

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

FEBRUARY 2022

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[The 2022 Annual Ottawa Region Charity & NFP Law Seminar Materials Now Available For Download](#)

Webinar hosted by Carters Professional Corporation in Ottawa, Ontario, on February 17, 2022

With special guest speakers, **The Honourable Ratna Omidvar**, C.M., O.Ont., Senator for Ontario, and Former Deputy Chair of the Special Senate Committee on the Charitable Sector, as well as **Melissa Shaughnessy**, Director of the Compliance Division of the Charities Directorate of the Canada Revenue Agency.

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RECENT PUBLICATIONS AND NEWS RELEASES

1. Bill S-216 — ‘Resource Accountability’ and the Vulnerable Sector

Presented by The Honourable Ratna Omidvar, C.M., O. Ont, Senator for Ontario

On February 17, 2022, the Honourable Ratna Omidvar, C.M., O. Ont, Senator for Ontario, delivered a presentation setting out the context of [Bill S-216, An Act to amend the Income Tax Act \(use of resources of a registered charity\)](#). The Senator explained why the Bill is necessary and how it addresses the needs and lives of vulnerable communities. The presentation, given at the *2022 Ottawa Region Charity & Not-for-Profit Law Webinar*, includes helpful information about the domestic and international context of resource accountability in the charitable sector and points towards a better alternative.

The following is a transcript of the presentation. Select questions raised at the conclusion of Senator Omidvar’s presentation have also been included. For the full transcript, please click [here](#).

2. Reminder for Charities to Take the Necessary Steps to Meet the DQ

By [Terrance S. Carter](#) and [Theresa L.M. Man](#)

Following the proposal for a public consultation to potentially increase the 3.5% Disbursement Quota (“DQ”) in the April 2021 Federal Budget, there has been much discussion in the charitable sector regarding charitable tax policy as it relates to the DQ, including in our own firm’s submission in [Charity & NFP Law Bulletin No. 498](#). However, what has been overlooked in the discussion is an understanding of the process that charities are required to follow in order to calculate and meet the DQ, whether or not the DQ rate is to be changed.

The DQ is a requirement set out in subsection 149.1(1) of the ITA and is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that its charitable assets are used for charitable purposes and are not simply accumulated indefinitely. The 3.5% DQ obligation applies to property owned by the charity in the preceding 24 months that is not used directly in charitable activities or administration. This *Bulletin* sets out a brief outline of the steps charities would need to take to comply with the DQ rules, and highlights a few key areas to pay attention to.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 507](#).

3. CRA News

By [Ryan M. Prendergast](#)

Guidance about Gifts to Qualified Donees More Inclusive of Indigenous Government Bodies

The Canada Revenue Agency (“CRA”) updated [Guide P113](#) – Gifts and Income Tax 2021 (the “Guide”) to further clarify that gifts to “qualified donees” include those made to groups performing a function of government in Canada, such as a First Nation. The Guide, updated January 1, 2022, sets out when a donor may be able to claim a non-refundable tax credit for gifts made to a qualified donee.

There are various non-substantive changes throughout the Guide. For example, in previous versions of the guide, donors could claim a tax credit based on the eligible amount of the gifts they made to the Government of Canada, a province, or a territory. In the updated version, the Guide clarifies that, in addition to gifts made to the federal, provincial, or territorial governments, donors may claim a tax credit for gifts made to “registered municipalities in Canada, or registered municipal or public bodies performing a function of government in Canada”. A registered municipal or public body performing a function of government in Canada may include a First Nation or other Indigenous body – the CRA has a full [list](#) online.

CRA Reminds Charities and NPOs to Declare Government Subsidies

As tax season approaches, the CRA is [reminding](#) charities and non-profit organizations that any subsidies they received to cover employee wages, hiring expenses, commercial rent, and/or property expenses must be reported on their information returns. The reminder, published on February 15, 2022 on the Government of Canada’s website, states that organizations must report the subsidies on their information return for the tax year (fiscal period) in which they are considered to have received them. As an example, wage and rent subsidies are generally considered to have been received on the last day of the claim period they relate to.

While registered charities and non-profit organizations are exempt from tax on such subsidies, charities still have an obligation to file a complete and accurate T3010 return under the ITA and should review properly documenting these amounts with their accountants.

