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CHARITY & NFP LAW UPDATE

APRIL 2022

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

APRIL 2022

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RECENT PUBLICATIONS AND NEWS RELEASES

1. Federal Budget 2022 and Implementation Act No. 1 Introduced

Federal Budget 2022: Impact on Charities and Not-for-Profits

By Terrance S. Carter, Theresa L.M. Man, Ryan M. Prendergast, Esther Shainblum, Esther S.J. Oh, Jennifer M. Leddy, Sean S. Carter, Adriel N. Clayton and Martin U. Wissmath

Finance Minister Chrystia Freeland tabled the sixth budget of the Liberal federal government ("Budget 2022") on April 7, 2022. Budget 2022 is comprised of nine chapters and three appendices focussing on a wide range of matters, such as housing affordability, climate change, reconciliation, health care, support for diverse communities, and tax fairness.

This *Charity & NFP Law Bulletin* provides a summary and commentary on provisions proposed in Budget 2022 that impact the charitable and not-for-profit sector. Budget 2022 includes a number of legislative proposals that will impact the operations of charities, including charities "partnering" with non-qualified donees in a legislative initiative aimed at reflecting the "spirit of Bill S-216", increasing the disbursement quota for charities with investments above $1 million from 3.5% to 5%, and expanding the scope of Canada's anti–money-laundering and anti–terrorist-financing (AML/ATF) regime to cover crowdfunding platforms. Additionally, Budget 2022 responds to some of the challenges of the past couple of years by including a number of health-related initiatives, funding for Canada's Performing Arts and Heritage Sectors, and financial support and funding for Indigenous communities, Black Canadian communities, and various religious communities through different programs and funds.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 510*.

Draft Budget Implementation Legislation Tabled in the House of Commons

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

Draft legislation for the *Budget Implementation Act, 2022, No.1* ("BIA") was tabled in the House of Commons on April 26, 2022, through a "Notice of Ways and Means Motion to introduce an Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022, and other measures" (the "Motion"). After the Motion is debated at the House of Commons, the Motion will need to be adopted before it is introduced as a bill.

The BIA contains a number of proposed legislative changes relevant to charities. As well, the BIA provides further information about the federal government's intentions regarding Bill S-216, *An Act to*

amend the Income Tax Act (use of resources of a registered charity), which was recently explained in-depth by The Honourable Senator Ratna Omidvar in her presentation *Bill S-216 — 'Resource Accountability' and the Vulnerable Sector* on February 17, 2022. In this regard, the BIA proposes that if Bill S-216 received royal assent before or on the same day as the BIA, then Bill S-216 would be deemed never to have come into force and would be repealed on the day the BIA came into force.

Key proposed draft changes to the *Income Tax Act* and *Income Tax Regulations* contained in the BIA relevant to registered charities include:

- Introducing a new regime permitting registered charities to make "qualifying disbursements" to "grantee organizations" which are newly defined terms in the *Income Tax Act;*
- Requiring qualifying disbursements to meet detailed prescribed conditions set out in new *Income Tax Regulation* 3703;
- Requiring a charity that has made over $5,000 in qualifying disbursements to a grantee organization in a year be reported in its T3010 *Registered Charity Information Return* under new *Income Tax Regulation* 3704; and
- Expanding the power of the Minister of National Revenue to revoke the registration of a registered charity if a gift was made "expressly or implicitly conditional" on the charity making a gift to another person, club, society, association or organization other than a qualified donee (a power that is currently limited to registered Canadian amateur athletic associations and registered journalism organizations).

An in-depth commentary of the BIA will follow in a future Charity and NFP Law Bulletin.

2. Legislation Update

By Terrance S. Carter

Ontario Proposes Regulatory Changes under *Child, Youth and Family Services Act, 2017*

The Ontario government is proposing amendments to Ontario Regulation 155/18, *General Matters under the Authority of the Lieutenant Governor in Council* under the *Child, Youth and Family Services Act, 2017* to streamline matters concerning police record checks. In particular, the proposed amendments are

intended to clarify "when and from whom police record checks are required in the child and youth services sectors, and what practices and procedures are to be followed when a check is required."

The proposed amendments will set out minimum requirements for police record checks in the child and youth services sector, as well as mandatory practices and procedures for service providers to follow where checks are required. They will also establish standards for the type of check or records required, for example, for the purposes of screening staff and volunteers providing child and youth services where the *Police Record Checks Reform Act, 2015* is not applicable.

The provincial government is seeking comments on the proposed regulatory changes no later than May 4, 2022.

Ontario Bill 88, *Working for Workers Act, 2022* enacts *Digital Platform Workers' Rights Act, 2022*

As reported in the *March 2022 Charity & NFP Law Update*, omnibus Bill 88, *Working for Workers Act, 2022* ("Bill 88") was tabled in Ontario to introduce changes for workplace health and safety, including a higher level of risk for non-compliance by directors and officers of charities and not-for-profits. Bill 88 received Royal Assent on April 11, 2022, and will bring into force a new *Digital Platform Workers' Rights Act, 2022*, along with amendments to the *Employment Standards Act, 2000* and the *Occupational Health and Safety Act*, among other amendments.

