



# Carters/Fasken Healthcare Philanthropy: Check-Up 2021

**September 22, 2021**

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## **Carters/Fasken Healthcare Philanthropy: Check-Up 2021**

**September 22, 2021**

<b>Index</b>	<b>Tab</b>
<b>Agenda</b>	<b>1</b>
<b>Overview of Fasken</b>	<b>2</b>
<b>Overview of Carters</b>	<b>3</b>
<b>Presentations</b>	<b>4</b>
<b>Income Generation for Healthcare Charities, including Social Enterprise and Impact Investing</b>	
<i>Terrance S. Carter, Managing Partner, Carters Professional Corporation</i>	
<b>Due Diligence: A Necessary Precondition to Accepting Large Gifts</b>	
<i>Laurie Turner, Partner, Fasken</i>	
<b>The ONCA and Healthcare Charities: What you need to know</b>	
<i>Theresa L.M. Man, Partner, Carters Professional Corporation</i>	
<b>Data Security, Ransomware and Privacy Law Compliance for Healthcare Charities</b>	
<i>Daniel Fabiano, Partner, Fasken and Daanish Samadmoten, Associate, Fasken</i>	
<b>Fasken Resource Materials</b>	<b>5</b>
<b>Carters Resource Materials</b>	<b>6</b>
<b>Biographies</b>	<b>7</b>



## **Carters/Fasken Healthcare Philanthropy: Check-Up 2021**

**September 22, 2021**

### **Agenda**

**8:45 am – 8:50 am**

#### **Opening Remarks**

*Terrance S. Carter, Managing Partner, Carters Professional Corporation  
Lynne Golding, Partner, Fasken*

**8:50 am – 9:20 am**

#### **Income Generation for Healthcare Charities, including Social Enterprise and Impact Investing**

*Terrance S. Carter, Managing Partner, Carters Professional Corporation*

**9:20 am – 9:50 am**

#### **Due Diligence: A Necessary Precondition to Accepting Large Gifts**

*Laurie Turner, Partner, Fasken*

**9:50 am – 10:20 am**

#### **The ONCA and Healthcare Charities: What you need to know**

*Theresa L.M. Man, Partner, Carters Professional Corporation*

**10:20 am – 10:50 am**

#### **Data Security, Ransomware and Privacy Law Compliance for Healthcare Charities**

*Daniel Fabiano, Partner, Fasken and Daanish Samadmoten, Associate, Fasken*

**10:50 – 11:00 am**

#### **Questions and Closing Remarks**

*Lynne Golding, Partner, Fasken*



## Fasken at a Glance

Fasken's more than 750 lawyers, in ten offices across four continents, are always ready to navigate legal challenges and capitalize on business opportunities for you.

As a leading international business law and litigation firm, we offer experience and expertise across a number of countries and a wide range of industries and practice areas to suit the needs of organizations worldwide.

Clients rely on us for practical, innovative and cost-effective legal services. We solve the most complex business and litigation challenges, providing exceptional value.

## Our Clients

We advise corporate clients, government agencies, regulatory authorities, non-profit bodies and individual clients. As our client, you benefit from our:

- Commitment to quality – Our legal practice is rooted in the relationships we build with clients. That means a comprehensive and sustained focus on the highest level of service throughout our entire Firm to meet and anticipate your evolving needs. Quite simply, we start building relationships by listening to you, our client. We gauge our success from clients like you who continue to entrust us with their most pressing matters.
- Cogent advice – Known for our ability to think strategically and deliver practical solutions, we have extensive experience acting for clients on domestic and international issues. Our lawyers are often asked to comment on legal issues affecting business and are quoted regularly in the media.
- International reach – To meet your needs worldwide, we have teams of lawyers and professionals working in our offices across Canada, Europe, Africa and Asia.



# Our Expertise

We have top-ranked lawyers in a wide range of industries and practice areas:

## Practice Areas

- Antitrust/Competition & Marketing
- Banking & Finance
- Corporate Finance and Securities
- Corporate Social Responsibility Law
- Corporate/Commercial
- Environmental
- Estate Planning
- Government Relations and Strategy
- Indigenous Law
- Insolvency & Restructuring
- Intellectual Property
- International Trade & Customs Law
- Investment Management
- Labour, Employment & Human Rights
- Litigation and Dispute Resolution
- Mergers & Acquisitions
- Political Law
- Privacy and Cybersecurity
- Private Client Services
- Private Equity & Venture Capital
- Procurement
- Real Estate
- Tax Law

## Industries

- Construction
- Energy
- Financial Services
- Franchising
- Health
- Infrastructure & Public-Private Partnerships
- Insurance
- Life Sciences
- Mining
- Real Estate
- Retail
- Technology, Media and Telecommunications
- Transportation

## Markets

- Africa
- Americas
- Asia Pacific
- Europe

## Rankings & Awards

- *Chambers Canada (2021)* recognizes 110 of our lawyers in 43 practice areas.
- Fasken was awarded 'Deal of the Year' in two categories at the *2020 IFLR1000 Canada Awards* and the *IFLR1000 Financial and Corporate Guide (2021)* recognizes 45 of our lawyers in 11 practice areas across Canada, South Africa and England.
- Fasken receives Mansfield Certification. This designation confirms that for the last year the Firm has considered women and/or visible minorities in 30% or more of at least 70% of all its senior positions.
- Fasken achieves ISO27001 Certification. This means our Information Security Management System is compliant with the ISO27001 standards and guidelines.
- *The Legal 500 Canada (2021)* ranks our Firm as top tier in five areas and recognizes 49 of our lawyers across 33 areas of practice.
- *Chambers UK (2021)* ranks Fasken in Energy & Natural Resources: Mining, and recognizes two of our lawyers.
- *The Best Lawyers in Canada (2021)* awards Fasken Natural Resources Law Firm of the Year and Privacy and Data Security Law Firm of the Year and recognizes 256 of our lawyers in 56 practice areas.
- *Chambers Global (2018)* recognizes 61 of our lawyers in 27 practice areas across the Global-wide, African-wide, South African and Canadian categories.
- *Benchmark Canada (2020)* recognizes 72 of our litigators, including two lawyers listed in its Top 50 Trial Lawyers in Canada and another two in Top 50 Women in Canada and nine listed in its 40 & Under Hot List.
- *Who's Who Legal (2020)* recognizes Fasken as the Global Mining Law Firm of the Year, for the sixth straight year. The Firm is a twelve-time winner of this award.
- *Chambers High Net Worth (2020)* ranks our Firm top tier (Band 1) in Private Wealth Law and recognizes three of our lawyers in the area, including two as top tier (Senior Statespeople and Band 1).



## Rankings

**The Canadian Legal Expert Directory (2021)** recognizes two of our lawyers for their expertise in Charities/Not-For-Profit Law

**Chambers Canada (2020)** ranks our Firm nationwide in Charities/Non-profits and recognizes one of our lawyers in the area

**The Best Lawyers in Canada (2020)** recognizes one of our lawyers for their expertise in Charities/Non-Profit Law

## Charities and non-profits

Charities and non-profits enrich the lives of people and communities every day. But managing charitable organizations is a heavy responsibility. Directors, officers and employees of charitable organizations face increased regulations and growing scrutiny of both their operations and governance. Fasken's Charities and Non-Profit Law Group can help you navigate the complex laws and regulations governing the creation, organization, and ongoing administration of charities and non-profit entities.



**Industry knowledge** — The lawyers in the Group have in-depth experience in charitable giving; creation of charitable entities; tax considerations; litigious matters; and general advice relating to governance, compliance and regulatory issues, fundraising, and directors' duties and obligations.



**Multidisciplinary approach** — To address the wide range of issues that can come up in this industry, our team includes specialists from multiple disciplines. With tax, labour and litigation experts, we have the breadth of expertise to effectively support your needs.



**Client-focused approach** — Our customer service culture builds partnerships with our clients. We place great emphasis on timeliness, communication, and understanding our clients' business and legal objectives.



**Local expertise and international reach** — We have multidisciplinary teams of lawyers working in offices across Canada in Vancouver, Calgary, Toronto, Ottawa, Montréal, Québec City, and around Asia, Africa and Europe.

## Recent Experience

Working with **high net worth families** to establish private foundations, donor advised funds and charitable trusts.

Advising on **donor agreements, administration and governance** of the charity, advice regarding investment policies.

Work with **foreign charities** who wish to establish a presence in Canada.



## Other Recent Experience

Advice regarding carrying on **activities abroad** (US, UK and other jurisdictions).

Advise **foreign charities accepting gifts** from Canadian donors.

Working with charities in regard to **amalgamations, transfer of donor, endowment funds and governance matters**;

Acting for **charities involved in litigation matters** regarding estate gifts, regarding enforcement of pledges, inter-charity fights, fights regarding governance issues, director and member meeting protocols, fights regarding existing board, proxy fights, etc;

Advising regarding **HST issues** relating to non-profit charities.

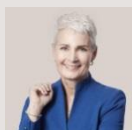
Advising charities on **structuring** regarding business sector and social impact.

## Did you know...

With more than 20 professionals in Canada who practice Charities and Non-Profit Law, our advice extends to charitable activities on a regional, national and international scope.



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## Rankings

*Chambers Canada* (2020) ranks our Firm nationwide in Healthcare and recognizes one of our lawyers in the practice area

*IFLR1000* (2020) recognizes one of our lawyers in the Healthcare practice area.

*The Best Lawyers in Canada* (2019) lists three of our lawyers for Health Care Law

*Chambers Canada* (2018) ranks our Firm nationwide in Healthcare and recognizes one of our lawyers in the practice area

## Health Law

Booming demand for health care is pushing the public health care sector to provide patients with more for less. More access, more solutions and more choice but at lower costs. At the same time, private health sector providers are seeking to help meet those needs and to fill the gaps. To meet your strategic goals, you need a sophisticated legal team schooled in the complexities of health care delivery, administration, technology and regulation. Fasken's Health Law Practice Group is a multidisciplinary team of health law experts who can ensure your challenges are properly addressed.



**Knowledge of the sector** – We have an in-depth understanding of the health care sector. Not only does our team understand the applicable laws and policies but also the key players within the sector.



**National perspective** – With offices in the major population centres across Canada, we are familiar with both federal and provincial legislation and regulations governing health care. Equally important, we are privy to local and regional innovations and can advise clients on innovations and lessons learned from other jurisdictions.

## Recent Experience

Advised **Edesa Biotech** in the acquisition of Stellar Biotechnologies in a reverse merger transaction. Following the closing of the share exchange transaction and given effect to the reverse share split, the combined company has approx. 7,138,233, shares issued and outstanding.

Advised **WELL Health Technologies Corp.** in the acquisition of Kela Atlantic Inc. for up to \$17.75 million. The acquisition of KAI Innovations significantly expanded WELL's digital health portfolio.

Advised **Lonza Group Ltd.** on the acquisition of a controlling stake in Octane Biotech, with the right to acquire full ownership. The increase in equity share will allow Lonza to further develop the technology to support the growing need for scalable autologous manufacturing.



## Other Recent Experience

Advised **Ergoresearch Ltd.** in a going private transaction. All of the outstanding shares have been acquired by a corporation controlled by Sylvain Boucher and Danielle Boucher, in partnership with Walter Capital Partners Inc., for a cash consideration of \$0.30 per share.

Advised **Symbility Solutions** with the completion of its sale of substantially all of the assets of its Symbility Health Division to TELUS Health for aggregate proceeds of approximately C\$16.5 million.

Advised **Knowlton Development Corporation (KDC)** in the acquisition of Aromair Fine Fragrance Company (Aromair). This acquisition adds a new product category to KDC's portfolio and offers new market development and growth opportunities.

Advised **Retirement Concepts** on the corporate reorganization of operational and real estate assets and refinancing of credit facilities with multiple lenders for 23 long-term assisted living and residential care facilities.

Advised **Walter Capital Partners** in the acquisition of the Epiderma group which operates 22 medical aesthetic clinics in Quebec and Ontario.

Advised **Mira IV Acquisition Corp.** in a qualifying transaction pursuant to Policy 2.4 - Capital Pool Companies of the TSX Venture Exchange. The Transaction was structured as a "three-cornered" amalgamation as a result of which Profound became a wholly-owned subsidiary of Mira IV.

Advised **Unipex Solutions Canada inc.**, in the acquisition of all the issued and outstanding shares of Baralex inc. from Manitec Capital inc., continuing to expand its product offering to pharmaceutical manufacturers in Canada and the United States.

Advised **Hincks-Dellcrest** with various aspects of the exploration process in connection with the proposed integration of The Hospital for Sick Children (SickKids) and The Hincks-Dellcrest Treatment Centre, Institute, and Foundation.

Advised **Alegro Health Corp.**, a leading provider of medical, surgical and disability management services, acquired the business and substantially all of the assets of Active Health Management Inc. and The Brenda Rusnak Clinics Inc.

## Did you know...

*What distinguishes Fasken is our large, cross-Canada team. Our lawyers have deep experience and trusted relationships with a wide range of health sector clients in each of our regional markets, as well as national-level expertise.*



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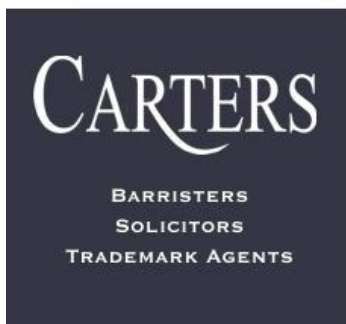
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## **CARTERS CHARITY & NFP FIRM PROFILE**

### **A LAW FIRM WITH A FOCUS ON CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS**

Carters Professional Corporation (Carters) is one of the leading firms in Canada in the area of charity and not-for-profit law and is able to provide a wide range of legal services to its charitable and not-for-profit clients, as well as to individuals, corporations and businesses. With offices in Toronto, Ottawa and Orangeville, Carters provides assistance to clients across Canada and internationally with regard to all aspects of charity and not-for-profit law. Seven of the lawyers at Carters have been recognized by *Lexpert*, and six have been recognized by *Best Lawyers in Canada*, as leaders in their fields in Canada. Carters has also been ranked by *Chambers and Partners*, an international rating service for lawyers. The lawyers and staff at Carters are committed to excellence in providing clients with complete legal solutions for their unique needs.

### **PROVIDING 'PROACTIVE ADVICE'® TO CLIENTS**

Carters strives to provide clients with 'Proactive Advice'® in our integrated approach to legal services. Our lawyers are committed to assisting clients in developing short-term and long-term strategic plans in order to avoid legal problems before they occur in all areas of the law. As part of this commitment, Carters has made numerous resource materials available through its websites [www.carters.ca](http://www.carters.ca), [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca).

### **WITH SOLICITORS TO HELP YOU AVOID LEGAL LIABILITY**

The focus of the solicitors at Carters is in serving charities and not-for-profit organizations through an effective legal risk management approach to the practice of law, and providing legal services in the areas of charity and not-for-profit law, including incorporation, charitable registrations, fundraising, taxation, development of national and international structures, as well as related areas of corporate and commercial law, contracts, real estate and leasing, intellectual property and technology (i.e. trademarks and copyrights), technology, labour, employment, human rights, estates and trusts, charity tax audits, and the evolving area of privacy law and anti-spam.

#### **Carters Professional Corporation**

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## **A LITIGATION DEPARTMENT TO ASSIST YOU WHEN PROBLEMS ARISE**

The litigation lawyers at Carters are experienced in representing clients before all levels of the federal and Ontario courts, before various administrative tribunals, as well as in mediation and other alternative dispute resolution proceedings. Carters' litigation practice encompasses all aspects of litigation and dispute resolution, including mediation, human rights litigation, civil litigation, employment, corporate/commercial, shareholder disputes, personal injury, product liability, intellectual property, charity and not-for-profits, and real estate disputes. Carters also undertakes litigation audits, policy reviews and liability risk management in an effort to limit exposure to liability for its clients.

## **WITH INTERNATIONAL RELATIONSHIPS**

Carters has full access to specialized national and international legal services through its relationship with Fasken, an international business law firm, as well as relationships with firms that specialize in tax exempt organizations in other countries. Terrance S. Carter of Carters also acts as legal counsel to the Charities Practice Group at Fasken. Through these professional relationships, Carters is able to provide its charitable and not-for-profit clients, as well as other clients, with specialized legal services as necessary.

## **CONVENIENCE AND ACCESSIBILITY**

The lawyers and staff at Carters strive to be as accessible to our clients as much as possible. We can be reached by telephone, fax or email, with a complete listing of our staff and lawyers' contact information available at [www.carters.ca](http://www.carters.ca), as well as through our office phone system. Client meetings can be held by telephone conferences, by appointment at our offices in Toronto, Ottawa, or Orangeville, or at the client's location as required. When necessary, evening and weekend appointments are possible.

## **PUBLICATIONS & RESOURCES**

In accordance with Carters' commitment to keep clients abreast of changes in the law, the firm regularly publishes articles, checklists, newsletters, webinars and seminar materials concerning a number of areas of the law. All of these materials are made available free of charge at our websites [www.carters.ca](http://www.carters.ca), [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca). To subscribe to our mailing list, please go to our websites and click on the button "Join Carters Mailing List" to receive our monthly Charity Law Update – Updating Charities and Not-for-Profit Organizations on recent legal developments and risk management considerations.

## EXPERTISE IN CHARITY AND NOT-FOR-PROFIT LAW

Carters has developed extensive expertise in charity and not-for-profit law in support of its work with charities through participation in various forums for professional development, including:

- ♦ Development and maintenance of the websites [www.carters.ca](http://www.carters.ca), [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorismmlaw.ca](http://www.antiterrorismmlaw.ca);
- ♦ Authoring the *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Thomson Reuters), with annual updates;
- ♦ Co-editing *Charities Legislation & Commentary*, 2021 Edition (LexisNexis), published annually;
- ♦ Contributing to *The Management of Nonprofit and Charitable Organizations in Canada*, 4<sup>th</sup> Edition (LexisNexis, 2018);
- ♦ Co-authoring *Branding and Copyright for Charities and Non-profit Organizations*, 3<sup>rd</sup> Edition (LexisNexis, 2019);
- ♦ Co-authoring *Branding and Copyright for Charities and Non-profit Organizations*, (LexisNexis, 2014);
- ♦ Co-authoring *Branding & Trademarks Handbook for Charitable and Not-For-Profit Organizations* (LexisNexis Butterworths, 2006);
- ♦ Contributing to the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada, 2002);
- ♦ Contributing articles on charity and not-for-profit legal issues for various periodicals, including *The Lawyers Daily*, *Law Times*, *The Philanthropist*, *Canadian Fundraiser*, *Canadian Association eZine*, *Canadian Journal of Law and Technology*, *U.S. Journal of Tax Exempt Organizations*, *The International Journal of Not-for-Profit Law*, *The International Journal of Civil Society Law*, *Estates and Trust Quarterly*, *The Bottom Line*, and *The Canadian Bar Association International Business Law Journal*;
- ♦ Publication of newsletters: *Charity & NFP Law Bulletin*, *Charity & NFP Law Update*, *Church Law Bulletin*, and the *Anti-Terrorism and Charity Law Alert*, distributed across Canada and internationally by email;
- ♦ Speaking nationally and internationally at seminars and conferences for the Law Society of Ontario, the Canadian Bar Association, the Ontario Bar Association, The National Society of Fund Raising Executives, The Canadian Association of Gift Planners, the Chartered Professional Accountants Canada, the Chartered Professional Accountants Ontario, the Society of Trust and Estate Practitioners Canada, the Canadian Society of Association Executives, the Canadian Cancer Society, Institute of Corporate Directors, Pro Bono Law Ontario, The American Bar Association, The Canadian Counsel of Christian Charities, The Christian Legal Fellowship, The Canadian Tax Foundation, Osgoode Hall Law School, Insight Information, the University of Ottawa Faculty of Common Law, Ryerson University's Voluntary Sector Management Program, the University of Waterloo, the University of Manitoba Law School, McMaster University, the University of Iowa, and the New York University School of Law;
- ♦ Participating recently as a member of CRA Advisory Committee on the Charitable Sector;
- ♦ Participating in consultations with Canada Revenue Agency (CRA) and the Public Guardian and Trustee on charitable matters; and as agent of the Attorney General of Canada and outside counsel to the Corporate Law Policy Directorate of Industry Canada to provide legal advice on the reform of the *Canada Corporations Act*;
- ♦ Hosting the annual “*Church & Charity Law Seminar™*” in Toronto for 1,000 charity and church leaders, members of religious charities, accountants and lawyers; the annual “*Charity & Not-for-Profit Law*”

Seminar” in Ottawa for more than 400 members of the sector, and co-hosting the annual “Healthcare Philanthropy Seminar” with Fasken;

- ♦ Serving as past members of Canada Revenue Agency’s Charities Advisory Committee, the Technical Issues Working Group of CRA’s Charities Directorate representing the Canadian Bar Association (CBA), the Uniform Law Conference of Canada’s Task Force on Uniform Fundraising Law, the Liability Working Group of the Insurance Bureau of Canada and Voluntary Sector Forum, the Government Relations Committee of the Canadian Association of Gift Planners; the Anti-terrorism Committee and the Air India Inquiry Committee of the CBA, and in consultations with Finance Canada and the Province of Ontario, and the Social Enterprise Panel Consultation for the Ministry of Consumer Services; and
- ♦ Participating as founding members and chairs of the Canadian Bar Association and Ontario Bar Association Charity and Not-for-Profit Law Sections, as well as co-founder of the Canadian Bar Association annual Charity Law Symposium.

## **SPECIFIC LEGAL SERVICES FOR CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS**

As a law firm experienced in serving charities and not-for-profit organizations, Carters is able to provide:

- |                                                     |                                         |
|-----------------------------------------------------|-----------------------------------------|
| ♦ Anti-bribery Compliance                           | ♦ Gift Acceptance Policies              |
| ♦ Counter-terrorism Policy Statements               | ♦ Governance Advice                     |
| ♦ CRA Charity Audits                                | ♦ Human Rights Litigation               |
| ♦ Charitable Organizations & Foundations            | ♦ Insurance Issues                      |
| ♦ Charitable Incorporation & Registration           | ♦ International Trademark Licensing     |
| ♦ Charitable Trusts                                 | ♦ Investment Policies                   |
| ♦ Charity Related Litigation                        | ♦ Legal Risk Management Audits          |
| ♦ Church Discipline Procedures                      | ♦ Legal Audits                          |
| ♦ Church Incorporation                              | ♦ National and International Structures |
| ♦ Corporate Record Maintenance                      | ♦ Privacy Policies and Audits           |
| ♦ Director and Officer Liability                    | ♦ Religious Denominational Structures   |
| ♦ Dissolution and Wind-Up                           | ♦ Sexual Abuse Policies                 |
| ♦ Employment Related Issues                         | ♦ Special Incorporating Legislation     |
| ♦ Endowment and Gift Agreements                     | ♦ Charity Tax Opinions and Appeals      |
| ♦ Foreign Charities Commencing Operations in Canada | ♦ Trademark and Copyright Protection    |
| ♦ Fundraising and Gift Planning                     | ♦ Transition Under the ONCA             |

## EXPERIENCE WITH CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Some of the categories of charities and not-for-profit organizations that Carters has acted for in relation to charity and not-for-profit law include the following:

- ♦ Churches, Dioceses and Related Religious Organizations
- ♦ Ecological Charities
- ♦ Educational Institutions in Canada and Internationally
- ♦ Environmental Organizations
- ♦ Financially Troubled Charities & Their Directors
- ♦ Government Agencies
- ♦ Health Care Organizations
- ♦ Hospitals and Hospital Foundations
- ♦ International Missionary Organizations
- ♦ Lawyers Requiring Counsel on Charitable Matters
- ♦ Museum Foundations
- ♦ National and International Charitable Organizations
- ♦ National Arts Organizations
- ♦ National Medical Research Foundations
- ♦ National Religious Denominations
- ♦ Not-for-Profit Housing Corporations
- ♦ Not-for-Profit Organizations
- ♦ Parallel Foundations
- ♦ Religious and Secular Schools
- ♦ Religious Broadcasting Ministries
- ♦ Safety Regulatory Organizations
- ♦ Seminaries and Bible Colleges
- ♦ Temples, Synagogues and Other Religious Organizations
- ♦ Violence Prevention Organizations
- ♦ Universities and Colleges



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# CARTERS

BARRISTERS  
SOLICITORS  
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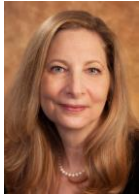
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Carters/Fasken Healthcare Philanthropy:  
Check-Up 2021

# **PRESENTATIONS**

**FASKEN**

**CARTERS**



## Carters/Fasken Healthcare Philanthropy: Check-Up 2021

**FASKEN** **CARTERS**

September 22, 2021

1

### Agenda

- **Income Generation for Healthcare Charities, including Social Enterprise and Impact Investing** – Terrance Carter
- **Due Diligence: A Necessary Exercise for Charities when Accepting Donations** – Laurie Turner
- **The ONCA and Healthcare Charities: What you need to know** – Theresa Man
- **Data Security, Ransomware and Privacy Law Compliance for Healthcare Charities** – Daniel Fabiano and Daanish Samadmoten

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2

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## Healthcare Philanthropy Check-Up 2021:

September 22, 2021

### Income Generation for Healthcare Charities, including Social Enterprise and Impact Investing

By Terrance S. Carter, B.A., LL.B., Trademark Agent

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#### OVERVIEW OF TOPICS

Survey of Different Kinds of Income Generation

Income from Related Business

Income from Unrelated Business

Income from Social Enterprises

Income from Impact Investing

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## A. SURVEY OF DIFFERENT KINDS OF INCOME GENERATION

### 1. Government Contracts, Grants & Contributions

- Primary source of income from healthcare charities
- Contracts must relate to the purposes of the charity

### 2. Income Generation from Gifts

- Gifts from different donors
  - Individuals
  - Corporations and businesses
  - Other registered charities, e.g. public foundations
- Donation receipts can be issued subject to split-receipting rules in order to determine the “eligible amount”

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### 3. Income from Fundraising Events

- Galas, dinners, auctions, concerts, golf tournaments
- Crowdfunding campaigns and other online events
- Donation receipts can be issued but are subject to split-receipting rules to determine the “eligible amount”

### 4. Income from Fundraising by Third Parties

- Charities can earn income from third-party fundraising events, either in person or on the internet, e.g. a P2P campaign
- However, the charity must remain in control of tax receipting and be able to account for all income pursuant to a written agreement

### 5. Income from Membership Fees

- Charities can earn income from membership fees
- Charitable donation receipts can be issued for the “eligible amount” of membership fees

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## 6. Income from Sponsorships

- Charities can earn income from business sponsorships provided that sponsorships are done on an irregular basis
- No donation receipt can be issued, but businesses can claim a tax deduction for the sponsorship, subject to the reasonableness of the expenses claimed

## 7. Income from Lotteries/Raffles

- Games of chance e.g. bingo, Nevada tickets, etc.
- No donation receipt can be issued

## 8. Income from Conference Fees

- Charities can earn income from conference fees for in-person and virtual conferences tied to their charitable purposes
- No donation receipts can be issued because value is received

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## 9. Income from Passive Investments

- Charities can earn income from passive investments that arise from “mere ownership” of property
- Investment income includes interest, dividends, royalties and rent
- Charities can also invest in limited partnerships as passive investments subject to the rules under the *Income Tax Act* (ITA)

## 10. Income from Charitable Programs/Sale of Goods

- Charities can earn income by charging fees for charitable programs and/or sale of goods, provided that the programs and/or sales:
  - Serve the charity’s beneficiaries;
  - Directly further a charitable purpose; and
  - Fees are reasonable in the circumstances and typically aimed at cost recovery

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## 11. Income from Related Business