4. Legislation Update

By [Terrance S. Carter](#)

Department of Finance Seeks Public Comment on Draft Legislative Proposals to *Income Tax Act*

The Department of Finance released a set of [draft legislative proposals](#) and accompanying [explanatory notes](#) on February 4, 2022, to implement certain tax measures previously announced in the Budget 2021, as well as certain additional measures. Of interest to charities and non-profit organizations, are proposed changes regarding the reporting requirements for trusts, including amendments to subsection 104(1) of the ITA, as well as the introduction of new subsections 150(1.2) and (1.3) of the ITA.

The proposed changes are very technical, but generally will require more trusts to file a return of income (“T3”) than what is currently the case. For example, bare trusts will be subject to reporting requirements, as will express trusts (if certain conditions are met). All trusts that are required to file a T3 (except express trusts when certain conditions are met) will have to provide additional personal information (*e.g.* names, addresses, dates of birth) about trustees, beneficiaries, or settlors of the trust. Failure to comply with the new reporting requirements is addressed in newly added penalty provisions, and could result in a monetary penalty of \$2500 or greater.

Other amendments of interest include proposed amendments to subsection 188(1.2) of the ITA concerning revocation rules applicable to charities. Specifically, pursuant to Budget 2021, the ITA has already been amended to “streamline the revocation process of charitable status” to prevent the abuse of charitable registration for terrorist financing purposes by allowing for the immediate revocation of charitable status of an organization listed as a terrorist entity, as set out in greater detail in [Charity & NFP Law Bulletin No 492](#). The new proposed amendments would include coordinating amendments to subsection 188(1.2). This subsection concerns a charity’s winding-up period and applies for the purpose of calculating revocation tax under subsection 188(1.1) with regard to certificates issued under the *Charities Registration (Security Information) Act* and notices of intention to revoke a charity’s registration. The proposed amendments to subsection 188(1.2) would make these provisions applicable with respect to entities that become a “listed terrorist entity”.

The Department of Finance is [seeking public comment](#) on the draft legislative proposals, and has indicated that any responses to its consultation should be submitted no later than March 7, 2022.

Federal Government Declares Public Order Emergency under *Emergencies Act*

In response to the recent “Freedom Convoy” protests in Canada, the Government of Canada declared a “public order emergency” under Part II of the [Emergencies Act](#) (the “Act”) on February 14, 2022. This was followed by the filing of [Emergency Measures Regulations](#) (the “Regulations”), and an [Emergency Economic Measures Order](#) (the “Order”) under the Act on February 15, 2022. However, on February 23, 2022, the government [revoked](#) the *Emergencies Act*.

Of note, the declaration of a public order emergency allowed the federal government to strengthen anti-money-laundering controls, which may affect fundraising platforms used by charities. For further details, see the [ATF/AML Update](#), below.

5. Continuing Dilemma: Ontario Corporations Going Federal?

By [Theresa L.M. Man](#)

The Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) was finally proclaimed into force on October 19, 2021.¹ Incorporation as a new not-for-profit corporation in Ontario is now governed under the ONCA. As well, the ONCA automatically applies to all not-for-profit corporations previously incorporated under Part III of the Ontario *Corporations Act* (“OCA”). These corporations have three years from the date of the ONCA’s proclamation to undertake an optional “transition process” to amend their governing documents to comply with the requirements of the ONCA before they are automatically amended to comply with the ONCA on October 19, 2024.

As a result of the repeated delay in the proclamation of the ONCA since its enactment in 2010, Ontario corporations had been left in corporate limbo for 11 years, struggling with whether to update their objects and by-laws under the OCA to further their mission or to wait for the proclamation of the ONCA before making those changes. Many Ontario corporations had to make the difficult decision of whether to give up waiting for the proclamation of the ONCA by continuing under the federal *Canada Not-for-Profit Corporations Act* (“CNCA”). [Charity & NFP Law Bulletin No. 379](#) explained the steps involved and key considerations for such a move.

Now that the ONCA is proclaimed into force, Ontario corporations are faced with the new of dilemma of whether to undertake the transition process to continue to remain under the ONCA, or whether it is time

¹ *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15 [“ONCA”].

to take a second look at whether to go federal under the CNCA. This *Bulletin* reviews some of the key factors that should be considered when deciding which move to make.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 508](#).

6. Court Finds County's Property Purchase to be a Breach of Trust

By [Jacqueline M. Demczur](#)

A decision from the Ontario Superior Court of Justice emphasized that a tax-exempt organization that receives a gift from an individual's estate cannot spend the funds as it wishes. Rather, funds must be used according to the terms of use set out in the will. The court, in its January 31, 2022 unreported decision of *County of Bruce v Office of the Public Guardian and Trustee*, ultimately concluded that the funds from the estate were misused and that there had been a breach of trust.

