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CHARITY & NFP LAW UPDATE

JANUARY 2021

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

JANUARY 2021

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RECENT PUBLICATIONS AND NEWS RELEASES

COVID-19 UPDATE

COVID-19 Measures and Restrictions in Ontario

By Terrance S. Carter and Luis R. Chacin

Second Declaration of Emergency in Ontario, Enforcement and Stay-at-Home Orders

As discussed in the January 12, 2021 *COVID-19 Resource for Charities and NFPs*, the provincial government, in consultation with the Chief Medical Officer of Health, declared an emergency on January 12, 2021, in the whole of the Province of Ontario under section 7.0.1(1) of the *Emergency Management and Civil Protection Act* ("EMCPA"). Section 7.0.7 of the EMCPA provides that an emergency declared under section 7.0.1 is terminated at the end of the 14th day following its declaration unless the Lieutenant Governor in Council either declares it to be terminated or extends the emergency for one further period of no more than 14 days. As such, on January 25, 2021, the Ontario government filed Regulation 24/21 under the EMCPA, extending the emergency past the end of January 26, 2021 for a period of 14 days.

On January 13, 2021, the Ontario government filed Regulation 11/21, *Stay-at- Home Order* ("Stay-at-Home Order") under the EMCPA. The Stay-at-Home Order took effect as of 12:01 a.m. on January 14, 2021 and, on January 25, 2021, pursuant to section 7.0.8 of the EMCPA, was extended to February 9, 2021. As discussed in the January 14, 2021 *COVID-19 Resource for Charities and NFPs*, the Stay-at-Home Order apples to individuals, generally, and Schedule 1 of the Stay-at-Home Order provides that every individual must remain in their place of residence at all times unless leaving their place of residence is necessary for purposes such as working or volunteering where the nature of the work or volunteering requires the individual to leave their place of residence (including when the individual's employer has determined that the nature of the individual's work requires attendance at the workplace), obtaining certain food and services, attending a gathering for the purpose of a wedding, a funeral or a religious service, rite or ceremony that is permitted pursuant to regulations under the ROA or making necessary arrangements for the purpose of such a gathering.

Extension of Orders and Amendments to Rules for Stages of Reopening

On January 15, 2021, the Ontario government extended a number of orders issued under the ROA until February 19, 2021 and amended Ontario Regulation 82/20, *Rules for Areas in Stage 1* ("Stage 1 Order").

The Stage 1 Order, which currently applies to the whole of Ontario, has been amended so far four times since January 7, 2021, whereas Ontario Regulation 263/20, *Rules for Areas in Stage 2* and Ontario Regulation 364/20, *Rules for Areas in Stage 3* were previously amended on January 9, 2021.

As discussed in the January 14, 2021 *COVID-19 Resource for Charities and NFPs*, the Stage 1 Order, as amended by way of Ontario Regulation 10/21, filed on January 13, 2021, introduces a number of general requirements that apply to individuals and members of the public in the premises of a business or organization that is permitted to open, including the obligation to wear a mask or face covering and keep physical distancing.

The Stage 1 Order currently provides that "each person responsible for a business or organization that is open shall ensure that any person who performs work for the business or organization conducts their work remotely, unless the nature of their work requires them to be on-site at the workplace." The Stage 1 Order also restricts in-person teaching or instruction for public and private schools, with special rules for those located in City of Hamilton Health Unit, City of Toronto Health Unit, Peel Regional Health Unit, Windsor-Essex County Health Unit, and York Regional Health Unit.

COVID-19 Corporate Update

By Theresa L.M. Man

Order Extending AGM Deadlines for Federal Corporations Now Ended

Corporations Canada published a reminder to federal corporations on December 30, 2020, that the *Order Respecting Time Limits and Other Periods Established By or Under Certain Acts and Regulations for which the Minister of Industry is Responsible (COVID-19)* (the "Order") has now ended. The Order previously extended the deadline for federal corporations, including those under the *Canada Not-for-Profit Corporations Act* ("CNCA"), to call annual general meetings ("AGMs") and present financial statements, and applied during the period between March 13, 2020 and December 31, 2020.

Commencing on January 1, 2021, federal corporations will therefore return to "business as usual" with respect to the timing of their AGMs, following the normal rules set out in their incorporating legislation. For CNCA corporations, this means holding an AGM no later than 15 months after the previous AGM, and no more than six months after the last financial year-end.

Corporations Canada's announcement states that it is unsafe to hold in-person AGMs during the COVID-19 outbreak because it would contradict public health advice to practice physical distancing and self-isolation to prevent the spread of the virus.

Corporations Canada reminded corporations that depending on the by-laws, a corporation could have two possibilities to hold electronic AGMs:

- Virtual meetings where all participants attend exclusively through a digital channel that allows participants to communicate adequately with each other during the meeting. Virtual meetings must specifically be in the corporation's by-laws.
- Hybrid meetings (*i.e.*, partially virtual meetings) where some participants attend in-person and others participate through a digital channel that allows participants to communicate adequately with each other during the meeting. A hybrid meeting may be held if (i) they are not prohibited by by-laws, or (ii) the by-laws are silent and thereby may be held by default under the CNCA.