- Related business income is permitted subject to prescribed rules under the ITA (Details below)

## 12. Income from Unrelated Business

- Unrelated business income is not permitted but can be carried out through a for-profit subsidiary (Details below)

## 13. Income from Social Enterprise

- Social Enterprise income is possible on a limited basis or through a for-profit subsidiary (Details below)

## 14. Income from Impact Investing

- Impact Investing income is possible but is subject to prescribed rules (Details below)

## B. INCOME FROM RELATED BUSINESS

- CRA permits charitable organizations and public foundations to carry on “related businesses”
- However, private foundations cannot carry on any business activities (related business or otherwise)
- With a related business, there is no requirement that the charity price the sale of products or services on a cost recovery basis
- Non-compliance, though, resulting from engaging in businesses that are not a related business can result in penalties and even revocation
- See CRA Policy (CPS-019) What is a Related Business?
- A related business is a business that is either:
  - Substantially run by volunteers (90%); or
  - Linked and subordinate to a charity’s purpose

9

## 1. Substantially Run by Volunteers

- “Related Business” is defined in the ITA to include a business that is unrelated to the objects of the charity provided that it is run substantially (90%) by volunteers
  - 90% volunteer determination is based on a head count calculated on an annual basis
  - *E.g.* calculation is based on the number of people used to operate the business rather than the number of hours worked
  - A business run by 90% volunteers can be unrelated to the charitable purpose (like PEI church lobster dinners)

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## 2. Linked and Subordinate to Charitable Purposes

- Four forms of linkage identified by CRA:
  - A usual and necessary concomitant of charitable programs;
    - Business activities that supplement a charity’s charitable programs, like a hospital cafeteria
  - An off-shoot of a charitable program;
    - Charity may create an asset it can sell in the ordinary operation of charitable programs
  - A use of excess capacity;
    - Earns income during the periods when assets and staff are not being used to full capacity
  - Sale of items that promote the charity or its objects;
    - Involves sales that are intended to advertise, promote, or symbolize the charity or its objects

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- **Factors that indicate “subordination” to the charitable purpose:**

- The business receives a minor portion of the charity’s attention and resources;
- The business is integrated into the charity’s operation (not acting as a self-contained unit);
- The charity’s charitable goals continue to dominate its decision-making; and
- The charity continues to operate for an exclusively charitable purpose by permitting no element of undue private benefit to enter into its operations

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## C. INCOME FROM UNRELATED BUSINESS

### 1. Utilizing a For-Profit Subsidiary Corporation

- In order to avoid a charity carrying on an unrelated business with resulting penalties and possible revocation, a charity could consider setting up a for-profit subsidiary corporation in order to operate the unrelated business
- A for-profit subsidiary corporation can also be effective in containing potential liability within the subsidiary corporation
- A for-profit subsidiary corporation could also participate in joint business ventures with other for-profit corporations
- However, in setting up a for-profit subsidiary corporation, there are a number of factors that must be considered

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- a) Tax Liability Under ITA
  - Tax would have to be paid on income earned, but generally may claim a deduction for donations up to 75% of net income of the for-profit subsidiary
  - As well, some management service fees and sponsorship fees may be charged by the charity to the subsidiary to reduce taxable income of the for-profit subsidiary corporation
  - Resulting tax from placing unrelated business activity in a for-profit subsidiary may be quite low in the single digits depending on the circumstances
- b) Charity Needs to Receive FMV for the Use of Any of Its Resources
  - The charity cannot simply gift resources to its for-profit subsidiary, including space, facilities and personnel
  - Instead the resources transferred must be done at FMV

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- c) Charity Owning an Interest in a Business
  - The charity would need to justify the investment of charitable resources in the subsidiary as either:
 

OR

Meeting the prudent investor standard under the *Trustee Act* (Ontario)

A Program Related Investment under the CRA's CED Guidance, and possibly as a "social investment" in Ontario under the *Charities Accounting Act* (See below)
  - In Ontario, the Public Guardian and Trustee has the right under the *Charities Accounting Act* to make inquiries where the charity owns a "substantial interest" in a business e.g. 20%

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- d) Restrictions on Foundations Owning a For-Profit Business Corporation
  - Public and private foundations cannot acquire more than 50% of issued share capital with full voting rights
  - However, shares may be gifted to a foundation (regardless of the percentage) as long as the foundation does not acquire more than 5% of the shares for consideration
  - Private foundations are subject to excess corporate holding rules requiring public disclosure over 2% and divestment requirements over 20%
- e) Governance and Operational Issues
  - Need a separate board of directors
  - Issues involving cross-over liability need to be considered
  - Subsidiary corporation needs to operate on an arm's length basis with its own bank account, as well as its own books and records

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## 2. Brief Reference to Other Business Structures

- a) Non-profit Organizations (NPOs)
  - Utilizing NPOs under par 149(1)(l) of the ITA is a difficult option through which to earn income
  - Definition of an NPO under the ITA and interpretation by the CRA preclude operating a business intended to earn a profit
- b) Business Trusts
  - Business trusts allow distribution of income to the charity tax free
  - However, business trusts are more complicated to set up and operate than a subsidiary corporation

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## D. INCOME FROM SOCIAL ENTERPRISES

### 1. What is a Social Enterprise?

- Many charities, including healthcare charities, may be considering starting a social enterprise but are not sure what it involves
- In its most basic form, a “social enterprise” can be described as a revenue-generating business dedicated to achieving a social goal
- A social enterprise is not normally expected to provide a significant return for its investors, since the focus is on achieving a social purpose rather than simply making a profit
- A social enterprise can be undertaken by for-profit corporations, charities, and possibly NPOs to a limited extent

- The ongoing public interest in social enterprise in Canada has been reflected in provincial social enterprise legislation

B.C. Community Contribution Companies (C3s)  
July 29, 2013

Nova Scotia Community Interest Companies (CICs)  
August 2, 2016

B.C. Benefit Companies June 30, 2020

- It is also possible for a for-profit corporation to seek certification as a Certified B Corporation (U.S. designation)

- Any for-profit corporation in Canada (either federally or provincially) can be structured to achieve a social purpose in making a profit through appropriate share attributes and/or unanimous shareholder agreements
- This is because for-profit corporations have a broader mandate at law than simply “shareholder primacy”
- For-profit corporations as social enterprises though, are taxable entities with no resulting tax incentives for investors
- However, charities operating social enterprises are exempt from income tax, can issue charitable receipts for donations, and can receive gifts from other registered charities

## 2. Examples of Social Enterprises by Charities

### a) Social Businesses for Individuals with Disabilities

- Pursuant to CRA’s CED Guidance (CG-014), social businesses by charities include providing permanent employment for those with disabilities, not simply on-the-job training or limited time employment
- Social businesses for the disabled may provide services, sell goods, manufacture articles, operate retail outlets or undertake other kinds of work
- Work must match the special needs of the disabled and relieve conditions associated with the respective disability
- The charity can generate an incidental profit from these programs

21

## b) Employment-Related Training for the Unemployed

- The CRA CED Guidance (CG-014) provides that employment-related training activities that relieve unemployment can be charitable, provided the beneficiary group consists of individuals who are:
  - Unemployed or facing a real prospect of imminent unemployment; and
  - Are shown to need assistance (*i.e.* lack of resources or skills to help themselves)
- Examples of employment-related training include employability training, entrepreneurial training and on the job training
- CRA permits charities to generate incidental profits from these programs

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## c) Loans and Loan Guarantees

- The CRA CED Guidance (CG-014) permits charities to provide loans to eligible beneficiaries to achieve a charitable purpose, including micro-finance and loan guarantees
- Charities can operate these programs to advance education or other charitable purposes, including health care, that benefit the community, not just to relieve poverty
- *E.g.* loans to help eligible beneficiaries attend courses to enhance their employability or establish a business
- *E.g.* providing start-up loans and loan guarantees to establish a business for an eligible beneficiary to further charitable purposes, but not simply entrepreneurship

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## E. INCOME FROM IMPACT INVESTING

### 1. What is Impact Investing?

- Many charities are interested in becoming involved in “impact investing” but are not sure what it involves
- “Impact investing” generally refers to investments made with the intention to achieve a measureable social or environmental impact, as well as a financial return to the investor (e.g. a dual purpose)
- Impact investing is often used interchangeably with “social investing”, “social finance” and “program related investing”
- Social responsible investing (“SRI”) and environmental, social and governance investing (“ESG”) is somewhat different from impact investing in that SRI and ESG investing tend to be more passive strategies for investments in public equities

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- Supporters may be interested in making either a loan or a donation to a charity in order to create a “charitable impact investment fund”
- A donation to a charity will result in a donation tax receipt whereas a loan to a charity will not, unless the loan is subsequently forgiven
- Impact investing by a charity can take the form of:
  - A loan (both secure and unsecure)
  - An equity interest (e.g. shares or partnerships interests)
- While impact investing is an important development, it has limitations which the charity needs to be aware of
- The starting point is to understand the different options for impact investing and the applicable regulatory regimes

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## 2. “Prudent Investor” form of Impact Investing

- a) Standard of Care
  - *Trustee Act* states a trustee (e.g. a director of a charity) must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments
- b) Authorized Investments
  - *Trustee Act* states that a “trustee may invest trust property in any form of property in which a prudent investor might invest”
  - Investment in mutual funds and pooled funds are permitted
- c) Mandatory Investment Criteria
  - *Trustee Act* states that seven mandatory criteria must be considered
    - Includes “assets special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries”
    - Arguable this criteria provides for some scope to make impact investments as part of an investment strategy to pursue financial returns for the charity

- d) Mandatory Diversification Obligation
  - *Trustee Act* requires that trustees must diversify to an extent appropriate to the requirements of the trust and general economic and investment market conditions
- e) Delegation of Investment Decision Making
  - *Trustee Act* permits trustees to delegate investment decision making, but need to comply with prescribed requirements
- f) Prohibition on Sub-delegation
  - *Trustee Act* provides that a delegated investment manager may not further delegate investment decision making
- g) Liability Protection of Trustees
  - *Trustee Act* provides that a trustee will not be liable for losses if the investment decision conformed to an investment plan that a prudent investor would adopt under comparable circumstances

27

### 3. “Social Investment” form of Impact Investing

- a) Option of “Social Investments” (Dual Purpose) in Ontario
  - In 2017 the *Charities Accounting Act* (CAA) was amended to permit charities in Ontario to make “social investments”
  - “Social investments” involve applying charitable property to both:
    - Directly further the purposes of the charity, and
    - Achieve a “financial return”
  - “Financial return” is defined as an outcome that is better, in financial terms than expending all of the property
- b) Duties of Trustees in Making “Social Investments”
  - Must ensure that social investment is in the interest of the charity
  - Review the investment periodically after making a social investment
  - Both before and after making a social investment, determine whether advice should be obtained (not clear what type of advice is required)

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- c) Limitations on Expenditure of Capital
  - Social investments may not be made in relation to trust property that is subject to a limitation on capital expenditure unless trustees expect that the social investment will not contravene that limitation or the terms of the trust to permit such investment
  - Therefore, important to review existing endowment agreements, and endowment templates for future endowment agreements to avoid contravention, as well as possible breach of trust
- d) No Delegation of Power to Make Social Investments
  - Charities may not delegate decision making power with regard to making social investments.
- e) Liability Protection for Trustees
  - Protection of trustees from liability for losses from social investments is limited to only when trustees “acted honestly and in good faith” with the duties, restrictions and limitations that apply under the CAA and terms of trust

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## 4. CRA Program Related Investments

- a) What are Program Related Investments (PRIs)?
  - Described in the CRA CED Guidance (CG-014)
  - PRIs are defined by the CRA as investments that “directly further” the charitable purposes of the charity
  - A PRI may generate a financial return, though they are not made for that purpose
  - A PRI usually involves the return or potential return of capital but is not mandatory
  - A PRI may also yield revenue, such as interest, but the yield can be below market rates
  - A charity can make a PRI with both “qualified donees”, e.g. other registered charities, but also non qualified donees

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- PRIs may overlap with “social investments” in Ontario referenced above
- As such, social investments may require compliance with the CRA requirements of a PRI (legal advice should be sought)
- Requirements to engage in PRIs
  - Need a policy to describe how PRIs will further the purposes of the charity
  - The charity must maintain “direction and control” over the PRI when engaged in PRIs with non-qualified donees
  - Must ensure that any private benefit is no more than incidental
  - Must prepare and maintain adequate books and records
  - Must have an exit plan

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- c) Accounting for PRI
  - PRIs are excluded from the asset base for the calculation of the 3.5 disbursement quota (“DQ”)
  - PRIs, though, are not considered by CRA to be charitable expenditures in meeting the 3.5% DQ except with the loss of capital or lost opportunity costs
- d) What Happens if PRI Requirements No Longer Met?
  - If the requirements for a PRI are no longer met then either exit the PRI or the investment would need to meet prudent investor standards of a regular investment
  - In this regard, it is important to make sure that regular investments are not seen as a business of the charity and/or a “collateral unstated non-charitable purpose”

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## 5. Other Factors to Consider when Engaging in Impact Investment

- a) Under the *Income Tax Act*
  - Restrictions on acquisition of control of corporations by public and private foundations (See above)
  - Non-qualified investment rules for private foundations
  - Excess business holding regime for private foundations (See above)
  - Limitations on registered charities investing in limited partnerships
  - Needs to avoid being seen as a related business
- b) Under the *Charities Accounting Act* in Ontario (CAA)
  - 20% “substantial interest” threshold permitting the Public Guardian and Trustee to require financial statements and seek court intervention
  - Commingling of restricted funds rules under CAA regulations

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## Due Diligence: A Necessary Exercise for Charities when Accepting Donations



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## Context / Background

- Why conduct due diligence in the context of gifts and pledges?

- ✓ Assists directors in fulfilling their fiduciary duties
- ✓ May assist in the event of litigation
- ✓ Reduces likelihood of unwanted consequences (and surprises!) arising later
- ✓ May identify unwanted sources of funding
- ✓ May be required by your charity's policies



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## ▼ Context / Background

- Distinction between gifts and pledges

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## ▼ Due Diligence: Sources of Information

- Board / committee members
- Board members of “friendly” charities (however, consider confidentiality obligations)
- Internet
- Social media (e.g. Instagram, LinkedIn)
- Public searches (e.g. litigation search) – be arranged by legal counsel

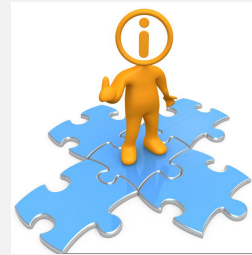


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## ▼ Due Diligence: Sources of Information

- Global risk and compliance databases
- Criminal record check (consent required)



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## ▼ Due Diligence: Resources

Query whether due diligence will be performed using:

- internal resources (e.g. charity staff)?
- external resources (e.g. professional advisors retained for this specific purpose)?
- combination of both?

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## Considerations re Due Diligence

- Is there a policy that governs due diligence on donors (e.g. acceptance of gift policies)? If not, should there be?
- What drives the required scope of due diligence?
  - Amount of gift or pledge?
  - Donor type?
  - Donor location?
  - Naming rights?

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## Example Due Diligence Matrix

Due Diligence Level	Applicable where...	Requirements
1	<ul style="list-style-type: none"> <li>• Gift or pledge does not exceed \$x</li> <li>• No naming rights provided to donor</li> <li>• Donor is a “repeat donor” or otherwise known to the charity</li> </ul>	<ul style="list-style-type: none"> <li>• Review of publicly available information (e.g. on web, social media)</li> <li>• Due diligence conducted internally</li> <li>• Approval level: 1</li> </ul>
2	<ul style="list-style-type: none"> <li>• Gift or pledge exceeds \$x but does not exceed \$y</li> <li>• No naming rights provided to donor</li> <li>• Donor is not a “repeat donor” or otherwise known to the corporation</li> </ul>	<ul style="list-style-type: none"> <li>• Review of publicly available information</li> <li>• Review of legal and financial profile</li> <li>• Public searches</li> <li>• Due diligence conducted internally with assistance of legal advisor to perform public searches</li> <li>• Approval level: 2</li> </ul>
3	<ul style="list-style-type: none"> <li>• Gifts or pledge exceed \$y</li> <li>• Naming rights provided to donor</li> <li>• Where otherwise warranted or required by the Board</li> </ul>	<ul style="list-style-type: none"> <li>• All required elements of level 2</li> <li>• Criminal record check</li> <li>• Global risk and compliance database checks</li> <li>• Due diligence conducted internally with involvement of external professional advisors</li> <li>• Approval level: 3</li> </ul>

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8



## ▼ Considerations re Due Diligence

- What resources are available for the process?
- What resources (if any) are required to be used for the process?
- How will due diligence findings be presented and to whom?
- Do any due diligence findings necessitate that the matter be escalated?
- Will you obtain donor consent to due diligence?

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## ▼ Gift Agreements

- Documents a gift having been made by a donor to a charity
- Not required (could be a gift at common law)...but many benefits of documenting the terms of a gift
- Generally, once a gift is transferred, it cannot be returned to the donor – so what happens if the charity no longer wishes to possess the gift after it has been accepted?

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## ▼ Pledge Agreements

- Documents a commitment by a donor to make a gift to a charity at a future date
- Only enforceable where certain conditions are met
- Important to clearly document the terms of the arrangement, particularly where naming rights are involved
- If policies are referenced, then ensure that the terms of the policies and the agreement are consistent

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## ▼ Pledge Agreements

- Where naming rights are included:
  - Typically will increase the level of due diligence required
  - Need to clearly define at what time the naming rights are triggered (e.g. on the charity's receipt of 25% of the pledge? 50%?)
  - Need to clearly define in what instances the naming rights can be revoked (e.g. where donor engages in specified conduct? where donor fails to advance funds in accordance with the agreement?)

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## ▼ Pledge Agreements

- Where naming rights are included:
  - Need to clearly define how long the naming rights will continue (e.g. perpetual? 50 years?)
  - If not perpetual, does the donor (or donor's estate) have a right of first refusal with respect to the name after the date on which the original right expires? If yes, subject to what conditions?
  - Consider the costs to the charity of having to remove the donor's name (e.g. financial, reputational)

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## ▼ Other Matters...

- Keep detailed documentation of:
  - Due diligence conducted
  - Results of due diligence
  - Decision making re acceptance or rejection of gifts/pledges
- Update policies on a routine basis to reflect lessons learned, etc.
- Implementing ongoing monitoring

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14

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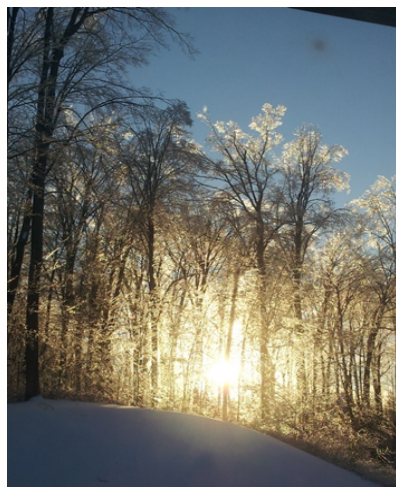
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 BARRISTERS SOLICITORS TRADEMARK AGENTS	<h2>Healthcare Philanthropy Check-Up 2021:</h2> <p>September 22, 2021</p>		
<h3>The ONCA and Healthcare Charities: What you need to know</h3> <p>By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.          tman@carters.ca          1-877-942-0001</p>			
<p>© 2021 Carters Professional Corporation</p> <table> <tr> <td>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td> <td>Toronto   Ottawa   Orangeville  <a href="http://www.carters.ca">www.carters.ca</a>   <a href="http://www.charitylaw.ca">www.charitylaw.ca</a>   <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a> </td> </tr> </table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto   Ottawa   Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorismlaw.ca">www.antiterrorismlaw.ca</a>
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<div></div> <div>2</div>
<h2>OVERVIEW</h2> <div> <div>STATUS OF ONCA</div> <div>PRACTICAL STEPS FOR TRANSITION</div> <div>OVERVIEW OF KEY ELEMENTS OF ONCA</div> </div> <ul style="list-style-type: none"> <li>This presentation is not about share capital social clubs under Part II of OCA – they will have 5 years to continue under the ONCA, the Ontario <i>Business Corporations Act</i> or the <i>Co-operative Corporations Act</i></li> </ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <span style="float: right;"><a href="http://www.carters.ca">www.carters.ca</a></span></p>

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**FINALLY .....**  
**YES IT IS HERE!!!**

**The Beginning of  
a New Era**

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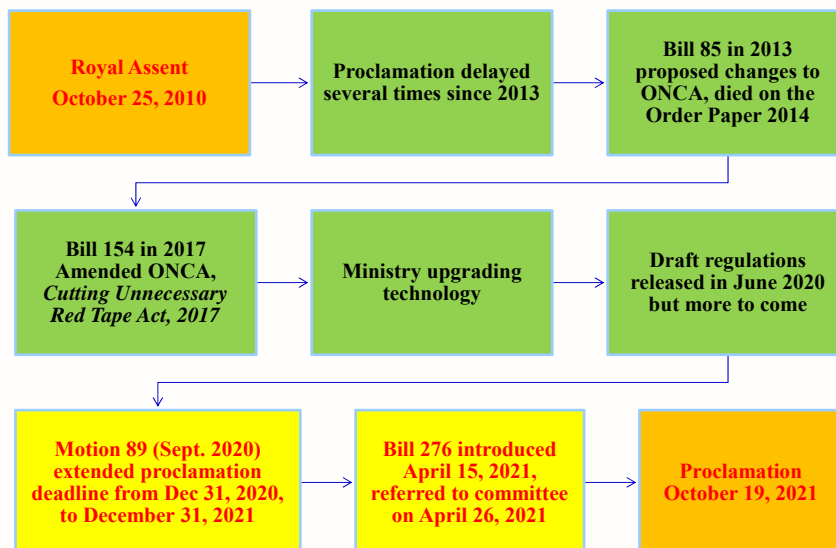
## A. THE ONCA IS COMING

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") will be proclaimed into force on October 19, 2021
- Once proclaimed, ONCA will replace Part III of Ontario *Corporations Act* ("OCA") which governs non-share capital membership corporations
- See Ministry's website for updates  
<https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- LONG history of ONCA to this point (next slide)

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## WHAT DOES IT MEAN?



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## B. IMPLICATIONS OF ONCA PROCLAMATION

- ONCA applies to all OCA corporations automatically upon proclamation
- If do nothing –
  - Corporation will not be dissolved
  - LP, SLPs, by-laws and special resolutions will continue to govern for 3 years even if inconsistent with ONCA, but will be deemed amended after 3 years to comply with the ONCA - will result in uncertainty

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- Not moving the following provisions from by-laws or special resolutions to articles in order to comply with ONCA is fine until articles of amendment are endorsed
  1. Number of directors
  2. Two or more classes or groups of members
  3. Voting rights of members
  4. Delegates under section 130 of the OCA
  5. Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution

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- Optional transition process within 3 years of proclamation to make necessary changes to current governing documents
  - adopt articles of amendment
  - adopt ONCA-compliant by-law
- Prudent to go through the transition process

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Current documents under OCA	If do nothing after proclamation of ONCA		Optional transition after proclamation
	During first 3 years after proclamation	After 3 years	During first 3 years after proclamation
LP SLPs	- LP and SLPs will continue to govern even if inconsistent with ONCA	Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy	<b>Adopt articles of amendment</b> Goals: - Ensure comply with ONCA - Certainty and no mess
By-laws Special resolutions	- By-laws will continue to govern even if inconsistent with ONCA - ONCA will apply to areas not addressed in the by-laws	Provisions inconsistent with ONCA will be deem amended to comply with the ONCA => uncertainty and messy	<b>Amend by-law or adopt new ONCA-compliant by-law</b> Goals: - Ensure comply with ONCA - Certainty and no mess

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## WHAT DO I DO?



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### C. HOW TO GET READY FOR ONCA TRANSITION

#### Collect

#### COLLECT GOVERNING DOCUMENTS

- Confirm corporation is actually under the OCA
- Collect LP, SLPs, by-laws (including amendments)
- Collect governance related documents - e.g., organizational charts, policies, manuals

#### Review

#### REVIEW GOVERNING DOCUMENTS

- Do they reflect current governance process? If not, what is current governance process?
- Are changes desired? Write them down, come up with a wish list

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## Study

### STUDY KEY ONCA FEATURES

- To determine how current governance structure will be impacted by the ONCA
- ONCA framework
  - Rules in the Act
  - Some details in the Regulations (still to come)
  - Articles and by-laws
- Three types of rules in ONCA
  - Mandatory rules - cannot be overridden by the articles or by-laws
  - Default rules - by-laws or articles can override
  - Alternate rules - articles/by-laws can include certain optional rules permitted by ONCA

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## Compare

### COMPARE ONCA VS CURRENT GOV. DOCS.

- Are the current by-laws or desired governance structure/process inconsistent with ONCA? What to do if they are?

## Prepare

### PREPARE NEW ONCA DOCUMENTS

- Articles of amendment
- Current by-law be replaced or substantially revised

## Approve

### APPROVAL AND FILINGS

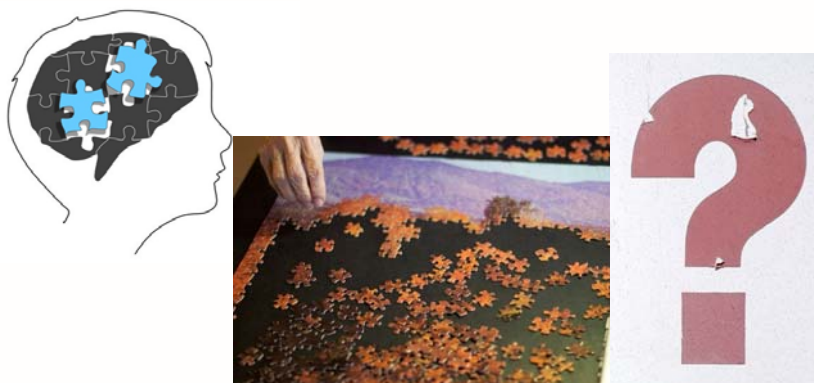
- Need special resolution of members to approve
- File articles of amendment with the Ministry (but not the by-laws)
- Registered charities will need to file all of the ONCA documents with Canada Revenue Agency, Charities Directorate

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## WHAT ARE THE ONCA RULES?



