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CHARITY & NFP LAW UPDATE

SEPTEMBER 2022

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

SEPTEMBER 2022

SECTIONS

HIGHLIGHTS

RECENT PUBLICATIONS AND NEWS RELEASES

1. September 30, 2022 Marks Canada's Second National Day for Truth and Reconciliation

September 30 marks the second annual National Day for Truth and Reconciliation in Canada. This federal statutory holiday recognizes and commemorates the generations of Indigenous children who suffered and perished under the Canadian residential school system. Over the course of a century, approximately 150,000 Indigenous children were forced into a system of cultural assimilation. This system left a legacy of inter-generational trauma that still haunts Indigenous individuals and communities today. Carters Professional Corporation would like to acknowledge the importance of the Truth and Reconciliation process, and to honour the lost children and survivors of the residential school system.

We recognize that Carters' Orangeville office is located on the traditional territory of the Anishinaabe people, including the Ojibway, Potawatomi and Odawa of the Three Fires Confederacy; Carters' Ottawa office is located on the traditional unceded territory of the Algonquin Anishnaabeg People; and Carters' Toronto office is located on the traditional territory of many nations including the Mississaugas of the Credit, the Anishnabeg and the Chippewa, amongst others.

Links to reports from the National Centre for Truth and Reconciliation and to resources from the federal government are included here for those readers who wish to learn more.

2. Recent Legislative Changes May Facilitate Impact Investing by Charities

By Terrance S. Carter, Jacqueline M. Demczur and Lynne M. Westerhof

With the introduction of "qualifying disbursements" in the *Income Tax Act* ("ITA") on June 23, 2022 in Bill C-19, *Budget Implementation Act, 2022, No. 1,* along with other changes concerning which charitable activities will satisfy the disbursement quota ("DQ") obligation, it may now be possible for impact investments to be considered as "qualifying disbursements" and thereby be counted towards meeting a charity's DQ obligations. As background, the DQ is the minimum amount that a charity must spend on its charitable activities or in making qualifying disbursements (including gifts to qualified donees) and is calculated based on the assets owned by the charity in the preceding 24 months that is not used directly in charitable activities or administration. Given the proposed changes in draft legislation released on August 9, 2022 to increase charities' DQ obligations to 5% on investment property in excess of $1 million, it will

become increasingly important that the Canada Revenue Agency recognise impact investing as a qualifying disbursement for purposes of charities being able to meet their DQ obligations each year.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin No. 516*.

3. Legislation Update

By Terrance S. Carter

Provisions in Draft ITA Legislation Could Affect Charities' Trust Reporting Requirements

Charities should be aware of potential changes to the ITA that could create trust reporting requirements for incorporated charities as a result of draft legislation released by the Department of Finance on August 9, 2022. While not-for-profit corporations that are registered charities are currently exempt from filing returns of income for trusts ("T3s") by virtue of subsection 150(1.1) of the ITA, the draft legislation released by the Department of Finance includes proposed changes that could result in incorporated charities having to complete separate T3 trust returns for each restricted charitable purpose trust held by the charity, such as endowments, research funds or scholarship funds. Further information on this concern about the draft legislation can be found in *Charity & NFP Law Bulletin No. 515* at pages 7-9.

Those interested in providing comments to the Department of Finance regarding the draft legislation must do so by the deadline of **September 30, 2022.**

Portions of Québec's Privacy Law Now in Force

Portions of Québec's *Act to modernize legislative provisions as regards the protection of personal information* ("Bill 64") came into force as of September 22, 2022, including requirements relating to the reporting of confidentiality incidents, and the designation of a privacy officer. As reported in the *September 2021 Charity & NFP Law Update*, Bill 64 received royal assent on September 22, 2021 and represents a major step forward in the development of privacy laws in the province.

Under the legislation in force as of September 22, 2022, organizations will be required to notify Québec's privacy regulator and the affected individual following a confidentiality incident (such as unauthorized access to, use of or communication of personal information or loss of personal information) where there is a "risk of serious injury" to an individual. Organizations are also required to keep a register of confidentiality incidents and provide a copy of this register upon the request of the provincial privacy regulator.

