

## **WELCOME**

We are pleased to welcome you to the **2024 Carters Annual Charity & Not-for-Profit Law Webinar**, being held virtually again this year, as requested by the overwhelming majority of previous attendees.

The Webinar today will provide an overview of recent developments and practical advice on legal issues that impact charities and not-for-profits. In this regard, Carters has been serving the charity and not-for-profit sector, inclusive of the broader faith community, every year since 1994 through seminars and webinars, making this our 31st year!

This webinar is eligible for **3.75 substantive hours** towards the annual **Law Society of Ontario (LSO) CPD** and **CPA Professional Development** requirements.

## **ACKNOWLEDGEMENTS AND THANKS**

We gratefully acknowledge and thank **The Honourable Ratna Omidvar, C.M., O.Ont., Retired Senator from Ontario, Senate of Canada, and Bruce MacDonald, President and CEO, Imagine Canada** for speaking with us today.

## **FORMAT OF THE WEBINAR**

Presentations will be 20 minutes in length. The special presentations by our guest speakers, The Honourable Ratna Omidvar, and Bruce MacDonald, will be before the first break and at the end of the webinar, and will be 30 minutes in length, including Q&A. Questions for our speakers, other than our special guests, can be entered in the Question Box feature of the webinar at any time and will be addressed at the end of the day. Unfortunately, not all questions can be answered due to time constraints.

## **ON DEMAND REPLAY**

Please note that On Demand Replay will be made available this year for all registrants, should you find you cannot attend the webinar.

## **CARTERS RESOURCE MATERIALS**

Today's electronic handout package, including the PowerPoint presentations and various resource materials, are available online during the webinar and can be downloaded for your use. These materials, along with numerous other articles, Webinar materials, and newsletters of interest to churches and charities, including back issues of our *Charity and NFP Law Bulletins*, *Church Law Bulletins*, and *Anti-terrorism and Charity Law Alerts*, as well as our updated *November 2024 Legal Risk Management Checklists* for both Charities and Not-for-Profits are available free of charge on our website at [www.carters.ca](http://www.carters.ca) as well as in the Event Resources tab on this website

## **CHARITY & NFP LAW UPDATE**

To receive the monthly *Charity & NFP Law Update*, please e-mail us at [info@carters.ca](mailto:info@carters.ca) with "mailing list" in the subject line. Alternatively, please click on the webinar event resources button to sign up for our [Mailing List](#) indicating your consent to receive firm newsletters and information about future seminars. You may access the October 2024 edition of the [Charity & NFP Law Update](#) through our website.

## WEBINAR SPONSORS

Carters would like to thank the following companies for their sponsorship of the **2024 Carters Annual Charity & Not-for-Profit Law Webinar** that helps to underwrite costs associated with the Webinar, including contracting EventStream Inc., who are helping to ensure that the Webinar runs smoothly and professionally.

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- **LexisNexis Canada Inc., 1-800-668-6481, <https://www.lexisnexis.ca/en-ca>**
- **Beacon Endowment Solutions, 416-629-9242, <https://beaconendowmentsolutions.ca>**

## SECTOR RESOURCE MATERIALS

We are pleased to make resource materials, from the following organizations, available on the webinar platform.

- **Canadian Association of Gift Planners (CAGP), <https://www.cagp-acpdp.org/>, and CAGP Foundation, <https://www.cagpfoundation.org/>**
- **Canadian Centre for Christian Charities (CCCC), <https://www.cccc.org>**
- **Imagine Canada, <https://imaginecanada.ca/en>, and Advocacy Hub <https://imaginecanada.ca/en/public-policy>, and About Sector <https://imaginecanada.ca/en/About-the-sector>**
- **LexisNexis Canada Inc., 1-800-668-6481, <https://store.lexisnexis.ca/en>**
- **ONN (Ontario Nonprofit Network), <https://theonnc.ca>, and <https://nonprofitresources.ca/>**

## ABOUT CARTERS

**Carters** is a law firm with expertise in the area of, charity and not-for-profits, including faith-based organizations, and is committed to assisting clients in avoiding legal problems before they occur, through effective legal risk management advice, including assistance with:

- Charitable Registration
- Charity and Not-For-Profit Incorporation
- Faith-based Organization Incorporation
- Corporate Maintenance and Filings
- Donor Advised Funds
- Social Enterprise and Finance
- Transition to ONCA
- Amalgamations and Mergers
- Dissolution and Wind-Up
- Membership Discipline and Disputes
- National and International Structures
- Public Policy Dialogue and Development Activities
- Endowment and Gift Agreements
- Gift Acceptance Policies
- CRA Charity Audits and Appeals
- Director and Officer Liability
- Governance Policies and Advice
- Investment Policies and Provincial Investment Laws
- Fundraising and Gift Planning
- Legal Risk Management Audits
- Privacy Policies and Audits / Anti-Spam
- Policies on Anti-Bribery, Anti-Terrorism and Anti-Money Laundering
- Human Rights Compliance and Litigation
- Investment Powers
- Religious Denominational Structures
- Vulnerable Person Policies

## **PROTECTION FROM REGULATORY OFFENCES FOR CHARITIES AND NOT-FOR-PROFITS**

Churches and charities often face significant liability and financial challenges due to increasing enforcement of federal and provincial regulatory legislation dealing with such matters as water, working conditions and environmental issues. Carters is able to provide advice and assistance at all stages from an initial investigation through to a full defence at a trial. For more information, contact Sean Carter at Carters (1-877-942-0001).

## **EVALUATION**

We appreciate your evaluation and comments. Feel free to use the Feedback Evaluation form available at the end of the webinar or email your comments to [seminars@carters.ca](mailto:seminars@carters.ca). Complete the fillable pdf form and send by email as an attachment (In Adobe: File → Send File to [seminars@carters.ca](mailto:seminars@carters.ca)).



## **CARTERS OFFICE LOCATIONS**

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## **GENERAL DISCLAIMER**

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## SPEAKER BIOGRAPHIES



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



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



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



**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, 2023), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a former member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.



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



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



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



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



**[Bruce MacDonald](#)**, President and CEO Imagine Canada, Toronto, Ontario. Bruce has been in the business of “doing good” for over 30 years. Prior to Imagine Canada, Bruce spent 20 years at Big Brothers Big Sisters of Canada, serving as both Vice-President of Marketing and as the organization's CEO. Bruce holds a Bachelor of Commerce in Sports Administration and a Masters in Management in the Voluntary Sector.



