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CHARITY & NFP LAW UPDATE

NOVEMBER 2021

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

NOVEMBER 2021

SECTIONS

HIGHLIGHTS

RECENT PUBLICATIONS AND NEWS RELEASES

1. Legislation Update

By Terrance S. Carter

Bill S-216 Reintroduces the *Effective and Accountable Charities Act* in the Senate

The Honourable Senator Ratna Omidvar's Bill proposing amendments to the *Income Tax Act* to eliminate the "own activities test" and the "direction and control" regime has been reintroduced in the Senate and completed first reading on November 24, 2021. The proposed legislation had been previously set out in Bill S-222, the *Effective and Accountable Charities Act* ("Bill S-222"), and had passed through the Senate and received First Reading at the House of Commons, as reported in the June 2021 *Charity & NFP Law Update*. However, Bill S-222 died on the Order Paper when Parliament was dissolved on August 15, 2021.

With the resumption of Parliament on November 22, 2021, the proposed legislation has now been reintroduced as Bill S-216, the *Effective and Accountable Charities Act* ("Bill S-216"), and will need to pass through the Senate and the House of Commons before it receives Royal Assent. Bill S-216 sets out in essence the same proposed revisions to the *Income Tax Act* as those contained in Bill S-222, with very minor "housekeeping" amendments.

As explained in the May 2021 *Charity & NFP Law Update*, Bill S-222, and now its replacement Bill S-216, proposes significant changes to several provisions in the *Income Tax Act* governing charities to eliminate the "own activities test" and the related Canada Revenue Agency ("CRA") "direction and control" regime in order to permit charities to provide their resources to qualified donees, provided that charities take reasonable steps to ensure those resources are used exclusively for a charitable purpose.

Ontario Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021*

The Government of Ontario is proposing to replace the *Long-Term Care Homes Act, 2007* (the "2007 Act") with new legislation, following the final report of Ontario's Long-Term Care COVID-19 Commission, released on April 30, 2021. Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021* was introduced by Ontario's Minister of Long-Term Care on October 28, 2021, and was carried after its second reading on November 18, 2021. If passed, Bill 37 would repeal the 2007 Act, enact the new *Fixing Long-Term Care Act, 2021* (the "2021 Act"), and amend the *Retirement Homes Act, 2010*.

The 2021 Act largely follows the same structure as the 2007 Act, though a new Part III concerning a mandatory "continuous quality improvement initiative" has been proposed. The preamble to the 2021 Act reiterates the province's commitment to "the promotion of the delivery of long-term care home services by not-for-profit and mission-driven organizations." Additionally, and as set out in the provincial government's news release introducing Bill 37, the 2021 Act is intended to "fix long-term care" by:

- establishing the commitment to provide an average of four hours of daily direct care per resident per day by March 31, 2025
- strengthening the Residents' Bill of Rights to align with the Ontario *Human Rights Code* and recognizing the role caregivers play in resident health and well-being
- implementing new requirements for annual resident, family, and caregiver surveys
- establishing new compliance and enforcement tools, including doubling the fines on the conviction of an offence under the proposed legislation
- introducing a Minister's review of a Director's decision in the licensing process.

While the 2021 Act references additional details and requirements to be prescribed by regulation, the initial regulations under the Act are not yet available, and must undergo a public consultation process before they can be filed.

Ontario Releases Fall Economic Statement 2021 and Implementation Bill

The Government of Ontario released its *2021 Ontario Economic Outlook and Fiscal Review: Build Ontario* (the "Fall Economic Statement"), together with its draft implementing legislation, Bill 43, *Building Ontario Act (Budget Measures), 2021* ("Bill 43") on November 4, 2021. The Fall Economic Statement "lays out how the government will build the foundation for Ontario's recovery and prosperity" and "protects Ontario's progress against the COVID-19 pandemic", according to a government news release.

While the Fall Economic Statement does not contain many measures and legislative proposals specifically targeting charities and not-for-profits, the government has proposed support through funding, including $12.4 million over two years in support of health and long-term care workers' mental health and addictions; $548.5 million over three years to expand home and community care; $1.6 million over three years to "create a database of diverse, skilled volunteers who will be screened and receive training to help

respond to emergencies"; and $10 million over two years in support of the Anti-Racism Anti-Hate Grant Program and a new Racialized and Indigenous Support for Entrepreneurs (RAISE).

As announced in the Fall Economic Statement, Bill 43 also proposes to amend subsection 3(1) of the *Assessment Act*, which sets out the types of property that are exempt from Ontario property taxes. In this regard, in addition to the current exemption for "land owned, used and occupied solely by a university, college, community college or school as defined in the *Education Act* or land leased and occupied by any of them if the land would be exempt from taxation if it was occupied by the owner", Bill 43 proposes to also exempt from property taxes:

> Land leased and occupied solely by a university if the following conditions are satisfied:
>
> i. the land forms part of the main campus of the university,
>
> ii. the land is used for administrative, educational or research purposes or such other purposes as may be prescribed by the Minister,
>
> iii. the university is a not-for-profit corporation without share capital, and
>
> iv. such other conditions as may be prescribed by the Minister

While the Fall Economic Statement indicates that this amendment is aimed at ensuring that the new Université de l'Ontario français campus is exempt from property tax, this exemption will apply equally to all universities that meet the above-noted requirements, and will allow them to direct funds "to priority initiatives that support students and academic programming."

2. Corporate Update

By Theresa L.M. Man

Ontario Updates Not-for-Profit Incorporator's Handbook

In conjunction with the proclamation of the Ontario *Not-for-Profit Corporations Act, 2010* (the "ONCA"), the Ontario Ministry of the Attorney General has updated its *Not-for-Profit Incorporator's Handbook* (the "Handbook"). The Handbook, prepared jointly by the Ministry of Government and Consumer Services, ServiceOntario and the Office of the Public Guardian and Trustee for Ontario, is a useful tool for not-for-profits seeking to be incorporated and operate in Ontario. It provides general information on the nature of not-for-profit corporations, guidelines for incorporation, and basic information on incorporating charitable corporations.

Prior to the recent amendments, the Handbook was previously updated in May 2018, and provided guidance on incorporation under the Ontario *Corporations Act*. With the proclamation of the ONCA, the updated Handbook now sets out details for incorporating and operating under the ONCA, including incorporation process, organization and start-up after incorporation, and corporate maintenance and filing requirements.

British Columbia Amends *Societies Act*

Following a public consultation held by the British Columbia Ministry of Finance in 2019, British Columbia's *Societies Act* received significant amendments through Bill 19, *Societies Amendment Act, 2021*. Bill 19, which received Royal Assent on October 28, 2021, addresses issues that have been brought to light since the Act was brought into force on November 28, 2016. The amendments in Bill 19 are intended to make the Act more accessible, addressing uncertainties and omissions, and creating consistency within the Act and with other legislation, according to a government Information Bulletin.

Many of these issues were identified by the public, societies and the legal community. Feedback from public consultation was analyzed and incorporated in these amendments. The proposed amendments were also developed in close consultation with the B.C. Corporate Registry.

