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CHARITY & NFP LAW UPDATE

SEPTEMBER 2021

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

SEPTEMBER 2021

SECTIONS

HIGHLIGHTS

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RECENT PUBLICATIONS AND NEWS RELEASES

September 30, 2021 Marks Canada's First National Day for Truth and Reconciliation

By Terrance S. Carter and Esther Shainblum

September 30, 2021 is the first National Day for Truth and Reconciliation, a time for reflection about the legacy of the residential school system in Canada. The day honours the lost children and survivors of residential schools, their families and communities. This federal statutory holiday falls on the same day as Orange Shirt Day, an Indigenous-led commemorative day to create meaningful discussion about the effects and legacies of residential schools and to affirm the survivors and those affected matter.

The National Day for Truth and Reconciliation is a response to Call to Action 80 from the Truth and Reconciliation Commission which called for a federal statutory day of commemoration. Parliament responded to this call to action by passing Bill C-5 *An Act to amend the Bills of Exchange Act, the Interpretation Act and the Canada Labour Code (National Day for Truth and Reconciliation)*, which received royal assent on June 3, 2021.

Links to reports from the National Centre for Truth and Reconciliation and to resources from the federal government have been included for those readers who wish to learn more.

The ONCA is Finally Coming! Preparing for Transition

By Theresa L.M. Man

After more than a decade-long wait, the much-anticipated Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") will be proclaimed into force on October 19, 2021. With its looming proclamation date just around the corner, not-for-profit corporations incorporated under Part III of the Ontario *Corporations Act* ("OCA") will need to familiarize themselves with how the ONCA will change their future corporate structure and governance and how they will need to transition under the ONCA, including amending constating documents to conform with ONCA requirements.

This *Charity & NFP Law Bulletin* provides a brief outline of the transition process and considerations for Part III OCA corporations to take into account before transitioning to the ONCA. This brief overview of the ONCA transition process is intended to help Ontario corporations transition as smoothly as possible. As a result of the sweeping changes that the ONCA will bring about, it will be important for boards,

executives, staff, and legal counsel of corporations in Ontario to become familiar with the provisions of the ONCA in planning for the transition under the ONCA after its proclamation.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 501*.

ACCS Makes Submission to Finance on the Disbursement Quota Consultation

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

The Advisory Committee to the Charitable Sector ("ACCS") has responded to the Department of Finance Canada's ("Finance Canada") request that the ACCS provide input into its public consultation about the disbursement quota (the "DQ"). Finance Canada announced it was launching a consultation about the DQ on August 6, 2021, with a closing date of September 30, 2021. Finance Canada indicated that it would "engage with the [ACCS]" and consider feedback "alongside input from the [ACCS] to help inform decisions on potentially increasing the disbursement quota and updating enforcement tools." The August 31, 2021, submission from the ACCS (the "Submission") was prepared with the expectation that it would help "inform the policy conversation about a modernized legislative and regulatory framework for charities in Canada."

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 502*.

Corporate Update

By Theresa L.M. Man

OCA Filings with ServiceOntario and PGT before Proclamation of ONCA

The ONCA will be proclaimed into force on October 19, 2021, at the same time with the launching of the Ontario Business Registry.

ServiceOntario announced on September 10, 2021, that the current business registry services and transactions will be paused on October 18, 2021, as migration work is completed to the new Ontario Business Registry. Documents (including those filed under the current OCA) not processed before October 18, 2021 will be returned for resubmission using the new Ontario Business Registry or by mail or email (if applicable), on new forms. As such, in order to ensure that registrations, filings and other requests submitted by mail under the current system are processed before October 18, 2021, documents must have been received by ServiceOntario before September 17, 2021. For information on the new Ontario Business Registry, please visit: Ontario.ca/BusinessRegistry.

As such, application filings by charities (such as applications for supplementary letters patent) that normally require the pre-approval of the Ontario Public Guardian and Trustee ("PGT") should also be filed in light of ServiceOntario's filing deadline of September 17, 2021. Although the PGT may continue to process applications and send them over to ServiceOntario for processing after September 17, 2021, they may not be processed in time, according to a Question & Answer sheet circulated by the PGT. Filings may be submitted by email to PGT-Charities@ontario.ca and the processing fees may be sent by mail. Only applications not processed by the PGT would be given a full refund.

Ontario PGT Answers More Questions Regarding Corporate Applications Under New ONCA

The PGT has clarified in its Question & Answer sheet, discussed above, what its involvement would be under the ONCA once it is in force.

In this regard, once the ONCA is in force, the PGT will not normally be involved in corporate applications except in cases where a charity wants to change its purposes but does not want to use the after-acquired clause, or in cases where the applicant wishes to use the term 'Foundation' in the corporate name, the PGT stated. For such cases, charities should contact the PGT directly (416-326-1963 or PGT-Charities@ontario.ca) for further information. The "after-acquired clause" is a clause requiring that properties of a charity acquired after the updating of the charitable purposes be applied to the new purposes, thereby requiring properties of a charity prior to updating the purposes continue to be applied to the former purposes. ServiceOntario will notify the PGT of newly incorporated charities under the ONCA.

