CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CHARITY & NFP LAW UPDATE

JANUARY 2023

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

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

JANUARY 2023

SECTIONS

Recent Publications and News Releases 2
In the Press 16
Recent Events and Presentations 16
Upcoming Events and Presentations 16
Contributors 17

HIGHLIGHTS

1. Draft Qualifying Disbursement Guidance Poses Practical Challenges for Charities
2. CRA News
   - No Requirement for Charities to Report Granting Activities until T3010 and T4033 are Updated, Provided that Adequate Books & Records are Kept
   - Charities Directorate Provides Updated Instructions for My Business Account Sign Up
3. Legislation Update
   - Federal Bill C-32, *Fall Economic Statement Implementation Act, 2022* Receives Royal Assent
   - Ontario Bill 26, *Strengthening Post-secondary Institutions and Students Act, 2022* Receives Royal Assent
   - New Brunswick Bill 19, *Fiduciaries Access to Digital Assets Act*
4. Corporate Update
   - Saskatchewan *Non-Profit Corporations Act, 2022* Coming into Force
5. Canada's Taxpayers' Ombudsperson Makes Statement on His Review of CRA's Treatment of Muslim Charities
6. Copyright Protection Term Extended by 20 Years
7. Court Criticizes Religious Organization for Statutory Non-Compliance Despite Lack of Breach
8. Employment Update
   - Contractor Ruled to be an Employee, Awarded Termination Damages by Ontario Court
   - Ottawa Extends EI Sick Benefits Permanently
9. Privacy Law Update
   - Negligent Security of Personal Data does not 'transform' into Invasion of Privacy: Court
10. ATF/AML Update
    - FINTRAC Publishes Operational Alert Regarding Financing Terrorism
    - Standing Senate Committee on Human Rights Makes Recommendations Regarding Afghanistan
    - UNSC Adopts Resolution on Humanitarian Carve-Out

RECENT PUBLICATIONS AND NEWS RELEASES

1. Draft Qualifying Disbursement Guidance Poses Practical Challenges for Charities

By Terrance S. Carter, Theresa L.M. Man and Lynne M. Westerhof

The federal budget, released on April 7, 2022 ("Budget 2022"), proposed to allow a charity to provide its resources to organizations that are not qualified donees with the intention that these changes would "implement the spirit of Bill S-216." Bill S-216 was a bill that garnered significant support from the charitable sector and was based on the premises that charities must be able to operate efficiently when devoting their resources to charitable activities, must be held to reasonable standards in the proper use of their resources, and should promote local capacity-building and collaborative decision-making in the communities with whom they work. However, early drafts of Bill C-19, the *Budget Implementation Act, 2022, No. 1*, contained prescriptive regulations that would have imposed onerous documentation and other requirements for charities. In response, the charitable sector successfully advocated to have these restrictions removed from the final version of the bill.

Now, with the introduction of the guidance CG-032 "Registered charities making grants to non-qualified donees (draft)" ("Draft Guidance") on November 30, 2022, (for which feedback is being sought by January 31, 2023) there are again concerns that the Canada Revenue Agency's ("CRA") application of the qualifying disbursement legislation will result in onerous requirements for the charitable sector. It is doubtful whether the combined effect of the new regime in the *Income Tax Act* ("ITA") and the enforcement framework in the Draft Guidance will give the charitable sector a regime that is truly in "the spirit of Bill S-216."

This Bulletin explains some of the practical challenges for charities posed by the Draft Guidance and identifies aspects of the Draft Guidance that do not appear to be in step with the spirit of Bill S-216 or even the qualifying disbursement provisions in the ITA.

To read more, please see *Charity & NFP Law Bulletin No. 519*.

