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CHARITY & NFP LAW UPDATE

JANUARY 2022

EDITOR: TERRANCE S. CARTER
ASSISTANT EDITORS: NANCY E. CLARIDGE,
RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

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

JANUARY 2022

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The 2021 Annual Ottawa Region Charity & NFP Law Seminar Continues Virtually!

Thursday February 17, 2022

Webinar hosted by Carters Professional Corporation in Ottawa, Ontario,
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. Ontario Workers Have the Right to 'Disconnect from Work' as Well as Other Rights Under ESA

By Barry W. Kwasniewski and Martin U. Wissmath

Employers of charities and not-for-profits must provide a "right to disconnect" for workers and increase the minimum wage rate after changes were made affecting employment standards legislation in Ontario this year. As of January 1, 2022, *Employment Standards Act, 2000* (the "ESA") provisions take effect that increase the minimum wage and eliminate the special "liquor servers" wage rate. Amendments to the ESA are also now in effect that were introduced with Bill 27, *the Working for Workers Act, 2021*, which received Royal Assent on December 2, 2021. This *Bulletin* provides a brief overview of these new employment law developments that will impact charities and not-for-profits in Ontario.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin No. 506*.

2. Legislation Update

By Terrance S. Carter

Bill S-216, *Effective and Accountable Charities Act*

As reported in the November 2021 *Charity & NFP Law Update*, Bill S-216, *Effective and Accountable Charities Act*, proposing amendments to the *Income Tax Act* ("ITA"), was introduced in the Senate by the Honourable Senator Ratna Omidvar after its predecessor Bill S-222 had died on the Order Paper when Parliament was dissolved on August 15, 2021. Bill S-216 completed Third Reading in the Senate on December 9,2021, and is now awaiting First Reading in the House of Commons.

As previously discussed, Bill S-216 proposes changes to several provisions in the ITA governing charities to eliminate the fictitious "own activities" test in the ITA and the related Canada Revenue Agency ("CRA") "direction and control" regime that prohibits charities from making grants to non-qualified donees for charitable purposes, and replaces it with a proposed new regime of "resource accountability."

Bill C-4, *An Act to amend the Criminal Code (conversion therapy)*

Legislation prohibiting certain acts related to conversion therapy has now been passed in Canada. Bill C-4, *An Act to amend the Criminal Code (conversion therapy)*, was introduced to the House of Commons on November 29, 2021 and received Royal Assent on December 8, 2021. Bill C-4 amends the

Criminal Code as of January 7, 2022 to, among other things, prohibit: “(a) causing another person to undergo conversion therapy; (b) doing anything for the purpose of removing a child from Canada with the intention that the child undergo conversion therapy outside Canada; (c) promoting or advertising conversion therapy; and (d) receiving a financial or other material benefit from the provision of conversion therapy.” Further, the *Criminal Code* has also been amended to authorize courts to order that advertisements for conversion therapy be disposed of or deleted.

Ontario Bill 9, *Non-Profit Sector Appreciation Week Act, 2021*

Ontario has declared the third week of February each year as Non-Profit Sector Appreciation Week. Bill 9, *Non-Profit Sector Appreciation Week Act, 2021*, was introduced on October 6, 2021 and brought into force upon receiving Royal Asset on December 9, 2021. The preamble to Bill 9 recognizes that “Ontario’s non-profit sector is a major contributor to innovation, job creation and the economy”, that the work of non-profits “is indispensable and heroic, but it is all too often invisible”, and that “their public service deserves to be recognized and honoured.”

Ontario Bill 13, *Supporting People and Businesses Act, 2021*

Ontario’s *Police Record Checks Reform Act, 2015* (the “PRCRA”) will be amended to provide relief to volunteers who must undergo police record checks. The omnibus Bill 13, *Supporting People and Businesses Act, 2021* received Royal Assent on December 2, 2021, introducing amendments to the PRCRA that will be proclaimed into force on a future date to be named.

In particular, the amendments include a definition for volunteer under the PRCRA as “a person who performs a service but who receives no compensation for doing so other than an allowance for expenses or an honorarium, and excludes a person receiving some other form of credit such as academic credit or fulfilling a sentence requirement”. Further, people becoming or continuing as volunteers will not be required to pay a fee for a criminal record check or for a criminal record and judicial matters check. Notably, though, the fee exemption for volunteers does not apply to vulnerable sector checks.

Ontario Bill 27, *Working for Workers Act, 2021*

Employment legislation in Ontario has been passed to prohibit non-compete clauses in most employment contracts, as well as to require employers with 25 or more employees to have a “Disconnect from Work” policy, among other things. Amendments to the *Employment Standards Act, 2000* were passed in through Bill 27, *Working for Workers Act, 2021*, which received Royal Assent on December 2, 2021. For further details, see *Charity & NFP Law Bulletin No. 506*, above.

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

As reported in the November 2021 *Charity & NFP Law Update*, Ontario's *Long-Term Care Homes Act, 2007* is being repealed and replaced by the *Fixing Long-Term Care Act, 2021*. Bill 37, *Providing More Care, Protecting Seniors, and Building More Beds Act, 2021* received Royal Assent on December 9, 2021, and is to be proclaimed in force on a date to be named. According to Ontario's Regulatory Registry, the *Fixing Long-Term Care Act, 2021* "maintains parts of the [*Long-Term Care Homes Act, 2007*] and includes new provisions around staffing and care; new protections for residents through better accountability, enforcement and transparency; and streamlined development processes."

Draft Phase I Regulations for the *Fixing Long-Term Care Act, 2021* were also posted on January 18, 2022 for public consultation. The draft regulations focus on those regulations that are necessary to support bringing the Act into force, including bringing forward many provisions contained in O Reg 79/10, General under the *Long-Term Care Homes Act, 2007*. The province is seeking comments by February 17, 2022.

Ontario Bill 43, *Build Ontario Act (Budget Measures), 2021*

Draft implementing legislation for the 2021 Ontario Fall Economic Statement was introduced through Bill 43, *Build Ontario Act (Budget Measures), 2021*, which received Royal Assent on December 9, 2022. Bill 43 amends the *Assessment Act* to exempt from property taxes land leased and occupied solely by a university if the certain conditions are met. This amendment is deemed to have come into force on September 1, 2021. For more details, please see the November 2021 *Charity & NFP Law Update*.

Ontario Bill 75, *Emancipation Month Act, 2021*

Ontario has followed in the footsteps of the United Nations General Assembly, which adopted 2015 to 2024 as the International Decade for People of African Descent to ensure people of African descent receive the recognition, justice and access to opportunities they deserve. Bill 75, *Emancipation Month Act, 2021* received Royal Assent on December 9, 2021, and proclaims the month of August each year as Emancipation Month. The preamble to Bill 75 "pays tribute to the important contributions and leadership that the Black communities have made and continue to make in Ontario as a major part of the vibrant social, economic, political and cultural fabric of our province". It further states that Emancipation Month will be "a time for healing, unification and restoration. It is about eliminating discrimination by continuing to educate and advance the importance of racial equity across the province. Emancipation Month will help build a more inclusive province, where everyone is treated with fairness, respect and dignity."