Under the new Ontario Business Registry system, applicants for incorporation will select whether they wish to incorporate as a charity. However, charitable corporations already in existence will be recognized as such.

Where a corporation that is registered as a charity has applied for a change in articles, the after-acquired clause will be automatically included under the new electronic system. Any applicant that wants to omit the after-acquired clause will need to contact the PGT separately and request a letter allowing its removal.

For those applications that still require the PGT's approval, the review process will be paper-based, via mail/courier or e-mail (PGT-Charities@ontario.ca). It may involve the PGT providing a portable document format (PDF) copy of a letter, which the applicant would then upload to the application. Procedures may be adjusted after the new system is implemented. Any further questions regarding the process of the Ontario Business Registry should be directed to the Ministry of Government and Consumer

Services, which is responsible for its implementation and operation. The PGT will provide referrals to ServiceOntario or the relevant guidance when asked.

COVID-19 Update

Ontario COVID-19 Vaccination Policies: Important Legal Issues for Employers

By Barry W. Kwasniewski, Adriel N. Clayton and Martin U. Wissmath

We are in the midst of an unprecedented situation for employment law in Ontario as the COVID-19 pandemic continues, and public health guidance recommends vaccination policies for workplaces. Charities and not-for-profits in the province must consider the legal responsibilities for employers to manage the workplace, the rights of employees and the risks involved when implementing vaccination policies for COVID-19. From the outset, we must remind readers that this Carters' *Bulletin* is not a legal opinion and involves a discussion that is largely untested in courts and tribunals, with laws that are still to be interpreted and are likely to change in the near future. We cannot be certain where things are headed, but there are "signposts" that indicate a likely direction. As mandatory COVID-19 "vaccine passports" are implemented province-wide and employers institute vaccine policies in the workplace, it is important to be aware of the interacting issues to be able to make informed decisions. This *Bulletin* offers a high-level overview of the legal areas that are engaged by COVID-19 vaccination policies and discusses the broad implications for charities and not-for-profits to consider in the employment context.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 503*.

Ontario Implements COVID-19 Vaccine Passport System

By Terrance S. Carter and Adriel N. Clayton

Ontarians are now required to provide proof of vaccination prior to entry into certain premises, as a result of the province's implementation of a "vaccine passport" system that commenced on September 22, 2021. Ontario Regulation 645/21, which was filed on September 14, 2021, and Ontario Regulation 678/21, which was filed on September 24, 2021, amended Ontario Regulation 364/20, *Rules for Areas at Step 3 and at the Roadmap Exit Step* ("O Reg 364/20") under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. Ontario Regulation 645/21 mandates proof of vaccination at certain non-essential venues in Ontario, some of which may be operated by charities and not-for-profits. Beyond including additional non-essential venues, Ontario Regulation 678/21 also amended O Reg 364/20 by easing capacity limits for select indoor and outdoor settings where proof of vaccination is required.

As a result of these amendments, those responsible for organizations operating areas listed in subsection 2.1(2) of Schedule 1 to O Reg 364/20 must require non-exempt patrons to provide proof of identification and of being "fully vaccinated" against COVID-19, as defined under subsection 2.1(5), at the point of entry. Of particular interest to charities and not-for-profits, areas which require proof of vaccination as set out under subsection 2.1(2) include "indoor areas of meeting and event spaces, including conference centres or convention centres" (although areas rented out for children's camps, childcare and social services as set out in subsection 4(2) are excluded), as well as indoor areas of facilities used for sports and recreational fitness activities, together with indoor areas of concert venues, theatres and cinemas. Indoor areas of meeting and event spaces may increase capacity up to 50 per cent capacity or 10,000 people, whichever is less, for indoor events.

Organizations are also exempt from enforcing vaccine passport requirements in respect of patrons who are under 12; under 18 and entering a facility to actively participate in an organized sport; or have a documented medical reason for not being vaccinated, set out in a letter in the prescribed form from a physician or registered nurse in the extended class . Further exemptions exist for those attending a wedding service, rite or ceremony, or a funeral service, rite or ceremony, including where a meeting or event space is located "in a place of worship or in a funeral establishment, cemetery, crematorium or similar establishment […] for the purposes of attending a social gathering associated with a funeral service, rite or ceremony."

According to guidance from the Ministry of Health, proof of vaccination includes a "vaccine receipt" such as the one provided by the Ministry of Health upon receipt of all requisite vaccinations, though individuals must wait 14 days after receiving their final dose before being considered fully vaccinated. Organizations verifying proof of vaccination must also verify patrons' identification, but are not permitted to retain any information provided by patrons under O Reg 364/20. The province has also announced that it will be introducing an "enhanced digital vaccine receipt" that features a QR code for organizations to scan, to reduce the amount of information that is disclosed to organizations, and which is anticipated to be available for use as of October 22, 2021.

