" the court. They also stated that the video footage "speaks for itself."

Justice Thomas A. Bielby did not decide on the question of whether Dhaliwal was or was not misappropriating donations. Rather, the judgment focused on the issue of whether the respondents acted within their authority when they terminated Dhaliwal's membership. Reviewing the *Corporations Act*, sections 127.2(1) and 129(1), Bielby J considered the statute "a vehicle by which members can make a change" and for directors "to pass by-laws, to regulate the qualifications of membership, and the ability to suspend and terminate memberships." Citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, Bielby J adopted as part of his reasons that courts will not intervene in decisions of membership in a religious organization " 'save where it is necessary to resolve underlying legal dispute' (para. 39)." From what was presented, Bielby J considered that the respondents had evidence on which to base their decision, stating they "were in a better position to judge than this court and the court should be reluctant to interfere." Nanaksar's by-laws set out the mechanism and procedure by which the board could terminate membership. While the notice of the May 27th meeting may have "lacked formality" according to Bielby J, "the court ought not to interfere in breaches said to be technical in nature." The procedure set out in Nanaksar's by-laws was "effectively, met." Ruling that the respondents were within their authority to terminate Dhaliwal's membership, Bielby J further concluded that, by operation of the by-laws, his "appointment as a director was automatically vacated".

BC Court Overturns Purported Removal of Directors of BC Society

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

The Supreme Court of British Columbia released its decision in [Brown v Brousseau](#) on February 2, 2021, in which it considered a dispute between two groups of directors of the Burns Bog Conservation Society (the "Society"). The dispute involved, among other things, disagreement on the validity of the purported removal of certain directors by a minority of the board. In this regard, the Society's board had nine directors split into two factions, with five directors on one side (the "Majority Directors") and four directors on the other (the "Minority Directors"). A dispute between the Majority Directors and Minority

Directors began when, after receiving allegations of employee bullying and harassment against Ms. Olson (one of the Minority Directors), the Majority Directors voted to remove Ms. Olson from her position as executive director and limit her responsibilities as president. The Minority Directors voted against Ms. Olson's removal. At a subsequent meeting, the Majority Directors also voted to remove Ms. Von Kish, another Minority Director, from her role as secretary.

One day prior to a board meeting scheduled for June 25, 2020, Ms. Von Kish emailed the board with notice of a motion to remove all of the Majority Directors (the "Removal Motion"). The June 25 board meeting then proceeded according to the meeting agenda, (which did not include the Removal Motion). However, during the meeting Ms. Von Kish raised the Removal Motion during a vote on a separate agenda item. Ms. Von Kish then purported to take minutes of the board meeting (despite having been removed from her role as secretary), which minutes indicated that the Removal Motion was approved. The Minority Directors then took steps to invalidate previous motions approved by the Majority Directors, remove the Society's accountant, replacing her with Ms. Von Kish, file a notice of change to remove the Majority Directors from the BC Registries records, change the Society's bank account signatories, and redirect the Society's mail. This dispute resulted in the Society's bank accounts being frozen and its mail being held by Canada Post, which prevented the Society from paying rent, staff salaries, and meeting other financial obligations.

The Majority Directors argued that they did not vote on or approve the Removal Motion. In its analysis, the court found subsection 50(1) of the British Columbia *Societies Act* provides that directors can only be removed by way of a special resolution, or in accordance with a society's by-laws, which was not done. The court further found that the Society's by-laws provided that the Society had adopted *Robert's Rule of Order Newly Revised, 11th ed* ("*Robert's Rules*") as its rules of order. In accordance with *Robert's Rules*, the court found that "directors were only entitled to disrupt the order of business set out in that agenda with a two-thirds vote of the directors", and that "Ms. Von Kish simply took it upon herself to raise the Removal Motion at various random times during the meeting." In summary, the court held that there had not been a vote in favour of the Removal Motion in contravention of the *Societies Act* and the Society's by-laws. Further, even if a vote had been held validly, any such vote was not validly held in accordance with *Robert's Rules*.

The court then referred to section 105 of the *Societies Act*, which allows courts to remedy an "omission, defect, error or irregularity in the conduct of the activities or internal affairs of a society" that results in a

contravention of the Act, the society acting contrary to its purposes, non-compliance with the by-laws of the society or other problematic scenarios listed in the Act. Relying on previous case law, the court found that intervention was warranted where “significant irregularities” existed and it was “unrealistic” to suggest “that there was any real possibility that any disagreements could be worked out informally or by some internal process”. The court found that the Removal Motion caused a significant irregularity by depriving the Majority Directors of their “legitimate right” to properly govern the Society, which in turn resulted in significant disruptions to the affairs of the society. Given the animosity between both factions of directors, the court found it appropriate to intervene, making 16 separate orders and declarations, including declaring that the Removal Motion was invalid and reinstating the Majority Directors. The court ordered that the Minority Directors cease and desist from holding themselves out as the sole directors of the Society and cease and desist from stating that the Majority Directors have been removed from the board. The court also ordered the Society to hold its annual general meeting within 60 days from the date of the decision in order to elect a new board of directors.

