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CHARITY & NFP LAW UPDATE

OCTOBER 2022

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

OCTOBER 2022

SECTIONS

HIGHLIGHTS

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RECENT PUBLICATIONS AND NEWS RELEASES

1. Ontario Court Confirms Church Incorporated in Ontario Must Adhere to ONCA

By Esther S.J. Oh

In *Birhane v Medhanie Alem Eritrean Orthodox Tewahdo Church*, the Applicants, members of the Church, sought a court order requiring that a general membership meeting and election of the board of directors of the Respondent, Medhanie Alem Eritrean Orthodox Tewahdo Church ("Church"), take place. While it is beyond the scope of this article to describe all of the events leading up to the court case, some of the more cogent background facts are summarized below.

The Church was incorporated as a not-for-profit corporation under the Ontario *Corporations Act* ("OCA") on December 8, 1997 with letters patent that listed three applicants for incorporation / first directors. From 2000 to 2018, the Church held annual general meetings ("AGMs") every year and elections of the board of directors every three years. No AGM or elections of directors were held in 2019 or 2020 and the directors who were elected at the last election held in 2016 (for the term starting on January 1, 2017) continued in office and were named as individual respondents (the "Individual Respondents") in the action that resulted from the following situation.

On July 18, 2021, more than 90 Church members signed a petition asking, among other things, that an AGM be called and that an election of directors be conducted within three weeks. The board acted contrary to the provisions of the Church's own bylaw by failing to respond to the petition from the members. The chair of the board at the time advised that a general meeting was held "by the end of November 2019" and that all the members in attendance at the meeting extended the term of the members of the board of directors "indefinitely to finish the renovation of the church".

On November 11, 2021, the Respondents announced to Church members through automated calls that an AGM and board elections would be held on December 4, 2021. They also advised that they would hold a members' meeting on November 20, 2021. Approximately 165 Church members attended the meeting on November 20, 2021. While the issue of whether the AGM and elections should have been postponed was discussed, no conclusive decision was made at the meeting. While the board later did call other membership meetings, the manner and form in which the meetings were called and held were not in compliance with corporate law requirements, but instead reflected a number of irregularities and were not otherwise done in an orderly manner.

The Individual Respondents took the position that the court did not have the jurisdiction to determine the issues before the court, claiming that the Applicants were members of a voluntary religious association (*i.e.* an unincorporated congregation) and were not members of the Church (a corporation incorporated under the OCA). Citing previous case law, the Individual Respondents argued that since voluntary religious associations are not governed by corporate statutes, and that the Ontario *Not-for-Profit Corporations Act* (which replaced the OCA on October 19, 2021) does not apply to the Church as a congregation. In making this assertion, the Individual Respondents argued that the only members of the Church corporation were the original three persons who applied to incorporate the Church in 1997. The Church also argued that the bylaw before the court was the bylaw of the congregation (a voluntary religious association), but not the Church corporation.

The court found these arguments did not make any sense when reviewing the background facts and history of the Church. The corporate records of the Church clearly reflected elections of directors by members of the Church corporation, with no evidence indicating there was ever any intention to distinguish between the Church (as a corporation) and an alleged unincorporated association. In addition, there was only one bylaw for the Church corporation and there was no separate bylaw for an alleged unincorporated association. The court also noted that the Church has registered charity status, receives and issues official donation receipts and holds title to the Church property.

In arguing that the court lacks jurisdiction, the Individual Respondents attempted to rely upon two relatively recent decisions of the Supreme Court of Canada involving religious organizations that were unincorporated associations. One of the cases was *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga* ("***Aga***"), discussed in *Charity & NFP Law Bulletin No. 494*, in which members of the congregation of the church brought an action against the church and members of its senior leadership after being expelled from the congregation. The second case was *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, discussed in *Church Law Bulletin No. 54*, which also considered issues involving the expulsion of a member from an unincorporated religious organization.

The court in *Birhane* distinguished its circumstances from those in the two Supreme Court cases. Firstly, the court in *Birhane* noted that both Supreme Court cases dealt with reviewing decisions made on the basis of procedural fairness or issues involving the expulsion of members and disciplinary actions against them, which were not at all relevant to the issues in the *Birhane* case. Secondly, the court in *Birhane* noted

that the Supreme Court in *Aga* had expressly distinguished cases involving corporations from cases involving voluntary associations that were not incorporated. Other determinations were also made.