While O Reg 364/20 explicitly lists settings for which vaccine passports are mandatory, organizations that run facilities excluded from mandatory proof of vaccination under O Reg 364/20 may still consider the use of vaccination policies, which are discussed in greater detail in *Charity & NFP Law Bulletin No. 503*, above.

COVID-19 Employment Law Update

By Barry W. Kwasniewski and Martin U. Wissmath

a) Extension to the Infectious Disease Emergency Leave in Ontario

The Government of Ontario announced it is further extending the period that infectious disease emergency leave ("IDEL") will apply. On September 16, 2021, the government filed Ontario Regulation 650/21: *Infectious Disease Emergency Leave* under the *Employment Standards Act, 2000* ("ESA"). O Reg 650/21 amends Ontario Regulation 228/20, thereby extending the "COVID-19 Period" under section 50.1 of the ESA to January 1, 2022.

IDEL had been set to expire on September 25, 2021, as referenced in the June 2021 *Charity & NFP Law Update*. The extension may come as a relief for employers, including charities and not-for-profits who had to reduce or eliminate employee working hours during the COVID-19 pandemic to reduce the risk of exposure among their workforce. The extension of the COVID-19 period means that non-unionized employees who have been temporarily laid off due to an infectious disease emergency, such as the COVID-19 pandemic, will be deemed to be on IDEL (rather than laid off or constructively dismissed under the ESA) until January 1, 2022, which will provide employees with unpaid job-protected leave during the pandemic.

It is important to note that IDEL does not necessarily exclude the possibility for laid-off employees to claim common-law constructive dismissal. The jurisprudence in Ontario on this issue is currently uncertain after conflicting judgements in the Ontario Superior Court of Justice. *Charity & NFP Law Bulletin No. 497* provides further background regarding recent court decisions about deemed IDEL and constructive dismissal actions.

b) Personal Preference Not Enough for Ontario *Human Rights Code* COVID Vaccine Exemption: OHRC

"While the [*Human Rights*] *Code* prohibits discrimination based on creed, personal preferences or singular beliefs do not amount to a creed for the purposes of the *Code*." That is according to the Ontario Human Rights Commission ("OHRC") in a policy statement published September 22, 2021, regarding religious claims for COVID-19 vaccine exemptions. While the OHRC and human rights laws recognize the importance of balancing rights of non-discrimination and public health and safety, "including the need to address evidence-based risks associated with COVID-19," not all personal beliefs amount to a religious "creed", which is protected under the *Code.* Receiving a COVID-19 vaccine is voluntary, however,

> the OHRC's position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the *Code*. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the *Code*.

For *bona fide* claims of "creed" exemptions — and other enumerated grounds, such as a medical disability — under the *Code,* employers have a duty to accommodate an employee to the point of undue hardship. According to the OHRC, "the duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship — such as during a pandemic." Even if someone were denied employment or a service "because of a creed-based belief against vaccinations" that does not necessarily mean they would be exempted from vaccine mandates, certification or COVID-19 testing requirements, the OHRC stated.

In an earlier policy statement on COVID-19 Questions and Answers published July 27, 2021, the OHRC cited *Sharma v Toronto (City)*, a 2020 Human Rights Tribunal of Ontario decision that found "the person's objection to wearing a mask does not fall within the meaning of 'creed'." According to the OHRC, a requirement to wear a mask or prove vaccination may in fact be a reasonable *bona fide* requirement by an employer for health and safety reasons, "especially when serious risk to public health and safety are shown to exist like during a pandemic." For more information on COVID-19 vaccination policies for workplaces, see this month's *Charity & NFP Law Bulletin No. 503*, above.

c) COVID-19 On-Site Testing of Workers Allowed by Arbitrator

An Ontario arbitrator decided that requiring COVID-19 on-site testing of workers at a Toronto construction site was a reasonable balancing of employer and employee interests. In the June 10, 2021 award, *Ellisdon Construction Ltd. and LIUNA, Local 183*, the union grieved the employer's policy, which made on-site rapid antigen testing for COVID-19 a compulsory requirement to access the worksite (the "Policy"). The union argued that the Policy "failed to balance critical privacy rights and bodily integrity interests that it violates." According to the union's submissions, the employer did not discharge its burden of "establishing on the basis of objective evidence that the Policy is a reasonably necessary and proportionate response to a specific problem in the setting in which the Union members work." Arbitrator Robert W. Kitchen dismissed the grievance, deciding that the Policy was reasonable when "one weighs the intrusiveness of the rapid test against the objective of the Policy" to prevent the spread of COVID-19, which "remains a threat to the public at large" and those working at the employer's construction sites.