This case serves as a reminder to charities and not-for-profits that the board of directors governs an organization by majority vote in accordance with the organization’s by-law and governing legislation, and a minority faction of directors cannot do so. While courts may be reluctant to interfere in the internal affairs of an organization, where the actions of a minority faction of the board causes significant disruption in the operations of the organization contrary to its by-law and governing legislation, the courts will exercise their jurisdiction to take remedial action.

BC Supreme Court Applies *Cy-près* Doctrine to “Flow-through Gift”

By [Jacqueline M. Demczur](#)

[*Galloway Estate v British Columbia Society for the Prevention of Cruelty to Animals*](#) (“Galloway”) is a March 10, 2021 judgment of the Supreme Court of British Columbia regarding an interesting application of the *cy-près* doctrine in the case of testamentary gifts.

In *Galloway*, the wills of twin sisters, Sheila Holland (“Sheila”) and Lea Galloway (“Lea”), contained similarly worded residual provisions which provided, on the death of the surviving sister, a testamentary gift to the Pacific Coast Public Television Association (“PCPTA”), among other charities. PCPTA was, at the time that these wills were made, a Canadian registered charity. Each bequest stated that the gift would only be made if PCPTA continued to be “in existence” at the time of the respective testator's death.

Sheila passed away on September 4, 2010 and Lea on May 3, 2020. Both testamentary gifts would, therefore, be distributed upon Lea's death. However, while PCPTA had been in existence at the time of Sheila's death, it was dissolved during Lea's lifetime. The petition of the estate trustee sought direction from the court for the distribution of the estates. Of note, in relation to the testamentary gifts to PCPTA, the court issued a *cy-près* order in favour of the US corporation which had been earlier designated to receive all "flow through gifts" from PCPTA.

In terms of the key background facts, PCPTA was incorporated in 1987 and was registered as a charity in Canada in order to issue tax receipts to Canadian donors wishing to support the programming of KCTS Television ("KCTS"), a US public broadcasting company that owned and operated a commercial-free educational channel, KCTS 9 or PBS Channel 9. KCTS was succeeded in 2015 by a US non-profit, Cascade Public Media ("CPM").

A key piece of information that was not included in the reasons for judgement in *Galloway* was that CPM is a 501(c)(3) organization in the US, which is generally considered to be the equivalent of a charity in Canada, with the ability to issue donation receipts for tax purposes. In addition, from the date of PCPTA's incorporation, a Sponsorship Agreement had been in place which directed all donations to PCPTA over to CPM (or its predecessor, KCTS, before 2015).

In 2017, the CRA began investigating organizations established for similar reasons as PCPTA and, as a result, determined that they were not independent, arms-length Canadian charities. PCPTA, anticipating that it would likewise be investigated by the CRA and assessed to be "merely an agent" for CPM under the Sponsorship Agreement then in place, filed to have its Canadian charitable status voluntarily revoked. This revocation became effective on March 24, 2018. PCPTA subsequently took steps to dissolve itself as a not-for-profit corporation on October 18, 2018.

CPM took the position that it was "in substance" the successor to PCPTA because, prior to PCPTA's dissolution, a gift to PCPTA was effectively a gift to CPM for which a Canadian tax receipt would be issued. In addition, CPM submitted that, pursuant to a separate Agency & Assumption Agreement between the parties for a period of ten years, CPM, as PCPTA's agent under this Agreement, assumed the debts and liabilities connected with PCPTA's wind-up and dissolution. Accordingly, it was CPM's position that a gift to PCPTA was "in effect, a flow through gift", and, therefore, fulfilled the testators' intention. Finally, given the "exclusive relationship" between PCPTA and KCTS 9, now operated by CPM, it was

argued that there were no other British Columbia- or Vancouver-based charitable organizations whose purposes were similar in nature to the purposes of PCPTA.

