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CHARITY & NFP LAW UPDATE

NOVEMBER 2022

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

NOVEMBER 2022

SECTIONS

HIGHLIGHTS

Carters Spring Charity & Not-for-Profit Law Webinar

SAVE THE DATE – Thursday, March 2, 2023
Hosted by Carters Professional Corporation
Details will be posted soon at www.carters.ca

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RECENT PUBLICATIONS AND NEWS RELEASES

1. Bill C-32 Will Increase DQ, Affect Trust Reporting, and Make Other Changes to the Income Tax Act

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

The Fall Economic Statement 2022 was released on November 3, 2022, focusing heavily on recovery from the COVID-19 economic downturn and weathering the ongoing global financial slump. The next day, on November 4, 2022, *An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 3, 2022 and certain provisions of the budget tabled in Parliament on April 7, 2022* ("Bill C-32") was introduced in the House of Commons. Bill C-32 will implement certain provisions of the Fall Economic Statement and the April 2022 Federal Budget. A number of aspects of Bill C-32 are relevant to charities.

For full details on Bill C-32 and its impact on charities, please see *Charity & NFP Law Bulletin No. 517*.

2. Ontario Bill Seeks to Address Sexual Abuse in Post-Secondary Institutions

By Barry W. Kwasniewski

Legislation has been tabled by the Ontario government to instruct post-secondary institutions on dealing with employment issues that stem from incidents of sexual abuse of students. On October 27, 2022, Bill 26, or the *Strengthening Post-secondary Institutions and Students Act, 2022* ("Bill 26") was introduced. Bill 26 aims to amend both the *Ministry of Training, Colleges and Universities Act* and the *Private Career Colleges Act, 2005*, by determining steps institutions that are governed by these acts can take when an employee is found to have committed sexual abuse towards a student.

Bill 26 would add a definition of sexual abuse, which includes sexual contact, behaviour or remarks towards a student that falls afoul of either the *Criminal Code*, the *Human Rights Code* (specifically, reprisals or retaliation for denial of sexual advances) or the specific institution's sexual misconduct policy.

If an individual is found to have committed an act of sexual abuse under one of these codes, the employer institution can discharge or discipline them on the grounds of "just cause". The employee does not receive the benefit of statutory or common law "notice of termination or termination pay or any other compensation or restitution". Bill 26 would override the *Labour Relations Act, 1995*, the *Colleges Collective Bargaining Act, 2008* and any relevant collective agreements or employment contracts in this

regard. Further, labour arbitrators would be prohibited from substituting any other penalty for the discharge or disciplinary measure imposed by the employer institution.

If an employee were discharged under the amended legislation (or resigns as a consequence of sexual abuse committed against a student), they would not be eligible for reemployment with the institution which employed them when the abuse was committed. Institutions would have a positive duty to discharge employees if they have been wrongfully rehired.

Collective agreements, employment contracts, and agreements settling ongoing or prospective litigation that are entered into if Bill 26 comes into force will be barred from having provisions that would disallow the public disclosure of sexual misconduct by an employee and subsequent arbitration of the matter.

Post-secondary institutions would be required to have comprehensive sexual misconduct policies, which must include rules related to sexual behaviour between employees and students, and specified disciplinary measures to be taken in the event those rules are contravened. This misconduct policy could be a subset of a larger policy, such as a "sexual violence policy" which is mandated by the *Ministry of Training, Colleges and Universities Act*.

Bill 26 is in Second Reading in the legislature and has been ordered referred to the Standing Committee on Social Policy. As such, Bill 26 is not yet law. If it does pass, it would come into effect on July 1, 2023.