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



**[Esther S.J. Oh](#)**, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management. Ms. Oh has written articles for *The Lawyer's Daily*, [www.carters.ca](http://www.carters.ca) and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Charity & Not-for-Profit Law Seminars* and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



**The Honourable Ratna Omidvar, C.M., O.Ont.** Ratna Omidvar served in the Senate of Canada as an independent senator representing Ontario from 2016 to 2024. She served as the Deputy Chair of the Special Senate Committee on the Charitable Sector, and Chair of the Senate's Social Affairs, Science and Technology Committee. In 2022, she successfully had measures that changed "direction and control" requirements regulating charities who work with non-charities, pass in the federal budget. Senator Omidvar has over 30 years of experience working in the charitable sector at senior levels of management as well as serving as a board director and a volunteer with over 35 organizations. Ratna Omidvar is also a Member of the Order of Canada and an appointee of the Order of Ontario.



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



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



**Martin U. Wissmath, B.A., J.D.** – Called to the Ontario Bar in 2021, Martin joined Carters after finishing his articling year with the firm. In addition to his legal practice, he assists the firm's knowledge management and research division, providing in-depth support for informative publications and client files, covering a range of legal issues in charity and not-for-profit law. His practice focuses on employment law, privacy law, corporate and information technology law, as well as the developing fields of social enterprise and social finance. Martin provides clients with legal advice and services for their social-purpose business needs, including for-profit and not-for-profit organizations, online or off-line risk and compliance issues.

## **ADDITIONAL LAWYERS AT CARTERS**



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



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



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**[Jennifer M. Leddy](#)**, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one-year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose."

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## AGENDA

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8:30 a.m.	Online Login	
9:00 a.m.	Opening Remarks	Terrance Carter Sepal Bonni
9:10 a.m.	Gift Acceptance Policies and Donor Agreements: An Integrated Approach	Jacqueline M. Demczur Ryan M. Prendergast
9:30 a.m.	IT and Data Management: Board Governance Issues to Consider	Esther Shainblum Cameron A. Axford
9:50 a.m.	Protecting Communications in Anticipation of Lawsuits and CRA Audits	Sean S. Carter Heidi N. LeBlanc
10:10 a.m.	Essential Employment Law Update for Charities and NFPs	Barry W. Kwasniewski Martin U. Wissmath
10:30 a.m.	Fireside Chat #1: “Challenges and Opportunities for the Charitable & NFP Sector: What to Get Ready For”	Bruce MacDonald
11:00 a.m.	Break (15 minutes –including Terry’s jokes)	
11:15 a.m.	Understanding New Changes to the T3010 Charity Return	Theresa L.M. Man
11:35 a.m.	Remuneration of Directors of Charities in Ontario: What is Allowed & What’s Not?	Esther S.J. Oh Urshita Grover
11:55 a.m.	Charities Working with Non-Charities: What are the Options?	Terrance S. Carter
12:15 p.m.	Fireside Chat #2 - Looking Back, Looking Forward: A Conversation with The Former Senator Omidvar about the Charitable Sector	The Honourable Ratna Omidvar
12:45 p.m.		Question Period for Presenters (15 minutes)
1:00 p.m.		Concluding Remarks and Draw Prizes
1:10 p.m.		Program Ends

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Please see **Speaker Biographies** in the electronic handout package and take a moment to complete the **Evaluation Form** that will be sent to you after the webinar to help us make the next Annual *Charity & Not-for-Profit Law* Webinar/Seminar even better.

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## LIST OF POWERPOINTS

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- ◆ **Gift Acceptance Policies and Donor Agreements: An Integrated Approach**  
Jacqueline M. Demczur, B.A., LL.B. & Ryan M. Prendergast, B.A., LL.B.
- ◆ **IT and Data Management: Board Governance Issues to Consider**  
Esther Shainblum, B.A., LL.B., LL.M., CRM & Cameron A. Axford, B.A., J.D.
- ◆ **Protecting Communications in Anticipation of Lawsuits and CRA Audits**  
Sean S. Carter, B.A., LL.B. & Heidi N. LeBlanc, J.D.
- ◆ **Essential Employment Law Update for Charities and NFPs**  
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- ◆ **Challenges and Opportunities for the Charitable & NFP Sector: What to Get Ready For**  
Bruce MacDonald & Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **Understanding New Changes to the T3010 Charity Return**  
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- ◆ **Remuneration of Directors of Charities in Ontario: What is Allowed & What's Not?**  
Esther S.J. Oh, B.A., LL.B. & Urshita Grover, H.B.Sc., J.D.
- ◆ **Charities Working with Non-Charities: What are the Options?**  
Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent
- ◆ **Looking Back, Looking Forward: A Conversation with The Former Senator about the Charitable Sector**  
The Honourable Ratna Omidvar & Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent

# **Gift Acceptance Policies and Donor Agreements: An Integrated Approach**

**By Jacqueline M. Demczur, B.A., LL.B  
& Ryan M. Prendergast, B.A., LL.B**

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# Carters Annual *Charity & Not-for-Profit Law* Webinar

November 14, 2024

## Gift Acceptance Policies and Donor Agreements: An Integrated Approach

By Jacqueline M. Demczur & Ryan M. Prendergast

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### Overview of Presentation

- A Introduction
- B What is a Gift Acceptance Policy and Why is It Important?
- C What are Donor Agreements and Why are They Important?
- D Key Issues to Address in Gift Acceptance Policies
- E Key Components of Gift Agreements
- F Key Takeaways
- G Resources

## A. Introduction

- Important for charities to have gift acceptance policies for the acceptance and receipting of gifts
- Such gift acceptance policies serve to support charities' effective gifting and planned giving programs
- However, gift acceptance policies on their own are often not enough
- This is because another key component of any good charitable gifting program is having template gift agreements of various types available for use with donors.
- An integrated approach is recommended for charities so that gift acceptance policies and template gift agreements work together "hand in glove" for charities