The *Digital Platform Workers' Rights Act, 2022* (the "Act"), enacted by Bill 88, is new legislation with reference to the *Employment Standards Act, 2000* to provide "digital platform workers" with basic rights to information, minimum wage, and the right to resolve workplace disputes, among many other changes. The Act contains provisions setting out directors' joint and several liability for amounts owing to workers in certain circumstances, but also sets out an exemption for directors of corporations to which the Ontario *Not-for-Profit Corporations Act, 2010* or the *Co-operative Corporations Act* apply.

For further information on Bill 88's amendments to the *Occupational Health and Safety Act*, please see the *Employment Update*, below.

Ontario Bill 37, *Fixing Long-Term Care Act, 2021* and Regulation 264/22, *General*

Ontario Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021* was proclaimed into force on April 11, 2022 after it received Royal Assent the previous year. As reported in the *January 2022 Charity & NFP Law Update*, Bill 37 repeals the *Long-Term Care Homes Act, 2007* and replaces it with the *Fixing Long-Term Care Act, 2021*, which "includes new provisions around staffing

and care; new protections for residents through better accountability, enforcement and transparency; and streamlined development processes."

Ontario Regulation 264/22, *General* under the Act was filed on March 31, 2022. Of note, section 317 of the regulation clarifies the meaning of "non-profit" in the Act. In this regard, a non-profit entity is a non-share capital corporation to which the Ontario *Not-for-Profit Corporations Act, 2010* applies or which is incorporated under an Ontario special act, or which is a municipality or a board of management for a municipal home, a council of a band under the *Indian Act* (Canada) or a board of management for a First Nations home; or a corporation with share capital whose equity shares are owned by one of the above-noted entities.

Alberta Bill 12, *Trustee Act*

Legislation for a new *Trustee Act* has been proposed in Alberta that is intended to improve the creation and management of trusts, as well as decrease the involvement of the courts. Bill 12, *Trustee Act* was introduced on March 29, 2022, and most recently passed second reading on April 21, 2022 and the Committee of the Whole on April 26, 2022. The new Act will replace current trust legislation in Alberta if passed, and will provide "a new model that sets clear provisions to support improved day-to-day function of trusts for Albertans, including charities and businesses", according to a government announcement. The government also indicated that the new Act will modernize trust legislation by:

- reducing administrative burdens and increasing the efficiency of trusts;
- lessening the need for court involvement by specifying processes so that, in many instances, trustees and beneficiaries do not need court applications for most matters;
- providing a basis for trusts that do not have extensive terms, while making sure people can still set their own terms;
- clarifying trustees' duties and their accountability to improve protection for beneficiaries;
- decreasing the number of matters going to court resulting in cost savings in legal fees for Albertans, businesses and to free up court resources.

Notably, Part 7 of the new Act contains provisions related to charitable trusts and non-charitable purpose trusts, and sets out provisions, for example, regarding the court's power to vary charitable trusts and to order the sale of property of charitable trusts.

3. Tax Court of Canada Rejects Donation Credit in Banyan Tree Tax Shelter Scheme

By Ryan M. Prendergast

The Tax Court of Canada released its decision in *Herring v The Queen* on March 31, 2022, in which it heard an appeal over reassessments of various participants (the "Appellants") of a leveraged donation gifting arrangement (the "Program") involving the Banyan Tree Foundation ("Bayan Tree"). The Appellants claimed they were entitled to charitable tax credits for alleged gifts they had made through the Program to Banyan Tree, which was a registered charity at the time of the alleged gifts.

As reported in *Charity Law Bulletin No. 190*, Banyan Tree's charitable status was revoked in 2008, largely as a result of its participating in the Program and promoting a tax shelter arrangement, and charitable donation tax credits were disallowed by the Canada Revenue Agency (CRA) as the donations and loans were not genuine gifts and were unenforceable. A class action was certified in 2010 against the promoters of the Program, and the parties ultimately agreed to a settlement of $11 million.

In the case at hand, the court considered, among many issues, whether any part of the Appellants' donations were gifts under the common law such that they would be entitled to a tax credit. Although all Appellants testified that they were motivated to participate because of the Program's philanthropic objectives, with tax savings as a secondary consideration, the court gave no weight to this because "it is not relevant that a taxpayer was in a 'charitable frame of mind' or not, since 'this is not a prerequisite to getting a charitable gift tax credit'." It also stated that donative intent cannot be determined on a subjective basis alone, and that the court must look for the "objective manifestation of purpose […] with due regard for all the circumstances". Based on an objective review of evidence, the court held that while the Appellants might have been motivated by philanthropic objectives, "they participated because of the benefit offered to them in exchange for their cash outlay", and that no part of the donation amounted to a gift under common law.

The Appellants also raised various alternative, unsuccessful arguments concerning "split gifts". While they argued that certain portions of their donations were eligible as split gifts, the court found that donative intent was required for the portion purported to be a gift. It again concluded that the Appellants lacked donative intent, and that no part of the donation could be considered a gift, and ultimately dismissed the appeals.