The court disagreed with the Individual Respondents' positions and confirmed that it did have the jurisdiction to review issues involving rights conferred on members of a corporation governed by the ONCA. In making its decision, the court noted that the case did not involve "the bonds of religion" but instead involved issues relating to proper corporate governance and compliance with Ontario and Canadian law. Based on the lack of cogent and consistent evidence, the court found that the directors' terms had not been extended by a valid vote of the Church members and that a new meeting needed to be called. The court then ordered that the Church hold an AGM under the supervision of a neutral chair in order to elect a new board of directors in accordance with the ONCA and the Church's own bylaw.

This case affirms the principle in previous cases that insofar as matters of corporate procedures and laws are concerned (as opposed to issues involving pure religious doctrine), incorporated religious organizations are required to comply with the requirements set out in the corporate statute and their respective bylaws. The case also reflects the willingness of the courts to intervene in situations where necessary to ensure election processes are followed, where directors' failure to adhere to bylaws and corporate law requirements interfere in the fundamentals of the election process.

2. CRA News

By Jennifer M. Leddy

Minister of National Revenue Announces New Members for Advisory Committee on Charitable Sector

The Honourable Diane Lebouthillier, Minister of National Revenue, announced on October 26, 2022 an updated membership for the Advisory Committee on the Charitable Sector ("ACCS") including the appointment of existing members to various roles, the addition of four new members, and the departure of three former members. The ACCS is a consultative forum for the Government of Canada "to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do" and has published three reports to date containing a range of recommendations on important issues to charities.

Effective September 1, 2022, Bruce MacDonald, President & CEO of Imagine Canada, began in the one-year role of Transitional Co-chair, while Hilary Pearson, former President of Philanthropic Foundations

Canada, began in the one-year role of Past Co-chair. The intent of these roles is to ensure continuity within the ACCS.

Additionally, four new members were appointed to the Committee to join the eleven current members. These new members will commence their two-year terms on November 1, 2022, and include:

- Althea Arsenault – Manager Resource Development, Economic and Social Inclusion Corporation, Government of New Brunswick
- Elisabeth Baugh – former CEO, Ovarian Cancer Canada
- Minnie Karanja – Director of Government Relations and Public Policy, Network for the Advancement of Black Communities
- Kevin McCort – President & CEO, Vancouver Foundation (reappointed for a second term)

The three members departing the committee are as follows (their terms ended on August 31, 2022):

- Peter Dinsdale – President & CEO, YMCA Canada
- Arlene MacDonald – former Executive Director, Community Sector Council of Nova Scotia
- Andrea McManus – Chief Advancement Officer, Banff Centre for Arts & Creativity and Co-Founder and Senior Counsel of ViTreo Group

3. Legislation Update

By Terrance S. Carter

Ontario Bill 7, *More Beds, Better Care Act, 2022*

Amendments to Ontario's *Fixing Long-Term Care Act, 2021* (the "*LTC Act*") have been made through Bill 7, *More Beds, Better Care Act, 2022*, which received Royal Assent on August 31, 2022 and was proclaimed into force on September 21, 2022. Broadly speaking, the *LTC Act* sets out a foundation to regulate long-term care homes in the province.

Bill 7 amends both the *LTC Act* and the *Health Care Consent Act* to authorize certain actions to be carried out without the consent of alternate level of care patients ("ALC patients"), *i.e.* those who, in a clinician's opinion, do not "require the intensity of resources or services provided in the hospital care setting." More specifically, these actions include the determination of ALC Patients' eligibility for long-term care home residence by a placement coordinator, who would select a home for the ALC Patient and authorize their

admission to the home. Notwithstanding the above, reasonable efforts must be made to obtain an ALC Patient's consent prior to the placement coordinator acting on their behalf without consent.

Amending Ontario Regulation 16 of the *Agricultural and Horticultural Organizations Act*

The Government of Ontario is seeking comments on proposed amendments to Regulation 16 of the *Agricultural and Horticultural Organizations Act*. The proposed amendments would reduce the minimum member thresholds required for societies to qualify for an annual grant of $5,000 administered by the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA). To qualify for the grant, the government is proposing to reduce the member threshold of Agricultural Societies from 60 to 40 members, and from 50 to 30 members for Horticultural Societies, except in territorial districts, where it would be reduced from 25 to 15 members. Comments should be provided no later than November 21, 2022.

Alberta Bill C-12, *Trustee Act* Receives In-Force Date

Alberta's new *Trustee Act* has now been proclaimed to be brought into force on February 1, 2023, according to the province's Order in Council 339/2022, which was ordered on September 27, 2022. As reported in the *May 2022 Charity & NFP Law Update*, draft legislation had been proposed through Bill C-12, *Trustee Act* to replace Alberta's current *Trustee Act*. The new Act clarifies the powers of trustees and the rules around trust property investment, and proposes a new standard of care for professional and institutional trustees.