3. Federal Court of Appeal Dismisses Charity's Motion to Delay Notice of Revocation

By Lynne M. Westerhof

The Federal Court of Appeal dismissed a charity's motion for interim relief, demonstrating the difficulty in meeting the threshold of "irreparable harm" required by the court. In *Fortius Foundation v Canada (National Revenue)*, decided on October 19, 2022, the Federal Court of Appeal considered a determination by the Canada Revenue Agency ("CRA") that the Fortius Foundation ("Fortius") failed to comply with the requirements for continued registration as a charity under the *Income Tax Act* ("ITA"). The Minister of National Revenue ("Minister") subsequently advised Fortius of her intention to publish a notice in the *Canada Gazette* revoking its charitable registration (the "Notice"). Fortius brought an application for an order under paragraph 168(2)(b) of the ITA precluding the Minister from publishing the Notice until Fortius had the opportunity to pursue an internal appeal process with the Minister, along with any possible appeals from the Minister's decision ("Internal Appeal"). Fortius also brought a motion for interim relief under rules 372 and 373 of the *Federal Courts Rules* that sought to enjoin the Minister from publishing

the notice of its revocation until Fortius' application was decided. In its analysis of this matter, the court addressed the motion for interim relief, and ultimately found that Fortius' arguments were without merit.

The court considered whether Fortius had shown that it would be just and equitable for the court to stay the Minister's publication of the Notice of revocation until the Internal Appeal was complete, relying on the three-part test set out in *RJR MacDonald Inc v Canada (Attorney General)* that (1) there was a serious issue to be tried, (2) publication of the Notice would cause Fortius irreparable harm, and (3) the balance of convenience favoured Fortius, not the Minister. That there was a serious issue to be tried was conceded by the Minister.

Fortius focused on the test for irreparable harm with three arguments: that publication of the Notice would (1) "effectively render the application moot", (2) eliminate the statutory advantages it enjoyed as a registered charity, and (3) undermine its ability to fund its legal costs for the Internal Appeal because the Notice would cause donations to immediately cease. However, the court did not find these arguments persuasive. The court did not agree with Fortius' first argument that publication would "render the application moot", stating that "[p]ublication of the notice of revocation […] does not foreclose Fortius's statutory appeal rights." Even if the court did not grant the interim motion that Fortius was requesting and if the Minister subsequently published a notice of the revocation of its charitable status, Fortius would still have the opportunity under the ITA to challenge the Minister's decision to revoke its registration as a charity, meaning that the matter was not moot.

The court was also not persuaded by Fortius' second argument that the elimination of its statutory advantages as a charity were sufficient evidence of irreparable harm. Instead, the court stated that "[a]bsent evidence of unique or specific harm or damage, irreparable harm does not encompass the ordinary consequences that flow from an entity losing its registered charity status". Finally, with regards to Fortius' third argument that the Notice would undermine its ability to receive donations and thus fund its legal cost, the court noted that one of Fortius' directors had asserted there were enough funds to dispute the matter in court, and further, less than 1.5% of Fortius' overall revenue between 2015 and 2021 came from receipted donations.

Because Fortius failed to establish irreparable harm under the second part of the *RJR MacDonald* test, it was not necessary for the court to determine if the third part – balance of convenience – had been met. Nevertheless, the court found that the balance weighed in favour of the Minister because "[t]he public has a legitimate interest in the exercise of CRA's statutory mandate to enforce the obligations applicable to

registered charities under the ITA." That public interest carries significant weight in the court's analysis of the balance of convenience.

As Fortius failed to convince the court that it met all three parts of the *RJR MacDonald* test, the Federal Court of Appeal dismissed its motion for interim relief under rules 372 and 373 of the *Federal Courts Rules* that sought to enjoin the Minister from publishing the notice of its revocation until Fortius' application under the ITA was decided. This case demonstrates the fact that while charities may appeal a decision to revoke their charitable status, notice of the revocation of their charitable status may be published in the interim. Persuading the court to delay the publication of a notice of revocation will be very difficult, as the courts have repeatedly stated that the loss of receipting ability and/or revenue is not sufficient to establish irreparable harm.

