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CHARITY & NFP LAW UPDATE

AUGUST 2021

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

AUGUST 2021

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CHARITY AND NFP MATTERS

Complexities of the Disbursement Quota Consultation: More Than Just A Number

By Terrance S. Carter, Jacqueline M. Demczur and Theresa L.M. Man

As anticipated, the Department of Finance Canada ("Finance Canada") launched a public consultation on August 6, 2021 (the "Consultation") in order to consider a potential increase of the annual disbursement quota ("DQ"). The DQ is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that charitable funds are used for charitable purposes and are not accumulated indefinitely. It is determined based on the value of a charity's property (*e.g.*, real estate, investments) that is not used for charitable activities or administration. A potential increase to the DQ was first proposed in the 2021 Federal Budget released on April 19, 2021. The Consultation, first announced on August 6, 2021, closes on September 30, 2021.

The Budget 2021 initiative comes at a time when there has been increased public discussion about the DQ. Much of that discussion revolves around if and by how much the DQ should be increased. These two questions, among others, have also been raised in the Consultation.

Finance Canada's Backgrounder to the Consultation includes comparisons to the United States and Australia where private foundations and funds have a minimum 5% disbursement requirement, while the Conservative election platform proposes a DQ of 7.5%. Other proposals have ranged as high as 10%. However, a thoughtful consultation about the DQ involves more than simply picking a number. It also requires consideration of the complex legislative and policy environment in which the DQ exists and the impact that any change in the DQ rate might have on registered charities.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 498*.

ONCA and Ontario Business Registry Come Into Force on October 19, 2021

By Theresa L.M. Man

At long last, the wait is almost over, and the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") will soon be proclaimed into force. The decade-old piece of legislation received Royal Assent in 2010 but will finally be brought into force on October 19, 2021, according to a provincial government

announcement published on August 17, 2021 (the "Announcement"). The Announcement indicates that the ONCA will come into force at the same time as the new Ontario Business Registry takes effect to provide a modern legislative framework for Ontario's not-for-profit corporations.

The ONCA was originally targeted to be proclaimed on July 1, 2013, but this was delayed to include amendments to the ONCA embodied in Bill 85. However, Bill 85 died on Order Paper due to the dissolution of the Ontario Parliament on May 2, 2014. In the fall of 2017, the Ontario government again began to move forward with the corporate reform for the not-for-profit sector by enacting Bill 154, making certain changes to the ONCA. Following the enactment of Bill 154, the Ministry indicated that it was upgrading technology to support the changes implemented by Bill 154 and to improve service delivery.

To prevent the ONCA from becoming subject to repeal pursuant to the *Legislation Act, 2006*, Motion 89 was carried on September 21, 2020, extending the deadline for the ONCA to be proclaimed by one year to December 31, 2021. However, the extension did not apply to provisions in the ONCA dealing with class voting and non-voting members' rights. The ONCA was subsequently amended by Bill 276, *Supporting Recovery and Competitiveness Act, 2021* to clean up remaining references to voting rights of non-voting classes and the requirement of mandatory class vote, among other changes. Finally, two regulations supporting the implementation of the ONCA and 12 regulations supporting the upcoming launch of the Ontario Business Registry were filed on June 3, 2021, as set out in the June 2021 *Charity & NFP Law Update*.

Once the ONCA is in force, the ONCA will automatically apply to all non-share capital corporations incorporated under Part III of the Ontario *Corporations Act*. Although it is optional for corporations to undertake a transition process within three years to amend their governing documents to comply with the rules in the ONCA, it is generally prudent for corporations to undertake the transition process in order to avoid uncertainty of their documents by: (a) filing articles of amendment; and (b) adopting a new ONCA compliant by-law. Further details on the transition process will follow.

What Charities and NFPs Need to Know for the Upcoming Federal Election

By Terrance S. Carter and Ryan M. Prendergast

Following the announcement by Prime Minister Justin Trudeau on August 15, 2021 calling a federal election, Canadians will be going to the polls on September 20, 2021. As the country prepares for the federal election, it is important that registered charities and not-for-profits ("NFPs"), also generally

referred to as non-profit organizations for tax purposes, are aware of what they can and cannot do regarding advocacy, including "lobbying", as well as what registered charities can do as part of the "public policy dialogue and development activities" ("PPDDAs") regime that replaced the previous rules concerning political activities in 2018.

There are several pieces of legislation at the federal, provincial, and municipal levels, which regulate the election-related activities of charities and NFPs. These include the *Income Tax Act*'s ("ITA") requirements for PPDDAs, as well as the *Canada Elections Act*, *Lobbying Act* (Canada), *First Nations Elections Act*, and provincial lobbyist legislation, such as the *Lobbyists Registration Act, 1998* (Ontario), among others. This *Charity & NFP Law Bulletin* provides a brief overview of the PPDDA regime and lobbying legislation that charities and NFPs need to be aware of in light of the ongoing election period.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 499*.

Corporate Update

By Theresa L.M. Man

Import and Export under CNCA Now Easier In Alberta, BC & New Brunswick

The *Canada Not-for-profit Corporations Act* ("CNCA") permits provincial non-share corporations to continue under and be governed by the CNCA ("import") and CNCA corporations to continue under and be governed by provincial/territorial non-profit statutes ("export"). To make it easier for the import and export process, the CNCA has pre-approved certain provincial/territorial non-profit acts to allow for a streamlined process.