3. Corporate Update

By Theresa L.M. Man

Ontario Proposes Permanent Changes to Enable Digital and Virtual Processes for Businesses

On January 4, 2022, the Ontario Ministry of Government and Consumer Services released draft permanent changes to various corporate legislation, including the *Corporations Act* and *Not-for-Profit Corporations Act, 2010* ("ONCA"), regarding virtual processes. A consultation on the draft changes closed on January 21, 2022.

By way of background, since as early as May 2020, Ontario has provided temporary relief to corporations under various corporate statutes in response to the COVID-19 pandemic. Of note, relief under these statutes includes permitting electronic meetings despite provision in a corporation's constating documents that provide otherwise. The current temporary relief framework will expire on September 30, 2022.

The Ministry is now proposing permanent changes or further temporary changes to the various corporate statutes in relation to virtual processes. For example, proposed changes to the ONCA would include:

(1) allowing corporations to hold virtual or hybrid meetings by default unless the constating documents provide otherwise, and removing the requirement for unanimous consent from directors in order to hold hybrid or virtual directors' meetings;

(2) allowing votes and elections to be conducted virtually by default, unless a corporation opts out in their constating documents, clarifying that hybrid voting/elections are allowed, and removing the requirement that voting by mail or by telephonic or electronic means must allow votes be verified as having been made by members entitled to vote and not being able to be identified by the corporation how each member voted;

(3) permitting notices to directors and members be sent by electronic means in accordance with the *Electronic Commerce Act*, and addressing waiver of notice and abridgement of time; and

(4) permitting affected corporations to store records by electronic means and facilitating the electronic examination and inspection of records as applicable.

My ISED Account Now Required to Access Corporations Canada's Online Filing Centre

As of January 19, 2022, anyone wishing to access the Corporations Canada's Online Filing Centre is required to first log in to My ISED Account in order to perform transactions that require a secure connection. Registered intermediaries must also log in to their My ISED account. Once logged in, they

can access the same services as before. Users will not need a corporation key (which is unique to each corporation) to sign into their My ISED Account, but will need the corporation key for individual corporations to file certain transactions with Corporations Canada. However, users may continue to access the following services of the Online Filing Centre without being logged into their My ISED Account: Ordering uncertified copies, getting a certificate of compliance, getting a certificate of existence, subscribing to email notice, and ordering a corporate profile.

Minister Releases Report on 10-Year Review of CNCA

As reported in the November 2021 *Charity & NFP Law Update*, the Minister of Innovation, Science and Industry published a report (the "Report") on its statutory review of the *Canada Not-For-Profit Corporations Act* ("CNCA") on November 23, 2021. The Report was published following a public consultation on the implementation of the CNCA launched in June 2021, and provides the federal government the opportunity to assess whether the CNCA "continues to meet its objectives and remains a sufficiently flexible statutory vehicle for not-for-profit corporations" ten years after its enactment.

The Report sets out a brief history of the CNCA, followed by a summary of the Act's objectives, which generally include setting out the legal and regulatory framework for federally incorporated non-share capital corporations through legislation that was designed to "promote accountability, transparency and good corporate governance, while being flexible enough to meet the needs of organizations both small and large". This was done through a combination of mandatory and default provisions.

Generally speaking, the consultation found that the CNCA "remains a modern corporate statute and a legislative vehicle of choice for many not-for-profit organizations across the country", with a streamlined incorporation process and efficient service from Corporations Canada. There were several general suggestions for reform, including suggestions related to audit and reporting obligations, to the conduct of meetings, with suggestions that the in-person default was outdated, as well as for clarification and/or correction of terms and concepts concerning the distribution of assets to members.

More specific comments were also provided, touching on issues related to audit and reporting obligations (including issues associated with the soliciting and non-soliciting corporation distinction); boards of directors (including issues associated with *ex officio* appointments, the "one third rule", and the prohibition on appointing officers or employees); hybrid and virtual decision making (including support for fully virtual meetings and general interest in permitting electronic voting outside of formal members' meetings); classes of membership; member rights (including issues associated with non-member voting

rights and absentee voting); distribution of property; the soliciting and non-soliciting distinction; and the applicability of new corporate governance measures to non-profit organizations (including issues related to diversity disclosures, individuals with significant control, and further elaboration on fiduciary duties).

The Report concludes by reiterating the objectives of the CNCA, and stating the importance of periodic review of the legislation. While it indicates that the COVID-19 pandemic has highlighted how certain requirements under the CNCA could constrain organizations in times of change, it also found helpful proposals to increase flexibility and facilitate better comprehension of the CNCA that are "worthy of examination". Going forward, a Parliamentary committee is expected to review the Report and produce its own report this year.

Saskatchewan Proposes New *Non-profit Corporations Act, 2021*

On December 7, 2021, the Government of Saskatchewan introduced draft not-for-profit corporate legislation to replace its current *Non-profit Corporations Act, 1995*. In this regard, Bill 75, *The Non-profit Corporations Act, 2021* ("New Act") and Bill 76, *The Non-profit Corporations Consequential Amendments Act, 2021* were introduced in the Legislative Assembly for First Reading on December 7, 2021, and were both most recently debated at Second Reading on December 8, 2021.

Bill 75 contains draft legislation for the new proposed *Non-profit Corporations Act, 2021*. According to a government announcement, the New Act is modelled after Saskatchewan's new for-profit corporate legislation, *The Business Corporations Act, 2021*, which received Royal Assent on May 13, 2021. The New Act is intended to modernize provisions to reflect current practices, replace outdated rules and language, reduce red tape, and create efficiencies for organizations by emphasizing the use of modern technologies.

As currently drafted, the New Act will update provisions for boards of trade and chambers of commerce; remove certain notice and filing requirements with the registrar; permit corporate names to be in Cree, Dene, or other prescribed Indigenous languages; expressly permit the use of electronic technologies, such as sending financial statements electronically and holding electronic meetings; remove the current requirement that at least 25% of directors be Canadian residents; and remove the registrar's ability to appoint non-accountants to conduct audits or reviews, while allowing for increased dollar thresholds for mandatory audits or review requirements.

In conjunction with Bill 75, Bill 76 contains consequential amendments to other legislation, including *The Business Corporations Act, 2021*, *The Business Names Registration Act*, and *The Charitable Fund-raising Businesses Act*, among others. The consequential amendments are generally housekeeping in nature.

4. CRA Updates GST/HST Guides for Charities & NPOs

By Ryan M. Prendergast

Charities and non-profit organizations ("NPOs") should be aware that the CRA has updated two guides: RC4081 - *GST/HST information for Non-Profit Organizations* and RC4082 - *GST/HST information for Charities*, which were updated on December 10 and 6, 2021, respectively. Charities and NPOs may be required to pay GST/HST and to collect GST/HST on taxable supplies they make in Canada. They are encouraged to carefully review the CRA's guides, due to the situation-specific nature of GST/HST calculations. The updates to RC4081 and RC4082 add and amend several definitions in addition to modifying certain tests pertaining to grants and small supplier status.

RC4081 updates several definitions with regard to property, including the definitions of "property", "capital property", and "designated municipal property". RC4081 also references new situations in which NPOs that receive grants and subsidies may be subject to GST/HST. In the updated guide, forgivable loans are now included along with grants and subsidies as subject to GST/HST if there is a direct link between the payment received by the NPO and supply provided to the grantor (or a specified third party). As well, the guide no longer provides that transfer payments "made in the public interest, or for non-profit purposes" will not usually be subject to GST/HST. Therefore, given the expanded scope of what may be subject to GST/HST and the lack of explicit approval for "public interest" transfer payments, NPOs should review whether certain activities may now be subject to GST/HST.