Further, the legislation now mandates that the individual that has the highest authority within an organization shall be responsible for ensuring Bill 64 is implemented and complied with, though that individual may also delegate in writing all or part of that role to someone else. The information of the person in charge of the protection of personal information is required to be published on an organization's website (or be made available by other appropriate means if no website exists).

4. Corporate Update

By Theresa L.M. Man

Amendments to the CNCA and Regulations Brought Into Force

Certain amendments to the *Canada Not-for-Profit Corporations Act* ("CNCA") and Canada Not-for-Profit Corporations Regulations (the "Regulations") were brought into force on August 31, 2022. As reported in the *March 2022 Charity & NFP Law Update*, these amendments include various technical amendments to the CNCA set out in Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act* that affect corporate governance under the CNCA. They also include technical amendments to the Regulations that were published in the *Canada Gazette* on March 4, 2022 as Regulations Amending Certain Regulations Administered by the Department of Industry: SOR/2022-40.

Included among the amendments to the CNCA are amendments to section 238 concerning custody of dissolved corporations' documents and records; subsections 279(1) and (2) concerning inspection and making copies and extracts of certain corporate documents; and subsection 283(1) concerning the obligation of the Director to keep documents received and accepted pursuant to the CNCA.

Amendments to the Regulations include amendments to the time periods for which the Director must keep and produce certain corporate documents; as well as technical regulatory amendments to the Regulations, such as fixing time periods, changes to the name granting rules, and fixing typographical errors.

Ontario Extends Relief for Members' and Directors' Electronic Meetings to September 2023

Temporary relief for *Corporations Act* ("OCA"), *Co-operative Corporations Act* ("CCA") and Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") corporations concerning electronic directors' and members' meetings has been further extended to September 30, 2023. As previously reported in the *October 2021 Charity & NFP Law Update*, the Ontario government has been providing temporary relief to corporations in relation to holding electronic meetings of directors and members in response to the

COVID-19 pandemic. The rules in all three statutes were amended to permit electronic meetings of directors and members to be held during the "temporary suspension period", regardless of contrary provisions in a corporation's constating documents.

Although the temporary suspension period was previously set to expire on September 30, 2022, O Reg 473/22, Extension of Temporary Suspension Period under the OCA, O Reg 474/22, Extension of Temporary Suspension Period under the CCA, and O Reg 476/22, Extension of Temporary Suspension Period under the ONCA, were filed on August 25, 2022 to extend the temporary suspension period by one further year until September 30, 2023. As with previous extensions, the timelines for annual general meetings have not been extended.

5. Public Services and Procurement Canada Introduces GCDonate Platform

By Jennifer M. Leddy

In an announcement released on September 21, 2022, the Canada Revenue Agency introduced GCDonate on behalf of Public Services and Procurement Canada. GCDonate is an online platform that advertises the Government of Canada's surplus moveable assets available for donation. Generally, federal departments and agencies must sell their surplus goods or transfer them to other federal government departments for reuse. Items that are not claimed can instead be donated to eligible groups, including charities, non-profit organizations, Indigenous communities, and other levels of government.

With the introduction of GCDonate, eligible groups will have an online platform to visit to see what goods are available for donation from the federal government. Donated items range from furniture and binders to personal protective equipment and specialized goods, such as fluorometers used for testing lake water.

Eligible organizations will need to register with GCDonate in order to browse available goods, and can sign up for alerts when goods are added to their preferred categories. Goods must be picked up locally with the department offering the goods.

6. Ontario Court Rejects Donor's Claim to Direct Gift's Allocation

By Jacqueline M. Demczur

Donors do not necessarily have the right to direct the way in which their donations to donor advised funds are spent by charities. This was the Ontario Superior Court of Justice's ruling in *The Joseph Lebovic Charitable Foundation v Jewish Foundation of Greater Toronto* on July 11, 2022, in which the court

considered a claim by a donor that it be able to direct the allocation of funds donated to a donor advised fund held by a charity. The court ruled against the Joseph Lebovic Charitable Foundation ("JLCF"), finding that it could not direct the way in which the Jewish Foundation of Greater Toronto ("Jewish Foundation") made grants from the donor advised fund that the JLCF has established with the Jewish Foundation.

