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CHRISTIAN LEGAL FELLOWSHIP CPD WEBINAR

Virtual – April 1, 2021

ESSENTIAL UPDATE ON CHARITY LAW

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 Essential Update on Charity Law By Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent tcarter@carters.ca 1-877-942-0001 © 2021 Carters Professional Corporation	
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Advisory Committee on the Charitable Sector Update

A. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR (ACCS) UPDATE

- ACCS was established in 2019 as a consultative forum for the Government of Canada to
 - engage in meaningful dialogue with the charitable sector
 - advance emerging issues relating to charities
 - ensure the regulatory environment supports the important work that charities do
- At its first meeting in December 2019, the ACCS agreed on three broad areas to offer advice:
 - Evolve the institutional framework to explore issues and develop recommendations
 - Ensure financial sustainability within the charitable sector
 - Establish modern governance for charitable sector

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- ACCS released “Report #1 of the Advisory Committee on the Charitable Sector” March 12, 2021 (dated January 2021)
 - First of a series of reports to be released by ACCS
 - ACCS made three important recommendations:
 - 1) amending the Income Tax Act (“ITA”) to remove the “own activities” test and allow for “resource accountability”;
 - 2) amending the ITA to allow all appeals to go to the Tax Court of Canada;
 - 3) creating a permanent “home in government” for the charitable and non-profit sector
- See Charity and NFP Law Bulletin No. 489 for details
<https://www.carters.ca/pub/bulletin/charity/2021/chylb489.pdf>

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1. Remove the “Own Activities” Test from the ITA, and Allow for “Resource Accountability”

- Current “own activities” test regime requires registered charities to devote all of their resources to charitable activities carried on by themselves
- “Own activities” should be replaced with a regime that permits registered charities to operate in furtherance of their charitable purposes
- ACCS recommends replacing administrative “Direction & Control” requirement with reasonable parameters for ensuring “resource accountability” when working through a third party that is not a qualified donee

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- ACCS Report #1 coincides with Bill S-222 proposal (discussed below) to remove “own activities” test and allow charities to make their resources available to non-qualified donees while taking “reasonable steps” to ensure funds used exclusively for charitable purpose
- This recommendation is based on the work done by the ACCS Purposes and Activities Working Group
 - heard from charity leaders, board members, and legal advisors that CRA’s administrative “direction and control” requirements are “paternalistic and intrusive,” and hinder partnership and collaboration with Indigenous Peoples and Indigenous-led organizations in Canada, as well as with local communities around the world

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- Although recent changes to the CRA's guidances dealing with direction and control of activities conducted through intermediaries (discussed below) have "clarified and also created slightly" more flexibility for smaller charities, the fundamental problem remains
 - an amendment to the ITA would also lead to corresponding revisions to CRA administrative policy guidances
- The focus of legislation and regulation should be on whether a charity uses, in a responsible manner, its resources to further its charitable purposes, not how the charity carries on its charitable "activities"
- ACCS does not suggest that accountability for the use of charitable resources should in any way be weakened, but rather made more appropriate and practical

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2. Amend the ITA to Allow All Appeals to Go to the Tax Court of Canada

- ACCS recommends implementing recommendation 23 from the Senate Special Committee Report in two respects:
 - a) allow all appeals from decisions of the Charities Directorate of the CRA to the Tax Court of Canada for a hearing *de novo*, following consideration by the Appeals Branch of the CRA
 - b) allow a right to appeal to the Tax Court of Canada for cases where:

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- The Appeals Branch of the CRA has not rendered a decision on an appeal by an organization that has had its application for registered charity status refused, or an existing charity that has had its registration revoked, within six months of it having been referred to the Appeals Branch
- Under the current regime, any appeal by a charity of decisions made by the CRA on registration or revocations is required to be heard at the first instance by the Federal Court of Appeal
 - Such appeal mechanisms are time-consuming, costly, and, in almost all cases, do not allow for a reconsideration of the question of what constitutes a charitable purpose, and the legal definition of what is charitable

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3. Create a Permanent Home in Government for the Charitable and Non-profit Sector

- A permanent “home in government” (outside the CRA) for Canada’s charities and non-profits would:
 - provide a place within government for comprehensive policy development which will strengthen the relationship to ensure a more productive and effective partnership
 - advocate on behalf of the sector when broader government policies and programs are being considered, thereby acting as a connector and communicator with other government departments