The Attorney General of British Columbia (“AG”) took the position that the gift given by Sheila disclosed a general charitable intent because PCPTA was in existence at the time of her death in 2010 and the gift should be subject to distribution under a *cy-près* scheme due to the exclusive relationship between PCPTA and KCTS 9, which was succeeded by CPM. However, the gift given by Lea, in the opinion of the AG, did not disclose a general charitable intent and should not be distributed to CPM under the *cy-près* doctrine because PCPTA was no longer in existence at the time of Lea’s death. The AG argued that Lea’s gift to PCPTA fails and should become part of the net estate to be divided among the remaining charitable organizations in existence at the time of her death.

Ultimately, the court agreed with CPM that there was an important relationship between PCPTA and CPM, and stated that the concept of a “successor” under the *cy-près* doctrine is not limited to a strict corporate successor but that the focus should be on which organization “succeeds” in meeting the testator’s charitable intent. As such, the court held that the testator “can be taken to have known that the sole purpose for the incorporation of PCPTA was to flow donations intended for the public broadcaster [...], now operated by CPM, through a Canadian charity which could issue charitable tax receipts to Canadian donors”. As a result, the court concluded that the gift left to PCPTA should be distributed to CPM under the *cy-près* doctrine.

The decision is important to emphasize to charitable corporations which dissolve themselves to ensure that they take appropriate steps prior to dissolution to appoint their successors in the event that future estate gifts may be received. As well, the decision is significant in making clear that courts will not be limited to applying the *cy-près* doctrine to benefitting only Canadian registered charities, particularly where a donor’s charitable intent is clear that they wished to benefit an intermediary with whom a Canadian charity worked closely.

Pregnancy a Factor for Court in Reasonable Notice Decision

By [Barry W. Kwasniewski](#)

A recent Ontario Superior Court decision considered pregnancy as a factor for calculating the reasonable notice period when an employee’s position is terminated. Released on February 26, 2021, [Nahum v Honeycomb Hospitality Inc.](#) cited Ontario precedent in awarding five months’ pay-in-lieu of reasonable

notice to the plaintiff, who had worked for the employer for a total of four-and-a-half months, but was pregnant at the time of her termination without cause. The court rejected the defendant's arguments that including pregnancy as a factor would create problems with human rights legislation, or that it would open up the determination to other physical factors, such as height, or even that a complainant must provide evidence that pregnancy negatively impacted their job prospects after termination. This *Bulletin* summarizes the facts of the case and highlights some of the reasoning in the court's analysis on factors for assessing reasonable notice of termination that employers, including charities and not-for-profits, must consider.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 493](#).

Federal Court of Appeal Confirms Narrow Trademark Protection for Acronyms

By [Sepal Bonni](#)

The Federal Court of Appeal dismissed an appeal by Loblaws Inc. ("Loblaws") from a decision of the lower court that held that Columbia Insurance Company, The Pampered Chef, Ltd., and Pampered Chef – Canada Corp. ("Pampered Chef") had not infringed Loblaws' well-known "PC" trademark. This case, [Loblaws Inc. v Columbia Insurance Company](#), released on February 15, 2021, will be of interest to charities and not-for-profits that use acronyms or short-form trademarks.

The case arose when Loblaws, the owner of the well-known family of registered and unregistered trademarks "PC", reflecting its "President's Choice" brand, brought an action before the Federal Court alleging that the Pampered Chef, through its use of the "PC" acronym with a spoon between the letters "P" and "C", was infringing Loblaws' trademark rights. At the trial level, after an analysis of the legal test for confusion, the court found that despite the fact that the [Loblaws' PC mark](#) and the [Pampered Chef mark](#) bore a certain degree of resemblance, there was no likelihood of confusion. Amongst other factors, the court reasoned that the Pampered Chef uses its PC acronym with a spoon between the "P" and the "C" and with its full corporate name or the full "Pampered Chef" trademark, therefore negating any likelihood of confusion.

The Federal Court of Appeal upheld the trial court's decision, dismissing Loblaws' appeal and finding that there was no likelihood of confusion between the two PC acronyms.

This decision is a reminder to charities and not-for-profits of the importance of conducting due diligence searches prior to using trademarks in order to avoid any potential confusion with another organization's

trademarks and therefore minimizing the risk of a trademark infringement lawsuit. Similarly, charities and not-for-profits that currently own and use acronyms as registered or unregistered trademarks should keep in mind that acronyms are afforded a very narrow scope of protection and third parties may use variations of the acronym without the charity or not-for-profit having the ability to stop such use. If acronyms are used, it is important that they at times be used without the full corporate name or the full trademark so that rights can accrue in the acronym. Lastly, charities and not-for-profits should diligently monitor the marketplace to ensure that third parties are not using confusingly similar trademarks, and to take appropriate action to enforce their valuable trademark rights where necessary.