JLCF was established by Joseph Lebovic, who used JLCF as a vehicle to make donations to the Jewish Foundation through a donor advised fund named the Joseph Lebovic Charitable Fund ("Lebovic Fund"). When he passed away in May of 2021, his brother – Wolf Lebovic – assumed control of the JLCF and the Lebovic Fund on a *de facto* basis as executor of Joseph's estate, as Joseph had not nominated a successor for either.

During his life, Joseph provided advice to the Jewish Foundation on how it should spend the money that JLCF donated to the Lebovic Fund. It is the Jewish Foundation's policy that while donors are free to make such recommendations on how monies in any donor advised fund within the Jewish Foundation are to be granted, and even though such recommendations are usually accepted, the Jewish Foundation is under no obligation to follow such recommendations.

In March of 2022, JLCF was advised by the Jewish Foundation that a small portion of the funding that JLCF had provided to the Lebovic Fund would be spent in a manner contrary to Wolf Lebovic's requests. JLCF brought a motion to prevent this from occurring. They sought that the entire Lebovic Fund be either secured by way of having them paid into court under rule 45.02 of the *Rules of Civil Procedure* (*Rules*), or that an interlocutory injunction restrict the distribution from the Lebovic Fund until this action could be considered by the court.

To be entitled to relief under rule 45.02, a claimant must establish "(a) that its claim is to a right in a specific fund; (b) that there is a serious issue to be tried as to its claim to the fund (a serious prospect of ultimate success); and (c) that the balance of convenience favours granting the order." The Jewish Foundation argued that the JLCF's Lebovic Fund was not a "specific fund" within the meaning of rule 45.02, and could not be secured as such. However, this was rejected by the court as the fund was found to be readily identifiable and that the *Rules* do "not require the legal right to the specific fund to be a proprietary right".

However, the court found that JLCF's complaint lacked grounds to provide for either of the remedies sought. The tests for both relief under rule 45.02, as well as for an interlocutory injunction, required that

there be a "serious issue to be tried". JLCF conceded that there was no agreement that the Jewish Foundation was required to spend the donated money in the Lebovic Fund as per their recommendations. This reflects the law that, unless restrictions are imposed at the time of making the gift, the donor is not able to later direct how any charitable gifts are spent by the charity to whom they are made, and the court cannot order the Jewish Foundation to make any particular distribution from a donor advised fund such as the Lebovic Fund.

JLCF then argued that the Jewish Foundation must consider their recommendations on distributions from the Lebovic Fund in good faith. The court rejected this and raised the point that even if it were true that the Jewish Foundation must consider these recommendations, there was no evidence of bad faith in the Jewish Foundation's rejection of JLCF's recommendations. As such, there was no serious issue to be tried.

Furthermore, the court found that there would be no irreparable harm if the injunction was not granted, and that this did not favour the granting of relief on the balance of convenience. For these reasons, JLCF's motion was dismissed with costs fixed at $135,000.

This case is a helpful reminder that, without any prior agreement setting out specific restrictions that attach to a gift such as limiting future grants to be made to a named charity(ies), type of charity or other restricted charitable use, donors "divest themselves of all power and control over the property and transfer such control to the donee" by gifting property to a charity. Where donors have specific restrictions that they wish to impose on a gift, it is important to enter into a properly worded agreement between the charity and donor at the outset setting out these restrictions in detail concerning the charity's use of the gifted property.

7. Court Denies First Nation Members' Application to Dissolve Alberta Society

By Ryan M. Prendergast and Lynne M. Westerhof

What happens when some members of a society or not-for-profit corporation want the organization to be dissolved while other members do not? This is the question that the Court of Queen's Bench of Alberta considered in the case of *Blood Tribe v Bearspaw Nation* when members of the Treaty 7 First Nations Chiefs' Association ("Association") brought their dispute to the court after attempts to voluntarily dissolve the Association failed. Ultimately the court decided that despite the tensions between certain member First Nations, there was not enough evidence to establish that it would be just and equitable for the court to dissolve the society.