Bruce Krug was an expert in local and natural history, well known for his financial support of Bruce and Grey County museums and historical societies. In his will, he gave \$500,000 to the County of Bruce "for the archives building for the storage and display of the archives of the county", thus creating a restricted charitable purpose trust. The will also set out that if any beneficiaries named in the will declined or refused to comply with the conditions attached to the legacy bequeathed to them, then that amount would lapse and fall into the residue of his estate.

In March 2014, about a year after Mr. Krug passed, the County of Bruce (the "County") passed a by-law to establish the Bruce County Archives Krug Reserve Fund (the "Fund"). The County spent about \$30,000 of the Fund commissioning plans regarding the development of its museum, but the majority of the Fund was spent in March 2018 when the County purchased the property adjacent to its museum (the "property") for \$550,000.

The Southampton Cultural Heritage Conservancy ("Southampton") brought an application before the court seeking, among other things, an order that the County breached the restricted purpose charitable trust when it purchased the property using money from the Fund. The County also brought an application requesting an order dismissing Southampton's application and confirming that the language of Mr. Krug's will was broad enough to encompass the County's plans.

In reviewing the facts before it, the court expressed concern regarding the County's actions, noting that the County had unlawfully closed to the public at least 18 of its meetings relating to the purchase and use

of the property, that it had demonstrated extreme reluctance to produce relevant records, and that “on the admitted record, the County’s behaviour has been atrocious throughout.” The court also highlighted concerns that “the County has not spent any of the Krug trust funds on the archives building” nor on “the storage and display of the archives of the County” contrary to the terms of the will.

The County’s submission urged the court to consider whether the words of Mr. Krug’s will, particularly regarding the gift “for the archives building for the storage and display of the archives of the county”, meant that “approval should be given to the County to expend funds for a new archival structure”. However, in reviewing the record, the court found that there was no clear intent by the County to use the property for the archives building; the County could only provide that it had “no intent not to use this property for archival storage” (emphasis added). Further, there was no explanation regarding why the Fund was used to pay for the entire lot “when the archive did not need the full lot”. Ultimately, the court found that the Fund was “used to buy land in the name of the County for its own benefit”.

The County had also requested that, in the alternative, the court consider if the *cy-près* doctrine applied. The *cy-près* doctrine allows a court to make orders to give effect to a charitable gift where the charitable objectives of the gift are clear but are impossible or impracticable to carry out. The County requested that because the existing archives building had reached its capacity and it would be impossible or impracticable to spend money from the Fund to expand the building, the court should apply the *cy-près* doctrine to allow the Fund to be used for the purpose of maintaining a museum archives at a different location and in a different building. However, the court disagreed that it would be impossible or impracticable to use the Fund for the purposes set out in the will. Even if that were true, the will set out a “gift over clause” that if any of the beneficiaries declined or refused to comply with the conditions attached to the legacy, the legacy would lapse and fall into the residue of Mr. Krug’s estate. Ultimately, the court concluded that it “need not apply the *cy-près* doctrine in these circumstances and on this record”.

The court found that the County was in breach of trust for using the majority of the Fund to buy the property and “required the assistance of both the [Public Guardian and Trustee] and Estate Trustee” to make submissions “with respect to what should occur next”. This decision is a reminder for charities and other qualified donees (such as municipalities) that when they receive a gift from an individual’s will, there are obligations to use the property in accordance with the restricted terms of the will. Failure to do so will be a breach of trust and may result in consequences, including a review by the Ontario Public Guardian and Trustee as well as possibly the court.

7. Trust for Wrongfully Dismissed Employees Not Charitable

By [Jennifer M. Leddy](#)

Mr. Jim Crerar sought a declaration from the Supreme Court of British Columbia that the trust agreement he created was a valid charitable purpose trust. In [Jim Crerar Charitable Trust \(Re\)](#), released on January 14, 2022, the court found the trust’s purpose – to provide funds to people to prosecute wrongful dismissal claims against former employers – was not “charitable”.

Mr. Crerar had been terminated from a job earlier in his life, but did not have the funds to pursue a wrongful dismissal claim. He decided to set up a trust to help others who might find themselves in similar circumstances and wrongfully dismissed. The trust would distribute funds to “any poor person, who [...] requires funds for the prosecution of a wrongful dismissal claim against a former employer” no matter if they were a unionized or non-unionized employee, “as a means of alleviating his or her poverty”. There was no definition of poor person.