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### D. OVERVIEW - KEY ELEMENTS OF THE ONCA

#### 1. Incorporation and Corporate Powers

Incorporation	<p>Incorporation as of right with only 1 incorporator</p> <p>Certificate of incorporation issued - no more LPs</p>
By-laws	<p>No need to file by-laws or financial statements</p> <p>Default by-law will apply if no by-laws adopted within 60 days after incorporation</p>
Powers	<p>Corporation will have powers of a natural person</p> <p>ONCA will not apply to corporations sole "except as is prescribed"</p>

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## 2. Public Benefit Corporations (PBCs)

PBCs include Charitable corporations



Non-charitable corporations that receive more than \$10,000 (or another amount prescribed in the regulations) in a financial year in funding from public sources (see next slide) => Need to monitor revenue sources and level annually

Change status

If a non-charitable corporation reaches threshold, deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year

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Public sources means

Donations or gifts from persons who are not members, directors, officers or employees of the corporation

Grants or similar financial assistance from the federal, provincial or municipal government or government agency

Liquidation and dissolution of a non-PBC

Net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)

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## Consequences of being a PBC

Not more than 1/3 of the directors may be employees of the corporation or its affiliates

Higher thresholds for dispensing with appointing an auditor or person to conduct review engagement

On dissolution of charitable corporations - net assets must be distributed to a Cdn. corporation that is a registered charity with similar purposes, or to the government

On dissolution of non-charitable corporations - net assets must be distributed to a PBC with similar purposes, to Cdn. corporation that is a registered charity with similar purposes, or to government

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## 3. Financial Review

### Thresholds

Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting

There are rules for exemption

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	\$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$100,000 but less than \$500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	\$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of	\$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than \$500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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## 4. Directors

Number & Qualifications	Minimum 3 directors
	Articles may provide maximum & minimum range
	Directors not need to be members
Election and appointment	Directors elected at AGMs
	Ex-officio directors possible
	Directors may appoint directors between AGMs (1 year term, 1/3 cap)
	If different member groups elect x directors to the Board, must structure members as separate classes

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Term	Maximum 4 year term of directors
	No limit on maximum number of terms
	Staggered terms for directors possible
	Removal of any director by majority vote of members (mandatory), except ex officio directors
	Directors must consent in writing to take office

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Objective standard of care for directors and officers	Act honestly and in good faith with a view to the best interests of the corporation
	Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
Reasonable diligence defence for directors	Not liable if fulfilled their duty if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
	Defence includes good faith reliance on financial statements and reports of professionals

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## 5. Members

Basic concepts	Corporation must have members
	By-laws must set out conditions for membership
	Default rule is 1 vote per member (subject to articles)
Classes	Articles must set out the classes of members
	If 1 class, all members must be voting, but if 2+ classes, voting rights must be given to at least 1 class
Default rules to terminate members	Death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination

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May allow directors, members or committee to discipline members or terminate

Articles/by-laws must set out circumstances and the manner in which the power may be exercised

Must exercise power in good faith and fair & reasonable manner - 15 days notice of disciplinary action or termination with reasons, give member opportunity to be heard

Member may apply for compliance or restraining order if power misused

Class veto votes

ONCA originally gave all member classes (even non-voting) separate vote on fundamental matters and certain amendments to articles, *i.e.* class veto

Bill 154 (2017) proposed delaying membership class votes for at least 3 years after proclamation

Motion 89 did not extend class vote provisions beyond Dec. 31, 2020 = class votes provisions died

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Extensive rights

Requisition members' meeting (by 10% of voting right)

Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)

Submit proposal to nominate directors (by 5% of voting right)

Access corporate records (e.g., membership list)

Broad remedy powers (e.g., dissent and appraisal remedy derivative action, compliance & restraining orders, court ordered wind-up and liquidation)

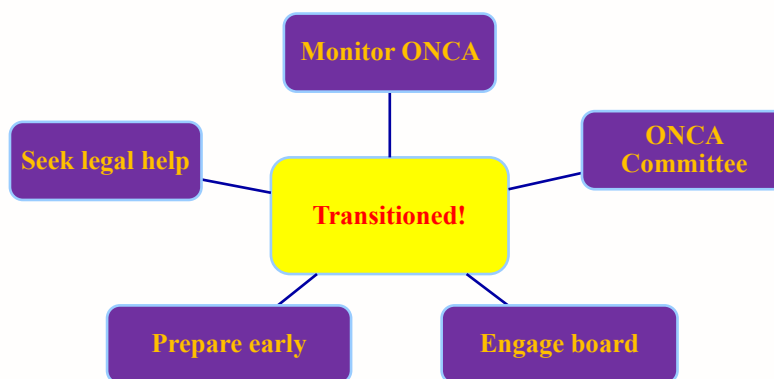
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## 6. Members' Meetings

Notice of meeting	10 to 50 days before the meeting
Record date	Directors may fix "record date" of no more than 50 days before members' meeting (to determine who are members for the meeting)
Voting	Optional proxy votes, voting by mail, voting by telephonic or electronic means
Proxyholders	May limit proxyholders to members
Circulation of financials	FS, auditor/review engagement report, & information required by articles or by-laws must be given to members upon request at least 21 days (or as prescribed in regulations) before AGM

## E. KEY TAKEAWAYS



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## Data Security, Ransomware and Privacy Law Compliance for Healthcare Charities



**Daniel Fabiano**

Partner, Fasken  
+1 416 868 3364  
[dfabiano@fasken.com](mailto:dfabiano@fasken.com)



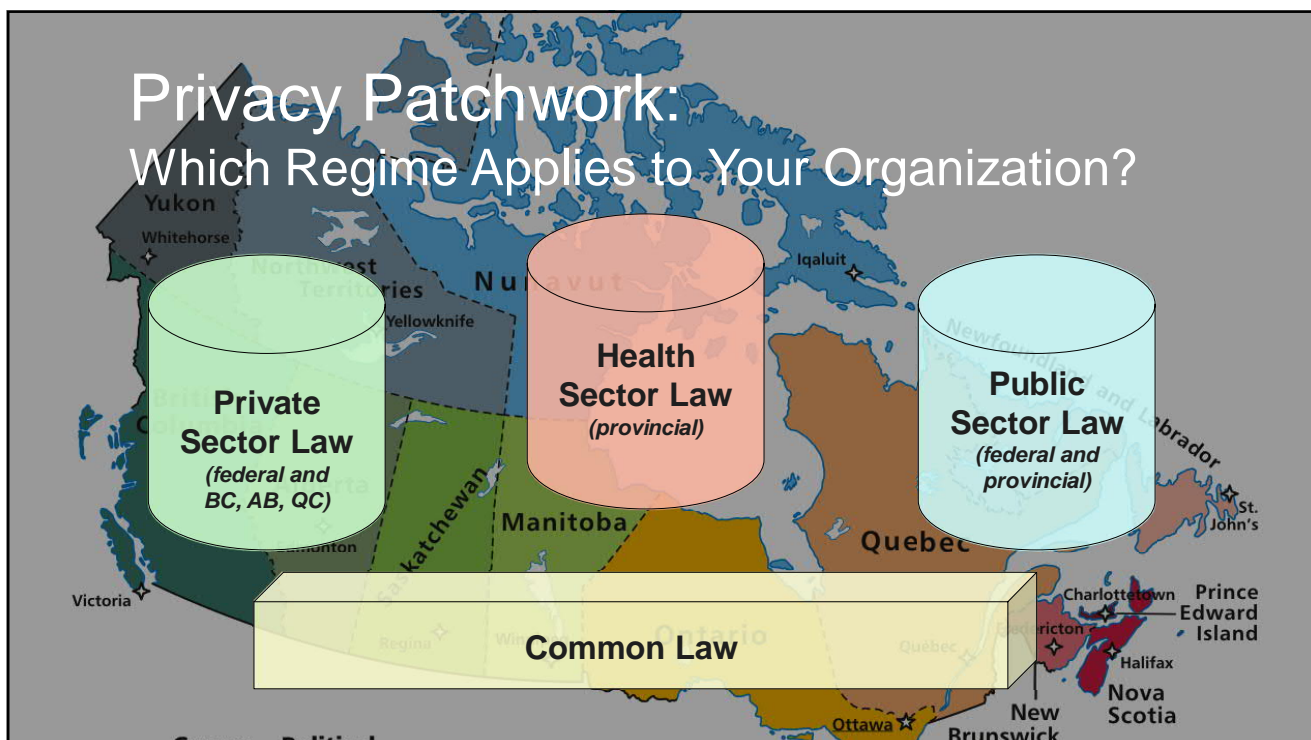
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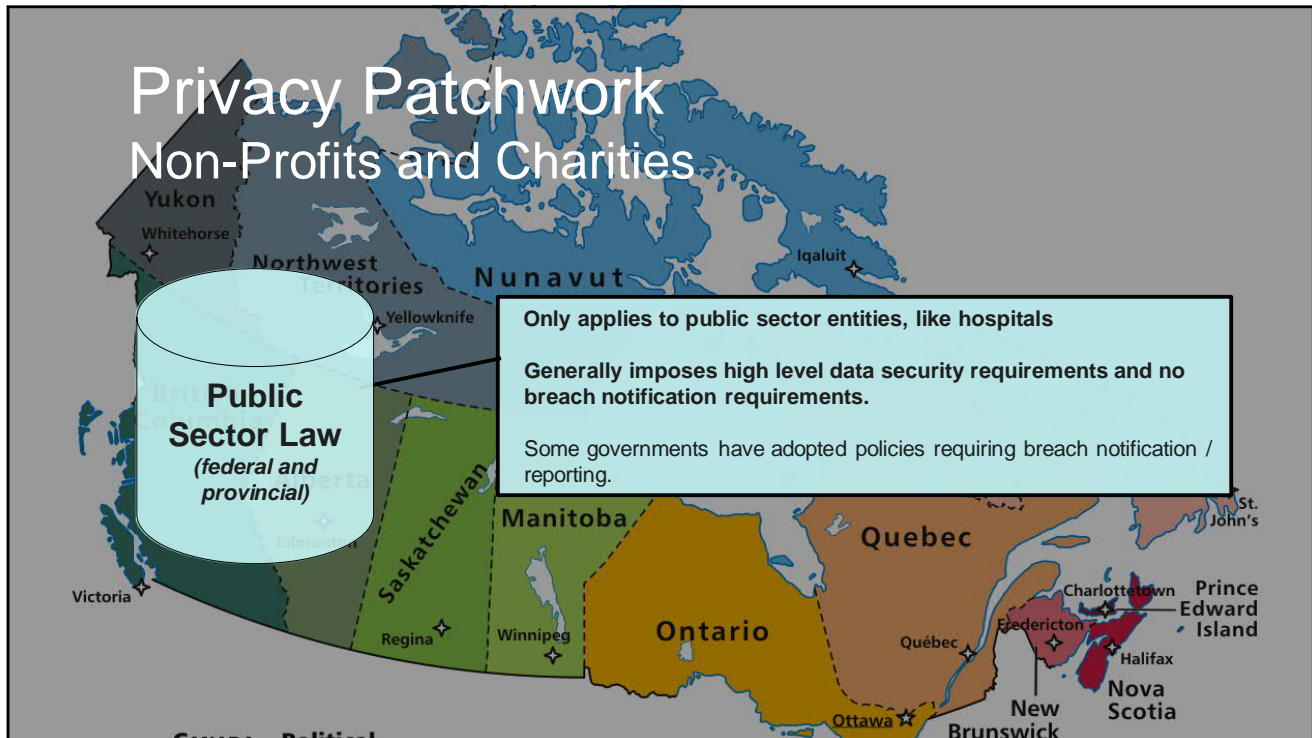
## Privacy Patchwork: Which Regime Applies to Your Organization?



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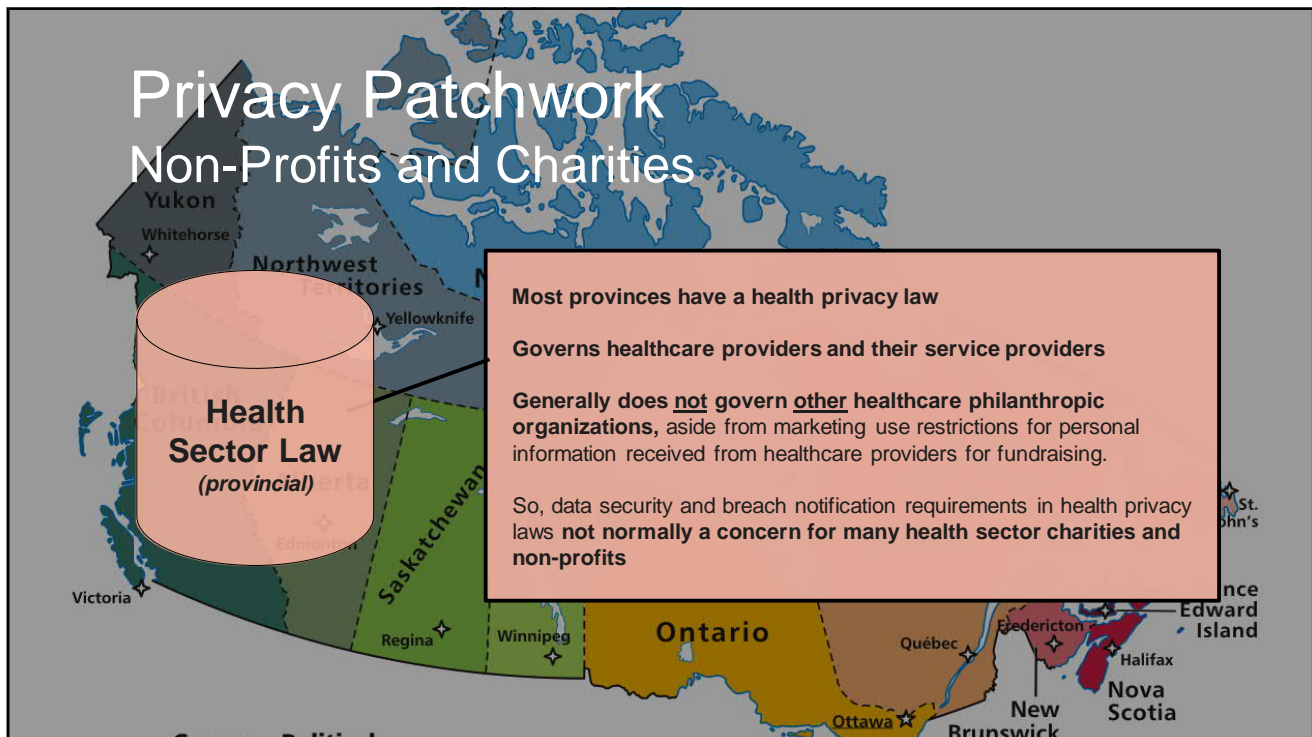


# Privacy Patchwork Non-Profits and Charities



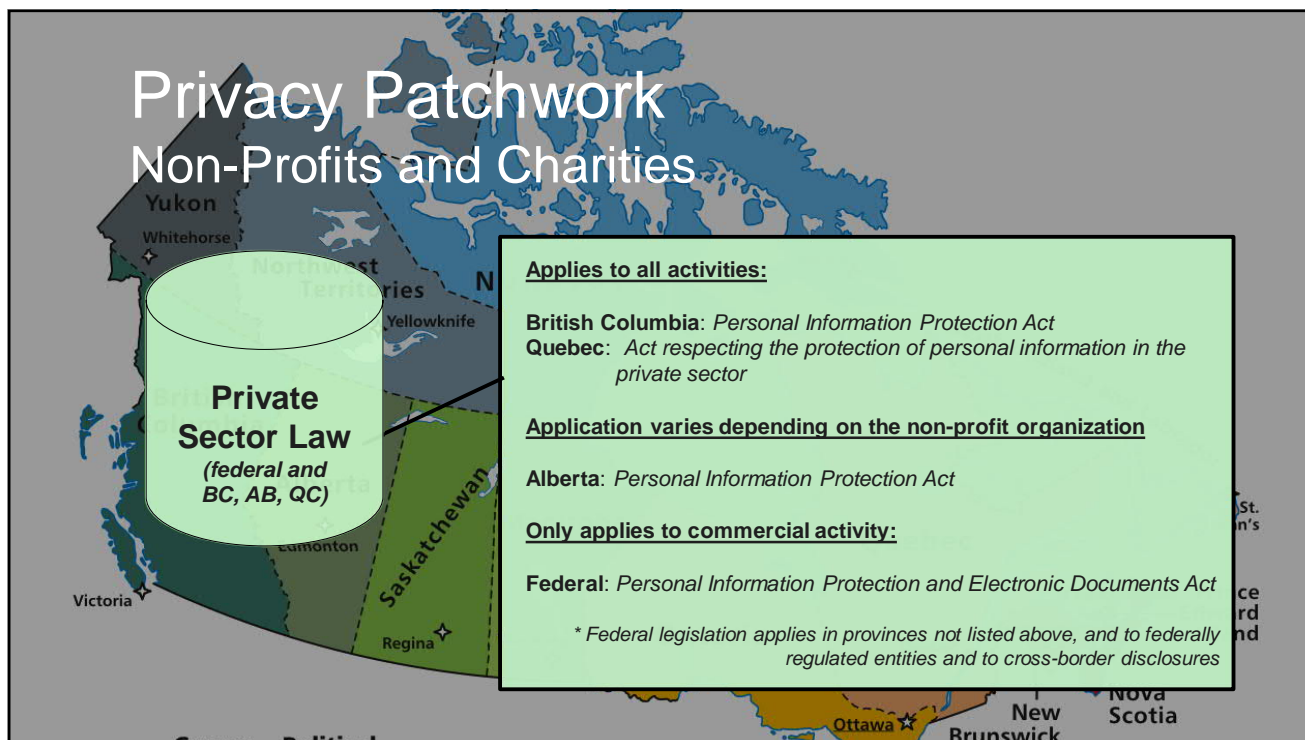
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# Privacy Patchwork Non-Profits and Charities



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# Privacy Patchwork Non-Profits and Charities



5

## Commercial Activity

- Relevant consideration outside of BC and Quebec (and partly Alberta) is whether the non-profit is engaged in “commercial activity”:
  - Transaction, act or conduct or any regular course of conduct that is of a commercial character
  - Examples:
    - Selling, bartering or leasing of donor, membership or other fundraising lists
    - Sale of merchandise / services and events / performances for an admission fee
- Accepting donations (fundraising) or providing free services (newsletters) would not fall within the definition of commercial activity.

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## ▼ Safeguards

- All privacy laws speak to safeguarding personal information in a manner appropriate to its sensitivity: more sensitive = more rigorous safeguards
- Some privacy laws impose a breach notice / reporting regime
  - PIPEDA
  - Alberta PIPA
- Others do not (BC PIPA), or do not at this time (Quebec)

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## ▼ Trigger for Mandatory Notice / Report

- PIPEDA:  
  
**Breach of security safeguards** involving **personal information** under an organization's **control** if it is reasonable in the circumstances to believe that the breach creates a **real risk of significant harm** to an individual
- Alberta PIPA: Similar trigger

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## ▶ PIPEDA Breach Requirements

- Must keep a log that summarizes all breaches (going back 2 years)
- If it is reasonable to believe that the breach creates a “**real risk of significant harm to the individual**”, then organization must as soon as feasible:
  - Report breach to the federal Commissioner
  - Notify affected individuals of the breach
- Report / notice has prescribed contents
- Requirements around how notice is provided (direct vs. indirect vs. exceptions)

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## ▶ Alberta Breach Requirements

- If it is reasonable to believe that the breach creates a “**real risk of significant harm to the individual**”, then organization must without unreasonable delay:
  - Report breach to the Alberta Commissioner
  - Alberta Commissioner may then require notice to affected individuals
- Report / notice has prescribed contents
- Requirements around how notice is provided (direct vs. indirect vs. exceptions)

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## General Principles

- Privacy laws should inform practices and response to privacy breaches (regardless of whether they apply):
  - notifying if there is a real risk of significant harm
  - providing information to enable the individual to self-help
- Privacy laws are changing, new obligations will arise – *stay tuned*:
  - modernization of current privacy laws underway, at different stages (*Quebec far ahead; federal reform likely renewed post-election, other jurisdictions sending signals*)
  - Ontario is moving towards enacting new privacy law likely to apply to non-profit organizations
- Litigation risk applies (regardless of whether a privacy law breach notice applies) – so important to respond to breaches accordingly

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## More than 15.1 Billion Records Exposed in 2019

The total number of records exposed in 2019 increased by 284 percent compared to 2018.

LifeLabs data breach could impact up to 15m customers

SHIELDS HEALTH SOLUTIONS EMPLOYEE EMAIL HACK

**Ransomware Attacks Cost Healthcare Sector At Least \$160M Since 2016**

LAFAYETTE REGIONAL REHABILITATION REPORTS JULY 2019 EMAIL HACK

SUNSHINE BEHAVIORAL HEALTH GROUP CLOUD MISCONFIGURATION

About 3,500 Sunshine Behavioral Health Group patients are being notified that some of their protected health information was left exposed online due to a misconfigured cloud server.

**Stolen laptop leads to potential data breach of 650,000 Health Share of Oregon patients**

Winnipeg-based online pharmacy warns of data breach

**More than 28 million Canadians impacted by a data breach in past 12 months: privacy watchdog**

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 Lisa Cameron is the United States Privacy & Information Officer at the American Red Cross, a non-profit organization, and privacy is a core value at this non-profit. She has been working in the privacy field for over 10 years and has been a part of the American Red Cross since 2008. She is currently the Privacy Officer for the American Red Cross, where she is responsible for ensuring that the organization's privacy practices are in line with the requirements of the Privacy Act and the Access to Information Act. She is also a member of the International Association of Privacy Professionals (IAPP) and the Privacy Law Institute (PLI).

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## ▼ Lessons from the cases

- Internal incident and crisis teams
- External team may include:
  - legal counsel “breach coach”
  - forensic investigation and incident response teams
  - crisis communications/public relations experts
  - other providers (e.g. IT teams, ransom payment, notification provider, call centre, identity protection)

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## ▼ Lessons from the cases

**“After the data breach was discovered, there was no cover up, and Home Depot responded as a good corporate citizen to remedy the data breach. ...Unless one wishes to play pretend, Home Depot was the successful party in resisting a pleaded claim of \$500 million.”**

*- Lozanski v. Home Depot, 2016 ONSC 5447*

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## Lessons from the cases

### Target Court Upholds Attorney-Client Privilege in Cyber Investigations

**ATTORNEY-CLIENT PRIVILEGED**

In a decision issued late last Friday, the United States District Court for the District of Minnesota rejected an effort by class action Plaintiffs to access materials created in the course of Target's investigation of its 2013 payment card breach that Target claimed were protected by the attorney-client privilege and work product doctrine.

### Experian need not share data breach forensics report, judge says in tentative ruling

Jurisdiction : - North America / USA

15 May 17 | 22:12 GMT

Author: Mike Swift

#### IN BRIEF

A federal judge in California tentatively plans to rule that Experian need not share a computer forensics report done by a contractor in the wake of a 2015 data breach that exposed the personal information of 15 million T-Mobile subscribers, saying the report was done in preparation for litigation.

5 UNITED STATES DISTRICT COURT  
6 NORTHERN DISTRICT OF CALIFORNIA  
7  
8 **IN RE ANTHEM, INC.**  
9 **DATA BREACH LITIGATION** Case No. 15-md-02617 LHK (NC)  
10  
11 **ORDER AFTER DISCOVERY**  
12 **HEARING**  
Re: Dkt. Nos. 705, 706, 710, 715

691565, at \*3 (N.D. Cal. Feb. 21, 2014). Here, the Court finds that Anthem has met its burden of showing that the withheld documents were created with a dual purpose, and that the litigation purpose permeates the documents. On the record before the Court, plaintiffs' motion to compel production of these withheld documents is denied.

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## Lessons from the cases

- *Condon v Canada*, 2018 FC 522
  - “This settlement will serve as a benchmark for future privacy breach class actions and encourage organizations throughout Canada to take privacy seriously, for fear of facing serious litigation consequences for a privacy breach.”

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## ▼ Lessons from the cases

- *Condon v Canada*, 2018 FC 522
  - Lost drive affecting 583,000 individuals (including name, SIN, address, student loan)
  - Response:
    - Notification of breach to individuals
    - Six years of fraud flagging from Equifax and Transunion
    - Forensic investigation and darkweb searches

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## ▼ Lessons from the cases

- *Condon v Canada*, 2018 FC 522
  - \$17.5 million settlement fund for:
    - \$5.25 million to plaintiff counsel
    - Cost of administering settlement
    - \$60 per individual for wasted time
  - Unlimited compensation for any actual losses

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## ▮ Lessons from the cases

### Aetna Announces Program to Provide Immediate Relief to Individuals Claiming to Be Affected By Privacy Mailing Incident

Sep 28 2017

Aetna has launched a program to provide immediate relief to individuals who are claiming they were affected by the inadvertent disclosure of protected health information in a July mailing regarding filing prescriptions for medications to treat or prevent HIV/AIDS. Through this program, Aetna is offering reimbursement and payments to individuals who claim they have incurred financial hardship as a direct result of the privacy breach, and Aetna is also providing access to counseling services for affected individuals and their families who claim they were affected. You may submit forms in either or both categories.

Aetna is offering this program as a service to individuals who claim they have been impacted by the potential inadvertent disclosure of their personal health information and, by doing so, is not admitting any wrongdoing. All of Aetna's rights and defenses are reserved. Individuals who avail themselves of the benefits offered under this program will not release any legal claims.

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21

## ▮ Ransomware

- Ransomware attacks increasing
- Amounts demanded increasing
- New exploitation in addition to encryption: stealing data and threatening to publish it
- Organized crime, sanctions, and increased government focus on ransomware

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22

## ▼ Email Compromise

- One of the most common types of privacy incidents
- Potential privacy implications often not considered

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23

## ▼ Third Party Vendors

- Vendors can often be a source of compromised information
- Consider contractual clauses in agreements with such vendors re notification

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24

## ▼ Key takeaways

- Risks and requirements are escalating
- Manage information intake and retention
- Incident response plan
- Privilege considerations
- Escalation protocols
- Cyber insurance

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25

## ▼ Disclaimer

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26

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## **Resource Materials**

# Proposed Changes would lead to the regulation of Personal Support Workers, Physician Assistants and Behaviour Analysts in the Province of Ontario

READING TIME

9 MINUTE READ

MAY 6, 2021

## Health Bulletin

On April 27, 2021 Ontario introduced Bill 283, *Advancing Oversight and Planning in Ontario's Health System Act, 2021* ("Bill 283"). As of the date of this bulletin, Bill 283 passed its second reading and has been ordered referred to the Standing Committee on Social Policy.

Bill 283 is comprised of various parts, included among which are four Schedules:

Schedule 1	<i>Covid-19 Vaccination Reporting Act, 2021</i>
Schedule 2	<i>Health and Supportive Care Providers Oversight Authority Act, 2021</i>
Schedule 3	<i>Medicine Act, 1991</i>
Schedule 4	<i>Psychology and Applied Behaviour Analysis Act, 2021</i>

This bulletin will provide a high-level summary of some of the principal matters of each of the Schedules. Further details regarding certain aspects of Schedules 2 and 4 (as identified below) will be the subject of a subsequent bulletin.

### ▼ I. Schedule 1 – Introduction of *COVID-19 Vaccination Reporting Act, 2021*

Schedule 1 introduces a new Act, namely, the Covid-19 Vaccination Reporting Act, 2021 (the "Covid Reporting Act"). If enacted, the Covid Reporting Act will require "vaccinators" -- defined to mean any person or entity who/that administers a vaccine to protect against COVID-19 to an individual in Ontario -- to ensure that prescribed information regarding:

- i) the individual receiving the vaccine (e.g. individual's name and date of birth);
- ii) the vaccine administered (e.g. product name and manufacturer, expiry date); and
- iii) the vaccinator (e.g. vaccinator's name and professional designation and licence number),

is disclosed to the Ministry of Health (the “Ministry”)[1] in respect of every individual to whom the vaccinator either administers a vaccine or refuses to administer a vaccine.[2] The Covid Reporting Act would require the Ministry to use and disclose all such information it receives in accordance with the *Personal Health Information Protection Act, 2004*. [3]

If passed, the Covid Reporting Act would confer the Minister of Health (the “Minister”) with the authority to make directives respecting the form, manner and timing of the disclosures referenced above in paragraphs i), ii) and iii).[4]

## ▼ II. Schedule 2 – Introduction of *Health and Supportive Care Providers Oversight Authority Act, 2021*

Schedule 2 introduces another new Act, being the *Health and Supportive Care Providers Oversight Authority Act, 2021* (the “PSW Act”).

Currently, unlike many other health professions (e.g. medicine, nursing), PSW is not a regulated profession in the Province of Ontario. If enacted, the PSW Act will establish a new corporation called the Health and Supportive Care Providers Oversight Authority (the “Authority”). The Authority would be responsible for increasing accountability of PSWs through, among other things, the use of a *voluntary* public registry for PSWs in the Province of Ontario (the “Registry”) to identify registrants to members of the public, and provide for “consistency in PSW education, training and standards of practice”.[5]

In addition to creating the Authority, the PSW Act sets forth the functions and powers of:

- the Authority;
- the board of directors of the Authority (which is to be comprised of between 8 and 12 members, less than a majority of which will be appointed by the Lieutenant Governor in Council); and
- the Chief Executive Officer of the Authority (being an employee of the Authority who is appointed by its board of directors).