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- Federal policy frameworks for the charitable and non-profit sector are missing or uncoordinated
 - no comprehensive and coordinated policy development across the different federal departments and/or ministries that work with the sector
- A broader policy perspective provided by a cross-government policy unit or secretariat would:
 - help ensure a more productive, effective partnership between charity & NFP sector and federal government across various issues
 - Act as a convener and coordinator of other federal departments and, as needed, provincial authorities with responsibilities for the sector

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Bill S-222, *Effective and Accountable Charities Act*

B. BILL S-222, EFFECTIVE AND ACCOUNTABLE CHARITIES ACT

- Hon. Ratna Omidvar, Senator for Ontario, tabled Bill S-222, the *Effective and Accountable Charities Act* for first reading on February 8, 2021
 - will hopefully provide registered charities in Canada with needed reform of the ITA concerning how they can work with organizations that are not “qualified donees.”
 - Expected to receive broad support from the charitable sector
 - Thirty-seven charity lawyers in Canada signed an open letter explaining the need for reform and to eliminate “own activities” requirement
 - See Charity and NFP Law Bulletin No. 486
<https://www.carters.ca/pub/bulletin/charity/2021/chylb486.pdf>

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1. Background: Requirements under the *ITA*

- Current ITA provisions have been generally interpreted by the CRA to mean that a registered charity can only use its resources in two ways, whether inside or outside Canada:
 - on their “**own activities**”; and
 - on gifts to qualified donees
- charitable organizations are required to primarily carry on their own charitable activities and may, if they wish, disburse not more than 50% of their income annually to qualified donees

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- CRA requires that a charity cannot merely be a conduit to funnel money to an organization that is not a qualified donee, but instead must direct and control the use of its resources when carrying out activities through an intermediary
 - This is known as the CRA’s administrative requirement of “**direction and control**” policy
- Many in the sector have consistently expressed concerns with the CRA’s interpretation of the “own activities” test and the direction and control mechanism for years
- CRA updated their Guidances on November 27, 2020, relaxing some of the more onerous CRA requirements in the previous Guidances
 - But no substantive changes (see below)

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2. Historical Justification for “Own Activities”

- The requirement that “all the resources” of a charitable organization be “devoted to charitable activities carried on by the organization itself” has remained since 1950
- Intended to prevent charitable organizations from “circulating funds endlessly or sheltering them without actually using them for charitable relief.”
- It is highly doubtful whether the historical basis or rationale for the requirement that charitable organizations must devote all their resources to charitable activities carried on by the organizations themselves continues to be valid in 2021
- See Terrance S. Carter & Theresa L.M. Man, “Direction and Control: Current Regime and Alternatives”
<https://www.carters.ca/pub/article/charity/2020/Direction-and-Control-Current-Regime-and-Alternatives.pdf>

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3. Practical Problems with Own Activities/Direction and Control

- Direction and control mechanism requiring programs be the “own activities” of the funding Canadian charity in essence creates a legal fiction in order to satisfy the requirements of the ITA as interpreted by CRA
 - This is outmoded, impractical, inefficient, unpopular, and difficult to comply with
 - built upon the fiction that everything that a charity does through a third party intermediary must be structured as the activity of the charity itself, which also creates unnecessary liability

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- Top-down approach to exercise “direction and control” is fundamentally at odds with international development philosophy that recognizes the importance of developing empowering partnerships with local communities and non-governmental organizations
- Ignores the benefit of relying on the expertise of the local partner in an international context doing the work on the ground
 - Monitoring, management and reporting rules of CRA are onerous and disproportionate
- Compliance requires high administrative costs and draws resources away from actual charity work
- Imposes a paternalistic and patronizing obstacle to working with Indigenous communities

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4. Proposed changes of Bill S-222

- Bill proposes to:
 - Remove the fictitious “own activities test”
 - Expand the definition of “charitable activities”
 - Allow resources to be available to non-qualified donees as part of charitable activities
 - Provided that “reasonable steps” are taken
- Aligns with ACCS Report #1 recommendations to eliminate “own activities” test and replace “direction and control” with “resource accountability”

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- Removal of “own activities” test by changing ss. 149.1, 188, 188.1 and 189 of the *ITA*
 - Requiring charities to carry on “charitable activities” instead of “charitable activities ~~carried on by it~~”
- Would amend the definition of “charitable activities” to provide for a “resource accountability” type of test in s. 149.1(1) by adding a paragraph:
 - (b) making resources — including grants, gifts or transfers — available by transactions, arrangements or collaborations of any kind whatsoever in furtherance of a charitable purpose to a person that is not a qualified donee if those resources are made available by a charity that takes reasonable steps to ensure that those resources are used exclusively for a charitable purpose in accordance with subsection (27).

