

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

OCTOBER 2023

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PUBLICATIONS & NEWS RELEASES

1. No Relief Likely from Finance for the New Trust Reporting Requirements for Charities

By [Terrance S. Carter](#), [Theresa L.M. Man](#) and [Jacqueline M. Demczur](#)

As we have reported on since June 2023, charities in Canada will unfortunately be faced with having to file separate T3 returns by March 30, 2024, for each internal express trust (such as endowments, scholarships and restricted building funds to name a few) or face significant penalties as a result of the passage of [Bill C-32, the *Fall Economic Statement Implementation Act, 2022*](#) in December 2022. For a detailed explanation of what the new trust filing obligations involve, please refer to our [Charity and NFP Law Bulletin No. 522](#), as well as to the ongoing updates in our *Charity & NFP Law Update* in both [August 2023](#) and [September 2023](#).

The charitable sector has been hoping that the Department of Finance (“Finance”) might be prepared to introduce a legislative amendment in the *Income Tax Act* (“ITA”) to provide an exemption from these filing requirements for internal express trusts held by charities. Such an exemption for charities would be similar to the exemption that has already been proposed by Finance in its [draft budget implementation legislation](#) released on August 4, 2023 for express trusts held by the Canadian Wheat Board.

In that regard, two of the authors of this article recently participated in a video meeting, along with other lawyers from the charitable sector, with two senior members from the Legislation Policy Branch of Finance to enquire if Finance might be prepared to announce whether a legislative exemption from the trust reporting requirements for internal express charities would be forthcoming. Unfortunately, after considering the matter for over a week following the video meeting, the written response from one of the senior Finance officials was that the official was not able to provide an answer and did not have “a clear timeline” when Finance would be able to provide one.

The same senior official went on to say that “the question was currently under active consideration by CRA,” but did not elaborate what that meant. Possibly, it might indicate that an administrative exemption by the Charities Directorate of the Canada Revenue Agency (“CRA”) from the trust reporting requirements is being considered based upon the fact that the CRA has a policy exempting internal trusts from having to register as separate registered charities, as explained in more detail in our *Charity and NFP Law Bulletin No. 522*. However, to date, there has been no indication by the CRA that an administrative exemption is under consideration, so any speculation in that regard cannot be relied upon.

Given Finance's reticence to indicate whether a legislative exemption will be forthcoming, coupled with the lack of any indication by the CRA about whether an administrative exemption is under consideration, charities have been left in a very difficult situation. While they may continue to hope for a legislative fix by Finance or an administrative exemption by the CRA, the reality is that charities no longer have the luxury of waiting for the government to speak on this issue. Instead, charities should be consulting with their legal and accounting professionals now to seek advice on what they will need to do in order to be able to file T3 trust returns by March 30, 2024 for each one of their internal express trusts to avoid significant penalties. There is a limited exception in subsection 150(1.2) of the ITA for trusts that hold less than \$50,000 in assets throughout the taxation year, provided that their holdings are confined to deposits, government debt obligations and listed securities.

The due diligence that will be required will include, among other onerous requirements, determining whether each restricted fund is an "express trust" and, if so, identifying the names of all donors (settlers) for each express trust, as well as the said donors' taxpayer identification numbers. Our *Charity and NFP Law Bulletin No. 522* explains what the trust reporting requirements will include in more detail, together with an explanation of the penalty that will apply for failure to comply (*i.e.* in general terms the greater of \$2500 and 5% of the value for each express trust). Directors of charities with internal express trusts should be informed of the pending T3 filing requirements and the applicable penalty, as they have a fiduciary obligation to comply with the law and to protect their charity's assets from avoidable penalties.

The sector will no doubt want to continue to press the government for a legislative or administrative exemption from the pointless trust reporting requirements of internal express trusts of charities, which hopefully will prove to be successful. However, in the meantime, charities and their boards need to be prudent and get prepared so that they can comply with the trust reporting requirements on a timely basis and, in so doing, avoid very significant penalties.

2. CRA News

By [Ryan M. Prendergast](#)

CRA Releases Publication Warning Public About Tax Schemes

The Canada Revenue Agency ("CRA") released a new [webpage](#) highlighting the risks associated with tax schemes that promise to reduce taxes, and provides guidance on recognizing and avoiding them. The "promoters" of these schemes often make false statements to aid clients in evading taxes while benefiting financially. The guidance warns against fraudulent practices, such as promising significant tax reductions,

often marketed as financial products or business opportunities. These schemes are typically promoted through various channels and may include free information sessions, promising substantial returns on small investments.

To protect oneself from falling victim to tax schemes, the document advises seeking professional and independent advice, being cautious of overly optimistic claims, and ensuring a complete understanding of the tax return, as you are ultimately responsible for the information on your tax return.