The updated RC4082 also adds new definitions and re-defines existing definitions, including an update to the definitions of "charity" and the inclusion of a new definition for "designated charity". RC4082 contains clarifications to the "small supplier" test. Charities are required to register for GST/HST if they provide taxable supplies in Canada and if they are not a small supplier. A charity may qualify as a small supplier by either having $250,000 or less of gross revenue in a fiscal year or by having $50,000 or less in revenues from the sale of taxable supplies. In this regard, the $50,000 test has been updated by the CRA to reflect that it is the "worldwide" revenue of the charity *and* that of the charity's associates that is to be considered. Two calculations must be done "separately", considering first, revenues in the current quarter and second, revenues in the last four calendar quarters. Additionally, the definition of "associate" was added to the

guidance to confirm that an associate is "a person that is generally associated with another person where one controls the other" such as in the case of two or more corporations or where two persons are associated with the same third person. Charities that provide taxable supplies in Canada and which currently qualify as a small supplier under the $50,000 test should review RC4082 to make sure that they still qualify under the updated guidance.

One further update in RC4082 is that charities resident in participating provinces that have paid the provincial part of the HST on goods imported to Canada for use in another province may be entitled to a rebate for the provincial portion of HST paid. In order to be eligible for this rebate, the charity must meet certain requirements, such as filing the rebate application within a year and claiming at least $25 of eligible tax.

Both RC4081 and RC4082 are comprehensive guides to assist charities and NPOs apply the GST/HST and claim tax credits or rebates where possible. Reviewing recent changes will help organizations ensure they remain tax compliant and understand how the law applies to them with regard to GST/HST.

5. CRA Sets Out Tax Context of Charitable Gifts to US Organizations

By Theresa L.M. Man

The CRA recently released CRA View Document 2020-086613 that was dated August 21, 2021, responding to the question of whether an individual could claim a non-refundable tax credit on the person's final return for a gift by will to a US organization. In response, the CRA reviews the rules on when a gift by will is deemed to be made by the estate, and the circumstances in which a non-refundable tax credit for gifts by will to US organizations can be claimed.

The CRA explains that pursuant to subsections 118.1(4.1) and (5) of the ITA, a gift by will is deemed to be made by the estate at the time the gift is transferred to the donee. Paragraph 118.1(5.1)(b) of the ITA applies in particular to a gift made by a graduated rate estate ("GRE") of an individual if the subject of the gift is property that was acquired by the estate on and as a consequence of the death or is property that was substituted for that property. In this scenario, pursuant to paragraph (c) of the definition of "total charitable gifts" in subsection 118.1(1), the estate will have the flexibility to allocate the donation to any of: (a) the last two taxation years of the deceased individual; (b) the year of the donation or any of the five following years of the estate; or (c) any preceding year of the estate in which it is the individual's GRE.

In relation to gifts to U.S. organizations, the CRA made reference to the Canada-U.S. Tax Convention ("Treaty"), which provides limited tax relief with respect to gifts made by Canadian residents to certain U.S. organizations that are not qualified donees. Pursuant to paragraph 7 of Article XXI of the Treaty, a gift made by a Canadian resident in a taxation year to an organization that is resident in the U.S. that is generally exempt from U.S. tax, and that could qualify in Canada as a registered charity if it were created or established and resident in Canada, will be treated as a gift to a registered charity. In this regard, the amount of relief that would be available under the ITA is restricted to the income of the Canadian resident for that year from U.S. sources. However, under the Treaty, the restriction to income from U.S. sources does not apply to the eligible amount of a gift to a college or university at which the Canadian resident or his/her family member(s) is or was enrolled. The CRA accepts that any organization that is exempt under section 501(c)(3) of the U.S. Internal Revenue Code will qualify for the purposes of paragraph 7 of Article XXI of the Treaty.

6. Mandate Letters Issued to Amend ITA Concerning the Charitable Status of Certain Organisations

By Terrance S. Carter

Prime Minister Justin Trudeau issued mandate letters to all Cabinet Ministers on December 16, 2021. Two mandate letters, specifically a letter to the Deputy Prime Minister and Minister of Finance, and a letter to the Minister for Women and Gender Equality and Youth, direct them to introduce amendments to the ITA to, among other things, "make anti-abortion organizations that provide dishonest counselling to pregnant women about their rights and options ineligible for charitable status […]".

As mandate letters outline objectives set out by the Prime Minister for Cabinet Ministers to achieve, it remains to be seen what amendments to the ITA will be introduced to that end. However, notwithstanding one's position on the underlying social issues reflected in the mandate letters, it is concerning that the federal government's proposal specifically targets an existing segment of the charitable sector that it believes should no longer be eligible for charitable status by proposing amendments to the ITA to ensure that result.

Such action may have the unintended consequence of establishing an unsettling precedent in the long term, as a similar approach could subsequently be taken by future governments with regard to another segment of the charitable sector that the government of the day considers should no longer be eligible for charitable status. Ultimately, this provision of the mandate letters affects the entire charitable sector. As

such, it will be important to carefully monitor any proposed amendments to the ITA to see what the long-term implications of such amendments might be on the sector as a whole.

7. Court Refuses to Preserve Non-Compliant By-Law

By Jennifer M. Leddy

In a decision delivered on November 17, 2021, the British Columbia Court of Appeal found that a not-for-profit corporation with by-laws contrary to its governing legislation could not obtain a court order to temporarily preserve the invalid by-law for one court-ordered meeting. In *Delta Patriots Cricket Club v. West Coast Cricket Organization* the court affirmed the chambers judge's decision to refuse to allow some members to cast multiple votes because this was contrary to subsection 84(2) of the British Columbia *Societies Act* (the "Act").

While the context of the appeal arose out of a membership dispute between Delta Patriots Cricket Club ("DPCC") and another cricket association, the focus of the case shifted to consider the membership and weighted voting rights set out in the by-laws of the West Coast Cricket Organization ("Cricket BC"), the appellant in the case. Cricket BC is the official governing body for the sport of cricket in British Columbia and is a not-for-profit society, originally formed under the 1996 British Columbia *Society Act* (the "Act").

The chambers judge found two problems with Cricket BC's by-laws. First, the by-laws allowed "any cricket league" and "any cricket club" that had paid its membership fee to be eligible for admission as a full member of the Society in good standing ("emphasis added"). This was contrary to the definition of "member" in the Act which required that a member be "a person". "Person" is defined in section 29 of the British Columbia *Interpretation Act*, to mean "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law". Notably, an unincorporated cricket club or cricket league is not included in the definition of person. Therefore, Cricket BC's by-laws, which had admitted at least two unincorporated groups as "members", were not compliant with the Act. Secondly, Cricket BC's bylaws allowed any club in good standing to have one vote per team that it had registered with a League, contrary to subsection 84(2) of the Act which provides that "[a] voting member of a society has only one vote". These by-law provisions had likely existed since Cricket BC's incorporation "meaning that its bylaws have been non-compliant with the societies legislation since 2004".