This case is a helpful reminder of the definition of a gift at common law, and in particular about the requirement for donative intent where any gifts are made. Further, this case and the 2010 class action

highlight the associated dangers of tax shelters and leveraged donation gifting arrangements, both to recipient charities as well as to participating donors.

4. Court Recognizes Importance of Indigenous Traditions in NFP Governance Dispute

By Esther S.J. Oh

In a Decision concerning the governance of an Indigenous not-for-profit corporation, the Saskatchewan Court of Appeal ("SKCA") has recognized the importance of considering Indigenous custom and tradition when interpreting general corporate legislation and the common law. *Agency Chiefs Tribal Council Inc. v Big River First Nation* is a SKCA judgment heard on March 3, 2021 and published on February 4, 2022 ("*Agency Chiefs* Case"). This case is an example of a case where Indigenous customs and tradition were recognized in a dispute concerning the governance of a not-for-profit corporation. The SKCA dismissed the appeal from a lower court decision ("Chambers Decision") that found in favour of the plaintiff, Big River First Nation ("Big River"). The Chambers Decision had involved an application for an oppression remedy under section 225 of the Saskatchewan *Non-profit Corporations Act, 1995* ("*NPC Act*").

The case involved the Agency Chiefs Tribal Council (the "Tribal Council") and the Agency Chiefs Tribal Council Inc., a not-for-profit corporation incorporated under the *NPC Act* that conducts key aspects of the Tribal Council's business (the "Council Corp.").

Big River was one of three member nations of the Tribal Council, together with the Pelican Lake First Nation and Witchekan Lake First Nation (collectively referred to as the "Member Nations"). While the Council Corp. was incorporated by the Member Nations in 1990, no general operating bylaw outlining the procedures to govern the Council Corp. (such as the election of directors) was ever adopted. Instead, the Tribal Council developed a practice of having each of the three Member Nations appoint two of their own members to sit on the Council Corp's six-person board of directors.

In 1991, the Member Nations signed the "Agency Chiefs' Tribal Council Convention Act" (the "*Convention Act*"), a document which, although never formally ratified, was signed by all parties to the agreement. It was therefore accepted by the court in the Chambers Decision as a written intention of the parties to be bound by its terms, including the expression of Cree custom and tradition.

In 2019, as a result of differences, Big River decided that it would resign as a member from the Council Corp. effective as of the future date on which two conditions stipulated in the Band Council resolution adopted on September 9, 2019, had occurred. These two conditions were as follows: (1) that the directors

of the Council Corp. approve its annual audited financial statements for the fiscal year ending on March 31, 2020; and (2) receipt of federal government funding from Indigenous Service Canada "in such amounts and on such terms and conditions as [Big River] deems appropriate, in its sole discretion." The Council Corp. then took the position that Big River had resigned as a member of the Council Corp. effective immediately as of September 9, 2019, the date of the Band Council resolution, as opposed to the date on which all conditions to the resignation were completed. The Council Corp. proceeded to replace the two directors appointed by Big River with other individuals.

In the Chambers Decision, the court found that the Council Corp. contravened section 225 of the *NPC Act* and acted in a manner that was unfairly prejudicial to the Big River by removing two directors appointed by Big River from both the Tribal Council and the board of the Council Corp.

The court in the Chambers Decision also rejected the Council Corp.'s arguments and cited a common law principle to interpret the *NPC Act* that confirms that a party resigning from a non-profit corporation could specify a future date when a resignation would be effective. The Council Corp. appealed and alleged that the judge in the Chambers Decision "erred by truncating its oral arguments, thereby denying it a full and fair response"; and also alleged multiple violations of procedural rules of court. The SKCA did not agree, and upheld the Chambers Decision, amending the particular remedy granted by the Chambers Decision by restoring Big River's membership on the Council Corp. with the ability to appoint two directors on the board of the Council Corp.

The *Agency Chiefs* Case is of interest for charities and not-for-profits because while statutory law and common law governing not-for-profits continues to apply, the court recognized that Indigenous custom and tradition can inform and serve as an interpretive framework for applying general legislation and the common law where Indigenous organizations are involved.

5. Court Dismisses Class Action Proceeding that Alleged Charity Defrauded Donors

By Terrance S. Carter & Jacqueline M. Demczur

A donor brought a class action proceeding against a Canadian charity alleging that the charity acted fraudulently and misappropriated charitable donations. In the matter of *Zentner v GFA World*, a decision handed down from the Ontario Superior Court of Justice on March 17, 2022, Mr. Zentner alleged that GFA World (referred to as "GFA Canada" throughout the decision) "defrauded thousands of individuals and churches from across Canada […] by diverting those funds to improper purposes." GFA Canada's

affiliate, Gospel for Asia, Inc. ("GFA USA") and four individuals who were directors and officers of GFA Canada and GFA USA (the "four directors") were also named in the proposed class action. Notably, GFA USA and the four directors had previously settled a class action brought by American donors (the "American class action"), though with no admission of liability. While the Ontario court ultimately dismissed Mr. Zentner's claim and refused to certify the class, the analysis of the court will be of interest to charities and donors. This is because the court sets out the factors that it will consider in class action claims brought by donors alleging misuse of charitable funds. The ultimate impact of this decision will depend upon how persuasive other lower court judges may treat it and if it is adopted (in whole or in part) at the appellate court level. It is also not known at the time of writing whether the decision will be appealed.