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- A new subsection (27) would provide that a charity take reasonable steps to ensure the use of its resources are exclusively for a charitable purpose
 - (27) A charity is considered to have taken reasonable steps to ensure its resources are used exclusively for a charitable purpose if
 - (a) before providing resources to a person who is not a qualified donee it collects the information necessary to satisfy reasonable person that the resources will be used for a charitable purpose by the person who is not a qualified donee, including information on the identity, experience and activities of the person who is not a qualified donee; and
 - (b) when providing resources to a person who is not a qualified donee, it establishes measures, imposes restrictions or conditions, or otherwise takes actions necessary to satisfy a reasonable person that the resources are being used exclusively for a charitable purpose by the person who is not a qualified donee.

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- Bill S-222 would also clarify that charitable foundations (public and private) are also permitted to make their resources available to non-qualified donees, provided they take the “reasonable steps”
- New subsection 149.1(2.1):
 - For greater certainty, a charitable foundation, as defined in subsection 149.1(1), may make resources — including grants, gifts or transfers — available by transactions, arrangements or collaborations of any kind whatsoever to a person that is not a qualified donee if the charitable foundation takes reasonable steps to ensure that those resources are used exclusively for a charitable purpose in accordance with subsection (27).
- Bill S-222 as tabled would come into force two years after Royal Assent

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- Sen. Omidvar moved second reading of Bill S-222 on March 16, 2021
 - In her speech, Sen. Omidvar described the challenges with “own activities” and limit on working with non-qualified donees
- See Charity and NFP Law Bulletin No. 488
<https://www.carters.ca/pub/bulletin/charity/2021/chylb488.pdf>
- Sen. Omidvar noted that Canadian charities cannot realistically participate in pooled efforts with non-Canadian charities to address international development issues
- It is important to support and monitor this Bill
 - can expect further amendments as it makes its way through Parliament
 - Stay tuned!

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Canada Revenue Agency (CRA) Guidances:

C. CANADA REVENUE AGENCY (CRA) GUIDANCES:

1. CG-002 & CG-004: Charities Using Intermediaries

- Updated Guidance CG-002 *Canadian Registered Charities Carrying On Activities Outside Canada*
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadian-registered-charities-carrying-activities-outside-canada.html>
- Updated Guidance CG-004 *Using An Intermediary to Carry On a Charity's Activities Within Canada*
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>
- Welcomed minor updates, but overall requirements remain the same
- See Charity and NFP Law Bulletin No. 484 for details
<https://www.carters.ca/pub/bulletin/charity/2021/chylb484.pdf>

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a) Own Activities Test & Direction and Control

- ITA allows charities to use their resources in 2 ways**
 - 1) Make gifts to qualified donees ("QDs")
 - 2) Conduct their own activities ("own activities test") by 2 ways:
 - Charities' own staff and volunteers
 - Through third party intermediaries (non-QDs)
- ITA "Own Activities" test**
 - Activities must be directly under the charity's direction, control and supervision and for which it can account for any funds expended

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- **CRA “Direction and Control” policy**
 - When working through an intermediary, a charity must direct and control the use of its resources
- **Active involvement**
 - Charities must be actively involved in programs to achieve its charitable purposes
 - Can only make gifts to QDs
 - Cannot carry out charitable purposes by simply giving monies or “resources” to non-QDs

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- **Ongoing involvement**
 - how the activity will be carried on
 - the overall goals of the activity
 - the area or region where the activity will be carried on
 - who will benefit from the activity
 - what goods and services the charity's money will buy
 - when the activity will begin and end

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b) What's new? — Examples of key differences

• Previous Guidances

- “resources” = physical, financial, material, IP, staff
- Rules on how to transfer “capital property” to non-QDs
- 4 common types of intermediaries - agency, contractor, joint venture participant, and co-operative participant
- One-time activity involving \$1,000 or less does not need a written agreement, when other forms of communication might be used to show direction and control