2. CRA News

By Jacqueline M. Demczur

No Requirement for Charities to Report Granting Activities until T3010 and T4033 are Updated, Provided that Adequate Books & Records are Kept

As reported in this month's *Charity & NFP Law Bulletin No. 519* (above), the CRA Charities Directorate released its Draft Guidance for charities making grants to non-qualified donees on November 30, 2022. The CRA published an email announcement on January 26, 2023, noting that while the new rules for making grants to non-qualified donees have been in effect since June 23, 2022, Form T3010, Registered Charity Information Return, and the accompanying guide T4033, have not yet been updated to reflect these rules. The CRA expects updated versions of form T3010 and guide T4033 to be available sometime in the spring of 2023. Accordingly, "[u]ntil the form and guide are updated, you are not required to report your granting activities", the CRA stated,

> You must, however, keep adequate books and records to support all granting activities. Your books and records must contain enough information to allow the CRA to assess whether your charity is operating in accordance with the Income Tax Act.

For more information on these rules, the CRA is directing readers to see the Draft Guidance.

Charities Directorate Provides Updated Instructions for My Business Account Sign Up

The CRA Charities Directorate has provided in-depth instructions to sign up for My Business Account ("MyBA"). MyBA is a portal which allows charities, not-for-profits, amateur athletic associations and registered national arts service organizations to register for official status, complete T3010 annual information returns and other required submissions, update the Charities Directorate about their status, or communicate with the Charities Directorate about any other matter.

The updated instructions come after a period of consultation with the public regarding the online portal. As the Charities Directorate is now seeking feedback regarding the instructions, comments can be left at the bottom of the page under the heading "Did you find what you were looking for?"

3. Legislation Update

By Terrance S. Carter and Adriel N. Clayton

Federal Bill C-32, *Fall Economic Statement Implementation Act, 2022* Receives Royal Assent

The *Fall Economic Statement Implementation Act, 2022* ("Bill C-32"), an act which implements certain provisions from the Fall Economic Statement and the April 2022 Federal Budget, received Royal Assent on December 15, 2022. Bill C-32 introduces several changes that are relevant to charities, namely, an increased disbursement quota of 5% for eligible property held by charities in excess of $1 million, expanded audit powers for the CRA, and expanded trust reporting requirements.

For further details about the changes introduced by Bill C-32, see *Charity & NFP Law Bulletin No. 517* and *Charity & NFP Law Bulletin No. 515*.

Ontario Bill 26, *Strengthening Post-secondary Institutions and Students Act, 2022* Receives Royal Assent

Bill 26, *Strengthening Post-secondary Institutions and Students Act, 2022* received Royal Assent on December 8, 2022. As reported in the *November 2022 Charity & NFP Law Update*, the bill will 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 an act of sexual misconduct towards a student.

New Brunswick Bill 19, *Fiduciaries Access to Digital Assets Act*

A new piece of legislation in New Brunswick, Bill 19, *Fiduciaries Access to Digital Asset Act*, which received Royal Assent on December 16, 2022, will grant trustees rights to access digital assets while also imposing fiduciary obligations in relation to these assets. The Act will also have application to charities and not-for-profits and any digital assets, such as cryptocurrency, that they may hold.

According to the Act, a digital asset can be "a record that is created, recorded, transmitted or stored in digital or other intangible form" by various means. The Act contemplates situations in which an account holder might choose to enter into a service agreement with a custodian, such that the custodian will hold or process the account holder's digital assets. When this happens, a fiduciary of the account holder (such as a trustee) will have the right to access these assets, subject to any instructions from the account holder, despite any other law or choice of law provisions in the service agreement that would limit the fiduciary's access.

4. Corporate Update

By Theresa L.M. Man

Saskatchewan *Non-Profit Corporations Act, 2022* Coming into Force

The Saskatchewan *Non-Profit Corporations Act, 2022* (the "New Act") will come into force on March 12, 2023. Order in Council 541/2022 was signed on December 7, 2022, and fixes March 12, 2023 as the date when the New Act will come into force, save and except for subsection 6-4(5) concerning manual signatures on certain security certificates.