## B. What is a Gift Acceptance Policy and Why is It Important?

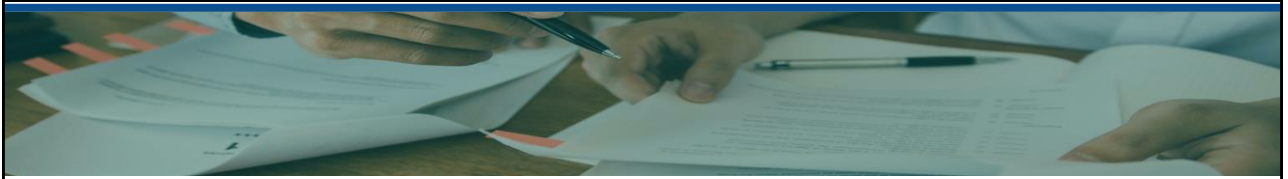
- Facilitates gift solicitation and management
  - When and how to accept and receipt various types of gifts
  - Enables charities to keep up with the development of new and hot gifts in the sector (e.g. gifts of cryptocurrencies) and be ready to respond to donors
  - How to track and manage gifts and gift restrictions
  - When and how to decline a gift
- Ensures legal compliance and risk management
  - Enables compliance with the law in Canada, including case law and the requirements of the *Income Tax Act* (Canada)
  - Evidences due diligence as a defence in the event of litigation
  - Avoids unexpected surprises and costs



- Manages donor relations
  - Enables transparency of process and policy
  - Ensures compliance with donor restrictions
  - Assures donors of sound management of their gifts
  - Avoids misunderstanding with donors
  - Manages donor expectations
  - Facilitates having answers “ready” to respond to donor’s enquiries
- Effective operational management
  - Ensures consistent administration of policies and procedures
  - Avoids case-by-case subjective scenarios
  - Assists staff and volunteer training
  - Sets out code of conduct for staff and volunteers
  - Promotes credibility of the charity
  - Manages expectations of directors, staff and volunteers

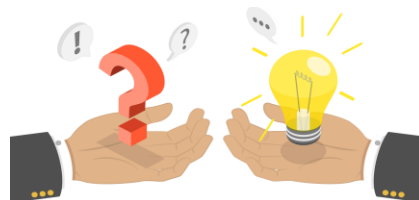


- Considerations in developing a gift acceptance policy
  - Review the charity’s current planned giving program
  - Review the charity’s current procedures for gift acceptance
  - Review the charity’s planned giving goals
  - Review the charity’s future gift planning objectives
  - Undertake staff consultation
  - Seek legal advice
  - Circulate draft policy to staff for comments and inputs
  - Review current legal requirements relating to gift acceptance, for example
    - When is a gift not a gift?
    - How to properly document a gift?
- Other considerations to include in a gift acceptance policy
  - Sponsorship, i.e., when it differs from a gift and how it is to be treated
  - When and who will obtain an appraisal (one or more) in the case of a gift-in-kind
  - Naming rights that will be provided in return for a gift



- Review current legal requirements relating to gift management because these may affect how gifts are to be accepted and managed, for example:
  - Effective tracking of restricted gifts and compliance with the gift restrictions
  - No comingling of restricted funds with unrestricted/general funds
  - Investments must comply with provincial *Trustee Act* requirements
  - Tracking gift restrictions that are either impossible or impractical and what to do with them
  - Determining whether total return investment strategy may be used when investing endowed gifts
  - How to deal with donors' advice and amendments of gift agreements

- Develop a written policy, instead of tradition or practice
- Key drafting issues
  - Organize the policy into sections by topics
  - Outline step-by-step process for staff and volunteers to follow
  - Develop templates for bequest language and gift agreements to be attached to the policy or as a schedule
  - Use user-friendly and practical language
  - Develop a detailed version for use in-house
  - Develop a user-friendly high-level version for public communications (such as website and donor communications)



- Need to ensure gift acceptance policy is coordinated with other polices of the charity to ensure consistency of management, for example:
  - Investment policy
  - Privacy policy
  - Fundraising policy
  - Social media policy
  - Naming policies and procedures
  - Sponsorship policy



## C. What are Donor Agreements and Why are They Important?

### 1. First Principles – What is a Gift?

- A gift in law is “a *voluntary transfer of property to another made gratuitously and without consideration*”
- For a gift to be voluntary, a donor must have intent to make the gift and capacity to do so, i.e. not under duress or mentally incapable
- Property to be gifted must be transferred/delivered to intended donee with evidence of their acceptance
- No consideration back to the donor for making the gift - donor cannot retain control over the gifted property and must fully divest all rights to the donated property
- Excessive on-going control by donor over the gifted property may defeat or negate the gift

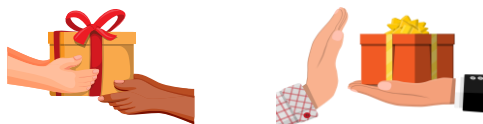
## 2. Importance of a Gift Agreement

- A gift agreement is not legally required to make a gift
- However, it will show that there has been a gratuitous transfer of property to a charity intended as a gift
- A gift agreement will also help to evidence what the gift's terms were – this can be helpful in ensuring a charity legally complied with those terms
- While sometimes used interchangeably with the term “gift agreement”, a “pledge agreement” is different:
  - It is generally not enforceable at law
  - However, it could be enforceable if there is consideration given to the donor or detrimental reliance by the charity can be shown



## 3. Unrestricted vs. Restricted Gifts

- Unrestricted gifts are used for a charity's charitable purposes without restriction
  - Board decides how to apply the gift but use cannot be beyond the purposes
  - Options: (1) Spend the gift; (2) Invest and use income; or (3) Internally restrict for specific purpose
- Restricted gifts must be used for donor-imposed restrictions
  - This constrain how charity holds, manages and/or uses the gift
  - Results in separate restricted charitable purpose trusts – “a charity within a charity”
  - Failure to fulfil restricted purposes will be a breach of trust
- Charity with restricted gifts must know: (1) what the donor restrictions are; (2) their legal implications; and (3) need to comply





#### 4. Types of Restricted Charitable Gifts

- Time restrictions?
  - Endowments – capital held permanently
  - Long Term – capital held for a set time period
  - Income used for general charitable purposes or donor-restricted purpose
- Use restrictions?
  - Capital and/or income used for restricted use purpose
  - Restricted use must fall within charity's purposes and not offside public policy
  - If no time restriction, expend as soon as possible
- Often donors impose both time and use restrictions
- Other types of gifts possible – Conditional gifts, testamentary gifts (with or without restrictions), precatory (non-binding) gifts, donor advised gifts and restricted gifts between charities

#### D. Key Issues to Address in Gift Acceptance Policies

- Outline duties of the directors regarding charitable gifts
- Explain basic rules that apply to receipting for reference by staff and volunteers
- Explain difference between gifts of cash and gifts-in-kind and where appraisals may be necessary
- Explain the nature of restrictions that may be imposed by donors on gifts and the implications arising from those restrictions
- Explain endowment and long term funds and donor advised funds
- Explain policies for various types of gifts
- Special issues (see slide 18)
- Gift agreements, gift acknowledgement, and other donor related issues
- Declining and returning a gift
- Outline the role of parallel foundation (if applicable)