The amendments are broad, and include amendments related to by-laws; directors' and members' registers; correcting errors in the statement of directors and registered office; access to society records; disclosure of remuneration to all employees and contractors; directors' term of office; meetings of directors and members; member proposals; member proxy votes; a new record keeper requirement for dissolved societies; restorations; and receipt of testamentary gifts by member-funded societies. Additionally, there are amendments related to attorney filings, names, and annual reports by extra-provincial non-share corporations.

While certain provisions in Bill 19 were brought into force upon Royal Assent, many provisions will only come into force by regulation of the Lieutenant Governor in Council. A helpful summary titled *Changes to the Societies Act* from the Government of British Columbia provides further details on the amendments.

Minister's Report on Statutory Review of CNCA Published

Following an online public consultation launched in June 2021 seeking feedback on the implementation of the *Canada Not-For-Profit Corporations Act*, the Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry laid before Parliament a report on the statutory review of the Act on November 23, 2021. Details on the report will follow in a subsequent *Charity & NFP Law Update*.

3. Legal Risk Management Checklists for Ontario-based Charities and Not-for-Profits

By Terrance S. Carter and Jacqueline M. Demczur

The annual updated Legal Risk Management Checklist for Ontario-Based Charities, as well as the Legal Risk Management Checklist for Ontario-Based Not-for-Profits, updated as of November 2021, are now available through our website at http://www.carters.ca/.

4. BC Court Considers Oppression Claim in Soccer Association Dispute

By Ryan M. Prendergast

The Supreme Court of British Columbia released its decision in *Fusion Football Club Soccer Association v Vancouver Youth Soccer Association* on July 8, 2021 concerning a dispute between two societies incorporated under the British Columbia *Societies Act*. Fusion Football Club Soccer Association ("FFCSA") had petitioned for orders permitting it to operate as an affiliated member of the Vancouver Youth Soccer Association ("VYSA"), arguing that certain VYSA board decisions limiting the number and type of youth soccer teams was oppressive and unfairly prejudicial pursuant to s 102(1)(a) and (b) of the *Societies Act*, and further in breach of VYSA's bylaws.

VYSA is a youth district soccer association and governing body for youth soccer in Vancouver. VYSA had seven affiliated clubs prior to January 2021 offering youth soccer programs. Its bylaws require VYSA to be a member of the British Columbia Soccer Association ("BC Soccer"), and to be subject to the published bylaws, rules, regulations, and policies of FIFA (the international governing body of soccer), the Canadian Soccer Association, and BC Soccer. In 2009 VYSA had established an affiliate, Vancouver Football Club ("VFC"), to harmonize the boys' and girls' elite-level programs under the BC Coastal Soccer League's Metro division. However, in 2021, VFC amalgamated with another soccer club, Fusion Soccer, which played at the highest level of the BC Soccer Premier League, to form FFCSA, with the stated objective of "expand[ing] its soccer programs beyond what was previously offered by VFC and Fusion."

VYSA was not in support of the amalgamation, indicating in a letter from the board to FFCSA that VFC was "created and affiliated for the sole purpose of operating Metro teams at the discretion of the VYSA." It further stated that it retained the right to modify or terminate the program and VFC's affiliation rights, and that VFC was neither intended as a grassroots club, nor permitted to expand its mandate without complying with VYSA's new club member admissions policies. VYSA then indicated that if FFCSA complied with the VYSA governance going forward, it would not revoke the affiliation of team currently

playing in the Metro division under the VFC affiliation until the end of the 2020/2021 season, but that it would not affiliate any other FFCSA teams.

FFCSA filed an appeal with BC Soccer, which found that its authority did not extend to law, including the *Societies Act*, but otherwise generally sided in favour of VYSA, including a decision that the VYSA board decisions were not oppressive or unfairly prejudicial to FFCSA or its officers. FFCSA then brought its petition to the Supreme Court of British Columbia, arguing that upon amalgamation, FFCSA retained VFC's previous rights as an affiliated club of VYSA and was entitled to exercise the same rights as other affiliated clubs. On this basis, it submitted that VYSA's decision violated FFCSA's reasonable expectations and was oppressive and/or unfairly prejudicial under section 102 of the *Societies Act*.

The court found that pursuant to paragraph 90(1)(d) of the *Societies Act*, the rights and interests of the amalgamating societies became the rights and interests of the new society upon amalgamation. It also found that the relationship between a society and its members is contractual in nature and that "FFCSA's rights and interests vis-à-vis VYSA are thus rooted in the contractual relationship between the two entities". Further, reviewing case law concerning voluntary associations, including the recent Supreme Court of Canada decision in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, the court also outlined the principle that courts have jurisdiction to intervene in a voluntary association's decisions or affairs of voluntary associations only where a legal right is affected, requiring a legal or proprietary right to have been harmed.

With respect to the oppression claim, the court found that VFC was established "for the specific and limited purpose of entering teams in the Metro divisions", and that there was nothing in VFC's history, structure, operations, relationship with VYSA, or the policies and practices of the parent organizations (to which it was subject, pursuant to its bylaws) that supported FFCSA's alleged expectations. As such, FFCSA had not established a reasonable expectation that it would be permitted to register its teams in all BC Coastal divisions as affiliated teams with VYSA, and VYSA's actions were therefore not oppressive.

FFCSA also argued that VYSA had violated its bylaws, which provide that member clubs may "register players and team officials with BC Soccer and the Association" and "be a Member of and register their teams with BC Soccer sanctioned Leagues". Given the contractual nature of societies' relationships with their members, the court interpreted the terms of the contract by determining the parties' intent and scope of their understanding. It found that the intention of all the parties when VFC was formed with the specific and limited purpose of fielding teams in the Metro division, and that there was no evidence that the parties

ever intended to permit VFC to unilaterally expand its mandate. The court again stressed that VFC was subject to BC Soccer's and VYSA's bylaws and policies, which "have always recognized that programming decisions relating to Metro division play, as well as play at other levels, rests with the youth district soccer association." It therefore found that YVSA's decision did not contravene the *Societies Act* or YVSA's bylaws to warrant court intervention.

This case is a reminder of the importance of charities and not-for-profits understanding and following one's bylaws and the other rules and regulations that organizations are subject to. This is particularly the case where inter- and intra-organizational relationships are complex, such as in the case of affiliates and amalgamated organizations.

5. SCC Finds Insurer Participation in Litigation Not a Promise to Maintain Coverage

By Sean S. Carter and Barry W. Kwasniewski

The Supreme Court of Canada ("SCC") has found that an insurance company that was unaware of a policy violation could deny full coverage once it was made aware of the violation in question, in a decision that could have implication for all insureds, including charities and not-for-profits. In the case of *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, published on November 18, 2021, the SCC considered whether an insurer had waived its right to deny full coverage when it provided a defence to litigation brought against the estate of one of its insureds. Ultimately, the court concluded the insurer did not waive its right and could deny coverage because it did not know of the policy breach.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin No. 504*.