On July 7, 2021, Corporations Canada updated its *Policy on continuance (import) of a body corporate into the Canada Not-for-profit Corporations Act* to add the Alberta's Societies Act and the New Brunswick Companies Act to the previous list of pre-approved provincial legislation (Ontario Corporations Act, Manitoba The Corporations Act, Newfoundland & Labrador Corporations Act, and Saskatchewan The Non-profit Corporations Act) for continuance from those acts to the CNCA.

On the same date, Corporations Canada updated its policy *Continuance (export) – Legislation pre-approved by Corporations Canada under the Canada Not-for-profit Corporations Act* to add the B.C. Societies Act and the New Brunswick Companies Act to the previous list of pre-approved provincial legislation (Alberta Societies Act, Manitoba The Corporations Act, Saskatchewan The Non-profit

Corporations Act, and Newfoundland and Labrador Corporations Act) that CNCA corporations can be exported to.

By pre-approving provincial legislation, corporations that apply for continuance to export to, or import from, those jurisdictions, can take advantage of a simplified procedure as part of Corporations Canada's policies. Applicants for import from pre-approved provincial legislation no longer require an excerpt of relevant provisions of their incorporation legislation to show that the continuance is permitted. They also do not require a signed legal opinion by a lawyer practicing in their incorporating jurisdiction. For CNCA corporations applying to export to provincial jurisdictions with pre-approved legislation, they no longer require extracts of relevant statutory provisions, signed legal opinions, or statements of a director or authorized officer of the corporation in their applications.

Yukon *Societies Act* Comes Into Force

The Yukon now has replaced its former *Societies Act* with new legislation of the same name governing not-for-profits. After receiving Royal Assent in 2018, the new *Societies Act*, SY 2018, c 15, was proclaimed into force on April 1, 2021 (the "New Act"). The New Act repealed and replaced the previous *Societies Act,* RSY 2002, c 206, upon proclamation. As of April 1, 2021, all societies will operate under the New Act. As reported in the February 2019 *Charity & NFP Law Update*, the New Act resulted from efforts of the Government of Yukon to modernize legislation in order to better serve the needs societies and the public, and it aims to clarify the framework for societies and the processes regarding their creation, governance and operation.

All pre-existing societies under the repealed old *Societies Act* are required to transition to the New Act within two years of the New Act coming into force, *i.e.*, by March 31, 2023. However, prior to transition, societies are required to continue to file under the old Act. To transition to the New Act, pre-existing societies must submit a transition application, and must complete the fiscal year reporting for the transition year under the old Act. As such, societies should (i) consider what needs to be done before submitting the transition application and completing the transitional fiscal year reporting period; and (ii) determine whether it would be better to transition as close as possible to the end of the society's current reporting period (fiscal year) for a smooth transition regarding new reporting requirements.

The transition process is explained in greater detail on the Government of Yukon's website, but generally requires societies to (i) ensure all their annual report filings are current; (ii) refile their constitution (under the existing name and with the existing purposes of the society); (iii) submit new by-laws that comply

with the New Act (whether the model by-laws or their own) that have been approved by special resolution of members that follow the new statutory requirements; (iv) have directors' information and the registered office address as currently in the registry; and (v) have information required by the application for transition form.

Legislation Update

By Terrance S. Carter

Bill C-30, *Budget Implementation Act, 2021, No. 1* Receives Royal Assent

The budget implementing bill for the 2021 Federal Budget, Bill C-30, *Budget Implementation Act, 2021, No. 1*, received Royal Assent on June 29, 2021 ("Bill C-30"). Bill C-30 includes amendments to the ITA that will impact charities and not-for-profits, as discussed in *Charity & NFP Law Bulletin No. 492*, including amendments for registered journalism organizations as a category of qualified donees (further discussed in the June 2020 *Charity & NFP Law Update*); enhanced anti-terrorism provisions; an expanded definition of ineligible individuals; provisions concerning suspension of receipting for false statements; and the removal of the restriction in the *Canada Small Business Financing Act* that excluded not-for-profit businesses, charitable businesses and businesses having as their principal object the furtherance of a religious purpose as eligible borrowers.

Bill C-30 also makes changes to the Canada Emergency Wage Subsidy ("CEWS"), revising the eligibility criteria and extending it until September 25, 2021, with authority provided for a possible further extension to November 20, 2021, and ensures that the level of CEWS benefits for furloughed employees continues to align with the benefits provided through the *Employment Insurance Act* until August 28, 2021.

Federal Court of Appeal Says CRA Too Restrictive in Refusing Registration for CAAAs

By Ryan M. Prendergast

Two successful appeals in the Federal Court of Appeal ("FCA") insist that the Canada Revenue Agency ("CRA") cannot treat its policy documents as binding the law for the purpose of registration of a Canadian Amateur Athletic Association ("CAAA"). The two separate appeals, *Athletes 4 Athletes Foundation v Canada (National Revenue)*, and *Tomorrow's Champions Foundation v Canada (National Revenue* (the "Appeals"), were heard together and released on July 21, 2021. The two appellants, Athletes 4 Athletes Foundation ("A4A") and Tomorrow's Champions Foundation ("TCF"), both British Columbia societies, had applied to the CRA in 2014 for Registered Canadian Amateur Athletic Association status ("RCAAA")

under the ITA, which would provide them with tax exemptions and make them "qualified donees", allowing the issuance of tax receipts for donations. After their applications were refused by the CRA, both A4A and TCF filed notices of objection concerning CRA's refusal for registration in 2016. However, in 2019, neither notice of objection had been responded to and so both applicants appealed under the *ITA* for judicial review directly to the FCA. The FCA allowed both appeals.