Included in the list of powers conferred on the Authority by the Act, are powers related to complaints, dispute resolution and investigations with respect to registrants of the Authority. Each of these powers will be further detailed in our future bulletin on the PSW Act.

The PSW Act also outlines the powers of the Chief Executive Officer of the Authority, including, for example:

- the power to investigate, mediate or resolve complaints pertaining to registrants;
- the power to appoint investigators to inquire and examine the actions of registrants; and
- the power to refer, in whole or in part, any contraventions by registrants of the prescribed code of ethics to the Discipline Committee of the Authority who may then direct the Chief Executive Officer to revoke, suspend or impose conditions on a registrant.

Further information regarding the Authority’s Discipline Committee, together with the other Committees prescribed by the PSW Act (including, for example, its Advisory Committee -- which will be required to include patient/client, professional and educator representation), will be provided in our next bulletin.

In providing background on the PSW Act, the Ministry clarified that the PSW Act “[...] contains only those elements that are necessary to establish the Authority. Further details would be set out in regulations, by-laws and policies following extensive consultation with the system partners”.[6] For example, while the PSW Act expressly provides that applications for registration on the Registry will be made to the Authority, it merely states that such applications will be made in the form and manner required by the Authority and does not specify the specific requirements or criteria for registration.

## ▼ III. Schedule 3 – *Amendments to Medicine Act, 1991*

Schedule 3 of Bill 283 provides for the regulation of physician assistants – of which there are approximately 400 currently practising in Ontario.[7] More specifically, Schedule 3 introduces amendments to the *Medicine Act, 1991* (the “Medicine Act”) that would recognize a new class of members of the College of Physicians and Surgeons of Ontario (“CPSO”) – namely, the class of “physician assistants”. The Ministry has indicated that this amendment is aimed to “reflect the role of physician assistants as extensions of physicians” and

“improve [physician assistants’] integration within Ontario’s health care system and facilitate quality of care and patient safety.”<sup>[8]</sup>

If enacted, the Medicine Act would also be amended to provide that:

a member of the CPSO who is a physician assistant is not permitted to perform an act under the authority of section 4 of the Medicine Act (being those acts authorized to be performed by other members of the CPSO)<sup>[9]</sup> unless: (i) the performance of the act by the member is permitted by the regulations and the member performs the act in accordance with such regulations; and (ii) the act is ordered by a person who is a member of the CPSO (other than a physician assistant) who is authorized to perform the act; and

a panel of the Discipline Committee of the CPSO shall find that a member of that College who is a physician assistant has committed an act of professional misconduct if the member performs an authorized act in contravention of the above noted restrictions.

## ▼ IV. Schedule 4 – *Psychology and Applied Behaviour Analysis Act, 2021*

Schedule 4 would repeal the *Psychology Act, 1991* and replace it with a new Act, titled the *Psychology and Applied Behaviour Analysis Act, 2021* (the “PABAA”). If enacted, the PABAA would continue the College of Psychologists of Ontario (“CPO”) under the name “College of Psychologists and Behaviour Analysts of Ontario” (“CPBAO”).<sup>[10]</sup> This new name reflects the fact that the PABAA would, for the first time, regulate the profession known as “applied behaviour analysis”. As part of the transition, individuals who are members of the CPO prior to the PABAA coming into force and effect will be deemed to be registrants of the CPBAO under the PABAA.<sup>[11]</sup>

The PABAA details the scopes of practice for psychology and applied behaviour analysis as follows:

*Psychology* – being “the assessment of behavioural and mental conditions, the diagnosis of neuropsychological disorders and dysfunctions and psychotic, neurotic and personality disorders and dysfunctions, the prevention and treatment of behavioural and mental disorders and dysfunctions and the maintenance and enhancement of physical, intellectual, emotional, social and interpersonal functioning”;<sup>[12]</sup> and

*Applied Behaviour Analysis* – being “the assessment of covert and overt behaviour and its functions through direct observation and measurement, and the design, implementation, delivery and evaluation of interventions derived from the principles of behaviour in order to produce meaningful improvements.”<sup>[13]</sup>

Notably, the current regulatory framework for psychologists will remain unaffected if the PABAA comes into force. However, the PABAA does include provisions which would increase the size of, and amend the composition of the Council of the CPBAO to “enable equitable representation for both professions.”<sup>[14]</sup>

Further details regarding the proposed CPBAO, including the profession of applied behaviour analysis, will be included in our upcoming bulletin.

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<sup>[1]</sup> “Ministry” is defined by the Covid Reporting Act to mean the “Ministry of the Minister”, while “Minister” is defined to mean the Minister of Health or such other Minister as may be assigned responsibility for the administration of the Covid Reporting Act under the Executive Council Act. For the purposes of this bulletin, we have assumed that “Ministry” refers to the Ministry of Health and “Minister” refers to the Minister of Health.

<sup>[2]</sup> Unless the applicable individual has not provided such information to the vaccinator.

<sup>[3]</sup> Subject to any requirements provided in the regulations (of which none of have been introduced at the date of this bulletin).

<sup>[4]</sup> Bill 283 provides that Schedule 1 will come into force on the day Advancing Oversight and Planning in Ontario’s Health System Act, 2021 receives Royal Assent.

<sup>[5]</sup> Ministry’s *Proposed Legislation to Strengthen the Health and Supportive Care Workforce During COVID-19 and Beyond* dated April 27, 2021, [Ontario Introduces Legislation to Strengthen Health Workforce Accountability and Enhance Data-Driven COVID-19 Response](#) (the “Ministry Backgrounder”).



[6] Ibid.

[7] See the [Canadian Association of Physician Assistants /Association canadienne des adjoints au médecin](#) ↗

[8] The Ministry Backgrounder.

[9] In particular, Section 4 of the Medicine Act provides that, “ In the course of engaging in the practice of medicine, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following: 1. Communicating a diagnosis identifying a disease or disorder as the cause of a person’s symptoms. 2. Performing a procedure on tissue below the dermis, below the surface of a mucous membrane, in or below the surface of the cornea or in or below the surfaces of the teeth. 3. Setting or casting a fracture of a bone or a dislocation of a joint. 4. Moving the joints of the spine beyond a person’s usual physiological range of motion using a fast, low amplitude thrust. 5. Administering a substance by injection or inhalation. 6. Putting an instrument, hand or finger, i. beyond the external ear canal, ii. beyond the point in the nasal passages where they normally narrow, iii. beyond the larynx, iv. beyond the opening of the urethra, v. beyond the labia majora, vi. beyond the anal verge, or vii. into an artificial opening into the body. 7. Applying or ordering the application of a prescribed form of energy. 8. Prescribing, dispensing, selling or compounding a drug. 9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses. 10. Prescribing a hearing aid for a hearing impaired person. 11. Managing labour or conducting the delivery of a baby. 12. Allergy challenge testing of a kind in which a positive result is a significant allergic response. 13. Treating, by means of psychotherapy technique delivered through a therapeutic relationship, an individual’s serious disorder of thought, cognition, mood, emotional regulation, perception or memory that may seriously impair the individual’s judgement, insight, behaviour, communication or social functioning"

[10] And L'Ordre des psychologues et des analystes du comportement de l'Ontario in French.

[11] Subject to any term, condition, or limitation to which the previous registration was subject.

[12] Section 3(1).

[13] Section 3(2).

[14] The Ministry Backgrounder.

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# New COVID-19 Regulations Address Patient Transfers and the Redeployment of Health Care Professionals to Hospitals

READING TIME

5 MINUTE READ

APRIL 14, 2021

## Health Bulletin

On April 9, 2021, the Ontario government made two new regulations under the *Emergency Management and Civil Protection Act*<sup>[1]</sup> (the “EMCPA”): the Transfer of Hospital Patients Regulation<sup>[2]</sup> (the “Transfer Regulation”) and the Work Redeployment for Local Health Integration Networks and Ontario Health Regulation<sup>[3]</sup> (the “Work Redeployment Regulation”). Both regulations aim to ensure that hospitals have the resources and capacity necessary to provide patient care during the COVID-19 pandemic.

### ▼ Declaration of Emergency

On April 7, 2021, the provincial government declared an emergency in the Province of Ontario under the EMCPA.<sup>[4]</sup> During a declared emergency, the Lieutenant Governor is empowered by the EMCPA to make orders to promote the public good by protecting the health, safety and welfare of the people of Ontario.<sup>[5]</sup> Both the Transfer Regulation and the Work Redeployment Regulation were enacted by order of the Lieutenant Governor.

### ▼ Transfer of Hospital Patients

The Transfer Regulation is intended to address “major surge events”, meaning an increase in demand for critical care resources of hospitals that is attributable to COVID-19 and which is overwhelming, or imminently threatens to overwhelm, hospitals’ critical care resources.<sup>[6]</sup>

The Transfer Regulation authorizes hospitals to transfer a patient to an alternate hospital site, and authorizes the receiving hospital to admit that patient, whether or not the patient or their substitute decision-maker has consented to the transfer.<sup>[7]</sup> An “alternate hospital site” is either a different location or site of the same hospital or a different hospital, as hospital is defined in the *Connecting Care Act*.<sup>[8]</sup> This includes public and private hospitals and psychiatric facilities, but excludes other care facilities such as long-term care homes.

Four conditions must be met in order for the transfer to be permitted:<sup>[9]</sup>

1. The transfer must be necessary to
  - I. respond to a major surge event,

- II. enable the hospital to optimize the availability of its critical care and acute care resources, or assist another hospital in optimizing the availability of such resources, and
  - III. reduce a foreseeable risk of serious bodily harm to a person;
2. Reasonable efforts must have been made to obtain consent to the transfer from the patient or their substitute decision-maker;
  3. The attending physician must be satisfied that the patient can receive the required care at the alternate hospital site and that the transfer will not compromise the patient's medical condition; and
  4. Where the proposed transfer is to a different hospital, a member of the medical, extended class nursing, dental or midwifery staff at the receiving hospital must be prepared to admit the patient.

Hospitals should maintain appropriate documentation to confirm that, prior to transferring a patient, each of these four conditions were met.

To facilitate the provision of care to the patient being transferred, the transferring hospital is authorized to disclose any necessary information, including personal health information, to the receiving hospital.<sup>[10]</sup>

Transfers effected under the Transfer Regulation are not permanent. As soon as possible following the conclusion of the major surge event, the alternate hospital must make reasonable efforts to transfer the patient back to the original hospital site, or to another suitable location which is consented to by the patient or their substitute decision-maker.<sup>[11]</sup>

## ▼ Work Redeployment for Local Health Integration Networks and Ontario Health

Under the Work Redeployment Regulation, Home and Community Care Support Service (“HCCSS”) organizations (previously part of local health integration networks)<sup>[12]</sup>, are authorized to take reasonably necessary measures, with respect to work redeployment and staffing, to respond to, prevent and alleviate the outbreak of COVID-19.<sup>[13]</sup> Ontario Health and HCCSS organizations are also authorized to redeploy staff to assist hospitals in responding to COVID-19 outbreaks.<sup>[14]</sup>

Such measures may include any of the following:<sup>[15]</sup>

- redeploying staff from one HCCSS organization to another;
- redeploying staff to provide assistance within a hospital;
- changing the assignment of work, including assigning non-bargaining unit employees or contractors to perform bargaining unit work;
- changing the scheduling of work or shift assignments;
- deferring or cancelling vacations, absences or other leaves;
- employing extra part-time or temporary staff or contractors, including for the purposes of performing bargaining unit work; or
- providing appropriate staff training or education to achieve the purposes of a redeployment plan.

Ontario Health and HCCSS organizations can develop, modify, and implement staffing redeployment plans without complying with the provisions of a collective agreement. Further, any grievance process with respect to measures taken under the Work Redeployment Regulation is suspended for the period that the regulation remains in force.<sup>[16]</sup> Staff who are temporarily deployed to another organization or hospital remain the staff of the deploying organization, and both organizations will not be seen as constituting a single employer for the purposes of the *Labour Relations Act*.<sup>[17]</sup>

In order to implement redeployment plans, Ontario Health and HCCSS organizations are given the authority to collect information from staff about their work skills and availability. They may also require that staff provide information about their likely or actual exposure to COVID-19 or other health conditions that may affect their ability to work.<sup>[18]</sup>

## ▼ Looking Forward

Both the Transfer Regulation and the Work Redeployment Regulation are temporary measures, and are set to expire by default after 14 days, on April 23, 2021, unless terminated sooner in accordance with the EMCPA.<sup>[19]</sup> However, for as long as the emergency declaration remains in effect, the two regulations may be extended by further 14-day periods if extensions are necessary to deal with

the effects of the emergency.<sup>[20]</sup>

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[1] *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. [↗](#)

[2] O. Reg. 272/21: Transfer Of Hospital Patients [↗](#).

[3] O. Reg. 271/21: Work Redeployment For Local Health Integration Networks And Ontario Health [↗](#).

[4] O. Reg. 264/21: Declaration Of Emergency [↗](#).

[5] EMCPA, section 7.0.2(1).

[6] Transfer Regulation, Schedule 1, section 1.

[7] *Ibid*, section 2(1).

[8] *Ibid*, section 1.

[9] *Ibid*, section 2(2).

[10] *Ibid*, section 3.

[11] *Ibid*, section 4.

[12] [Facts about Home and Community Care Support Services](#) [↗](#), Ministry of Health.

[13] Work Deployment Regulation, Schedule 1, section 2(1).

[14] *Ibid*, section 2(2).

[15] *Ibid*, section 3(1).

[16] *Ibid*, section 3(2).

[17] *Ibid*, section 4.

[18] *Ibid*, section 3(2).

[19] EMCPA, section 7.0.8(1).

[20] EMCPA, section 7.0.8(3).

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## **Resource Materials**

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

## AUGUST 2021

### SECTIONS

Recent Publications and News	
Releases	2
In the Press	22
Upcoming Events and Presentations	22
Contributors	23

### HIGHLIGHTS

#### CHARITY AND NFP MATTERS

- ♦ Complexities of the Disbursement Quota Consultation: More Than Just A Number
- ♦ ONCA and Ontario Business Registry Come Into Force on October 19, 2021
- ♦ What Charities and NFPs Need to Know for the Upcoming Federal Election
- ♦ Corporate Update
- ♦ Legislation Update
- ♦ Federal Court of Appeal Says CRA Too Restrictive in Refusing Registration for CAAAs
- ♦ Advisory Committee on the Charitable Sector Releases Report #3
- ♦ Faith-Based University Entitled to Procedural Fairness in Funding Applications
- ♦ Severance Pay Threshold Calculations are not Limited to Ontario or Canadian Payroll
- ♦ BC Court Hears Decision after City Cancels Youth Conference Rental
- ♦ SCC Provides Further Guidance on “Fair Dealing” Exception to Copyright Infringement
- ♦ Staff Training about Privacy Rules is Essential in Preventing Snooping
- ♦ Permanent Residency Status Not a Protected Ground of Citizenship in Human Rights Code
- ♦ AML/ATF Update

#### COVID-19 UPDATE

- ♦ Federal and Ontario COVID-19 Update
- ♦ Lexpert Rankings
- ♦ Best Lawyers in Canada Rankings

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## **RECENT PUBLICATIONS AND NEWS RELEASES**

### **CHARITY AND NFP MATTERS**

#### **Complexities of the Disbursement Quota Consultation: More Than Just A Number**

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

As anticipated, the Department of Finance Canada (“Finance Canada”) launched a [public consultation](#) on August 6, 2021 (the “Consultation”) in order to consider a potential increase of the annual disbursement quota (“DQ”). The DQ is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that charitable funds are used for charitable purposes and are not accumulated indefinitely. It is determined based on the value of a charity’s property (e.g., real estate, investments) that is not used for charitable activities or administration. A potential increase to the DQ was first proposed in the 2021 Federal Budget released on April 19, 2021. The Consultation, first announced on August 6, 2021, closes on September 30, 2021.

The Budget 2021 initiative comes at a time when there has been increased public discussion about the DQ. Much of that discussion revolves around if and by how much the DQ should be increased. These two questions, among others, have also been raised in the Consultation.

Finance Canada’s Backgrounder to the Consultation includes comparisons to the United States and Australia where private foundations and funds have a minimum 5% disbursement requirement, while the Conservative election platform proposes a DQ of 7.5%. Other proposals have ranged as high as 10%. However, a thoughtful consultation about the DQ involves more than simply picking a number. It also requires consideration of the complex legislative and policy environment in which the DQ exists and the impact that any change in the DQ rate might have on registered charities.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 498](#).

#### **ONCA and Ontario Business Registry Come Into Force on October 19, 2021**

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

At long last, the wait is almost over, and the Ontario [Not-for-Profit Corporations Act, 2010](#) (“ONCA”) will soon be proclaimed into force. The decade-old piece of legislation received Royal Assent in 2010 but will finally be brought into force on October 19, 2021, according to a [provincial government](#)

[announcement](#) published on August 17, 2021 (the “Announcement”). The Announcement indicates that the ONCA will come into force at the same time as the new Ontario Business Registry takes effect to provide a modern legislative framework for Ontario’s not-for-profit corporations.

The ONCA was originally targeted to be proclaimed on July 1, 2013, but this was delayed to include amendments to the ONCA embodied in Bill 85. However, Bill 85 died on Order Paper due to the dissolution of the Ontario Parliament on May 2, 2014. In the fall of 2017, the Ontario government again began to move forward with the corporate reform for the not-for-profit sector by enacting Bill 154, making certain changes to the ONCA. Following the enactment of Bill 154, the Ministry indicated that it was upgrading technology to support the changes implemented by Bill 154 and to improve service delivery.

To prevent the ONCA from becoming subject to repeal pursuant to the *Legislation Act, 2006*, Motion 89 was carried on September 21, 2020, extending the deadline for the ONCA to be proclaimed by one year to December 31, 2021. However, the extension did not apply to provisions in the ONCA dealing with class voting and non-voting members’ rights. The ONCA was subsequently amended by Bill 276, *Supporting Recovery and Competitiveness Act, 2021* to clean up remaining references to voting rights of non-voting classes and the requirement of mandatory class vote, among other changes. Finally, two regulations supporting the implementation of the ONCA and 12 regulations supporting the upcoming launch of the Ontario Business Registry were filed on June 3, 2021, as set out in the [June 2021 Charity & NFP Law Update](#).

Once the ONCA is in force, the ONCA will automatically apply to all non-share capital corporations incorporated under Part III of the Ontario *Corporations Act*. Although it is optional for corporations to undertake a transition process within three years to amend their governing documents to comply with the rules in the ONCA, it is generally prudent for corporations to undertake the transition process in order to avoid uncertainty of their documents by: (a) filing articles of amendment; and (b) adopting a new ONCA compliant by-law. Further details on the transition process will follow.

## What Charities and NFPs Need to Know for the Upcoming Federal Election

By [Terrance S. Carter](#) and [Ryan M. Prendergast](#)

Following the announcement by Prime Minister Justin Trudeau on August 15, 2021 calling a federal election, Canadians will be going to the polls on September 20, 2021. As the country prepares for the federal election, it is important that registered charities and not-for-profits (“NFPs”), also generally

referred to as non-profit organizations for tax purposes, are aware of what they can and cannot do regarding advocacy, including “lobbying”, as well as what registered charities can do as part of the “public policy dialogue and development activities” (“PPDDAs”) regime that replaced the previous rules concerning political activities in 2018.

There are several pieces of legislation at the federal, provincial, and municipal levels, which regulate the election-related activities of charities and NFPs. These include the *Income Tax Act*’s (“ITA”) requirements for PPDDAs, as well as the *Canada Elections Act*, *Lobbying Act* (Canada), *First Nations Elections Act*, and provincial lobbyist legislation, such as the *Lobbyists Registration Act, 1998* (Ontario), among others. This *Charity & NFP Law Bulletin* provides a brief overview of the PPDDA regime and lobbying legislation that charities and NFPs need to be aware of in light of the ongoing election period.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 499](#).

## Corporate Update

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

### Import and Export under CNCA Now Easier In Alberta, BC & New Brunswick

The *Canada Not-for-profit Corporations Act* (“CNCA”) permits provincial non-share corporations to continue under and be governed by the CNCA (“import”) and CNCA corporations to continue under and be governed by provincial/territorial non-profit statutes (“export”). To make it easier for the import and export process, the CNCA has pre-approved certain provincial/territorial non-profit acts to allow for a streamlined process.

On July 7, 2021, Corporations Canada updated its [Policy on continuance \(import\) of a body corporate into the Canada Not-for-profit Corporations Act](#) to add the Alberta’s Societies Act and the New Brunswick Companies Act to the previous list of pre-approved provincial legislation (Ontario Corporations Act, Manitoba The Corporations Act, Newfoundland & Labrador Corporations Act, and Saskatchewan The Non-profit Corporations Act) for continuance from those acts to the CNCA.

On the same date, Corporations Canada updated its policy [Continuance \(export\) – Legislation pre-approved by Corporations Canada under the Canada Not-for-profit Corporations Act](#) to add the B.C. Societies Act and the New Brunswick Companies Act to the previous list of pre-approved provincial legislation (Alberta Societies Act, Manitoba The Corporations Act, Saskatchewan The Non-profit

Corporations Act, and Newfoundland and Labrador Corporations Act) that CNCA corporations can be exported to.

By pre-approving provincial legislation, corporations that apply for continuance to export to, or import from, those jurisdictions, can take advantage of a simplified procedure as part of Corporations Canada's policies. Applicants for import from pre-approved provincial legislation no longer require an excerpt of relevant provisions of their incorporation legislation to show that the continuance is permitted. They also do not require a signed legal opinion by a lawyer practicing in their incorporating jurisdiction. For CNCA corporations applying to export to provincial jurisdictions with pre-approved legislation, they no longer require extracts of relevant statutory provisions, signed legal opinions, or statements of a director or authorized officer of the corporation in their applications.

### **Yukon Societies Act Comes Into Force**

The Yukon now has replaced its former *Societies Act* with new legislation of the same name governing not-for-profits. After receiving Royal Assent in 2018, the new [Societies Act](#), SY 2018, c 15, was proclaimed into force on April 1, 2021 (the "New Act"). The New Act repealed and replaced the previous *Societies Act*, RSY 2002, c 206, upon proclamation. As of April 1, 2021, all societies will operate under the New Act. As reported in the [February 2019 Charity & NFP Law Update](#), the New Act resulted from efforts of the Government of Yukon to modernize legislation in order to better serve the needs societies and the public, and it aims to clarify the framework for societies and the processes regarding their creation, governance and operation.

All pre-existing societies under the repealed old *Societies Act* are required to transition to the New Act within two years of the New Act coming into force, *i.e.*, by March 31, 2023. However, prior to transition, societies are required to continue to file under the old Act. To transition to the New Act, pre-existing societies must submit a transition application, and must complete the fiscal year reporting for the transition year under the old Act. As such, societies should (i) consider what needs to be done before submitting the transition application and completing the transitional fiscal year reporting period; and (ii) determine whether it would be better to transition as close as possible to the end of the society's current reporting period (fiscal year) for a smooth transition regarding new reporting requirements.

The transition process is explained in greater detail on the [Government of Yukon's website](#), but generally requires societies to (i) ensure all their annual report filings are current; (ii) refile their constitution (under the existing name and with the existing purposes of the society); (iii) submit new by-laws that comply

with the New Act (whether the model by-laws or their own) that have been approved by special resolution of members that follow the new statutory requirements; (iv) have directors' information and the registered office address as currently in the registry; and (v) have information required by the application for transition form.

## Legislation Update

By [Terrance S. Carter](#)

### **Bill C-30, *Budget Implementation Act, 2021, No. 1* Receives Royal Assent**

The budget implementing bill for the 2021 Federal Budget, [Bill C-30, \*Budget Implementation Act, 2021, No. 1\*](#), received Royal Assent on June 29, 2021 ("Bill C-30"). Bill C-30 includes amendments to the ITA that will impact charities and not-for-profits, as discussed in [Charity & NFP Law Bulletin No. 492](#), including amendments for registered journalism organizations as a category of qualified donees (further discussed in the [June 2020 Charity & NFP Law Update](#)); enhanced anti-terrorism provisions; an expanded definition of ineligible individuals; provisions concerning suspension of receipting for false statements; and the removal of the restriction in the *Canada Small Business Financing Act* that excluded not-for-profit businesses, charitable businesses and businesses having as their principal object the furtherance of a religious purpose as eligible borrowers.

Bill C-30 also makes changes to the Canada Emergency Wage Subsidy ("CEWS"), revising the eligibility criteria and extending it until September 25, 2021, with authority provided for a possible further extension to November 20, 2021, and ensures that the level of CEWS benefits for furloughed employees continues to align with the benefits provided through the *Employment Insurance Act* until August 28, 2021.

### **Federal Court of Appeal Says CRA Too Restrictive in Refusing Registration for CAAAs**

By [Ryan M. Prendergast](#)

Two successful appeals in the Federal Court of Appeal ("FCA") insist that the Canada Revenue Agency ("CRA") cannot treat its policy documents as binding the law for the purpose of registration of a Canadian Amateur Athletic Association ("CAAA"). The two separate appeals, [Athletes 4 Athletes Foundation v Canada \(National Revenue\)](#), and [Tomorrow's Champions Foundation v Canada \(National Revenue\)](#) (the "Appeals"), were heard together and released on July 21, 2021. The two appellants, Athletes 4 Athletes Foundation ("A4A") and Tomorrow's Champions Foundation ("TCF"), both British Columbia societies, had applied to the CRA in 2014 for Registered Canadian Amateur Athletic Association status ("RCAAA")

under the ITA, which would provide them with tax exemptions and make them “qualified donees”, allowing the issuance of tax receipts for donations. After their applications were refused by the CRA, both A4A and TCF filed notices of objection concerning CRA’s refusal for registration in 2016. However, in 2019, neither notice of objection had been responded to and so both applicants appealed under the *ITA* for judicial review directly to the FCA. The FCA allowed both appeals.

By brief way of background, subsection 248(1) of the *ITA* defines RCAAs as CAAs that have applied for and received registration, meaning that an organization must meet the requirements of a CAA, as set out in subsection 149.1(1) of the *ITA* before being eligible to be registered as an RCAA.

In the FCA’s view in the Appeals, the CRA and Minister of National Revenue erred on both the A4A and TCF applications in the same ways:

- (a) treating its list of acceptable purposes and functions as being the only acceptable purposes and functions for an organization to qualify as a CAA;
- (b) denying the registration of [A4A or TCF] as an RCAA on the basis that the Minister was unable to draw an analogy between providing financial assistance to athletes and any of the exclusive purposes and functions of an existing CAA that has been registered as an RCAA; and
- (c) reading into the definition of CAA a requirement that an eligible organization must directly promote amateur athletics.

The CRA sent letters on the same date (March 18, 2015) to both A4A and TCF, stating similar concerns in each letter that the financial support provided to athletes in A4A’s case, or the financial support for teams and clubs to pay for facilities, equipment and services in TCF’s case, did not satisfy the *ITA* subsection 149.1(1) requirement for a CAA to promote amateur athletics in Canada “as its exclusive purpose and exclusive function”. In making this determination, the CRA relied on its policy statement CPS 0-11, “Registration of Canadian amateur athletic associations”, which set out a list of “Qualifying objects” for CAAs. Based on precedent in the FCA’s decision in *Stemijon Investments Ltd. v Canada (Attorney General)*, the FCA in the Appeals held that the Minister has no broad discretion to refuse registration, and must ensure that Parliament’s statutory requirements are met. A policy or guidance document “as previously drafted by the CRA cannot bind the Minister nor can it alter the provisions of the statutory definition of a CAA.”