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• Revised Guidances

- “resources” = physical, financial, staff, volunteers
- Rules on how to transfer “real property (land and immovable property on land, such as buildings)” to non-QDs (no longer “capital property”)
- 3 common types of intermediaries: consultant or contractor, joint venture participant, co-operative participants (“agency” no longer included)
 - Possible to have other types
- One-time activity involving \$5,000 or less does not need a written agreement, when other documents might be enough to show ongoing direction and control, e.g., written instructions, email records, meeting minutes, and regular reporting (up from \$1,000)

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- Previous Guidance & Revised Guidance have the same **Measures to maintain direction and control:**
 - 1) Create and implement written agreement
 - 2) Communicate clear, complete, and detailed description of activity to intermediary
 - 3) Provide clear, complete, and detailed instructions to intermediary on ongoing basis
 - 4) Make periodic transfers of resources to intermediary, based on demonstrated performance

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- Previous Guidance: Charities can be Canadian representatives or offshoots of larger organizations outside Canada, i.e., head bodies
 - **Revised Guidance: Charities can be Canadian representatives or affiliates of other (usually larger) organizations that are non-QD outside Canada**
- Previous Guidance: Charities must keep adequate books and records
 - **Revised Guidance: Whether a charity's books and records are adequate, CRA looks at the risk of non-compliance for the particular activities – depending on the location, the activity, or the type of resources**

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- Previous Guidance: Getting original source documents are recommended — but if it is not possible or practical, then the charity needs to explain why it cannot get them, and make all reasonable efforts to get copies and/or reports and records to support the expenditures, and show that it has made such efforts
 - **Revised Guidance: Getting original source documents are recommended — but if it is not possible or practical, then CRA will accept photocopied or electronic (scanned) documents, as long as proper imaging practices are followed, and charity should still make all reasonable efforts to get source documents and/or reports and records to support its expenditures**

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2. CG-029: Relief of Poverty and Charitable Registration

- New Guidance CG-029 *Relief of Poverty and Charitable Registration* released on Nov. 27, 2020
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charitable-registration-relief-poverty.html>
- See Charity and NFP Law Bulletin No. 482 for details
<https://www.carters.ca/pub/bulletin/charity/2021/chylb482.pdf>
- Relief of poverty is one of 4 heads of charity
- Charities under the relief of poverty category must show both the following:
 - their beneficiaries are experiencing poverty
 - their activities provide a charitable benefit that relieves the poverty of their beneficiaries

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a) What is poverty?

- Relative – Poverty is a relative term
- Definition - Poverty = people who do not have the ability to acquire the basic necessities of life or simple amenities that are seen as necessary for a modest but adequate standard of living
- Prevention of poverty is not charitable
 - See *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue*, 2016 FCA 193, [2017] 1 FCR 480

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b) How to relieve poverty?

- Provide benefits – Provide beneficiaries with a charitable benefit and that the beneficiaries are experiencing poverty – examples:
 - Provide basic necessities of life
 - Provide simple amenities, necessary for a modest but adequate standard of living, and activities that promote social inclusion
- Extent of benefits – Benefits limited to the extent that they are shown to relieve poverty
- No undue private benefit – Cannot provide benefit that is more than what is needed to relieve their poverty because the charity may be delivering an unacceptable private benefit

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c) Who can be helped?

- Criteria and process – Establish “well-reasoned” criteria and process to evaluate beneficiaries to make sure that they need poverty relief
- Indicators – May use recognized poverty indicators or may establish other criteria
- Purpose – Charitable purposes should include a term that clearly describes its beneficiaries as those in need of poverty relief
- Public – Eligible beneficiaries must represent the public or a sufficient section of the public and not be unreasonably restricted

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d) Additional issues:

- T5007 – May need to provide T5007 slips to beneficiaries if financial assistance is provided
- Records – Keep records of selection criteria and how relief is provided
- Benevolent funds – Donors give general direction that the funds be used in a particular program, but up to the charity to decide how funds are used and who may receive benefit
 - Control must be with the board of the charity, not with the donor

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3. CG-030: Advancement of Education

- New Guidance CG-030 *Advancement of Education and Charitable Registration* released on Nov. 27, 2020
<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/whats-new.html>
- See Charity and NFP Law Bulletin No. 483 for details
<https://www.carters.ca/pub/bulletin/charity/2021/chylb483.pdf>
- Advancement of education is one of 4 heads of charity
- Not all education is charitable
 - Although the concept of education is broad, and all experience may be said to educate, what qualifies as education under charity law is limited
 - For education to be charitable, it must provide knowledge or develop abilities by deliberate teaching or training