4. Appeal for Defying Public Health Orders Dismissed

By Jennifer M. Leddy

The Court of King's Bench of Alberta (the "Court") dismissed the appeal of the Church in the Vine of Edmonton (the "Church") and its co-pastor, Tracy Fortin, of their convictions and sentences for obstructing a public health inspector in the execution of their duties under the *Public Health Act, R.S.A.*("Act") on three occasions by refusing the inspector entrance to the Church to ensure compliance with COVID public health orders. The Court delivered its judgment, *R v Church in the Vine and Fortin*, on October 21, 2022.

The Church and Ms. Fortin ("the Appellants") raised two grounds of appeal from the trial decision, reported in the *June 2022 Charity & NFP Law Update*. Firstly, the Appellants argued that the trial judge's summary dismissal of their *Charter* claims to freedom of religion, during a pre-trial application known as a *Vukelich* Application, was an unreasonable use of discretion. Secondly, they argued that the trial judge displayed a reasonable apprehension of bias. The sentences were also appealed.

The Court found that the trial judge's pre-trial dismissal of the *Charter* claims was proper, based on a three-part procedure for considering a *Vukelich* Application: 1) the judge must assume that the facts are true, 2) consider if the facts establish a basis in law for the constitutional remedy the applicant is seeking, and 3) failing the second consideration, must consider if an evidentiary hearing is nevertheless warranted.

The Appellants claimed that the Trial Judge failed in the first step of the process by not recognizing that freedom of religion was raised by the facts in the way the public inspector exercised her authority under

the Act. The Court agreed with the trial judge, finding that the facts did not support a *Charter* claim based on the actions of the inspector. The Appellants' statement that on a previous visit the mere presence of the inspector in the sanctuary was disturbing to the worshippers was insufficient given the competing interests of protection of the public and compliance with government orders. In addition, the inspector did nothing on the charge dates to infringe the freedom of religion of the Appellants, leaving when entry to the Church was refused. As a result, the Court agreed with the trial judge that the Appellants real argument was an indirect challenge to the Act which they were not entitled to make. In order to advance such a claim, the Appellants would have had to do so directly in their written claim and they did not do so. Therefore, this *Charter* argument was not open to them.

Ultimately, the trial judge concluded that there was no likelihood of the *Charter* challenge succeeding, and the Court agreed that was a reasonable exercise of her discretion. The second ground that the case was appealed on was the reasonable apprehension of bias by the trial judge. Among their complaints included her references to the severity and scope of the COVID pandemic and its transmutability. They claimed that this was political rhetoric which was intended to imply that the Church, through noncompliance, was to blame for the spread of COVID. The court rejected this, saying that the statements made by the judge were all supported by public health records and the evidence before her.

The Appellants claim that the trial judge hampered their ability to present evidence regarding religious freedom was found to be incorrect, as evidence about how the Act infringed on religious liberty was beyond the scope of the trial because the Appellants had not directly challenged the constitutionality of the Act.

Regarding the sentence appeal, the Appellants argued that the trial judge took improper judicial notice of the facts surrounding COVID. This was rejected by the court, stating that the trial judge relied on Statistics Canada data in her consideration of the seriousness of COVID, a source which is generally considered reliable by the Court. Further, there exists a litany of cases across Canada where courts have accepted the validity of information provided by public health authorities.

The final argument of the Appellants was that their sentences were "demonstrably unfit" and that there were several reasons that should warrant mitigation of the sentences. They argued that the trial judge "overemphasized the gravity of the offence", that there was no link between their actions and the overall pandemic, that they had allowed the public health inspector to do her job by allowing her entry on one

previous occasion, and that the lack of an actual contravention of the Act (other than the obstruction charge) were all elements that should indicate leniency on the part of the Court.

It was found that the sentence was justified because of a need for "strong denunciatory sentences for obstruction offences, especially when that obstruction prevents the potential discovery of other misconduct." Considering that the fines Ms. Fortin received were only upwards of 5% of the maximum penalties she could be liable for and the Church was only liable for upwards of 30% of the maximum penalties, the Court concluded that the sentence was fit. As such, the appeals were dismissed.