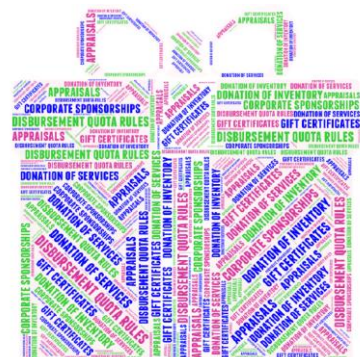
- Explaining Basic Rules that Apply to Receipting for Reference by Staff and Volunteers
  - Split-receipting rules
  - *De minimis* rule on receipting
  - Intention to donate
  - How to establish fair market value
  - When and how to obtain appraisals
  - Deeming of fair market value under the *Income Tax Act* (Canada) for certain types of gifts
  - Due diligence in determining the eligible amount of a gift



- Onus is on the charity to get it right!
- Receipts must comply with *Income Tax Act* (ITA) and Regulations, and Canada Revenue Agency's (CRA) policies
- If a receipt includes incorrect information
  - Penalty of 5% of the eligible amount on the receipt
  - Penalty of 10% for a repeat infraction within 5 years
- If a receipt includes false information
  - Penalty of 125% of eligible amount on receipt
  - If penalty is greater than \$25,000, charity is liable to suspension of tax-receipting privileges
- Registered charity status may also be revoked

- Explain Policies for Various Types of Gifts
  - For each type of gift, set out the charity's policy on
    - Gift acceptance requirements
    - Gift processing and management
    - Donor acknowledgment
    - Receipting
  - Set out the types of gifts the charity is not prepared to accept
  - Gifts that involve special gifting considerations and new types of gifts that may come up from time to time
    - Need to decide whether the charity would like to accept them and the acceptance process and issues
    - E.g., cryptocurrencies, airline points, etc.

- Special Issues
  - Disbursement quota rules
  - Gifts from other registered charities
  - Corporate sponsorships
  - Donation of inventory by businesses
  - Gift certificates – CRA's policies
  - Donation of services
  - Donation tax shelters
  - Appraisals



**E. Key Components of Gift Agreements**

**1. Description of Restricted Purposes**

- If endowed, is it permissible to encroach on capital and for what reasons?
- Can the charity vary any restricted use purpose?

**2. Naming Rights**

- Are naming rights in favour of the donor to be provided?
- If so, how long are the naming rights to be in place and can they be terminated?

**3. Donor Advised Provisions**

- Any ability for donor advice to be provided?
- Imperative to avoid too much control by donor over the gift once it is made

**4. Investment and Disbursement**

- How will capital be invested? *Trustee Act* vs. charity's investment policy
- If no time restriction, then the gift is to be expended in timely manner
- With a time restriction, is all income to be expended or does a portion have to be added to capital?
- How to calculate income? Classic vs. total return approaches

**5. Administrative Fee?**

- Okay to charge?
- If so, how much and how is the fee determined?
  - Set amount in the agreement
  - Or evergreen through policy as amended from time to time



**6. Variation of Terms of Restricted Gift**

- Does the gift agreement allow the charity to vary restricted terms?
- Agreement could require charity to consult with the donor on any change but donor must not have decision making authority in this area

**7. Other Issues**

- Is a change of trustee possible?
- How to deal with any return of the gift?
- Are administrative amendments possible?
- Confirmation of independent legal advice for donor



• Simple One-Time Gift



• Directions for Additional Contributions

• Endowment Fund



**Types of Gift Agreements**



• Donor Advised Fund

• Long Term Fund



• Gifts in Kind

• Flow Through Fund



• Template Bequest Clauses

• Restricted Use/Expendable Fund



• Internal Terms of Reference for Board-Established Restricted Funds

## F. Key Takeaways



Charities should have both good acceptance gift policies and template gift agreements in place, which need to coordinate well with one another



These documents, working together, help charities facilitate good gift solicitation and management



They also ensure legal compliance and allow charities to effectively manage their donor relations



Charities should consistently utilize both documents to enhance effective operational management



Both are “living” documents that need to be constantly reviewed and updated

## G. Resources

- “*Gift Acceptance Policies*” by Terrance S. Carter and Theresa L.M. Man on November 26, 2019, <https://afptoronto.org/wp-content/uploads/2021/10/R-13-AFP-Congress-2019-Gift-Acceptance-Policies-Handout-TSC-TLM-FINAL-2019-11-12-00424935xE0E23-Terrance-Carter.pdf>
- “*The ABCs of Gift Agreements*” by Jacqueline M. Demczur on November 10, 2022, <https://www.carters.ca/pub/seminar/charity/2022/cnfp/The-ABCs-of-Gift-Agreements-JDemczur.pdf>



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# **IT and Data Management: Board Governance Issues to Consider**

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# Carters Annual *Charity & Not-for-Profit Law* Webinar

November 14, 2024

## IT and Data Management: Board Governance Issues to Consider

By Esther Shainblum & Cameron Axford

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### Overview of Presentation

- A** Setting the Stage
- B** Understanding the Risk
- C** The Importance of Governance in Effective IT and Data Management
- D** IT Governance Responsibilities
- E** Practical Steps for Directors and Officers to Take in Managing the Risks
- F** Key Takeaways

## A. Setting the Stage

- Charities and not-for-profits (collectively “NFP Corporations”) depend on their information technology (“IT”) infrastructure to manage and administer their overall operations
- As NFP Corporations become increasingly dependent on their IT infrastructure, the greater the risk to the NFP Corporation if there is an IT failure or interruption, and the greater portion of its budget must be spent on IT infrastructure
- Directors must consider how reliant the NFP Corporation is on the IT infrastructure, what possible risks may exist and what strategies are necessary to address those risks
- Failure to properly manage an NFP Corporation’s IT infrastructure and the associated risks could expose its board of directors to potential liability
- This presentation reviews board governance issues as they relate to IT and data management
- First, though, need to understand the risks involved and basic governance principles

## B. Understanding the Risk

- Like their for-profit counterparts, NFP Corporations are increasingly reliant on IT infrastructure for core operational functions, such as managing their activities and operations, overseeing their employees, serving their clients, engaging with their donors, paying their vendors and suppliers and maintaining their books and records
- NFP Corporations are also active in the digital/online landscape, including:
  - Public facing websites
  - Online presence/social media
  - Online donation forms
  - Cloud-based platforms for core business processes, such as video conferencing, donor management and payment processing (e.g. Zoom, Blackbaud, Stripe)