Corporations Canada then states that "if the corporation's by-laws prohibit virtual meetings or are silent on holding them, the board of directors may change the by-laws with the change effective until the next meeting of shareholders or members (when the change can be confirmed or rejected)." However, Corporations Canada fails to point out that this option does not apply to those corporations that have a provision in their articles requiring by-law changes be subject to a special resolution of members before the by-law changes may take effect.

Corporations Canada also points out that for those corporations that have a small number of members, they can have the members sign a written resolution approving business items in lieu of holding an AGM. However, since this option requires the written resolution to be signed by all members in order to be valid, the practical application of this option is fairly limited.

Lastly, Corporations Canada points out that not-for-profit corporations may also apply to Corporations Canada to delay the calling of their AGM where calling the AGM within the normal timeframe would be detrimental. The application must be made at least 30 business days before notice calling the AGM is required to be sent to members online or by email to IC.corporationscanada.IC@canada.ca.

Ontario Extends Infectious Disease Emergency Leave for Workplaces

By Barry W. Kwasniewski

Unpaid, job-protected leave during the ongoing COVID-19 pandemic will continue to be available to employers and employees in Ontario for at least the first half of this year. A news release published on December 17, 2020 announced the extension of Infectious Disease Emergency Leave ("IDEL") until July 3, 2021, under the Ontario *Employment Standards Act, 2000* ("*ESA*"). The provincial government stated its intention to "protect jobs by helping businesses avoid costly payouts and potential closures" and to continue "offering protection to workers that are laid off due to COVID-19." Ontario Regulation 765/20, filed on December 17, amended O Reg 228/20: *Infectious Disease Emergency Leave* to extend the "COVID-19 Period" under section 50.1 of the *ESA*. IDEL provides unpaid, job-protected leave of absence for non-unionized employees temporarily laid off due to an infectious disease emergency, such as the current coronavirus pandemic, to be determined by regulation.

Under Ontario and Canadian common law, a constructive dismissal occurs when the terms and conditions of employment are substantially altered, and is treated by the courts effectively as a legal repudiation of the employment contract without cause — allowing employees to claim wrongful dismissal. The COVID-19 Period initially was to last from March 1, 2020 until "six weeks after the day that the emergency declared by Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* is terminated or disallowed." That emergency declaration terminated on July 24, 2020, when the *Re-opening Ontario (A Flexible Response to COVID-19) Act, 2020* came into force, leaving the IDEL clock running for at least six more weeks until September 4, 2020. The provincial government then extended IDEL by regulation until January 2, 2021.

In its December 17, 2020 announcement, the government noted its concern to prevent employers from facing costly termination and severance payouts during the difficult economic situation caused by the pandemic. IDEL law was introduced by an amendment to the *ESA* — the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* — that came into force last year on March 19, 2020.

Ontario Church Unsuccessful in Bid for Interim Injunction Against COVID-19 Regulation

By Jennifer M. Leddy

The Toronto International Celebration Church (the "Church") brought an application to strike down Ontario Regulation 82/20, *Rules For Areas In Stage 1* (the "Regulation") to the extent that it restricts in-person attendance of religious services to a maximum of 10 people, arguing that the Regulation infringed freedom of religion under section 2(a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The Church is a large evangelical church with 1500 members and a place of worship that can hold 1000 people. Although the Church was situated in a region subject to the Stage 1 Regulation, it also sought an interim injunction pending the hearing of its *Charter* challenge to permit it to hold religious services subject to a 30% capacity restriction in compliance with Ontario's Stage 2 regulation. The Ontario Superior Court of Justice dismissed the application for an interim injunction in *Toronto International Celebration Church v. Ontario (Attorney General)* on December 18, 2020.

With respect to the interim injunction, the court stated that the Church had to establish that it would be in the interests of justice, which would require balancing the interests at stake. Following the Supreme Court decision of *RJR-MacDonald Inc v Canada*, the court considered the application for the interim injunction in light of three questions: (1) whether the Church's *Charter* application had merit; (2) whether the Church and its members would suffer irreparable harm if the injunction were to be refused; and (3) whether the balance of convenience was in favour of granting the injunction.

As for the merit of the *Charter* application, the court considered whether the Church could establish that there was a "serious issue to be tried." Ontario conceded that the Regulation restricted the freedom of religion of the Church and its members, but the court found that it was still to be determined whether it was a reasonable limit on freedom of religion. While it was not for the court to decide the *Charter* matter in this application, it found that there was a serious issue to be decided, that being whether the Regulation was tailored to impair freedom of religion no more than reasonably necessary, and whether the government's chosen means to minimize the spread of COVID-19 fell within a range of reasonable alternatives.