The employer's Policy started with participation in a provincial government pilot program, and received testing materials from the Ontario Ministry of Health. Nurses and other healthcare professionals administered rapid tests involving throat swabs, which the union argued was physically invasive. Other "less intrusive measures" had already significantly reduced the risk of COVID-19 transmission at the employer's worksites, the union argued, such as pre-attendance screening, mandatory masking, physical distancing and enhanced cleaning procedures. Open-air settings at the employer's worksites also reduced the risk of transmission, the union asserted. In its submissions, the union compared the invasion of privacy and bodily integrity by the Policy to mandatory drug and alcohol testing, relying on the Supreme Court of Canada's judgment in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.* The Supreme Court of Canada in that case found that an employer's unilateral imposition of "mandatory, random and unannounced testing for *all* employees" was "overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is a reasonable cause" in the workplace.

Arbitrator Kitchen cited another recent award in *Caressant Care Nursing & Retirement Homes and Christian Labour Association of Canada*, in which the arbitrator rejected the analogy of drug and alcohol testing, stating that "controlling COVID infection is not the same as monitoring the workplace for intoxicants", COVID-19 is a novel virus that public health authorities are still learning about, and testing positive for COVID-19 is not "culpable conduct" — such as being intoxicated. In his decision, Arbitrator Kitchen also found that "significant steps" had been taken by the employer to protect the privacy of individuals:

> (a) Individuals being tested are physical distanced from others during the testing (aside from the healthcare professional administering the test).
>
> (b) Swabbing is conducted in a manner such that it cannot be observed by anyone other than the healthcare professional administering the test.
>
> (c) Testing results are read and recorded by healthcare professionals such that they cannot be observed by anyone other than the healthcare professional administering the test.
>
> (d) Healthcare professionals sanitize before and after each test, and deep cleaning of the test site is conducted at regular intervals throughout the day.
>
> (e) All bio hazardous waste from the test site is disposed of through a registered hazardous waste removal process.

While the "open air" environment might have lowered the risk of transmission, it did not eliminate the risk, Arbitrator Kitchen noted, and with approximately 100 workers at a worksite on any day for long hours, social distancing was not always possible. Arbitrator Kitchen found no evidence that the mitigation efforts had "significantly reduced" transmissions. Further weight was given to the reasonability of the Policy because the risk of COVID-19 was not "hypothetical or speculative," since there had been an outbreak and two cases of apparent workplace transmission. In conclusion, the Policy was found to be reasonable.

This arbitration award provides some quasi-judicial support for the reasonability of requiring COVID-19 tests by employers; however, the decision depended on the particular facts and circumstances at the time. Charities and not-for-profits should interpret such arbitration decisions with caution, as their own situation and policies implemented during this pandemic may be assessed differently. The facts of this award took place when the province was still in a government-mandated lockdown, and fewer people had been vaccinated. Courts are not bound by any arbitration awards, which may not be persuasive to judges when similar cases are litigated.

Ontario Court Rules on Decade-Long Property and Membership Dispute

By Esther S.J. Oh

After a lengthy and complicated dispute between members of the Hamilton branch of the Royal Yugoslav Army Combatants' Association in Canada-Draza Mihailovic (the "RYACA"), the Ontario Superior Court of Justice released its September 1, 2021 decision concerning membership and decision-making rights concerning property owned by RYACA in *Varjacic et al. v Radoja et al.* The dispute largely centered around who had the right to determine RYACA's future, as well as the future of its main asset, a large parcel of land in Stoney Creek, Ontario (the "Property"). RYACA is an unincorporated association which is a member of The Royal Yugoslav Army Combatants Association "Draza Mihailovic" (the "Association"); the rights and obligations of RYACA members are governed by the Association's constitution (the "Constitution").

A dispute arose at RYACA's 2010 annual general meeting ("AGM"). RYACA's then-president, Dragan Varjacic ("Danny"), had attempted to recruit new members in response to RYACA's dwindling membership and collected membership fees, but failed to properly account for and provide receipts for those fees. Further, questions concerning the validity of the new members were raised. Nonetheless, it was

"assume[d] that the people present had paid and were members", and an executive board was elected (the "2010 Board").

After its election, the 2010 Board called a meeting for April 9, 2011 (the "2011 Meeting"), but did not provide notice to all who considered themselves to be members, including Danny. However, Danny (and other alleged members) heard about the 2011 Meeting and attempted to attend the meeting. Upon their arrival, Danny was advised that he and others were not welcome, and Danny was handed a termination letter explaining that he was not considered a member for failure to pay his membership dues. The 2010 Board purported to revoke the membership of a number of individuals, without documentation to support their decision.

With regard to the Property, in 2013, various members of the 2010 Board had attempted to sell the Property unsuccessfully. Subsequently, in 2015, the plaintiffs discovered that the Property had been transferred to one of the defendants as sole owner, raising concerns that the Property could be sold without membership approval. Following this, a court order was issued in 2016 directing that title be reconveyed to RYACA.