By brief way of background, subsection 248(1) of the *ITA* defines RCAAAs as CAAAs that have applied for and received registration, meaning that an organization must meet the requirements of a CAAA, as set out in subsection 149.1(1) of the *ITA* before being eligible to be registered as an RCAAA.

In the FCA's view in the Appeals, the CRA and Minister of National Revenue erred on both the A4A and TCF applications in the same ways:

> (a) treating its list of acceptable purposes and functions as being the only acceptable purposes and functions for an organization to qualify as a CAAA;
>
> (b) denying the registration of [A4A or TCF] as a RCAAA on the basis that the Minister was unable to draw an analogy between providing financial assistance to athletes and any of the exclusive purposes and functions of an existing CAAA that has been registered as a RCAAA; and
>
> (c) reading into the definition of CAAA a requirement that an eligible organization must directly promote amateur athletics.

The CRA sent letters on the same date (March 18, 2015) to both A4A and TCF, stating similar concerns in each letter that the financial support provided to athletes in A4A's case, or the financial support for teams and clubs to pay for facilities, equipment and services in TCF's case, did not satisfy the *ITA* subsection 149.1(1) requirement for a CAAA to promote amateur athletics in Canada "as its exclusive purpose and exclusive function". In making this determination, the CRA relied on its policy statement CPS 0-11, "Registration of Canadian amateur athletic associations", which set out a list of "Qualifying objects" for CAAAs. Based on precedent in the FCA's decision in *Stemijon Investments Ltd. v Canada (Attorney General)*, the FCA in the Appeals held that the Minister has no broad discretion to refuse registration, and must ensure that Parliament's statutory requirements are met. A policy or guidance document "as previously drafted by the CRA cannot bind the Minister nor can it alter the provisions of the statutory definition of a CAAA."

According to the FCA, the Minister also added a word to the requirement that is not in the *ITA*'s definition of a CAAA for "direct" promotion of amateur athletics in Canada, characterizing A4A and TCF's financial

support as "indirect" and therefore insufficient for registration according to the CRA's policy. But this interpretation is neither supported by the language of the *ITA* nor by the Minister's own reasoning in its correspondence with A4A and TCF, according to the FCA. The FCA held that the Minister had acknowledged that RCAAAs do not "solely" restrict themselves to funding and in effect accepted that funding is a means of promoting amateur athletics. Therefore, the CRA's argument that financial support is insufficient for registration is not, on its own, a valid basis to deny registration.

A further error in refusing registration was based on a misinterpretation of the required national scope of a CAAA. Because they are based in Vancouver, A4A and TCF did not, according to the CRA, promote amateur athletics on a nationwide basis, which the CRA considered a requirement under the *ITA*. Citing precedent in *Maccabi Canada v Minister of National Revenue*, the FCA held that for the purposes of the *ITA*, it is only necessary that a CAAA "carry on its activities across Canada, [and that] it is not necessary that such organization have a physical presence in each province and territory." In the TCF case, the CRA implied that a CAAA should be incorporated federally, however, the FCA held this to be too restrictive compared with the language in the *ITA*, which only requires a CAAA to be created "under any law in force in Canada." As such, the A4A and TCF incorporations under British Columbia's previous *Society Act* satisfied the statutory requirement. In conclusion, the FCA quashed the prior refusals and referred the matter back to the Minister for a fresh determination of the registration applications, taking into account the court's reasoning in these Appeals.

Advisory Committee on the Charitable Sector Releases Report #3

By Theresa L.M. Man and Jacqueline M. Demczur

The Advisory Committee on the Charitable Sector ("ACCS") released its Report #3, dated July 15, 2021, subtitled "Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector" ("ACCS Report #3"). This is the third of a series of ongoing reports by the ACCS. In this ACCS Report #3, the ACCS makes 23 recommendations for action in two main areas: the relationship between the CRA's Charities Directorate and charities (particularly those serving vulnerable populations); and the ability of charities to earn income from activities, such as related or unrelated business activities. This *Bulletin* provides an overview of the ACCS Report #3.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 500*.

Faith-Based University Entitled to Procedural Fairness in Funding Applications

By Jennifer M. Leddy

In *Redeemer University College v Canada (Employment, Workforce Development and Labour)*, the Federal Court found that the Minister of Employment, Workforce Development and Labour ("Minister") breached procedural fairness when it rejected Redeemer University College's ("Redeemer") application for funding from the Canada Summer Jobs ("CSJ") program in 2019. Justice Mosley of the Federal Court also made a rare order for the respondent Minister to pay the entirety of Redeemer's legal costs in the June 29, 2021 decision.

Redeemer, a faith-based university and registered charity, had applied for and received CSJ funding from 2006 through 2017. Redeemer's 2018 CSJ application was denied after it refused to include a compulsory attestation that its core mandate affirmed reproductive rights, such as abortion, which Redeemer considered to be contrary to its religious beliefs and values. That attestation was removed from the 2019 CSJ program requirements and replaced with a statement attesting that CSJ funds would not be used to undermine or restrict the exercise of rights legally protected in Canada. Additionally the 2019 requirements included a new question requiring organizations to specify how they would provide a safe, inclusive, and healthy work environment free of harassment and discrimination. Included in this was a requirement that organizations implement measures to ensure their hiring practices and work environments were free of harassment and discrimination.