6. Judicial Review of 2018 Canada Summer Jobs Funding Dismissed by Federal Court

By Esther S.J. Oh

The Federal Court in *Right to Life Association of Toronto v Canada (Employment, Workforce, and Labour)* considered whether the Minister of Employment, Workforce, and Labour's (the "Minister") decision to add an attestation requirement to the 2018 Canada Summer Jobs program ("CSJ") was *ultra vires*, whether the Minister acted in bad faith and with bias against the Applicants, and whether the Applicants' *Charter* rights were engaged. The case, released October 22, 2021, arose when the Applicants (The Right to Life Association of Toronto and Area ["TRTL"] along with its former president and a

student seeking re-employment with TRTL) sought judicial review after the Minister did not consider TRTL's application for funding on the basis that TRTL did not make the required attestation.

In this regard, the Minister had added an attestation as an eligibility requirement for the 2018 CSJ program whereby all applicants were required to attest that the job and the organization's mandate respected individual human rights, *Charter* rights and reproductive rights (the "attestation"), as discussed in more general terms in the *February 2018 Charity & NFP Law Update*. The 2018 Applicant Guide stated that failing to check the box agreeing to the attestation would result in an incomplete application and the application for funding would not be considered by the Minister. As mentioned above, TRTL did not check the box agreeing to the attestation but instead included a letter which explained that they could not make the attestation on the basis of conscience and that making the attestation would be inconsistent with their fundamental personal beliefs about the value of life and the right to life under section 7 of the *Charter*. As a substitution for the attestation, TRTL's letter confirmed that TRTL was able to "to attest that 'we support all Canadian law, including Charter and human rights law.'"

The Federal Court did not agree with the Applicants' position that the attestation included in the 2018 CSJ application was *ultra vires* (i.e. an act beyond the Minister's legal power or authority). Instead, the court found that the attestation was within the powers of the Minister as set out in sections 5 and 7 of the *Department of Employment and Social Development Act* which grant the Minister broad discretion to implement programs designed to contribute to the social development of Canada. The inclusion of the attestation was to prioritize funding to groups that would respect *Charter* and other rights and that would provide job opportunities for vulnerable groups or to those who would benefit or serve those vulnerable groups – the effect to exclude TRTL was not the purpose.

The Federal Court also found that there was no bad faith, irrelevant considerations, or improper purposes on the part of the Minister. Because the attestation was within the Minister's authority and because there was no evidence that the government worked with pro-choice groups regarding a strategy to defund pro-life groups (as had been alleged), the court dismissed these claims. Additional arguments by TRTL that the Minister's decision to add the attestation reflected a closed mind or reasonable apprehension of bias were dismissed on the basis they were unsupported by evidence. The Applicants failed to establish any other breach of procedural fairness.

The Applicants claimed that their *Charter* rights to freedom of religion (section 2(a)), freedom of expression (section 2(b)), and equality (section 15) were infringed. Though the attestation's purpose was

to broadly promote *Charter* rights, the court found that it did engage the Applicants' rights to freedom of religion and expression. Nevertheless, the Federal Court concluded that the decision to add the attestation was a proportional balancing of the Applicants' rights with the objectives of the 2018 CSJ program to protect and promote *Charter* rights and values. Despite the Applicants complete exclusion from funding, the Court found that the limitation was minimal as it was a one-time impact on potential – not certain – funding for the summer of 2018. The nature of the balancing exercise that the court engaged in recognized that rights are not absolute, and the rights of some may inevitably yield to the rights of others. As a result, the Minister's policy decision was found to be reasonable and owed deference. The application for judicial review was dismissed.

This case underscores that *Charter* rights are not absolute and the courts may become involved in balancing competing rights in such cases subject to the facts of the case.

7. No Tax Rebate for Charity Housing Project's Market Rate Units

By Nancy E. Claridge and Adriel N. Clayton

An interpretation letter identified as Case no: 209926 (the "letter") from the CRA addressed when certain registered charities that qualify as designated municipalities pursuant to subsection 259(1) of the *Excise Tax Act* ("ETA") will be eligible for a rebate from the Goods and Services Tax/Harmonized Sales Tax ("GST/HST") paid on property and services. Specifically, the letter, dated May 25, 2021, and published on November 8, 2021, considered whether the charity's supply of market units for moderate income households could qualify for a rebate of the GST/HST according to section 259 of the ETA. As all pertinent facts could not be established, the CRA could not issue a written ruling, but instead provided a general explanation of how the legislation might apply in the charity's situation.

The charity had entered into a multi-year head lease agreement with a developer to lease several self-contained residential units in a multi-unit residential complex. The charity then leased those units to tenants on a Rent-geared-to-income ("RGI") basis in accordance with the terms of an agreement with a separate organization. The charity planned to lease some of the units to tenants as affordable housing, some units being on an RGI basis, and others on a "deep subsidy" basis. Other units would be rented at the market rate ("Market Units") and were intended for households with moderate incomes. The charity asked the CRA if the Market Units were eligible for the municipal rebate of GST or federal portion of HST paid on property and services related to these units.

The charity in this case was designated as a municipality as per subsection 259(1) of the ETA which says:

> ***municipality*** includes a person designated by the Minister, for the purposes of this section, to be a municipality, but only in respect of activities, specified in the designation, that involve the making of supplies (other than taxable supplies) by the person of municipal service

While the letter notes that "municipal service" is not defined in the ETA, nor does the ETA set out other legislative criteria, an organization can be designated as a municipality if it meets all four eligibility criteria set out in the CRA's info sheet GI-124 *Municipal Designation of Organizations Providing Rent Geared to Income Housing*:

- The organization is a charity, cooperative housing corporation, non-profit organization, or public institution;
- The organization supplies long-term residential accommodation within a program to provide housing to low-to-moderate-income households;
- More than 10% of the housing units are provided on an RGI basis; and
- The organization receives funding from a government or municipality to assist in providing accommodation within a program to provide housing to low-to-moderate-income households

The letter sets out that an organization that has been designated to be a municipality may be entitled to the Public Service Bodies' rebate of GST/HST paid or payable on eligible property or services, but only to the extent that such property or services are intended for use "in the course of the activities for which it has been designated." For example, this would include providing RGI housing, since this is included in the four eligibility criteria set out above. A designated municipality could claim 50% of the GST (in provinces where the GST is collected) and the federal part of the HST (in provinces where the HST has been introduced) on eligible purchases and expenses for which it cannot claim input tax credits.

In this instance, the CRA found that the charity's market units would not qualify for the rebate because the market units did not meet certain eligibility requirements, such as receiving an operating subsidy for these units. The CRA also raised concerns that the charity would only review the income of tenants occupying Market Units at the time of initial occupancy and mentioned this as a further ground that the charity would not be eligible for the municipal rebate for these units.

8. Discriminatory Language Results in Liability for Employer

By Barry W. Kwasniewski

The Human Rights Tribunal of Ontario (the "Tribunal") found an employer and its owner/manager liable for damages when they failed to appropriately respond to employees' concerns that the owner/manager Jamie Gallagher had used a derogatory slur to refer to them and additionally that he failed to address them by their preferred pronouns. The March 30, 2021 decision of *EN v Gallagher's Bar and Lounge* arose out of allegations by three employees (the "Applicants") who had been employed by the Respondents, Jamie Gallagher, and his restaurant, Gallagher's Bar and Lounge (the "restaurant"). Neither Mr. Gallagher nor the restaurant responded to these allegations before the Tribunal.