Of particular note for charities, a new Part 7 has been included to specifically address charitable trusts and the court's power to vary the trust or order sale of charitable trust property. In this regard, Part 7 allows the court, in certain circumstances upon application of trustees, to vary the trust instrument even where "an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust" or where a variation would facilitate the carrying out of the settlor's general or specific charitable intent. It also permits courts to order a power of sale of charitable trust property where "it may no longer be used advantageously for the charitable purpose or should for any other reason be sold", and to give directions concerning the conduct of the sale and the application of the proceeds of sale. The provisions for variation and power of sale prevail over contrary provisions in trust instruments.

4. Corporate Update

By Theresa L.M. Man

Ontario Corporations Exempt from Certain Registration Fees in Québec

As of September 14, 2022, Ontario-based corporations, including not-for-profit corporations, that carry on activities in Québec are exempt from paying fees for filing declarations of registration and applications for reregistration in Québec, as noted by Registraire des entreprises Québec. The Registraire des entreprises' French-only FAQs page indicates that the exemption applies to fees paid when the extra-provincial corporation is registered as an extra-provincial corporation in Québec. Annual registration fees, however, will continue to be payable each year.

Pursuant to *An Act respecting the legal publicity of enterprises*, "legal persons established for a private interest not constituted in Québec", including non-profit legal persons, are required to be registered in Québec where they "carry on an activity in Québec ... or possess an immovable real right, other than a prior claim or hypothec, in Québec". Upon application, registration fees to file a declaration of registration or application for reregistration are payable to the Registraire des entreprises and currently range from $356 on a regular basis to $534 on a priority basis.

The exemption for registration fees for Ontario corporations carrying on activities in Québec was enacted in reciprocity with Ontario, and to reduce administrative burden and stimulate interprovincial trade between the two provinces. Québec corporations carrying on activities in Ontario are already subject to the same registration fee exemptions.

5. Employment Update

By Barry W. Kwasniewski

Unpaid Leave for Non-Compliance with Vaccine Policy not Constructive Dismissal

The COVID-19 pandemic was certainly uncharted waters in many areas of law. One of the more contentious aspects of this period of time has been the nexus between employment rights and mandatory vaccine policies in the workplace. Employees and employers alike struggled to understand what their rights and obligations were, and in some cases, it has been left to the courts to determine what was acceptable at the time.

One such instance was *Parmar v Tribe Management Inc.* On September 26, 2022, the British Columbia Supreme Court determined that Tribe Management Inc.'s ("Tribe") decision to place an unvaccinated

employee on unpaid leave did not amount to constructive dismissal. The court classified the Plaintiff employee's decision to not comply with the mandatory vaccination policy ("MVP") as a "personal choice" and that it "was a repudiation of her contract of employment."

The Plaintiff was a senior manager with over 19 years as an employee. She argued that her being placed on unpaid leave was constructive dismissal as it breached Tribe's contractual obligation. The Defendant employer is a property management company. They argued that their actions were reasonable and "implicitly authorized by the terms of the employment contract."

On October 5, 2021, Tribe rolled out its MVP, which required all employees to be "fully vaccinated" by November 24, 2021. Their policy allowed for medical or religious exemptions, none of which were invoked by the Plaintiff, despite her insistence that family members had experienced negative side effects related to the vaccine. Tribe did not terminate the employment of those who refused to comply with the MVP; rather, they simply put them on unpaid leave.

The Plaintiff requested that alternative arrangements, such as work from home and constant rapid testing be allowed for her. Tribe refused these requests, and put her on unpaid leave on November 25, 2021. The Plaintiff characterized the leave as "indefinite", though the company communicated that they would review the situation after 3 months. After less than a month, the Plaintiff requested a return to work, barring which, she would allege constructive dismissal. Tribe refused this, but offered an indefinite unpaid leave and said the Plaintiff could return to work once she complied with the MVP. On January 26, 2022, the Plaintiff resigned from her position and filed a notice of civil claim.

The court noted that the employment contract in place demanded that all employees comply with workplace policies. The only rebuke to this would be if the polices were unlawful or unreasonable. The lawfulness of the MVP was not contested by the Plaintiff, only its reasonableness, who claimed that the lack of ability to work almost totally from home was unreasonable.