The plaintiffs commenced a court application, broadly seeking (1) to restrain the defendants from exercising authority as RYACA executive members, which included dealing with the Property; (2) a declaration that the 2011 Meeting was invalid; and (3) a declaration that the 2010 Board's termination of approximately 30 members was invalid. They also sought orders to allow for new members to be recruited and for an AGM to be called, at which current members could elect a new executive board and vote on the future of RYACA and the Property. A number of the parties to the action were self-represented and did not follow the applicable rules of civil procedure. Several aging individuals who had helped to establish and operate the RYACA passed away or became incapacitated and unable to attend the hearings in person due to poor health.

The court first reviewed whether it had jurisdiction over the matter, citing the Supreme Court of Canada's ("SCC") decision in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga* ("*Aga*"), discussed in *Charity & NFP Law Bulletin* No 494. In that case, the SCC confirmed its ruling in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, stating that courts have jurisdiction to intervene in voluntary associations' decisions where a legal right, including a property or contractual right, is affected by a decision. Reviewing the evidence, the court found that the actions taken by the 2010 Board to oust members and transfer the Property had left one individual "with sole control over the RYACA's largest and most valuable asset, the Property". The court further found that "the parties whose

memberships were purportedly terminated had contributed years of time, labour, and money, toward the betterment and preservation of the Property". The court therefore found that the 2010 Board's actions had deprived the members and interfered with their legal and contractual right to enjoy the use of the Property and to share in decision-making concerning its future use. Given that contractual and property rights of the members were at stake, the court found that it had jurisdiction to decide on the matter.

The court then found that, pursuant to the Constitution, all memberships expired after two years of non-payment of membership dues. As no one had paid dues since 2011, the court held that RYACA had no current members. It also found that RYACA had no valid executive board, as the 2010 Board had been inactive since the 2011 Meeting, had failed to call a new election, and all but one member had resigned. Given that neither the members nor the 2010 Board voted to authorize the sale or transfer of the Property, and that the Association had no authority to manage or oversee the matters at hand, the court found that the solution lay with the members of RYACA. It dismissed most of the relief sought by the various parties, and instead ordered that those individuals who sought to become full and valid members or who had their valid membership restored be granted membership upon the payment of members' dues. It further ordered that an annual general meeting be held for those members to elect a new executive board, and for the Property to be held by RYACA until after election of the new board, that could then determine whether to retain or sell the Property.

This case follows previous case law in confirming the courts' jurisdiction over the affairs of voluntary associations where property and contractual rights are affected. Further, it serves to underscore the importance of following an organization's governing documents, as well as maintaining complete and accurate records of an organization's financial and corporate activities. The case also serves as an example of why not-for-profits should endeavor to work co-operatively in order to avoid the time consuming and expensive process of attempting to resolve internal disputes through the courts.

Court Intervenes When Sole Officer of Voluntary Associations Breaches Trust

By Ryan M. Prendergast

The case of *Hofer v Hofer et al.*, decided by the Court of Queen's Bench of Manitoba, provides an example of when the court will intervene in the affairs of a voluntary association. The decision, delivered on August 3, 2021, considered, among other things, if the court had jurisdiction to adjudicate the alleged breach of trust by the voluntary association's sole officer and trustee.

The Rainbow Colony of Hutterian Brethren ("Rainbow") was a voluntary association operating a large mixed farm through several corporations. For many years it had been operated and directed by Cornelius Hofer Senior (the "Father") with the assistance of one of his sons, Rodney Hofer (the "Respondent"). After the Father passed away in 2018, the Respondent was the sole officer and trustee of Rainbow, the voluntary association, and the only one in control of Rainbow's members' income as trustee. Through a series of events, the Respondent made financial and business decisions which put his personal interests before the interests of other members and beneficiaries of Rainbow. Two other sons, Cornelius Hofer Junior and Gerald Hofer (the "Applicant Brothers"), who disagreed with the Respondent's actions, were eventually excluded from membership in Rainbow. The Applicant Brothers then brought an application to the court alleging that the Respondent engaged in conduct that amounted to a breach of trust.

The Respondent submitted that the court had no jurisdiction to adjudicate the matters raised by the Applicant Brothers, because Rainbow is a voluntary association, relying on the decision of the Supreme Court of Canada ("SCC") in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* ("*Wall*"), discussed in *Church Law Bulletin* No. 54. In *Wall*, the SCC held that there are limits to the court's authority to review decisions of voluntary associations. The SCC noted that judicial review is reserved for state action, there is no free-standing right to procedural fairness, and that even where judicial review is available, the court can consider only those issues that are justiciable. The Respondent claimed that the SCC decisions in *Wall*, *Lakeside Colony of Hutterian Brethren v Hofer* ("*Lakeside*"), and *Aga v Ethiopian Orthodox Tewahedo Church of Canada* ("*Aga*") applied to this case.