The court then turned to whether the Church would suffer irreparable harm as a result of the prohibition on religious services with more than 10 people. Although the Regulation does not entirely prohibit in-person religious services, the court found that the Church nonetheless would suffer irreparable harm,

particularly given that its regular services include 600 congregants or more, and because "the vast majority of the members of the Church are unable to participate in congregational prayer and fellowship, which is central to their religious beliefs."

With regard to the balance of convenience, *i.e.* which party would suffer greater harm from the granting or refusal of the injunction, the court asked whether it would be equitable to deprive the public from the protection offered by the Regulation before the Regulation's validity was determined in the *Charter* application. It found that there was a "strong" public interest both in protecting public health during the COVID-19 pandemic and in protecting religious freedom. However, it held that granting the injunction would cause greater harm to public safety than the harm to religious freedom caused by dismissing the injunction. To this point, the court stated that granting the Church the exemption from the Regulation would set a precedent that would likely lead to other religious organizations seeking similar exemptions, which was a factor in weighing the public interest. The court therefore found that the balance of convenience favoured public health, and dismissed the Church's application, indicating that courts "should not lightly interfere with the government's ability to enforce laws duly enacted for the public good before a full hearing on the constitutionality of the provisions."

In view of the court's findings, religious organizations will need to wait for the court's separate ruling on the *Charter* challenge, which will undoubtedly be of interest to the sector. For now, this decision makes it clear that religious organizations will need to comply with the restrictions on religious services in Ontario's regulations until and unless the *Charter* challenge proves successful.

OTHER CHARITY AND NFP MATTERS

CRA Publishes New and Updated Guidances for Charities

By Terrance S. Carter

The Canada Revenue Agency (the "CRA") announced the release of two new guidances and amendments to two existing guidances impacting charities on November 27, 2020. The two new guidances are CG-029: *Relief of poverty and charitable registration* and CG-030: *Advancement of education and charitable registration*. Amendments have also been made to 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*. These new and amended guidances are summarised below.

New CRA Guidance on Relief of Poverty and Charitable Registration

By Ryan M. Prendergast

Charities with a focus on relieving poverty have a new guidance document from the CRA. The CRA published CG-029: *Relief of poverty and charitable registration* ("CG-029") on November 27, 2020. CG-029 considerably expands on the brief description previously published in summary policy CSP-P03: *Poverty*, and provides an outline of charity law issues to help charities and applicants for charitable registration comply with the requirements of Canadian common law and the *Income Tax Act* (ITA). In its summary, the document states the two requirements for a registered charity under the relief of poverty category or "head of charity": the charity's beneficiaries are experiencing poverty, and the charity's activities provide a charitable benefit that relieves the poverty of its beneficiaries.

Although it states that there is "no complete definition of poverty in charity law", CG-029 defines people experiencing poverty for its purposes as "those who do not have the ability to acquire the basic necessities of life or simple amenities that are seen as necessary for a modest but adequate standard of living." To ensure they meet these purposes, charities may need to establish criteria that evaluate whether their beneficiaries are in need of poverty relief. With regard to **prevention** of poverty, CG-029 states that while it may be a beneficial effect of other charitable purposes, such as advancement of education or religion, preventing poverty does not in itself qualify as **relief** of poverty for a registered charity. This *Charity & NFP Law* Bulletin provides an overview of the contents of CG-029.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 482.

New Comprehensive Guidance for Charities on Advancement of Education from CRA

By Jacqueline M. Demczur

Eight policy documents have been effectively replaced by a new guidance for charities from the CRA. The CRA's Charities Directorate published the new guidance, CG-030, *Advancement of education and charitable registration* (the "New Guidance") on November 27, 2020. Although the collection of previous documents is still accessible on the CRA website, the New Guidance states that it replaces each of the following: Policy commentary CPC-027, *Publishing a magazine*; Policy statements CPS-003, *Daycare facilities*, CPS-013, *School councils*; and Summary policies CSP-B05, *Broadcasting*, CSP-S08, *Scholarships*, CSP-E01, *Advancement of education*, CSP-I06, *Provision of information*, and CSP-S09,

School associations. This *Charity & NFP Law* Bulletin offers a general overview of the contents of the New Guidance.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 483.

CRA Updates Guidances on Charities Using Intermediaries

By Terrance S. Carter and Theresa L.M. Man

The CRA has released revised guidance documents for registered charities using intermediaries carrying out activities both outside and inside Canada. The CRA published updated Guidance CG-002*: Canadian registered charities carrying on activities outside Canada* ("CG-002"), and Guidance CG-004*: Using an intermediary to carry on a charity's activities within Canada* ("CG-004"), on its website on November 27, 2020.

As a whole, there are no fundamental changes on the general requirements concerning how registered charities can work with non-qualified donee intermediaries to carry out activities outside and inside Canada. While there are a number of changes that relax some of the more onerous CRA requirements in the previous guidances, the majority of the revisions involve rewording the previous guidances to clarify the CRA's long-term interpretation of the "own activities" test under the *Income Tax Act* (the "*ITA*"), and the requirement for a registered charity to exercise "direction and control" when working through intermediaries to meet that test. As such, in general terms, these changes preserve the *status quo* of the CRA's regulatory policy for registered charities rather than reflecting any substantial reform of the current "direction and control" regime that would have otherwise required amendments to the *ITA*. This *Bulletin* provides a brief explanation of the more notable changes to both CG-002 and CG-004.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 484.