Mr. Zentner, a resident of Nova Scotia and a former regular donor to GFA Canada, sought a declaration from the court that he be appointed as the representative of the class and that the requirements for certification under Nova Scotia's *Class Proceedings Act, 2007* had been satisfied. If the class action was allowed to proceed, Mr. Zentner's claim was for $100 million in damages for fraud, breach of fiduciary duty, negligent misrepresentation, and conspiracy; as well as $50 million in punitive damages and the return of $20 million in donations made to GFA Canada that was allegedly used by GFA USA in the construction of a 350-acre corporate headquarters and personal residence in Texas. Essentially, Mr. Zentner asserted that GFA Canada made two promises to donors that it failed to keep: 1) that donors had the ability "to direct the specific charitable purpose that their donation would be used to support"; and 2) "that 100% of all donations designated by donors for a purpose in the mission field or the field[*i.e.* South Asia] would actually be spent in the field". Four months after Mr. Zentner first commenced his class action claim, GFA Canada filed for protection under the *Companies' Creditors Arrangement Act* (an act that facilitates compromises and arrangements between companies and their creditors).

The court's analysis considered whether Mr. Zentner's claim satisfied the requirements for certification as a class action in Nova Scotia under the *Class Proceedings Act, 2007*. There were three requirements that were at issue in this matter: 1) whether the claim disclosed a cause of action; 2) whether the claim raised a common issue amongst class members; and 3) whether a class proceeding would be the preferable procedure for a fair and efficient resolution of the dispute.

GFA Canada argued that the claim did not disclose a cause of action because all of Mr. Zentner's pleadings were based on "a fundamental misconception of a right to recovery of an unencumbered gift". GFA Canada took the position that once funds are donated to a charity, the funds are the property of the charity rather than the donor. Sometimes a donor may attach certain requirements to a gift which engages the

duties and obligations of trust law. But in this case, GFA Canada submitted, the donors did not attach any express trust conditions to their gifts. Therefore, there was no harm or injury to the donors, because even if the funds had been misappropriated, the funds were no longer the donors' property, but rather belonged to the charity.

Mr. Zentner's response was that "there is no fraud exception for charities", and that when a donor's donated funds were "dishonestly misappropriated from the charity and not used for the charitable objects of the charity", then the donor is not precluded from commencing an action to recover the misappropriated donated funds. Further, he submitted that it was not necessary for him to plead the existence of a trust in order to have a legitimate cause of action arising out of property rights and trust law. In the alternative, Mr. Zentner submitted that even where donors may not have a claim for the return of donated money based on the property rights and obligations manifested in trust law, donors would "still have a legal right to sue for misappropriation of donated funds in tort."

The court agreed with Mr. Zentner that it was not necessary for him to plead the legal conclusion that a trust was created. However, he did need to plead facts that, if true, plausibly supported the legal conclusion that a charitable purpose trust was created when he donated funds to GFA Canada. Based on the facts, the court concluded that Mr. Zentner's donations were unencumbered gifts and there was, therefore, no trust and no ability to ground a civil claim on the basis of any property rights.

With regard to the ability to claim in tort rather than make a proprietary claim, the court did not think there was a meaningful distinction between the two. Whether a claim is framed as a proprietary claim for breach of trust (which Mr. Zentner did not make) or as a claim in tort, the claimant "must have a compensable loss." Therefore, the court concluded that "[a]bsent a claim for a compensable loss, Zentner's statement of claim does not disclose a cause of action against the defendants." In situations where donated funds may have been misused or misappropriated, the court set out that the proper remedies would be through "regulatory or enforcement measures", such as those found in the *Charities Accounting Act* (Ontario) or possibly through criminal proceedings.

The court did not need to go into further analysis after finding that Mr. Zentner's claim failed to meet the requirement of disclosing a cause of action. Nevertheless, it addressed the other two requirements that were at issue, namely whether the claim raised a common issue amongst class members, and whether a class proceeding would be the preferable procedure for a fair and efficient resolution of the dispute. The

court ultimately concluded that Mr. Zentner's evidence failed to show that there was a common issue amongst class members, stating that "suspicion, based on speculation, is not enough."

With regard to the "preferable procedure", GFA Canada submitted that an investigation under the *Charities Accounting Act* (Ontario) or by the Canada Revenue Agency followed by a judicially supervised claims process under the *Companies' Creditors Arrangement Act* would be best. The court did not directly comment on involvement by the Canada Revenue Agency and noted that investigation under the *Charities Accounting Act* (Ontario) might not necessarily be effective because, for example, it would have no bearing on a civil claim in tort. Therefore, if Mr. Zentner's claim had met all of the other requirements to be certified as a class action, the court would have accepted that a class action would be "the preferable procedure" as compared with proceedings under the *Companies' Creditors Arrangement Act*. A class action would promote access to justice and judicial economy which would be preferable to individualized claims in proceedings under the *Companies' Creditors Arrangement Act*.