As reported most recently in the *June 2022 Charity & NFP Law Update*, once in force, the New Act will replace Saskatchewan's current *Non-profit Corporations Act, 1995*. The New Act updates provisions for boards of trade and chambers of commerce; removes certain notice and filing requirements with the registrar; permits corporate names to be in Cree, Dene, or other prescribed Indigenous languages; expressly permits the use of electronic technologies, such as sending financial statements electronically and holding electronic meetings; removes the current requirement that at least 25% of directors be Canadian residents; and removes the registrar's ability to appoint non-accountants to conduct audits or reviews, while allowing for increased dollar thresholds for mandatory audits or review requirements.

As well, *The Non-profit Corporations Consequential Amendments Act, 2022* (the "Amending Act") will come into force on the same date as the New Act. The Amending Act makes consequential amendments to other legislation, including *The Business Corporations Act, 2021*, *The Business Names Registration Act*, and *The Charitable Fund-raising Businesses Act*, among others. Broadly speaking, these amendments are housekeeping in nature.

Order in Council 555/2022 was also signed on December 7, 2022, and similarly fixes March 12, 2023 as the date for new regulations under the New Act to come into force. SR 92/2022, The Non-profit Corporations Regulations, 2022 (the "New Regulations") were published in the *Saskatchewan Gazette* on December 16, 2022, and will repeal and replace the current Non-profit Corporations Regulations, 1997 as of March 12, 2023. Broadly speaking, the New Regulations set out rules regarding corporate registry notices and documents, corporate names, and financial statements, audits and reviews. They also set out details for various matters prescribed in the New Act.

5. Canada's Taxpayers' Ombudsperson Makes Statement on His Review of CRA's Treatment of Muslim Charities

By Terrance S. Carter and Ryan M. Prendergast

Following his appearance before the Senate Committee on Human Rights, the Taxpayers' Ombudsperson, François Boileau, provided a statement on November 21, 2022 (the "Statement") regarding the progress of the review of the CRA's treatment of Muslim charities. The Office of the Taxpayer's Ombudsperson (the "Office") was asked to review the CRA's practices after allegations of systemic anti-Islamic bias and discrimination arose in 2021, as reported in our *February 2022 Charity and NFP Law Update*.

The Ombudsperson was asked by the Minister of National Revenue to scrutinize the selection of files chosen by the CRA's Review and Analysis Division, the quality of service in interactions between the CRA and Muslim charities, and anti-bias training within the CRA.

One of the main concerns of the investigation is the auditing of Muslim charities. Issues include the selection process for audits, their conduct, equity during the audit process, transparency, communication with charities being audited, and the timeliness and fairness of their outcome.

The Ombudsperson expressed confidence in the Office's ability "to assess the existing policies and practices related to services", in his Statement, and that he believes in their ability to answer questions related to CRA practices and anti-discrimination policy. However, Boileau stated that it would be "impossible for us to validate" certain aspects of the CRA's practices because of legislation and CRA policy.

Section 241 of the *Income Tax Act* prevents the CRA from sharing aspects of taxpayer information, even with the subject's consent. Furthermore, the CRA's current practice is not to disclose certain information, particularly regarding its risk assessment process, invoking national security concerns as a justification. For this reason, the Ombudsperson stated that the Office may not succeed in analysing the CRA's audit selection process:

> To be clear, some of the participants told us that they felt they had been unfairly selected for audit purposes. Some indicated that they sometimes felt intimidated, and many described the process as tedious. However, we cannot verify these alleged facts without having access to complete taxpayer files.

Despite the obstacles to completing their original goal, the Office has committed to having a report to the Minister of National Revenue ready for the stated deadline of March 2023.

This appears to be an unfortunate example of the federal government hampering an independent, fact-finding investigation. The issue of possible systemic bias within the CRA is a dire issue for many registered charities, and it is disappointing to see legislative provisions concerning privacy for taxpayer information being used as a shield by the government when there are serious allegations that need to be investigated.

6. Copyright Protection Term Extended by 20 Years

By Sepal Bonni

As of December 30, 2022, the general term of Canadian copyright protection changed from the life of the author plus 50 years, to the life of the author plus 70 years, therefore increasing the term of copyright protection by 20 years.