Corporate Update

By Theresa L.M. Man

Consultation on Permanent Amendments to Corporate Legislation in Ontario

The government of Ontario is conducting a consultation to seek feedback on potential permanent changes to corporate legislation, including the Ontario *Corporations Act* ("OCA"), *Not-for-Profit Corporations Act, 2010* ("ONCA"), and *Co-operative Corporations Act* ("CCA") to enable digital and virtual processes in the province.

The *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*, which received Royal Assent on May 12, 2020, temporarily amended the OCA and CCA to permit virtual meetings and defer AGMs in some circumstances in response to the COVID-19 pandemic as a result of the first emergency declaration on March 17, 2020. While the timeframe for AGMs was not extended after the ending of the first emergency declaration on July 24, 2020, the temporary amendments permitting electronic meetings were extended until May 31, 2021, as discussed in the October 2020 *Charity & NFP Law Update*.

The government is now seeking input from the public and stakeholders on making these changes permanent, or providing further temporary changes in relation to virtual processes. In this regard, the Ministry of Government and Consumer Services has produced sector-specific feedback forms to canvas the sector on potential permanent amendments to the OCA, ONCA and CCA regarding (1) virtual meetings, (2) electronic delivery of notices and documents, and (3) storage/examination of records through electronic means. For those interested, feedback must be provided by February 8, 2021.

Amendments to Ontario *Co-operative Corporations Act*

Ontario's Bill 213, *Better for People, Smarter for Business Act, 2020* received Royal Assent on December 8, 2020, introducing changes to various provincial corporate and business-related statutes. Among the changes, Bill 213 amends the *Co-operative Corporations Act* to include new section 168.1, regarding the availability of a co-operative's property to satisfy judgments.

Section 168.1 provides that where a co-operative's property becomes forfeited corporate property, as defined under the *Forfeited Corporate Property Act, 2015*, as a result of a dissolution, that property will not be available to satisfy a judgment, order, or decision against the co-operative, and cannot be sold in power of sale proceedings. Substantively the same provisions were previously included in section 39 of the *Forfeited Corporate Property Act, 2015*, and have been repealed from that Act.

Similar provisions regarding the availability of property to which the *Escheats Act, 2015* apply have also been included in section 168.1.

Supreme Court Upholds Appeal Court Decision on Vicarious Liability

By Sean S. Carter and Terrance S. Carter

On January 14, 2021, the Supreme Court of Canada denied the Roman Catholic Episcopal Corporation of St. John's Newfoundland (the "Archdiocese") application for leave to appeal from the decision of the

Newfoundland and Labrador Court of Appeal ("Court of Appeal") in a sexual and physical abuse case involving the Mount Cashel orphanage in St. John's Newfoundland rendered in *Roman Catholic Episcopal Corporation of St. John's v. John Doe (G.E.B. #25), et al*.. As discussed in *Church Law Bulletin* No. 58, the Court of Appeal on July 28, 2020 had found the Archdiocese vicariously liable for sexual and physical abuse that was committed by a civilian employee and by members of the Christian Brothers Institute Inc. ("Christian Brothers") against former residents of the Mount Cashel orphanage.

In general terms, the Court of Appeal found that the Archdiocese was vicariously liable because there was an integrated relationship between the Diocese and the Christian Brothers, and that the parties were "sufficiently close to make the imposition of vicarious liability on the Archdiocese appropriate." This finding was fact-specific, drawing on factors including the agreement between the Archdiocese and the Christian Brothers, the authority of the Archdiocese over the Christian Brothers and Mount Cashel, the public's perception thereof, and the Archdiocese's funding of the Christian Brothers, among others. The Court of Appeal further found that the sexual abuse committed by the Christian Brothers was sufficiently connected with their assigned tasks to run the Mount Cashel orphanage to find the Archdiocese vicariously liable.

In the wake of the Supreme Court of Canada's decision to deny the Archdiocese's leave to appeal, the Court of Appeal's decision remains unchallenged and is final and binding in Newfoundland and Labrador. This means that organizations in that province may be found vicariously liable for the actions of separate third-party organizations where a sufficiently close relationship exists and a connection exists to the incident causing the harm. Although the decision is not binding outside of Newfoundland and Labrador, it remains to be seen whether other provinces and territories will follow the precedent set by this case.

Divisional Court Upholds Order for Election of Common Board by De Facto Members

By Esther S.J. Oh

An Ontario Divisional Court ruling dismissed an appeal of a decision recognizing that the members of one not-for-profit were *de facto* members of another charity. On January 6, 2021, the Divisional Court in *Bose v Bangiya Parishad Toronto* (the "Appeal") dismissed the appeal of an August 26, 2019 Superior Court decision on two applications that awarded costs (the "Applications"). The Applications, discussed in the October 2019 *Charity & NFP Law Update*, concerned a dispute that arose in 2016 between the Prabasi Bengal Cultural Association, which organized cultural events for members of the Bengali

community ("Cultural Organization"), and the Bangiya Parishad Toronto ("Religious Corporation"), which are both not-for-profit corporations incorporated under the *Corporations Act* (Ontario).