While the court dismissed Mr. Zentner's class action claim against GFA Canada, this case nevertheless provides important insights to charities and donors about remedies available under the law when there are allegations of mismanagement of charitable funds. The court affirmed that once unrestricted gifts are made, donors cease to have proprietary rights over the donated funds. However, the court did not rule out the possibility that donors might be able to bring a class action claim if the gifts in question were restricted charitable purpose trusts. However, presumably any such claim of this kind would need to be based on an allegation of breach of trust and/or brought by an application under section 10 of the *Charities Accounting Act* (Ontario), which permits a claim to be brought by two or more individuals alleging breach of a trust created for a charitable purpose. In addition, the court indicated that there may be instances where it could consider a class action claim to be a more efficient use of judicial resources than other types of claims against charities.

This case is a good wake up call for charities in understanding that, depending upon the nature of their fundraising campaigns, what is communicated during their campaigns to potential donors, and how they have used the funds raised, the possibility of a class action proceeding being commenced and possibly certified is not outside of the realm of possibility. The court has made clear in this decision that charities are not exempt from class action proceedings. As such, it will be important to monitor future caselaw to see if class actions regarding charitable donations may become a developing trend or not and what potential impact such developments might have on charities.

6. Employment Update

By Barry W. Kwasniewski

New *Working for Workers Act* Enacts $1.5M Maximum Fine for D&Os under OHSA

Ontario's newest legislative changes for workplace health and safety include a much higher level of risk for non-compliance by corporate directors and officers, including those serving in those roles for charities and not-for-profits. Bill 88, the *Working for Workers Act, 2022* received Royal Assent on April 11, 2022 ("Bill 88"). It amends both the *Employment Standards Act, 2000* (*ESA*) and the *Occupational Health and Safety Act* (*OHSA*). In particular, amendments to the *OHSA* raise the maximum fines significantly for convictions: from $100,000 to $1,500,000 for directors and officers of corporations — including charities and not-for-profits; or $500,000 for other individuals. Bill 88 also adds a list of aggravating factors to the *OHSA* to be considered in determining a penalty, and extends the limitation period for instituting a prosecution from one year to two years. These changes to penalties and prosecution under the *OHSA* will take effect on July 1, 2022. Further obligations under the *OHSA* for certain employers to provide naloxone kits and train staff on their use will take effect on a forthcoming date by proclamation of the Lieutenant Governor of Ontario.

Part IX of the *OHSA* for Offences and Penalties currently states under section 66 (1), "Every person who contravenes or fails to comply with" its provisions or regulations is liable to a fine of up to $100,000 or twelve months' imprisonment, or both. The maximum fine for a corporation is $1,500,000 under subsection 66 (2). Bill 88 amends this section by increasing the individual fine in subsection (1) to $500,000, and adds a new subsection (2.1):

> (2.1) A director or officer of a corporation who contravenes or fails to comply with section 32 is guilty of an offence and on conviction is liable to a fine of not more than $1,500,000 or to imprisonment for a term of not more than twelve months, or to both.

Section 32 of the *OHSA*, Duties of directors and officers of a corporation, states:

> **32** Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,
>
> (a) this Act and the regulations;
>
> (b) orders and requirements of inspectors and Directors; and
>
> (c) orders of the Minister.

The individual liability for directors and officers of a corporation, set at the same maximum amount as the corporation itself, is a new addition to the *OHSA* by Bill 88, and underscores the need for directors and officers of charities and not-for-profits to take seriously all of the health and safety obligations of their organizations as required of employers. Directors and officers should establish a proactive system of rigorous compliance, undertake a comprehensive regular review of all relevant workplace health and safety issues, and document all steps taken in detail to ensure due diligence with regard to *OHSA* requirements, as well as carefully document any incidents that may occur with actions taken in response. Such documentation is necessary and could be significant evidence in defence if the corporation is ever party to a claim against it under the *OHSA* in litigation.

Aggravating factors for "the purposes of determining a penalty" under section 66 of the *OHSA* are added by Bill 88 in a new subsection (2.2):

> (2.2) Each of the following circumstances shall be considered an aggravating factor for the purposes of determining a penalty under this section:
>
> 1. The offence resulted in the death, serious injury or illness of one or more workers.
>
> 2. The defendant committed the offence recklessly.
>
> 3. The defendant disregarded an order of an inspector.
>
> 4. The defendant was previously convicted of an offence under this or another Act.
>
> 5. The defendant has a record of prior non-compliance with this Act or the regulations.
>
> 6. The defendant lacks remorse.
>
> 7. There is an element of moral blameworthiness to the defendant's conduct.
>
> 8. In committing the offence, the defendant was motivated by a desire to increase revenue or decrease costs.
>
> 9. After the commission of the offence, the defendant,
>
> i. attempted to conceal the commission of the offence from the Ministry or other public authorities, or
>
> ii. failed to co-operate with the Ministry or other public authorities.
>
> 10. Any other circumstance that is prescribed as an aggravating factor.