As previously reported in *Charity and NFP Law Bulletin No. 433*, this long-awaited amendment fulfills one of Canada's obligations under the *Canada-United States-Mexico Agreement*. Many other industrialized jurisdictions have a 70-year term, including the UK, EU and Japan. Section 6 of the *Copyright Act* is the key provision, stating that: "Except as otherwise expressly provided by this Act, the term for which copyright subsists is the life of the author, the remainder of the calendar year in which the author dies, and a period of 70 years following the end of that calendar year."

For works with multiple authors, the term of 70 years begins upon the death of the last-living author. Previously, amendments were made for longer terms of protection for anonymous and pseudonymous works.

The extension in the term of copyright is not retroactive and therefore will not impact works that were in the public domain before the amendments came into force on December 30, 2022.

7. Court Criticizes Religious Organization for Statutory Non-Compliance Despite Lack of Breach

By Ryan M. Prendergast

Religious organizations can be scrutinized by the courts, even when they have not committed statutory infractions. This is the lesson that the Ontario Superior Court of Justice imparted in *Athesivan v. Canada Shri Muththumaari Amman Temple* ("*Athesivan*").

Athesivan, which was heard on November 16, 2022, concerned a dispute between the leadership of a Hindu temple and its members. The Canada Shri Muththumaari Amman Temple is a Hindu Temple in Toronto which serves the local Tamil community. It was incorporated as a not-for-profit corporation under the *Corporations Act* (Ontario) (the "OCA"), and is governed as of October 2021 by the Ontario *Not-For-Profit Corporations Act, 2010* (the "ONCA"). The ONCA did not apply at the time of the dispute in 2019, and so the court only considered the implications of the OCA in this decision. As a corporation which exists for charitable or religious purposes, the temple is considered a trust under the *Charities Accounting Act* (though it is not a registered charity with the CRA). Therefore, directors have a fiduciary duty to ensure that the interests of the trust are properly addressed.

This was an application, in which the applicants sought the court appointment of a monitor over the temple and a freezing of the temple's assets, based on allegations of breach of trust by the respondents. The respondents were current or former directors and officers of the temple, who argued that they were the legitimate leadership of the organization.

There was no evidence supporting the supposed misappropriation of funds claimed by the applicants, or alleged non-compliance with the governing documents of the corporation. The court found that almost all the accusations against the respondents were "unsubstantiated", and had caused the assets of an innocent organization to be frozen during the litigation process.

However, the court did criticize the board for not properly following the requirements under the OCA, stating that:

> In making this decision, I'm not blessing the temple's failure to abide by appropriate corporate governance rules. Though a nonprofit run by volunteers should not be held to the standard of a public company with a professional board, the directors must not forget that our law makes them fiduciaries of the members' trust.

The case serves as a reminder that it is best practice for charities and not-for-profits to be vigilant in their compliance with both their governing documents and incorporating legislation, even when failure to do so does not rise to the level of breach of trust or breaking statutory provisions.

8. Employment Update

By Barry W. Kwasniewski and Martin U. Wissmath

Contractor Ruled to be an Employee, Awarded Termination Damages by Ontario Court

A decision of the Ontario Superior Court of Justice released on October 26, 2022, *Baker v Fusion Nutrition Inc.*, 2022 ONSC 5814 ("*Baker*"), provides a review of the legal principles relating to employee versus independent contractor status, and damages for pay in lieu of notice arising from the termination of fixed term employees. In *Baker*, the court awarded over $64,000 in damages including for pay in lieu of reasonable notice. *Baker* reminds employers that they cannot contract out of the minimum standards in Ontario's *Employment Standards Act, 2000* (the *ESA*), including for fixed-term employment contracts, and if termination provisions are found unenforceable, the court could award damages based on common law principles. In *Baker*, the court held that the employer miscategorized the plaintiff as an independent contractor, finding that the plaintiff was in fact an employee, and therefore the contract needed to comply with the *ESA*. This case, and others like it, remind employers of charities and not-for-profits to draft carefully worded termination clauses in employment contracts, and to ensure that anyone providing services is not miscategorized as an independent contractor with inadequate termination clauses that could be struck down by a court.