In the lower court decision, Cricket BC acknowledged the apparent conflict between its by-laws and the Act yet contended that the chambers judge should direct that a general meeting be held and that the voting

members (inferred to be those members recognized by the existing by-laws) "remediate" the conflict. The chambers judge, however, found that section 105 of the Act – a provision that grants the court jurisdiction to correct, negative or modify the consequences in law of a defect or irregularity – did not allow a court to rewrite the bylaws of a society and that "a cautious approach should be taken to correct irregularities". As a result, the chambers judge read down Cricket BC's by-laws so that they allowed any member in good standing to have one vote at a meeting of the members. The chambers judge also deleted a portion of the by-laws in its entirety for failing to conform to the requirements of the Act. Further, he ordered a new annual general meeting be held, providing time for clubs that did not have legal status as "members" under the definition in the Act to take steps to achieve legal status.

On appeal, Cricket BC claimed that the chambers judge gave insufficient weight to the past practices of Cricket BC, namely "the importance of maintaining the Balance of Power chosen by Cricket BC members as a way of governing their society voting arrangements". In considering this claim, the Court of Appeal was "not persuaded that a court of law should devise an order that has as its objective the continued dominance of a society's affairs by one group over others in the face of the one member/one vote rule embedded in the Act". Because there was nothing in the Act that would have permitted the chambers judge to bypass the one member / one vote rule or anything to suggest that an entity other than a "person" may vote, the Court of Appeal found "it was not … open to the chambers judge to preserve the 'irregularity' or contravention of the Act" even if this was only for one court-ordered meeting. Therefore, since the court was not persuaded that the chambers judge made any error, it dismissed the appeal.

This case serves as a reminder about the importance of keeping by-laws up-to-date and compliant with governing legislation. Legally compliant by-laws may protect the organization from further issues that could arise in a dispute, especially with regard to important matters such as membership and voting privileges.

8. Court Had No Jurisdiction to Consider Hockey Players' Claim

By Esther S.J. Oh

A voluntary association of hockey players and their family members (the "Applicants") had their claim dismissed after the Alberta Court of Queen's Bench applied the principles recently articulated in the Supreme Court of Canada's decision of *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga* ("Aga"). In *Chinook Park-Kelvin Grove-Eagle Ridge Community Association v Minor Hockey Association of Calgary*, decided July 14, 2021, the court was required to determine whether it had

jurisdiction to grant the relief sought by the Applicants. In order to have jurisdiction, the Applicants needed to demonstrate that they had an underlying legal right upon which they could ground their claim. Ultimately, the Applicants' claim was dismissed as the court found there was no legal right in question and that therefore the court did not have jurisdiction to grant any relief.

The dispute in the matter arose after the Minor Hockey Association of Calgary ("Hockey Calgary") proposed to redraw the boundaries of certain of its members associations resulting in the relocation of certain families from one member association within Hockey Calgary to another. The Applicant, Chinook Park-Kelvin Grove-Eagle Ridge Community Association ("CKE"), was an association of families who opposed their relocation to a different hockey member association. CKE itself was not a member association of Hockey Calgary. Rather, many of the people in CKE were members of Glenlake Minor Hockey Association (a member association of Hockey Calgary), and they did not want to become members of Southwest Hockey Association (another member association of Hockey Calgary) as a result of the new boundaries being proposed.

However, in late April 2020, the board of Hockey Calgary approved the boundary changes and in June 2020 at the annual general meeting, the resolution to change the boundaries passed. The Applicant challenged this decision on several grounds including that the relocation was made in breach of Hockey Calgary's contractual relationship with its members.

In considering the Applicant's argument, the court engaged in a substantive analysis of *Aga* and considered how it applied to the facts of the matter. The court cited the legal test from para 31 of Aga that in determining whether a court has jurisdiction in cases involving a voluntary association "[t]he question to be answered in a given case is not whether the voluntary association exercises legal rights in general, but whether the particular relief sought by the plaintiff is the vindication of the legal right". The court also noted that membership is not automatically contractual. Rather, voluntary associations must first demonstrate that there was an objective intention to create legal relations.

The court noted that the Court in Aga "…urged caution in assuming the existence of a contract based on a constitution, bylaws, and the existence of a governing body to apply rules". The court also noted that "the fact that all of Hockey Calgary players agree to be bound by a common set of rules does not evidence in this instance an underlying objective intention to create legal relations". While the court sympathized with the Applicants' disappointment about the redrawn boundaries, it concluded that "disappointment,

inconvenience and even modest disruption to some community residents does not create legal rights to be vindicated by a court".

As the law regarding voluntary associations continues to develop in the wake of Aga, charities and not-for-profits would be prudent to determine whether circumstances in their governance and operations might give rise to legal relationships which could be legally enforced in court. The facts in this particular case affirm previous case law principles that something more than a common set of rules and modest disruption is needed in order for the courts to find that they have jurisdiction to intervene in a voluntary association's affairs.

9. Court Finds a Contract and Adjudicates Voluntary Association's Dispute

By Jacqueline M. Demczur

An Alberta voluntary association's election in March 2020 was challenged on the basis of numerous irregularities, with the court ultimately finding that it had the jurisdiction to set aside the election and require a new election be held. In *Hon v Liao*, decided on January 13, 2022, the Alberta Court of Queen's Bench provided a further example of how the Supreme Court of Canada's decision in *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga* ("Aga") should be applied, particularly in the context of non-religious voluntary associations.

Two applicants, Mr. Ly and Mr. Hon (the "Applicants") brought a claim against the Hakka Tsung Tsin Association of Edmonton (the "Association") and Ms. Liao, president of the Association at the time that the election was held. The Applicants claimed that the election was not held according to the Association's by-laws and further that Ms. Liao's conduct amounted to oppression of the Association's members. The election had originally been scheduled for March 29, 2020, from 10am – 4pm with ballots to be cast in-person for positions on the Association's two boards, though the notice of election indicated that members would be voting for the Association's president, rather than board members. On March 17, 2020, the Government of Alberta began to implement public health measures to combat the spread of COVID-19, and limited the number of persons who could gather together to less than 50. In response, Ms. Liao amended the voting procedures so that members could vote from March 22 until March 29 at 1pm, but did not publicly announce this change. To ensure that members did not vote more than once, their membership number was included at the bottom of their voting ballot. When the results of the election were announced, Ms. Liao had been re-elected president. In addition, five individuals who were not

included on the ballot were listed as appointed to the boards. At the same time, six individuals who had been on the ballot did not receive a position.

Courts do not always have jurisdiction in all cases to adjudicate the disputes of voluntary associations. Rather, there must be "an underlying legal right at stake, such as a contractual right". As set out in Aga, "courts cannot rely on the existence of bylaws or a constitution alone to find that membership in an association is contractual". In order for the court to decide whether a contract exists, "general contract principles (offer, acceptance, consideration), and objective intention to enter into legal relations" must be present. However, the court in this decision also recognized that the Aga analysis is fact-driven and that there were "multiple factors" to distinguish this case both from Aga and from the court's analysis in *Chinook Park*, above.