5. Minister of National Revenue Can Compel Supporting Information for Tax Returns

By Ryan M. Prendergast

The Federal Court of Appeal has affirmed the principle that the Minister of National Revenue (the "Minister") can compel the production of information that should have been recorded in relation to income tax filings, even if this information was never recorded in the first place. In *Miller v Canada (National Revenue)*, the Federal Court of Appeal upheld the Federal Court's ruling on the matter, which was reported in the *October 2021 Charity & NFP Law Update*.

Mr. Miller was a consultant who had an unwritten arrangement with a client based in Europe. There were no recorded invoices documenting their transactions. The Canada Revenue Agency ("CRA") audited Mr. Miller's personal finances, and sent various requests for documents and information, as a result of which the agency regarded him as "unresponsive".

Consequently, the Minister brought an application in Federal Court against Mr. Miller, which claimed that he was failing to provide necessary information to the CRA, as stipulated under subsection 231.1(1) of the *Income Tax Act* (ITA). In his defence, Mr. Miller stated that he had complied to the best of his ability, and that the documents sought were not available.

The Minister claimed her powers to gather information are broad and entitle her to request written information about official records and documents. Mr. Miller relied on *Her Majesty the Queen v Cameco Corporation* ("*Cameco*"), which held that employees of a corporation do not need to orally answer questions posed by the CRA. This was not accepted by the Federal Court drawing a distinction between being compelled to answer questions by the CRA and being required to provide necessary information for CRA verification purposes, as was the case at hand. Therefore, Mr. Miller was found to have violated the ITA.

On appeal, the Federal Court of Appeal found that the Federal Court did not err in ruling that the CRA was justified in demanding the relevant documents under subsection 231.1(1) of the ITA. Mr. Miller was incorrect that the ruling in *Cameco* applied in this case. While the CRA cannot compel oral interviews of employees in regard to corporate audits, the situation before the court touched on neither of those issues. Mr. Miller was not being forced to give oral evidence regarding a corporate matter; rather, he was being compelled to produce information regarding his own personal finances.

The plain wording of the ITA allows the CRA to perform an "audit" of "documents", and the court saw no reason why this plain wording should not stand. As the information should have been contained in the documents that Mr. Miller was legally obliged to provide, the CRA had the right to demand the omitted facts. Section 231.1 exists to ensure compliance with the ITA, so by not providing the Minister with the complete information required, the Minister could justifiably use this section to compel a production of complete information.

This case stands as a reminder that individuals cannot simply neglect to record information that is relevant to their tax filings. The CRA will not accept the fact that said information has not been recorded. The specific ruling in *Cameco* does not apply to information that properly belongs on an information return. The Minister has broad powers to require an individual to provide supplementary evidence to support the specifics provided in their information return, and that is not the same as being compelled to provide oral evidence as an employee of a company, the limits of which have been defined in *Cameco*.

6. Inmates' Handwritten Notes about Lack of COVID Masks is Accessible Info

By Esther S.J. Oh

John Howard Society of Canada v Canada (Public Safety) is a federal court decision published October 25, 2022, in which the court found that handwriting cannot universally be treated as personal information under subsection 19(1) of the *Access to Information Act* (the "ATIA") and as such, handwriting cannot be entirely redacted as a matter of course in anonymized Access to Information and Privacy ("ATIP") requests. Instead, the court found that handwritten information must be reviewed the same as typewritten information, with the same principles applied. This case would be of interest to registered charities and not-for-profits that have filed ATIP requests or are the subject of an ATIP request.

The plaintiff in the case, the John Howard Society (the "Society"), is a registered charity that operates throughout Canada with the objective of providing just and humane responses to crime and its causes

through prevention, intervention and re-integration. The Society requested access under the ATIA to information regarding inmate grievances from Bath Institution that involved allegations that Correctional Officers ("CO") were not wearing masks as required by public health mandates during the COVID-19 pandemic (the "ATIP Request"). In responding to the ATIP Request, Corrections Service Canada ("CSC") redacted all handwritten portions of the grievances. Out of the 12 identified grievances in the ATIP Request, only two were typed, and the remainder were handwritten since the inmates' access to computers is limited. The CSC's approach resulted in the entirety of the handwritten grievances being redacted.