For several decades, the two organizations had a common board of directors and issued consolidated financial statements. The Religious Corporation owned the community centre — the Tagore Centre — from which both organizations have carried out their programs over the years. The Cultural Organization was properly organized under its incorporating statute and held membership elections. In contrast, the Religious Corporation was never properly organized from a corporate law perspective. The board of directors of the Cultural Organization functioned as the board of directors for both corporations, and members of the Cultural Organization were always treated as members of the Religious Corporation, even though the by-laws of the Cultural Organization did not mention the Religious Corporation.

When the dispute arose, a minority of the Religious Corporation's board took action to nullify the election of that board and purported to form a new board of directors for the Religious Corporation (the "New Board"). The New Board then began to govern the Religious Corporation independently of the Cultural Organization and took steps to change the locks of the Tagore Centre so the Cultural Organization members could no longer access it. The Applications were brought by the Cultural Organization: (1) To regain access to the Tagore Centre ("Lease Application"); and (2) To resolve the issue of who were the lawful directors of the Religious Corporation are ("Governance Application"). The Applications judge ordered: (1) That the Religious Corporation must deliver the keys for the Tagore Centre to the Cultural Organization; and (2) That an election be held for a new common board of directors within 30 days where the paid-up members of the Cultural Organization would be entitled to vote. The Applications judge also awarded costs of $20,000 in favour of the applicants in the Lease Application and $35,000 to the applicants in favour of the Governance Application.

The Religious Corporation appealed the orders and also argued that the costs were excessive. The Divisional Court noted that it was not possible to call a meeting of the members of the Religious Corporation, because the Religious Corporation had not taken the formal steps necessary to enact its own by-laws or admit its own members. However, the Divisional Court recognized that this does not mean that the Religious Corporation did not have members, as the Religious Corporation had treated the members of the Cultural Organization as its members for decades, and the members of the Cultural Organization had regarded themselves as members of the Religious Corporation. In this regard, the Divisional Court recognized that the Religious Corporation's members, were the paid-up members of the Cultural

Organization and s. 297 of the *Corporations Act* (Ontario) gave the Application Judge the authority to have those members hold a meeting to determine whom they wished to run their organizations, as the most practical and democratic option.

As mentioned earlier in this summary, the Divisional Court upheld the findings in the Applications. This decision illustrates what can happen when factions within a not-for-profit corporation attempt to take over control of the board of directors in a manner that is prejudicial to the rights of its members. This case also affirms the importance of complying with basic corporate law requirements (including adoption of an appropriate by-law and complying with by-law provisions).

Long-Serving Radio Broadcaster Paid 21 Months in Lieu of Notice

By Barry W. Kwasniewski

Supporting evidence is essential for any employer arguing that an employee could have mitigated their damages by finding comparable employment after termination. The Ontario Superior Court in *Rothenberg v Rogers Media Inc.* awarded a long-time radio broadcaster 21 months' compensation in lieu of reasonable notice after he was terminated by his employer and could not find another job in his field. Although the COVID-19 pandemic began during the plaintiff's reasonable notice period, the court did not hold that to be an exceptional circumstance, although the decision does not entirely settle the issue of how the pandemic may affect reasonable notice. This *Bulletin* summarizes the facts of the case and highlights the court's analysis of the issues.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 485.

Ontario Occupiers' Liability Act Amendments Receive Royal Assent

By Sean S. Carter and Heidi LeBlanc

Ontario Bill 118, *Occupiers' Liability Amendment Act, 2020* ("Bill 118"), received Royal Assent on December 8, 2020. Once Bill 118 has been proclaimed into force, it will amend the *Occupiers' Liability Act* (the "Act") to provide certain protections to "occupiers" of a premises, including charities and not-for-profits. Broadly speaking, the amendments prohibit plaintiffs from bringing an action against occupiers of a premises, and independent contractors employed by an occupier for snow or ice removal from the premises, for personal injury damages related to snow or ice injuries suffered by the plaintiff,

unless they first serve written notice of the claim within 60 days of the injury. Occupiers are defined in the Act as including "(a) a person who is in physical possession of premises, or (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises."

In addition to the 60-day timeframe for service, Bill 118 requires that written notice must set out the date, time and location of the injury. Where an occupier receives service of such a notice, Bill 118 requires them to subsequently serve a copy of that notice to all other occupiers and their independent contractors, as the case may be. Similarly, where an independent contractor receives service of such notice, they must serve a copy of that notice to the occupier that employed them.

Bill 118 also provides that, where the injury has resulted in death, failure to give notice will not prevent an action against an occupier or their independent contractor. Further, failure to give notice or sufficient notice will not prevent an action if a judge finds that there is "reasonable excuse for the want or the insufficiency of the notice and that the defendant is not prejudiced in its defence."