Redeemer submitted its completed application for the 2019 CSJ program. Its application was subsequently deemed high-risk because of information found on the university's website from 2011-2012 and 2014-2015, as well as a recent article about faith-based institutions. The reviewing agency, Employment and Social Development Canada ("ESDC"), then sent a letter requesting additional information and clarification about measures to provide a workplace free of harassment and discrimination (the "Letter"). Redeemer replied by providing the ESDC with documents outlining its policies and procedures regarding harassment and discrimination as well as its health and safety training.

Upon receiving these materials, the ESDC recommended that Redeemer's application be determined to be ineligible for funding on the grounds of harassment and discrimination. That decision was the subject of the judicial review application to the Federal Court, where Redeemer argued that it was denied procedural fairness and that the decision interfered with its rights under sections 2(a), 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

Justice Mosley found that the Minister breached the rules of procedural fairness which require, among other things, that there be notice of the case to be met and the opportunity to provide relevant evidence to the decision maker (as set out in *Vakulenko v Canada (Minister of Citizenship and Immigration)*). In particular, Justice Mosley took issue with how nothing in the Letter indicated that the Minister believed that Redeemer unlawfully discriminates or that she took issue with any of Redeemer's policies. Nor did the Letter mention that the Minister's determination was based on information found on the internet.

With regard to the *Charter* claims, Justice Mosley found, based on the principle of judicial restraint (as set out in *Taseko Mines Limited v Canada (Environment)*), that the Court should avoid making pronouncements on *Charter* questions if it is not necessary to resolve an application for judicial review. Therefore, he did not consider Redeemer's *Charter* claims. Justice Mosley did note, however, that if a future case were to arise in which officials "discriminated in administering funding programs against faith-based institutions because of the sincerely held religious beliefs of their community, a finding of a *Charter* violation may well result." He concluded by finding that both procedural fairness and respect for *Charter*-protected rights are essential in the treatment of faith-based institutions.

This case serves as a reminder that charities are entitled to procedural fairness when their applications for federal funding are reviewed. Faith-based institutions have further rights under section 2 of the *Charter*, which may be relevant in cases where applications are not resolved by other means.

Severance Pay Threshold Calculations are not Limited to Ontario or Canadian Payroll

By Barry W. Kwasniewski

The Ontario Superior Court of Justice, Divisional Court ("Divisional Court") has further clarified when employers must pay severance pay to their employees. Paragraph 64(1)(b) of the *Employment Standards Act, 2000* ("*ESA*") requires an employer with a payroll of $2.5 million or more to pay severance when the employer severs an employment relationship with an employee of five or more years of service. In *Hawkes v Max Aicher (North America) Limited*, released on June 15, 2021, the Divisional Court overturned an earlier decision of the Ontario Labour Relations Board (the "Board") and found that the calculation of payroll for the purpose of section 64 of the *ESA* is not limited to either Ontario payroll or Canadian payroll, but will include global payroll amounts.

The plaintiff, Doug Hawkes, was terminated from employment on October 7, 2015 after more than three decades of employment with the defendant company and its predecessors (the "Defendant"). Following

termination, Hawkes filed a complaint alleging he was entitled to termination, vacation, and severance pay. While he was found to be entitled to termination and vacation pay on January 25, 2017, he was told he was not eligible for severance pay because the Defendant did not have a payroll of $2.5 million or more, when considering only the salaries in the Ontario jurisdiction. Hawkes then applied for the decision to be reviewed by the Board pursuant to subsection 116(3) of the *ESA*.

The Board's decision, *Doug Hawkes v Max Aicher (North America) Limited*, released on December 27, 2018, affirmed that global payroll was excluded from the section 64 calculation (the "Board Decision"). The Board's reasoning relied on the interpretation limits imposed by subsection 3(1) of the ESA to conclude that section 64 only anticipates payroll amounts from operations in Ontario. The Board also distinguished the case before them as factually different from *Paquette c. Quadraspec Inc.* ("*Paquette*"), a 2014 Superior Court of Justice decision which held that an employer's national payroll must be considered in calculations made under section 64. Finally, the Board took the position that there was no reason to depart from its position pre-Paquette, namely that only Ontario payroll should be considered in calculations under section 64.

Upon reviewing the Board Decision on a standard of reasonableness, the Divisional Court found the Board Decision to be unreasonable because of a lack of justification and intelligibility in its reasoning. As a matter of statutory interpretation, the inclusion of words of limitation in one part of the *ESA* (such as the limitation of "in Ontario" in section 3) and not in another (such as in section 64) is seen as deliberate and meaningful. The Board missed this in their analysis. Restricting the meaning of "payroll" in subsection 64(2) of the *ESA* by virtue of subsection 3(1) is indefensible and unreasonable, according to the Divisional Court.

The Divisional Court also thought that *Paquette* was not substantially factually different, and the Board (while not bound by *Paquette*) should have given it serious consideration. As well, the cases the Board considered as justifying its position did not assert that only the payroll of an employer's operation in Ontario is relevant for the purposes of the *ESA*.