In 2018, when the relevant events took place, the Applicants identified as gender queer and/or non-binary trans and used they/them pronouns. One of the Applicants had asked Mr. Gallagher to refer to themselves and the other kitchen staff using they/them pronouns. The Applicants alleged that Mr. Gallagher mis-gendered them during their employment.

In addition, on June 21, 2018, an employee told one of the Applicants that days earlier on June 10, they had heard Mr. Gallagher use a slur when he said to a customer words to the effect of "I have four trannies in my kitchen." In the employee's follow up conversation with Mr. Gallagher, he reportedly denied using the word "trannies" and complained that the employees were too sensitive. The Applicants did not find Mr. Gallagher's denial to be credible. On July 7, 2018 two of the Applicants provided written notice from their lawyer of their concerns, but Mr. Gallagher did not respond. As a result, they became increasingly concerned that their employer was not taking their safety, dignity and privacy in the workplace seriously. By July 21, 2018 each of the Applicants had quit working for the restaurant due to Mr. Gallagher's disregard for their safety, dignity and privacy.

Mr. Gallagher's and the restaurant's lack of response to the allegations brought before the Tribunal was deemed an acceptance of all allegations set out in the application. The Tribunal found that Mr. Gallagher discriminated against each of the Applicants in their employment because of their gender identity, gender expression and sex. The slur was egregious and caused the Applicants to fear for their safety. There was no meaningful response to the Applicants' concerns raised at various times, including through their lawyer. The restaurant was found liable for Mr. Gallagher's actions as per section 46.3 of the *Human Rights Code*, which deems an act done by an officer or agent of a corporation in the course of his or her employment to be an act done by the corporation. As a result, Mr. Gallagher and the restaurant were jointly and severally liable to pay the Applicants amounts for their wage losses (ranging from $2000 to $6000

each, depending on their original hourly wage and average hours of work), as well as compensation for injury to dignity, feelings and self-respect ($10,000 for each Applicant). The Applicants were not awarded a monetary remedy with regard to Mr. Gallagher's misgendering because they did not provide the Tribunal with particulars. However, the Tribunal was clear that intentional incorrect pronoun usage could constitute adverse treatment

Charities and not-for-profits should be aware of their responsibilities to provide safe and respectful workplaces for their employees, in accordance with human rights laws. They should also be aware of the consequences of not responding to a human rights claim which may result in a deemed acceptance of the allegations made against them.

9. Imagine Canada and Pemsel Foundation Release Their Disbursement Quota Submissions

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

The Department of Finance Canada ("Finance Canada") ended its consultation on the disbursement quota ("DQ") on September 30, 2021. Imagine Canada, a leading voice for Canada's charitable sector, and the Pemsel Foundation, a leading Canadian think tank on legal issues involving charities, have recently released copies of their submissions to Finance Canada on the DQ consultation. The two submissions reflect a number of shared positions, as well as some differing views, concerning what should be done with the DQ in the future.

As explained in *Charity & NFP Law Bulletin No. 498*, the DQ, in general terms, 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 based on the value of a charity's property that is not used for charitable activities or administration, and is currently set at a rate of 3.5% for charities, regardless of whether they are charitable organizations, public foundations or private foundations.

Imagine Canada published its submission on the DQ consultation on November 8, 2021, in which it advocates for "a scaled disbursement quota designed to infuse new funds and reflect the different realities of the foundation community." By way of an example, Imagine Canada explains that a scaled disbursement quota could keep the minimum threshold at 3.5% for "smaller organizations" with less than $1 million in assets, which could then increase to "7% and beyond for larger organizations." Imagine Canada envisions a system where there would be "a mandated review of the disbursement quota at five

year intervals" and proposes, among other recommendations, that this periodic review be grounded "in the principle of 'intergenerational justice'" so that the current generation may have decision-making authority over the timing of the release of funds for public benefit." In addition to the current generation, Imagine Canada recommends that the sector be engaged with in reviewing DQ policy, including proactively seeking input from grantees, potential grantees and other organizations, but notably those having points of view coming from "outside the legal and foundation communities."

Many of the DQ discussions to date have also considered how the T3010, *Registered Charity Information Return* can be improved. Imagine Canada makes several suggestions about improving the T3010, including identifying the causes of T3010 completion errors, implementing transparency and accountability measures through the T3010, and applying an "equity principle" to these measures through the T3010 process. It further recommends that the T3010 ask trustees and directors for more information about donor advised funds (also known as "DAFs"), including their link to the organization's disbursement and accumulation strategy.

Imagine Canada's comments on the need for improvement of the T3010 are shared by the Pemsel Foundation, which published its research series on the DQ consultation on October 18, 2021. The Pemsel Foundation's analysis (focusing on available T3010 data) suggests that there are significant issues around data collection and enforcement, which should be addressed before, or in tandem with legislative changes, including in relation to the DQ. This approach will ensure that policy initiatives and the ensuing consultations are evidence driven.

The Pemsel Foundation also recommends that the CRA's Charities Directorate undertake educational and compliance measures to ensure better data, including ensuring that T3010 data is complete and accurate. While the Pemsel Foundation does not recommend that information about DAFs be included in the T3010, it does recommend that information be obtained and consideration given to whether the disbursement quota should be applied to existing donor-advised funds within a charity.

However, the Pemsel Foundation's approach to the DQ differs in some respects from Imagine Canada's, most notably in that it recommends that no change to the disbursement quota be made "without better data." The Foundation recommends the federal government's DQ consultation be limited as much as possible to the disbursement quota rate and if the rate were to increase, that there be publicly available plans to later assess the impact of such a change. The Pemsel Foundation also recommends that an examination be made of how and the degree to which existing tools are used by the CRA for compliance

and enforcement measures. Further, the Pemsel Foundation goes on to point out that having additional compliance tools without more enforcement by the CRA "would not be productive."

Charities will want to carefully follow the discussion about the DQ in the coming months, particularly watching out for what is included in the 2022 Federal Budget about it. As is evident from both of these most recent submissions, the DQ continues to be a topic for which there is a wide variety of opinions, as well as differing recommendations within the charitable sector in Canada. In light of the DQ's long history of complicated taxation provisions and earlier initiatives for reform and simplification of past DQ iterations, it remains to be seen how and in which direction the DQ will evolve in the future. Hopefully, the DQ will not revert to one of its earlier and more complicated versions which necessitated that charities regularly hire lawyers and/or accountants in order to ensure their ongoing DQ compliance.

10. New Resources about Community Investing Available

By Ryan M. Prendergast

Two resources are now available for charities and not-for-profits in Ontario to become better informed about community impact investing. The Cooperation Council of Ontario, Ontario Trillium Foundation, and Canadian CED Network partnered together to produce *Community Investment in Ontario: Status and Prospects* (the "Report") as well as *Start-up and Operations Guide: Ontario Community Investment Co-operative (CIC)* (the "Guide"). The two resources adopt distinct yet complementary perspectives about community investment organizations, with the Report providing helpful contextual information about community investments, and the Guide providing generalized, practical information for groups interested in developing their own community investment cooperative.