The CRA is taking action to combat tax schemes by increasing audits of promoters, improving information gathering, educating taxpayers on how to recognize such schemes, and investing in its Promoter Compliance Centre. Those who participate in or promote these schemes face severe consequences, including penalties, court fines, and potential jail time. Participants may also be subject to additional taxes on top of the fees paid to the promoter. The CRA can impose third-party penalties on preparers, promoters, and others intentionally involved in filing false statements or omitting information from tax returns, leading to significant financial consequences. The CRA also investigates and prosecutes those who promote and advise tax evasion, and convicted taxpayers must repay taxes owed, plus interest and civil penalties. Courts may impose fines of up to 200% of the evaded taxes and jail terms of up to five years. The CRA publicly shares information on individuals, corporations, and trusts convicted of tax evasion.

Charities and donors should be aware of these schemes and review the CRA's webpage, especially concerning common elements of tax schemes to avoid becoming involved in them.

3. Legislation Update

By [Terrance S. Carter](#) and [Urshita Grover](#)

Bill S-279 on the Collection and Dissemination of Data Completes First Reading on October 4, 2023

Senator Ratna Omidvar introduced [Bill S-279, An Act to amend the Income Tax Act \(data on registered charities\)](#) ("Bill S-279"), which completed its first reading on October 4, 2023. Bill S-279 aims to amend the *Income Tax Act* to ensure the collection and dissemination, in aggregate, of data on the directors, trustees, officers or like officials of registered charities in Canada and whether they are members of each of the designated groups as defined in section 3 of the *Employment Equity Act* ("Designated Groups"). Designated Groups means women, Aboriginal peoples, persons with disabilities and members of visible minorities.

The key provisions of Bill S-279 include the requirement for registered charities to provide information, to the best of their knowledge, in their filed information returns on the number of directors, trustees, officers or like officials who are members of the Designated Groups.

The Minister would be allowed to use this information for the preparation of an annual report on diversity with regard to registered charities, which must be completed and published by June 1st each year using the aggregate data and without identifying specific charities or individuals. The Minister would be able to revoke a charity's registration if it fails to provide the required information.

Whether there will be support in the Senate and the House of Commons to pass Bill S-279 is not yet known, but if the Bill is passed, it would no doubt result in very important information being made available to the charitable sector and the public at large.

Proposed Changes to the *Charities Accounting Act* in Ontario Bill 139, *Less Red Tape, More Common Sense Act, 2023*

A draft omnibus bill has been proposed in Ontario with the intent to “help improve services for people, reduce costs for businesses and make it easier to work with government.” Ontario [Bill 139, *Less Red Tape, More Common Sense Act, 2023*](#) (“Bill 139”) proposes amendments to 20 statutes in the province, and was carried on First Reading on October 19, 2023. Among the proposed changes, Bill 139 seeks to amend the *Charities Accounting Act* (“CAA”) by eliminating certain notice requirements.

Subsection 1(1) of the CAA currently sets out notice requirements for certain executors or trustees for religious, educational, charitable or public purposes, as follows:

1 (1) Where, under the terms of a will or other instrument in writing, real or personal property or any right or interest in it or proceeds from it are given to or vested in a person as executor or trustee for a religious, educational, charitable or public purpose, or are to be applied by the person for any such purpose, the person shall give written notice to,

- (a) the person, if any, designated in the will or other instrument as the beneficiary or as the person to receive the gift from the executor or trustee; and
- (b) the Public Guardian and Trustee, in the case of an instrument other than a will.

Bill 139 seeks to eliminate the notice requirement to the Ontario Public Guardian and Trustee (“PGT”) under paragraph 1(1)(b).

As well, subsection 1(6) of the CAA currently requires notice to be accompanied by forwarding a copy of the will or other instrument:

The notice shall be accompanied by a copy of the will or other instrument; in the case of a notice under clause (1) (b), the Public Guardian and Trustee may require a notarial copy.

In this regard, Bill 139 proposes to amend subsection 1(6) to exempt corporations incorporated for a religious, educational, charitable or public purpose from including the will or other instrument with their notice. As a consequential amendment, reference to the PGT would also be removed from subsection 1(6).

These changes, which will come into force on the day Bill 139 receives Royal Assent, would serve to alleviate some of the administrative burden placed on charities, provided the Bill passes through the legislature in its current form.

Bill 139 also proposes changes to the Ontario *Corporations Act*, discussed in the [Corporate Update](#), below.

4. Corporate Update

By [Theresa L.M. Man](#)

Amendments Made by Bill 91 in Force as of October 1, 2023

Our June 2023 [Charity & NFP Law Update](#) reported that Ontario's omnibus [Bill 91, Less Red Tape, Stronger Economy Act, 2023](#) received Royal Assent on June 8, 2023. Among other statutes, Bill 91 amends the Ontario *Not-for-Profit Corporations Act, 2010* and the *Corporations Act*, the changes to which came into force on October 1, 2023.