Therefore, because of the unreasonable position adopted by the Board, as well as its method of interpretation, which was inconsistent with modern principles of statutory interpretation required in *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Divisional Court set aside the Board Decision. Further, the Divisional court remitted the matter back to the Board to determine entitlement to

severance pay with the direction that the payroll calculation of section 64 of the *ESA* is not limited to either Ontario or Canadian payroll.

BC Court Hears Decision after City Cancels Youth Conference Rental

By Esther S.J. Oh

The British Columbia Supreme Court released its decision in *The Redeemed Christian Church of God v New Westminster (City)* on July 19, 2021. In this decision, a church, which rented an event venue from a municipality to host a youth conference, had its rental agreement cancelled without a specific explanation after the booking was earlier confirmed by the municipality. The court found that the City of New Westminster (the "City") unjustifiably infringed the Redeemed Christian Church of God's (also known as "Grace Chapel") right to freedom of expression under subsection 2(b) of the *Charter* when it cancelled Grace Chapel's event booking.

Grace Chapel had entered into an agreement with the City to rent the Anvil Centre ("Anvil") for its youth conference, an event open to the public and advertised on posters at Grace Chapel's rented Sunday service location. Staff from Anvil received an email from a member of the public urging them to rethink hosting the youth conference and alleging that the content of the conference would be "anti-LGBTQ" based on the views of one of the conference's facilitators.

While internal emails between Anvil and the City expressed concern over the possible dissemination of anti-LGBTQ rhetoric, the City's message to Grace Chapel did not outline its specific concerns with the church but instead generically stated that Anvil's booking policy "restricts or prohibits user groups if they promote racism, hate, violence, censorship, crime, or other unethical pursuits." Grace Chapel responded by advising that there would be no hate, racism or violence promoted at their conference and requested a meeting to discuss the content of the conference. The City advised that while a meeting could be arranged, this would not reverse the cancellation of the event.

Grace Chapel sought several forms of relief under the British Columbia *Judicial Review Procedure Act* ("JRPA"), including a declaration of procedural unfairness under the JRPA and unjustifiable infringement of its rights under subsections 2(a) (freedom of religion), 2(b) (freedom of expression), and 2(d) (freedom of association) of the *Charter*. Grace Chapel's claims for relief under the JRPA were dismissed, as the court found that since (1) the case involved is, at its core, a contractual dispute over the rental of property,

(2) did not involve the exercise of a statutory power that would invoke the duty of procedural fairness or (3) have sufficiently public character, it did not fall within the ambit of the JRPA.

In relation to Grace Chapel's claims under the *Charter*, the court found that Grace Chapel's subsection 2(b) freedom of expression rights had been infringed. The court followed the test set out in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, and recognized that the singing and discussion contemplated at the youth conference was expressive content covered by subsection 2(b). The court found that the purpose of Grace Chapel's expression "to consider biblical views regarding sexuality and identity issues" was not axiomatically at odds with the values of democratic discourse protected by subsection 2(b). In this regard, the court stated,

> In a free and democratic society, the exchange and expression of diverse and often controversial or unpopular ideas may cause discomfort. It is, in a sense, the price we pay for our freedom. Once governments begin to argue that the expression of some ideas are less valuable than others, we find ourselves on dangerous ground.

The court also found the City failed to proportionately balance competing *Charter* rights, as the City took immediate steps to research and consider the concerns raised by the complaint it received (*i.e.* that anti-LGBTQ views would be disseminated at the youth conference). However, before cancelling the youth conference the very next day, the City took no similar steps to more fully inform itself about the anticipated content or focal points of the speakers at the youth conference. In this regard, the court stated that, "there was a clear imbalance in the City's efforts to inform itself of the competing rights at stake, or to at least attempt to balance them. The failure to balance competing rights leads me to conclude that the City's Decision is an unreasonable and unjustified infringement."

Grace Chapel's claim to rights under subsection 2(d) (freedom of association) was dismissed. Regarding Grace Chapel's claim alleging infringement of its rights under subsection 2(a) of the *Charter* (freedom of religion), the court concluded that the issue required a trial in order to determine whether the claim falls within the scope of the protection under subsection 2(a) of the *Charter* or whether any infringement could be justified.

This case reflects the willingness of the B.C. court to protect the *Charter* rights of charities and other not-for-profits where it is unclear whether or not an alleged infringement of a *Charter* right by a government body was justified. In this regard, while the court did not comment on procedural fairness rights under the JRPA, an important aspect of the court's decision was based on the failure of the City to proportionately balance competing Charter rights.

SCC Provides Further Guidance on "Fair Dealing" Exception to Copyright Infringement

By Sepal Bonni

The Supreme Court of Canada ("SCC") released its decision in *York University v Canadian Copyright Licensing Agency (Access Copyright)* on July 30, 2021. Access Copyright ("Access") is a non-profit organization and collective society under section 2 of the Copyright Act (the "Act") that represents a collection of copyright owners, including writers, artists, and publishers. Access licenses and administers reproduction rights throughout Canada on behalf of copyright owners. Litigation commenced between Access and York University ("York") when York opted out of an interim tariff that it had initially paid to Access. Instead, York continued to operate without a license from Access and implemented its own "fair dealing" guidelines to help the university comply with section 29 of the Act, which states that "fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."