According to the FCA, the Minister also added a word to the requirement that is not in the *ITA*’s definition of a CAA for “direct” promotion of amateur athletics in Canada, characterizing A4A and TCF’s financial

support as “indirect” and therefore insufficient for registration according to the CRA’s policy. But this interpretation is neither supported by the language of the *ITA* nor by the Minister’s own reasoning in its correspondence with A4A and TCF, according to the FCA. The FCA held that the Minister had acknowledged that RCAAAs do not “solely” restrict themselves to funding and in effect accepted that funding is a means of promoting amateur athletics. Therefore, the CRA’s argument that financial support is insufficient for registration is not, on its own, a valid basis to deny registration.

A further error in refusing registration was based on a misinterpretation of the required national scope of a CAAA. Because they are based in Vancouver, A4A and TCF did not, according to the CRA, promote amateur athletics on a nationwide basis, which the CRA considered a requirement under the *ITA*. Citing precedent in *Maccabi Canada v Minister of National Revenue*, the FCA held that for the purposes of the *ITA*, it is only necessary that a CAAA “carry on its activities across Canada, [and that] it is not necessary that such organization have a physical presence in each province and territory.” In the TCF case, the CRA implied that a CAAA should be incorporated federally, however, the FCA held this to be too restrictive compared with the language in the *ITA*, which only requires a CAAA to be created “under any law in force in Canada.” As such, the A4A and TCF incorporations under British Columbia’s previous *Society Act* satisfied the statutory requirement. In conclusion, the FCA quashed the prior refusals and referred the matter back to the Minister for a fresh determination of the registration applications, taking into account the court’s reasoning in these Appeals.

## **Advisory Committee on the Charitable Sector Releases Report #3**

By [Theresa L.M. Man](#) and [Jacqueline M. Demczur](#)

The Advisory Committee on the Charitable Sector (“ACCS”) released its [Report #3](#), dated July 15, 2021, subtitled “Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector” (“ACCS Report #3”). This is the third of a series of ongoing reports by the ACCS. In this ACCS Report #3, the ACCS makes 23 recommendations for action in two main areas: the relationship between the CRA’s Charities Directorate and charities (particularly those serving vulnerable populations); and the ability of charities to earn income from activities, such as related or unrelated business activities. This *Bulletin* provides an overview of the ACCS Report #3.

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 500](#).



## Faith-Based University Entitled to Procedural Fairness in Funding Applications

By [Jennifer M. Leddy](#)

In [\*Redeemer University College v Canada \(Employment, Workforce Development and Labour\)\*](#), the Federal Court found that the Minister of Employment, Workforce Development and Labour (“Minister”) breached procedural fairness when it rejected Redeemer University College’s (“Redeemer”) application for funding from the Canada Summer Jobs (“CSJ”) program in 2019. Justice Mosley of the Federal Court also made a rare order for the respondent Minister to pay the entirety of Redeemer’s legal costs in the June 29, 2021 decision.

Redeemer, a faith-based university and registered charity, had applied for and received CSJ funding from 2006 through 2017. Redeemer’s 2018 CSJ application was denied after it refused to include a compulsory attestation that its core mandate affirmed reproductive rights, such as abortion, which Redeemer considered to be contrary to its religious beliefs and values. That attestation was removed from the 2019 CSJ program requirements and replaced with a statement attesting that CSJ funds would not be used to undermine or restrict the exercise of rights legally protected in Canada. Additionally the 2019 requirements included a new question requiring organizations to specify how they would provide a safe, inclusive, and healthy work environment free of harassment and discrimination. Included in this was a requirement that organizations implement measures to ensure their hiring practices and work environments were free of harassment and discrimination.

Redeemer submitted its completed application for the 2019 CSJ program. Its application was subsequently deemed high-risk because of information found on the university’s website from 2011-2012 and 2014-2015, as well as a recent article about faith-based institutions. The reviewing agency, Employment and Social Development Canada (“ESDC”), then sent a letter requesting additional information and clarification about measures to provide a workplace free of harassment and discrimination (the “Letter”). Redeemer replied by providing the ESDC with documents outlining its policies and procedures regarding harassment and discrimination as well as its health and safety training.

Upon receiving these materials, the ESDC recommended that Redeemer’s application be determined to be ineligible for funding on the grounds of harassment and discrimination. That decision was the subject of the judicial review application to the Federal Court, where Redeemer argued that it was denied procedural fairness and that the decision interfered with its rights under sections 2(a), 2(b) and 2(d) of the *Canadian Charter of Rights and Freedoms* (“Charter”).



Justice Mosley found that the Minister breached the rules of procedural fairness which require, among other things, that there be notice of the case to be met and the opportunity to provide relevant evidence to the decision maker (as set out in [Vakulenko v Canada \(Minister of Citizenship and Immigration\)](#)). In particular, Justice Mosley took issue with how nothing in the Letter indicated that the Minister believed that Redeemer unlawfully discriminates or that she took issue with any of Redeemer's policies. Nor did the Letter mention that the Minister's determination was based on information found on the internet.

With regard to the *Charter* claims, Justice Mosley found, based on the principle of judicial restraint (as set out in [Taseko Mines Limited v Canada \(Environment\)](#)), that the Court should avoid making pronouncements on *Charter* questions if it is not necessary to resolve an application for judicial review. Therefore, he did not consider Redeemer's *Charter* claims. Justice Mosley did note, however, that if a future case were to arise in which officials "discriminated in administering funding programs against faith-based institutions because of the sincerely held religious beliefs of their community, a finding of a *Charter* violation may well result." He concluded by finding that both procedural fairness and respect for *Charter*-protected rights are essential in the treatment of faith-based institutions.

This case serves as a reminder that charities are entitled to procedural fairness when their applications for federal funding are reviewed. Faith-based institutions have further rights under section 2 of the *Charter*, which may be relevant in cases where applications are not resolved by other means.

## **Severance Pay Threshold Calculations are not Limited to Ontario or Canadian Payroll**

By [Barry W. Kwasniewski](#)

The Ontario Superior Court of Justice, Divisional Court ("Divisional Court") has further clarified when employers must pay severance pay to their employees. Paragraph 64(1)(b) of the *Employment Standards Act, 2000* ("ESA") requires an employer with a payroll of \$2.5 million or more to pay severance when the employer severs an employment relationship with an employee of five or more years of service. In [Hawkes v Max Aicher \(North America\) Limited](#), released on June 15, 2021, the Divisional Court overturned an earlier decision of the Ontario Labour Relations Board (the "Board") and found that the calculation of payroll for the purpose of section 64 of the *ESA* is not limited to either Ontario payroll or Canadian payroll, but will include global payroll amounts.

The plaintiff, Doug Hawkes, was terminated from employment on October 7, 2015 after more than three decades of employment with the defendant company and its predecessors (the "Defendant"). Following

termination, Hawkes filed a complaint alleging he was entitled to termination, vacation, and severance pay. While he was found to be entitled to termination and vacation pay on January 25, 2017, he was told he was not eligible for severance pay because the Defendant did not have a payroll of \$2.5 million or more, when considering only the salaries in the Ontario jurisdiction. Hawkes then applied for the decision to be reviewed by the Board pursuant to subsection 116(3) of the *ESA*.

The Board's decision, *Doug Hawkes v Max Aicher (North America) Limited*, released on December 27, 2018, affirmed that global payroll was excluded from the section 64 calculation (the "Board Decision"). The Board's reasoning relied on the interpretation limits imposed by subsection 3(1) of the *ESA* to conclude that section 64 only anticipates payroll amounts from operations in Ontario. The Board also distinguished the case before them as factually different from *Paquette c. Quadraspec Inc.* ("*Paquette*"), a 2014 Superior Court of Justice decision which held that an employer's national payroll must be considered in calculations made under section 64. Finally, the Board took the position that there was no reason to depart from its position pre-*Paquette*, namely that only Ontario payroll should be considered in calculations under section 64.

Upon reviewing the Board Decision on a standard of reasonableness, the Divisional Court found the Board Decision to be unreasonable because of a lack of justification and intelligibility in its reasoning. As a matter of statutory interpretation, the inclusion of words of limitation in one part of the *ESA* (such as the limitation of "in Ontario" in section 3) and not in another (such as in section 64) is seen as deliberate and meaningful. The Board missed this in their analysis. Restricting the meaning of "payroll" in subsection 64(2) of the *ESA* by virtue of subsection 3(1) is indefensible and unreasonable, according to the Divisional Court.

The Divisional Court also thought that *Paquette* was not substantially factually different, and the Board (while not bound by *Paquette*) should have given it serious consideration. As well, the cases the Board considered as justifying its position did not assert that only the payroll of an employer's operation in Ontario is relevant for the purposes of the *ESA*.

Therefore, because of the unreasonable position adopted by the Board, as well as its method of interpretation, which was inconsistent with modern principles of statutory interpretation required in *Canada (Minister of Citizenship and Immigration) v Vavilov*, the Divisional Court set aside the Board Decision. Further, the Divisional court remitted the matter back to the Board to determine entitlement to

severance pay with the direction that the payroll calculation of section 64 of the *ESA* is not limited to either Ontario or Canadian payroll.

## **BC Court Hears Decision after City Cancels Youth Conference Rental**

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

The British Columbia Supreme Court released its decision in [\*The Redeemed Christian Church of God v New Westminster \(City\)\*](#) on July 19, 2021. In this decision, a church, which rented an event venue from a municipality to host a youth conference, had its rental agreement cancelled without a specific explanation after the booking was earlier confirmed by the municipality. The court found that the City of New Westminster (the “City”) unjustifiably infringed the Redeemed Christian Church of God’s (also known as “Grace Chapel”) right to freedom of expression under subsection 2(b) of the *Charter* when it cancelled Grace Chapel’s event booking.

Grace Chapel had entered into an agreement with the City to rent the Anvil Centre (“Anvil”) for its youth conference, an event open to the public and advertised on posters at Grace Chapel’s rented Sunday service location. Staff from Anvil received an email from a member of the public urging them to rethink hosting the youth conference and alleging that the content of the conference would be “anti-LGBTQ” based on the views of one of the conference’s facilitators.

While internal emails between Anvil and the City expressed concern over the possible dissemination of anti-LGBTQ rhetoric, the City’s message to Grace Chapel did not outline its specific concerns with the church but instead generically stated that Anvil’s booking policy “restricts or prohibits user groups if they promote racism, hate, violence, censorship, crime, or other unethical pursuits.” Grace Chapel responded by advising that there would be no hate, racism or violence promoted at their conference and requested a meeting to discuss the content of the conference. The City advised that while a meeting could be arranged, this would not reverse the cancellation of the event.

Grace Chapel sought several forms of relief under the British Columbia *Judicial Review Procedure Act* (“JRPA”), including a declaration of procedural unfairness under the JRPA and unjustifiable infringement of its rights under subsections 2(a) (freedom of religion), 2(b) (freedom of expression), and 2(d) (freedom of association) of the *Charter*. Grace Chapel’s claims for relief under the JRPA were dismissed, as the court found that since (1) the case involved is, at its core, a contractual dispute over the rental of property,

(2) did not involve the exercise of a statutory power that would invoke the duty of procedural fairness or (3) have sufficiently public character, it did not fall within the ambit of the JRPA.

In relation to Grace Chapel's claims under the *Charter*, the court found that Grace Chapel's subsection 2(b) freedom of expression rights had been infringed. The court followed the test set out in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, and recognized that the singing and discussion contemplated at the youth conference was expressive content covered by subsection 2(b). The court found that the purpose of Grace Chapel's expression "to consider biblical views regarding sexuality and identity issues" was not axiomatically at odds with the values of democratic discourse protected by subsection 2(b). In this regard, the court stated,

In a free and democratic society, the exchange and expression of diverse and often controversial or unpopular ideas may cause discomfort. It is, in a sense, the price we pay for our freedom. Once governments begin to argue that the expression of some ideas are less valuable than others, we find ourselves on dangerous ground.

The court also found the City failed to proportionately balance competing *Charter* rights, as the City took immediate steps to research and consider the concerns raised by the complaint it received (*i.e.* that anti-LGBTQ views would be disseminated at the youth conference). However, before cancelling the youth conference the very next day, the City took no similar steps to more fully inform itself about the anticipated content or focal points of the speakers at the youth conference. In this regard, the court stated that, "there was a clear imbalance in the City's efforts to inform itself of the competing rights at stake, or to at least attempt to balance them. The failure to balance competing rights leads me to conclude that the City's Decision is an unreasonable and unjustified infringement."

Grace Chapel's claim to rights under subsection 2(d) (freedom of association) was dismissed. Regarding Grace Chapel's claim alleging infringement of its rights under subsection 2(a) of the *Charter* (freedom of religion), the court concluded that the issue required a trial in order to determine whether the claim falls within the scope of the protection under subsection 2(a) of the *Charter* or whether any infringement could be justified.

This case reflects the willingness of the B.C. court to protect the *Charter* rights of charities and other not-for-profits where it is unclear whether or not an alleged infringement of a *Charter* right by a government body was justified. In this regard, while the court did not comment on procedural fairness rights under the JRPA, an important aspect of the court's decision was based on the failure of the City to proportionately balance competing *Charter* rights.

## SCC Provides Further Guidance on “Fair Dealing” Exception to Copyright Infringement

By [Sepal Bonni](#)

The Supreme Court of Canada (“SCC”) released its decision in [York University v Canadian Copyright Licensing Agency \(Access Copyright\)](#) on July 30, 2021. Access Copyright (“Access”) is a non-profit organization and collective society under section 2 of the Copyright Act (the “Act”) that represents a collection of copyright owners, including writers, artists, and publishers. Access licenses and administers reproduction rights throughout Canada on behalf of copyright owners. Litigation commenced between Access and York University (“York”) when York opted out of an interim tariff that it had initially paid to Access. Instead, York continued to operate without a license from Access and implemented its own “fair dealing” guidelines to help the university comply with section 29 of the Act, which states that “fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.”

Access sued York in Federal Court seeking to compel York to pay the tariff, and York counterclaimed seeking a Declaration that any copies made constitute a “fair dealing”. At the Federal Court, the court held that the interim tariff was enforceable against York and dismissed York’s counterclaim for a fair-dealing Declaration. On appeal, the FCA set aside the lower court’s decision on the interim tariff enforcement and held that the Copyright Board’s approved tariffs were not mandatory for users who do not opt for a license. The FCA also dismissed York’s appeal of the dismissal of York’s counterclaim for a fair-dealing Declaration.

Access appealed the FCA’s decision regarding the interim tariff to the SCC and York appealed the dismissal of the fair-dealing Declaration. Therefore, the SCC considered two main issues: (1) if York is compelled to be a licensee of Access and therefore pay the tariff that was set; and (2) whether to grant a Declaration that copies made by York constitute “fair dealing” in accordance with the Act.

The SCC dismissed Access’ claim against York and found that the interim tariff was not enforceable against York. Access cannot force York to pay fees in accordance with a license that York did not agree to. The SCC also dismissed York’s counterclaim for a fair-dealing Declaration. The SCC held that a Declaration was not warranted, but this was because the case did not meet the threshold requirements for when declaratory relief may be granted.

Given that this dispute was not between the copyright owners and York, the SCC did not see any reason to make any finding regarding whether York’s dealings constitute “fair dealings” under the Act. However, the SCC did provide some guidance regarding the two-step framework to assess fair dealing which

requires a party prove that (1) the dealing was for an allowable purpose enumerated in the Act, and (2) that it was fair. The second step of the test, fairness, is a question of fact, with six non-exhaustive factors which provide a framework for assessment. The SCC held that the dealings under York's fair use guidelines were allowable for the purpose of education. However, to determine if the dealing was fair, the Federal Court and FCA had approached the analysis by considering the six factors only from the perspective of York. The SCC concluded this was an error and that these courts focused on the wrong end-user.

In determining if a university's use of copyright material is fair, the question is whether the university's actions "actualize *students'* rights to receive course material for educational purposes in a fair manner, consistent with the underlying balance between users' rights and creators' rights in the Act". It is important to note that this same analysis is equally applicable when considering whether any particular dealing is "fair". That is, the perspective of the end-user that actually uses the copied materials as well as any intermediaries facilitating that ultimate use must be taken into account.

While this decision provides some guidance for charities and not-for-profits that rely on the fair dealing exception to copyright infringement, given that the decision does not provide a definitive assertion on what constitutes a fair dealing, charities and not-for-profits must remain prudent when using copyright-protected content.

## **Staff Training about Privacy Rules is Essential in Preventing Snooping**

By [Esther Shainblum](#)

Employee snooping poses a serious privacy risk to all organizations, including charities and not-for-profits. Institutional training about privacy is essential for organizations that deal with sensitive personal information, as demonstrated by the findings of the Information and Privacy Commissioner of Ontario ("IPC") in [PHIPA Decision 147](#), released on June 18, 2021. Employees and managers should recognize which behaviour is and is not acceptable, so as to prevent snooping.

This case originated with a patient who made a complaint after she attended at the emergency department of a hospital following a motor vehicle accident where she was treated for her injuries, then released. A physician who was not involved in providing health care to the patient during her stay in the hospital called her a few days later at her home. According to the patient's report, the physician stated he was conducting a courtesy follow-up call to see how she was doing. Over the course of the call, he arranged

to have a physiotherapy clinic contact the patient and book an appointment. When the patient went to the clinic, she was met by a personal injury lawyer, who asked her if she was interested in a lawsuit and spent 30 minutes discussing the lawsuit process and compensation with her. After this meeting, the patient contacted the hospital because of concerns about the appropriateness of the physician's access to and use of her personal information.

During its investigation into the patient's complaint, the hospital discovered that the physician and a hospital clerk had, over two years, accessed hundreds of charts of patients to whom the physician was not providing care. The hospital also discovered that the physician's wife was the personal injury lawyer the patient had met. While the clerk was dismissed, and subsequently pled guilty to offences under the *Personal Health Information Protection Act* ("*PHIPA*"), the physician was not because he maintained his actions were justified by virtue of him undertaking "quality audits." He also maintained that his wife's presence at the clinic was a coincidence and that he did not disclose any of the patient's personal information to her. The hospital referred the matter to the Attorney General and the investigation was taken up by the IPC.

The IPC had serious concerns about the physician's "quality audits" and potential disclosures of personal health information to his wife both in this instance and on prior occasions. However, due to a lack of cooperation from witnesses, the IPC was unable to determine whether the physician disclosed personal health information to his wife in contravention of *PHIPA*. Instead, the IPC found that the hospital's policies and training of physicians regarding quality audits were not sufficient to comply with its safeguarding obligations under *PHIPA*. The applicable policies, practices, and procedures regarding quality audits were lacking in clarity and detail, and privacy training was not provided to physicians. As a result, the IPC found that the hospital did not take reasonable steps to protect the personal health information of its patients as required by subsection 12(1) of *PHIPA*. Nevertheless, it was satisfied with the steps that the hospital had taken since then to update its policies and provide annual privacy training for all staff and physicians.

While many charities and not-for-profits are not governed by *PHIPA*, this case serves as a reminder that any organization holding personal information must educate and train its staff about their privacy obligations. There can be strong incentives to "snoop" and serious reputational and financial consequences for organizations that do not prevent snooping. Charities and not-for-profits holding personal information must establish clear training requirements for employees, ensure that access is restricted on a "need to

know” basis, monitor compliance, and ensure that employees are aware that there will be consequences for inappropriate access to personal information.

## **Permanent Residency Status Not a Protected Ground of Citizenship in Human Rights Code**

By [Barry W Kwasniewski](#)

The Divisional Court released its decision in the “significant case” of [Imperial Oil Limited v Haseeb](#) on June 1, 2021. The 2-1 majority of the court overturned the Human Rights Tribunal of Ontario Decision (“HRTO Decision”), discussed in [Charity & NFP Law Bulletin No 456](#), which included “permanent residence” as a protected ground from discrimination under the basis that “permanent residence” was an aspect of “citizenship.”

The employer, Imperial Oil Limited (“Imperial Oil”), had a requirement that prospective employees be eligible to work permanently in Canada. The prospective employee, Muhammad Haseeb, was an international student. In his application forms, Haseeb represented that he was entitled to work in Canada on a permanent basis. Imperial Oil extended a job offer, subject to Haseeb providing proof of his eligibility to work in Canada on a permanent basis. When he was unable to do so, Imperial Oil rescinded its offer of employment. Haseeb claimed discrimination on the basis of citizenship under subsection 5(1) of the Ontario *Human Rights Code*. The Human Rights Tribunal of Ontario (“HRTO”) awarded considerable damages to Haseeb, holding that the requirement for entry-level job applicants to disclose proof of their eligibility to work in Canada on a permanent basis was discriminatory on the grounds of citizenship. After Imperial Oil unsuccessfully applied for a reconsideration of that decision, it applied to the Divisional Court for judicial review.

The finding of the HRTO had the effect of extending the ground of “citizenship.” However, the Divisional Court found that the HRTO Decision lacked the required coherent and rational chain of analysis to justify the extension of “citizenship.” Particularly, “the failure to examine the plain and ordinary meaning of ‘citizenship’ and ‘permanent residence’ is a gap in the analysis undertaken by the HRTO.” The court assessed the plain and ordinary meanings of both citizenship and permanent residence to conclude that citizenship is “nothing less or more than membership in the state” under the *Citizenship Act*. Permanent residence is not synonymous with citizenship and can stand on its own. The HRTO erred in law when it included permanent residence as a criterion of the citizenship ground of discrimination.



The Divisional Court was careful to clarify that the factual circumstances of this case deal with “direct” discrimination on the grounds of permanent residence. It is possible that a requirement for permanent residence could be so narrowly prescribed that it is effectively a requirement for citizenship – this would be indirect or constructive discrimination. Therefore, while the court in this case offers further clarity about when permanent residency requirements are not discriminatory, employers of charities and not-for-profits should still use caution when drafting employment letters so as to avoid indirect or other forms of discrimination where permanent residency is concerned.

## **AML/ATF Update**

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

### **Bank De-Risking Frustrates Humanitarian Aid for Countries in Need**

Denial of financial services to non-profit organizations and charities to avoid the potential risk of terrorist financing or money laundering has an adverse impact on human rights, according to a recent report by a New York University legal clinic in Paris. [“Bank De-Risking of Non-Profit Clients: A Business and Human Rights Perspective”](#) was published by the NYU Paris EU Public Interest Clinic in cooperation with Human Security Collective, ABN AMRO and Dentons Netherlands, on June 1, 2021. The 27-page report offers new data and insight into the human rights consequences of the banking practice of de-risking non-profit organizations (“NPOs”), which includes charitable and not-for-profit organizations (the “Report”). At the same time, the Financial Action Task Force (“FATF”) has also recognized that financial institutions engaging in “de-risking” may have an adverse impact on charities and not-for-profits, and has launched a project to study, in part, de-risking and the undue-targeting of NPOs. This *Alert* provides a brief summary of the Report and discusses the impact of de-risking on the charitable and not-for-profit sector.

For the balance of this *Alert*, please see [AML/ATF and Charity Law Alert No. 49](#).

## COVID-19 UPDATE

### Federal and Ontario COVID-19 Update

By [Adriel N. Clayton](#) and [Terrance S. Carter](#)

#### Federal Government Proposes to Extend CEWS, CERS and Lockdown Support

In continued response to the COVID-19, Deputy Prime Minister and Minister of Finance, the Government of Canada [proposed](#) the extension of certain financial support of Canadian business on July 30, 2021. The proposed extended support would include an extended eligibility period for the Canada Emergency Wage Subsidy (“CEWS”), the Canada Emergency Rent Subsidy (“CERS”), and lockdown support from September 25, 2021 to October 23, 2021.

The CEWS is a wage subsidy provided to eligible employers, including eligible charities and NFPs, that experience a drop in “qualifying revenues”, in support of employee wages, and is discussed in greater detail in [Canada Emergency wage Subsidy \(“CEWS”\): An Overview for Charities and NFPs](#) as well as [New Changes to the Canada Emergency Wage Subsidy \(“CEWS”\)](#). As announced in Budget 2021, the subsidy is provided at a maximum rate of 20% per eligible employee’s remuneration, up to a maximum of \$226 per week, for the period of August 29, 2021 to September 25, 2022 (“Period 20”).

The CERS is a commercial rent subsidy available to organizations, including eligible charities and NFPs, consisting of a rent subsidy percentage calculated from eligible expenses, on a sliding scale, up to a maximum of 20% for Period 20. A Lockdown Support rent top-up of 25% is also available for organizations that have been temporarily shut down by a mandatory public health order.

While Budget 2021 had announced the maximum 20% subsidy rate under both the CEWS and CERS for Period 20, and extended both to the end of Period 20 pursuant to Bill C-30, as discussed in the [Legislation Update](#), above, the government’s [Background](#), released in conjunction with its July 30, 2021 proposal, proposes that the maximum rate for both remain at 40% during Period 20. Instead, the maximum rate during the extended period from September 26, 2021 to October 23, 2021 would then be decreased to 20%. The Lockdown Support will continue and remain at its set rate of 25%.

#### Details on Canada Recovery Hiring Program Announced

As announced in Budget 2021, the federal government has launched a new program, the [Canada Recovery Hiring Program](#) (“CRHP”) in support of employers impacted by the COVID-19 pandemic. Originally [announced](#) on June 6, 2021, the CRHP provides eligible employers who have experienced “qualifying

revenue declines” with a subsidy of up to 50% of eligible salary or wages to help hire new workers or increase their current workers’ hours or wages. The CRHP has been made available to qualifying employers retroactive to June 6, 2021.

Charities and not-for-profits that are eligible for the CEWS will also meet qualification requirements for the CRHP. However, during any claim periods where both CEWS and CRHP availability overlaps, organizations would not be able to receive both CEWS and CRHP subsidies, but could apply for whichever subsidy provides them with the higher subsidy amount. Further, organizations are permitted to apply for different subsidies for each claim period.

### **Vaccination Policies Mandatory for High-Risk Settings in Ontario**

In accordance with an [announcement](#) by the Ontario government on August 17, 2021, COVID-19 vaccination policies will be mandatory for high-risk settings, where there is a higher risk of contracting and transmitting COVID-19 and the Delta variant, as of September 7, 2021. High-risk settings include hospitals and home and community care service providers. A directive issued by the Chief Medical Officer of Health in Ontario mandates that the mandatory vaccination policies for high-risk settings apply to employees, staff, contractors, students and volunteers, as well as for paramedics working for ambulance services.

At a minimum, the vaccination policy must require individuals to provide proof of one of the following: (1) full vaccination against COVID-19; (2) a medical reason for not being vaccinated against COVID-19; or (3) completion of a COVID-19 vaccination educational session. Further, those who do not provide proof of full vaccination must undertake regular testing for antigens. In addition to maintaining a vaccination policy, high-risk settings will also be required to track and report to the provincial government on the implementation of their policies.

### **Ontario Amends Reopening Regulations**

Ontario has amended its regulations to reopen the province under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. [Ontario Regulation 541/21: Rules for Areas at Step 3](#) was filed on July 30, 2021, and amends [Ontario Regulation 364/20: Rules for Areas at Step 3 and Roadmap Exit Step](#) (“O Reg 364/20”) to include new Schedules 4 and 5, which set out regulations regarding the Ontario’s “Roadmap Exit Step”, which will follow Step 3 in the province’s [Roadmap to Reopen](#).