**1. Why Effective IT Governance Matters to NFP Corporations**

- Safeguard Donor Trust
  - Protecting donor data ensures trust, strengthens relationships, and encourages continued support
  - Data breaches can damage reputation and erode public confidence
- Enhance Operational Efficiency
  - Effective data management streamlines operations, reduces redundancy, and facilitates informed decision-making, allowing resources to be allocated more effectively
- Mitigate Security Risks
  - Proactive IT management helps identify and address vulnerabilities, reducing the risk of cyber threats, privacy and data breaches, business interruption and financial loss
- Support Mission Fulfillment
  - Clear, organized data supports transparent reporting and strategic planning, helping NFP Corporations to measure impact, set goals, and fulfill their mission



**2. IT Related Risks that Directors Need to be Aware of:**

a) Cybersecurity Threats

- In 2024 Canadian organizations paid an average cost of \$6.32 million per data breach
- The average ransom paid in ransomware attacks in Canada has increased significantly, more than \$1.130 million, an increase of nearly 150% in two years
- 58% of affected mid-market companies say that it took more than a month to recover from an attack, 24% said that it took longer than four months, up from 17% in 2021



## b) Business Interruption

- The more reliance an NFP Corporation places on its IT infrastructure, the greater the risk that any failure of the IT infrastructure will damage its operations
- IT related business interruption can be caused by cyber incidents, equipment or machinery failure, a fire, flood or other disaster that causes damage to IT infrastructure, loss of records or backups, human error, a power failure or a supplier's IT failure
- Any of these could hamper or even shut down an NFP Corporation's operations
- This summer's CrowdStrike failure caused a worldwide shut down of various industries and left people without access to many services, from finance to healthcare to travel
- NFP Corporations that rely on cloud service providers for e-commerce and other core functions could experience a business interruption if that provider goes down



## c) Cost Overruns and Revenue Losses

- Directors of NFP Corporations, especially charities, have a fiduciary duty to act in the best interests of the corporation and, in the case of charities, to safeguard charitable assets
- IT investments can be so large and can impact so many aspects of an organization that they can pose a risk to NFP Corporations
- In 2020, McKinsey & Company found that 17% of large IT projects go so badly, they threaten the very existence of the company
- Half of large IT projects exceed budgets and timelines, often delivering only half of expected value
- Research shows large IT projects can go over budget by 45% and fall short on benefits by 56%
- Projects often struggle due to unclear objectives, shifting requirements, team skill gaps, and reactive planning



**C. The Importance of Governance in Effective It and Data Management**

**1. What is Good Governance?**

- The law and the public look to the NFP Corporation’s governing body, i.e., the board of directors, to put in place the rules, processes and structures used to direct and manage the NFP Corporation’s operations and activities
- Governance includes having clear lines of accountability and responsibility and ensuring that the NFP Corporation acts in accordance with the law
- The goal of good governance is to ensure the effectiveness, credibility and sustainability of the NFP Corporation
- Risk oversight is increasingly seen as a key competence of boards of directors
- Effective management of the NFP Corporation’s IT infrastructure – including appropriate risk management strategies – is an essential aspect of corporate governance



**2. The Statutory Duties of Directors and Officers of NFP Corporations**

**a) Statutory Duty to Manage the Corporation**

- Under both the *Canada Not-for-Profit Corporations Act* (“CNCA”) and the Ontario *Not-for-Profit Corporations Act* (“ONCA”), the directors have a duty to “manage or supervise the management of the activities and affairs of [the] corporation”
  - To fulfill this duty, directors must ensure:
    - The purposes of the NFP Corporation are properly carried out and activities undertaken fit within those purposes
    - The NFP Corporation is financially stable
    - Proper management of corporate assets and infrastructure
    - Proper hiring, training, and supervision of management, staff and volunteers
    - The overall operating integrity of the corporation
  - Does not involve interference with day to day operations by management





## b) Statutory Fiduciary Duty

- Under the CNCA and the ONCA every director and officer of an NFP Corporation has a duty to “act honestly and in good faith with a view to the best interest of the corporation”
- This is the core duty that a director has under the CNCA and the ONCA and has its roots in the common law duty to act in good faith with honesty and loyalty, which will be discussed in a few minutes

## c) Statutory Standard of Care

- Under the CNCA and the ONCA, every director and officer has a duty to exercise the “care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances”
- Objective standard of care, same as business corporations

## 3. Common Law Duties of Directors and Officers

Duty to Act in Good Faith with Honesty and Loyalty

Duty of Diligence

Duty to Exercise Power

Duty of Obedience

Duty of Confidence

Duty to Avoid Conflict of Interest

Duty to Continue

#### 4. High Fiduciary Duties for Charities



#### D. IT Governance Responsibilities

- Effective management of the NFP Corporation’s IT infrastructure includes the following:
  - Approve, review and implement an IT governance policy/framework
    - Set out criteria and thresholds for IT decisions
    - How IT investment requests are initiated, review and approval process
    - Roles and accountabilities
    - Consider establishing an IT committee to lead IT decision making
  - Establish and approve the NFP Corporation’s IT objectives
    - Identify corporate needs and demands
    - Select software and technology and ensure they align with business objectives
    - Be aware of technology trends e.g. AI



- Oversee IT resources and manage expenditures
  - Ensure adequate control of IT resources and that they are spent in accordance with the NFP Corporation’s mission, purposes and objectives
  - Balance and prioritize resources and investments
  - Approve financial and investment decisions
  - Approve software, hardware and IT staffing requests
- Manage risk and compliance
  - Be informed about cybersecurity and other IT related risks and the NFP Corporation's exposure
  - Proactively identify, manage and mitigate IT related risks
  - Ensure that the NFP Corporation is compliant with laws and best practices
  - Put in place policies/procedures, including protocols for safeguarding personal information, protecting at-risk assets and responding to security breaches

### E. Practical Steps for Directors and Officers to Take in Managing the Risks

- In order to fulfill their fiduciary duties and avoid liability, directors of NFP Corporations must be able to demonstrate that they took appropriate steps to identify, manage and mitigate IT related risks
- The “Business Judgment Rule” – courts will not second guess boards that act prudently and on a reasonably informed basis
- Directors can show that they met the required standard of care and fiduciary duties by taking some practical steps:
  - a) Conduct an Audit
    - First step is to develop a reasonable understanding of the NFP Corporation’s assets and potential IT related risk exposures
    - Understand how IT systems are utilized in the NFP Corporation’s operations and the extent of its reliance on them