Further Evidence Required to Demonstrate COVID Impact on Reasonable Notice for Termination

By [Barry W. Kwasniewski](#)

Not all jobs and skillsets have suffered an economic downturn during the pandemic, and should not receive a longer period of reasonable notice for termination during the pandemic without additional evidence, according to a recent Ontario employment case. [Marazzato v Dell Canada Inc.](#) is an Ontario Superior Court decision, released January 12, 2021. This decision adds further judicial commentary to the impact of the COVID-19 pandemic on calculating reasonable notice where an employer, including a charity or not-for-profit, terminates the employment contract without cause. The plaintiff's employment terminated in March, 2020, but he worked in computers, a field that the judge noted may actually have benefited economically from the increase in using the internet. Further evidence is necessary to demonstrate that the pandemic led to an economic situation that made it more difficult for the employee to find work, according to the judgment. That evidence was not presented in this case, and so the decision rested on the already established common law precedent for calculating reasonable notice.

G. Dow J first went through the factors to consider for calculating reasonable notice from *Bardal v Globe & Mail*, being age, duration of service, character of employment, and availability of similar employment. Applying the factors to this case, the court found that the plaintiff, Dan Marazzato, was 59 years old at the time of his termination on March 4, 2020. He had worked for the employer for 14 years. His income ranged from \$464,580.06 in 2017 to \$466,502.24 in 2018, to \$465,695.75 in 2019. As "Senior Manager Director Sales" he supervised nine employees and was the "top executive of the defendant for direct sales in Canada." Marazzato had made efforts to find new employment but remained unemployed as of the date of the hearing on December 9, 2020. "Mr. Marazzato was paid for two weeks of working notice, 14.2

weeks of statutory service and eight weeks of termination pay pursuant to the *Employment Standards Act, 2000*. Eight weeks of continuing benefits were also paid,” Dow J noted.

Marazatto sought 20 months of pay in lieu of reasonable notice. The employer argued instead for 16 months of pay-in-lieu. Although not “old” by today’s standard, according to Dow J, Marazatto’s age favours a longer period of reasonable notice, as does his 14 years of service. The senior management position he held along with the high-end of salary also favours a longer period of reasonable notice. While the difficulty for him to find a similar position favours longer reasonable notice as well, applying *Bardal*, Dow J did not consider the COVID-19 pandemic to further lengthen that period in this case. No evidence of “extra difficulty in finding and obtaining a new position” was presented, Dow J stated, and it would not be appropriate to speculate. In fact, it may actually be the case that certain positions and skill sets, such as working in computers as Marazatto did, would have gained an economic benefit from the pandemic because of the greater internet use and “remote practices”. Considering all the *Bardal* factors, Dow J decided that 18 months of reasonable notice was appropriate.

Ontario COVID-19 Update

By [Terrance S. Carter](#) and [Luis R. Chacin](#)

Ontario issued its third declaration of emergency on April 7, 2021 through [Ontario Regulation 264/21](#) under the *Emergency Management and Civil Protection Act* (the “EMCPA”). On the same day, the provincial government issued a stay-at-home order as [Ontario Regulation 265/21](#) under the EMCPA, stating that “[e]very individual shall remain at the residence at which they are currently residing at all times unless leaving their residence is necessary [...]” for permitted activities, such as work, volunteering, school and child care; obtaining goods and services; moving residences; gathering for the purpose of a wedding, funeral or religious service; or for health, safety and legal purposes. Both the declaration of emergency and the stay-at-home order were extended on April 16, 2021 for another period of 14 days past April 21, 2021 until May 5, 2021, unless they are extended again.

The extension until May 5, 2021 applies to all orders issued under the EMCPA, including Ontario Regulation 272/21: *Transfer of Hospital Patients* and Ontario Regulation 271/21: *Work Redeployment for Local Health Integration Networks and Ontario Health*, both made on April 9, 2021, and Ontario Regulation 8/21: *Enforcement of COVID-19 Measures*, made on January 12, 2021. Of note, Ontario Regulation 8/21: *Enforcement of COVID-19 Measures* was initially amended to provide police officers

and other provincial offences officers enhanced authority to support the enforcement of Ontario's stay-at-home order, including the power to “require any individual who is not in a place of residence to (a) provide the address of the residence at which they are currently residing; and (b) provide their purpose for not being at their residence” and require the driver of a vehicle to stop to answer such questions. However, a subsequent amendment to Ontario Regulation 8/21 clarified that such powers may only be exercised where “a police officer or other provincial offences officer has reason to suspect that an individual may be participating in a gathering that is prohibited [...] and believes that it would be in the public interest to determine whether the individual is in compliance”.