The court, however, asked whether this case involved a mere breach of a Rainbow custom, or if it was instead a violation of a legal right sufficiently important to warrant judicial intervention. The circumstances in *Wall*, *Lakeside* and *Aga* were distinguishable from the circumstances which occurred at Rainbow. The court found that this case was about legal rights affected by the Respondent's administration of a trust and related property. Additionally, the court concluded that even if the analysis from *Wall*, *Lakeside*, and *Aga* applied, it would have found the legal rights of the Applicant Brothers to be sufficiently important to warrant court intervention and justiciable. Since the case was about allegations of breach of trust by a trustee, the court had jurisdiction to decide the case. The court ultimately concluded that the Respondent was in a conflict of interest and that he failed to place the interests of beneficiaries above his own.

Charities and not-for-profits that organize as unincorporated associations should take note of this case, which demonstrates that certain conflicts between members may rise to the level where a court finds

judicial intervention is warranted for violation of a legal right. For example, where an officer of the association is in the position of a trustee of property for the association as a whole and breaches that trust, judicial intervention may be justified. Especially where an individual's legal rights are at risk, the court may find it necessary to intervene.

Infringing Use of a Modified Trademark Negates Finding of Distinctiveness

By Sepal Bonni

Charities and NFPs should be aware of the importance of maintaining the distinctiveness of their trademarks as demonstrated by the recent Federal Court decision in *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd.* released on June 11, 2021. This decision follows a decade-long history of litigation between Sadhu Singh Hamdard Trust (the "Trust") and Navsun Holdings Ltd. ("Navsun"). The present decision is a second redetermination of the passing off and trademark infringement issues between the two parties.

"Passing off" is a common law and statutory cause of action under the *Trademarks Act* that occurs when one party deceptively markets goods or services in a manner that confuses the public, usually taking advantage of the goodwill associated with a particular trademark. For a passing off claim to succeed, a party must prove: (1) the existence of goodwill; (2) deception to the public because of a misrepresentation; and (3) actual or potential damages to the plaintiff.

In the present case, the Trust alleged that Navsun's logos (both an original logo and subsequently used modified logo) infringed and passed off the Trust's AJIT logo and depreciated the value of the Trust's AJIT logo. AJIT, a Punjabi term, was used in association with a newspaper widely-read among the Punjabi population in India.

In its redetermination, the Federal Court found that Navsun had engaged in passing off with respect to Navsun's use of its original logo, in use between 1993 and 2009, although not with respect to Navsun's use of its modified logo, in use as of September 2009. With regard to the original logo, the Federal Court found that the Trust had sufficient goodwill in 1993, the Trust's logo was distinctive, and there was a likelihood of confusion between the Trust's logo and Navsun's original logo to support a passing-off claim. Importantly, with respect to the modified logo, the court found that the Trust did not meet the threshold for distinctiveness that is required for its passing-off claim to succeed, mainly because the distinctiveness of the Trust's logo was displaced following the Navsun's adoption of its modified logo in 2009.

The court further dismissed the Trust's claims for infringement under sections 19 and 20 of the *Trademarks Act*, and for depreciation of goodwill under section 22 with respect to Navsun's current, modified logo, as the court found it was neither identical nor "confusingly similar" to the Trust's logo and given that Navsun's modified logo had been used for around six years prior to the Trust's trademark registration for its logo.

While the Trust was partly successful in its passing off claim, timely registration and enforcement of its mark may have potentially avoided a decade long dispute. To ensure the distinctiveness of a trademark is not eroded, charities and not-for-profits must actively monitor and enforce all registered and unregistered trademarks that they own. Where trademarks are not enforced in a timely manner, the trademarks may lose distinctiveness and be unenforceable.

Privacy Law Update

By Martin U. Wissmath and Adriel N. Clayton

Ontario's Privacy Commissioner Praises Ontario Government Vision for Enhancing Privacy Rights

The Office of the Information and Privacy Commissioner of Ontario ("IPCO") is urging the provincial government to "press forward with its plans of enhancing Ontarians' privacy rights" despite a federal privacy bill dying on the order paper due to the calling of the federal election. Dated September 2021, the IPCO published a 41-page commentary "on the Ontario Government's White Paper on *Modernizing Privacy in Ontario*" (the "Commentary"). The Ministry of Government and Consumer Services published the White Paper on June 17, 2021 (the "White Paper"), announcing a vision to "make Ontario the world's most advanced digital jurisdiction." The White Paper noted "several points of weakness" in the federal Bill C-11, *Digital Charter Implementation Act, 2020*, which is now dead on the order paper after the federal election ended the 43rd Parliament. The Commentary commends the White Paper as a "critical step in the journey of building a modern, privacy protective environment in Ontario that will give the public the confidence it needs to embrace innovation rather than shy away from it." Whether or not the same federal bill will be reintroduced, or a modified version, the Commentary notes, it is "incumbent upon the Government of Ontario" to forge ahead with "concrete provisions consistent with the principles-based, fair, well-balanced, pragmatic, flexible and proportionate approach" for provincial privacy law.