Bill 88 also adds subsection 66 (5), which provides express allowance for a prescribed court order "in addition to any fine or imprisonment that is imposed" by the *OHSA*. The extended limitation period, from one to two years, is in section 69 of the *OHSA*. Taken together, these changes add significant risk to directors and officers of charities and not-for-profit organizations for potential liability for workplace health and safety.

7. Federal Court Interprets Unregistrable Place of Origin Marks Broadly

By Sepal Bonni

Charities and not-for-profits looking to register their trademarks should keep in mind that trademarks which are descriptive of a place of origin of goods or services are unregistrable due to a lack of distinctiveness. In the February 22, 2022 decision of *Nia Wine Group Co., Ltd. v North 42 Degrees Estate Winery Inc.*, the Federal Court found that North 42 Degrees Estate Winery Inc's (the "Applicant") trademark contravened section 12(1)(b) of the *Trademarks Act* ("TMA") and that therefore its trademark application should be refused in its entirety.

The winery filed an application for the trademark NORTH 42 DEGREES ("proposed trademark") in Canada in June 2016. In March 2017 Nia Wine Group Co., Ltd. (the "Opponent") filed a Statement of Opposition (the Opponent operated a winery in the Niagara Region and sold wine in Canada under various brand names, including NORTH 43º). One of the specific grounds of opposition that the Opponent raised was that the proposed trademark "was clearly descriptive of the place of origin of the goods and services as the Applicant's winery is located at or near the 42nd line of constant latitude in the northern hemisphere" contrary to 12(1)(b) of the TMA.

However, the Opponent was unsuccessful in opposing the trademark application before the Trademarks Opposition Board (the "Board"). Even though the Board accepted that there was evidence which established that the Applicant's goods and services came from a farm located along the 42nd parallel, it concluded that "the Mark is neither a geographic name referring to a place of origin nor … the name of a place." Therefore, while the Board considered the proposed trademark to be a "geographical reference" that alluded to a coordinate for a place, it was not a self-evident description of a place.

The Opponent then appealed the Board's decision to the Federal Court. After considering some issues regarding evidence and the standard of review, the court directed its analysis to whether the Board erred in concluding the proposed trademark did not contravene 12(1)(b) of the TMA. The undisputed test for

the application of 12(1)(b) was set out by the Federal Court of Appeal in *MC Imports Inc v AFOD Ltd*. Only the first two parts of the test were relevant to the court's analysis: determining whether the trademark was a geographical name; and whether the place of origin of goods and services is the location of the geographic name. In *MC Imports*, the Federal Court of Appeal used both the phrase "geographical name" as well as "geographical location" in its analysis under 12(1)(b). Therefore, the court in this case concluded that there was no requirement "that a mark, to be unregistrable under section 12(1)(b), must use a geographical name." Even if a geographical name was required, "[e]ach line of latitude and longitude has a distinctive designation (in this case, North 42 degrees)" and therefore "does in fact have a name".

Further, when considering what constituted a "place of origin", the court concluded that the term should be interpreted as referring "to any geographical designation." For these reasons, the court found that the proposed trademark NORTH 42 DEGREES contravened section 12(1)(b) of the TMA and that the Applicant's trademark application was refused in its entirety.

The court's decision in this case provides charities, not-for-profits, and other organizations with further information about when a location-based trademark application may be unregistrable. While the Canadian Intellectual Property Office's practice notice about the application of 12(1)(b) refers to "a geographic name" and goods originating from the location of the geographic name, the court's decision illustrated a somewhat broader understanding and included terms indicative of geographic location, such as latitude and longitude.

8. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

Helpful Guidelines on Security for Personal Information from B.C. Privacy Commissioner

Any security assessment for disclosing personal information outside of Canada must include an assessment of the legal framework for the jurisdiction where that personal information would be disclosed, according to British Columbia's Office of the Information & Privacy Commissioner ("BC IPC"). A guidance published by the BC IPC in March 2022, entitled "Reasonable security measures for personal information disclosures outside of Canada" (the "Guidance"), offers useful advice to organizations, including charities and not-for-profit organizations anywhere in Canada, with regard to the factors they should take into account when considering the disclosure of personal information outside of the country.

Although it is directed to public bodies in British Columbia that are governed by BC's *Freedom of Information and Protection of Privacy Act* (BC FIPPA) and is intended to help them interpret the requirement to implement "reasonable security measures" to protect personal information against risks such as unauthorized collection, use, disclosure or disposal when disclosing personal information outside of Canada, the Guidance provides good advice that can be extrapolated to other sectors and other types of organizations.

Because Canadian laws do not apply once personal information leaves the country, and because, according to the BC IPC, contractual or technical protections may not be enough to protect the information, the BC IPC advises public bodies to conduct comprehensive privacy impact assessments before making the decision to proceed with disclosure. This recommendation is included as a requirement under Regulation 294/2021, enacted pursuant to BC FIPPA.

Noting that the disclosure of personal information outside of Canada requires a very high level of rigour, the Guidance advises that public bodies should have administrative, technical or contractual controls in place and should be prepared to demonstrate reasonable security controls in line with industry standards such as ISO 27002, ISO 27017 or the NIST Cybersecurity Framework. This recommendation is aligned with the privacy best practices set out in Schedule 1 to the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA).