The most notable changes impacting the not-for-profit sector are that the corporations governed by the two statutes can now hold virtual or hybrid meetings, and conduct votes virtually or in hybrid form, unless the corporation's governing documents provide otherwise. The new amendments also facilitate the sending of notices or other documents by electronic means, and permit affected corporations, businesses, and partnerships to store records electronically, in addition to facilitating the electronic examination of records remotely.

New Bill Proposes to Amend Social Club Provisions of *Corporations Act*

A bill released by the Ontario government proposes to amend the Ontario *Corporations Act* to simplify voting requirements to authorize the continuance of share capital social clubs ("social clubs"). The August 2023 [Charity and NFP Law Update](#) explained the introduction of a [draft bill](#) in the summer of 2023 in this regard. The draft bill became Schedule 5 of Bill 139, *Less Red Tape, More Common Sense Act, 2023* ("Bill 139"), introduced to the Legislative Assembly on October 19, 2023. Further discussion on Bill 139 and changes to the *Charities Accounting Act* is available in the [Legislation Update](#), above.

Social clubs under the Ontario *Corporations Act* have until October 19, 2026 to continue out of the Ontario *Corporations Act* into the Ontario *Not-for-Profit Corporations Act, 2010*, the *Co-operative Corporations Act*, or the *Business Corporations Act*.

Currently, if a social club has more than one class of shareholders, approval for the continuance process requires special resolution approval by each class of shareholders voting separately by class. Depending on the shareholding class structure, the process to notify shareholders and facilitate voting for all classes may be complex and time-consuming. As well, a failed vote for continuance could lead to a forced dissolution of the club. In response to these concerns, the proposed amendments will remove the requirement that each class of shareholder vote separately as a class and clarify that only a social club's shareholders entitled to vote may vote to authorize the continuance.

The intended outcome of these proposed changes is to diminish the risk of social clubs facing dissolution, thereby allowing them to continue their operations and serve their members and communities. Additionally, this streamlines the voting procedure, reducing the administrative burden on social clubs. These amendments would also bring the *Corporations Act* in line with the continuation provisions in other Ontario business legislation.

These provisions will come into effect on the day that Bill 139 receives Royal Assent, should it make it through the legislature in its current form.

5. Underused Housing Tax Filing Requirements May Impact Certain NFPs

By [Adriel N. Clayton](#)

Entities in Canada, including certain not-for-profits, that own residential real estate in the country may have increased tax filing requirements as a result of the underused housing tax ("UHT"), a federal taxation scheme that was initially introduced in the 2021 Federal Budget and implemented by way of the [Underused Housing Tax Act](#) ("*UHT Act*"). The UHT, which came into effect on January 1, 2022, imposes a 1% tax on vacant and underused residential real estate owned by certain non-residents and non-Canadians. While Canadian charities and not-for-profits will generally be exempt from paying the tax itself, there are certain circumstances where UHT filing requirements may still apply notwithstanding having a tax exemption.

The Tax Exemption

Subsection 6(7) of the *UHT Act* sets out various circumstances where the UHT is not payable. This includes an exemption for “specified Canadian corporations” that hold “residential property”. Specified Canadian corporations include both share-capital and non-share capital corporations that are incorporated in Canada (which would include charitable and other types of not-for-profit corporations), with a few exceptions related to limited control by non-citizens and non-residents. A residential property includes a “detached house or similar building that contains a maximum of three dwelling units, including the related land” or a “semi-detached house, rowhouse unit, or condominium, including the related land”. The tax exemption is therefore broad – as a general rule, corporations that are incorporated in Canada and largely Canadian controlled will be exempt from paying the UHT where they hold residential property.

Filing Requirements and Exemptions

Notwithstanding the above, entities that are exempt from paying the tax may nonetheless be required to file an annual UHT return, [Form UHT-2900](#). The return must be filed by entities that are “affected owners” of residential property. Affected owners include those that own residential property in the land registration system where the residential property is located; life tenants under a life estate in the residential property; life lease holders of the residential property; and lessees that have continuous possession of the residential property via a long-term lease.

The general assumption is that affected owners (including those that are exempt from paying the UHT) will be required to file the Form UHT-2900, unless they are subject to a filing exemption. Those owners that are exempt from filing include registered charities for Canadian income tax purposes; cooperative housing corporations, hospital authorities, municipalities, para-municipal organizations, public colleges, school authorities, and universities for Canadian GST/HST purposes; as well as corporations wholly owned by Indigenous governing bodies. Additionally, entities that own residential property as trustees of a mutual fund trust, real estate investment trust (REIT), or specified investment flow-through trust for Canadian income tax purposes are exempt from filing requirements.