Whether or not someone is an employee, which entitles them to minimum standards under the *ESA*, or an independent contractor, is a "factual question to be determined on the evidence" the court stated. Although the plaintiff's contract with the defendant clearly described him as an independent contractor, that is "not determinative of the nature of his status". Citing precedent case law, the court noted the following principles to distinguish independent contractors from employees:

> 1. Whether or not the agent was limited exclusively to the service of the principal;
>
> 2. Whether or not the agent is subject to the control of the principal, not only as to the product sold, but also as to when, where and how it is sold;
>
> 3. Whether or not the agent has an investment or interest in what are characterized as the "tools" relating to his service;
>
> 4. Whether or not the agent has undertaken any risk in the business sense or, alternatively, has any expectation of profit associated with the delivery of his service as distinct from a fixed commission;
>
> 5. Whether or not the activity of the agent is part of the business organization of the principal for which he works. *In other words, whose business is it?* [Emphasis added.]

On the facts in *Baker* (which was a default judgment because the defendant did not respond to the statement of claim, and therefore the plaintiff's pleadings were deemed admissions of the defendant) the court found that the plaintiff met the criteria to be classified as an employee. The court found that the plaintiff's primary income was from the defendant, for which he worked full-time hours out of the defendant's head office and under the defendant's control, without hiring his own helpers, holding himself out as a representative of the defendant's company, and with no opportunity for profit for the performance of his work tasks. The court inferred that the plaintiff would not have assumed a financial risk. Because he was found to be an employee, the contract was not legally enforceable, including the termination clause.

The termination provisions of the contract included the following clause:

> 4.1 Termination for Cause: Both parties may terminate this Agreement at any time without notice of further payment/provisions of services if either is in breach of any of the terms of this Agreement.

Under the *ESA* sections 54 and 55, termination pay "must be given for all terminations, even those for a just cause," the court stated, except for certain prescribed employees by regulation. Ontario Regulation 288/01: *Termination and Severance of Employment* lists the employees that are not entitled to notice of termination or termination pay in subsection 2(1), which includes, "An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." However, the defendant's termination clause in *Baker* did not specify wilful misconduct, and for that reason was not *ESA* compliant, according to the court. Citing precedent from the Ontario Court of Appeal, "absent an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, an employer must pay a terminated fixed-term employee to the end of the contract term." The court awarded the plaintiff a total of $54,283.56 for the balance of his contract term, plus unpaid wages, vacation and holiday pay.

Ottawa Extends EI Sick Benefits Permanently

For employment insurance claims on or after December 18, 2022, potential benefits have been extended from 15 weeks to 26 weeks. Carla Qualtrough, Minister of Employment, Workforce Development and Disability Inclusion, announced the extension on November 25, 2022 (the "Announcement"). The federal government launched consultations on the employment insurance (EI) program in August 2021 and included a commitment to extend the sickness benefit in its 2022 Budget. EI sickness benefits are paid at 55% of an applicant's average weekly insurable earnings, up to a maximum entitlement of $650 per week for 2023. According to the Announcement, EI sickness benefits "are designed as a short-term income

replacement measure and will continue to complement" other supports "for longer-term illnesses and disabilities, including the Canada Pension Plan Disability benefit, and benefits offered through private and employer insurance, as well as supports provided by provinces and territories."

9. Privacy Law Update

By Esther Shainblum and Martin U. Wissmath

Negligent Security of Personal Data does not 'transform' into Invasion of Privacy: Court

An organization that fails to adequately protect the personal data entrusted to it may be liable for negligence, breach of contract or violation of a privacy law statute, according to the Ontario Court of Appeal, but that does not mean the organization itself is liable for an invasion of privacy when they are the victim of a cyberattack. The Ontario Court of Appeal heard three appeals, published on November 25, 2022, for certification of class action lawsuits seeking to claim the tort of intrusion upon seclusion against defendant organizations whose commercial databases were hacked for personal information of customers (the "Three Appeals"). The Court of Appeal found there was no cause of action and reasons for dismissing the Three Appeals were written in the decision for *Owsianik v Equifax Canada Co*. More fact-specific additional reasons were included in *Obodo v Trans Union of Canada, Inc.*, and in *Winder v Marriott International, Inc.* The court's judgment is relevant to charities and not-for-profits that keep a database of personal information, such as for members or donors.