As the range of individuals and entities that can fall within the scope of the definition of "occupiers" under the proposed legislation is broad and includes, for example, property owners, tenants, and licensees, this new protection will be afforded to charities and not-for-profits that are in physical possession of premises, as well as to any independent contractors they hire to remove snow or ice from the premises. Once proclaimed into force, this new 60-day notice period will likely serve to reduce snow and ice 'slip and fall' claims against occupiers, but it is important to note that the *Limitations Act, 2002,* (as amended) remains in force, which has generally a two-year limitation period, and an analysis will be necessary depending on the facts of each case to determine whether a potential lack of notice under the *Occupiers' Liability Act* will serve as an absolute defence. Even if an individual serves the requisite notice under the Act, they will still need to commence an action in accordance with the *Limitations Act, 2002,* (as amended) to preserve and pursue their right to commence an action for damages.

Privacy Commissioner Report on eHealth Saskatchewan Cyberattack

By Esther Shainblum and Luis R. Chacin

On January 5, 2021, the Office of the Saskatchewan Information and Privacy Commissioner (the "Commissioner") released its Investigation Report on the ransomware attack affecting eHealth Saskatchewan ("eHealth"), the Saskatchewan Health Authority ("SHA") and the Ministry of Health ("Health") in late 2019 and early 2020.

The ransomware attack occurred when, on December 20, 2019, an SHA employee opened a corrupt Microsoft Word document from their personal email account on their personal device which was at the time charging via USB connection on their SHA workstation. The corrupt Microsoft Word document triggered the execution of a "Ryuk" ransomware on the workstation and subsequently infiltrated and encrypted a number of files on the shared network infrastructure of eHealth, the SHA and Health on January 5, 2020.

Although the Commissioner was not able to conclude exactly how many files were potentially affected, it was determined that approximately 50 million files were exposed to the ransomware, of which a minimum of 547,145 potentially contained personal information and/or personal health information. The investigation found that the employee had received privacy training but had not received training on the SHA's Acceptable Use of Information Technology (IT) Assets policy.

In its report, the Commissioner found, among other things, that there was a privacy breach affecting personal information and personal health information of individuals, as defined in Saskatchewan's *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act*, respectively, and that eHealth failed to fully investigate two early threat occurrences which may have prevented the subsequent attack and extraction of data. The Commissioner also found that SHA had not provided the employee who caused the breach with training on its Acceptable Use of IT Assets policy, that eHealth, the SHA and Health failed to contain the breach and that eHealth, SHA and Health failed in their breach notification obligations. Further, the Commissioner found that the SHA and Health failed their duty to protect personal information and personal health information without having all the necessary checks and balances in place to ensure that eHealth was not handling their IT service delivery in a deficient manner.

The Commissioner made a number of recommendations in its report, including that:

- eHealth utilize key network security logs and scans to effectively monitor the eHealth IT network and detect malicious activity.
- eHealth undertake a comprehensive review of its security protocols to include an in-depth investigation when early signs of suspicious activity are detected.
- eHealth continue dark web monitoring for a minimum of five years from the date of this Report.
- The SHA and Health take immediate steps to provide mass notification including media releases, newspaper notices, website notices and social media alerts.
- eHealth, the SHA and Health work together and provide identity theft protection, including credit monitoring, to affected individuals for a minimum of five years from the date an affected individual's information is discovered on the dark web or to any concerned citizen who requests it.
- eHealth review and reconsider the 70% cyber security training pass mark for its employees and its partners' employees and increase the pass mark to a minimum of 90%.
- eHealth review whether it should have IT security staff in place 24 hours a day, seven days a week to actively monitor and investigate potential threats.
- The Minister of Health immediately commence an independent governance, management and program review of eHealth based upon the concerns put forward by Saskatchewan Telecommunications, the Provincial Auditor and this Report.

The Commissioner's report is particularly relevant in the context of the National Cyber Threat Assessment 2020 (the "Assessment") recently released by the Canadian Centre for Cyber Security which warns that "as more information is shared and stored online, the threat to individual privacy increases." In this regard, the Assessment further states that "cybercrime remains the most common threat faced by Canadian organizations of all sizes" and that "cyber threat actors have expanded the use of [Business Email Compromise] beyond traditional business victims to target religious, educational, and not-for-profit organizations."

Although the ransomware attack on eHealth and SHA involved a personal email account on a personal device which was connected to a network computer via USB, as opposed to a business email account, the Commissioner's report is an important reminder for charities and not-for-profits of the importance of

having appropriate policies and implementing appropriate training and protocols to ensure employees know what to do in order to protect the personal information under the control of the organization.