When Ontario enters the Roadmap Exit Step, many rules and restrictions currently in place under Step 3 will be lifted, with businesses and places permitted to reopen, provided that they follow the general

requirements set out under Schedule 4. Businesses and organizations will continue to be required to ensure that those indoors wear masks, except for those who are exempt, as set out in subsection 2(5) under Schedule 4 of O Reg 364/20. Those who temporarily remove their masks, for example to eat, will be required to maintain a distance of at least two metres, or be separated from others by plexiglass or another impermeable barrier. Businesses and organizations will also continue to be required to continue to comply with the advice, recommendations and instructions of public health officials (including on physical distancing, cleaning, disinfecting, and screening individuals).

Businesses and organizations will also be required to prepare, make available, and post in a conspicuous location a safety plan within seven days of entering the Roadmap Exit Step. The safety plan must set out measures and procedures that the business or organization has or will implement to reduce the transmission risk of COVID-19, and must include measures for screening, masks or face coverings, and the wearing of personal protective equipment.

Schedule 5 sets out specific, tailored rules at the Roadmap Exit Step for certain organizations, including camps for children, as well as for schools and private schools.

## **Lexpert Rankings**

Seven partners of Carters Professional Corporation have been ranked as leaders in their respective practice areas by *The Canadian Legal Lexpert® Directory 2021*. [Terrance S. Carter](#), [Theresa L.M. Man](#), [Jacqueline M. Demczur](#), [Esther S.J. Oh](#), [Jennifer M. Leddy](#), and [Ryan M. Prendergast](#) have been ranked as leaders in the area of Charities. [Nancy E. Claridge](#) has been ranked as a leader in the area of Estate and Personal Tax Planning.

## **Best Lawyers in Canada Rankings**

Six partners of Carters Professional Corporation have been ranked as leaders in their practice areas by [The Best Lawyers in Canada](#) for 2022. [Theresa L.M. Man](#), [Jacqueline M. Demczur](#), [Esther S.J. Oh](#), [Ryan M. Prendergast](#), and [Terrance S. Carter](#) have been ranked as leaders in the area of Charity and Non-Profit Law. [Sean S. Carter](#) has been ranked as a leader in the area of Corporate and Commercial Litigation.

In addition, Theresa Man has been named "Lawyer of the Year" in the practice area of Charity and Non-Profit Law.

## IN THE PRESS

[Charity & NFP Law Update – June 2021 \(Carters Professional Corporation\)](#) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

## UPCOMING EVENTS AND PRESENTATIONS

[Carters/Fasken Healthcare Philanthropy Webinar: Check-Up 2021](#) will be held on **Wednesday, September 22, 2021**. This is a complimentary webinar hosted by Carters Professional Corporation and Fasken. [Registration](#) is available online.

[Volunteer Ottawa](#) will host a webinar on Tuesday, September 28, 2021. Esther Shainblum will present on the topic of Legal Check-up: Duties and Liabilities of Directors and Officers of Charities and Not-For-Profits.

[The 28th Annual Church & Charity Law Webinar™](#) will be held on **Thursday, November 4, 2021**, hosted by Carters Professional Corporation. [Registration](#) and [Details](#) are available online.

## CONTRIBUTORS

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[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, 2020), 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 member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.



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## **ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS**

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## ADVISORY COMMITTEE ON THE CHARITABLE SECTOR RELEASES REPORT #3

*By Theresa L.M. Man & Jacqueline M. Demczur\**

### A. INTRODUCTION

THE ADVISORY COMMITTEE ON THE CHARITABLE SECTOR (“ACCS”) released its Report #3, dated July 15, 2021, subtitled “Towards a federal regulatory environment that enables and strengthens the charitable and non-profit sector” (“ACCS Report #3”).<sup>1</sup> This is the third of a series of ongoing reports by the ACCS.<sup>2</sup> In this ACCS Report #3, the ACCS makes 23 recommendations for action in two main areas: the relationship between the Canada Revenue Agency’s (“CRA”) Charities Directorate and charities (particularly those serving vulnerable populations); and the ability of charities to earn income from activities, such as related or unrelated business activities. This *Bulletin* provides an overview of the ACCS Report #3.

\* Theresa L.M. Man, BSc, MMus, LLB, LL.M, is a partner practicing in charity and not-for-profit law. Jacqueline M. Demczur, BA, LLB, is a partner at Carters Professional Corporation practicing in the area of charity and not-for-profit law. It should be noted that Terrance S. Carter, managing partner at Carters and editor of this *Bulletin*, is one of the members of the Advisory Committee on the Charitable Sector. Any opinions expressed in this *Bulletin* are those of the authors. The authors would like to Lynne Westerhof, BA, JD, student-at-law, for her assistance in preparing this *Bulletin*.

<sup>1</sup> Canada Revenue Agency, Advisory Committee on the Charitable Sector, *Report #3 of the Advisory Committee on the Charitable Sector — July 2021* (July 15, 2021) online <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-july-2021.html>> [Report #3].

<sup>2</sup> For an overview of the ACCS first and second reports in this series, see Theresa LM Man and Jacqueline M Demczur, *Charity & NFP Law Bulletin No. 489*, “Advisory Committee on the Charitable Sector Releases its First Report” (24 March 2021), online (pdf): Carters <<https://www.carters.ca/pub/bulletin/charity/2021/chylb489.pdf>> [Bulletin No. 489], and Theresa LM Man and Jacqueline M Demczur, *Charity & NFP Law Bulletin No. 495*, “Advisory committee on the Charitable Sector Releases Report #2” (27 May 2021), online (pdf): Carters <<https://www.carters.ca/pub/bulletin/charity/2021/chylb495.pdf>> [Bulletin No. 495].

## B. BACKGROUND

AS EXPLAINED in earlier *Charity & NFP Law Bulletins*, the ACCS was established in 2019 as a consultative forum for the Government of Canada to engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do.<sup>3</sup> Following the release of the 2019 Report of the Senate Special Committee on the Charitable Sector, “Catalyst for Change: A Roadmap to a Stronger Charitable Sector” (the “Senate Committee Report”),<sup>4</sup> the ACCS was asked to consider the recommendations of the Senate Committee Report.

The ACSS first met in December 2019, and since then has organized itself into six working groups, which includes one to respond to the Disbursement Quota Consultation recently launched by Finance Canada.<sup>5</sup> At its meetings on April 28 and May 31, 2021, the ACCS reviewed and moved forward with recommendations proposed by two working groups: the Vulnerable Populations Working group (“VPWG”) and the Purposes and Activities Working Group (“P&AWG”).

The ACCS Report #3 made 12 recommendations regarding the relationship between the Charities Directorate of the CRA and charities and 11 recommendations about the ability of charities to earn income from activities. The ACCS Report #3 also provides an update on the Charitable Sector Data Working Group (“CSDWG”).

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<sup>3</sup> For additional information about the mandate, membership, and structure of the ACCS, see Canada Revenue Agency, “Terms of Reference” (September 5, 2019), online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/terms-reference.html>>. For further details and commentary on the background of the ACCS, see also *Bulletin No. 489* and *Bulletin No. 495*, *ibid*.

<sup>4</sup> Canada, Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector*, (Final Report), (Ottawa: Senate of Canada, June 2019), online (pdf): <[https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB\\_Report\\_Final\\_e.pdf](https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf)>.

<sup>5</sup> For further details on the Disbursement Quota Consultation, see Terrance S Carter, Jacqueline M Demczur and Theresa LM Man, *Charity & NFP Law Bulletin No. 498*, “Complexities of the Disbursement Quota Consultation: More Than Just A Number” (25 August 2021) online (pdf): Carters Professional Corporation <<https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>>

## C. RECOMMENDATIONS TO IMPROVE THE RELATIONSHIP BETWEEN THE CHARITIES DIRECTORATE AND CHARITIES

THE VPWG'S PRIMARY FOCUS is to examine the specific and systemic challenges that Canadian grassroots charities face. Specifically, the VPWG considers the situations of charities which offer responsive and essential services to those on the margins of society.

Recommendations 1 to 6 deal with areas that could be addressed in the short term, focussing on accessibility of information, such that communication and interaction with the charitable sector would improve the relationship with the charitable sector and reduce unnecessary administrative burdens of valued time and resources.

Recommendation 1 asks the CRA to promote the availability and accessibility of the Charities Directorate telephone enquiries line. This would include allowing organizations to ask questions anonymously to encourage charities to overcome their hesitancy of making inquiries of the CRA. It also recommends a short post-call survey for the CRA to determine client satisfaction.

In recommendations 2 to 5, the ACCS makes various recommendations to improve accessibility issues. This includes asking the CRA to develop and deliver a focused outreach and education program for charities serving vulnerable populations; to continue to use clear and accessible language in its communication, education, and guidance products to improve accessibility and ease of use; to review the CRA's model charitable purposes to ensure they are accessible and understood by charities; and to further develop focused communication, education and guidance products on advocacy and public policy work to illustrate, in a clear and straightforward manner, the range and scope of acceptable activities.<sup>6</sup>

In recommendation 6, the ACCS recommends the establishment of a "buddy" program within the charitable sector, in which established voices in the sector will help new and smaller charities.

Recommendations 7 to 10 deal with medium-term action steps that will require further consideration, input, and deliberation. The ACCS recommends the CRA clarify the rules on earned income derived from social enterprises in order to legitimize and expand the use of these platforms by smaller charities and

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<sup>6</sup> Canada Revenue Agency, "Model purposes" (22 July 2013), online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/applying-registration/charitable-purposes/model-purposes.html>>.

non-profits, as well as help reduce overall operating costs for smaller organizations. The ACCS also recommends the CRA recognize that the reduction of systemic oppression is a charitable purpose. In addition, it recommends that the CRA increase accessibility of its resources and services for seeing and hearing-impaired communities; as well as update and align accounting forms and tools to be consistent with modern practices used by charities and their accountants.

Recommendations 11 and 12 are focussed on long-term issues affecting the sustainability and stability of the charitable sector. In this area, the ACCS recommends the CRA consider requesting the Department of Finance to: (i) amend the *Income Tax Act* provisions to not require charities to carry on their “own activities” (which have resulted in “direction and control” measures); (ii) expand the category of qualified donees; and (iii) enable non-profit organizations to receive grants without becoming registered charities. Additionally, the ACCS recommends the CRA to clarify allowable practices by charities to reimburse reasonable and acceptable costs to volunteers.

## **D. RECOMMENDATIONS TO ALLOW CHARITIES TO EARN INCOME FROM ACTIVITIES**

THE P&AWG REVIEWS the regulatory and legislative regime governing the “earned-income” activities of charities. As the charitable sector continues to experience a growing demand for services along with declining revenue, more charities are interested in growing their revenue through commercial activities. The P&AWG considers how changes to the regulatory environment may help charities undertake commercial activities for this purpose.

Recommendations 1 to 5 deal with short-term recommendations. Specifically, the ACCS recommends the CRA to:

- update the revised draft guidance CPS-019, *What is a related business?*<sup>7</sup> to be more “enabling” (by emphasizing that it is intended to enable, not to prevent, the earning of income through business activities) and to make it public as soon as possible;

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<sup>7</sup> Canada Revenue Agency, CPS-019, *What is a related business?* (31 March 2003, modified 11 February 2020), online: Government of Canada <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-019-what-a-related-business.html>>.

- ensure that fees charged for charitable programs are not conflated with related business in the guidance;
- adjust all guidance documents to clarify the steps taken before sanctions or revocations are applied;
- improve intradepartmental communication among the various CRA branches that deal with a charity's reporting requirements (such as payroll, sales tax, and annual T3010 reporting) to provide consistent information and avoid duplicate reporting; and
- develop tools for publicly reporting stakeholder satisfaction with CRA education and communications.

Recommendations 6 to 8 deal with medium term issues for the CRA work to create a more supportive environment for earned income activities of charities. Specifically, the ACCS recommends the CRA to revise and clarify its guidance on the various ways in which charities can earn income (including eliminating the current “linked and subordinate” test for related business). It also recommends the CRA to coordinate with other federal departments and provincial governments to develop a shared vision of an environment where charities can earn income to further their purposes. The CRA is also recommended to support the development of advisory capacity and services to help charities’ efforts to generate earned income.

Lastly, recommendations 9 to 11 deal with long-term plans. Specifically, the ACCS recommends that further study and consultation be conducted on two important issues regarding income generation by the sector: the “destination of funds” test and the “substantially run by volunteers” test. In this regard, the P&AWG intends to continue consultations to better understand the implications of adopting a destination of funds test, and to provide further recommendations to the Minister of National Revenue. The ACCS also recommends further review of the out-dated volunteer-run business provisions in the *Income Tax Act* before making specific recommendations to the CRA.

## **E. UPDATE ON THE CHARITABLE SECTOR DATA WORKING GROUP**

THE CHARITABLE SECTOR DATA WORKING GROUP (“CSDWG”) is focused on improving data collection and analysis related to the charitable sector. It made several recommendations in ACCS Report #2 and is now continuing its work with consultations focussing on the financial data ecosystem of the charitable

sector.<sup>8</sup> While the CSDWG's consultations about financial data are still in the early stages, preliminary findings show that the charitable sector is not homogeneous in its use of financial models and options. The lack of individual, granular-level data available means that nuances in the situations of charities may be missed. One additional challenge identified by the CSDWG is the multi-jurisdictional regulatory environment of Canada, which makes it difficult to compare and contrast data across the sector and across the country. Accordingly, the CSDWG will continue to look for ways to improve data collection through the T3010 and other mechanisms, as well as to identify the data which will assist the Government to make evidence-based decisions about issues in the charitable sector.

## F. CONCLUSION

THE ACCS's three priority recommendations to create a policy "home in government," to amend the *Income Tax Act* to focus on the purposes rather than the activities of charities, and to create a federal data strategy for the charitable sector, remain important in the ongoing conversation between the Minister of National Revenue and the ACCS. By categorizing the recommendations of ACCS Report #3 in the short, medium, and long-term, the ACCS recognizes that some recommendations can be implemented by the CRA more quickly than others, and that other recommendations may require legislative change or further consultation with other government departments.



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<sup>8</sup> Canada Revenue Agency, Advisory Committee on the Charitable Sector, *Report #2 of the Advisory Committee on the Charitable Sector — April 2021* (April 28, 2021), online <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-april-2021.html>>.



## COMPLEXITIES OF THE DISBURSEMENT QUOTA CONSULTATION: MORE THAN JUST A NUMBER

*By Terrance S. Carter, Jacqueline M. Demczur and Theresa L. M. Man\**

### A. INTRODUCTION

AS ANTICIPATED, the Department of Finance Canada (“Finance Canada”) launched a public consultation on August 6, 2021 (the “Consultation”) in order to consider a potential increase of the annual disbursement quota (“DQ”).<sup>1</sup> The DQ is the minimum amount that a charity must spend on its charitable activities or gifts to qualified donees to ensure that charitable funds are used for charitable purposes and are not accumulated indefinitely. It is determined based on the value of a charity’s property (*e.g.*, real estate, investments) that is not used for charitable activities or administration. A potential increase to the DQ was first proposed in the 2021 Federal Budget released on April 19, 2021.<sup>2</sup> The Consultation, first announced on August 6, 2021, closes on September 30, 2021.

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<sup>1</sup> “Consultation: Boosting Charitable Spending in Our Communities” (6 August 2021), online: *Government of Canada* <<https://www.canada.ca/en/departement-finance/programs/consultations/2021/boosting-charitable-spending-communities.html>>.

<sup>2</sup> “Budget 2021” (19 April 2021), online: *Government of Canada* <<https://www.budget.gc.ca/2021/report-rapport/toc-tdm-en.html>>; See also Terrance S. Carter et al., *Charity & NFP Bulletin* No 492 “Federal Budget 2021: Impact on Charities and Not-For-Profits” (20 April 2021), online: *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2021/chylb492.pdf>>; and Terrance S. Carter and Jacqueline M. Demczur, *Charity & NFP Law Update June 2021* “Pending Disbursement Quota Consultations: Questions for Consideration” (June 2021), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/update/charity/21/jun21.pdf>>.

The Budget 2021 initiative comes at a time when there has been increased public discussion about the DQ. Much of that discussion revolves around if and by how much the DQ should be increased. These two questions, among others, have also been raised in the Consultation.<sup>3</sup>

Finance Canada's Backgrounder to the Consultation includes comparisons to the United States and Australia where private foundations and funds have a minimum 5% disbursement requirement,<sup>4</sup> while the Conservative election platform proposes a DQ of 7.5%.<sup>5</sup> Other proposals have ranged as high as 10%.<sup>6</sup> However, a thoughtful consultation about the DQ involves more than simply picking a number. It also requires consideration of the complex legislative and policy environment in which the DQ exists and the impact that any change in the DQ rate might have on registered charities.

## B. BRIEF HISTORICAL OVERVIEW

A BRIEF OVERVIEW of the history of the DQ in Canada is helpful in understanding the complexities behind it. The DQ was first introduced in 1976 with the intent to ensure that a significant portion of a charity's resources were devoted to its charitable purposes. Charitable organizations and public foundations were required to disburse 80% of what they received in donations from the immediately preceding year, but gifts made to public foundations with directions by the donor that the gift be held by the charity for at least 10 years ("ten-year gifts") were exempt.<sup>7</sup> Private foundations were required to disburse the greater of 5%

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<sup>3</sup> Finance Canada is seeking feedback on the following six questions:

- Should the disbursement quota be raised to produce additional funding for charities, and to what extent?
- Would it be desirable to increase the disbursement quota to a level that causes foundations to gradually encroach on investment capital, and would it be sustainable in the long-term for the sector?
- What additional tools (e.g., monetary penalties or other intermediate sanctions) should be available to the CRA to enforce the disbursement quota rules?
- Do the relieving and accumulation of property provisions continue to be useful for charities?
- Do the existing carry-forward provisions strike the appropriate balance between ensuring the timely disbursement of funds and allowing foundations to make large gifts on a more infrequent basis?
- Are there any temporary changes to the disbursement quota that should be considered in the context of the COVID-19 recovery?

See "Consultation," *supra* note 1.

<sup>4</sup> "Backgrounder for Disbursement Quota Consultation" (6 August 2021) ["Backgrounder"], online: *Government of Canada* <<https://www.canada.ca/en/department-finance/programs/consultations/2021/boosting-charitable-spending-communities/backgrounder-disbursement-quota-consultation.html>>.

<sup>5</sup> "Canada's Recovery Plan" (16 August 2021), online (pdf): *Conservative Party of Canada* <<https://cpcassets.conservative.ca/wp-content/uploads/2021/08/16102359/f8279981721e07a.pdf>>.

<sup>6</sup> John Hallward, "Unlocking the Expanding Wealth of Charitable Foundations" (20 May 2020), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/may-2020/unlocking-the-expanding-wealth-of-charitable-foundations/>>.

<sup>7</sup> Theresa L. M. Man, 2011 *National Charity Law Symposium* "Disbursement Quota Reform: The Ins and Outs of What You Need to Know" (6 May 2011), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/article/charity/2011/tlm0506.pdf>>.

of the fair market value of their non-arm's length investments and 90% of the actual income therefrom.<sup>8</sup> Private foundations were also required to distribute at least 90% of income received from other sources, such as from qualified investments.<sup>9</sup>

In 1984, legislative changes were made requiring all charities to disburse 80% of the gifts receipted in the previous year (subject to exceptions). Ten-year gifts and testamentary gifts to charitable organizations became exempt from the DQ, while public foundations were required to disburse 80% of the gifts they received in the previous year from registered charities.<sup>10</sup> Private foundations had to disburse 100% of gifts they received from other charities.<sup>11</sup> The disbursement requirement based on the value of property not used in charitable programs or administration was lowered to 4.5% but was made applicable to both private and public foundations.<sup>12</sup>

In 2004, the 4.5% portion of the DQ was reduced to 3.5% and then extended to charitable organizations.<sup>13</sup> However, foundations (both public and private) as well as charitable organizations with \$25,000 in assets or less were exempted from the 3.5% DQ.<sup>14</sup> Interest rates were "low" at the time and, as a result, many charities were struggling to meet their DQ requirements without expending a portion of the capital of their bequests or long-term gifts.<sup>15</sup> The then new 3.5% DQ was intended to be "more representative of historical long-term real rates of return earned on the typical investment portfolio held by a registered charity."<sup>16</sup>

<sup>8</sup> This rule did not apply to arm's length investments in the open market (*i.e.*, qualified investments, such as publicly traded securities), capital property used directly in the foundation's own activities or amounts being accumulated for specific projects approved by the Minister of National Revenue. See Theresa LM Man, *ibid.*

<sup>9</sup> Theresa LM Man, *ibid.*

<sup>10</sup> Theresa LM Man, *ibid.*

<sup>11</sup> Theresa LM Man, *ibid.*

<sup>12</sup> "Backgrounder", *supra* note 4.

<sup>13</sup> *The Budget Plan 2004* "Annex 9 Tax Measures: Supplementary Information and Notice of Ways and Means Motions" (23 March 2004), online (pdf): *Government of Canada* <<https://budget.gc.ca/pdfarch/budget04/pdf/bp2004e.pdf>>; *Budget Implementation Act, 2004, No. 2, SC 2005, c 19, s 35 (1)*.

<sup>14</sup> *Budget Implementation Act, 2004, No. 2, SC 2005, c 19, s 35 (1)*. See also *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 149.1(1), 248(1) definitions of "disbursement quota" and "registered charity" as they appeared on 13 March 2005.

<sup>15</sup> Interest rates were 2.25% which was low in comparison to earlier rates. See Letter from Florence Carey, Chair, CBA Charities and Not-for-Profit Law Section to the Honourable Chrystia Freeland (15 June 2021) published online: *The Canadian Bar Association* <<https://www.cba.org/CMSPages/GetFile.aspx?guid=164448c5-bdca-4d8a-999f-06b23d981111>>.

See also Terrance S Carter and Jacqueline M Demczur, *supra* note 2.

<sup>16</sup> *The Budget Plan 2004*, *supra* note 13.

In 2010, the legislation changed again and charities were no longer required to disburse 80% of the amount received in donations during the previous fiscal year. The elimination of the 80% disbursement quota requirement was strongly supported by the charitable sector at the time. This was because the 80% disbursement quota had created an unnecessarily onerous administrative burden that few charities (especially small and rural ones) had the resources with which to be able to comply.<sup>17</sup> Also as of 2010, charitable organizations could hold up to \$100,000 in assets not used for charitable programs or administration without being required to comply with the DQ, although the threshold remained at \$25,000 for public and private foundations.<sup>18</sup>

## C. CURRENT CONTEXT

RECENT PUBLIC DISCUSSION of the DQ has highlighted varied concerns about how charitable organizations and foundations manage their property. Some wonder if charities are “hoarding” funds,<sup>19</sup> while others maintain that policy makers are not looking at enough data.<sup>20</sup> However, while much focus and discussion surrounding the Consultation has been with respect to increasing the DQ percentage, a holistic view of the DQ is needed – one that takes into consideration more than just the percentage of assets to be distributed.<sup>21</sup> Further to this, there are several complex factors that need to be taken into account which are briefly outlined below.

### 1. A Lack of Relevant and Helpful Data

The first major complicating factor with regard to an effective reform of the DQ is the lack of available data. As noted in *Report #3 of the Advisory Committee on the Charitable Sector - July 2021*, it would be “problematic” to base policy decisions, such as an increase in the DQ rate, on high-level data from the

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<sup>17</sup> Karen J Cooper and Terrance S Carter, “Significant Benefit for Charities in 2010 Federal Budget DQ Reform”, *Charity & NFP Law Bulletin* No. 197 (8 March 2010, revised 29 April 2010), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2010/chylb197.pdf>>.

<sup>18</sup> *Supra* note 11.

<sup>19</sup> Barbara Shecter, “Charities Hoarded Cash and Failed to Address Crises During COVID: Report”, *Financial Post* (6 August 2021) online: <[financialpost.com/news/economy/charities-hoarded-cash-and-failed-to-address-crises-during-covid-report](https://financialpost.com/news/economy/charities-hoarded-cash-and-failed-to-address-crises-during-covid-report)>.

<sup>20</sup> Letter from Bruce MacDonald, President & CEO of Imagine Canada and Cathy Taylor, Executive Director of Ontario Nonprofit Network to the Editor of Financial Post, *Ottawa Citizen* (17 August 2021) published online: *Imagine Canada* <<https://imaginecanada.ca/en/news-and-events/Letter-to-the-editor-Financial-Post-Ottawa-Citizen>>.

<sup>21</sup> “Renewing our Social Contract: Private Philanthropy for the Public Good” (June 2021), online (pdf): *Philanthropic Foundations Canada* <[https://pfc.ca/wp-content/uploads/2021/06/2021-06-15-pfc-policy-brief-dq\\_final-eng.pdf](https://pfc.ca/wp-content/uploads/2021/06/2021-06-15-pfc-policy-brief-dq_final-eng.pdf)>.

T3010 reporting form (which charities must file with the Canada Revenue Agency (“CRA”)).<sup>22</sup> This is because the lack of homogenous financial models and options across the charitable sector results in different understandings of T3010 reporting expectations. There is not enough data at an individual level which would show whether large charities, such as universities, are impacting the average percentage of overall DQ disbursements, thereby enabling legislators to target amendments to the DQ appropriately.

A second related issue is that there is no information concerning whether increasing the DQ will meet the government’s goal of increasing support for other registered charities, as well as non-profit organizations that collectively provide essential services to local communities. This is because T3010 data does not capture how and where a charity’s funds or resources are expended in order to meet its respective DQ. Specifically, funds or resources of a charity must be expended to accomplish a charity’s own programs or, alternatively, gifted to qualified donees<sup>23</sup> in order to meet its DQ. However, there is no data whatsoever to show if these funds or resources are directed to charities serving vulnerable communities, such as those affected by COVID-19. Additionally, some organizations working on the frontlines may not be qualified donees and, therefore, a change in the DQ is unlikely to provide them with further support. Simply increasing the DQ, without more information concerning where the increased funds to meet the DQ will be utilized, does not mean there will be additional funds going to assist front line organizations, whether they be charitable and non-profits, facing heightened demand for services.

## 2. Compliance May Become Overcomplicated

An important factor to consider is how a change to the existing DQ obligations may result in complex and expensive compliance issues for registered charities. By way of comparison, the 80% disbursement quota

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<sup>22</sup> “Update on the Charitable Sector Data Working Group”, *Report #3 of the Advisory Committee on the Charitable Sector – July 2021* (3 August 2021), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/corporate-reports-information/advisory-committee-charitable-sector/report-advisory-committee-charitable-sector-july-2021.html#h5>>.

<sup>23</sup> For a full definition of “qualified donee”, see *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 149.1(1) [“ITA”]. The CRA summarizes the list as follows: a registered charity; a registered Canadian amateur athletic association; a registered housing corporation resident in Canada constituted exclusively to provide low-cost housing for the aged; a registered Canadian municipality; a registered municipal or public body performing a function of government in Canada; a registered university outside Canada the student body of which ordinarily includes students from Canada; a registered charitable organization outside Canada to which Her Majesty in right of Canada has made a gift; Her Majesty in right of Canada, a province, or a territory; the United Nations and its agencies; and registered journalism organizations. See *Canada Revenue Agency Guidance CG-010 “Qualified Donees”* (15 August 2011), online: *Government of Canada* <<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/qualified-donees.html>>.

abolished in 2010 had numerous difficult-to-understand concepts and rules, which increased the administrative burdens of charities trying to comply with the legislation.<sup>24</sup>

Depending on what is ultimately proposed by Finance Canada, an increased DQ could result in a similarly heavy compliance burden for charities, particularly if it comes into conflict with existing legal obligations. For example, restricted funds held by charities (such as perpetual endowments and other long-term funds) may have restricted terms prohibiting encroachment on capital, which, if not complied with without court approval, would amount to a breach of trust.<sup>25</sup> In such situations, the capital of these restricted funds would not be available to these charities to utilize to meet their increased DQ requirements. While applications to the court to vary the terms of these trusts are possible, the reality is that such applications are costly and would result in more funds being directed to professionals, including lawyers and accountants, rather than to charitable programs and activities. Furthermore, there is no guarantee that the courts would grant an order allowing the capital of restricted fund be available for DQ disbursements.