The Association was not a church or religious organization, which was important for the court to consider because "it can be more difficult to show an objective intent to enter legal relations in the case of religious organizations". Also, there was evidence that the Applicants and a large portion of the membership were aware of the by-laws at the time they became members, suggesting that "knowledge of and a promise to adhere to the bylaws was a condition of membership for at least some of the members of the Association". Finally, the Association's by-laws explicitly stated that membership fees were revenue for the operation of the Association. All of these facts led the court to conclude that "[t]he basic elements of a contract are present in this case". There was an offer of membership, consideration in the form of a membership fee, and acceptance upon the approval of membership by the Executive Board. Members agreed to be bound by the by-laws and their membership could be terminated for failure to follow by-laws which the court concluded amounted to "evidence of objective intention to enter into legal relations".

Not only did the court find that members had contractual rights, it also acknowledged that the Association's bank account (which held approximately $100,000) gave members a proprietary right for the courts to adjudicate.

With regard to the election, the court found that it was not carried out according to the Association's own by-laws. The election was improperly communicated as a presidential election, rather than one to elect members of the board, whereas the by-laws provided that the duly elected board members were to select a president. In addition, the by-laws set out that voting was to be done by secret ballot, which was frustrated by the inclusion of membership numbers at the bottom of each ballot. As a result, the court found the election invalid and required that a new, by-law-compliant election be held.

The court's interpretation of Aga in this decision is one to note, as it demonstrates how the fact-driven analysis in Aga may result in a court having the authority to intervene in the affairs of a voluntary association where the circumstance adequately demonstrate that a legal right has been affected.

10. Key Findings from the Alberta Commissioner's Report

By Terrance S. Carter

The Government of Alberta published a lengthy (657-page) Report by the Commissioner of the Alberta Public Inquiry into Anti-Alberta Energy Campaigns (the "Report") on October 21, 2021, the latest in the ongoing discussion about the role environmental charities play in Alberta's energy sector. The Commissioner was appointed on July 4, 2019 "to inquire into the role of foreign funding, if any, in anti-Alberta energy campaigns" and delivered an interim report on January 31, 2020. The final Report was submitted to the Honourable Sonya Savage, Minister of Energy, on July 30, 2021, and was later published by the Alberta government on October 21, 2021.

Essential to understanding the Report is the definition of an "anti-Alberta energy campaign". The Commissioner defines "anti-Alberta energy campaign" to be "a campaign that involves attempts to frustrate the development of Alberta's oil and gas resources in a broad and general sense". The specific reference to "anti-Alberta", the Report notes, is a reference to Alberta "as a geographic modifier" and should not give "any connotation that opposition to oil and gas development in Alberta is 'against Alberta' or its interests in any sense". The Commissioner concluded that "I do not find that participation in an anti-Alberta energy campaign is in any way improper or constitutes conduct that should in any way be impugned, nor do I find that it indicates a party is 'pro' or 'anti' Albertan". In this regard, charities involved in such campaigns were not found by the Report to be engaging in improper activities. This conclusion is an important vindication for the many environmental charities that were involved in the energy debate after a decade of scrutiny as was reported on in *Charity Law Bulletin No. 286*.

The Report also raised concerns about a perceived lack of transparency with regard to how funds are spent by charities in their activities. In this regard, the Commissioner had difficulty tracing funds received by charities from both foreign and domestic sources to the activities carried out by those charities, in part due to the limited resources which did not allow him to examine grantors and recipients under oath as well as the way information is reported in T3010s. These difficulties informed the Commissioner's first recommendation to "[d]evelop standards for not-for-profit/charitable organizations and public institutions that provide a level of consistency and a more level playing field with the corporate sector, in terms of

transparency, accountability and governance". The Report emphasized that "greater transparency is required in respect of funding in the charity/non-profit sector" in order to encourage "more open and transparent dialogue on matters of importance" and not stifle parties' abilities to exercise their fundamental rights and freedoms, such as freedom of expression, assembly, and association.

11. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

BCCA certifies class action against US company for 'scraping' Instagram user data

A privacy law case in British Columbia provides an example of what courts in Canada may look for to certify a privacy class action proceeding. *Severs v. Hyp3R Inc.* is a November 22, 2021 judgment of the British Columbia Court of Appeal (the "BCCA") involving breaches of the *Privacy Act* statutes by the defendant, Hyp3R Inc., a U.S.-based company ("Hyp3R"), in four provinces: B.C., Saskatchewan, Manitoba, and Newfoundland & Labrador (the "Four Provinces"). The BCCA also found Hyp3R committed the tort of intrusion upon seclusion in Ontario, Alberta, New Brunswick, Nova Scotia, Prince Edward Island and all three territories.

Hyp3R, founded in 2015, describes itself as a "location-based marketing platform" that collects data on social media from users' posts that include real-world locations and permits third-party advertisers to target users in connection with locations and events. In contravention of Instagram's privacy policies, from April 2018 to August 2019, Hyp3R collected extensive personal data from users, including photos, exploiting a security flaw, in a process called "scraping." Instagram removed Hyp3R from its platform and revoked its access in August 2019. The representative plaintiff, Catherine Severs, was an Instagram user at that time who had her privacy settings set to "public". Severs served Hyp3R a notice of civil claim in June 2020, but Hyp3R did not respond and Severs received a default judgment for damages to be assessed. Notwithstanding the defendant's default, Justice Veenstra ("Veenstra J") concluded that it was appropriate to proceed with certification and determination of the issues.

In making his findings, Veenstra J considered whether Hyp3R had breached the respective *Privacy Acts* of the Four Provinces and whether it had committed the tort of intrusion upon seclusion in the remaining common law provinces. Veenstra J was satisfied that Hyp3R had breached the respective *Privacy Acts* of the Four Provinces because it had, intentionally and without consent, violated the privacy of class members in each of the Four Provinces. He also concluded that, in the common law provinces without a privacy statute, Hyp3R's conduct met the test for the common law tort of intrusion upon seclusion, as set

out in *Jones v Tsige*, because its conduct was intentional, involved the invasion of class members' privacy without lawful justification, a reasonable person would regard that invasion as highly offensive, and a reasonable person would be caused distress, humiliation or anguish. Nominal damages of $24,921,378, which worked out to $10 per Instagram user in Canada, were awarded.

Cyber Centre 'Ransomware Playbook' recommended by federal government

The Canadian Centre for Cybersecurity ("Cyber Centre") has published best practice guidelines and a "Ransomware Playbook" that the federal government is recommending organizations to read and follow, which would include charities and not-for-profits. Best practice guidelines include "Top 10 IT security actions to Protect Internet-Connected Networks and Information" for an organization to follow, and baseline cybersecurity controls. A December 6, 2021 letter signed by four federal cabinet ministers — National Defence; Public Safety; Emergency Preparedness; and International Trade, Export Promotion, Small Business, and Economic Development — discusses the growing threat of ransomware attacks, and urges Canadian organizations "to take stock of your organization's online operations, protect your important information and technologies with the latest cyber security measures, build a response plan, and ensure that your designated IT security personnel are well-prepared to respond to incidents." The letter recommends that if an organization is threatened or falls victim to ransomware, to implement a recovery plan, seek professional cyber-security assistance, and "immediately report the incident to the Cyber Centre's online portal as well as local police."