The Report considers what the literature reflects about the state of the current ecosystem in Ontario for community investment organizations. In addition, it considers issues such as what type of legal structure (as a business, non-profit, or cooperative) a community investment organization could adopt. For added context, the Report goes through a comparative analysis of the different kinds of engagement with community investment organizations that individuals across Canada have had.

The Guide sets out the phases an organization should expect to go through in the development of a community investment cooperative. For example, it prompts individuals to consider the community needs and opportunities, to create a development timeline, to establish partnerships, and to keep records of

necessary legal documents. The Guide also includes 31 appendices consisting of templates, surveys, and manuals anyone looking to create a community investment cooperative can use.

11. COVID-19 Employment Update

By Barry W. Kwasniewski and Martin U. Wissmath

No 'Irreparable Harm' to Employees for COVID-19 Workplace Vaccination Policy: ONSC

Ontario's Superior Court of Justice ("ONSC") dissolved an injunction it had granted to University Health Network ("UHN") employees to suspend the termination of their employment for non-compliance with a UHN mandatory vaccination policy. Justice Dunphy had granted the temporary injunction in *Blake v University Health Network* ("*Blake*") on an October 22, 2021 motion for six days, and then dissolved the injunction in a preliminary hearing on October 28, 2021. The court ruled that the dispute between the employees, some of whom were unionized, and their employer, was not within the ONSC's jurisdiction, but was within the ambit of the collective bargaining agreement, and should therefore be resolved as policy grievances in an arbitration process. Justice Dunphy ("Dunphy J") stated that dissolving the injunction did not address "the question of the merits or legality of the vaccine policy adopted by the UHN." However, Dunphy J held that without jurisdiction to decide the issue, the court could not maintain the injunction.

The court applied the tripartite test in *RJR-MacDonald Inc. v Canada (Attorney General)* to assess whether the injunction could be continued.

> a. Is there a serious issue to be tried on the question of liability?
>
> b. Is there a real potential for irreparable harm to ensue if relief is not granted? and
>
> c. Does the balance of convenience favour the granting of relief at this early stage?

As the court did not have jurisdiction to examine the issue for those employees subject to the collective bargaining agreement, Dunphy J held that the plaintiffs failed to satisfy part a. of the test: where there is no jurisdiction, there is no serious issue to be tried. For the non-unionized employees, Dunphy J outlined the freedom to terminate the employment relationship, with or without cause, for private sector employers:

> As a general rule, private-sector employment may be terminated at will outside of the collective bargaining sphere in Ontario. Where cause is not alleged, or if cause is alleged and not proved, compensation is payable to the employee. The level of compensation may be a function of a written contract, of statutory minimum standards or of the common law. Given that fundamental principle, it is hard to see how any plaintiff who is not in a union can allege irreparable harm arising from threatened termination of employment. If the termination of their employment is

> not justified, they are not entitled to their job back – they are entitled to money. Money, by definition is not only an adequate remedy it is the *only* remedy.

Consequently, non-unionized employees could not satisfy part b. of the *RJR* test for irreparable harm, according to Dunphy J. This rationale has already been cited as precedent in a November 13, 2021 Federal Court case, *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232, in which the plaintiff also unsuccessfully sought an injunction to suspend the implementation of a federal government "COVID-19 vaccination requirement for supplier personnel."

Some of the non-unionized plaintiffs in *Blake* alleged a violation of their rights under the Ontario *Human Rights Code*, but Dunphy J held that the evidentiary record did not yet establish "a serious issue to be tried that the impugned vaccine policy contravenes the anti-discrimination provisions of the *Code* as regards any of them". That does not "preclude such proof being led at some later date," but it was insufficient to justify the continuance of an injunction based "solely on that narrow speculative ground."

Arbitrators Decide Both for and Against Reasonableness of Workplace COVID-19 Vaccination Policies

Two recent labour arbitration awards in Ontario reached different conclusions on the reasonableness of employers' COVID-19 workplace vaccination policies, demonstrating the significance of how a decision maker interprets and applies the relevant laws to the particular facts in each situation. In an award on November 9, 2021, *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.*, Arbitrator F.R. von Veh dismissed United Food and Commercial Workers Union, Canada Local 333's ("UFCW") policy grievance and found that Paragon Protection Ltd.'s ("Paragon") COVID-19 vaccination policy — including an exemption policy for accommodation under the Ontario *Human Rights Code* (the "*Code*") — was "reasonable, enforceable and compliant" with the *Code* and Paragon's obligations under the *Occupational Health and Safety Act* (the "OHSA") ("UFCW and Paragon Award"). There was a different result in *Electrical Safety Authority and Power Workers' Union*, a November 11, 2021 award ("ESA and PWU Award"), as Arbitrator John Stout decided that Electrical Safety Authority's ("ESA") mandatory COVID-19 vaccination policy was unreasonable "to the extent that employees may be disciplined or discharged for failing to get fully vaccinated."

Paragon employs 4400 security guards at 450 client sites in Ontario, Arbitrator von Veh observed, and the majority of those clients have implemented their own vaccination policies that require contractors, such as Paragon's security guards, to be fully vaccinated in order to work at their sites. Paragon's policy fulfilled legal obligations under the *Code* and the OHSA, according to Arbitrator von Veh, who referred to the Ontario Human Rights Commission's ("OHRC") policy statement "on COVID-19 vaccine

mandates and proof of vaccine certificates", which states that "personal preferences" do not amount to a "creed" under the *Code*, and are therefore not protected as a ground for discrimination that requires accommodation by the employer. Given the "wealth of scientific information available on the pandemic and COVID-19", Arbitrator von Veh found that "personal subjective perceptions of employees to be exempted from vaccinations cannot override or displace available scientific considerations." As is common in collective bargaining, the collective agreement between Paragon and UFCW included a management rights clause, which allowed Paragon to "make, enforce and alter, from time to time, reasonable rules and regulations to be observed by employees." The collective agreement also specifically included an article for employees to agree to receive "vaccination or inoculation" based on site-specific work requirements.

In the ESA and PWU Award, Arbitrator Stout's decision turned on the reasonability of ESA's exercising the management rights clause in the parties' collective agreement. A significant difference from the UFCW and Paragon Award is the lack of any specific article in the collective agreement that addresses vaccinations. There is no "legislated requirement" for employees to be vaccinated, Arbitrator Stout noted, and no court decision or arbitration award that upholds a mandatory vaccination policy "without specific collective agreement language or legislative authority, outside of a healthcare or long-term care setting." Arbitrator Stout distinguished his award from the UFCW and Paragon Award due to the absence of this specific language in the collective agreement. While high-risk workplaces, such as in healthcare or long-term care, may justify mandatory vaccinations for all employees,

> However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the ESA's voluntary vaccination disclosure and testing policy (VVD/T Policy) employed prior to October 5, 2021, may be adequate to address the risks.