While registered charities are exempt from filing, other not-for-profits, apart from those specified above, will not qualify for the filing exemption. As such, corporations that hold residential property in trust for another entity or person other than in a manner specified above, *e.g.* through a bare trust, will not qualify for the filing exemption. This means that although registered charities are exempt from the UHT filing requirements, it will be important to review title ownership in circumstances where a separate non-charity

trustee is holding title in trust for the charity (as is sometimes done, for example, to prevent the merging of adjacent lots of land), since the trustee may not be exempt and may therefore be subject to filing requirements. While the rules regarding exemptions are complex, the Government of Canada provides a helpful [interactive questionnaire](#) to assist with determining whether an entity is an affected or excluded residential property owner.

For the 2022 taxation year, affected owners must file a return **by October 31, 2023**. Thereafter, annual returns for the previous taxation year will be due on April 30, commencing in 2024. The importance of timely filing, even where a tax exemption is available, should also be stressed, as there are significant penalties for failure to file on time. For corporations, there is a minimum penalty of \$10,000 per late return. Instructions for filing the return are available [online](#).

6. Employment Update

By [Barry W. Kwasniewski](#) and [Cameron Axford](#)

Ontario Court Rules Contractual Termination Provisions Not Enforceable

Employment contracts must comply with at least the minimum standards set out in the Ontario *Employment Standards Act, 2000* (“ESA”), as failure to do so will invalidate the termination provisions of these contracts. In a termination situation, an unenforceable termination provision in an employment contract may entitle an employee to common law reasonable notice, which is often more than what would have been granted under a properly drafted contract.

Such a situation occurred in [Ramcharan v. Wesdome Gold Mines Ltd.](#), decided by the Ontario Superior Court of Justice (the “Court”) on August 28, 2023. Vincent Ramcharan (the “Plaintiff”) was a director at Wesdome Gold Mines Ltd., a mining, exploration and development company (the “Defendant”). When hired, the Plaintiff signed an employment agreement (“the Agreement”) drafted by the Defendant, which contained a termination provision that read as follows (the “Termination Provision”):

This Agreement and your employment with the Company may be terminated at any time for just cause, without prior notice or any payment in lieu of notice or payment of any kind whatsoever, either by way of anticipated earnings or damages of any kind, by advising you in writing.

The Company may at any time terminate this Agreement and your employment, in accordance with the *Employment Standards Act*, (Ontario) (the “ESA”). The provisions of this paragraph will not apply in circumstances where you resign from employment or are terminated for cause. [Emphasis added.]

The Plaintiff's compensation package included a base salary of \$164,800, a month of vacation, eligibility in bonus and stock option programs, benefits and 5% RRSP contributions. After just over one year of employment, the Plaintiff was terminated without cause, and was provided with two weeks pay in lieu of notice, as per the ESA, as well as accrued vacation pay and 6 months of health and dental benefits.

The Plaintiff sought summary judgement for 10 months' pay, 10% pay in lieu of benefits, the net difference in value between the strike price and the closing price of his stock options over the 10 month notice period, vacation pay on bonuses and ESA termination pay, interest, and costs. The Plaintiff argued that he was entitled to common law reasonable notice as the terms of the Agreement did not comply with the ESA in several respects. The Defendant denied this, stating that the Termination Provision in the Agreement ousted any common law entitlements, and that the Agreement was compliant with ESA requirements.

While the Defendant did not allege that the Plaintiff was dismissed for cause, the Court stated that it does not impact the determination on the enforceability of the Termination Provision. The common law allowed for dismissal of employees without notice or pay in lieu of for "just cause". However, in Ontario the common law principle of "just cause" has been impacted by recent court decisions, which have found that terminated employees can only be deprived of their ESA entitlements to statutory severance pay and termination pay if their conduct falls within Ontario Regulation 288/01.

Ontario Regulation 288/01: *Termination and Severance of Employment*, a key Regulation of the ESA, establishes that "employees who are not entitled to notice of termination or termination pay" include:

"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."

Note that this same wording also applies to severance pay as per section 9(1) of that Regulation.

This is a threshold which well exceeds simple "for cause" termination at common law, and instead imposes a high onus on employers to prove. The Termination Provision, if allowed, would have disintitiled the Plaintiff from the ESA standards in the case of termination for cause, and was therefore inconsistent with the ESA. A landmark Court of Appeal decision, [*Waksdale v. Swegon North America Inc.*](#), found that noncompliance with the ESA in a for-cause provision will invalidate any other termination provisions in an employment agreement. *Waksdale* has been followed in several later Ontario judicial decisions.