Another factor that must be taken into account is the legal framework of the jurisdiction to which the personal information will be disclosed. The Guidance notes that the requirement for "reasonable security measures" is unlikely to be met when personal information is being disclosed to an authoritarian regime that "does not respect the rule of law, has no privacy laws, or those laws are inadequate." Any jurisdiction lacking constitutional individual freedoms, due process and responsible government, would not likely allow for "reasonable security measures" to be put in place, especially if it would have "the power to compel information without a warrant".

Other factors to assess, depending on circumstances, include:

- the sensitivity of the personal information in question (e.g., personal health information is much more sensitive than contact information);
- the volume of the personal information in question;
- the foreseeability of an unauthorized collection, use, disclosure, or storage of personal information;

- the impact to individuals of an unauthorized collection, use, disclosure, or storage of their personal information;
- whether a reasonable alternative is available within Canada.

Even if all the factors indicate that disclosure to the foreign jurisdiction would be reasonable, the public body must still implement reasonable administrative and technical measures to protect the information.

The Guidance notes that disclosure of personal information will "always involve risks that no administrative, technical or contractual controls can eliminate." The Guidance advises that disclosure of personal information outside of Canada should only be undertaken after a careful assessment, where the risks involved are objectively assessed and reasonable and with reasonable measures in place to "adequately mitigate those risks."

It should be noted that neither the Guidance nor BC FIPPA include a definition of "disclosure". It is not clear whether the term would include a "transfer" for processing of personal information under PIPEDA, which is not considered to be a disclosure. However, all the factors set out in the Guidance would apply equally to actual disclosures as well as to transfers for processing and should be adhered to by charities and not-for-profits considering taking either step.

9. Nine New Sector Members to Begin Terms with ACCS

By Jennifer M. Leddy

Nine new members have been appointed to the Advisory Committee on the Charitable Sector (ACCS), according to an announcement by Honourable Diane Lebouthillier, Minister of National Revenue, released on April 5, 2022. As explained most recently in *Charity & NFP Law Bulletin No. 502*, the ACCS was established in 2019 as a consultative forum for the Government of Canada to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do.

In its first two years, the ACCS released three reports on issues and challenges facing charities, subtitled "Towards a federal regulatory environment that enables and strengthens the charitable and nonprofit sector". They were issued in January, April and July 2021 and are discussed in greater detail in *Charity & NFP Law Bulletins No. 489*, *No. 495*, and *No. 500*, respectively.

The ACCS consists of 15 members from the charitable sector, as well as the Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch of the CRA and one representative from each of the CRA Charities Directorate and Finance Canada. All members are appointed by the Minister of National Revenue or the Commissioner of the CRA.

As ACCS sector members serve different terms, nine sector members' terms came to an end in 2021 and will be replaced by nine new sector members, who will begin two-year terms on May 1, 2022, joining the six current sector members, who have ongoing terms. The new members are:

- Christian Bolduc – President & CEO, BNP Performance, LL.B, ASC, C.Dir., CFRE
- Owen Charters – President & CEO, BGC Canada (formerly Boys & Girls Clubs)
- Dr. Anver Emon – Canada Research Chair in Islamic Law and History, and Director of the Institute of Islamic Studies, University of Toronto
- Sheherazade Hirji – Former Resident Representative, Aga Khan Development Network, Afghanistan
- Jean-Marc Mangin – President & CEO, Philanthropic Foundations Canada
- Sarah Midanik – President & CEO, The Gord Downie & Chanie Wenjack Fund (DWF)
- Martha Rans – Founder & Legal Director, Pacific Legal Education and Outreach Society (PLEOS)
- Tanya Rumble – Director of Development, Ryerson University
- Bob Wyatt – Executive Director, Muttart Foundation

The ongoing sector members are:

- Bruce MacDonald – President & CEO, Imagine Canada (sector co-chair)
- Hilary Pearson – former President, Philanthropic Foundations Canada (sector co-chair)
- Peter Dinsdale – President & CEO, YMCA Canada
- Arlene MacDonald – former Executive Director, Community Sector Council of Nova Scotia
- Kevin McCort – President & CEO, Vancouver Foundation
- Andrea McManus – Chief Advancement Officer, Banff Centre for Arts & Creativity and Co-Founder and Senior Counsel of ViTreo Group

10. Statistics Canada Releases 2021 Fourth Quarter Results for Non-Profit Sector

By Jacqueline M. Demczur

New statistics released by Statistics Canada show growth in the non-profit sector, though this growth lags behind economy-wide growth. "Non-profit institutions and volunteering: Economic contribution, fourth quarter 2021" (the "Report"), published by Statistics Canada on March 29, 2022, shows that the real gross domestic product ("GDP") (*i.e.* nominal GDP adjusted for inflation), of non-profit institutions increased by 2.1% overall in 2021, while economy-wide real GDP growth for the year was 4.6%. Growth for the sector was particularly slow in the fourth quarter of 2021, which coincided with Omicron-related restrictions. However, the Report attributes the lower growth rate in 2021, in part, to the strength of health care activities throughout 2020, which form a large component of non-profit institutions.