The privacy tort of intrusion upon seclusion was first recognized by the Ontario Court of Appeal in *Jones v Tsige*, where "the defendant repeatedly accessed the private banking records of the plaintiff, the former wife of the defendant's common-law partner, without lawful justification." There are three requirements for the tort of intrusion upon seclusion:

- the defendant must have invaded or intruded upon the plaintiff's private affairs or concerns, without lawful excuse [the conduct requirement];
- the conduct which constitutes the intrusion or invasion must have been done intentionally or recklessly [the state of mind requirement]; and
- a reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation or anguish [the consequence requirement].

In the Court of Appeal's analysis for the Three Appeals, there was no viable cause of action for intrusion upon seclusion, as the alleged intrusions were committed by "unknown third-party hackers, acting independently from, and to the detriment of, the interests of the Database Defendants." According to the

court, the claim already failed at the "fundamental level" of the conduct requirement, because it was not the Database Defendants' conduct, but rather the conduct of independent hackers, that invaded the privacy of the plaintiffs. "Negligence cannot morph or be transformed into an intentional tort" the court stated, and the "inability to successfully sue the hacker is no reason to make a Database Defendant liable, not only for its own wrongdoing, but also for the invasion of privacy perpetrated by the hacker." As stated by the court in *Owsianik*:

> Moral damages are awarded to vindicate the rights infringed, and in recognition of the intentional harm caused by the defendant. These purposes are served only if the damages are awarded against the actual wrongdoer, that is the entity that invaded the privacy of the plaintiff [paragraph 77].

The court noted that the plaintiffs had remedies available against the Database Defendants – namely claims for breach of contract, negligence, or breach of a statute. If these are inadequate to encourage Database Defendants to take all reasonable steps to secure data in their control, it is, according to the court, for Parliament and provincial legislatures to expand protections under privacy law to create more effective remedies.

Although these cases suggest that charities and not-for-profits targeted by cybercriminals will not be found liable for the tort of intrusion upon seclusion, they should ensure that they diligently learn and apply industry best practice standards for securing personal information in databases under their control. Charities and not-for-profits may still be held liable in negligence, breach of contract or breach of a statute, if they are the target of hackers who bypass insufficient security measures to access their data.

10. ATF/AML Update

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

FINTRAC Publishes Operational Alert Regarding Financing Terrorism

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) published an Operational Alert entitled "Terrorist Activity Financing" on December 15, 2022. The purpose of this new document is "to assist businesses subject to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* in identifying and reporting suspicious transactions and terrorist property to FINTRAC."

The report warns business that funding for terrorism can come from laundered money, sourced from illegal activities like the arms and drug trade, but funding can also come from seemingly legitimate sources.

Analysis by FINTRAC determined three classifications of terrorist activity which were receiving funding from Canada: domestic terrorists, international terror groups, and Canadian extremist travelers ("CETs"), i.e. Canadian residents who travel in support of international terrorism. There are currently 77 terrorist entities listed under the *Criminal Code*. The motivations for these groups have been broken down by FINTRAC into three categories – religious, political and ideological. FINTRAC cites ideological terrorism as the newest and most prominent form. It is distinguished from political terrorism by its decentralized nature, with little affiliation and communication between groups.

According to the report, most funding of international terrorism went to ISIL (Da'esh) and Hezbollah. Money sent to the Islamic State was primarily laundered through Turkey, especially to towns near the Turkish/Syrian border. Funds to Hezbollah were often laundered through the sale of automobiles to Lebanon. Other common destinations of these funds were Iraq, Pakistan, Syria, United Arab Emirates, and Yemen. Most transactions involved money service businesses.