The Association is comprised of seven member First Nations, with the elected Chiefs of each First Nation acting as directors of the Association. Its primary purpose is to advocate political positions of common interest with the federal and provincial governments, as well as other Indigenous governments and bodies. Three First Nations brought the application for dissolution before the court: the Blood Tribe, the Piikani Nation and the Siksika Nation (collectively, the "Applicants"), submitting that the relationship between them and the other First Nation members of the Association had deteriorated over the years, resulting in a deadlock in decision making. The other four First Nations that comprised the Association (the Bearspaw Nation, the Chiniki Nation, the Wesley Nation and the Tsuut'ina Nation, collectively, the "Respondents") disagreed and opposed dissolution on the basis that the differences between them and the Applicants did not relate to the core purposes of the Association and that there was value in having the Association continue to advocate for the Treaty 7 First Nations.

The court concluded that its authority to dissolve a society came from section 35 of Alberta's *Societies Act*. In deciding which factors it should consider, the court followed the decision of *Keho Holdings Ltd v Noble* and identified four grounds where it would be just and equitable for the court to exercise its discretion and dissolve a corporation, namely where there is a: (1) deadlock in management, (2) fundamental breakdown in a trust relationship, (3) loss of substratum (*i.e.* a sustained failure of a society to pursue its core purposes or where those purposes become impossible to carry out), and/or (4) loss of confidence in management. The Applicants relied on all four grounds, though it was only necessary for them to establish one of these grounds to the court.

In considering whether there was a deadlock in management, the court ultimately rejected the Applicants arguments on the grounds that despite areas of disagreement, there was not evidence that the members were unable to agree on matters fundamental to the Association or would be unable to do so in the future. Second, the court did not find that there was a fundamental breakdown in a trust relationship or a deep divide between the Applicants and the Respondents because their disagreements about funding did not pertain to the Association's core purpose, and represented only a small fraction of the funding received. Third, the court declined to find that there was a loss of substratum. In this instance, the court thought it was premature to conclude that the member First Nations would not be able to come to a common vision for the Association in pursuit of shared political goals, though it was not known to the court when the Association had last put forward a public political decision. Finally, the court was unsatisfied with the Applicant's arguments regarding the loss of confidence in management, since there was no clear pattern establishing this, and at least one of the allegations against management was not known to the Applicants

until after their application was made to the court. Therefore, the court concluded that there was not enough evidence to support a finding that it was just and equitable for the Association to be dissolved, noting that "dissolution is a discretionary remedy not to be granted lightly."

While the law as it pertains to the dissolution of not-for-profit corporations may vary by province, this case provides an example of factors the courts may consider in Alberta. Additionally, *Blood Tribe v Bearspaw Nation* highlights how dissolution of a corporation is a discretionary power of the courts, and may not be exercised unless the court is satisfied there is sufficient evidence that it would be just and equitable for the court to intervene.

8. Employment Update

By Barry W. Kwasniewski and Martin U. Wissmath

CERB Payments Not Always Deducted from Damages for Wrongful Dismissal in Ontario

"Where an employment agreement is not consistent with the [*Employment Standards Act, 2000*], it becomes invalid irrespective of the actual arrangements made with an employee on termination, and the terminated employee becomes entitled to common-law damages."

Justice Carole J. Brown (Brown J) stated this principle of employment law in an August 10, 2022 Superior Court of Ontario judgment, *Henderson v Slavkin et al.*, which found the termination clause in the parties' employment contract was unenforceable as a consequence of other provisions that were not in compliance with the *Employment Standards Act, 2000* (*ESA*). Brown J ordered the defendant employers to pay wrongful dismissal damages to the plaintiff employee based on the common-law right of reasonable notice. The parties had agreed prior to the hearing on a common-law reasonable notice period of 18 months, if the court ruled the employee was wrongfully dismissed.

The defendants argued that the plaintiff's payments from the Canada Emergency Response Benefit (CERB), paid during the COVID-19 pandemic, should reduce her damages. However, Brown J held that CERB payments would not be deducted. Employers of charities and not-for-profits should be aware of the requirements for employment contracts with legally enforceable termination clauses if they seek to limit their employees' rights to reasonable notice, or pay in lieu of such notice.