As stated in the *October 2021 Charity & NFP Law Update*, the definition of the "non-profit sector" in the Report adheres to international standards published in the United Nations' Handbook of National Accounting: *Satellite Account on Non-profit and Related Institutions and Volunteer Work*.

Across sectors, the real GDP of non-profit institutions serving businesses (which suffered the greatest impacts from COVID-related restrictions) rose by 0.9% in the fourth quarter of 2021. The real GDP of non-profit institutions serving governments and those serving households both rose by 0.5% in the same period.

Employment in the sector increased 1.4% overall in the fourth quarter, led by a strong increase in jobs in healthcare and social services, and representing a 4.3% increase from the fourth quarter of 2020. In particular, healthcare has seen the largest increase in employment, with a 6.3% increase as compared with the first quarter of 2020. Compared to healthcare, the social services activities only saw a 2.0% rise in the number of employees, which remains 7.1% lower than in first quarter of 2020.

The nominal GDP for the sector grew by 2.0% in the fourth quarter of 2021, with non-profit institutions constituting 8.3% of the economy-wide nominal GDP during that period, and non-profit instructions excluding the government constituting 2.1% of the economy-wide nominal GDP. The Report overall presents good news for Canada's non-profit sector, which has experienced growth and greater stability, particularly in the wake of a global pandemic.

11. New Zealand Report Asks "What Does a World-Leading Framework of Charities Law Look Like?"

By Terrance S. Carter

A report out of New Zealand, prepared by Sue Barker for the New Zealand Law Foundation (the "Report"), sets out in its title a question that many common law countries have wrestled with: "What Does a World-Leading Framework of Charities Law Look Like?" Published on April 10, 2022, the Report answers this question by setting out draft legislation that would amend New Zealand's *Charities Act 2005*. In the course of establishing the basis for the draft legislation as well as providing commentary on 70 recommendations, the Report provides a very helpful review and analysis of the regulation of charities in several common law jurisdictions, including Canada.

There are several interesting aspects that the Report explores in its analysis of the Canadian charitable framework. In a few instances, the Report highlights some of the challenges inherent in Canadian charitable legislation. For example, the Report considers how legislation relating to charities in Canada is largely characterized "by an overemphasis on controlling the extent of a perceived 'tax expenditure' through a classic tax regulatory approach of tax audits accompanied by intricate and specific rules." The Report concludes that this approach is both harmful to charities and creates a never-ending loop of increasingly complex rules. The Report also quotes the Report of the Special Senate Committee on the Charitable Sector, as well as the Advisory Committee on the Charitable Sector ("ACCS") to illustrate that Canada's complex rules pertaining to charities' business activities inhibit rather than enable social enterprise. In light of such complex and inhibitory rules, the Report concludes that New Zealand should "exercise considerable caution" before importing something similar.

The Report, though, also covers some of the strengths of Canada's charitable framework. While Canada's historical legislation limited charities' engagement in so-called "political activities" the law nevertheless evolved. Once Bill C-86 was passed into law in December 2018, revised rules relating to non-partisan political activities of charities allowed them to engage in public policy dialogue and development activities. This change, the Report notes favourably, "brought the law in Canada into line with that of all comparable jurisdictions, with the notable exception of New Zealand". Additionally, the Report commented favourably on the creation and involvement of the ACCS which "has been heralded as government and sector working together and 'making progress on some really tough questions' for the first time in 40 years."

While the overall focus of the Report is, understandably, on the law of charities as it pertains to New Zealand, it is interesting to see how Canada's legal system compares with the frameworks which regulate charities in other common law countries such as Australia, England and Wales, Ireland, New Zealand, Northern Ireland, Scotland, and the United States. Charities and others who are curious about "What does a world-leading framework of Charities Law look like?" are encouraged to read this excellent and very thorough report.

IN THE PRESS

Charity & NFP Law Update – March 2022 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Corporation Fined, Director Imprisoned for Contempt in Copyright Infringement Decision written by Sepal Bonni was featured in the OBA Charity & Not-for-Profit Law Section Insider on April 4, 2022.

Court Finds County's Property Purchase to Be a Breach of Trust written by Jacqueline M. Demczur was featured in the OBA Charity & Not-for-Profit Law Section Insider on April 4, 2022.

UPCOMING EVENTS AND PRESENTATIONS

CBA Charity Law Online Symposium will be hosted by the CBA on Thursday, May 5, 2022. Terrance S. Carter and Theresa L.M. Man will be speaking during the morning session on the topic: Bill S-216: End of the 'Own Activities' Requirement?

CSAE Webinar is being hosted by the Canadian Society of Association Executives (CSAE) on Wednesday, May 18, 2022. Theresa L.M. Man will present on the topic "ONCA Transition Challenges."

CAGP 28th National Conference hosted by the Canadian Association of Gift Planners is being held from June 14 to 16, 2022 in Halifax, NS. Theresa L.M. Man will speak on the topic of Foreign/Non-Resident Donors on Tuesday, June 14, 2022. Terrance S. Carter on the topic of Impact Investing by Charities: The New Frontier in Philanthropy on Wednesday, June 15, 2022.

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