The Operational Alert includes tips on identifying business relations which intend to become CETs. Individuals in the "pre-departure phase" are known to deplete their accounts before departing overseas. Accounts which have not been depleted often see the withdrawal of funds or spending on credit cards along "known travel corridors to a conflict zone or location of concern." Accounts subsequently go dormant while the CET is "in-theater". CETs often receive/give seemingly random transfers between themselves and third-parties. Some individuals who intended to become CETs but then decide against travel for extremism purposes have telltale transactions such as retuned airline tickets.

FINTRAC reminds Canadians that proof of terrorist activity financing is not required to make a report, though they ask that those considering making a report "must reach reasonable grounds to suspect that a transaction, or attempted transaction, is related to terrorist activity financing before they can submit a suspicious transaction report to FINTRAC." A list of "red flags" for entities to be aware of can be found in the report.

Those who wish to submit a report about suspicious activity can do so by submitting a terrorist property report to FINTRAC. A disclosure is needed when the reporter knows of that property in their possession or control is "owned or controlled by or on behalf of a terrorist or a terrorist group" or when they are aware of a transaction or proposed transaction involving such property. Property can be tangible, intangible or any form of currency/currency like asset (cryptocurrency, casino chips, precious metals).

Standing Senate Committee on Human Rights Makes Recommendations Regarding Afghanistan

The Standing Senate Committee on Human Rights released a report, "Interim Report on Canada's Restrictions on Humanitarian Aid to Afghanistan" (the "Report"), criticizing the federal government for failing to consider measures needed to exempt some Canadian organizations wishing to provide humanitarian aid in Afghanistan more than two months after agreeing that it should act immediately on that issue. The Report, released December 14, 2022, explains certain background information on the humanitarian situation in Afghanistan, international sanctions against the Taliban and humanitarian exceptions to those sanctions. It also highlighted the questions of various leaders of Canadian NGOs, including how allowing children to starve or freeze to death could be justified in any way.

One of the recommendations discussed in the Report was for the federal government to provide an assurance of non-prosecution to Canadian organizations seeking to provide vital humanitarian aid in good faith. A second recommendation was that the Attorney General of Canada "urgently consult with provincial counterparts" to seek guarantees that proceedings will not be commenced under section 83.03(b) of the *Criminal Code* in cases where legitimate humanitarian aid, absent any terrorist intent, results in an incidental benefit to a terrorist group. Other recommendations included that the Department of Justice should immediately publish its position on the scope of section 83.03(b) and introduce legislation to create an explicit humanitarian exemption to section 83.03(b). Finally, the Report concludes with a recommendation that the federal government "urgently increase its humanitarian assistance to Afghanistan and neighbouring countries, and continue to ensure that reasonable steps are taken to minimize the accrual of benefits to the Taliban."

UNSC Adopts Resolution on Humanitarian Carve-Out

Various measures have been passed to ease the provision of humanitarian assistance and support for basic human needs. In response to the unintended "adverse humanitarian consequences for civilian populations [and] adverse consequences for humanitarian activities or those carrying them out" that can be brought about by sanctions regimes, the United Nations Security Council adopted Resolution 2664 (2002) on December 9, 2022. In providing relief, Resolution 2664 establishes a "humanitarian carve-out" (also known as a standing humanitarian exception or exemption) to UN sanctions regime-imposed asset freeze measures.

UN Member States are required to comply with the UN sanctions regime by freezing assets of designated individuals, groups, undertakings, and entities. However, Resolution 2664 carves out an exception to this general rule and states that:

> the provision, processing or payment of funds, other financial assets, or economic resources, or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs … are permitted and are not a violation of the asset freezes imposed by [the] Council or its Sanctions Committees.

Of particular note, the humanitarian carve-out applies to the UN sanctions regime against ISIL (Da'esh) and Al-Qaida for two years. Resolution 2664 also requests those relying on the humanitarian carve-out to "use reasonable efforts to minimize the accrual of any benefits prohibited by sanctions, whether as a result of direct or indirect provision or diversion" to sanctioned parties, by "strengthening risk management and due diligence strategies and processes".