The plaintiff, Rose Henderson, commenced employment at the oral surgeon office of Drs. Slavkin and Kellner, in 1990. As the surgeons neared retirement in 2015, they offered revised employment contracts to their employees, including Ms. Henderson, who signed the new agreement (the "Employment

Contract"). Dr. Slavkin later retired effective August 26, 2019. The defendants convened a meeting on November 1, 2019 to advise that Dr. Kellner would be retiring in March 2020 and "provided to all staff, including the plaintiff, confirmation in writing of the termination of their employment effective April 30, 2020." The Employment Contract included a Termination Clause in paragraph 13, a Conflict of Interest Clause in paragraph 18, and a Confidential Information Clause in paragraph 19. Ms. Henderson argued that these three paragraphs were unenforceable and contravened the *ESA* and therefore that she was entitled to common-law reasonable notice.

The defendants argued that the impugned paragraphs were *ESA*-compliant and that they afforded sufficient notice according to the *ESA* minimums. While Brown J found the Termination Clause itself compliant with the *ESA*, the other two clauses in paragraphs 18 and 19 were not. As a result, the Employment Contract was invalid, and the Termination Clause unenforceable. Ms. Henderson therefore was entitled to her common law rights of 18 months' reasonable notice, with wrongful dismissal damages as payment in lieu.

During the 18-month reasonable notice period in 2020, Ms. Henderson received approximately $10,000 in CERB payments from the federal government. The defendants argued this amount should be deducted from the wrongful dismissal damages, or else Ms. Henderson would be paid more than if she had not been terminated, creating a "compensable advantage". While recognizing other case law in Ontario and other provinces that deducts CERB from such damages, Brown J distinguished this case, because Ms. Henderson did not cease working due to COVID-19, as her November 1, 2019 notice of termination predated the pandemic, and therefore there was a "real risk that she will be required to repay it, in due course." Ms. Henderson "should not have to bear the risk of not being made whole," Brown J ruled, "especially at her advancing age and after being a loyal and dedicated employee for 30 years — a length of service reflected in the 18-month notice period agreed to by the parties."

9. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

COVID-19 Test Company Stops Unsolicited Emails After OPC Investigation

After the Office of the Privacy Commissioner (OPC) of Canada investigated, a health services company stopped sending marketing emails to travelers arriving in Canada. The OPC announced its findings on its website on August 4, 2022. A case summary was published on May 10, 2022.

A traveler complained to the OPC about the health services company, Biron Groupe Santé (Biron), that was responsible for administering mandatory COVID-19 tests to travelers going through Montreal-Trudeau Airport. Biron collected email addresses from travelers receiving the testing. It then used those emails to send unsolicited advertisements of its other services.

The OPC investigated Biron's actions as a possible violation of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). Biron claimed that it had established a business relationship with those who used its services, and that it could assume that it had their implied consent to send them promotional emails.

The OPC rejected these arguments, pointing out that the service was mandatory and that Biron was the only company offering this service at that airport. This, combined with the fact that the company was collecting sensitive health information, should have indicated to Biron that the relationship between it and the testees was not one where implied consent for secondary marketing purposes would be found.

Biron ceased its marketing activities and deleted information collected through the COVID-19 testing program from its marketing database. As such, the OPC found the matter to be settled.

In the past, the OPC has called for amendments to federal private-sector privacy law to allow the levying of fines for contravention of the Act. The current Bill C-27, *An Act to enact the Consumer Privacy Protection Act*, if passed, would provide for this. As well, Quebec privacy law will allow for monetary penalties starting in 2023.

Though it may be appropriate to rely on implied consent to use personal information in some circumstances, charities and not-for-profits should take into account all the facts relating to how they collected the personal information, as well as the reasonable expectations of affected individuals for the use of their personal information, before using it.

Alberta Credit Union Required to Notify Customers of Employees' Unauthorized Access

Privacy breaches can be a threat even from within an organization, as demonstrated by a February 2022 decision from the Office of the Alberta Privacy Commissioner ("APC").

Between November 2020 and February 2021, four employees of Servus Credit Union Ltd. ("Servus") accessed names, addresses, dates of birth, social insurance/security numbers, and employment/financial information of customers and colleagues (78 in total) without an authorized purpose. The breach was discovered through an internal audit.