Access sued York in Federal Court seeking to compel York to pay the tariff, and York counterclaimed seeking a Declaration that any copies made constitute a "fair dealing". At the Federal Court, the court held that the interim tariff was enforceable against York and dismissed York's counterclaim for a fair-dealing Declaration. On appeal, the FCA set aside the lower court's decision on the interim tariff enforcement and held that the Copyright Board's approved tariffs were not mandatory for users who do not opt for a license. The FCA also dismissed York's appeal of the dismissal of York's counterclaim for a fair-dealing Declaration.

Access appealed the FCA's decision regarding the interim tariff to the SCC and York appealed the dismissal of the fair-dealing Declaration. Therefore, the SCC considered two main issues: (1) if York is compelled to be a licensee of Access and therefore pay the tariff that was set; and (2) whether to grant a Declaration that copies made by York constitute "fair dealing" in accordance with the Act.

The SCC dismissed Access' claim against York and found that the interim tariff was not enforceable against York. Access cannot force York to pay fees in accordance with a license that York did not agree to. The SCC also dismissed York's counterclaim for a fair-dealing Declaration. The SCC held that a Declaration was not warranted, but this was because the case did not meet the threshold requirements for when declaratory relief may be granted.

Given that this dispute was not between the copyright owners and York, the SCC did not see any reason to make any finding regarding whether York's dealings constitute "fair dealings" under the Act. However, the SCC did provide some guidance regarding the two-step framework to assess fair dealing which

requires a party prove that (1) the dealing was for an allowable purpose enumerated in the Act, and (2) that it was fair. The second step of the test, fairness, is a question of fact, with six non-exhaustive factors which provide a framework for assessment. The SCC held that the dealings under York's fair use guidelines were allowable for the purpose of education. However, to determine if the dealing was fair, the Federal Court and FCA had approached the analysis by considering the six factors only from the perspective of York. The SCC concluded this was an error and that these courts focused on the wrong end-user.

In determining if a university's use of copyright material is fair, the question is whether the university's actions "actualize *students'* rights to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the Act". It is important to note that this same analysis is equally applicable when considering whether any particular dealing is "fair". That is, the perspective of the end-user that actually uses the copied materials as well as any intermediaries facilitating that ultimate use must be taken into account.

While this decision provides some guidance for charities and not-for-profits that rely on the fair dealing exception to copyright infringement, given that the decision does not provide a definitive assertion on what constitutes a fair dealing, charities and not-for-profits must remain prudent when using copyright-protected content.

Staff Training about Privacy Rules is Essential in Preventing Snooping

By Esther Shainblum

Employee snooping poses a serious privacy risk to all organizations, including charities and not-for-profits. Institutional training about privacy is essential for organizations that deal with sensitive personal information, as demonstrated by the findings of the Information and Privacy Commissioner of Ontario ("IPC") in PHIPA Decision 147, released on June 18, 2021. Employees and managers should recognize which behaviour is and is not acceptable, so as to prevent snooping.

This case originated with a patient who made a complaint after she attended at the emergency department of a hospital following a motor vehicle accident where she was treated for her injuries, then released. A physician who was not involved in providing health care to the patient during her stay in the hospital called her a few days later at her home. According to the patient's report, the physician stated he was conducting a courtesy follow-up call to see how she was doing. Over the course of the call, he arranged

to have a physiotherapy clinic contact the patient and book an appointment. When the patient went to the clinic, she was met by a personal injury lawyer, who asked her if she was interested in a lawsuit and spent 30 minutes discussing the lawsuit process and compensation with her. After this meeting, the patient contacted the hospital because of concerns about the appropriateness of the physician's access to and use of her personal information.

During its investigation into the patient's complaint, the hospital discovered that the physician and a hospital clerk had, over two years, accessed hundreds of charts of patients to whom the physician was not providing care. The hospital also discovered that the physician's wife was the personal injury lawyer the patient had met. While the clerk was dismissed, and subsequently pled guilty to offences under the *Personal Health Information Protection Act* ("*PHIPA*"), the physician was not because he maintained his actions were justified by virtue of him undertaking "quality audits." He also maintained that his wife's presence at the clinic was a coincidence and that he did not disclose any of the patient's personal information to her. The hospital referred the matter to the Attorney General and the investigation was taken up by the IPC.

The IPC had serious concerns about the physician's "quality audits" and potential disclosures of personal health information to his wife both in this instance and on prior occasions. However, due to a lack of cooperation from witnesses, the IPC was unable to determine whether the physician disclosed personal health information to his wife in contravention of *PHIPA*. Instead, the IPC found that the hospital's policies and training of physicians regarding quality audits were not sufficient to comply with its safeguarding obligations under *PHIPA*. The applicable policies, practices, and procedures regarding quality audits were lacking in clarity and detail, and privacy training was not provided to physicians. As a result, the IPC found that the hospital did not take reasonable steps to protect the personal health information of its patients as required by subsection 12(1) of *PHIPA*. Nevertheless, it was satisfied with the steps that the hospital had taken since then to update its policies and provide annual privacy training for all staff and physicians.

While many charities and not-for-profits are not governed by *PHIPA*, this case serves as a reminder that any organization holding personal information must educate and train its staff about their privacy obligations. There can be strong incentives to "snoop" and serious reputational and financial consequences for organizations that do not prevent snooping. Charities and not-for-profits holding personal information must establish clear training requirements for employees, ensure that access is restricted on a "need to

know" basis, monitor compliance, and ensure that employees are aware that there will be consequences for inappropriate access to personal information.