Shortly after, the United States Department of Treasury's Office of Foreign Assets Control (OFAC) took steps to implement Resolution 2664 across the United States' sanctions programs, according to an OFAC press release on December 20, 2022. In this regard, OFAC issued and amended general licenses ("GLs") to "ease the delivery of humanitarian aid and ensure a baseline of authorizations for the provision of humanitarian support across many sanctions programs". Issued and amended GLs include:

- the official business of the U.S. government;
- the official business of certain international organizations and entities, such as the United Nations or the International Red Cross;
- certain humanitarian transactions in support of nongovernmental organizations' (NGOs') activities, such as disaster relief, health services, and activities to support democracy, education, environmental protection, and peacebuilding; and
- the provision of agricultural commodities, medicine, and medical devices, as well as replacement parts and components and software updates for medical devices, for personal, non-commercial use.

For further guidance on OFAC's implementation of Resolution 2664, including guidance for financial institutions facilitating activity for non-governmental organizations and OFAC's due diligence expectations, OFAC also concurrently released a set of Frequently Asked Questions.

IN THE PRESS

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

BILL C-19 Amended to Simplify Funding of Non-Qualified Donees written by Terrance S. Carter and Theresa L.M. Man was featured in the November 2022 issue of Amplify magazine.

RECENT EVENTS AND PRESENTATIONS

Transition Challenges under the ONCA was presented by Theresa L.M. Man on Wednesday, December 7, 2022 at a webinar hosted by the Alliance for a Grand Community.

Top Five Risk Management Tips for Associations was presented by Terrance S. Carter at the Peak Leadership Summit hosted by OREA on January 19, 2023.

UPCOMING EVENTS AND PRESENTATIONS

Canadian Centre for Christian Charities (CCCC) will host a webinar entitled Making Grants and the New Rules for Charities on February 8, 2023. Terrance S. Carter will participate on this panel discussion with Rhys Volkenant, Associate, De Jager Volkenant, and John Clayton, Director of Programs and Projects, Samaritan's Purse Canada.

2023 Carters Spring Charity & Not-for-Profit Law Webinar, hosted by Carters Professional Corporation, will be held on **Thursday, March 2, 2023** from 9:00 am to 12:45 pm EDT. Brochure and Online Registration available at www.carters.ca

CONTRIBUTORS

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

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

Terrance S. Carter, B.A., LL.B, TEP, Trademark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 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.

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

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

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

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

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

Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law, is ranked by *Lexpert*, *Best Lawyers in Canada*, and *Chambers and Partners*, and received the 2022 OBA AMS/John Hodgson Award of Excellence in Charity and Not-For-Profit Law. She is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is a former member of the Technical Issues Working Group of the CRA Charities Directorate, a member and former chair of the CBA Charities and Not-for-Profit Law Section and the OBA Charities and Not-for-Profit Law Section. Ms. Man has also written on charity and taxation issues for various publications.

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

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

Martin 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 BA 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.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

Links not Working: If the above links do not work from your mail program, simply copy the link text and paste it into the address field of your internet browser.

Get on Our E-Mailing List: If you would like to be added to our electronic mailing list and receive regular updates when new materials are added to our site, click here or send an email to info@carters.ca with "Subscribe" in the subject line. Feel free to forward this email to anyone (internal or external to your organization) who might be interested.

Privacy: We at Carters know how important your privacy is to you. Our relationship with you is founded on trust and we are committed to maintaining that trust. Personal information is collected solely for the purposes of: establishing and maintaining client lists; representing our clients; and to establish and maintain mailing lists for the distribution of publications as an information service. Your personal information will never be sold to or shared with another party or organization. For more information, please refer to our Privacy Policy.

Disclaimer: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish the solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

CARTERS PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE CARTERS

PARTNERS:

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

ASSOCIATES:

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

STUDENT-AT-LAW

Cameron A. Axford, B.A., J.D.	caxford@carters.ca

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

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

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