In considering whether the trust was valid, the court outlined that there must be a specific beneficiary of a trust or the trust must be recognized as a charitable purpose trust. In order to be a charitable purpose trust, the trust must be one of the four categories of charitable purposes which were set out in the case of *Pemsel v Special Commissioners of Income Tax* and include: relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community.

The court found that providing funds to prosecute wrongful dismissal claims did not have “at its core the relief of poverty” because it would not “provide funding for retraining, job search, daily living expenses, or even compensation for what might have been a proper period of notification or termination”. Rather, the court found that such litigation may result in a settlement for the employee which they “may or may not be able to collect on”. The court also highlighted the concern that if an employee loses their claim “they may well face a costs order, which would drive them further into poverty”. Because “the only guaranteed beneficiary is legal counsel”, the court declined to find that the trust had a charitable purpose for the relief of poverty.

Mr. Crerar also argued that the trust was for a purpose beneficial to the community, but the court was not satisfied that he provided any basis for this assertion. Where there is a trust that is for the benefit of the community, the court will consider whether there is a section of the community that can be identified as being helped by the trust. However, there was no evidence of this and the court declined to take judicial

notice that there was a sizable segment of society that faces access to justice issues related to wrongful termination.

In its conclusion, the court found that the Mr. Crerar failed to establish that the trust had a charitable purpose. While the court may have reached a different conclusion regarding whether there was a purpose beneficial to the community if more evidence had been provided, its analysis of whether there was a purpose for the relief of poverty was relatively narrow, as it was based on the Court's conclusion that it was an "ineffective tool for that purpose" when compared to more "immediate, short term assistance". This case serves as a reminder that whether a purpose is "charitable" is fact-dependent and grounded in the common-law understanding of the components of the four heads of charity.

8. Corporation Fined, Director Imprisoned for Contempt in Copyright Infringement Decision

By [Sepal Bonni](#)

In a rare decision, the Federal Court of Canada found a party in contempt of court for breaching the terms of two previous judgments concerning copyright infringement, resulting in a severe fine and imprisonment of a director of the infringing corporation in [Canadian Standards Association v P.S. Knight Co. Ltd.](#)

The parties to the decision, the respondents P.S. Knight Co. Ltd. ("Knight Co."), Knight Americas, Mr. Gordon Knight (the sole directing mind of Knight Co.) (together, "Knight Parties") and the applicant, Canadian Standards Association's ("CSA"), are competitors. CSA, a not-for-profit standards development organization, which publishes and updates various voluntary safety standards, had published a 2015 edition of its *Canadian Electrical Code, Part I* (the "2015 Code"). Pursuant to a dispute between CSA and the Knight Parties, the Knight Parties had knowingly and willingly produced and threatened to distribute a "substantial copy" of the 2015 Code for one third of the price (the "Knight Code").

Two judgments from 2016 had found that the Knight Co. and Mr. Knight infringed CSA's copyright of the 2015 Code by reproducing, distributing and selling the 2015 Code. According to these judgments, they were ordered to deliver up all copies of the Knight Code, and CSA was awarded a permanent injunction against Knight Co. and Mr. Knight enjoining them from infringing CSA's copyright in the 2015 Code. However, CSA brought the matter before court again, alleging contempt and arguing that since October 2020, the Knight Parties had deliberately disobeyed the injunction and resumed reproduction, distribution and sales of the Knight Code through a newly incorporated entity, Knight Americas, in an attempt to evade the injunction.

In examining the elements of contempt, the court found that there was a “clear and unequivocal” order from the courts in 2016. The order applied not only to Knight Co. and “its officers, directors, employees, and any related companies under its control”. This included both Mr. Knight personally, who is a director of Knight Co., as well as the new Knight Americas corporation, which is a related company. The court also found that the Knight Parties had knowledge of the judgments. In fact, the Knight Parties had acknowledged the injunction in multiple online posts. Finally, the court found that the Knight Parties had knowingly and intentionally carried out acts prohibited by the two 2016 judgments. The Knight Parties were therefore found to be in contempt of the judgments, and Mr. Knight was found guilty of contempt, both in his personal capacity and as the directing mind of Knight Co. and Knight Americas.