Permanent Residency Status Not a Protected Ground of Citizenship in Human Rights Code

By Barry W Kwasniewski

The Divisional Court released its decision in the "significant case" of *Imperial Oil Limited v Haseeb* on June 1, 2021. The 2-1 majority of the court overturned the Human Rights Tribunal of Ontario Decision ("HRTO Decision"), discussed in *Charity & NFP Law Bulletin* No 456, which included "permanent residence" as a protected ground from discrimination under the basis that "permanent residence" was an aspect of "citizenship."

The employer, Imperial Oil Limited ("Imperial Oil"), had a requirement that prospective employees be eligible to work permanently in Canada. The prospective employee, Muhammad Haseeb, was an international student. In his application forms, Haseeb represented that he was entitled to work in Canada on a permanent basis. Imperial Oil extended a job offer, subject to Haseeb providing proof of his eligibility to work in Canada on a permanent basis. When he was unable to do so, Imperial Oil rescinded its offer of employment. Haseeb claimed discrimination on the basis of citizenship under subsection 5(1) of the Ontario *Human Rights Code*. The Human Rights Tribunal of Ontario ("HRTO") awarded considerable damages to Haseeb, holding that the requirement for entry-level job applicants to disclose proof of their eligibility to work in Canada on a permanent basis was discriminatory on the grounds of citizenship. After Imperial Oil unsuccessfully applied for a reconsideration of that decision, it applied to the Divisional Court for judicial review.

The finding of the HRTO had the effect of extending the ground of "citizenship." However, the Divisional Court found that the HRTO Decision lacked the required coherent and rational chain of analysis to justify the extension of "citizenship." Particularly, "the failure to examine the plain and ordinary meaning of 'citizenship' and 'permanent residence' is a gap in the analysis undertaken by the HRTO." The court assessed the plain and ordinary meanings of both citizenship and permanent residence to conclude that citizenship is "nothing less or more than membership in the state" under the *Citizenship Act*. Permanent residence is not synonymous with citizenship and can stand on its own. The HRTO erred in law when it included permanent residence as a criterion of the citizenship ground of discrimination.

The Divisional Court was careful to clarify that the factual circumstances of this case deal with "direct" discrimination on the grounds of permanent residence. It is possible that a requirement for permanent residence could be so narrowly prescribed that it is effectively a requirement for citizenship – this would be indirect or constructive discrimination. Therefore, while the court in this case offers further clarity about when permanent residency requirements are not discriminatory, employers of charities and not-for-profits should still use caution when drafting employment letters so as to avoid indirect or other forms of discrimination where permanent residency is concerned.

AML/ATF Update

By Terrance S. Carter, Nancy E. Claridge and Sean S. Carter

Bank De-Risking Frustrates Humanitarian Aid for Countries in Need

Denial of financial services to non-profit organizations and charities to avoid the potential risk of terrorist financing or money laundering has an adverse impact on human rights, according to a recent report by a New York University legal clinic in Paris. "Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective" was published by the NYU Paris EU Public Interest Clinic in cooperation with Human Security Collective, ABN AMRO and Dentons Netherlands, on June 1, 2021. The 27-page report offers new data and insight into the human rights consequences of the banking practice of de-risking non-profit organizations ("NPOs"), which includes charitable and not-for-profit organizations (the "Report"). At the same time, the Financial Action Task Force ("FATF") has also recognized that financial institutions engaging in "de-risking" may have an adverse impact on charities and not-for-profits, and has launched a project to study, in part, de-risking and the undue-targeting of NPOs. This *Alert* provides a brief summary of the Report and discusses the impact of de-risking on the charitable and not-for-profit sector.

For the balance of this *Alert*, please see *AML/ATF and Charity Law Alert No. 49*.

COVID-19 UPDATE

Federal and Ontario COVID-19 Update

By Adriel N. Clayton and Terrance S. Carter

Federal Government Proposes to Extend CEWS, CERS and Lockdown Support

In continued response to the COVID-19, Deputy Prime Minister and Minister of Finance, the Government of Canada proposed the extension of certain financial support of Canadian business on July 30, 2021. The proposed extended support would include an extended eligibility period for the Canada Emergency Wage Subsidy ("CEWS"), the Canada Emergency Rent Subsidy ("CERS"), and lockdown support from September 25, 2021 to October 23, 2021.

The CEWS is a wage subsidy provided to eligible employers, including eligible charities and NFPs, that experience a drop in "qualifying revenues", in support of employee wages, and is discussed in greater detail in *Canada Emergency wage Subsidy ("CEWS"): An Overview for Charities and NFPs* as well as *New Changes to the Canada Emergency Wage Subsidy ("CEWS")*. As announced in Budget 2021, the subsidy is provided at a maximum rate of 20% per eligible employee's remuneration, up to a maximum of $226 per week, for the period of August 29, 2021 to September 25, 202 ("Period 20").

The CERS is a commercial rent subsidy available to organizations, including eligible charities and NFPs, consisting of a rent subsidy percentage calculated from eligible expenses, on a sliding scale, up to a maximum of 20% for Period 20. A Lockdown Support rent top-up of 25% is also available for organizations that have been temporarily shut down by a mandatory public health order.

While Budget 2021 had announced the maximum 20% subsidy rate under both the CEWS and CERS for Period 20, and extended both to the end of Period 20 pursuant to Bill C-30, as discussed in the *Legislation Update*, above, the government's Backgrounder, released in conjunction with its July 30, 2021 proposal, proposes that the maximum rate for both remain at 40% during Period 20. Instead, the maximum rate during the extended period from September 26, 2021 to October 23, 2021 would then be decreased to 20%. The Lockdown Support will continue and remain at its set rate of 25%.