As well, as some in the charitable sector have suggested, if an increased DQ was to apply at the individual fund level,<sup>26</sup> then this could result in significantly increased administrative costs on charities related to these new DQ calculation and reporting obligations at the individual fund level. This would particularly be the case for educational and health care charities that often hold many perpetual endowed funds, as well as long term/non-endowed restricted funds. It is doubtful whether compliance with such a complex DQ scheme is even possible, especially in situations where charities may hold a significant number of small endowments, such as colleges and universities.

Furthermore, while discussions have been focused on increasing the DQ to release endowments held by foundations, many charitable organizations likewise hold endowments. Since charities are currently

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<sup>24</sup> For a visual representation of the complexities of the old DQ rules, see Theresa L. M. Man and Terrance S. Carter, “Disbursement Quota Formula Under Bill C-33 (March 2004 Federal Budget Enabling Legislation)”, *Charity Law Bulletin*, No. 67 (31 March 2005), online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/bulletin/charity/2005/chylb67-05.pdf>>.

<sup>25</sup> Letter, *supra* note 15.

See also, Adam Parachin, “From WE to DQ – Liberal’s Charity Disbursement Quota Reform Misses the Mark”, *The Globe and Mail* (24 June 2021) online: <<https://www.theglobeandmail.com/business/commentary/article-from-we-to-dq-liberals-charity-disbursement-quota-reform-misses-the/>>.

<sup>26</sup> Imposing the DQ on individual donor-advised funds was a proposed solution to challenges associated with donor-advised funds including delays in distribution of benefits to charities. See Canada, Special Senate Committee on the Charitable Sector, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector*, (Final Report), (Ottawa: Senate of Canada, June 2019) at 112, online: <[https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB\\_Report\\_Final\\_e.pdf](https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf)>.



permitted to meet their DQ by making charitable disbursements from their non-endowed assets, increasing the DQ may have no impact on charitable organizations where their disbursements from non-endowed assets are more than enough to meet their DQ obligations. If the DQ was to be revised to apply differently to charitable organizations and foundations to address this issue, it would again result in an extremely complex DQ regime which would increase the administrative costs of charities and result in a compliance nightmare.

### 3. Expanding What is Acceptable as a Charitable Disbursement for Purposes of Meeting the DQ

At present, any type of investment by a charity that involves the dual purpose of achieving a charitable purpose of the charity and seeking some type of financial return, do not count as a recognized charitable disbursement for purposes of meeting the DQ.<sup>27</sup> Key examples of these types of investments include impact investments, social investments, social finance, and program related investments, collectively referred to as “program related investments” (“PRIs”) by the CRA’s administrative guidance CG-014, *Community Economic Development Activities and Charitable Registration*.

This failure by the CRA to recognize PRIs as a charitable disbursement is clearly a disincentive for charities with large investment assets from investing those assets in PRIs and, in so doing, are precluded from making a difference for good in achieving their charitable purposes.<sup>28</sup> As such, no matter what other changes may be made to the DQ going forward by Finance Canada, the CRA should revise its administrative policy so that investments by charities in dual purpose PRIs be counted toward meeting their DQ at whatever percentage it may be set at.

## D. CONCLUSION

THERE HAS BEEN an accumulation of investment assets by foundations in Canada along with a simultaneous heightened demand and strained revenues for charities. However, because the data on

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<sup>27</sup> See *Canada Revenue Agency Guidance CG-014*, “Community Economic Development Activities and Charitable Registration” (26 July 2012, revised 9 August 2017), online: *Government of Canada* <[www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/community-economic-development-activities-charitable-registration-014.html](http://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/community-economic-development-activities-charitable-registration-014.html)> at paras 39 – 68.

<sup>28</sup> For a more detailed discussion of why PRIs should be included as a charitable disbursement, see Terrance S Carter, *Ontario Bar Association’s Institute 2018 – Critical Development in Charity and Not-for-Profit Law* “The Investment Spectrum for Charities, Including Social Investments” (6 February 2018) online (pdf): *Carters Professional Corporation* <<https://www.carters.ca/pub/seminar/charity/2018/oba/OBA%20Paper%20Investment%20Spectrum.pdf>>.

charitable spending is incomplete, it is difficult to predict if an increase in the DQ rate will be effective in addressing the increased financial demands being faced by charities.

Accordingly, careful consideration must be given to unintended consequences arising from the question of whether, and how, the DQ should be changed, including the current administrative policy of the CRA concerning PRIs. A key factor in this regard must be how any increase in the DQ will most effectively help charities appropriately manage their resources and, at the same time, serve the public good, rather than simply choosing from a spectrum of possible arbitrary percentages to arrive at a new DQ rate.

The complexities of these issues require a careful discussion of all considerations. This is important to do as the charitable sector needs a much more nuanced approach than simply picking a number.



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## **LEGAL RISK MANAGEMENT CHECKLIST FOR ONTARIO-BASED CHARITIES**

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*By Terrance S. Carter and Jacqueline M. Demczur\**

### **A. INTRODUCTION**

The operations of charities are subject to an increasingly complex regulatory framework and the possibility of litigation against charities occurring as a result of their operation is an ever-present reality. The exposure of charities to liability goes further than the loss of charitable assets, possibly leading to the insolvency or winding up of a charity. Directors of charities may also face legal actions against themselves personally by donors, members, third parties and governmental authorities for breach of their fiduciary duties or even breach of trust in failing to adequately protect or apply the assets of a charity. Given these increased risks of potential liability to both charities and their directors, there is an increasing need to protect charitable assets from lawsuits on a proactive basis.

The purpose of this legal risk management checklist is to provide a brief outline of some of the more important issues that directors, officers, and executive staff of a charity, whether incorporated or not, may want to consider in ensuring due diligence in the operation of the charity.<sup>1</sup> As it is impossible to adequately address all issues faced by charities, this checklist provides only a general overview of the many considerations that charities and their boards of directors may need to be aware of to both identify and

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<sup>1</sup> For not-for-profits, a separate *Legal Risk Management Checklist for Ontario-Based Not-for-Profits* is also available at <http://www.carters.ca/pub/checklist/NFP-Checklist.pdf>.

manage legal risks, and as a starting point for charities when consulting with their legal counsel. In particular, and in light of the COVID-19 pandemic, this checklist also includes a dedicated section outlining practical due diligence issues to be considered during public health emergencies.

## B. IDENTIFICATION AND MANAGEMENT OF LEGAL RISKS

1. Is separate charitable status needed or even practical?
  - a) Are donation tax receipts required?
  - b) Can the organization become an operating division and be subject to the direction and control of the board of an existing charity as an alternative to seeking its own charitable status?
  - c) Can the organization handle the significant mandatory reporting requirements necessary to achieve and maintain charitable registration as required by the *Income Tax Act* (Canada)?
  - d) Business donors may not always require charitable receipts if there is a sponsorship opportunity with possible advertising expense deductions available
2. General overview of organizational and legal documentation
  - a) Identify the existence and location of key organizational documents
    - Develop an inventory of key documents
    - Maintain a central location for key documents
  - b) Identify key organizational documents for an unincorporated charity
    - Constitution and amendments, if applicable
    - Policy statements and procedures, if applicable
    - Minutes of board of directors' and members' meetings
  - c) Identify key organizational documents for a corporate charity
    - Letters patent (articles of continuance) and supplementary letters patent (articles of amendment), if applicable
    - By-laws and special resolutions
    - Mission statement, if applicable
    - Membership covenant, if applicable
    - Minutes of board of directors' and members' meetings
    - Directors', members', and debt registers
    - Copies of government filings
  - d) Identify other key legal documents
    - Leases/subleases, deeds, and mortgages

- Agency, partnership, association, and joint venture agreements
  - License agreements
  - Business name, trademarks, and domain name registrations
  - Charitable registration number, T3010's, and correspondence from the Canada Revenue Agency ("CRA"), including the CRA letter granting charitable registration
  - Program operational policy statements, *e.g.*, sexual abuse and volunteer policy statements
  - Insurance policies, including a historical record of insurance policies
  - Privacy policies under the Personal Information Protection and Electronic Documents Act ("PIPEDA")
  - Investment policies
3. Review of key documents for an unincorporated charity
- a) Are the objects clearly stated in the constitution and are they exclusively charitable?
  - b) Has there been "mission drift" from the original charitable purposes?
  - c) Do constitutional documents correctly reflect how the organization is actually structured and operated?
  - d) Has the current copy of the constitution been filed with the appropriate government agencies, *e.g.* with the CRA and the Ontario Public Guardian and Trustee for charities operating in Ontario?
4. Review of key documents for an incorporated charity
- a) Review of letters patent or articles of incorporation
    - Is the name in the letters patent or articles of incorporation the correct name of the charity and is it consistent with the charitable objects or purposes of the charity?
    - Has there been "mission drift" from the original charitable objects or purposes?
    - Are its objects or purposes exclusively charitable in nature?
    - Are the activities carried out by the charity authorized by its charitable objects or purposes?
    - Is the dissolution clause complementary to the charitable objects or purposes?
  - b) Review of supplementary letters patent or articles of amendment
    - Have all supplementary letters patent or articles of amendment been identified?
    - Has there been a change of corporate name?
    - Has there been a change of corporate objects or purposes?
    - What is the effect of a change of objects or purposes upon existing charitable property?

- c) Letters patent of amalgamation or articles of amalgamation
  - Are the charitable objects or purposes the same or similar?
  - What are the terms of the amalgamation agreement?
  - Is the existing charitable property held in trust for the charitable objects or purposes of the previous charitable corporations?
- d) Does the charity have historical records of all by-laws?
- e) Are the by-law provisions clearly defined and properly passed?
- f) Review of corporate by-law provisions for basic terms
  - Do the provisions conflict with the letters patent or articles of incorporation concerning objects, purposes, or dissolution?
  - Do the provisions reflect the actual organization and operational structure of the organization?
  - Does the by-law reflect changes to applicable corporate legislation?
  - Is there an adequate indemnification provision for the directors?
  - Has the indemnification provision been authorized in accordance with the regulations under the *Charities Accounting Act* (Ontario)?
  - Are the by-law amendment procedures consistent with corporate legislation?
- g) Was the initial corporate organization of the charity properly done?
- h) Was there a documented transfer of assets and liabilities on incorporation?
- i) Are the records of board decisions and/or membership meetings complete?
- j) Was there adequate board and/or members' authorization for indebtedness, if applicable?
- k) Have corporate records been properly maintained, such as consent to be directors and applications for membership?
- l) Where are the corporate records kept?
- m) Have necessary corporate filings and registrations been kept up to date?
  - Ontario Corporations:
    - ♦ Initial Return/Notice of Change (Form 1)
    - ♦ *Business Names Act* (Ontario) registrations
    - ♦ Mandatory reporting to the Office of the Public Guardian and Trustee
  - Federal Corporations:
    - ♦ Annual Return (Form 4022) – Canada
    - ♦ Extra-Provincial Initial Return/Notice of Change (Form 2) – Ontario
    - ♦ *Business Names Act* (Ontario) registrations
    - ♦ Mandatory reporting to the Office of the Public Guardian and Trustee

- ♦ Does the charity operate and/or fundraise in any other provinces? If so, there may need to be registration as an extra-provincial corporation and/or fundraiser in other provinces (such as Alberta), together with applicant business name registrations
- n) Has there been loss of corporate status for failure to maintain government filings?
- o) Is the charity aware of the importance of proper use of corporate name and operating names?
- p) Has the charity (if an Ontario corporation) reviewed the still to be proclaimed Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) as applicable, and assessed what changes will need to be made to its constating documents as part of its ONCA transition?
  - As of November 2020, the Ontario Government has taken steps to amend the ONCA in order to enable its proclamation. The deadline to proclaim the ONCA has been extended from December 31, 2020 to December 31, 2021. Once proclaimed, Ontario charitable corporations will have three years to amend their corporate documents to transition under the new legislation.
- 5. Has the charity developed and implemented operational and risk management policy statements, where applicable, on:
  - a) Abuse prevention;
  - b) Accessibility;
  - c) Anti-harassment;
  - d) Anti-terrorism and money laundering;
  - e) Authorization procedures (*e.g.* due diligence as a requirement of obtaining authorization for a decision or action);
  - f) Board succession planning, recruitment, and orientation;
  - g) Brain and spinal injury prevention and management (when working with youth sports);
  - h) Bullying;
  - i) Child protection;
  - j) Code of conduct;
  - k) Collection of personal information (particularly with respect to children);
  - l) Confidential and proprietary information;
  - m) Conflicts of interest;
  - n) Crisis management plan;
  - o) Data breaches;
  - p) Disbursements;
  - q) Donor recognition;
  - r) Electronic record-keeping;
  - s) Fiscal management;
  - t) Fitness to work for staff and volunteers;

- u) Gift acceptance;
  - v) Human Resources;
  - w) Infectious diseases (*e.g.* COVID-19);
  - x) Investments;
  - y) Privacy (with respect to donors, employees and volunteers);
  - z) Privacy breach reporting obligations;
  - aa) Protocol for domestic and foreign volunteer projects;
  - bb) Provision of goods and services to people with disabilities;
  - cc) Public policy dialogue and development activities, including lobbying;
  - dd) Public relations;
  - ee) Safety in the workplace;
  - ff) Social media, computing, and acceptable use of technology equipment;
  - gg) Third party use of the charity's facilities;
  - hh) Volunteer conduct and volunteer recruitment (including application forms and agreements);
  - ii) Vulnerable persons;
  - jj) Whistleblowing and fraud prevention; and
  - kk) Workplace violence and harassment (including sexual harassment) prevention?
6. Is the content and effectiveness of policies evaluated and reviewed on an annual basis, or as appropriate?
  7. Is the charity aware of recent amendments to the *Income Tax Act* (Canada) on public policy dialogue and development activities and revised its applicable policies?
  8. Has the charity reviewed its lobbying policy and registered where required by the *Lobbying Act* (Canada) and/or *Lobbyists Registration Act* (Ontario)?
  9. Has the charity conducted an up-to-date inventory of its charitable assets, including intellectual property, *i.e.* trademarks and copyright?
  10. Are there any independent contractors or employees and, if so, are all provisions in their respective contracts in accordance with applicable legislation?

## **C. UTILIZING MULTIPLE CHARITABLE CORPORATIONS**

1. Should the charity consider utilizing multiple charitable corporations for its high risk activities in order to better manage those risks?
2. Should a provincial or national charity that consists of member organizations be structured as an umbrella association of multiple corporations (federated model) or as a single corporation?
3. Should the charity consider establishing and utilizing a parallel foundation for either fundraising purposes or better management of charitable assets?

4. Has appropriate consideration been given to balancing inter-corporate relational provisions with regard to multiple corporations with issues involving the possibility of cross-over liability?
5. Has appropriate consideration been given to implementing effective inter-corporate relational provisions through contracts and/or licensing agreements as an alternative to overt corporate governance control?

## **D. BOARD MANAGEMENT ISSUES**

1. Who is a director?
  - a) What are the qualifications and procedures (*i.e.* election rules) to be elected a director and have all of those qualifications and procedures been met by each director, including the “ineligible individuals” requirements under the *Income Tax Act* (Canada)?
  - b) Are there conflicting qualifications to be a director in the by-laws, articles, and board policies?
  - c) Is the register of directors being maintained at least on an annual basis and are any changes among the directors or their addresses being sent to the relevant government authority?
2. Is the charity able to identify which group is in charge of the charity?
  - a) Where does the *de facto* control of the charity lie? Is it with a board, a committee, or the executive staff?
  - b) Is the authority of the board recognized by the membership?
3. Are the lines of authority between the board and the executive staff clearly defined?
4. Does the board meet on a regular basis with all directors in regular attendance (and by electronic means, where permitted)?
5. Has an audit committee been established to review financial statements and the auditor’s report?
6. Is there adequate communication of board responsibilities to existing, new, and future board members?
  - a) Has the charity created a board binder of all corporate documents, as well as an explanation of the general operations of the corporation as a charity and the board of directors’ legal duties and liabilities?
  - b) Does the organization provide regular updates on changes in the law to board members?
7. Are the individuals who are authorized to enter into contracts as signing officers on behalf of the charity clearly identified in their official capacity instead of as individuals?
8. Are there policies in place to address board succession planning, recruitment, and orientation?

## **E. REDUCING THE BOARD’S EXPOSURE TO LIABILITY**

1. Are the directors aware of their duties with respect to ensuring:
  - a) The objects or purposes of the charity are properly carried out and the charity’s activities comply with their objects or purposes?

- b) The charity's financial stability and overall performance?
  - c) Proper hiring and supervision of management and staff?
2. Do any directors receive direct or indirect remuneration or other financial benefit from the charity in contravention of their fiduciary duties?
  3. For incorporated charities, are any of the directors or any "connected" persons to a director receiving payments from the charity in contravention of regulations under the *Charities Accounting Act* (Ontario) and the Office of the Public Guardian and Trustee's related Guidance, *Payments to Directors and Connected Persons*?
  4. Do the governing documents authorize the charity to indemnify its existing and former directors and officers in accordance with applicable corporate legislation and regulations under the *Charities Accounting Act* (Ontario)?
  5. Is there corporate authority to acquire directors' and officers' liability insurance in accordance with the requirements of the *Charities Accounting Act* (Ontario)?
  6. Has the board delegated excessive responsibility to executive staff by restricting itself to policy decisions only without ensuring careful and ongoing supervision?
  7. Should the charity consider reducing the size of the board to limit the number of people who are exposed to liability as directors?
  8. Is the charity effectively making use of committees as an alternative to a large board of directors?
  9. Do the board members occasionally need to receive independent legal advice due to the possibility of liability exposure?
  10. Should the charity consider implementing an advisory board to complement the board of directors without a corresponding exposure to liability?
  11. Has the charity established a comprehensive due diligence review procedure by establishing and utilizing the appropriate legal risk management checklist?
  12. Has a legal risk management committee of the board been established or its functions added to the duties of another committee, such as an audit committee?
  13. Are the directors and officers aware of their fiduciary responsibilities at law in operating the charity?
  14. Are the directors and officers exercising due diligence in relation to the charity by remaining knowledgeable about its operations and ensuring its assets are properly protected?
  15. Are new and existing directors and officers receiving proper orientation and training?
  16. Are the directors ensuring that employee source deductions under the *Income Tax Act* (Canada), *Canada Pension Plan* and *Employment Insurance Act* (Canada), as well as GST/HST amounts pursuant to the *Income Tax Act* (Canada) and *Excise Tax Act* (Canada) are being remitted to avoid personal liability?
  17. Has the charity maintained a historical record of its insurance coverage in the event of a future claim, together with copies of the original policies?



18. Is there occurrence-based or claims-made insurance coverage for sexual abuse?
19. Has the charity provided full written disclosure each year of all risks to its insurer to avoid denial of coverage?
20. Does the charity request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
21. Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment benefits and practices liability?
22. Is there directors' and officers' liability coverage in place and is it reviewed on a regular basis to ensure its adequacy?
23. Does there need to be special insurance endorsements to extend insurance coverage to "out-of-the-ordinary" activities, *e.g.* third party use of facilities, non-owned vehicles, activities of volunteers and agents in foreign countries, and errors and omissions (*i.e.* professional services) including counselling?
24. Has the charity considered obtaining the services of an independent insurance consultant or specialist to conduct a risk management review of the charity's operations and policies from an insurance perspective to determine the adequacy of insurance coverage?
25. Has the charity developed and administered effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities for program participants, as necessary, as part of a volunteer agreement?

## **F. INSURANCE CONSIDERATIONS / RISK TRANSFER**

1. Has the charity maintained a historical record of its insurance coverage in the event of a future claim, together with copies of the original policies?
2. Is there occurrence-based or claims-made insurance coverage for sexual abuse?
3. Has the charity provided full written disclosure each year of all risks to its insurer to avoid denial of coverage?
4. Does the charity request regular written reports from its insurance broker on existing coverage, exclusions from coverage and recommendations to enhance coverage?
5. Is there a regular review of the adequacy and extent of general liability coverage and property insurance, as well as employment benefits and practices liability?
6. Is there directors' and officers' liability coverage in place and is it reviewed on a regular basis to ensure its adequacy?
7. Does there need to be special insurance endorsements to extend insurance coverage to "out-of-the-ordinary" activities, *e.g.* third party use of facilities, non-owned vehicles, activities of volunteers and agents in foreign countries, and errors and omissions (*i.e.* professional services) including counselling?

8. Has the charity considered obtaining the services of an independent insurance consultant or specialist to conduct a risk management review of the charity's operations and policies from an insurance perspective to determine the adequacy of insurance coverage?
9. Has the charity developed and administered effective liability shields in the form of informed consents, disclaimers, releases, waivers and indemnities for program participants, as necessary, as part of a volunteer agreement?

## **G. THIRD PARTY USE OF CHARITABLE PROPERTY**

1. Is the charity aware of the potential liability exposure in permitting third parties to use its property?
2. Has the charity developed and implemented a facility use policy and facility use agreement with appropriate waiver releases and indemnification?
3. Does the charity require evidence of liability insurance from third party users of its facilities?
4. Has the organization provided written notice to its insurer concerning the use of its property by third parties?
5. Does the charity charge appropriate fair market rental fees to users of these properties that are not charities?
6. Does the organization have the corporate authority to allow third party use of its property?
7. Does the third party use constitute an unrelated business prohibited by the *Income Tax Act* (Canada)?
8. For charities with lifestyle requirements, has consideration been given to compliance with the *Human Rights Code* (Ontario), including the exception available to special interest organizations?

## **H. REAL PROPERTY ISSUES**

1. Property Owned by the Charity
  - a) Has an environmental assessment been conducted to determine the extent of possible liability exposure for the organization in relation to future acquisitions as well as existing properties?
  - b) Are there trust provisions in old trust deeds or title documents? If so, are they being complied with? Should they be varied by a court?
  - c) Has the charity addressed and rectified encroachments with neighbouring lands?
  - d) Are municipal zoning and legal non-conforming uses being complied with?
  - e) Has the charity reviewed its municipal property tax assessment for accuracy and to determine both classification and valuation? If so, has there been a request for reconsideration or appeal of assessment?
  - f) Has the charity leased its lands and have the terms of the lease been reviewed for possible liability concerns?
  - g) Does the charity maintain a register of its ownership interests in land showing the identity of each property and the dates the corporation acquired it and, if applicable, disposed of it,

in accordance with the *Corporations Act* (Ontario) and, when it comes into force, the ONCA?

- h) Does the charity own property with a cultural heritage value or interest that is therefore subject to the *Ontario Heritage Act*?
- i) If the charity has fuel oil storage tanks either above or below ground, is it aware of, and compliant with, the requirement for upgrading or removal pursuant to Ontario Regulation 213/01, *Fuel Oil*, under the *Technical Standards and Safety Act, 2000* (Ontario)?
- j) Have accommodations been made for people with disabilities in accordance with the Accessibility Standards for Customer Service and the Integrated Accessibility Standards in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005*, and have the appropriate accessibility reports been filed?

## 2. Property Leased From Third Parties by the Charity

- a) Does the lease include personal guarantees or indemnities?
- b) Has access to adequate parking been ensured?
- c) Has the extent of tenant expenses under a net lease arrangement been limited?
- d) Has the possible right to sublet and assign the lease, with a release, been ensured?
- e) Have the issues of environmental liability for both the landlord and tenant been adequately addressed?
- f) Has there been careful monitoring of the date by which an option to renew the lease must be exercised?
- g) Has the amount of rent on renewal been made subject to arbitration?
- h) Has there been an attempt to obtain a covenant from the landlord to prohibit offensive uses of adjoining leased premises?
- i) Does the lease include a clause requiring restoration of leased premises at the end of the lease?
- j) Does the lease include a clause permitting the landlord to unilaterally relocate the tenant?
- k) Has there been an attempt to obtain a right of first refusal to lease adjoining leased premises?
- l) Does the lease need to be registered on title?
- m) Have accommodations been made for people with disabilities in accordance with the Accessibility Standards for Customer Service and the Integrated Accessibility Standards in accordance with the *Accessibility for Ontarians with Disabilities Act, 2005* and have the appropriate accessibility reports been filed?
- n) Is the arm's length landlord responsible for all leasehold improvements, or where the charity is undertaking leasehold improvements, has the charity negotiated with the landlord for reimbursement or cost-sharing of the improvements in accordance with the requirements of CRA for charities?

## I. INTELLECTUAL PROPERTY ISSUES

1. Do the board members and executive staff of the charity recognize that trademarks, internet domain names, and copyright are essential assets of an organization that need to be protected and managed?
2. Does the charity need to register any of its key names and/or logos as trademarks?
  - a) Identify trademarks, including domain names and social media hashtags
  - b) Protect trademarks by registration
  - c) License and enforce trademarks
  - d) Use trademarks in conjunction with appropriate markings of either a <sup>TM</sup> or an <sup>®</sup>, as applicable
  - e) Ensure that any third parties using trademarks enter into a trademark licensing agreement
3. Has the charity protected its trademarks by securing multiple corresponding domain names?
4. Has the charity removed all copyrighted material owned by any other organizations from its website?
5. Who owns the copyright for publications of the charity and is it properly identified with a notice of copyright protection, *i.e.* ©?
  - a) Does the copyright material produced by employees/volunteers need to be registered, assigned, or licensed?
  - b) Has the designer of the organization's website assigned the copyright for the website design?
6. Does the charity have a social media, computing, and use of technology policy statement that:
  - a) Prohibits employees and volunteers from using the trademarks, logos, copyrighted material or other intellectual property in any non-work related social networking and blogging activities?
  - b) Prohibits employees and volunteers from using the charity's email address in their personal profiles on social networking sites?

## J. EMPLOYMENT AND VOLUNTEER MATTERS

1. Are individuals being paid as employees or independent contractors, and if it is as independent contractors, is it in accordance with CRA's requirements?
2. Are there written employment contracts with all employees?
3. Is there a volunteer agreement and application form to be used with volunteers?
4. Has the charity developed and implemented appropriate hiring policies and practices for its employees and volunteers?
  - a) Is there compliance with applicable human rights legislation in the hiring process?

- b) Has the charity developed and implemented a policy concerning accommodation for employees who are members of a disadvantaged group identified in the *Human Rights Code* (Ontario)?
  - c) Do employees and volunteers, especially those who deal with children, need to be screened, including criminal record checks, and supervised in accordance with an appropriate sexual abuse policy statement?
  - d) For religious charities that require employees and volunteers to sign Lifestyle Statements, have these statements been reviewed to ensure compliance with the *Human Rights Code* (Ontario), including the exception available to special interest organizations?
5. Is there a need to develop and adopt policy statements and/or manuals for managing employees as well as volunteers in relation to conduct and performance structure?
- a) Has the charity developed and implemented a policy concerning sexual harassment?
  - b) Has the charity developed and implemented a policy concerning workplace violence and harassment prevention?
  - c) Has the charity developed and implemented a policy concerning social media, computing, and the use of technology?
  - d) Has the charity developed and implemented a drug, alcohol and cannabis/fitness to work policy for employees and volunteers?
  - e) Is there need for a discipline procedure for employees and/or volunteer members?
  - f) Is the charity aware of and addressing ownership issues regarding intellectual property created by the employees and volunteers, such as assignment of copyright and waiver of moral rights?
  - g) Is the charity aware of and complying with applicable statutory requirements, such as pay equity, employment standards, human rights legislation, privacy legislation, and occupational health and safety prerequisites?
6. Are the charity and its board of directors exposed to liability with regards to the actions of its employees or volunteers?
- a) Have the charity and its representatives (*i.e.* directors, officers and all others who act on behalf of the charity) taken every reasonable precaution to ensure the safety of workers, volunteers, and the public?
  - b) Have the charity and its representatives complied with federal and provincial occupational health and safety legislation?
  - c) Have the charity and its representatives established a safety committee or equivalent program or system?
  - d) Have all reasonable steps been taken to ensure that the committee, program, or system is effective on an ongoing basis?
7. Are the charity and the board exposed to potential criminal liability under section 217.1 of the *Criminal Code* to take reasonable steps to prevent bodily harm to any person arising from the work or tasks the board directs them to perform?