The court, after examining relevant jurisprudence, concluded that Tribe's policy was reasonable, stating that the Plaintiff "refusal to comply with the MVP was a repudiation of her contract of employment. Tribe did not accept that repudiation. Instead, it acted reasonably in putting her on an unpaid leave. She was not constructively dismissed from her position; she resigned. Any losses that she suffered from being put on unpaid leave were as a result of her personal choice not to follow Tribe's reasonable MVP."

While this is a B.C. decision and is not considered as a precedent outside of that province, this ruling is potentially significant for employers, in all fields, which may have similar situations and claims. As employers, charities and not-for-profits are subject to the same employment laws as commercial enterprises, and should take note of this case and the implications it could have regarding COVID-19 vaccination policies and dealing with non-compliant employees.

6. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

Privacy Commissioners Urge Governments & Health Sector to Stop Using Outdated, Old Technology

With new technological solutions available, more can and should be done to protect Canadians' personal health data, according to the country's privacy commissioners. Federal, provincial and territorial privacy commissioners published a resolution (the "Resolution") on September 22, 2022 with a list of 14 recommendations for "governments, health sector institutions and health providers to show concerted effort, leadership, and resolve in implementing modern, secure and interoperable digital health communication infrastructure." The Resolution states that resource constraints and staff shortages in Canada's health sector were aggravated by the COVID-19 pandemic, which "spurred innovation and change in the delivery of services, including through virtual care visits and other forms of digital health communications." Outdated and insecure communication technologies such as fax machines, unencrypted emails, along with employee snooping and cybersecurity attacks, continue to cause breaches of personal health information, which can cause "significant harm to affected individuals, including potential discrimination, stigmatization, financial and psychological distress," as well as consuming valuable health resources, creating delays in the delivery of care to individuals and damaging the reputation of and public trust in the health system, the Resolution states.

The Resolution's 14 recommendations are directed to three groups: federal/provincial/territorial governments, health sector institutions and providers, and privacy commissioners and ombudspersons with responsibility for privacy oversight. Recommendations include phasing out traditional fax and unencrypted email use and replacing them with modern, secure, and interoperable ways of transmitting personal health information that is accessible to all Canadians, adopting secure digital technologies and responsible data governance frameworks that have reasonable safeguards to protect personal health information, amending laws and regulations to provide for meaningful penalties, promoting transparency and education, and taking collaborative action "to address systemic practices in the health sector that are

unreasonable because they create unacceptable and easily avoidable risks to the privacy and security of personal health information." Although these recommendations are directed at the health sector, all charities and not-for-profits should take them into account when designing and updating their privacy and data security practices and procedures.

7. Pledge to Leverage Donation Agreement not a Charitable Gift without Donative Intent

By Jacqueline M. Demczur

Leveraged donation arrangements are not charitable gifts. This is what the Tax Court reminded the public in *Crane v The King* on October 7, 2022. This case was related to *Herring v The Queen*, which was earlier reported on in the *April 2022 Charity & NFP Law Update*. Readers may recall that *Herring* dealt with leveraged donation gifting arrangements to the Banyan Tree Foundation ("Banyan Tree"), an organization which had its charitable status revoked in 2008. This led to the subsequent litigation in *Herring*, wherein those who made donations unsuccessfully sought to have them recognized as gifts by the Canada Revenue Agency.

In *Crane*, the Appellant, a retired judge of the Ontario Superior Court of Justice, was a donor to Banyan Tree and claimed that the set of facts surrounding his situation was notably different from those found in *Herring*. However, the court found that these distinctions were not significant and that, as a result, he could not claim that his donation was a charitable gift.

The Appellant made a donation to Banyan Tree in 2004. On reassessment, the Minister denied the nearly $50,000 in tax credits he had garnered from this donation. Months before the trial commenced, he had changed the issue before trial and only sought a reassessment of an $11,000 donation he had made by cheque to Banyan Tree.

In addition to the 2004 donation, the Appellant signed a pledge to donate $100,000 to Banyan Tree. This pledge had a number of pseudo-legal terms and conditions which the court described as "self-serving nonsense." This included a clause that said, "this Pledge is made by the undersigned voluntarily and without expectation of any return, right, privilege, recognition, benefit or advantage of any nature from the Foundation, other than an income tax receipt in prescribed form." Rejecting this and other would be terms and conditions, the court stated that "the Appellant would not have made the pledge had it not been for the financial benefits that he expected to receive from the Program."

As part of the arrangements here, the Appellant had taken out a loan of $89,000, with a security deposit of $12,200 to the lender, to fund his donation to Banyan Tree. Testimony from the Appellant demonstrated that he intended to use the tax credits from his donation to make high yield investments, paying back his loan quickly and avoiding interest. With these factors considered, the court concluded that the Appellant had actually paid $23,000 as a participant in Banyan Tree's program, $12,200 from the security deposit and $11,000 out of pocket. He expected to receive $47,000 in financial benefits from this initial investment.