As the "for cause" termination provision was not compliant with the ESA, the entirety of the Termination Provision was unenforceable, despite the fact they were not immediately relevant to the case at hand, since

the Plaintiff was terminated without cause. As the Defendant only provided him with what was minimally required under the ESA, and the common law standards are higher than what is statutorily required, they did not adequately compensate the Plaintiff upon termination, and were liable for the pay in lieu of common law reasonable notice.

The Court ultimately found that the Plaintiff was entitled to damages for six months' notice less any statutory amounts paid, 10% of his base salary for benefits in lieu of notice less any amounts paid, and vacation pay based on his 2019 bonus and on severance pay less any amounts paid.

Ramcharan serves as a reminder that employment contracts need to be carefully drafted to ensure compliance with the ESA. An unenforceable provision, even one not directly related to a situation at hand, can defeat the enforcement of the termination provisions in a contract. Charities, not-for-profits, and employers in general should contact legal counsel for assistance with drafting these contracts when the need arises.

7. Privacy Update

By [Esther Shainblum](#) and [Martin U. Wissmath](#)

ISED new Voluntary Code of Conduct Encourages Responsible AI Development

The Honourable François-Philippe Champagne, Minister of Innovation, Science and Industry, unveiled Canada's [Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems](#) (the "Code"). Announced in a [news release](#) on September 27, 2023, this initiative offers voluntary commitments for industry participants to demonstrate responsible practices in the development and oversight of generative artificial intelligence (AI) systems, such as ChatGPT, DALL·E 2, and Midjourney.

The Code serves as an immediate guide to responsible AI development, bridging the gap until the proposed Artificial Intelligence and Data Act (AIDA) becomes effective, as part of Bill C-27, which was introduced in June 2022. Bill C-27 completed Second Reading in the House of Commons on April 24, 2023, and is currently under examination by the Standing Committee on Industry and Technology.

The Code emphasizes six core principles:

Accountability: Organizations must establish proportional risk management frameworks aligned with the scope of their activities.

Safety: Emphasis is placed on risk assessments and risk mitigation measures to ensure safety, including addressing malicious or inappropriate uses.

Fairness and equity: Organizations must assess and mitigate biases throughout an AI system's lifecycle.

Transparency: Transparency is achieved through the publication of information about AI systems and the clear identification of AI-generated content.

Human oversight and monitoring: Systems must be continually monitored, and incidents reported and addressed.

Validity and robustness: Comprehensive testing is required to ensure the effective operation and cybersecurity of AI systems.

Drafting of the Code was informed by input from diverse stakeholders, including the Government of Canada's Advisory Council on Artificial Intelligence, through the "[Consultation on the development of the Canadian code of practice for generative AI systems](#)". The federal government expects the Code to enhance Canada's contributions to international discussions on addressing common risks associated with the wide-scale deployment of generative AI, including "at the G7 and among like-minded partners," according to the news release.

The Code is part of the federal government's effort toward a proactive stance on regulating AI and ensuring its responsible use, citing the importance of addressing issues like bias and maintaining human oversight in AI technology. This Code signifies an attempt at building public trust and fostering innovation in the rapidly evolving AI landscape. It is designed to support the proposed AIDA, which focuses on high-impact AI systems' responsible design, development, and use in Canada's private sector, emphasizing health, safety, and human rights. Charities and not-for-profits, as participants in the private sector, will also be impacted by the development, implementation, and regulation, of AI systems.

Google's Contravention of Federal Privacy Law Not Exempt for 'Journalistic Purposes'

The Federal Court of Appeal has ruled that Google's search engine service is subject to federal privacy law. In [Google LLC v Canada \(Privacy Commissioner\)](#), published on September 29, 2023, the Federal Court of Appeal ("FCA") heard an appeal by Google from a lower court decision. The FCA held that Google is not exempt from the *Personal Information Protection and Electronic Documents Act* (PIPEDA), under the journalistic purposes exemption in paragraph 4(2)(c). Hon. Justice Wyman W. Webb dissented.

The proceedings began with an investigation by the federal Office of the Privacy Commissioner (OPC) involving a complainant that accused Google of violating privacy law under PIPEDA by displaying search results containing news articles related to the complainant when their name was searched. The complainant alleged that the articles were outdated, inaccurate, and disclosed sensitive personal information about them, and that this caused them significant harm. In dismissing Google’s appeal, the FCA upheld the Federal Court decision that Google’s search engine “collects, uses, or discloses” personal information “in the course of commercial activities” under paragraph 4(1)(a) of PIPEDA. Related legal issues, including whether an individual has the “right to be forgotten” in Canada, have yet to be decided. Charities and not-for-profits may in some cases be subject to PIPEDA and should seek legal advice to ensure that their online content complies with all privacy laws and OPC guidance.