As well, orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (“ROA”) have been extended until May 20, 2021. Of note, [Ontario Regulation 82/20: Rules for Areas in Stage 1](#), has been amended and now provides that a gathering, whether indoors or outdoors, for the purposes of a wedding, a funeral or a religious service, rite or ceremony is limited to no more than 10 people.

Advisory Committee for the Charitable Sector (ACCS) Webinar May 17, 2021

The Advisory Committee for the Charitable Sector (“ACCS”), whose mandate is to advance emerging issues relating to charities and to ensure that the regulatory environment enables the important work of the sector, will be hosting a webinar on May 17, 2021 at 2 pm to explain its work to date. During the webinar, co-chairs Hilary Pearson and Bruce MacDonald, along with representatives from the Advisory Committee, will discuss the recommendations contained in ACCS Report #1 and other progress updates. Join the webinar to learn more about the Report #1 and the work of the Committee. [Register today](#).

IN THE PRESS

[Charity & NFP Law Update – March 2021 \(Carters Professional Corporation\)](#) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

[Federal Budget 2021: Impact on Charities and Not-for-Profits](#), written by Terrance S. Carter, Theresa L.M. Man, Ryan M. Prendergast, Esther Shainblum, Luis R. Chacin, and Sean S. Carter, was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

[Government Responds to Recommendations of Senate Report on Charities & NFP Sector](#), written by Terrance S. Carter and Esther S.J. Oh was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

RECENT EVENTS AND PRESENTATIONS

[Spring Charity & NFP Law Update, Including Federal Budget 2021](#) was presented by Terrance S. Carter on Tuesday, April 27, 2021, as part of the [Carters Spring 2021 Charity & NFP Law Webinar Series](#).

Essential Charity Law Update Webinar was presented by Terrance S. Carter at the Christian Legal Fellowship Webinar on Thursday, April 1, 2021.

UPCOMING EVENTS AND PRESENTATIONS

[Carters Spring 2021 Charity & NFP Webinar Series](#) will be hosted by Carters Professional Corporation on Wednesdays starting April 27, 2021. Click here for [online registration](#) for one or more sessions. The remaining session titles are as follows:

- **Donor Advised Funds: An Overview and Legal Implications** presented by Jacqueline M. Demczur, B.A., LL.B. on Tuesday, May 4th - 12:00 - 1:00 pm ET
- **Getting Ready for the Ontario Not-for-Profit Corporations Act (ONCA)** presented by Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. on Tuesday, May 18th - 12:00 - 1:00 pm ET
- **Outsourcing and Transfers of Personal Information for Charities and NFPs** presented by Esther Shainblum, B.A., LL.B., LL.M., CRM on Tuesday, May 25th - 12:00 - 1:00 pm ET

[CBA Charity Law Symposium](#) is being held virtually on May 14, 2021. Terrance S. Carter will participate in a panel discussion with Susan Manwaring, providing an update on the work of the ACCS Committee with the CRA. Additional details are expected soon.

[Not-For-Profit Law & Governance in the Creative Industries](#) is being hosted by GeneratorTO and Artists' Legal Advice Services (ALAS) as a panel discussion on May 11, 2021 from 1:00 to 2:30 pm. The Moderator is Catherine Lovrics, and the panelists include Terrance S. Carter, Carol Hansell, and Jane Marsland.

YWCA Canada is hosting a webinar on June 10, 2021 entitled *Governance 101 for Charities: Back to the Basics, Including Governance Issues and Directors' Fiduciary Duties*, presented by Theresa L.M. Man.

[STEP Canada 23rd National Conference](#) is being held virtually on June 14 and 15, 2021. Terrance S. Carter will participate in a panel discussion entitled Philosophical Philanthropy on June 15, 2021 from 1:45 to 2:30 pm ET. Other panelists include Troy McEachren (Moderator), Kathy Hawkesworth, and Malcolm Burrows.

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



[Terrance S. Carter](#), B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 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 articulated with and been an associate with Fasken (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.



[Luis R. Chacin](#), LL.B., M.B.A., LL.M. – Luis Chacin 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, Privacy 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 corporate and commercial law, anti-terrorism, charity, real estate, 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. 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 manages Carters' knowledge management and research division, and practices in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.



[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 *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law Seminar*TM.



[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*.



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[Ryan M. Prendergast](#), B.A., LL.B. – Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan has co-authored papers for the Law Society of Ontario, and has written articles for *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.charitylaw.ca. Ryan has been a regular presenter at the annual *Church & Charity Law Seminar*TM, 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., Student-at-law – Martin graduated from Osgoode Hall Law School 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 moot 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

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