- Identify and categorize risks and their potential impacts, e.g.:
  - Risk of harms due to business interruption
  - Risk of harms due to failure to comply with legal, statutory or contractual obligations such as related to personal information, confidential business information
  - Categorize risk as “known-risks” and “unknown-risks”
- Audit systems and policies including cybersecurity, looking for potential weaknesses and failure points
- The board should understand what kind of data is held by the NFP Corporation, where it is held (e.g. cloud based vs. local servers), what jurisdiction is it in and how the data is protected
- Assess the robustness and resiliency of IT systems and infrastructure
- Audits can be conducted by internal IT staff or by external professional advisors
- The audit should evaluate the board’s level of competence and understanding of IT related topics and threats
- Post-audit, the board should analyze the report as well as recommendations made

## b) Asset Management

- *Inventory and Track IT Assets:* Maintain an up-to-date inventory of hardware, software, and data assets to monitor usage, reduce redundancy, and ensure efficient resource allocation
- *Lifecycle Management:* Implement a clear process for the acquisition, maintenance, and disposal of IT assets. Regularly assess and upgrade systems to stay current and secure
- *Data Ownership and Accountability:* Define clear ownership and accountability for data assets. This establishes responsibility for security, accuracy, and compliance
- *Cost Control and Budgeting:* Proper asset management helps control costs by optimizing asset utilization and planning for future needs, ultimately contributing to financial sustainability
- *Compliance and Risk Management:* Managing assets effectively supports regulatory compliance (e.g., data protection laws to the extent that any are applicable) and minimizes risk exposure by ensuring regular security updates and timely decommissioning of outdated assets

c) Regular Education

- Boards have the obligation to develop an appropriate level of understanding of IT governance and risk issues
- Engage in ongoing education to enhance the board's understanding and competence related to IT governance
- Become informed about IT "best practices" and gain technological literacy
- Understand the relevant laws, regulations, government policies, accounting requirements, and other obligations that the directors and the NFP Corporation are required to comply with
- Training for employees and volunteers may also be needed as part of robust enterprise-wide privacy and cybersecurity policies



d) Establish an IT Governance Committee

- Include members with professional IT experience and expertise, as well as those with financial and legal knowledge
- Supported and authorized by the IT governance policy framework to make decisions, set standards and mitigate IT related risks
- Should include outside experts, senior management, as well as directors
- Report and make recommendations to the board

e) Reporting and Accountability

- Directors should obtain regular reports from management on IT related compliance and risk, including cybersecurity and privacy issues and reflect in board minutes
- Obtain confirmation from management that the NFP Corporation has appropriate privacy, IT security, cybersecurity preparedness, response and compliance measures in place
- Ensure that the NFP Corporation has in place a robust cybersecurity plan including investigating/responding to attacks and incidents
- Management should produce regular e.g. quarterly reports to the board on these issues, which should be reflected in board and committee minutes

f) Seek Expert Advice

- Obtain expert advice on IT risk management, including privacy and cybersecurity
- Obtain professional advice on insurance coverage, as noted below
- Carry out a robust review/audit of the NFP Corporation’s IT infrastructure and policies
- Minutes should record that the expert met with the board, and advised the board on these issues

g) Insurance

- Confirm that the NFP Corporation has adequate cyber breach insurance in place to protect the NFP Corporation and the directors from IT related risks, such as a successful cyberattack on a business
- Seek professional advice from insurance brokers and insurers
- This is especially important for NFP Corporations that hold a significant amount of donor and/or client personal information or other sensitive data



**F. Key Takeaways**



**Board Accountability:** Boards must actively oversee IT Governance, ensuring policies are aligned with legal requirements and organizational goals



**Risk Management:** Implement risk assessments and create proactive policies which limit and prevent risks from occurring



**Ensure Audits Occur:** Audits of IT systems and Governance policies are essential to staying ahead of developing risks and requirements



**Continuous Education:** IT Governance is a constantly evolving field, and boards must ensure they are up to date with new developments



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# **Protecting Communications in Anticipation of Lawsuits and CRA Audits**

**By Sean S. Carter, B.A., LL.B &  
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# Protecting Communication in Anticipation of Lawsuits and CRA Audits

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## Overview – Key Questions Regarding Disclosure and Privilege

### A What Are Your Disclosure Obligations?

- What is required to be produced during ongoing litigation?
- What is required to be produced during a CRA audit?
- What are the potential impacts of these disclosure requirements?

### B What is Privilege?

- What are the different types of privilege?
- How do these different types of privilege impact your disclosure obligations?

### C What are Some Common Pitfalls and How Can These Pitfalls be Avoided?

### D Key Takeaways

## A. What Are Your Disclosure Obligations?

### 1. Ongoing Civil Litigation

- Parties are required to disclose all relevant documents in their power, possession, and control, unless subject to a type of privilege
  - “Documents” include any documents (including electronic, hand written, audio, etc.) that are relevant to the scope of the pleadings (Statement of Claim, Statement of Defence, Third Party/Crossclaim)
- A court can order production for inspection of any documents that are not privileged and that are in the power, possession, and control of a party
- If there is a dispute regarding whether privilege has been properly claimed over a document, the court may inspect the document to determine the validity of the claim
- Risks of non-compliance
  - The court has the authority to take steps against the impugned party
  - If a document is damaged or lost, the court can infer adverse interest against the impugned party

### 2. CRA Audit

- CRA officials are entitled to request and examine all relevant materials and/or records of a registered charity or not for profit organization as a “taxpayer” under the *Income Tax Act* (“ITA”) and any document of the taxpayer or any other person that may relate to a taxpayer’s records for the purposes of the administration or enforcement of the *ITA*
- This may include, amongst others:
  - Emails and social media accounts of the organization
  - Personal emails (if they include information about the operations of the organization)
  - All financial information, including communication with donors
  - All corporate records, including all board and committee minutes
  - All correspondence to and from the organization from and to anyone
- Similar to civil litigation, CRA auditors cannot compel production of information or documents which are subject to privilege



### 3. Impact of Disclosure Obligations – Practical Implications

- These disclosure obligations can arise at any time, and as such, timing is often outside of an organization's control
- Unless documents are protected by a type of privilege, they could be subject to disclosure obligations if they are relevant to an audit or to the subject of ongoing litigation
- While some documents and/or communications may be viewed as a result of their content to be sensitive, negative or otherwise intended to be kept confidential, this does not mean they are protected from disclosure as of right
- Understanding the reality and risks associated with possible future disclosure obligations is key to protecting your organization from future unnecessary and/or unintentional disclosure of sensitive and potentially prejudicial material