At issue in the case was whether all handwriting is personal information under section 3 of the federal *Privacy Act*, and therefore should be entirely redacted for ATIP requests pursuant to the ATIA. The CSC took the position that the handwritten portions were personal information that could identify the individuals involved, and redacted them completely, based on the reasoning this was necessary in order to comply with section 19 of the ATIA.

In her decision, Madam Justice McVeigh found that handwriting cannot be "blanket redacted", although "there may be aspects of the handwritten information" that fall under section 3 of the *Privacy Act*. In this regard, the court stated that the evidence did not establish a serious possibility that release of the handwritten grievances will allow identification of inmates who wrote the grievances and there were no grounds to exempt the handwritten grievances from disclosure under s 19(1) of the ATIA. The court ordered that before release of the handwritten complaints, CSC must review them and ensure appropriate redactions are made.

7. CRA Ruling Finds Charity's Facility Exempt from GST/HST

By Adriel N. Clayton and Nancy E. Claridge

Supplies of property and services by charities are generally exempt from GST/HST. However, exceptions to this rule are set out in section 1, Part V.1, Schedule V of the *Excise Tax Act* (the "*ETA*"). One of the exceptions to the tax exemption for charities is set out in paragraph (j) of that section, being a supply of "a residential complex, or an interest therein, where the supply is made by way of sale." This means that sales of residential complexes are exempt from GST/HST when sold by a charity. This exception was the subject of a recent Canada Revenue Agency (CRA) GST/HST Ruling, Document 222713 (the "Ruling"), published on March 24, 2022 and released on October 18, 2022, in which the CRA was asked to confirm

whether a charity's facility constituted a "residential complex" for GST/HST purposes in order to determine whether a sale of the facility would be subject to GST/HST.

While most of the details in the Ruling are redacted, the general facts involve a proposed sale of property by a registered charity. The charity had previously acquired vacant property in an arm's length transaction and constructed a facility on the land. It did not claim input tax credits in relation to the construction costs, and did not self-assess GST/HST when construction was substantially completed and the first client arrived, on the understanding that the facility was not a multiple unit residential complex. It then began to operate certain programs at the facility for its clients, who reside at the facility for less than 30 days on average without a lease agreement.

Pursuant to a proposed reorganization between the charity and a non-arm's length party, the charity sought to transfer title of its property to the third party. As part of the proposed reorganization, it was agreed that the charity would continue to be permitted to use the facility free of charge after transferring title to the third party.

Based on the facts, the CRA indicated that the facility was not a residential complex for GST/HST purposes, and that its sale constituted an exempt supply of real property under the *ETA*. It referred to the paragraph 123(1)(a) definition of "residential complex" and stated that "a residential complex is that part of a building in which one or more residential units are located, together with certain common areas of, appurtenances to, and land subjacent and immediately contiguous to the building". It then found, based on subsection 123(1) that a "residential unit" is:

> (a) a detached house, semi-detached house, rowhouse unit, condominium unit, mobile home, floating home or apartment,
>
> (b) a suite or room in a hotel, a motel, an inn, a boarding house or a lodging house or in a residence for students, seniors, individuals with a disability or other individuals, or
>
> (c) any other similar premises,
>
> or that part thereof that
>
> (d) is occupied by an individual as a place of residence or lodging,
>
> (e) is supplied by way of lease, licence or similar arrangement for the occupancy thereof as a place of residence or lodging for individuals,
>
> (f) is vacant, but was last occupied or supplied as a place of residence or lodging for individuals, or

> (g) has never been used or occupied for any purpose, but is intended to be used as a place of residence or lodging for individuals.

Given that the facility was not primarily established and operated to provide a place of residence or lodging for individuals, the charity's client accommodations were not residential units as defined in the *ETA*. Therefore, the facility was found not to be a residential complex for GST/HST purposes.