Annual OPC Report warns that AI could pose significant privacy risk in the future

The Office of the Privacy Commissioner of Canada (OPC) published its 2020–21 Annual Report with a look back at recommendations for legislative reform and warnings about the potential threats of artificial intelligence technology ("AI"). Among other issues, the Annual Report, published on December 9, 2021, discusses the OPC's concerns regarding the previous Bill C-11, *Digital Charter Implementation Act, 2020* which died on the order paper when a federal election was called in August 2021. The OPC was critical of Bill C-11, which would have enacted the *Consumer Privacy Protection Act* and the *Personal Information and Data Protection Tribunal Act*, and the Annual Report refers back to a submission released by the OPC in May 2021, which included 60 recommendations to improve the proposed legislation.

Among the concerns expressed by the OPC in the Annual Report was that Bill C-11 was misaligned and less protective than the laws of other jurisdictions in many ways, that it lacked the privacy protective measures that exist in other countries and that it was a "step backward". Of particular concern was the OPC's view that Bill C-11"would have given consumers less control and organizations more flexibility

in monetizing personal data, without increasing their accountability" and that the "proposed penalty scheme was unjustifiably narrow and protracted."

The Annual Report lists six key issues to consider when designing a modern privacy law that would be "fit for purpose" in light of the fact that digital technologies that rely on the collection and analysis of personal information are central to our society and economy but can threaten fundamental rights. One of the key issues identified is the need for a "rights-based framework", which would create a legal framework around the use of personal information that would entrench privacy as a human right.

The Annual Report also reviews the OPC's public consultation to examine AI as it relates to the private sector, which led to the OPC's March 2021 recommendations for the regulation of AI technology. While AI can increase efficiency, productivity and competitiveness, which are key factors in economic recovery, the Annual Report points out that it can also have serious consequences for privacy and, when AI is used to make automated decisions about people, it can seriously impact people's lives and can heighten inequality, discrimination and societal divisions. The OPC concludes that AI "presents fundamental challenges to all of PIPEDA's foundational privacy principles." Key recommendations to address these legal challenges include:

- Amending PIPEDA to allow personal information to be used for new purposes towards responsible AI innovation and for societal benefits;
- Creating the right to meaningful explanation for automated decisions and the right to contest those decisions to ensure they are made fairly and accurately; and
- Requiring organizations to design AI systems from their conception in a way that protects privacy and human rights.

The Annual Report states that the OPC believes that it is possible to improve PIPEDA within its existing structure without having to start over from scratch.

12. COVID-19 Legislation Update

By Terrance S. Carter, Adriel N. Clayton and Martin U. Wissmath

Federal Government Replaces COVID Relief through Bill C-2

Additional support has been made available to Canadians through COVID-19 relief subsidies introduced through Bill C-2, *An Act to provide further support in response to COVID-19*. Bill C-2 was introduced to

replace the expired Canada Emergency Wage Subsidy ("CEWS") and Canada Emergency Rent Subsidy ("CERS") with new subsidy programs that were announced on October 21, 2021, as reported in the October 2021 *Charity & NFP Law Update*. After its introduction on November 24, 2021, Bill C-2 received Royal Assent on December 17, 2021, replacing the CEWS and CERS with a new Tourism and Hospitality Recovery Program ("Tourism and Hospitality Program") and Hardest-Hit Business Recovery Program ("Hardest-Hit Program"). It also extends the Canada Recovery Hiring Program ("Hiring Program"), which provides eligible employers who have experienced "qualifying revenue declines" with a subsidy based on eligible salary or wages to help hire new workers or increase their current workers' hours or wages. Further, in addition to these programs, Bill C-2 also introduces a Local Lockdown Program.

Through the new Tourism and Hospitality Program, qualifying tourism or hospitality entities may apply for wage and/or rent subsidies of up to 75%. Of note, qualifying tourism or hospitality entities would include charities and not-for-profits that earned at least 50% of their revenue through organizing, promoting, hosting, supporting, or participating in events that meet the artistic or cultural interests of their patrons; preserving and exhibiting objects, sites and natural wonders of historical, cultural or educational value (*e.g.* museums, heritage sites, zoos, botanical gardens, and nature park); or operating or managing a facility or providing services that enable patrons to participate in recreational activities, such as amateur sports clubs. To be eligible, entities would also have to have had at least a 40% revenue decline over the first 13 qualifying periods for the CEWS and have a current-month revenue decline of at least 40%.

Organizations that are not in the tourism, hospitality, arts, entertainment, or recreation sectors may still qualify for relief under the Tourism and Hospitality Program through the Local Lockdown Program. This program allows non-sector specific organizations, including charities and not-for-profits, to qualify for the same relief where they have been affected by a qualifying public health restriction, and where their revenue has dropped at least 40% during a claim period.

To qualify for relief, organizations must be subject to a 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. In addition to this relief, pursuant to a news release published on December 22, 2021, the federal government announced its intention to expand the Local Lockdown Program from December 19, 2021 to February 12, 2022, in response to anticipated Omicron variant-related lockdowns, 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.

Organizations, including charities and not-for-profits, that were previously eligible for the CEWS or CERS may alternatively be eligible for relief under the new Hardest-Hit Program, provided that they have a 12-month average revenue drop from March 2020 to February 2021 of at least 50%, and have a claim period revenue drop of at least 50%. Eligible organizations under this program would receive a subsidy up to 50%.

The Tourism and Hospitality Program, Hardest-Hit Business Recovery Program and Hiring Program are all set to terminate on May 7, 2022, unless further extended. Eligible employers would be able to claim relief under one of three programs, whichever gives the highest relief, and cannot receive relief under more than one program.

Ontario to Ease COVID Restrictions through Three-Step Plan

In response to the recent surge of the Omicron variant in Ontario, on January 5, 2022, the provincial government temporarily moved the province into a modified Step Two of its Roadmap to Reopen, set out in greater detail in the May 2021 *Charity & NFP Law Update*. Further to this, amending regulation O Reg 2/22, *Rules for Areas in Step 2* was filed on January 3, 2022 to amend O Reg 263/20, *Rules for Areas in Step 2* under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* ("Reopening Act").

Among the amendments, provisions concerning vaccination policies and proof of vaccination requirements, as well as modified capacity restrictions were included. Of note, while the original Step 2 capacity restrictions for weddings, funerals and religious services, rites and ceremonies remained unchanged (*i.e.* no more than 50% of the capacity of a room for indoor gatherings with physical distancing requirements, and no capacity restrictions for outdoor gatherings, with physical distancing requirements), capacity restrictions for related social gatherings were tightened. In this regard, under the "modified Step 2", social gathering associated with weddings, funerals and religious services, rites or ceremonies are limited to five people for indoor social gatherings, and ten people for outdoor social gatherings. Additional restrictions were also included for gatherings held in motor vehicles for religious services, rites and ceremonies.

Work from home restrictions also remain unamended from the original Step 2 requirements; organizations that are open must ensure that their employees work remotely, except where the nature of their work requires them to be on-site at the workplace.

Further to an announcement by the provincial government, Ontario will be implementing a 3-step plan for lifting capacity limits. Effective January 31, 2022, social gathering limits will be increased to 10 people indoors and 25 people outdoors, and indoor capacity limits will be raised to 50% for meeting and event spaces, as well as museums, galleries, aquariums, zoos, science centres, landmarks, historic sites, botanical gardens and similar attractions.