According to the Commentary, Ontarians' privacy rights would be better protected with provincial legislation that is "substantially similar" but "goes beyond the limits" of the federal *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") or the future reform bill which may be introduced

to replace Bill C-11. IPCO approved of the White Paper's proposal for a provincial privacy law that would cover "unions, charitable organizations, and professional associations whose non-commercial activities" have gone unregulated by *PIPEDA*. A "made-in-Ontario private sector privacy law could offer more comprehensive protections" beyond the reach of federal law "now or in the future," the Commentary states.

There are "significant volumes of data held by the not-for-profit sector in Ontario" that are "not immune from privacy and security vulnerabilities," the Commentary states, "yet they remain largely unprotected by federal privacy law, which is constitutionally constrained in this space." The COVID-19 pandemic has only exacerbated the cyber-security threats to the non-commercial sector. Non-profit organizations "have increasingly moved to remote work, resulting in greater exposure to privacy and security risks," the Commentary asserts. With fewer resources to support privacy compliance activities, non-profits may be at a greater risk for security or privacy breaches. IPCO describes the example of a charity providing meal services that experienced a breach and took five months to (voluntarily) notify the affected individuals because of the substantial amount of resources that were required from the charity's small team to assess the breach and respond accordingly. There is currently no privacy law that applies generally to Ontario's not-for-profit and registered charity organizations "and no regulator has been given responsibility for this sector," the Commentary points out. A provincial private sector privacy law would provide IPCO with an expanded mandate to support not-for-profits with advice and education about the challenges, risks and protections involved in privacy and security issues.

Quebec Passes New Privacy Bill Enacts Sweeping Reforms to Modernize Legislation

Quebec's National Assembly has taken a major step forward in the development of privacy laws in the province with the enactment of amending legislation this month. Bill 64, *An Act to modernize legislative provisions as regards the protection of personal information* received Royal Assent September 22, 2021 ("Bill 64"). Bill 64 amends 21 pieces of existing legislation in Quebec including the *Act respecting Access to documents held by public bodies and the Protection of personal information,* the *Financial Administration Act, Tax Administration Act, Health Insurance Act,* the *Act to establish a legal framework for information technology,* the *Election Act,* the *Act respecting the protection of personal information in the private sector,* and the *Act respecting health services and social services for Cree Native persons,* among others.

Bill 64's "Explanatory Notes" detail the effect of the new legislation, which "modernizes the framework applicable to the protection of personal information" in the various amended Acts. Among the

amendments are updates to the rules "governing the use of personal information for commercial or philanthropic prospection purposes." New provisions require public bodies and private enterprises to publish governance rules regarding personal information. Additionally, those that collect personal information through technological means must publish and share a confidentiality policy. There are requirements to conduct assessments of privacy-related factors for "information system" or "electronic service delivery" projects that involve the collection, use, release, keeping or destruction of personal information. Express and informed consent rules govern the collection of personal information, and private enterprises must create "the function of person in charge of the protection of personal information." Technological products or services used to collect personal information must "provide the highest level of confidentiality by default, without any intervention by the person concerned." Bill 64 also raises the amount of fines for contravention of the law, and provides for the imposition of monetary administrative penalties.

Canada's Privacy Commissioner Meets with G7 to Discuss Global Data Protection Challenges

Artificial intelligence in line with data protection, pandemic-driven tech innovation and cross-border data flows are a few of the topics addressed during a roundtable discussion that the Office of the Privacy Commissioner of Canada ("OPC") attended with G7 data protection and privacy authorities (the "Roundtable"). The OPC published an Announcement and Communique: "Data Free Flow with Trust" summarizing the topics of the Roundtable, which included guests from the Organisation for Economic Cooperation and Development and the World Economic Forum, held September 7–8, 2021.

According to the summary of topics in the Communique, data protection and privacy authorities "should constructively influence the developments of AI systems and create a framework that safeguards human rights, democracy, the common good, and individual freedoms while creating room for innovation and progress." Regulators like the OPC must ensure that privacy rights are not violated by AI as technology progresses. Measures that governments have undertaken in response to the COVID-19 pandemic have "put stress on many of the fundamental rights and freedoms that are [the] cornerstone of modern democracies, including the right to respect for private life." The Roundtable called for the development of a framework for "cross-border transfer of personal data," which "presents a challenge to data protection and privacy enforcement authorities." The extent of internet tracking technologies, such as "cookies" should be reduced, according to the Roundtable summary, and "users should have the choice of not being tracked at all."

Consultation on New Home and Community Care Regulations Open until October 11

By Jennifer M. Leddy

The Ontario government has launched a consultation on the regulatory impact (*e.g.* costs and benefits) of the proposed regulations for home and community care. As discussed in the February 2020 *Charity & NFP Law Update*, Bill 175 *Connecting People to Home and Community Care Act, 2020* introduced modernized home and community care regulations, which would partially amend the *Connecting Care Act, 2019* and the *Ministry of Health and Long-Term Care Act*. Bill 175 received Royal assent on July 8, 2020, but will not come into force until the proposed modernized home and community care regulations are ready.