In its Breach Notification Decision from February 2022, the APC found that there was a "real risk of significant harm to the individuals affected by this incident." These two conditions: (1) real risk, and (2) significant harm, must be found for the APC to find a violation of Alberta's *Personal Information Protection Act* (PIPA). For significant harm to be established, the breach "must be important, meaningful, and with non-trivial consequences or effects." For real risk to be found "[t]he likelihood that the significant harm will result must be more than mere speculation or conjecture. There must be a cause and effect relationship between the incident and the possible harm."

The APC found that the unauthorized access to financial and contact information could lead to the harms of identity theft or fraud. The unauthorized access to employment information could lead to the harms of personal hurt, humiliation or embarrassment, as well as reputational/relationship damages. The APC considered these harms to constitute "significant harm" within the meaning of PIPA. Servus did not dispute this.

However, Servus denied there was a real risk of harm from the breaches, stating, "[t]here is a low likelihood for harm as the reason for access was curiosity and not malicious intent. In addition, we have confirmed that no information was transferred to personal devices." The APC rejected this argument on the grounds that a reasonable person would be concerned that the likelihood of significant harm is increased because this was a deliberate breach of privacy. Though no information was transferred to personal devices, there was no evidence that the personal information had not been disseminated or disclosed. The chance of real risk was further heightened by the fact that those responsible for the breach had accessed the personal information of their coworkers, individuals to whom they had a personal connection.

As the incident resulted in a real risk of significant harm to the affected individuals, the APC decided that the organization was required to notify them in accordance with PIPA.

As Servus had already contacted the affected individuals and provided written notice of the violation, no further action was required.

This decision demonstrates that organizations must be vigilant against internal privacy breaches. The common conception of a privacy breach is one that originates from outside an organization, but violations of privacy law by employees can be just as harmful. For more information, see *Online Privacy and Cybersecurity Issues for Charities and NFPs*, by Esther Shainblum.

Saskatchewan Should Enact Privacy Legislation Similar to B.C. or Alberta: Commissioner

Saskatchewan's privacy commissioner decided it does not have jurisdiction to investigate a situation in which a private non-profit organization disclosed a street worker's personal information without their consent, because it was not caught within the scope of existing privacy legislation in the province.

On September 6, 2022, the Saskatchewan Office of the Information and Privacy Commissioner ("SPC") published its report, *Ministry of Social Services, Street Worker's Advocacy Project*, concerning a complaint from a client (the "Complainant") regarding a non-profit, the Street Worker's Advocacy Project (SWAP). The Saskatchewan Ministry of Social Services (the "Ministry") sent an access of information request to SWAP, which was granted. The relayed information included personal details about the Complainant, who then submitted a complaint to the Ministry, but did not receive a response. She then submitted a complaint to the SPC, alleging a breach of privacy by SWAP in their disclosure of her personal information.

The SPC found that, the matter was outside the SPC's jurisdiction because SWAP was neither a government institution within the meaning of *The Freedom of Information and Protection of Privacy Act* (FOIP) in Saskatchewan or a health trustee within the meaning of *The Health Information Protection Act* (HIPA).

The SPC concluded that Saskatchewan's privacy law regime should be updated to reflect the *Personal Information Protect Act* of British Columbia or Alberta, in which non-profit organizations are partially — in the case of Alberta — or fully subject to provincial privacy legislation.

As we have mentioned in previous publications, even if a charity or not-for-profit is not subject to specific privacy legislation, violations of privacy can give rise to damage awards, tort claims and class action litigation. For this reason, charities and not-for-profits should follow privacy best practices to mitigate the risk of a privacy breach and to meet stakeholder awareness and expectations around privacy, transparency and accountability.

10. What Canadian Charities & NFPs Need to Know about the U.S. *Foreign Agents Registration Act*

By Terrance S. Carter and LaVerne Woods

Anyone who acts on behalf of a "foreign principal" to influence policy or public opinion or engage in "political activities" in the United States may be required to register as an "agent of a foreign principal"

under the U.S. *Foreign Agents Registration Act* ("FARA"). While this piece of legislation has existed for over 80 years (dating back to 1938), the U.S. Justice Department has reportedly been ramping up enforcement under FARA in recent years. This means that Canadian charities, NFPs, and activists involved in policy work in the United States should be aware of the act's broad reaching language that could potentially be interpreted to apply to them or organizations funded by them.