Unconscionability of a Standard Form Services Agreement

By Luis R. Chacin

One of the most important legal developments in 2020 was the Supreme Court of Canada decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 ("*Heller*"), released on June 26, 2020. Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. (collectively, "Uber") are part of an international corporate group that provides software applications for drivers and customers to arrange personal transportation and food delivery using their smartphones in what is referred to as the "sharing economy". In *Heller,* the Court considered the validity of the arbitration clause in Uber's standard form services agreement, which required that any dispute between a driver and Uber be submitted to mediation and arbitration in the Netherlands. In the result, the majority of the Supreme Court of Canada dismissed the appeal against the decision of the Court of Appeal for Ontario and found that the arbitration clause was unconscionable based on the inequality of bargaining power between the parties and the improvident bargain involving the substantial cost of arbitration proceedings in the Netherlands for a driver in Canada.

Online platform agreements are typically in standard form contracts of adhesion where the user is presented with the take it or leave it option "I Agree", with no room for bargaining or negotiation. Online platform agreements are drafted to manage the potential risks to which the provider is exposed in dealing with large numbers of users in different jurisdictions and circumstances. However, as in *Heller*, when the terms of an online platform agreement are unfair or unreasonably one-sided, particularly in situations where users are not freely accepting the terms, or there is a "cognitive asymmetry", and the agreement unduly advantages the stronger party or disadvantages the more vulnerable, such as where the weaker party did not understand or appreciate the meaning of important terms leading to an "unfair surprise", then those terms may be not enforceable.

Generally speaking, the doctrine of unconscionability is intended to protect vulnerable persons in transactions where there is an inequality of bargaining power resulting in an improvident bargain. A similar approach was considered by the Court in *Douez v. Facebook Inc.*, 2017 SCC 33 ("*Douez*"), regarding the forum selection clause and choice of law in Facebook's standard terms of use, which

required that disputes be resolved in California according to California law. In *Douez*, the majority of the Court found that the forum selection clause was unenforceable as a matter of public policy.

In *Heller*, the majority of the Court said that unconscionability has a meaningful role to play in examining the conditions behind consent in contracts of adhesion and in encouraging drafters of such contracts to make them more accessible to the other party or to ensure that such contracts are not so lop-sided as to be improvident, or both.

As a general rule, charities and not-for-profits should carefully review all their online agreements before entering them, either as customer or provider, and ensure that the terms, particularly any choice of law, forum selection, and arbitration clauses, are not potentially unconscionable.

Advisory Committee on the Charitable Sector Reviews Challenges Faced by Charities

By Jacqueline M. Demczur

The CRA's Advisory Committee on the Charitable Sector ("ACCS") met again in December, 2020 to discuss a number of matters of concern to the charitable sector, including charities that have been hit harder than others during the COVID-19 pandemic. The ACCS met by videoconference on December 1, 2020, and a readout of that meeting was published on the CRA website earlier this month on January 6, 2021.

The readout reported that Tony Manconi, Director General of the CRA's Charities Directorate, provided the ACCS with an update on the charitable sector, noting that the Directorate's client services phone line had received over 50,000 calls in the past eight months, similar to prior years. Manconi recommended that charities call the CRA if they are unsure about eligibility criteria for the Canada Emergency Rent Subsidy ("CERS") or the Canada Emergency Wage Subsidy ("CEWS"). According to the readout, the CRA has processed over 76,000 applications for CEWS with over $2 billion paid out to charities.

ACCS members noted the difficulty for some organizations to adapt to the pandemic, and how some charities that were not eligible for CERS because they own their own buildings and had to close some facilities. Many organizations "are spending their time and resources dealing with immediate challenges" and fatigue among volunteers and directors is "a real concern."

The ACCS also discussed the draft of its first report on "important issues facing registered charities" (set out below), which received detailed feedback from its five working groups during the meeting:

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

As part of this report, the ACCS has drafted recommendations for the Minister of National Revenue and the Commissioner of the CRA to address these important issues. The ACCS also discussed during the meeting "common themes, potential gaps and a work plan for 2021", which will include the five working groups consulting with a wide range of stakeholders and using those findings to inform future recommendations. The report is expected to be available "in the coming months."

The next ACCS meeting is scheduled for January 29, 2021.

Ontario Launches 2021 Budget Consultation

By Jennifer M. Leddy

The Ontario 2021 Budget Consultation is currently underway until February 12, 2021. The public is invited to take part in the provincial government's online survey to provide feedback. According to the published announcement, the survey is meant to canvass Ontarians' "ideas on how the government can continue to support people and employers during COVID-19, while continuing to position Ontario for a strong economic recovery". Charities and not-for-profits wanting to voice their opinions are therefore encouraged to participate in the survey before the deadline. Participation in the consultation is also available by written submission, 500 words or less, sent by email or post.

AML/ATF Update

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

FATF's "Update: COVID-19-Related Money Laundering and Terrorist Financing"

On December 16, 2020, the Financial Action Task Force ("FATF"), an inter-governmental body established to set standards and measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system, released its Update: COVID-19-Related Money Laundering and Terrorist Financing (the "COVID-19 Report"). The COVID-19 Report was first published in May 2020, highlighting an increase in COVID-19-related crimes, including fraud, cybercrime, misdirection or exploitation of government funds or international financial assistance, as well as online fundraising scams for fake charities.