This Ruling is a helpful reminder that many, though not all, sales of real property will be exempt from GST/HST, and that charities need to pay particular attention to the circumstances surrounding the use and sale of the property in order to properly assess GST/HST issues. In particular, the Ruling demonstrates that the sale of facilities that provide short-term accommodation but whose primary purpose is not to provide places of residence are likely to be exempt.

8. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

Ransomware on the Rise says Cyber Centre in New National Cyber Threat Assessment

According to an eye-opening "call to action", individual Canadians and organizations are facing increasing risks to their data security as cybercrime continues to evolve and proliferate, according to the Canadian Centre for Cyber Security ("Cyber Centre"). The Cyber Centre published its National Cyber Threat Assessment 2023-24 (the "Assessment") on October 28, 2022, on the Cyber Centre website. Among the major cybercrime threats described in the Assessment are ransomware, exploitation of critical infrastructure, cyber threats from foreign state-sponsored actors, misinformation, disinformation, malinformation (MDM), and "disruptive technologies" such as cryptocurrencies and decentralized finance. As described in Carters' *Charity & NFP Law Bulletin No. 468* and the February 2022 *Charity & Not-for-Profit Law* Webinar, the pandemic has caused a sea change in how people use technology and the internet, including work from home and hybrid work arrangements, greatly expanded use of the internet for business, work, medical and other purposes and the proliferation of cloud-based software and services that support organizations operating in the expanded cyber landscape. Cybercriminals and certain nation states exploit opportunities and weaknesses in this environment, posing a significant threat to Canadian organizations, infrastructure and individuals.

In a foreword to the Assessment, the Minister of National Defence, Anita Anand, stated that cyber security has become a "top concern" over the last two years since the expansion of online services during the

COVID-19 pandemic, and that ransomware incidents "hit the headlines on an almost daily basis both in Canada and around the world." Ransomware is "malicious software that restricts access to or operation of a computer or device, potentially restoring it following payment." Due to its impact on an organization's ability to function, according to the Assessment, ransomware is "almost certainly the most disruptive form of cybercrime facing Canadians." Financial costs can be significant, and an organization's data can be destroyed, or sensitive information revealed. Average ransomware payments from 2020–2022 have nearly doubled from $150,000 to nearly $300,000. Additional costs can include reputational damage, unrecoverable data, and the costs of repairing damaged systems.

Other than deploying ransomware tactics, cybercriminals sponsored by foreign states, such as China, Russia, Iran and North Korea, can "target diaspora populations and activists in Canada, Canadian organizations and their intellectual property for espionage," and even target Canadian organizations for financial gain, according to the Assessment. Artificial intelligence with "machine-learning enabled technologies are making fake content easier to manufacture and harder to detect" the Assessment reports. This has led to a proliferation of MDM, which degrades trust in online spaces. As cybercrime is enabled by cryptocurrencies, cyber threat actors can "deceive and exploit" machine learning in consumer services. Quantum computing also has the potential to enhance cybercriminals' ability to steal and decrypt sensitive information. Charities and not for profits are not immune to these threats.

The report points out that over 400 healthcare organizations in Canada and the United States have experienced a ransomware attack since March 2020. Further, cybercriminals and other actors are targeting supply chains and managed service providers, threatening any charity or not for profit that use such providers to host their websites, IT resources or to provide them with fund development, customer relations or email services (for example). The July 2020 Blackbaud breach, which affected dozens of Canadian charities, is an illustration of the threat this poses. In addition, the Assessment points out that data transmitted through or stored on a server physically located in a foreign state is at risk of being accessed/exploited by that state, potentially threatening the personal information being stored or transmitted. Charities and not for profits using cloud-based providers or other third parties to store or otherwise process their data are exposed to the risk that personal information for which they are accountable could be threatened.