## B. What Are the Different Types of Privilege?

### 1. Solicitor-Client Privilege

- Protects communications between a lawyer and their client that are made for the purpose of obtaining legal advice that is intended to be kept confidential between the parties
- Elements of solicitor client privilege:
  - A communication, either oral or written;
  - The communication must be of a confidential nature;
  - The communication must be between a lawyer and their client; and
  - The communication must be directly related to the seeking, formulating or giving of legal advice.
- Leading authority: *Solosky v. Canada*, 1980, 1 S.C.R. 821



## 2. Litigation Privilege

- Protects against the disclosure of documents which are prepared for the purpose of litigation
- Elements of litigation privilege:
  - Documents in question must have been created:
    - In contemplation of litigation which is in reasonable prospect; and
    - For the dominant purpose of use in the litigation.
- Litigation privilege, however, can only be asserted during the litigation process itself and does survive thereafter
- Leading authority: *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319



## 3. Settlement Privilege

- Protects the confidentiality of communications and information exchanged for the purpose of settling a dispute, including (but not limited to) discussions within the context of a mediation
- Elements of settlement privilege:
  - There is a litigious dispute;
  - Communications were had with the express or implied intention that they would not be disclosed in a legal proceeding in the event that the negotiations failed; and
  - The purpose of the communications is to attempt to effect a settlement
- There are important limitations, however, to the scope and use of this privilege
- Leading authority: *Re Hollinger Inc.*, 2011 ONCA 579



## 4. Common Interest Privilege

- Allows for documents or communications covered by another type of privilege to be shared between parties with a common interest and a mutual intention to keep the documents/communications confidential
- Elements of common interest privilege:
  - Communications and/or documents must have pre-existing privilege; and
  - Parties are engaged in a joint effort or strategy to further common interests
- Common interest privilege is not a separate category of privilege, but rather simply extends an existing privilege to the receiving party
- Leading authority: *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, leave to SCC dismissed



## 5. Wigmore Privilege (Case-by-Case Privilege)

- Privilege can arise outside of the other established categories on a case-by-case basis if certain criteria are met due to special circumstances or relationships
- Elements of *Wigmore* privilege:
  - Communications must originate in a confidence that they will not be disclosed;
  - Element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
  - Relation must be one which, in the opinion of the community, ought to be sedulously (e.g. diligently) fostered; and
  - Injury that would enure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation
- This “basket” privilege could encompass what is previously known as priest-penitent, doctor-patient, accountant-client privilege, etc.
- This is not a blanket privilege though, and each communication has to be assessed on its individual merits
- Leading authority: *R. v. Gruenke*, [1991] 3 SCR 263

## C. What Are Some Common Pitfalls and How Can These Pitfalls Be Avoided?

### 1. Not all communications with legal counsel are privileged

- Communications with legal counsel are not necessarily privileged as of right
  - Needs to be for the purpose of seeking, formulating or giving legal advice
- Simply copying your legal counsel on communications does not necessarily result in solicitor-client privilege for the purposes of preventing disclosure
- Similarly, communications between various parties will not be protected by solicitor-client privilege simply because legal counsel is copied for some or part of the chain of correspondence



### 2. Beware of inadvertent waiver of solicitor-client privilege

- If privilege is waived, even inadvertently, the protection of solicitor-client privilege will be lost and documents/communications will be deemed producible
- Examples of where privilege could be waived:
  - Copying other parties, who are not covered by the solicitor-client relationship, on communications with legal counsel
  - Forwarding or otherwise sharing privileged communications with other parties who are not covered by the solicitor-client relationship
  - Co-mingling solicitor-client communications with other communications, including those with other parties
- Keep careful track of communications involving solicitor-client privileged information within your organization to avoid inadvertent waiver of privilege
  - Take particular care when discussing legal advice in board meetings, ensuring that it is discussed in camera and that the written minutes do not set out any of the legal advice or discussion that occurred

### 3. Not all documents marked as privileged, without prejudice, or confidential will be protected from disclosure

- While commonly used, these labels on documents and/or communications do not automatically provide any protection from disclosure
- Content of the communication/document itself will need to be assessed in regards to whether privilege actually applies
- If there is no actual privilege, the document is not protected from disclosure, regardless of the use of these types of labels
- Labels can, of course, still be used for internal or other purposes, but improper reliance on these labels may result in inadvertent disclosure of material that is not properly covered by privilege
- Labels can also demonstrate a party's intention to keep document/communication confidential for the purposes of asserting a *Wigmore* privilege claim



### 4. Keep control over information within your organization

- Be cautious about the nature and scope of communications within your own organization that relate to sensitive, confidential, or potentially harmful information
- These internal communications are not necessarily subject to privilege, regardless of their confidential nature
- The more widespread the communications and/or documents are shared within the organization, the more challenging it may be to assert that materials were intended to be kept confidential and/or to manage the content of sensitive documents/communications
- Consider limiting such communications to a small team within the organization, where possible
- Caution should be exercised proactively, and regardless of whether there is imminent threat of disclosure requirement, to minimize future exposure

## 5. Do not share sensitive or confidential information outside of your organization

- Sharing of documents, communications, or information outside of your organization significantly increases the risk of inadvertent disclosure:
  - Could result in the inadvertent waiver of privilege over certain documents/communications
  - Could result in inquiries of other individuals outside of the organization to whom the information was disclosed about what was shared
- If information is required to be shared outside of the members of the organization, extreme caution should be exercised in doing so
- This includes the sharing of information with former members or directors of the organization or with friends and family



## 6. Avoid use of personal accounts and/or devices

- Similarly, the use of personal email accounts and/or devices to communicate information or share documents pertaining to the organization, also poses significant risk:
  - Could result in the inadvertent waiver of privilege over certain documents/communications if they are sent or forwarded to personal accounts/devices
  - Could result in the requirement that personal email inboxes, text messages, phone logs, etc. be disclosed or that access be provided to same for inspection
- Where possible, avoid or significantly limit the use of personal accounts and/or devices for operations related to your organization
- Where possible, utilize email accounts associated with the organization or create a dedicated email account that is only used for the purposes of the organization