Ontario Privacy Commissioner Expands Transparency of Decisions under PHIPA

The Information and Privacy Commissioner of Ontario (IPC) has introduced a significant alteration in the way it publishes its decisions under the *Personal Health Information Protection Act, 2004* (PHIPA). Effective October 10, 2023 the IPC may now publish PHIPA decisions at any stage of dispute resolution, encompassing early resolution, investigation, and adjudication. These decisions may include the names of the respondents and affected parties, unless revealing such names would identify the complainant or any individuals whose personal health information is at stake. Some charities and not-for-profits that collect personal health information are also subject to PHIPA.

The IPC’s revised “[PHIPA Practice Direction #3](#)” reflects this recent update and guides readers on when a PHIPA decision will be made available to the public and which parties will be identified in that decision by name. Directors on the board of charities and not-for-profits that collect personal health information should read this practice direction in conjunction with the IPC’s “[Code of Procedure for Matters under the Personal Health Information Protection Act, 2004](#).”

8. Ontario Nonprofit Network’s Annual Survey Suggests Tough Times Ahead for Charity/NFP Sector

By [Esther S.J. Oh](#)

During the months of June and July 2023, the Ontario Nonprofit Network (“ONN”) conducted its fourth annual sector-wide survey to gather information on the state of Ontario’s not-for-profit (“NFP”) organizations, including information concerning their financial well-being, staffing, volunteers, and overall operations. Nearly 1,400 NFPs, charities, and grassroots groups from across the province

participated in this survey. ONN developed several resources, including a policy report titled “[2023 Realities for Ontario’s Nonprofit Sector](#)” (“Report”). The Report features recommendations for both the government and the charity/NFP sector, together with a technical report presenting key data highlights.

The findings from the past four years reflect several significant trends:

- Demand for services from NFPs has reached an unprecedented high level over the past four years, with a 29% increase since 2020.
- Financial challenges are becoming increasingly prevalent, as many NFPs face a concerning “downward spiral”.
- Two-thirds of the sector are having to deal with staffing issues, particularly in recruitment and staff retention.
- Reports of NFP closures have surged, with 35% of organizations surveyed reporting that they are aware of another similar NFPs closing down its operations.
- Over this four-year period, only half of the sector has experienced slight increases in revenue, while 90% have reported an increase in expenditures.

NFPs are more vulnerable to the ever-changing social changes and context (more than other sectors and industries). Crises in the community translate into an increased demand for services from NFPs, often without corresponding additional support being provided to the NFPs to address the increased demand. At the same time, economic uncertainty and austerity measures lead to reduced donations and government funding.

Despite these formidable challenges, NFPs continue to bring immense value to their communities across Ontario. In this year's survey, NFPs shared their dedication to operating safe consumption sites, implementing HIV programming, facilitating access to organized sports for children from low-income families, nurturing artists with entrepreneurial skills for sustainable employment, supporting refugees from around the world, and undertaking a number of other valuable initiatives.

The findings of the Report indicate that if no substantial changes occur by 2026, the consequences will be dire. Cutbacks, extensive waitlists, and NFP closures will reach devastating levels, impacting communities throughout the province. Service provision will become untenable due to decreased funding and escalating costs, exacerbated by a lack of skilled staff to address pressing societal needs. *2023 Realities for Ontario’s*

Nonprofit Sector states that continued downward trends have the potential to push Ontario's NFP sector to the brink of collapse.

In this regard, ONN's analysis and forecasting focused on the following areas: service demand, NFP sustainability, costs, and closures. ONN's analysis indicated the following predictions for the sector by the year 2026:

- Every NFP in Ontario will experience a surge in demand for service.
- Only 17% of NFPs anticipate financial sustainability for a 12-month period or longer.
- NFPs will face a 131% increase in costs.
- 63% of NFPs will be aware of similar organizations closing their doors and ceasing operations.

ONN goes on to state that the loss of NFPs and their invaluable contributions will lead to communities that are economically less viable, less socially vibrant, and less connected.

To counter these predictions, ONN's made the following recommendations:

- Create a home in government for the sector to efficiently collaborate with Ontario's 58,000 NFPs and charities.
- Safeguard Ontario's social infrastructure for the future.
- Invest in NFPs and grassroots groups that serve equity-deserving communities.
- Provide support to the sector to build a resilient NFP workforce for the years ahead.
- Modernize the volunteerism landscape to ensure its relevance and effectiveness in the changing times.

ONN will [host a webinar](#) on November 29, 2023 for NFPs to discuss how the sector can use the data in the ONN Reports to advocate for themselves and for the sector.