However, there is some positive news in the Assessment as well. Sam Khoury, head of the Cyber Centre, stated that the "vast majority of cyber incidents can be prevented by basic cyber security measures" with

practical steps outlined in guides available on the Get Cyber Safe website. Not-for-profits and charities should inform themselves about these threats, pursue practical steps to improve their own cyber security standards and protect personal information in their custody or under their control. Awareness and "best practices in cyber security" can mitigate many cyber threats, according to the Assessment. Cyber threats continue to succeed because they "exploit deeply rooted human behaviours and social patterns, not merely technological vulnerabilities." For more information about cyber security, the Cyber Centre recommends reading its Cyber Security Guidance on these issues, as well as visiting the Get Cyber Safe website.

9. SCC Deems Donated Stock Options as Employment Income under Quebec *Taxation Act*

By Terrance S. Carter

Under Quebec's *Taxation Act* (the "Act"), stock options donated to charities by an employee are considered employment income and will therefore be included in calculating that employee's income tax obligation. The Supreme Court of Canada (the "SCC") made this ruling on November 17, 2022, in *Des Groseillers v. Quebec (Agence du revenu)*.

Mr. Des Groseillers (the "Appellant") had received stock options from his employer, which he donated to various registered charities. Agence du Revenu du Québec (ARQ) audited the Appellant and added the value of this donated stock to his employment income, increasing his tax liability under sections 50, 54 and 422 of the Act.

Section 50 is a deeming rule which states that once an employee disposes of certain securities, such as employee stock options, the employee will be deemed to have received a benefit in the amount that the value of the disposition exceeds what the employee paid for the security (*e.g.* if an employee received shares for free and sells them for a profit, the entire profit will be included in their income). Section 54 specifies that if a corporation sells or issues one of its securities to one of its employees, then the employee is deemed not to receive a benefit other than as provided in Division VI (sections 47.18-58.0.7) of the Act. Subparagraph 422(c)(ii) states that when a taxpayer disposes of property in various circumstances (including when the taxpayer gifts the property to "any person"), the value of this transaction is deemed to be at fair market value at the time of the disposition of the property.

The Appellant appealed the ARQ's decision from their audit, which added the value of donated stocks to his employment income, to the Court of Quebec. Here, the court ruled in favour of the Appellant, finding that he received no benefit from the donation, so the value of the donated stocks should be excluded from

the calculation of his taxable income. The ARQ appealed this decision to the Quebec Court of Appeal, where the original decision was overturned in favour of the agency. Following this, the Appellant brought the case to the SCC.

The Appellant argued that section 422 did not apply to him, because Division VI of the Act (of which section 422 is not a part) was "a complete code that contains, within itself and in an exhaustive manner, all the rules for the computation of income derived from the issuance of securities to employees." Since section 54 applied (which states that an employee is deemed not to receive a benefit when they receive securities from their employers unless Division VI provides otherwise), this should exclude the application of section 422 altogether.

In a unanimous decision, the SCC considered how sections 50, 54 and 422 should be interpreted. The SCC provided three reasons why it did not agree with the Appellant's arguments. First, the SCC concluded that there was no conflict between the application of section 50 of the Act and section 422. Section 50, a deeming provision, indicates the time at which an arrangement, such as an employee stock option, will be taxed and provides that a disposition of property in this context would be taxed as employment income rather than as a capital gain or loss. Section 422, the SCC found, does not impact this deeming provision at all. Second, the SCC inferred that, through the "broad formulation" of section 422, the legislative intent of the section was to deem the value of any disposition of property to be at fair market value for the purposes of calculating taxable income. The legislature had not explicitly said that section 422 did not apply to Division VI, which was telling, since there existed several other express references regarding the non-applicability of section 422 to other provisions in the Act. Third, the SCC concluded that section 54 "does not, in the absence of clear legislative indicia to this effect, constitute a code so complete and so hermetic that the application of section 422 is excluded." Therefore, since section 422 of the Act did apply, the Appellant's arguments were rejected and the appeal was dismissed.