In a [subsequent ruling](#), the court ordered the Knight Parties to pay a fine of \$100,000 directly to CSA. Further, and notably, Mr. Knight was sentenced to a term of imprisonment for a minimum of six months and ordered to remain imprisoned until the Knight Parties had purged their contempt by fully complying with the judgments and paying all fines and cost awards in full, to a maximum imprisonment term of five years less one day.

This decision is a helpful illustration of the lengths that Canadian courts will go, if necessary, to enforce the protection of intellectual property, particularly where an infringement has occurred and the infringing party continues to knowingly and intentionally infringe. As demonstrated in this case, in certain circumstances, liability can and will be imposed not only on infringing corporations, but on their directors as well.

9. Motion Introduced in Senate to Improve Data Collection about Diversity of Boards of Charities and NFPs

By [Esther S.J. Oh](#)

On February 8, 2022, the Honourable Senator Ratna Omidvar introduced a [motion](#) before the Senate to adopt one of the recommendations emanating from the report of the Special Senate Committee on the Charitable Sector (the “Report”) which was adopted by the Senate on November 3, 2020. Recommendation 8, in its entirety, recommends:

That the Government of Canada, through the CRA, include questions on both the T3010 (for registered charities) and the T1044 (for federally incorporated not-for-profit corporations) on diversity representation on boards of directors based on existing Employment Equity guidelines.

In her presentation before the Senate, Senator Omidvar called the recommendation “a rather straightforward, practical and eminently doable proposal” in the context of discussions regarding anti-racism and inclusion at the Senate. She pointed out that the proposed change would impact the charitable and not-for-profit sector which is “an incredibly important sector, that helps Canadians get through ordinary and extraordinary times”, that “.... covers all aspects of life in Canada, from religion, to health, to culture, to poverty and to the environment”. She noted while the sector employs close to 2.5 million people and contributes 8.2% to Canada’s GDP, it also suffers from a lack of consistent data collection essential for making decisions, including policy decisions.

Senator Omidvar mentioned other examples where data about diversity representation on boards of directors has been gathered. Under the *Canada Business Corporations Act*, federally incorporated distributing corporations must provide shareholders with information about diversity among directors and senior management. In addition, in December 2020, Statistics Canada conducted a crowdsourced voluntary survey of the sector asking board members about socio-demographic information, including their race, gender, sexual orientation, age, immigration status and disability. The survey found that while women were equitably represented on these boards, racialized people, immigrants and people with disabilities were not.

Senator Omidvar’s proposal involves a request that the Minister responsible for the CRA add a question on both the T1044 and T3010 forms (which not-for-profits and charities are required to file annually) asking about the diversity of an organization’s board members. This is a simple step which does not involve complicated or time-consuming procedures otherwise required to amend legislation.

Senator Omidvar ended her presentation with the following comments, “If we truly want this next decade to be a decade of reconciliation and about inclusion, hope and respect for the diversity of Canada, then we must hear the voices of Indigenous peoples, racialized communities and other marginalized groups not just in universities, courtrooms and in the Senate but also in the boardrooms of our many well-meaning charities and not-for-profit organizations.”

10. Employment Law Update

By [Barry W. Kwasniewski](#) and [Martin U. Wissmath](#)

Employer Liable for Damages Caused by Employee’s Negligence in Car Accident: Court of Appeal

An Ontario Court of Appeal decision affirming that an employer was vicariously liable for a motor vehicle accident involving an employee should remind charities and not-for-profits of the importance of non-

owned automobile insurance. Published on January 28, 2022, [Dagenais v Pellerin, 2022 ONCA 76](#) (the “Appeal”) upheld a lower court finding of vicarious liability (the “Judgment”) after the defendant employee (the “Employee”) admitted liability when his car collided with the plaintiff’s on Highway 17 while he was driving to a work site from Ottawa to Petawawa. Damages claimed by the plaintiffs exceeded the Employee’s \$2 million personal automobile insurance coverage. The accident occurred in 2013 and, after some delay due to the pandemic, a [summary judgment](#) was granted by the Ontario Superior Court of Justice on June 25, 2021. The Employee worked as a concrete pourer for Slavko Concrete Finishing Inc. (the “Employer”) and was directed by the Employer to drive the two-hour route to the work site and back on the same day in his own car; he was also paid under the terms of a collective agreement. The Employer argued they should not be liable because the Employee, who was pulling into a Tim Hortons at the time the accident occurred, was not authorized to take such a coffee break. The Judgment applied a Supreme Court of Canada precedent involving a non-profit organization to conclude that the Employer was liable, a decision which the Employer then appealed.