9. AML/ATF Update

By [Terrance S. Carter](#), [Nancy E. Claridge](#) and [Sean S. Carter](#)

Guidance on Bill C-41 Expected Soon

The fall of the democratically elected government of Afghanistan in August 2021 caused an ongoing humanitarian crisis. The main obstacle for Canadian charities and not-for-profits wanting to provide aid in Afghanistan has been the fact that Afghanistan is now controlled by the Taliban, a listed terrorist group

in Canada. Subsections 83.03(1) and (2) the *Criminal Code* make it an offence for any person to “directly or indirectly makes available property or financial or other related services for terrorist purposes or for use by terrorist groups”. This AML/ATF Update includes general information we have received from the Department of Justice on the expected release of a much-anticipated guidance document for [Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*](#).

As a result of intense lobbying from the charitable sector in 2022, the federal government finally passed Bill C-41 on June 20, 2023. The details of Bill C-41 were covered in detail in our August 2023 [AML/ATF and Charity Law Alert No. 53 \(“Alert 53”\)](#). In essence, Bill C-41 provides a blanket exemption for “humanitarian assistance activities” and a narrower exemption for a list of certain activities that requires an organisation to apply for and receive authorisation from the federal government in order to carry out certain activities in a geographic area controlled by a listed terrorist group.

While the federal government’s passing of Bill C-41 has been a welcome development, there has been no direction to date from the government concerning the practical aspects of working under the exemptions set out in Bill C-41 for those organizations wanting to provide aid to the people of Afghanistan, or elsewhere in the world under the control of a listed terrorist group.

While Bill C-41 provides important exemptions to the *Criminal Code*, there remain many grey areas where charities, not-for-profits, and concerned individuals may be unsure if they are compliant with the provisions of Bill C-41. In our [Alert 53](#) we reported that the Department of Public Safety (Canada), in a presentation given July 14, 2023, had indicated that it expected to make a guidance document available in the near future. Since a guidance document has yet to be posted, one of our Alert 53 authors recently spoke to a senior official from the Department of Justice (the “Senior Official”) to gain a better idea of the timing of when a guidance would be released. We received permission to report on the ensuing conversation in general terms.

The Senior Official said the federal government is planning to release the much-anticipated guidance by the end of 2023. As well, the guidance is expected to assist in determining if proposed aid can be classified under the general exemption of “humanitarian assistance activities” or under the listed exemptions for which a request for authorization from the government would be required. However, the Senior Official pointed out that the guidance, while vital to the sector once released, should not be treated as a legal or binding document as in the end, it will be up to the courts to interpret how Bill C-41 is applied in practice.

Pending judicial interpretation, any guidance from the federal government will no doubt prove to be an essential tool for those wanting to work in Afghanistan or other conflict areas controlled by a listed terrorist group, including Gaza. Clearly, the guidance cannot come soon enough.

Office of the Privacy Commissioner Makes Submission to Finance on AML/ATF Consultation Paper

The 2023 Federal Budget announced that the federal government would launch a Parliamentary Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”), to examine Canada’s anti-money laundering/anti-terrorist financing (“AML/ATF”) regime. The Department of Finance (the “Finance”) released a [Consultation Paper](#) (the “Paper”) on this Parliamentary Review, which ran until August 1, 2023. In response to the Paper, the Office of the Privacy Commissioner (“OPC”) released a [Submission](#) to Finance on August 10, 2023 (“Submission”), discussing the privacy aspects of AML/ATF law, oversight of the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) and what effect changes to that system could have on Canadian privacy rights.

The Submission underscores the significance of safeguarding privacy rights while ensuring the effectiveness of AML/ATF measures. It introduces several key areas and recommendations concerning privacy protection, including the following:

Protection of Privacy Rights:

In its Paper, Finance recognizes that privacy is integral to an effective AML/ATF regime, advocating for a privacy-focused approach. Proportionality is emphasized, calling for measures to justify privacy intrusions and minimize them.

In its Submission, the OPC expresses concern about government objections leading to refusals of access to information requests under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), emphasizing the need for improved notifications and information quality.

Beneficial Ownership Registry:

Finance recommends a collaborative and harmonized approach for collecting and reporting beneficial ownership information, consistent with the G20 developed *High-Level Principles on Beneficial Ownership Transparency*.

In response, the OPC notes that many in government wish to establish a beneficial ownership registry, but there must be safeguards for personal and sensitive information that would be included in this registry, and access should be under the pretext of a “legitimate interest” rather than “unfettered”. The Submission

recommends that privacy impact assessments be used as a first step in establishing a beneficial ownership registry.

Access to Subscriber Information/Electronic Devices:

While the Paper encourages the introduction of new criminal investigative powers, such as orders for subscriber information, the OPC in its Submission emphasizes the need for precise definitions and privacy safeguards, including clear thresholds, transparency measures, and statutory use limitations.

Other Investigative Powers:

The Submission from the OPC is somewhat critical of Finance's Paper regarding investigative powers. The Minister of Finance's suggestions included expanding search and seizure powers to allow law enforcement to confiscate the electronic devices of anyone present in a location where a search warrant is executed.