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- Advancement of education accepted by CRA (2 types)
 - 1) Training that provides knowledge or develops abilities
 - a) Educate through structured and targeted teaching or learning
 - b) Other purposes the courts have recognized to advance education
 - 2) Improving a useful branch of human knowledge through research (See CRA policy CPS-029 on research)
- Certain other topics of education may or may not be charitable

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a) Purposes that educate through structured and targeted teaching or learning

- Includes education by formal or traditional classroom instruction, as well as less formal instruction (e.g., workshops, seminars, self-study)
- **Examples:**
 - Operate a private secondary school in X city
 - Provide adult continuing education courses in business and accounting in Y community
 - Provide seminars and workshops on finance and accounting, Indigenous art history, or car maintenance to the public

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- **Content criteria (education):**
 - Subject matter is useful and has educational value
 - Subject matter is not focused on promoting a point of view
- **Process criteria (structured and targeted teaching or learning):**
 - Structured format
 - Legitimate, targeted attempt to educate
 - Teaching or learning component

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b) Other purposes the courts have recognized to advance education

- Most of these purposes are connected with and support formal or traditional classroom education
- Examples:
 - Scholarships, bursaries, prizes, and financial assistance for students
 - Schools and tuition fees
 - Providing educational facilities, teachers, equipment, and supplies
 - Sports & sports equipment for a school program
 - Community groups and clubs
 - Alumni associations / School councils
 - Student unions
 - Museums and libraries

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c) Special topics

- Certain topics may or may not meet the CRA's requirements to be acceptable as a charitable purpose of advancing education, depending on whether they meet the mandatory content and process criteria
- Examples:
 - Production and broadcasting / publishing books, magazines or other materials
 - Conferences
 - Vocational or professional education
 - Providing information and education
 - Experiential education
 - Preschool and daycare programs
 - Summer camps

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4. Pending Guidance: Advancement of Religion

- Guidance on Advancement of Religion has been in process since approximately 2007 (14 years)
- Earlier draft versions have been made available, but are not official
- It is possible that the Guidance on Advancement of Religion may be released sometime this year
- When the Guidance is released, the charity bar will want to make sure that the Guidance correctly reflects the law and hopefully does not impose a narrow view of what advancement of religion involves

D. SELECT CASE LAW UPDATE

1. *Ampratwum-Duah v The Queen*, 2020 TCC 18

- A religious minister (“Taxpayer”) claimed charitable deductions for donations to a charity that he was the religious leader of, and he signed the donation receipts in his capacity as the charity’s religious leader
 - No corroborating evidence, i.e. bank account or church records, testimony of other charity officials, was introduced
 - Taxpayer alleged no records were available because the donations were made more than six years earlier

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- The Tax Court of Canada upheld the CRA's reassessment, indicating that supporting books and records were necessary and that
 - The donation receipts were insufficient evidence of donations, particularly as the Taxpayer had signed his own donation receipts
- The CRA reassessed and denied his deductions on grounds that he had access to the charity's records, signed his own donation receipts, and failed to keep sufficient books and records for his donations

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2. Church of Atheism of Central Canada v. Canada (National Revenue), 2019 FCA 296

- Church of Atheism of Central Canada
 - CNCA corporation with a stated purpose “to preach Atheism through charitable activities...”
- In 2017 applied for charitable status and was refused by the Minister of Revenue
- Church appealed the decision arguing that the common law test governing the advancement of religion as a head of charity was invalid as contrary to sections 2, 15 and 27 of the Charter of Rights
- On October 29, 2020, application for leave to appeal to Supreme Court of Canada was dismissed

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3. *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's, 2020 NLCA 27 (July 28, 2020)*

- Archdiocese in this case was not found to have done anything negligent on its own
 - Court found Archdiocese responded appropriately and satisfied any duty that existed in civil law
 - However, Archdiocese was found vicariously liable because of the specific facts surrounding its involvement with another distinct entity, and the actions of that other entity's staff and members

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- Organizations may be found vicariously liable for the actions of separate third-party organizations where:
 - a) a sufficiently close relationship exists;
 - b) and a connection exists to the incident causing the harm
- Where this may apply, due diligence measures must also extend to the other organizations
- However, depends on the facts and the relationship between organizations
- Not a binding case outside of Newfoundland and Labrador, but persuasive authority in other provinces of Canada
- Leave to appeal to Supreme Court of Canada was denied

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