When it comes into force, Bill 175 will replace all references to "integrated care delivery systems" in the *Connecting Care Act, 2019* with "Ontario Health Teams", which is the terminology used by all stakeholders. Bill 175 will open the door for Ontario Health to authorize a health service provider or Ontario Health Team to govern the funding and oversight of home and community care services. According to the *Modernizing Ontario for People and Business Act, 2020* which came into force on January 1, 2021, there must be an analysis of the regulatory impact of the regulations introduced by Bill 175.

Stakeholders, including approved home and community care agencies, are invited to submit feedback about the government's preliminary analysis of the expected regulatory impact to the home and community care sector. The consultation document has identified on a preliminary basis the benefits of the regulations, including a more integrated care delivery system, more care in the community rather than costly institutional options, an integrated system centered around the needs of patients, and cost saving by reducing duplication of services. Costs identified include staff education on the new regulations and administrative/compliance costs.

The consultation, first posted on August 27, 2021, will remain open until October 11, 2021.

AML/ATF Update

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

FINTRAC Updates Guidance for Reporting Foreign and Domestic Politically Exposed Persons

A new guidance from the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") updates the information on requirements for doing business with Politically Exposed Persons ("PEP"s).

The guidance will be relevant for registered charities that must manage record-keeping and due-diligence requirements regarding PEPs under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("*PCMLTFA*"). For example, charities that carry on a related business that meets the definition of a money services business ("MSB") are affected by the requirements, and would be included as a reporting entity under the *PCMLTFA* and its regulations.

The Canada Revenue Agency's policy statement CPS-019, "What is a related business?" explains what it means for a charity to "carry on a related business". In brief, to carry on a related business means that a charity operates a continuous, regular commercial activity that either: has unpaid volunteers for substantially all (90%) or more of its workforce; or is "linked to a charity's purpose and is subordinate to that purpose." FINTRAC has a webpage explaining what a MSB is, which includes businesses that engage in: foreign exchange dealing; money transferring; issuing or redeeming money orders, traveller's cheques or anything similar; and/or dealing in virtual currency. Although not likely applicable to the vast majority of charities that operate a related business, those that do fall within the definition of a MSB will need to become aware of the new guidance.

The new FINTRAC guidance for PEPs and Heads of International Organizations ("HIO"s) was published in May and came into effect on June 1, 2021 (the "New Guidance"), coinciding with the coming-into-force of regulatory amendments on the same date. The New Guidance has detailed definitions of what a PEP and HIO are. Generally, a domestic PEP "is a person who currently holds, or has held within the last 5 years, a specific office or position in or on behalf of the Canadian federal government, a Canadian provincial (or territorial) government, or a Canadian municipal government." A foreign PEP is someone who holds or has held a public office or position in a foreign state. An HIO

> is a person who currently holds or has held within the last 5 years the specific office or position of head of an international organization and the international organization that they head or were head of is either:
>
> 1. an international organization established by the governments of states; or
> 2. an institution established by an international organization.

Charities that are reporting entities — because they carry on a related MSB — are obligated under the *PCMLTFA* to take additional measures and keep records when engaging in business with a PEP, HIO, or a family member or close associate of one. These additional measures and record-keeping requirements are triggered whenever the RE enters a business relationship, conducts periodic monitoring of or detects a fact about a business relationship, which "indicates a PEP or HIO" connection. The New Guidance

outlines these requirements in detail and charities that are reporting entities must diligently familiarize themselves and comply with these obligations.

Chambers and Partners Rankings 2022

Carters has been ranked as one of only seven Canadian law firms under Charities/Non-profits law by **Chambers and Partners**, an international lawyer ranking service. In addition, Terrance S. Carter and Theresa L.M. Man have been ranked, reviewed and listed on the Chambers and Partners website.

IN THE PRESS

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

ONCA and Ontario Business Registry Come Into Force on October 19, 2021 by Theresa L.M. Man, was featured in the CSAE Trillium FORUM on September 13, 2021.

RECENT EVENTS AND PRESENTATIONS

Carters/Fasken Healthcare Philanthropy Webinar: Check-Up 2021, hosted by Carters Professional Corporation and Fasken, was held on **Wednesday, September 22, 2021**. Terrance S. Carter presented on the topic of **Income Generation for Healthcare Charities, including Social Enterprise and Impact Investing.** Theresa L.M. Man presented on the topic of **The ONCA and Healthcare Charities: What you need to know**. A handout package is available online.

UPCOMING EVENTS AND PRESENTATIONS

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

Volunteer Ottawa will host a webinar that has been rescheduled to Thursday, November 18, 2021. Esther Shainblum will present on the topic of Legal Check-up: Duties and Liabilities of Directors and Officers of Charities and Not-For-Profits.

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