Due to the fluid and evolving nature of the pandemic, however, "[w]hat may be unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa." Arbitrator Stout found that the "vast majority" of work by ESA employees could be effectively undertaken remotely "and many employees have a right to continue working remotely under the Collective Agreement." Citing the Supreme Court of Canada's decision in *Machtinger v HOJ Industries,* Arbitrator Stout viewed it unjust to discipline or discharge an employee for failing to be vaccinated "when it is not a requirement of being hired and where there is a reasonable alternative". The Power Workers' Union ("PWU") grievance was allowed and the ESA directed to amend their vaccination policy "to make it clear that employees shall not

be disciplined or discharged for failing to get vaccinated" and that a testing option should be provided for those who have not been vaccinated.

These two awards demonstrate the importance of the decision maker's interpretation of laws, facts and the circumstances of the COVID-19 pandemic generally, in assessing the reasonability of a workplace COVID-19 vaccination policy. A significant difference in the two awards was the inclusion of specific article in the UFCW and Paragon collective agreement requiring employees to agree to a vaccination, whereas the ESA and PWU collective agreement did not include that language.

While these cases are interesting analyses of vaccination policies in unionized workplaces, it should be noted that a court of law is not required to follow arbitration awards because they are not binding. Therefore, there still remains much uncertainty about how the law will develop with regards to COVID-19 vaccination policies and charities and not-for-profits are encouraged to keep abreast of the latest developments.

12. COVID-19 Legislation Update

By Terrance S. Carter and Adriel N. Clayton

Bill C-2 Introduced to Provide Further COVID-19 Financial Support

After the resumption of Parliament, the Deputy Prime Minister and Minister of Finance tabled Bill C-2, *An Act to provide further support in response to COVID-19* ("Bill C-2"), which underwent First Reading on November 24, 2021. Bill C-2 amends the *Income Tax Act* and *Income Tax Regulations* to extend COVID-19 relief subsidies provided through the Canada Emergency Wage Subsidy ("CEWS"), the Canada Emergency Rent Subsidy ("CERS"), as well as the Canada Recovery Hiring Program ("CRHP") until May 7, 2022.

As reported in the October 2021 *Charity & NFP Law Update*, the CEWS and CERS had terminated and the federal government had announced that they would not be renewed as of October 23, 2021, instead to be replaced with a proposed replacement program, the Hardest-Hit Business Recovery Program (the "Hardest-Hit Program"). However, Bill C-2 instead proposes an extension of subsidies under the CEWS and CERS, made available to certain organizations including "the hardest-hit organizations that face significant revenue declines".

To be eligible for CEWS and CERS subsidies through the Hardest-Hit Program, eligible entities would need to demonstrate a revenue loss of at least 50% over the past 12 months, as well as a current-month revenue decline of at least 50%. Subsidies would be available at a rate of up to 50%.

Bill C-2 will also extended the CRHP until May 7, 2022 for "eligible employers with current revenue losses above 10% and increase the subsidy rate to 50%", according to the federal government's news release. As also discussed in the October 2021 *Charity & NFP Law Update*, the CRHP provides eligible employers who have experienced "qualifying revenue declines" with a subsidy based on eligible salary or wages to help hire new workers or increase their current workers' hours or wages, with a subsidy rate of 50%.

Ontario Extends Powers to Amend and Extend Emergency Orders

The Government of Ontario has extended its powers to keep emergency orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (the "*Reopening Act*") in place until March 28, 2022. The government's powers to amend and extend orders was previously set to expire on December 1, 2021, but were extended when Government motion 8 was carried on division on November 23, 2021.

Orders under the *Reopening Act* are set out in the regulations under the acts, and generally concern the following subject matter:

> 1. Closing or regulating any place, whether public or private, including any business, office, school, hospital or other establishment or institution.
>
> 2. Providing for rules or practices that relate to workplaces or the management of workplaces, or authorizing the person responsible for a workplace to identify staffing priorities or to develop, modify and implement redeployment plans or rules or practices that relate to the workplace or the management of the workplace, including credentialing processes in a health care facility.
>
> 3. Prohibiting or regulating gatherings or organized public events.

Of particular note, Ontario Regulation 364/20, *Rules for Areas at Step 3 and at the Roadmap Exit Step*, which sets out the general rules and regulations regarding how businesses may open and operate during the COVID-19 pandemic, including social distancing, masking, and vaccine passport requirements, has been frequently amended in response to the rapidly evolving pandemic, and will now continue to be able to be amended through to March 28, 2022.

13. COVID-19 Orders Upheld as Constitutional in Light of Religious Freedom Challenge

By Jennifer M. Leddy and Martin U. Wissmath

In *Gateway Bible Baptist Church et al v Manitoba et al*, released on October 21, 2021, the Manitoba Court of Queen's Bench has upheld various public health orders implemented by the government of Manitoba in response to the COVID-19 pandemic as constitutional. In this case, seven churches and three individuals (the "Applicants") challenged the constitutionality of specific sections of Manitoba's Emergency Public Health Orders ("PHOs"), arguing that those sections, together with restrictions on public gatherings, gatherings in private residences and the temporary closure of places of worship, infringed, among other freedoms, their section 2(a) freedom of conscience and religion under the *Canadian Charter of Rights and Freedoms* ("*Charter*").

The Applicants sought, in part, a declaration that the violations could not be saved under section 1 of the *Charter*. They argued, in part, in favour of "herd immunity", and that places of worship could safely hold indoor services with minimal spread by following guidelines recommended by the Centers for Disease Control and Prevention.

As the province conceded that section 2 of the *Charter* had been infringed by the PHOs, it contended instead that the limits on any section 2 rights are "constitutionally defensible in that they are reasonable, proportionate and justified in order to address a serious public health emergency: a global pandemic with grave, sometimes deadly consequences." However, the court clarified that the PHOs *restricted*, rather than *infringed*, *Charter* rights, and that the Oakes test would be applied to determine if the restriction was justifiable under section 1 of the *Charter*, by asking (1) whether the legislative goal is "pressing and substantial" and sufficiently important to justify limiting a *Charter* right, and (2) whether the means employed is proportionate to the objective.

In examining evidence put forth by both the Applicants and the province, the court found differing views and interpretations of evolving scientific information, and considered whether there is nonetheless, a sufficiently sound and credible evidentiary basis (even in light of any opposing evidence) for Manitoba's claim that the limitations and restrictions placed on certain fundamental freedoms represent valid policy approaches which are reasonably justified and constitutionally defensible in Canada's free and democratic society.

The court found that "the credible science that [the province] invoked and relied upon, provides a convincing basis for concluding that the circuit-break measures, including those in the impugned PHOs, were necessary, reasonable and justified."

Having found that the section 2(a) *Charter* freedom of conscience and religion had been restricted, the court considered the pressing and substantial nature of the PHO restrictions. The court found that the objectives were "clearly meant to protect public health and more specifically, they are meant to save lives, prevent serious illness and stop the exponential growth of the virus from overwhelming Manitoba's hospitals and acute healthcare system", a point which the Applicants did not contend. The PHO objectives were therefore sufficiently pressing and substantial.