When the term "foreign principal" is used in FARA, it is so broad that it could refer to not only foreign governments, but also to foreign individuals, companies, foundations, charities, NFPs, or other entities. A person could be considered an "agent of a foreign principal" if they act at the request of or are financed in major part by a foreign principal. Of interest to Canadian charities is the language found at 22 U.S.C. § 611(c)(1) which says that an agent of a foreign principal could also include any person "under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled … in whole or in major part by a foreign principal". Since Canadian charities are required by the *Income Tax Act* (Canada) to conduct their own activities by directing and controlling third party intermediaries that receive funds from the charity, there may be grounds for the U.S. Justice Department to find that a Canadian charity's intermediary operating in the U.S. (such as a 501(c)(3) organization) is acting as an agent of a foreign principal. In addition to the above definitions, "political activities" can include "any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency of official of the Government of the United States or any section of the public within the United States".

Because of these broad definitions, in a March 2020 advisory opinion, the Justice Department, found that FARA applied to a U.S. non-profit organization focused on environmental conservation that received a grant from a foreign government agency to serve as a general contractor for the implementation of a program focused on environmental issues. In that particular case, it was enough that the U.S. non-profit organization had met occasionally with officials of the U.S. government for FARA to apply. In a November 2019 advisory opinion, the Justice Department also found that FARA applied to a U.S. religious organization that helped prepare banners for foreign attendees of a March for Life rally, though there were also political activity considerations at play in this decision, such as the potential for meetings between foreign foundation members or foreign government officials and U.S. government officials. In light of these examples, and others not included in this article, charities, NFPs and activists in Canada working through third-party intermediaries in the U.S. should consider discussing with Canadian and U.S. legal

counsel the possibility that the third party intermediary in the U.S. may need to register under FARA and to discuss the risks of failing to do so.

11. Transitioning and Congregational Restructuring: Civil Law Issues to Consider

A handout is now available from a presentation given by Terrance S. Carter on the topic of *Transitioning and Congregational Restructuring: Civil Law Issues to Consider* at the Association of Treasurers of Religious Institutes Annual Conference, on September 24, 2022 in Moncton. The handout will be of interest for Catholic and other religious organizations having to deal with governance transitioning and corporate restructuring of civil law entities as a result of a reduction in members.

12. Chambers and Partners Rankings 2023

Carters has been ranked as one of only seven Canadian law firms under Charities/Non-profits law by Chambers and Partners, an international lawyer ranking service. In addition, Terrance S. Carter, Theresa L.M. Man and Esther Shainblum have been ranked, reviewed and listed on the Chambers and Partners website.

IN THE PRESS

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

Draft Budget Implementation Legislation written by Terrance S. Carter, Theresa L.M. Man and Jacqueline M. Demczur was featured in the OBA Charity & Not-for-Profit Law Section Insider on August 31, 2022. The article was divided into three parts as follows:

- Part I, Disbursement Quota
- Part II, Updated Reporting Requirements for Trusts
- Part III, Other Updates

RECENT EVENTS AND PRESENTATIONS

Update on Key Developments in the Law in Canada Affecting Charities was co-presented by Terrance S. Carter and Robert Hayhoe at the American Bar Association (ABA) Tax Exempt Organizations Committee meeting held on September 8, 2022.

Employment Law 101 for Charities was hosted by the Canadian Centre for Christian Charities (CCCC) on September 21, 2022. Barry W. Kwasniewski participated in this panel discussion.

Transitioning and Congregational Restructuring: Civil Law Issues to Consider was presented by Terrance S. Carter at the Association of Treasurers of Religious Institutes Annual Conference, on September 24, 2022 in Moncton.

UPCOMING EVENTS AND PRESENTATIONS

Philanthropic Foundations of Canada Annual Conference hosted by PFC will be held on Monday, October 3, 2022, in Montreal, Quebec. Terrance S. Carter will participate as part of a panel on Impact Investing being moderated by Senator Omidvar.

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

CSAE National Conference – Reunite hosted by the Canadian Society of Association Executives (CSAE) will be held October 19 to 21, 2022 in Halifax, Nova Scotia. Sepal Bonni and Terrance S. Carter will present on the topic of Essential Elements of an Effective Brand Strategy on Thursday, October 20, 2022.

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 EDT. Brochure and Online Registration available at 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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