Arguing that he sought no benefit from the program, the Appellant claimed that he was distinct from the plaintiffs in *Herring*. This was rejected as the court found that the Appellant expected to receive $47,000 from his gift, which was to be directed into his investment portfolio. This expectation "vitiated any donative intent at the time of his alleged gift." Regarding the amendment of the Appellant's claim that he only sought the benefit of the $11,000 not covered by his loan, the court found that this did not make him distinct from the taxpayers in *Herring*, who had also made cash contributions to Banyan Tree. The court concluded that no part of the Appellant's pledge to the organization was a gift.

Crane serves, once again, as a reminder that taxpayers cannot contribute to leveraged donation agreements and then simply claim they had honest intentions. This not only undermines the ethical foundation of charitable giving, it runs afoul of tax law.

8. Enrollment Fees to Quasi-Private Religious Schools Not Gifts Under the *Income Tax Act*

By Ryan M. Prendergast

In instances of public/private partnership where the latter entity is a registered charity, determining what constitutes a gift under the *Income Tax Act* ("ITA") can get murky. On October 5, 2022 the Tax Court of Canada heard *Leduc Society for Christian Education et al. v The King*, a determination under rule 58 of the *Tax Court of Canada Rules*, wherein the line between a gift to a charity and an enrollment fee for a religious school was considered.

The Appellants are a group of registered Christian education charities based in Alberta, who all operate publicly funded Christian schools (the "Schools"). Under the prior (*School Act*) and current education regime (*Education Act*) in Alberta, school boards are permitted to offer alternative education programs (called "education programs" under the *School Act*). Fees can be charged to the parents of children enrolled in these programs, but only for non-instructional costs.

The Schools collected fees ("Christian program fees") from the families of students and issued official tax receipts for 100% of the fees. The Minister of National Revenue brought penalties against the Appellants under subsection 188.1(7) of the ITA in relation to this practice.

In this determination, the court considered two questions: were the fees optional, and did the parents expect a benefit in consideration for their payment?

The argument of the Applicants was that the enrolment of children into the program and the paying of the Christian education fees were both optional, and therefore, there was no consideration of benefit to the donor. The Crown argued "that payment of the fees was a contractual condition of enrolment."

The court found that the payment of the fees was a condition of student enrolment, and therefore could not be found as a gift under the ITA. The fact that fees were often waived for those who had not paid were discretional decisions made by the Appellants. The court said, "I believe that the relationship between the appellants and parents of children enrolled in the alternative Christian program was contractual and non-payment of fees would likely be legally enforceable unless waived by the appellants."

On the second question, the Appellants argued that the value of a religious education is subjective and cannot be considered objective consideration. The Crown argued that the additional religious curriculum was of clear material benefit to the children and their parents.

The court looked at the enabling education legislation, noting that it allowed public schools to collect fees to support education programs, and determined that this is what the Appellants were doing in their collection of fees. This opinion was supported by examining the registration materials of the Appellant Schools, which stated that the fees were used to support the Schools and their programs. For these reasons, it was determined that there was "a tangible benefit in return for the fees paid".

IN THE PRESS

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

RECENT EVENTS AND PRESENTATIONS

An **Impact Investing Panel** was held at the Philanthropic Foundations of Canada Annual Conference hosted by PFC on October 3, 2022, in Montreal, Quebec. Terrance S. Carter participated as a member of the panel discussion, moderated by Senator Omidvar.

By-Laws: Default v Mandatory v Permissive Provisions of the ONCA was presented by Theresa L.M. Man at the ONCA Ontario Bar Association Charity & Not-for-Profit Law Program that hosted a webinar on the *Ontario Not-for-Profit Corporations Act — What You Need to Know* on October 13, 2022.

Essential Elements of an Effective Brand Strategy was presented by Sepal Bonni and Terrance S. Carter at the CSAE National Conference – Reunite on October 20, 2022.

UPCOMING EVENTS AND PRESENTATIONS

Carters Fall Charity & Not-for-Profit Law Webinar™, hosted by Carters Professional Corporation, will be held on **Thursday, November 10, 2022** from 9:00 am to 12:45 pm EST. Brochure and Online Registration available at www.carters.ca

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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*™.

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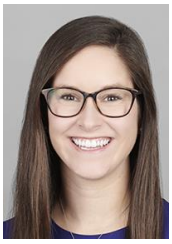

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Jennifer M. Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto 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.*

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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.

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