Effective February 21, 2022, social gathering limits will be further increased to 25 people indoors and 100 people outdoors; organizations and facilities that are permitted to “opt-in” to proof of vaccination requirements will be permitted to operate at 100% capacity; and indoor religious services, rites, and ceremonies will be limited to the number of people that can maintain two metres pf physical distance (with no capacity limits for those that require proof of vaccination for all attendees).

Effective March 14, 2022, capacity limits will be lifted in all public settings; social gathering limits will be increased to 50 people indoors, with no limits for outdoor social gatherings; and remaining capacity limits for religious services, rites and ceremonies will be lifted.

13. COVID-19 Employment Update

By Barry W. Kwasniewski and Martin U. Wissmath

Reimbursements for Infectious Disease Emergency Leave Pay Extended Until July 31, 2022

Ontario workers are still entitled to some paid time on leave for COVID-19 related reasons for most of this year, and employers can still apply for reimbursements. The provincial government announced the extension of its Worker Income Protection Benefit for reimbursement to employers for infectious disease emergency leave pay, which was extended until at least July 31, 2022. Under section 50.1 of the *Employment Standards Act, 2000* (*ESA*), employers must provide up to three (3) days of paid leave for an employee on an infectious disease emergency leave (IDEL) for certain reasons related to COVID-19 (see below). Currently, COVID-19 is prescribed as an infectious disease for the purposes of IDEL by Ontario Regulation 228/20, *Infectious Disease Emergency Leave* (O Reg 228/20), which sets the “COVID-19 Period” during which both paid and unpaid IDEL are available.

Employees are entitled to the three days of paid leave for IDEL if:

1. The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease;

2. The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease;

3. The employee is in quarantine or isolation or is subject to a control measure implemented as a result of information or directions by a public health official, qualified health practitioner or the government

4. The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

5. The employee is providing care or support to an individual who is either under medical investigation or in quarantine or isolation because of COVID-19.

Employers, including charities and not-for-profits, must apply for a Worker Income Protection Benefit reimbursement by applying to the Workplace Safety and Insurance Board within 120 days of the date the employer paid the employee, or November 28, 2022, whichever is earlier.

Some Not-For-Profits May Be Eligible for $10K Small Business Grant from Ontario Govt

The Ontario Small Business Relief Grant to support small businesses could help some not-for-profits "weather the storm" of the Omicron variant, according to the provincial government. Noting the move into a modified Step Two of the Roadmap to Reopen regulations, with some closures or reduction in allowed capacity for certain places of business, the government announced on January 7, 2022 that it would provide some eligible small businesses with a $10,000 grant.

Eligible businesses include:

- Restaurants and bars;
- Facilities for indoor sports and recreational fitness activities (including fitness centres and gyms);
- Performing arts and cinemas;
- Museums, galleries, aquariums, zoos, science centres, landmarks, historic sites, botanical gardens and similar attractions;
- Meeting or event spaces;

- Tour and guide services;
- Conference centres and convention centres;
- Driving instruction for individuals; and
- Before- and after- school programs.

14. AML/ATF Update

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

UN Report Highlights Impacts of Counter-Terrorism on Humanitarian Law

A report published by the United Nations ("UN") provides important reflection on the adverse impacts that counter-terrorism frameworks may have on the provision of humanitarian aid. In January 2022, the UN Security Council Counter-Terrorism Committee Executive Directorate published its report "The interrelationship between counter-terrorism frameworks and international humanitarian law" (the "Report"). This 45-page resource includes a review of UN Resolutions with regards to counter-terrorism and humanitarian law; an overview of international humanitarian law provisions, such as the Geneva Conventions; and the results of a survey completed by several civil society organizations who have reported significant challenges in the provision of humanitarian aid due to counter-terrorism frameworks.

The opening pages of the Report set out the problem: "in armed-conflict contexts involving terrorist groups, counter-terrorism measures may negatively impact on the ability of humanitarian actors to operate and, by extension, on persons in need of humanitarian assistance". Both UN humanitarian agencies and other humanitarian organizations have reported that counter-terrorism measures have "restricted humanitarian access to populations in areas where non-State armed groups designated as terrorist organizations operate", hampering the delivery of aid.

The Report sets out the chilling effect of domestic counter-terrorism laws which criminalize the provision of humanitarian assistance or introduce legal uncertainty prevents organizations from reaching those in need, such as victims of armed conflict or terrorism. Humanitarian organizations expressed concern over being put in a difficult position, facing the possibility of "prosecution, fines or loss of funding" if they do not comply with counter-terrorism provisions and "threats, attacks, and access restrictions by non-State armed groups" if they do comply with counter-terrorism provisions and are perceived to be implementing a political agenda.

While counter-terrorism provisions are an important part of the international response to terrorism, sometimes, the Report notes, these provisions ignore the practical reality that “humanitarian organizations need to engage with non-State actors” in order to secure access to affected populations “in particular if the non-State actor in question exercises control over territory or carries out Government-like functions”. International humanitarian law and related activities should not be viewed as undermining legitimate counter-terrorism actions. Rather, states should treat the matter of “an engagement for humanitarian purposes … separately from the question of engagement with terrorist groups for political and other ends”.

The Report states that neutral, impartial and independent humanitarian activities “shall not be regarded as … recognition of, or support to, a Party to the conflict”. Although not mentioned in the Report, such a position is reflected in various provisions of the UN, including UN Security Council Resolution 2615 (2021) adopted on December 22, 2021, which decided that humanitarian assistance and other activities supporting basic human needs in Afghanistan were not a violation of Resolution 2255 (2015), which set out that Member States should ensure that no financial resource be provided (directly or indirectly) to the Taliban.

States must be aware of the relevant impacts of counter-terrorism provisions in order to find “effective ways to mitigate the impact of counterterrorism on humanitarian activities.” However, the Report notes that “awareness is at times missing or insufficiently established among counter-terrorism actors”. To improve states’ efforts in this regard, the Report lists recommendations from humanitarian organizations. These recommendations include that states offer more clarity about the scope and implications of counterterrorism measures and adopt provisions “excluding principled humanitarian activities carried out in accordance with international humanitarian law from the scope of prohibited conduct in relevant legal and policy frameworks”. States should “actively engage with the private sector” to clarify expectations about risk management. Further, the Report notes, states are recommended to consider “the establishment of permanent structures for dialogue” between relevant governments, agencies, and private sector organizations with regards to country-specific issues about the implementation of counter-terrorism measures.

The provision of humanitarian aid in conflict situations is an important part of Canada’s international obligations, along with its obligations to comply with counter-terrorism provisions. The Report is a useful tool for governments, organizations, and policy makers in Canada to dialogue together concerning what action should be taken to ensure that humanitarian organizations are not prevented from acting in situations of significant need due to legal risks posed by domestic counter-terrorism legislation.

US Federal Bank Regulators Update NPO Derisking Practices

Bank derisking has been a problem faced by non-profit organizations ("NPOs") for at least the past decade, especially those that send money internationally in response to crises. However, banks approaches to risk may be changing, as demonstrated by the publishing of an updated chapter about NPOs in the United States federal "Bank Examination Manual" (the "Manual") in November 2021. The Manual governs how federal bank examiners review bank compliance with AML/ATF requirements and had previously, in a 2014 version, implied that NPOs were high-risk.