With regard to the proportionality part of the Oakes test, the court found that the PHOs' limits on gatherings (including places of worship) were rationally connected to the goal of reducing the spread of COVID-19, given that "the risk of transmission is particularly high in gatherings involving close contact for prolonged periods". It also found that the measures in the PHOs minimally impaired the rights at issue, since the province required a "quick and clear response" and there was no evidence of significantly less intrusive measures that might have been equally effective. Finally, it considered the balance between the identifiable beneficial and deleterious effects of the PHO restrictions, finding that the evidence "unquestionably demonstrates that the salutary effects of the limitation far outweigh those effects that may be characterized as deleterious," particularly in light of the benefits of the provincial response in the face of the threat of a deadly pandemic. It therefore found that, while the PHOs may have restricted section 2 *Charter* rights, those restrictions were justifiable under section 1, and upheld the PHOs as constitutional.

While the case also considers other matters, including administrative law matters and the doctrine of paramountcy, it is a clear example of the court's ability balance the *Charter* right to freedom of conscience and religion with conflicting legislation and government measures.

14. OPC Joins Int'l Privacy Authorities to Promote the Protection of Data in Video-Teleconferencing Services

By Esther Shainblum and Martin U. Wissmath

Canada's Privacy Commissioner joined several other countries to engage global leading companies providing video-teleconferencing technology ("VTC") in an effort to mitigate privacy risks and ensure best practices to protect personal information. The Office of the Privacy Commissioner of Canada joined privacy authorities from Australia, the United Kingdom, Hong Kong [SAR, China], Gibraltar and

Switzerland (the "Authorities") in a July 21, 2020 joint statement inviting five of the world's largest VTC companies to reply, leading to an October 27, 2021 announcement and report, "Observations following the joint statement on global privacy expectations of video teleconferencing companies". Microsoft, Google, Cisco and Zoom responded (the "Companies") — Houseparty, another social networking service that allowed group video chatting, did not respond, but ceased operations in September 2021.

The Authorities addressed privacy issues involving the general use of large public VTC platforms, rather than focusing on specific contexts such as telehealth or education where sensitive information is shared. The joint statement noted the Companies' "responsibility for protecting the privacy rights of citizens of the world" and acknowledged the "sharp increase in the use of VTC for both social and business purposes" as a result of the COVID-19 pandemic. The Authorities highlighted their concerns about whether "privacy safeguards were keeping pace with the rapid increase in the use of VTC services during the global pandemic", and provided "guiding principles to address key privacy risks." The report outlines five principles or "good practices" and offers three additional recommendations for further improvement, summarized in this *Bulletin*.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin No. 505*.

15. AML/ATF Update

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

FATF Plenary Project Synopsis Highlights Negative Consequences of Standards on NPOs

A high-level synopsis for a Financial Action Task Force ("FATF") Plenary project examining the unintended consequences of the FATF Standards highlights the negative impact that those consequences can have on non-profit organizations ("NPOs"). FATF published a synopsis of a stock-take of unintended consequences on October 27, 2021, focusing on four broad themes: (1) De-risking; (2) Financial Exclusion; (3) Undue targeting of NPOs; and (4) Curtailment of Human Rights (with a focus on Due Process and Procedural Rights). The synopsis was published "to facilitate further discussion with stakeholders" during the second phase of the FATF Plenary project, which was established in February 2021 to analyze and understand the unintended consequences resulting from FATF Standards, as amended in 2012 and 2016, and the implementation of those standards.

De-risking is defined as "the phenomenon of financial institutions terminating or restricting business relationships with clients or categories of clients to avoid, rather than manage, risk, in line with the FATF's

risk-based approach." De-risking has created "narrower access to banking services" for NPOs where it is "not based on a case-by-case assessment of risk and ability to mitigate that risk." As such, the synopsis notes that de-risking is inconsistent with the risk-based approach promoted by FATF. NPOs may face delayed and higher-cost transactions and some of these transactions may be outside the regulated financial system as a result of de-risking, the synopsis states. Emerging market economies, financially isolated economies and conflict zones are more impacted by the effects of de-risking. The causes of de-risking are "complex and interwoven" and not entirely clear, according to the synopsis, but analysis suggests that high compliance costs that impact profitability are the "primary driver". Implementing anti-money laundering and combatting financing of terrorism ("AML/CFT") requirements as well as a failure to apply the risk-based approach are other contributing factors. Fear of supervisory actions, "reduced risk appetite in banks, and reputational concerns" are other "drivers of de-risking". A proper implementation of the risk-based approach in the FATF Standards, improvements in AML/CFT "can be part of the solution" the synopsis states.

The synopsis outlines the motivation for revising Recommendation 8 of the FATF Standards in 2016 in response to concerns that AML/CFT measures "were having a chilling effect on NPOs' legitimate activity", to protect NPOs from terrorism-financing abuse while also ensuring that "focused risk-based measures do not unduly disrupt or discourage legitimate charitable activities." Such measures should be in line with the risk-based approach, as stated in the Interpretive Note. However, the synopsis states that countries continue to incorrectly implement the FATF Standards "and justify restrictive measures to NPOs in the name of 'FATF compliance'," intentionally in some cases. Reported constraints applied to NPOs included (1) intrusive supervision; (2) restrictions on access to funding and bank accounts; and (3) forced dissolution, de-registration or expulsion of NPOs. Each of these involved "a variety of restrictions, burdens and requirements that impede the ability of NPOs to operate and pursue their missions effectively, to access resources, and in some cases, to continue their operations." Most countries are still not conducting adequate risk assessments of their NPO sector, according to FATF's assessment, "and fewer are conducting risk-based outreach and monitoring." Analysis concludes that undue targeting of NPOs "in the context of purported or real AML/CFT implementation (both legitimate or otherwise) may be related in some cases to poor or negligent implementation of the FATF's [risk-based approach]."

FATF analysis is also exploring ways in which the misapplication of FATF Standards negatively affect due process and procedural rights, including:

- excessively broad or vague offences in legal counterterrorism financing frameworks, which can lead to wrongful application of preventative and disruptive measures including sanctions that are not proportionate;
- issues relevant to investigation and prosecution of [terrorist financing] and [money laundering] offences, such as the presumption of innocence and a person's right to effective protection by the courts; and,
- incorrect implementation of UNSCRs and FATF Standards on due process and procedural issues for asset freezing, including rights to review, to challenge designations, and to basic expenses.

Phase 2 of FATF's Plenary project seeks potential options to mitigate the negative consequences, although the synopsis states that "FATF is already actively responding to unintended consequences, with a significant percentage of FATF's activity and attention over recent years devoted to mitigating de-risking, financial exclusion, and undue targeting of NPOs." Further mitigation efforts are needed to address issues related to due process and procedural rights, the synopsis states, and "this may entail additional guidance, best practices, training, and possible revisions to FATF's Methodology, Procedures and Standards, as well as continuing engagement on the FATF's work with key external stakeholders."