In [Bazley v Curry](#), [1999] 2 SCR 534 (*Bazley*), the Supreme Court of Canada (SCC) found that a non-profit organization was vicariously liable for tortious conduct of an employee, establishing that there is no exemption for non-profits, which would include charities and not-for-profit organizations. The SCC applied a two-part common law test for finding vicarious liability, known as the Salmond test, which

... posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.

The Judgment concluded on the facts that the Employee was authorized to take a coffee break and that satisfied the first part of the Salmond test. If the second part of the test applied, then a further test would be required to assess the facts, from the *Bazley* precedent, based on policies of fairness and deterrence. Although the Employer argued on this point in the Appeal, the court upheld the Judgment, citing the phrase that a coffee break by the Employee was not a “ ‘frolic of his own’ ... where the employee went off to socialize for a lengthy period during the drive’.” Therefore, there was no reason to interfere with the Judgment. The amount of damages to be awarded has been left for trial.

Charities and not-for-profits should be careful to note that vicarious liability may involve no wrongdoing by or negligence of the organization, and liability can ensue even in the absence of fault. Non-owned automobile insurance is advisable if a charity or not-for-profit requires personnel to use their own vehicles for work-related duties. Non-owned automobile insurance coverage provides insurance protection when

an employee occasionally has to drive his or her personally owned vehicle for the purposes of their employment. This assumes that the vehicle is not owned, registered or contracted in the organization's name or on the organization's behalf.

11. Privacy Law Update

By [Esther Shainblum](#) and [Martin U. Wissmath](#)

State-Sponsored Cyber Criminals Cause Privacy Risks for Canadian Networks: Cyber Centre

Warnings from the federal government about Russian state-sponsored hackers highlights the need for organizations to comply with privacy law and protect sensitive data. The Canadian Centre for Cyber Security (“Cyber Centre”) published a “[Cyber threat bulletin](#)” on January 26, 2022 that “urges Canadian critical infrastructure operators to raise awareness and take mitigations against known Russian-backed cyber threat activity.” The Cyber Centre joined the United States’ [Cybersecurity & Infrastructure Security Agency](#), along with the United Kingdom’s [National Cyber Security Centre](#), in “recommending proactive network monitoring and mitigations.” Russian backed cyber threat actors are targeting Canadian critical infrastructure network operations, their operational and information technology, the Cyber Centre reported. The warning, though intended for “critical infrastructure network defenders” should remind charities and not-for-profit organizations across the country to increase their efforts to protect sensitive personal information in accordance with Canadian privacy law and best practices. The Cyber threat bulletin was published a week after a January 19 cyber attack on Global Affairs Canada amid fears of an escalating Russia–Ukraine conflict.

Under the *Canada Not-for-Profit Corporations Act*, directors of charities and not-for-profits have a duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. They could face potential personal liability if the organization suffers a loss because they have failed to take appropriate steps to identify, manage and mitigate privacy and cybersecurity risks. However, courts will not second-guess directors who act prudently in good faith, on a reasonably informed basis — a common law doctrine known as the “Business Judgment Rule.” In order to avoid potential liability, directors must be able to demonstrate that they obtained and considered information on cyber security and privacy issues and risks, that they took appropriate steps to make the organization compliant with privacy laws and best practices, and to put appropriate safeguards in place to protect personal information and to prepare for, and respond to, privacy breaches or cyber attacks. Directors should obtain regular reports from management on cybersecurity and privacy issues, as well as obtain adequate

insurance to cover the risks involved. The Office of the Privacy Commissioner of Canada recommends that charities and NFPs follow the principles set out in [Schedule 1](#) of the *Personal Information Protection and Electronic Documents Act*.

12. International Civil Liberties Group Disappointed with Review of CRA Audits of Muslim Charities

By [Ryan M. Prendergast](#)

An update on the Taxpayer Ombudsperson’s review of audits of Muslim charities in Canada has raised concerns from the International Civil Liberties Monitoring Group (ICLMG). After reports of systemic anti-Islamic bias in the CRA, the Minister of National Revenue tasked the Office of the Taxpayers’ Ombudsperson to examine complaints by Muslim-led charities about their experiences, which the Ombudsperson began in August 2021. The [Ombudsperson published an update](#) (the “Update”) on February 9, 2022 about its examination of the fairness of the CRA’s Charities Directorate’s audit process. In response, the ICLMG expressed surprise and disappointment in a press release about the apparently limited scope of the examination.