Details on Canada Recovery Hiring Program Announced

As announced in Budget 2021, the federal government has launched a new program, the Canada Recovery Hiring Program ("CRHP") in support of employers impacted by the COVID-19 pandemic. Originally announced on June 6, 2021, the CRHP provides eligible employers who have experienced "qualifying

revenue declines" with a subsidy of up to 50% of eligible salary or wages to help hire new workers or increase their current workers' hours or wages. The CRHP has been made available to qualifying employers retroactive to June 6, 2021.

Charities and not-for-profits that are eligible for the CEWS will also meet qualification requirements for the CRHP. However, during any claim periods where both CEWS and CRHP availability overlaps, organizations would not be able to receive both CEWS and CRHP subsidies, but could apply for whichever subsidy provides them with the higher subsidy amount. Further, organizations are permitted to apply for different subsidies for each claim period.

Vaccination Policies Mandatory for High-Risk Settings in Ontario

In accordance with an announcement by the Ontario government on August 17, 2021, COVID-19 vaccination policies will be mandatory for high-risk settings, where there is a higher risk of contracting and transmitting COVID-19 and the Delta variant, as of September 7, 2021. High-risk settings include hospitals and home and community care service providers. A directive issued by the Chief Medical Officer of Health in Ontario mandates that the mandatory vaccination policies for high-risk settings apply to employees, staff, contractors, students and volunteers, as well as for paramedics working for ambulance services.

At a minimum, the vaccination policy must require individuals to provide proof of one of the following: (1) full vaccination against COVID-19; (2) a medical reason for not being vaccinated against COVID-19; or (3) completion of a COVID-19 vaccination educational session. Further, those who do not provide proof of full vaccination must undertake regular testing for antigens. In addition to maintaining a vaccination policy, high-risk settings will also be required to track and report to the provincial government on the implementation of their policies.

Ontario Amends Reopening Regulations

Ontario has amended its regulations to reopen the province under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. Ontario Regulation 541/21: Rules for Areas at Step 3 was filed on July 30, 2021, and amends Ontario Regulation 364/20: Rules for Areas at Step 3 and Roadmap Exit Step ("O Reg 364/20") to include new Schedules 4 and 5, which set out regulations regarding the Ontario's "Roadmap Exit Step", which will follow Step 3 in the province's Roadmap to Reopen.

When Ontario enters the Roadmap Exit Step, many rules and restrictions currently in place under Step 3 will be lifted, with businesses and places permitted to reopen, provided that they follow the general

requirements set out under Schedule 4. Businesses and organizations will continue to be required to ensure that those indoors wear masks, except for those who are exempt, as set out in subsection 2(5) under Schedule 4 of O Reg 364/20. Those who temporarily remove their masks, for example to eat, will be required to maintain a distance of at least two metres, or be separated from others by plexiglass or another impermeable barrier. Businesses and organizations will also continue to be required to continue to comply with the advice, recommendations and instructions of public health officials (including on physical distancing, cleaning, disinfecting, and screening individuals).

Businesses and organizations will also be required to prepare, make available, and post in a conspicuous location a safety plan within seven days of entering the Roadmap Exit Step. The safety plan must set out measures and procedures that the business or organization has or will implement to reduce the transmission risk of COVID-19, and must include measures for screening, masks or face coverings, and the wearing of personal protective equipment.

Schedule 5 sets out specific, tailored rules at the Roadmap Exit Step for certain organizations, including camps for children, as well as for schools and private schools.

Lexpert Rankings

Seven partners of Carters Professional Corporation have been ranked as leaders in their respective practice areas by *The Canadian Legal Lexpert® Directory 2021*. Terrance S. Carter, Theresa L.M. Man, Jacqueline M. Demczur, Esther S.J. Oh, Jennifer M. Leddy, and Ryan M. Prendergast have been ranked as leaders in the area of Charities. Nancy E. Claridge has been ranked as a leader in the area of Estate and Personal Tax Planning.

Best Lawyers in Canada Rankings

Six partners of Carters Professional Corporation have been ranked as leaders in their practice areas by *The Best Lawyers in Canada* for 2022. Theresa L.M. Man, Jacqueline M. Demczur, Esther S.J. Oh, Ryan M. Prendergast, and Terrance S. Carter have been ranked as leaders in the area of Charity and Non-Profit Law. Sean S. Carter has been ranked as a leader in the area of Corporate and Commercial Litigation.

In addition, Theresa Man has been named "Lawyer of the Year" in the practice area of Charity and Non-Profit Law.

IN THE PRESS

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

UPCOMING EVENTS AND PRESENTATIONS

Carters/Fasken Healthcare Philanthropy Webinar: Check-Up 2021 will be held on **Wednesday, September 22, 2021**. This is a complimentary webinar hosted by Carters Professional Corporation and Fasken. Registration is available online.

Volunteer Ottawa will host a webinar on Tuesday, September 28, 2021. Esther Shainblum will present on the topic of Legal Check-up: Duties and Liabilities of Directors and Officers of Charities and Not-For-Profits.

The 28th Annual Church & Charity Law Webinar™ will be held on **Thursday, November 4, 2021**, hosted by Carters Professional Corporation. Registration and Details are available online.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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