Such proposals by the Finance to amend search warrant provisions raise significant privacy concerns, according to the OPC. The Submission highlights the need for necessity and proportionality considerations, recommending privacy safeguards if these tools are adopted.

Information Sharing — Within Federal Agencies:

In its paper, Finance recommends widening the scale and scope of information that is shared by federal organs. This would be a change of direction policy-wise, as there are multiple prohibitions under PCMLTFA regarding what can be shared amongst law enforcement and other authorities.

In response, the OPC submits that an expansion of information sharing among federal agencies needs to adopt a risk-based approach, with regular review and robust privacy safeguards. Privacy-enhancing technologies from global organizations can provide valuable insights.

Broadening of Canada's AML/ATF Regime:

Finance recommends broadening the scope of activities caught under AML/ATF law, with the stated goal of combatting evasion of sanctions, screening foreign investments for potential harm and promoting economic security.

In response, the OPC states that further expansion of the AML/ATF regime, since it has already rapidly increased its powers over the past two decades, requires careful consideration of necessity and proportionality. Robust oversight mechanisms, including regular audits, are recommended.

Conclusion:

In conclusion, the OPC highlights how the role of intelligence agencies, like FINTRAC, are critical to national security, while their secretive nature must be balanced with significant government oversight. The role of audits in ensuring accountability for intelligence agencies like FINTRAC and emphasizing the importance of considering necessity and proportionality in any changes or expansions to the AML/ATF regime are essential in achieving this balance. The OPC expressed its openness to further engagement with Finance on these crucial privacy-related issues.

10. Chambers and Partners Rankings 2024

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](#), [Esther Shainblum](#) and [Jacqueline M. Demczur](#) have been ranked, reviewed and listed on the Chambers and Partners website.

11. Career Opportunities at Carters

Carters is currently looking for a **Charity Lawyer** with a minimum of two-three years experience in charity and not-for-profit law with a focus in corporate and tax law to join our team of charity and not-for-profit lawyers. The successful candidate will work on a wide variety of files including those dealing with incorporations, applications for charitable status, gift planning and providing advice on complex corporate and tax structuring. The successful candidate will also be primarily remote but will connect with our team in-person at either our Orangeville or Ottawa office locations on a regular basis.

All interested applicants are invited to view our [Career Opportunities](#) page for more details.

IN THE PRESS

[**Charity & NFP Law Update – September 2023 \(Carters Professional Corporation\)**](#) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

RECENT EVENTS & PRESENTATIONS

Terrance S. Carter presented an “Update from Canada” at the American Bar Association (ABA) Tax Exempt Organizations Committee meeting held on October 17, 2023.

UPCOMING EVENTS & PRESENTATIONS

[**Carters Annual Charity & Not-for-Profit Law Webinar**](#) hosted by Carters Professional Corporation on **Thursday, November 9, 2023**. [Brochure](#) and [Online Registration](#) available at www.carters.ca

[**Federation of Ontario Lawyers Associations \(FOLA\)**](#) is hosting a Fall Plenary from November 8-10, 2023 in Windsor, ON, Jacqueline M. Demczur will be speaking on The ONCA and Beyond: Governance and Policy Issues to Consider, on November 10, 2023.

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Assistant Editors: Nancy E. Claridge, Ryan M. Prendergast, and Adriel N. Clayton



[Cameron A. Axford](#), B.A. (Hons), J.D. - Cameron is an associate whose practice focuses on Carter's knowledge management, research, and publications division. He articulated with Carters from 2022 to 2023 and joined the firm as an associate following his call to the Ontario Bar in June 2023. Cameron graduated from the University of Western Ontario in 2022 with a Juris Doctor, where he was involved with Pro Bono Students Canada and participated in the BLG/Cavalluzzo Labour Law Moot. Prior to law school, Cameron studied journalism at the University of Toronto, receiving an Honours BA with High Distinction. He has worked for a major Canadian daily newspaper as a writer.



[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 articulated 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*, *The Best Lawyers in Canada* and *Chambers and Partners*. 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*TM.



[Urshita Grover](#), H.B.Sc., J.D. – Urshita was called to the Ontario Bar in June 2020 after completing her articles with Carters. Urshita worked as a research intern for a diversity and inclusion firm. Urshita has volunteered with Pro Bono Students Canada, and was an Executive Member of the U of T Law First Generation Network. Urshita was able to gain considerable experience in both corporate commercial law as well as civil litigation. Building on this background, Urshita is able to integrate her wide range of experience into a diverse and practical approach to the practice of charity and not-for-profit law for her clients.



[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.



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



[Jennifer M. Leddy](#), B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). 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."



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[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*TM, 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.

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