According to the Update, the Taxpayers’ Ombudsperson created a Special Ombudsperson Response Team (SORT) to sort out:

- how the CRA selects registered charities for audit, and if the process is designed and applied fairly
- if there are areas in the audit process that may be inequitable
- the impact the audit process has on registered charities

The Update lists the following questions the Ombudsperson intends to answer in the examination:

- Are charities selected for audit fairly?
- How are audits carried out?
- Is the audit process equitable?

Meetings with the CRA officials and various stakeholders, including charities “to understand concerns and identify issues, if any” are going and will continue in 2022, the Update reports. While “some stakeholders have said that they were comfortable with the CRA’s processes,” according to the Update, others raised concerns:

- the CRA’s charity audit process can sometimes last for years

- audit results and compliance approaches may not be provided in a timely manner
- compliance approaches are not consistent
- some charities feel they are being unfairly or arbitrarily treated by the CRA

As its examination continues, the Taxpayers' Ombudsperson has published a [webpage](#) to "keep Canadians informed of the examination's progress." The webpage includes [an online questionnaire](#) for the charitable sector to provide feedback about their experiences with the CRA's Charities Directorate by no later than March 31, 2022.

In its February 9, 2022 press release, the ICLMG called on the Taxpayers' Ombudsperson to expand the scope of the examination to include "missing elements" and to include a focus on the CRA's Review and Analysis Division (RAD) rather than only on the CRA Charities Directorate in general. The Taxpayer Ombudsperson should include an examination into whether current practices have created a "presumption that Canadian Muslim charities must be monitored, and possibly audited, to verify no terrorist financing risks exist." The RAD's activities should be immediately suspended, the ICLMG stated, and the government should "commit to reforming its National Risk Assessment on terrorist financing in order to ensure fairness and eliminate unintended consequences on Muslim-led charities in particular, and the charity sector overall."

13. ATF/AML Update

By [Terrance S. Carter](#), [Nancy E. Claridge](#) and [Sean S. Carter](#)

Editor's Note: On February 23, 2022, the government [revoked](#) the *Emergencies Act*. The following article provides charities and not-for-profits with information about some of the effects of this legislation while it was invoked, which may be similar to the effect that it may have if or when it is ever invoked again and a public order emergency declared.

Crowdfunding Platforms and Banks Required to Report Donations Flagged for Protest Group

Blockades in Ottawa and at the Canada-United States border due to protests earlier this month led the federal government to declare a national emergency and strengthen anti-money-laundering controls, which affected fundraising platforms used by charities. On February 14, 2022, the Government of Canada declared a "public order emergency" under Part II of the [Emergencies Act](#) (the "Act"), which grants extraordinary powers for dealing with public protests. The following day, on February 15, the government filed [Emergency Measures Regulations](#) (the "Regulations"), and an [Emergency Economic Measures](#)

[Order](#) (the “Order”) under the Act. The Regulations prohibited public assembly that could lead to a serious disruption of transportation, interference with critical infrastructure or acts of serious violence against persons or property. Peace officers were empowered to ensure compliance with the Regulations, and penalties for failing to comply included criminal prosecution on summary conviction or by indictment with a maximum fine of \$5,000 or imprisonment up to five years, or both.

According to a government announcement, the Order extended the scope of Canada’s anti–money–laundering and anti–terrorist–financing rules, such as those under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA), to cover crowdfunding platforms, as well as payment processors and included digital assets such as cryptocurrencies. Some charities with related money services businesses are already subject to due diligence and reporting requirements under the PCMLTFA. The Order required crowdfunding platforms and payment service providers “that are in possession or control of any funds that are owned, held or controlled by or on behalf of anyone involved in the illegal blockades ... to register with and report suspicious or large value transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC).” The Order directed banks and financial service providers to immediately cease providing financial services where an account was suspected of “being used to further the illegal blockades.” Federal and provincial government institutions were also given new authority to share information with banks and financial services providers, “if the information will help put a stop to the funding of illegal blockades and illegal activities.”