10. The 2022 Annual *Carters Fall Charity & Not-for-Profit Law Webinar* – Held Virtually on November 10, 2022

The 2022 *Carters Fall Charity & Not-for-Profit Law Webinar*, hosted by Carters Professional Corporation on November 10, 2022, had over 1,200 registered attendees from the charitable and not-for-profit sector, including leaders of charities and the broader faith community, as well as accountants and lawyers. The special speakers this year were Sharmila Khare, the new Director General, Charities Directorate, Canada Revenue Agency and Bruce MacDonald, President and CEO of Imagine Canada.

The Church & Charity Law Seminar has been held annually since 1994 and continues as the *Carters Fall Charity & Not-for-Profit Law Webinar* as of November 2022 and onwards. The handouts and presentation materials from this year's webinar are now available below or at the following link.

IN THE PRESS

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

Ottawa Proposes Changes to How Charities can Fund Third-Party Organizations is an article featured in Canadian Lawyer on May 3, 2022, in which Terrance S. Carter and Susan Manwaring are quoted.

RECENT EVENTS AND PRESENTATIONS

The Carters Fall Charity & Not-for-Profit Law Webinar was held on Thursday, November 10, 2022. The full handout package is available on our website, as well as the individual presentations listed below:

- Agenda
- Introduction and Speaker Details
- Essential Charity & NFP Law Update – Esther Shainblum
- Qualifying Disbursements: The New Regime for Charities – Theresa L.M. Man
- Wrongful Dismissal Claims: A Primer for Charities and Not-for-Profits – Barry W. Kwasniewski
- Evolving Issues under the ONCA - Ryan M. Prendergast
- The ABCs of Gift Agreements - Jacqueline M. Demczur
- Changes and Challenges with the Disbursement Quota for Charities - Terrance S. Carter
- How to Work Effectively with the Charities Directorate - Sharmila Khare, Director General of the Charities Directorate, CRA

UPCOMING EVENTS AND PRESENTATIONS

Alliance for a Grand Community is hosting an online webinar entitled Transition Challenges under the ONCA presented by Theresa L.M. Man on Wednesday, December 7, 2022 at 9:00 am.

Peak Leadership Summit will be hosted by OREA on January 19 and January 20, 2023. Terrance S. Carter will be speaking on the Top Five Risk Management Tips for Associations. The Summit will be held both in person and virtually.

SAVE THE DATE - The **2023 Carters Spring Charity & NFP Law Webinar** will be hosted by Carters Professional Corporation on **Thursday, March 2, 2023**. Details will be available soon on our website www.carters.ca.

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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, 2022), 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 former 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.

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

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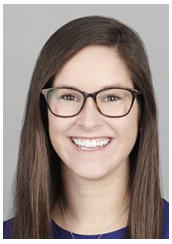

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Martin U. Wissmath, B.A., J.D. – Called to the Ontario Bar in 2021, Martin joined Carters after finishing his articling year with the firm. In addition to his legal practice, he assists the firm's knowledge management and research division, providing 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. – Lynne is a charity and not-for-profit law associate whose practice focusses on tax law, charitable status applications, corporate governance matters, legal risk management, and counter-terrorism financing law as it applies to the provision of humanitarian aid. She articled with Carters from 2021 to 2022 and joined the firm as an associate following her call to the Ontario Bar in June 2022. In addition to her work assisting charities and not-for-profits, Lynne assists with Carter's knowledge management, research, and publications division.

Cameron A. Axford, B.A., J.D., Student at Law - Cameron graduated from the University of Western Ontario in 2022 with a Juris Doctor. While studying at law school, he was involved with Pro Bono Students Canada in the Radio Pro Bono program and participated in the BLG/Cavalluzzo Labour Law Moot. Prior to law school, Cameron studied journalism at the University of Toronto and Centennial College, receiving a B.A. with High Distinction from the former. He has worked for a major Canadian daily newspaper as a writer. Cameron has experience doing volunteer work for social development programs in Nicaragua and in leadership roles in domestic philanthropic initiatives.

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