The COVID-19 Report provides a selection of case studies showing how the money laundering and terrorist financing risks have changed throughout the pandemic and the measures taken by authorities in response. The sources of concern resulting from the pandemic, as expressed by the FATF, include significant increases in online purchases due to widespread lockdowns with bank services transitioning online, as well as the losses of millions of jobs and closures of thousands of businesses.

In this regard, the updated COVID-19 Report states that fundraising for fake charities has continued throughout the pandemic, with victims being asked to provide credit card information or transfer funds to the bad actors' secure digital wallets. In some cases the bad actors pretend to raise funds on behalf of well-known global charities. The fundraising scams often rely on social media platforms and other technologies, such as QR codes to fraudulently appeal for funds.

The COVID-19 Report recommends that authorities and the private sector take a risk-based approach to respond to the crisis, as required by the FATF Standards. The COVID-19 Report states that that the aim of the FATF Standards is to ensure that financial transactions with jurisdictions where there may be high risks of money laundering and terrorist financing are not driven towards unregulated service providers but are instead completed through legitimate and transparent channels so that the funds reach the legitimate intended recipients. The COVID-19 Report further states that the FATF Standards do not require that all charities and non-profit organizations ("NPOs") be considered high-risk. Most NPOs play a vital role in the public health emergency response to the pandemic and carry little or no terrorist financing risk. As

such, a risk-based approach must be applied to ensure that legitimate NPO activity is not unnecessarily delayed, disrupted or discouraged.

FINTRAC Guidance on Suspicious Virtual Currency Transactions

The Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC"), published its guidance on suspicious transactions, "Money laundering and terrorist financing indicators – Virtual currency transactions" (the "FINTRAC Guidance") on December 2, 2020. The FINTRAC Guidance is applicable to all reporting entities that are subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA") and associated Regulations. Charities and not-for-profits would not generally fall within the definition of a reporting entity under the PCMLTFA. However, the FINTRAC Guidance is a useful tool for charities and not-for-profits to stay alert regarding virtual currency transactions and avoid becoming unknowing participants in a money laundering or terrorist financing scheme.

The FINTRAC Guidance provides a number of potential red flag indicators for money laundering and terrorist financing in the context of virtual currency transactions. These red flag indicators are intended to, depending on the specific circumstances of each case, initiate suspicion or indicate that something may be unusual in the absence of a reasonable explanation.

As such, the red flag indicators in the FINTRAC Guidance include, for example: i) transactions involving "privacy coins" such as Monero, Dash and Zcash; ii) transactions involving a virtual currency wallet or address that is linked to fraudulent activity in media reports and/or cyber security bulletins; iii) publicized initial coin offerings (ICOs) by way of advertisements, celebrity endorsements, social media ads that could potentially be a "pump and dump" scheme; iv) transactions involving a smart contract to which there is no access to the code or to relevant technical information; or v) transactions involving a series of complicated transfers of funds to multiple addresses or wallets seemingly attempting to hide the source and intended use of the funds.

The FINTRAC Guidance follows the FATF's Virtual Assets Red Flag Indicators of Money Laundering and Terrorist Financing, released on September 14, 2020.

IN THE PRESS

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

What's Happening with ONCA? is an article featured in the CSAE Trillium FORUM on January 18, 2021, including two recent updates on the ONCA by Theresa L.M. Man.

UPCOMING EVENTS AND PRESENTATIONS

Institute of Corporate Directors Ontario (GTA) Chapter (ICD) is hosting a virtual panel discussion on Wednesday, February 3, 2021, entitled *Reaching for New Not-for-Profit Operating Models in a COVID World*. Theresa L.M. Man will be one of three panellists with Susan Doyle and Robyn McDonald, with Don McCreesh as Moderator.

CPA Not-for-Profit Forum hosted by CPA Canada is being held February 9 to 10, 2021 as a virtual forum. Terrance S. Carter will be speaking on February 9, 2021, on the topic of *Considering Going Into Business? The Social Enterprise Spectrum for Charities and NPOs*.

The 2021 Annual Ottawa Charity & NFP Law Seminar Goes Virtual! The webinar this coming year will be hosted by Carters Professional Corporation on **Thursday, February 11, 2021**. The special speakers this year will be **The Honourable Ratna Omidvar**, C.M., O.Ont., Senator for Ontario and Former Deputy Chair of the Special Senate Committee on the Charitable Sector, as well as **Tony Manconi**, Director General of the Charities Directorate of the Canada Revenue Agency.

The Association of Treasurers of Religious Institutes (ATRI) is hosting a webinar on Wednesday, February 17, 2021. Terrance S. Carter will present on the topic of *Due Diligence Considerations in a Pandemic.*

OBA Charity and Not-for-Profit Law Program is hosting a webinar on Thursday, March 4, 2021, entitled *Understanding Charities' and Non-Profits' Financial Statements and Tax Returns* presented by Terrance S. Carter and Tim Galvin, CPA.

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