FATF Updates Guidance to Clarify Definitions and Application of Standards for Cryptocurrencies

The FATF has updated its 2019 Guidance for Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (VASPs). FATF published the updated 2021 Guidance on October 28 ("Updated Guidance"), which includes updates in six key areas:

1. clarification of the definitions of virtual assets and VASPs,
2. guidance on how the FATF Standards apply to stablecoins,
3. additional guidance on the risks and the tools available to countries to address the money laundering and terrorist financing risks for peer-to-peer transactions,
4. updated guidance on the licensing and registration of VASPs,
5. additional guidance for the public and private sectors on the implementation of the "travel rule", and
6. Principles of information-sharing and co-operation amongst VASP Supervisors

A brief published on the FATF website summarizes the sections and key changes in the Updated Guidance. The Updated Guidance "reflects input from a public consultation in March–April 2021" and addresses areas identified in the FATF 12-Month Review of the Revised FATF Standards on virtual assets and VASPs. Charities that carry on a related business, such as a money-services business, and deal with

virtual assets, such as cryptocurrencies, should familiarize themselves with the Updated Guidance. For background on the initial publication of the 2019 Guidance, see Carters' August 2019 *Charity & NFP Law Update*.

16. The 2021 Annual Church & Charity Law™ Seminar – Continued Virtually on November 4, 2021

The 2021 Annual Church & Charity Law™ Webinar, hosted by Carters Professional Corporation on November 4, 2021, had over 1,130 registered attendees from the charitable and not-for-profit sector, including leaders of charities and churches, inclusive of the broader faith community, as well as accountants and lawyers. The special speakers this year were Tony Manconi, Director General of the Charities Directorate of the Canada Revenue Agency; Kenneth Goodman, The Public Guardian & Trustee at the Attorney General Office of Ontario; as well as Kenneth Hall of Robertson Hall Insurance Inc.

The Church & Charity Law™ Seminar has been held annually since 1994. The handouts and presentation materials from this year's webinar are now available at the following link.

The date for the 2022 Annual Church and Charity Law™ Webinar has been set for **Thursday, November 10, 2022**, so save the date.

IN THE PRESS

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

Analysis/Commentary – Canada Tax Service - McCarthy Tetrault Analysis, 149.1 – Qualified Donees has been updated to include links to several Carters *Bulletins* (including our summaries of the ACCS reports, and our bulletin on the DQ). This analysis/commentary is available online on Taxnet Pro™ to those who have OnePass subscription privileges.

CRA Considers if NPO Can Add a Secondary Source of Income written by Theresa L.M. Man was featured in the OBA Charity & Not-for-Profit Law Section Insider on November 8, 2021.

$17 Million Gift to Private Foundation Ineligible for Tax Credit written by Terrance S. Carter and Ryan M. Prendergast was featured in the OBA Charity & Not-for-Profit Law Section Insider on November 8, 2021.

Federal Court Finds CRA Can Compel Taxpayers to Disclose Oral Agreements written by Ryan M. Prendergast was featured in the OBA Charity & Not-for-Profit Law Section Insider on November 8, 2021.

Ontario Court Rules on Decade-Long Property and Membership Dispute written by Esther S.J. Oh was featured in the OBA Charity & Not-for-Profit Law Section Insider on October 23, 2021.

RECENT EVENTS AND PRESENTATIONS

The 28th Annual Church & Charity Law Webinar™ was held on Thursday, November 4, 2021, hosted by Carters Professional Corporation. The full handout package is available on our website, as well as the individual presentations listed below:

- Introduction, Agenda and Speaker Details
- Essential Charity & NFP Law Update – Esther S.J. Oh
- Transitioning to the ONCA for Churches and Charities – Theresa L.M. Man
- Mergers and Acquisitions: What are the Options? – Ryan M. Prendergast
- Key Issues in Drafting Employment Contracts – Barry W. Kwasniewski
- New Developments in Brand Identity & Protection for Churches and Charities – Sepal Bonni
- Insurance Issues Involving Volunteers for Churches and Charities – Kenneth Hall, Robertson Hall Insurance Inc.
- Impact Investing for Churches and Charities: The New Frontier in Philanthropy – Terrance S. Carter
- Donor Advised Funds for Churches and Charities – Jacqueline M. Demczur
- Terms and Conditions for Websites: What the Small Print Really Means – Esther Shainblum
- When Does the PGT Intervene with a Charity: What Directors and Officers Need to Know – Kenneth Goodman, The Public Guardian & Trustee at the Attorney General Office of Ontario
- The Charities Directorate's Approach to Compliance – Tony Manconi, Director General of the Charities Directorate of the CRA

Addressing Some Legal Issues in Housing was presented by Nancy E. Claridge at the Community Services, County of Dufferin, Housing Forum 2021 held in Orangeville, Ontario on November 19, 2021.

UPCOMING EVENTS AND PRESENTATIONS

OBA Charity & Not-for-Profit Law Section will host a webinar entitled Understanding the New Ontario *Not-for-Profit Corporations Act* on November 25 and December 2, 2021. Ryan M. Prendergast will present on the topic of Membership Issues, and Theresa L.M. Man will co-chair the two-day series, as well as present on the topic of By-Laws.

Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips will be held on **Wednesday, December 8, 2021**, hosted by Carters Professional Corporation. This complimentary webinar will cover a wide range of topics with regard to the new Ontario *Not-for-Profit Corporations Act*. Registration and Details are available online.

SAVE THE DATE - The 2022 Annual Ottawa Charity & NFP Law Webinar Continues Virtually! The webinar this coming year will be hosted by Carters Professional Corporation on **Thursday, February 17, 2022**. Details will be available soon at our website www.carters.ca.

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Nancy E. Claridge, B.A., M.A., LL.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of corporate and commercial law, anti-terrorism, charity, real estate, and wills and estates, in addition to being the assistant editor of *Charity & NFP Law Update*. After obtaining a Master's degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award. Nancy is recognized as a leading expert by *Lexpert*.

Adriel N. Clayton, B.A. (Hons), J.D. – Called to the Ontario Bar in 2014, Adriel Clayton manages Carters' knowledge management and research division, and practices in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.

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

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

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

Martin Wissmath, B.A., J.D. – Called to the Ontario Bar in 2021, Martin joined Carters after finishing his articling year with the firm. In addition to his legal practice, he assists the firm's knowledge management and research division, providing in-depth support for informative publications and client files, covering a range of legal issues in charity and not-for-profit law. His practice focuses on employment law, privacy law, corporate and information technology law, as well as the developing fields of social enterprise and social finance. Martin provides clients with legal advice and services for their social-purpose business needs, including for-profit and not-for-profit organizations, online or off-line risk and compliance issues.

Lynne Westerhof, B.A., J.D., Student-at-law – Lynne graduated from the University of Toronto, Faculty of Law in June 2021. During law school she was a participant in the Donald G. H. Bowman National Tax Moot, President of the U of T chapter of the Christian Legal Fellowship, and a Division Leader and Caseworker in family law at Downtown Legal Services. Lynne worked as a summer student for Social Capital Partners where she researched the legal context of employee ownership trusts and did additional research for a tax professor about non-profit social enterprises. Prior to law school, Lynne received a Bachelor of Arts with a major in English from the University of British Columbia.

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