8. Has the charity undertaken an occupational health and safety audit conducted by an experienced work place safety consultant?
9. Has the charity developed and implemented appropriate policies and practices regarding the termination of employees and complied with appropriate provincial and/or federal legislation?
  - a) In relation to wrongful dismissal, is the charity aware that punitive damages may be awarded in a case where the employer's conduct was harsh, vindictive, reprehensible and malicious?
  - b) Does the charity draft termination clauses in its employment contracts to limit its potential liability to the minimum allowable under employment standards legislation?
10. Have the recent amendments to the *Employment Standards Act, 2000* (Ontario) been complied with, including Infectious Disease Emergency Leave (IDEL)?
11. For charities that have hired construction services, has the charity obtained a Workplace Safety and Insurance Board ("WSIB") clearance certificate from the contractor or the subcontractor before any construction work begins to ensure registration with the WSIB and good standing with respect to payment of its WSIB premiums?
12. Has the charity implemented policies on effective confidentiality and conflict of interest?
13. Has the charity developed job descriptions for the different employment and volunteer positions?
14. Has the charity properly managed the performance and expectations of older employees to avoid wrongful dismissal or human rights claims of older employees?
15. Does the charity have interns (unpaid individuals being trained for employment), and if so, do they meet any of the exemptions from minimum wage under the *Employment Standards Act, 2000* (Ontario)?
16. Does the charity have a policy setting out the expectations for staff working remotely, and if so, does it clarify working hours and overtime requirements to comply with the *Employment Standards Act, 2000* (Ontario)?

## K. FUNDRAISING ACTIVITIES

1. Does the charity comply with the requirements of the CRA's Guidance CG-013, *Fundraising by registered charities*?
2. Has the charity complied with fundraising legislation in other provinces, specifically Alberta, Prince Edward Island and Saskatchewan?
3. Has provincial fundraising legislation, where applicable, been complied with as well as the guideline on fundraising published by the Office of the Public Guardian and Trustee?
4. Have fundraising programmes been reviewed by legal counsel?
5. Are donors' rights to require accountability respected, particularly rights under the *Charities Accounting Act* (Ontario)?
6. Does the charity have a privacy policy in place in order to protect donors' rights?

7. Are sponsorship arrangements properly documented?
8. Has the charity developed and implemented a gift acceptance policy?
9. Do the charity's fundraising activities comply with the applicable corporate objects or purposes and powers of the charity?
10. Has the charity developed an appropriate standard of conduct for fundraising in accordance with sample fundraising codes established by umbrella organizations, such as the Association of Fundraising Professionals or Imagine Canada?
11. Does the fundraising venue meet proper health and safety standards where applicable?
12. If the fundraising event involves catered food, has the caterer assumed the responsibility of safe food preparation?
13. If the fundraising event involves non-catered food, are the employees and volunteers knowledgeable about the potential for food spoilage and contamination? Are any permits or licences required to provide food service?
14. If the fundraising event involves service of alcohol, is the duty of care to prevent intoxication and protect intoxicated individuals being met?
15. Does Canada's Anti-Spam Legislation ("CASL") apply to the charity? If so, is the charity aware of the prohibition against sending unsolicited "commercial electronic messages" ("CEMs")?
  - a) Has the charity implemented a compliance program to demonstrate due diligence regarding CASL, including:
    - Maintaining and reviewing an up-to-date policy
    - Being able to prove compliance
    - Continuous monitoring and improvement
  - b) Is the charity aware of the rules regarding express and implied consent regarding CEMs?
  - c) Barring consent from the receiver, does the charity ensure that the "primary purpose" of its message is to raise funds for the charity?
16. Has the charity developed a privacy policy in compliance with PIPEDA that protects the personal information of donors, employees, volunteers and clients, if applicable?
17. Has the charity taken steps to ensure that the *Competition Act* (Canada) has been complied with regarding possibly misleading fundraising information, or calls to donors as telephone solicitation?
18. Is the charity involved in telemarketing, and if so, is it complying with the do-not-call requirements applicable to charities under s. 41.7 of the *Telecommunications Act* (Canada)?
19. Does the charity have a policy dealing with cause-related marketing arrangements in accordance with the requirements of CRA?
20. Does the charity accept donations in cryptocurrency? If so, have appropriate policies and procedures in accordance with CRA requirements for donations in-kind been adopted and implemented?

21. Is the charity carrying out any online fundraising activities through the charity's own website or a third-party platform? If so, have the appropriate Terms and Conditions of Use been adopted and implemented to protect donors as well as the charity?
22. Is the charity collecting payment information from donors? If so, has the charity adopted and implemented appropriate device use and cybersecurity measures for protecting this information?

## **L. FISCAL MANAGEMENT ISSUES**

1. Are all salaries, benefits and statutory deductions being paid by the charity on a timely basis with appropriate reports to the board of directors?
2. Is the charity required to register for GST/HST purposes?
3. Is the charity operating with a deficit and, if so, for how long?
4. How is the deficit being funded?
5. Has a sinking fund been established to retire debt of the charity?
6. Are investments being offered to the public without appropriate exemptions for the distribution of securities?
7. Is there an audit committee in place?
8. Is the charity ensuring compliance with audit requirements imposed under applicable corporate legislation, such as the CNCA?
9. Are charitable funds being used to fund separate business operations of the charity?
10. If the charity is a private foundation, is it aware of the excess corporate holding regime concerning limitations on the ownership of shares?

## **M. INVESTMENT ISSUES**

1. What investment powers apply to the investment of surplus funds of the charity?
  - a) Prudent investor rule under the *Trustee Act* (Ontario) will generally apply
  - b) However, specific investment powers may sometimes apply as contained in:
    - Letters patent, supplementary letters patent, articles of incorporation or articles of amendment;
    - Incorporating legislation;
    - Endowment and gift agreements; or
    - Testamentary gifts
2. Does the charity need and/or have an investment policy?
  - a) Documenting compliance with prudent investor rule
  - b) Establishing requirements for delegation of investment decision-making
  - c) Prohibiting sub-delegation of investment decision-making
  - d) Proper management of endowed funds



3. Is the charity aware that CRA allows both public and private foundations to incur debt for the purpose of acquiring investments?
4. Is the charity engaged in “social investments” under the *Charities Accounting Act* (Ontario)? If so, is the charity able to distinguish them from “program-related investments” under CRA’s Guidance CG-014, *Community economic development activities and charitable registration*? Is the charity in compliance with the Guidance on *Charities and Social Investments* released by Ontario Public Guardian and Trustee?
5. Does the charity need a disbursement policy in relation to investment proceeds?

## **N. DONOR RESTRICTED TRUST FUNDS**

1. Are there donor restricted trust funds being held by the charity?
  - a) Building funds
  - b) Endowment funds (perpetual)
  - c) Special project funds
2. Are restricted funds being used only in accordance with applicable restrictions?
3. Has a breach of trust occurred as a result of restricted funds being used in whole or in part for general operational purposes or are being borrowed against?
4. Are restricted funds segregated from operating funds?
5. If not, is there compliance pursuant to the regulations under the *Charities Accounting Act* (Ontario) to co-mingle restricted funds for investment purposes?
6. Is the board of the charity aware of the consequences of breach of trust for failing to comply with restricted funds?
7. Do the charity’s gift agreements with donors include a power in favour of the charity to vary a restricted gift?
8. Is the charity investing endowed funds on a “total return” basis (realized capital gains being included as part of income) in violation of the terms of the endowed gifts?

## **O. MAINTAINING CHARITABLE REGISTRATION**

1. Does the charity know what charitable objects it has on file with CRA?
2. Has the charity ensured that its charitable activities are being undertaken in accordance with its charitable objects or purposes?
3. Is the legal name of the charity and/or its operating name consistent with the records of CRA?
4. Is the charity aware of the CRA’s rollout of the new electronic filing system under the Charities IT Modernization Project (“CHAMP”) that may now be used for filing purposes?
5. Has the charity filed all of its governance documents with CRA, including supplementary letters patent or articles of incorporation/continuance and by-laws?
6. Does CRA have the current head office address of the charity?

7. Do all of its charitable receipts include the name and website address ([canada.ca/charities-giving](http://canada.ca/charities-giving)) of CRA?
8. Does the charity submit its annual information return (Form T3010 *Registered Charity Information Return*) within six months of the financial year end of a charity in order to avoid loss of charitable status?
9. Does the board of directors, the charity's accountant, and legal counsel review and approve the annual information return (Form T3010 *Registered Charity Information Return*) for the charity before it is filed each year?
10. Does the charity comply with split receipting and anti-tax shelter provisions of the *Income Tax Act* (Canada)?
11. Is the charity aware of the intermediate sanctions and penalties for infractions?
12. Is the charity aware of the CRA's Guidance CG-013, *Fundraising by registered charities* and the need to track its fundraising ratio each year?
13. Is the charity aware of recent changes regarding the ability of charities to engage in public policy dialogue and development activities, and the new reporting requirements associated with them?
14. Does the charity follow the CRA requirements for "related business" as set out in the CRA's Policy CPS-019, *What is a related business?* Are charitable funds being used to fund separate business operations of the charitable organization?
15. Is the charity aware of the applicable rules concerning the issuance of donation receipts?
16. Has the charity adopted a gift acceptance policy?
17. Are agency, joint venture relationships, or contractual transfer arrangements with non-qualified donees, both inside and outside of Canada, properly documented and implemented in accordance with the CRA's Guidance CG-002, *Canadian registered charities carrying on activities outside of Canada*?
18. Are the charity's books and records maintained in accordance with the requirements of the *Income Tax Act* (Canada)?
19. Does the charity maintain electronic records on a foreign database in contravention of CRA requirements?
20. Is the charity prepared for an audit by CRA?
21. Is a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity an "ineligible individual" under the *Income Tax Act* (Canada)?

## **P. NATIONAL AND/OR INTERNATIONAL RELATIONSHIPS**

1. Are relationships with national organizations and/or subsidiary chapters adequately documented with specific reference to controlling trademarks in Canada?
2. Are relationships between national and international organizations adequately documented in order to effect an international operation?
3. Is the charity in compliance with the CRA's Guidance CG-002, Canadian registered charities carrying out activities outside Canada?
4. Is there a need for an international umbrella organization?
5. Has the ownership of trademarks and/or copyrights been determined and documented through license agreements?

## **Q. ANTI-TERRORISM/MONEY LAUNDERING LEGISLATION/FOREIGN CORRUPTION ISSUES**

1. Does the charity carry on operations that may require it to be in compliance with anti-terrorism/money laundering legislation?
  - a) International operations
  - b) Domestic operations
2. Has the charity undertaken appropriate due diligence procedures in complying with anti-terrorism legislation?
  - a) Development of an anti-terrorism/money laundering policy statement
  - b) Development of resource materials on anti-terrorism/money laundering legislation
  - c) Requiring disclosure statements for board members and staff
  - d) Evaluating all charitable programs for compliance
  - e) Requiring disclosure statements from affiliated charities, third party agents and/or partners and conducting appropriate inquiries
  - f) Determining when to make inquiries of donors
  - g) Conducting due diligence internet searches on directors, officers, and agents
3. Are directors aware of risks associated with failing to comply with anti-terrorism/money laundering legislation?
  - a) Loss of charitable status
  - b) Personal liability in civil law
  - c) Possible criminal law sanctions
4. If the charity is working in the U.S. or in conjunction with U.S. charities in conflict zones, is it aware of the impact of the *Patriot Act* (United States) and other international anti-terrorism legislation on its programs and operations?
  - a) Does the charity investigate significant ownership interest in any organizations it works with domestically and abroad?

- b) Does the charity conduct due diligence for any subcontractors it hires for work domestically and abroad?
- 5. Does the charity comply with anti-bribery prohibitions under the *Corruption of Foreign Public Officials Act, 1998* (Canada)?
  - a) Is the charity caught by the broader definition of “business” that does not require a “for-profit” element?
  - b) Is the charity aware that the “facilitation payment” exemption has been repealed?
- 6. Does the charity have any close associations with foreign or domestic politically-exposed persons?
- 7. If the charity is making payments through the U.S. banking system or selling goods of U.S. origin or with U.S. content, is it aware of the impact of the *Foreign Corrupt Practices Act* (United States) on charities with U.S. affiliations?

## **R. CRISIS MANAGEMENT ISSUES**

- 1. Does the charity have an existing committee or group that can develop a crisis management plan? If so, is the group diverse enough to consider the full range of crises that the charity might face?
- 2. Is the charity overly dependent on another organization? Could the relationship between the organizations be terminated with little or no warning?
- 3. Does the charity have contingency plans in the event of the following circumstances?
  - a) Death or injury of a key individual
  - b) Loss of access to the use of facilities and equipment
  - c) Disrupted or significantly diminished operations
  - d) Loss of crucial information
  - e) Intense media scrutiny
  - f) Irreparable damage to a charity’s reputation
  - g) Cyber security attack
- 4. Can some of the liability risk associated with a possible crisis be covered by specialized insurance?
- 5. Does the charity have a back-up plan in place for service options in the event of a cyber security attack?

## **S. PRACTICAL DUE DILIGENCE CONSIDERATIONS DURING PUBLIC HEALTH EMERGENCIES (e.g. COVID-19)**

- 1. Have meetings of the board of directors been convened to discuss the emergency, and a committee established to oversee initiatives of the board? If necessary, have the bylaws or governing legislation of the charity been amended to allow board meetings to be held by telephone or electronic means?
- 2. Has the charity documented in writing all of the appropriate due diligence steps being taken in response to the emergency and the dates for undertaking those actions?

3. Does the charity have appropriate health and/or safety measures for staff, volunteers, clients and beneficiaries so any potential exposure to the emergency is either reasonably minimized or eliminated, particularly with respect to vulnerable beneficiaries that may be adversely impacted by the emergency, and evaluated and managed risks related to employee shortages, project cancellations, disruptions, and delays?
4. Has the charity reviewed any existing risk management, disaster recovery and remote access policies, and, if these are not in place, developed, adopted and implemented such policies?
5. Are there any federal, provincial or local public policies and public health-related orders, directives and restrictions which may impact the operations of the charity, both inside and outside Canada?
6. Do any government actions affect any programs of the charity in any jurisdiction in which they are carried out by the charity?
7. Has the charity developed and implemented an effective communications strategy, and is the charity maintaining open communication and transparency with staff, members, volunteers, clients, beneficiaries, suppliers, counterparties, and other third parties?
  - a) Is there one person in the charity in charge of maintaining consistency in content and methodology of communication, who reports back to the board?
  - b) Does the charity keep written or electronic records of what communication was sent, on what date, and to whom?
8. Has the charity reviewed insurance policies, including directors' and officers' insurance and business interruption insurance, if applicable, as well as any travel insurance policies covering staff or volunteers unable to return to Canada as a result of international travel restrictions?
9. Has the charity reviewed all contracts with regard to the effect of the emergency, as well as any government directive or public health recommendation as a result of the emergency, on planned events or conferences, real estate transactions or the delivery or receipt of goods and services generally?
10. Has the charity reviewed its financial health and how it may have been impacted, and continue to be impacted moving forward, by the emergency?
  - a) Review funding and other agreements with governments and agencies to determine the charity's obligations to deliver goods and services
  - b) Consider impact of the emergency upon all sources of income and how to offset the anticipated reduction in income
  - c) Ensure that employee salaries and statutory deductions and remittances continue to be paid on a timely basis to avoid exposing directors to personal liability for unpaid amounts
11. Has the charity sought legal advice from employment counsel on the extent of potential layoffs and/or elimination of staff?
12. Has the charity asked legal counsel to review bylaw provisions concerning members' meetings and determine if annual members' meetings may need to be postponed or whether alternative methods for holding member meetings may need to be considered, such as by telephonic or other

electronic means if permitted in the bylaws or governing statute for the charity, and if so, has the charity taken action to postpone or provide alternate means for holding annual members' meetings?

13. Have corporate filing dates for annual returns been monitored for any changes?
14. Has the charity taken appropriate steps to protect privacy and personal information, including obtaining appropriate consent, and are the charity's responses to the emergency in line with privacy legislation?
  - a) Educate and train staff to be extra-vigilant against phishing scams, and comply with privacy policies.
  - b) Setting up a virtual private network for accessing work data.
  - c) Restricting data access on a need-to-know basis.
  - d) Encrypting data on portable devices and removable media.
  - e) Having robust contracts with third-party service providers, and ensuring adequate and trustworthy IT support is available.
  - f) Regularly backing up data and updating software, and requiring the same from the employees.
  - g) Requiring employees to fortify passwords and ensure their Wi-Fi connection is secure, along with storing work devices safely and securely, without access to anyone.



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# Carters/Fasken Healthcare Philanthropy: Check-Up 2021

September 22, 2021

## **BIOGRAPHIES**

**FASKEN**

**CARTERS**



## Areas of Expertise

Private M&A | Corporate Governance |  
Corporate/Commercial | Life Sciences | Health | Cannabis  
Law | Charities and Non-Profit Law

## Education

1987, LLB, Queen's University  
1984, BA, University of Toronto

## Jurisdiction

Ontario, 1989

## Language

English

Lynne Golding is the Leader of the firm's Health group. She has an active corporate/commercial practice based principally in the health industry.

Dealing with both for-profit and not-for-profit entities, Lynne advises clients on transactions in regulated and unregulated industries. A highly regarded name in the health regulatory space, Lynne's practice is principally comprised of clients in the health sector for whom she provides governance advice and structuring and transactional services.

Lynne is a frequent speaker on issues affecting the health sector and has been recognized for her expertise in healthcare law by Chambers Global and the Canadian Legal Lexpert Directory.





## Laurie M. Turner

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### Areas of Expertise

Corporate/Commercial | Health | Cannabis Law |  
Agribusiness, Food & Beverage | Charities and Non-Profit  
Law

### Education

2009, JD, Queen's University

2005, BA (Honours), University of Toronto

### Jurisdiction

Ontario, 2010

### Language

English

Laurie Turner has an active corporate/commercial practice and advises clients in the for-profit and not-for profit (specifically hospital sector) on a diverse range of matters including corporate restructurings, (e.g. mergers and amalgamations) corporate governance, procurement and privacy, with a particular focus on the health sector.

Laurie is a graduate of Queen's University, Faculty of Law. Prior to attending law school, Laurie earned her undergraduate degree from the University of Toronto (Distinction) and was an Executive Research Assistant to the Canadian Research Chair in Breast Cancer at Sunnybrook & Women's College Health Sciences Centre. Laurie also worked as a Research Assistant for Professor Jurgen Rehm at the Centre for Addiction and Mental Health. Laurie has gained valuable experience through recent secondments at two large teaching hospitals in Toronto and a shared service organization where she advised on a wide range of matters.



### Areas of Expertise

Information Technology | Corporate/Commercial | Privacy and Cybersecurity Law | Procurement | Health

### Education

2003, LLB, University of Windsor

2000, BA (Honours), Queen's University

### Jurisdiction

Ontario, 2004

### Language

English

Daniel Fabiano's business law practice is focused on privacy/information protection, procurement, and technology.

Daniel advises clients on the complexities of Canadian privacy, freedom of information, and anti-spam laws. Daniel regularly assists clients with:

- Ongoing compliance and risk management, including privacy impact assessments, privacy risk mitigation strategies, data sharing arrangements, privacy policies, notices and consents
- Preventing and responding to privacy breaches, cyber-security incidents and complaints
- Complying with Canada's rigorous anti-spam law, including Canadian Radio-television and Telecommunications Commission (CRTC) investigations
- Responding to access to information matters at all levels of government – Daniel is a lead author of the "Hospital Freedom of Information Toolkit: A Guide to Implementing the Freedom of Information and Protection of Privacy Act," published by the Ontario Hospital Association.

In his procurement practice, Daniel frequently advises clients on initiating and documenting the bidding process, drafting and negotiating contracts, as well as managing and mitigating procurement risks and in bid disputes. He has both a "Certificate in Public Procurement Law and Practice" and a "Certificate in Advance Procurement Law

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and Practice: Major Projects and Tendering.” Daniel also advises clients in innovative procurement methodologies and related strategies, and is one of the authors of the Healthcare Supply Chain Network “Innovation Procurement Toolkit Expansion” – a set of innovation procurement resources, guides and templates. In his technology practice, Daniel advises technology providers, developers and users on licensing, Internet/e-commerce platforms, social media, corporate transactions and corporate policy matters. Daniel drafts and negotiates a wide range of contracts, including master service agreements, software development agreements and licenses, maintenance and support agreements, and service level agreements.

Outside of his practice, Daniel has served on the board of directors of Healthcare Supply Chain Network, a national health sector procurement association, and the Canadian Medical Equipment Protection Plan. He is past Vice-Chair of Tarragon Theatre.

In 2018, Daniel served as General Counsel (Interim) of eHealth Ontario.





### Areas of Expertise

Litigation and Dispute Resolution | Privacy and Cybersecurity Law | Trade Secrets & Data Security

### Education

2014, JD, University of Toronto Faculty of Law

2011, BCom, McMaster University

### Language

English

Daanish Samadmoten is a member of the firm's Privacy and Cybersecurity Group. Daanish frequently advises clients on various privacy and cybersecurity matters by providing practical and strategic advice in respect of privacy compliance, data breach incidents, and privacy litigation.

Daanish has assisted numerous clients in addressing privacy and cybersecurity incidents, including by advising clients about their legal obligations and litigation risks, reporting to privacy regulators, working with forensic and data management experts, and drafting external communications.

With considerable experience and an ongoing practice in the fields of commercial, civil, and administrative litigation, Daanish brings to bear key legal and litigation risk management considerations in relation to privacy and cybersecurity matters.

Daanish received his Juris Doctor from the University of Toronto and studied transnational law at the Center for Transnational Legal Studies in London, England. Prior to that, he received an Honours Bachelor of Commerce degree from McMaster University.

Daanish was called to the Ontario bar in 2015 and is a member of the Law Society of Ontario, the Canadian Bar Association, the Ontario Bar Association, the South Asian Bar Association, the Federation of Asian Canadian Lawyers, and the Canadian Muslim Lawyers Association.

### TERRANCE S. CARTER, B.A., LL.B, TEP, TRADEMARK AGENT



Terrance Carter, as the Managing Partner of Carters, practices in the area of charity and not-for-profit law, and has been recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada*, and *Chambers and Partners*. Mr. Carter is also a registered Trademark Agent and acts as legal counsel to the Toronto office of the national law firm 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 & Commentary*, 2021 Edition (LexisNexis Butterworths), a contributing author to *The Management of Nonprofit and Charitable Organizations in Canada*, 4<sup>th</sup> Edition (2018 LexisNexis Butterworths), co-author of *Branding and Copyright for Charities and Non-Profit Organizations*, 3<sup>rd</sup> Edition (2019 LexisNexis Butterworths) and the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada).

Mr. Carter is a past member of CRA Advisory Committee on the Charitable Sector, a member of the Government Relations Committee of the Canadian Association of Gift Planners (CAGP), the Association of Fundraising Professionals, a Past Chair of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA) and a Past Chair of the Charity and Not-for-Profit Law Section of the Ontario Bar Association (OBA), a past member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, a past member of CRA's Charity Advisory Committee and the Uniform Law Conference of Canada Task Force on Uniform Fundraising Legislation,. Mr. Carter was awarded the Friends of CAGP Award in 2020, and was the 2019 recipient of the Jane Burke Robertson Award of the Canadian Bar Association, as well the 2002 recipient of the AMS - John Hodgson Award of the OBA for charity and not-for-profit law. He is also a member of the Intellectual Property Institute of Canada, the Association of Fundraising Professionals, and the American Bar Association Tax Exempt Section, and has participated in consultations with the Public Guardian and Trustee of Ontario, the Charities Directorate of CRA, Finance Canada, and was a member of the Anti-terrorism Committee and the Air India Inquiry Committee for the CBA.

Mr. Carter has written numerous articles and been a frequent speaker on legal issues involving charity and not-for-profit law for the Law Society of Ontario, the Canadian Bar Association (CBA), the Ontario Bar Association (OBA), the Association of Fundraising Professionals, the American Bar Association, the CAGP, the Canadian Tax Foundation, CPA Canada, CPA Ontario, STEP, CSAE, the New York University School of Law, the University of Ottawa Faculty of Common Law, Ryerson University, McMaster University, the University of Waterloo Master of Tax program, Queensland University of Technology (Brisbane, Australia), University of Manitoba Law School, as well as the C.D. Howe Institute.

Mr. Carter is also the editor of, and a contributor to [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca), [www.carters.ca](http://www.carters.ca), and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca), as well as Chair of the annual *Church & Charity Law Seminar*<sup>TM</sup>, and a founder and a past co-chair of the CBA National Charity Law Symposium.

**PRACTICE AREAS:** Charity and Not-for-Profit Law, Fundraising, Gift Planning, National and International Strategic Planning, Charity Tax and Trusts and Intellectual Property.

**EDUCATION:** B.A. (Joint Honours), and a McGill University Scholar, McGill, 1975  
LL.B., Osgoode Hall Law School, 1978

**CALL TO THE BAR:** Ontario Bar, 1980

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**THERESA L.M. MAN, B.SC., M.MUS., LL.B., LL.M.**



Theresa L.M. Man joined Carters in 2001, becoming a partner in 2006, to practice in the area of charity and not-for-profit law. Ms. Man is recognized as a leading expert in charity and not-for-profit law by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*.

Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She has also written on charity and taxation issues for various publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS*, and *Charity & NFP Law Bulletin*.

Ms. Man advises on charity and non-profit matters, including incorporation, reorganization, amalgamation, asset merger, restructuring, corporate governance, multiple corporate structures, affiliation and association agreements, dissolution, gift planning, facility and property use, fundraising, non-profit organization operations and tax status.

Ms. Man is a member and former chair of the Canadian Bar Association Charities and Not-for-Profit Law Section, a member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, and a member and former chair of the OBA Charities and Not-for-Profit Law Section. She has been actively involved with and is a legal advisor to numerous charities. She has been a speaker at various seminars, including the Annual *Church & Charity Law Seminar*<sup>™</sup> and seminars hosted by the Canadian Bar Association, Ontario Bar Association, the Canadian Association of Gift Planners, and Imagine Canada (Charity Tax Tools), among others.

Before embarking on the study of law, Ms. Man earned her Master of Music and partially completed doctoral studies at Southwestern Baptist Theological Seminary in Fort Worth, Texas. This has enabled her to serve as minister of music and organist in various churches in Regina, Saskatchewan and in the greater Toronto area.

**PRACTICE AREAS:** Charity and Not-for-Profit Law

**EDUCATION:** LL.M. (Tax Law), Osgoode Hall Law School, 2008  
LL.B., Osgoode Hall Law School, 1995  
M. Mus., Southwestern Baptist Theological Seminary, 1989  
B.Sc. in Agriculture (with Distinction), University of Manitoba, 1985

**CALL TO THE BAR:** Ontario Bar, 1997

**LANGUAGES:** Fluent in Cantonese, Mandarin and English

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