As reported in greater detail in *AML/ATF & Charity Law Alert* No. 49, "derisking" occurs when financial institutions indiscriminately terminate or restrict business relationships with broad classes of clients as a way of avoiding, rather than managing risk. In this regard, the Manual's updated chapter on NPOs emphasizes that banks "are neither prohibited nor discouraged from providing banking services to charities and other NPOs" and reminds bank examiners that "no specific customer type automatically presents a higher risk of money laundering, terrorist financing (ML/TF), or other illicit financial activity".

Canada's guidance from the Office of the Superintendent of Financial Institutions, entitled "Deterring and Detecting Money Laundering and Terrorist Financing" was last updated in December 2008 and still characterizes "charities and other non-profit organizations that are not monitored or supervised (for example, not registered with CRA)" as "higher risk". Given what is happening in the United States, it is time for Canada to follow suit.

IN THE PRESS

Charities Legislation & Commentary, 2022 Edition, by Terrance S. Carter, Maria Elena Hoffstein, and Adam M. Parachin, provides an overview of federal and Ontario statutes governing charitable organizations and is now available for purchase.

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

No Tax Rebate for Charity Housing Project's Market Rate Units written by Nancy E. Claridge and Adriel N. Clayton was featured in the OBA Charity & Not-for-Profit Law Section Insider on January 24, 2022.

New Resources about Community Investing Available written by Ryan M. Prendergast was featured in the OBA Charity & Not-for-Profit Law Section Insider on January 24, 2022.

RECENT EVENTS AND PRESENTATIONS

Understanding the New Ontario *Not-for-Profit Corporations Act* was hosted by the OBA Charity & Not-for-Profit Law Section on November 25 and December 2, 2021. Ryan M. Prendergast presented on the topic of **Membership Issues**. Theresa L.M. Man co-chaired the two-day series and presented on the topic of **By-Laws**.

Moving Forward with the ONCA: Understanding Key Provisions and Practical Tips was held on Wednesday, December 8, 2021, hosted by Carters Professional Corporation, and moderated by Terrance S. Carter. The full handout package is available on our website, as well as the individual presentations listed below:

- ONCA Proclamation, Transition Process and Overview - Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- Membership Issues and Meetings - Ryan M. Prendergast, B.A., LL.B.
- Board of Directors' Issues and Meetings - Jacqueline M. Demczur, B.A., LL.B.
- By-law Issues to Consider - Esther S.J. Oh, B.A., LL.B.
- Other Topics of Interest, Including Public Benefit Corporations and Financial Reporting - Esther Shainblum, B.A., LL.B., LL.M., CRM

Income Generation Through Impact Investing was presented by Terrance S. Carter at The UWO Faculty of Law School on January 12, 2022

Disbursement Quota Reform: Yesterday, Today and Tomorrow was presented by Theresa L.M. Man at The UWO Faculty of Law School on January 17, 2022.

The ONCA: Overview of Key Provisions and Practical Tips was presented by Jacqueline M. Demczur for the Institute of Law Clerks of Ontario (ILCO), Continuing Legal Education on January 13, 2022.

The ONCA: Overview of Key Provisions and Practical Tips was presented Esther Shainblum to the Federation of Citizens Association (FCA) on January 19, 2022.

UPCOMING EVENTS AND PRESENTATIONS

CPA Canada is hosting the **Not-for-Profit Webinar Series** on February 9, 2022. Terrance S. Carter will present on the topic of "The Top Ten Risk Management Tips for Charities and NFPs".

Orangeville Small Business and Economic Centre (SBEC) is hosting a series of webinars. Nancy E. Claridge will present on the topic of "Legal Issues for Small Business" on February 16, 2022.

The 2022 Annual Ottawa Charity & NFP Law Webinar Continues Virtually! will be hosted by Carters Professional Corporation on **Thursday, February 17, 2022**. Special guest speakers are **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. Registration and Details are available online.

CONTRIBUTORS

Editor: Terrance S. Carter
Assistant Editors: Nancy E. Claridge, Ryan M. Prendergast, and Adriel N. Clayton

Sepal Bonni, B.Sc., M.Sc., J.D., Trademark Agent – Sepal Bonni is a registered trademark agent and practices in all aspects of brand protection. Her trademark practice includes domestic and foreign trademark prosecution, providing registrability opinions, assisting clients with the acquisition, management, protection, and enforcement of their domestic and international trademark portfolios, and representing clients in infringement, opposition, expungement, and domain name dispute proceedings. She also assists clients with trademark licensing, sponsorship, and co-branding agreements Sepal also advises clients on copyright and technology law related issues.

Terrance S. Carter, B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2021), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a past member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.

Sean S. Carter, B.A., LL.B. – Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articled with and been an associate with Fasken (Toronto office) for three years. He is ranked as a leading expert by *Best Lawyers in Canada*. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.

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

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

Jacqueline M. Demczur, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law Seminar*™.

Barry W. Kwasniewski, B.B.A., LL.B. – Mr. Kwasniewski is a partner with the firm and joined Carters' Ottawa office in 2008 to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and been retained by charities, not-for-profits and law firms to provide legal advice pertaining to insurance coverage matters.

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

Jennifer M. Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose." Ms. Leddy is recognized as a leading expert by *Lexpert.*

Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is a member and former chair of the CBA Charities and Not-for-Profit Law Section, a former member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, and a member and former chair of the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.

Esther S.J. Oh, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management. Ms. Oh has written articles for *The Lawyer's Daily*, www.charitylaw.ca and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law Seminar*™, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.

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

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

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

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

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CARTERS PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE CARTERS

PARTNERS:

Terrance S. Carter B.A., LL.B. tcarter@carters.ca
(Counsel to Fasken)
Jane Burke-Robertson B.Soc.Sci., LL.B. (1960-2013)
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca
Jacqueline M. Demczur B.A., LL.B. jdemczur@carters.ca
Esther S.J. Oh B.A., LL.B. estheroh@carters.ca
Nancy E. Claridge B.A., M.A., LL.B. nclaridge@carters.ca
Jennifer M. Leddy B.A., LL.B. jleddy@carters.ca
Barry W. Kwasniewski B.B.A., LL.B. bwk@carters.ca
Sean S. Carter B.A., LL.B. scarter@carters.ca
Ryan M. Prendergast B.A., LL.B. rprendergast@carters.ca
Sepal Bonni B.Sc., M.Sc., J.D. sbonni@carters.ca

ASSOCIATES:

Esther Shainblum B.A., LL.B., LL.M., CRM eshainblum@carters.ca
Adriel N. Clayton B.A. (Hons), J.D. aclayton2@carters.ca
Heidi N. LeBlanc J.D. hleblanc@carters.ca
Martin U. Wissmath B.A., J.D. mwissmath@carters.ca

STUDENT-AT-LAW

Lynne Westerhof, B.A., J.D. lwesterhof@carters.ca

Toronto Office
67 Yonge Street, Suite 1402
Toronto, Ontario, Canada
M5E 1J8
Tel: (416) 594-1616
Fax: (416) 594-1209

Orangeville Office
211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada
L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300

Ottawa Office
117 Centrepointe Drive, Suite 350
Nepean, Ontario, Canada
K2G 5X3
Tel: (613) 235-4774
Fax: (613) 235-9838

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