14. COVID-19 Update

By [Adriel N. Clayton](#), [Martin U. Wissmath](#) and [Terrance S. Carter](#),

Extension Proposed for Expanded Benefits Under Local Lockdown Program

The federal government is proposing to extend the availability of certain COVID-19 relief, including the Local Lockdown Program which was introduced through [Bill C-2, An Act to provide further support in response to COVID-19](#). As discussed in the [January 2022 Charity & NFP Law Update](#), the Local Lockdown Program allows organizations, such as charities and not-for-profits, to qualify for relief under the Tourism and Hospitality Program even if they are not in the tourism and hospitality sector.

To qualify, organizations must have been affected by a qualifying public health restriction for at least seven days during a claim period, their stopped activities must account for at least 25% of their total eligible revenue during the period prior to the claim period, and they must have had at least a 40% revenue decline for the current claim period compared to the prior reference period.

Eligibility for the Local Lockdown Program had also been expanded from December 19, 2021 to February 12, 2022 to include employers subject to capacity-limiting restrictions of 50% or more, and to reduce the revenue decline threshold from 40% to 25%, with eligible employers receiving wage and rent subsidies between 25% and 75% depending on their degree of revenue loss. However, according to an [announcement](#) from the Department of Finance released on February 9, 2022, the federal government intends to extend this expanded access to these benefits for one additional month to March 12, 2022.

Ontario Moves to Next Phase of Reopening

The Government of Ontario is expediting its three-step plan for lifting capacity limits to ease public health measures across the province. As reported in the [January 2022 Charity & NFP Law Update](#), capacity limits were to be increased effective as of February 21, 2022, followed by further easing of limits on March 14, 2022. However, in accordance with a government [announcement](#) released on February 14, 2022, capacity limits were eased as of February 17, 2022, with further easing on March 1, 2022.

As February 17, 2022, social gathering limits were increased to 50 people indoors and 100 people outdoors; organizations and facilities that are permitted to “opt-in” to proof of vaccination requirements are now permitted to operate at 100% capacity; and indoor religious services, rites, and ceremonies may accommodate the number of people that can maintain two metres of physical distance (with no capacity limits for those that opt in to require proof of vaccination for all attendees).

As of March 1, 2022, provided that public health and health system indicators continue to improve, capacity limits in all remaining indoor public settings will be lifted. Proof of vaccination requirements for all settings will also be lifted, though “businesses and other settings” will be allowed to continue to require proof of vaccination. However, masking requirements will continue to remain in place, with a specific timeline to lift this measure to be announced later.

IN THE PRESS

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

[Ontario Workers Have the Right to ‘Disconnect from Work’ as Well as Other Rights Under ESA](#) written by Barry W. Kwasniewski and Martin U. Wissmath was featured in the February edition of CSAE Trillium FORUM Newsletter on Wednesday, February 23, 2022.

RECENT EVENTS AND PRESENTATIONS

[The Top Ten Risk Management Tips for Charities and NFPs](#) was presented by Terrance S. Carter on February 9, 2022 at CPA Canada's Not-for-Profit Webinar Series.

Legal Issues for Small Business was presented by Nancy E. Claridge on February 16, 2022 at a webinar series hosted by the Orangeville Small Business and Economic Centre (SBEC).

[The 2022 Annual Ottawa Charity & NFP Law Webinar Continues Virtually!](#) was hosted by Carters Professional Corporation on Thursday, February 17, 2022, as a webinar with more than 570 in attendance. The special guest speakers were **The Honourable Ratna Omidvar**, C.M., O.Ont., Senator for Ontario, and Former Deputy Chair of the Special Senate Committee on the Charitable Sector, as well as **Melissa Shaughnessy**, Director of the Compliance Division of the Charities Directorate of the Canada Revenue Agency. The [full handout package](#) is available on our website, as well as the individual presentations listed below:

- [Introduction, Agenda and Speaker Details](#)
- [Essential Charity & NFP Law Update](#) – Jacqueline M. Demczur
- [Financial Reporting and Audit Requirements for Charities and NPOs](#) – Ryan M. Prendergast
- [Employment Standards and Contracts Update](#) – Barry W. Kwasniewski
- [Bill S-216 – ‘Resource Accountability’ and the Vulnerable Sector](#) – The Honourable Ratna Omidvar, C.M., O.Ont.
- [Transition Challenges under the ONCA](#) – Theresa L.M. Man
- [Online Privacy and Cybersecurity Issues for Charities and NFPs](#) – Esther Shainblum
- [Disbursement Quotas for Charities: Issues to Consider](#) – Terrance S. Carter
- [The Charities Directorate's Approach to Compliance](#) – Melissa Shaughnessy, Director of Compliance Division, Charities Directorate, CRA

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