## 7. Maintaining privilege in communications with third party advisors/experts

- No inherent legal privilege with respect to communications between clients and accountants, public relations consultants, therapists/counsellors, doctors, etc.
- Types of privilege that could be applicable: solicitor-client, litigation, *Wigmore*
- Example: Claims of solicitor-client privilege can extend to the continuum of communication in which the lawyer tenders advice, wherein a third party is engaged by the lawyer for the purposes of providing legal advice
  - The nature and scope of the relationship should be carefully defined and limited to ensure that privilege is able to be asserted and protected
  - Caution should be exercised in the manner in which the third party advisor/expert is retained
    - Lawyer directly retaining the third party advisor/expert is best practice, regardless of how the third party advisor/expert is compensated
  - Content of the communications should be strictly limited to the defined scope of the relationship to avoid accidental waiver of privilege
- Recent case: *Coopers Park Real Estate Development Corporation v. His Majesty The King*, 2024 TCC 122

**Privilege can and is a powerful tool to protecting sensitive/confidential information, but if not fully understood and asserted, privilege can disappear**



**D. Key Takeaways**



Understand the reality of disclosure obligations - “confidential” does not always mean privileged



No “blanket” rule - not all correspondence with legal counsel is inherently privileged



Labelling a document as “privileged” or “confidential” does not automatically result in privilege under the law



If you forward legal advice/discussions to anyone outside of the organization, including former members, directors, friends, or family, privilege will be automatically waived



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# **Essential Employment Law Update for Charities and NFPs**

**By Barry W. Kwasniewski, B.B.A., LL.B &  
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## Carters Annual Charity & Not-for-Profit Law Webinar

November 14, 2024

### Essential Employment Law Update For Charities and NFPs

By Barry W. Kwasniewski & Martin U. Wissmath

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#### Overview of Presentation

##### A Essential Employment Case Law Update

1. *Lefebvre v Gisborne Holdings Ltd.*, 2023 BCSC 2231
2. *Dufault v The Corporation of the Township of Ignace*, 2024 ONSC 1029
3. *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593
4. Comparing *Dufault* and *Bertsch*

##### B Amendments to the *Employment Standards Act, 2000*

1. Working for Workers Four Act
2. Working for Workers Five Act

##### C Key Takeaways

## A. Essential Employment Case Law Update

### 1. *Lefebvre v Gisborne Holdings Ltd.*, 2023 BCSC 2231

- a) British Columbia Supreme Court Decision: Employer Liable for Wrongful Dismissal
- Employee's Contract: 18-month fixed-term for parental leave (starting May 2, 2022), \$25.95/hour, \$5,000 bonus upon completion
  - Termination: Six weeks in, employer terminated the employee after an email following a heated meeting
    - The email addressed communication concerns with a client
    - Employee wasn't informed of termination for cause
  - Compensation: Paid 2 weeks' pay as notice

### b) Court Decision: No Just Cause for Dismissal

- Employer's Burden: Had to prove the email justified dismissal for cause
  - Court disagreed; email was firm but not unprofessional
  - Suggested progressive discipline as more reasonable
- Contract Lacked Early Termination Clause: Without an enforceable clause for early termination, employee was entitled to:
  - Full pay for remaining contract term and \$5,000 bonus
- Damages: Employer ordered to pay \$81,800, plus costs
  - No punitive damages due to lack of severe misconduct by employer



- c) What lessons can Ontario employers and legal practitioners learn from this decision, even though it's a British Columbia case?
- Be careful when alleging cause for dismissal — Employer has the burden of proof that the facts justified cause
  - Consider progressive discipline, and apply a progressive discipline policy
  - If employer wants to terminate a fixed term contract early, make sure the contract contains an enforceable termination clause
  - Fixed term contract can result in greater liability to the employer on termination than indefinite term contracts, as employer may be liable for the unexpired part of the term



## 2. *Dufault v The Corporation of the Township of Ignace, 2024 ONSC 1029*

- a) Ontario Superior Court of Justice ruling: Unenforceable termination clause
- Position: Employee hired as Youth Engagement Coordinator under a fixed-term contract (Nov 24, 2022 – Dec 31, 2024)
  - Termination: Contract ended Jan 26, 2023, without cause
    - Employer paid 2 weeks' termination pay and benefits (excluding pension)
  - Employee sued for wrongful dismissal, claiming damages for the remaining term (101 weeks = \$157,071.57)
  - Employer argued compliance with ESA, offering minimum 2 weeks' pay (\$3,169.07)

- b) Court Findings: Employment Contract contravened ESA in 3 ways
1. “For Cause” Issue: Contract’s “for cause” clause didn’t align with ESA’s stricter “wilful misconduct” standard
  2. Wages: Contract limited pay to base salary, but ESA requires all regular wages, including vacation and sick days
  3. Employer Discretion: Allowed termination “at any time,” violating ESA protections for job security after leave
    - ESA also prohibits termination in reprisal for exercising ESA rights
- Employer owed Employee the rest of the salary of the fixed term

### 3. *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593

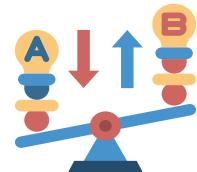
- a) Ontario Superior Court of Justice upholds employer’s termination clause
- Employment Details: Hired July 14, 2023, terminated June 7, 2024
  - Termination Pay: Employer paid 4 weeks, above ESA minimum of 1 week
  - Contract Limits: Only provided ESA minimums; waived common law notice rights
  - Employee’s Argument: Claimed termination provisions were unclear and did not meet ESA standards
    - Argued clause allowed termination “for cause” whether or not there was “wilful misconduct” (O Reg 288/01)
  - Employee’s claim for 12 months’ pay (\$300,000) was dismissed by the court.

- b) Court held that termination provisions were “clear and unambiguous”
- Court found the termination provisions compliant with ESA
  - No Illegal Outcome: No interpretation suggested an illegal outcome or exclusion of ESA entitlements
  - No Trial Needed: No factual disputes required further examination
  - Key Takeaway: Ontario charities and not-for-profits should draft employment agreements that clearly align with ESA standards
  - Contrast: Stands out against other recent cases where courts favored employees in termination clause disputes



#### 4. Comparing *Dufault* and *Bertsch*

- a) How were the termination provisions different in *Dufault* and *Bertsch*?
- *Dufault*:
    - For Cause: Allowed termination “at any time” without notice, citing “failure to perform services”
    - Without Cause: Gave employer broad rights without clearly limiting to ESA
  - *Bertsch*:
    - Termination clause specified ESA minimums only if terminated without cause.
    - ESA clauses clarified no entitlement to extra benefits (notice, severance, etc.) in certain cases
    - Excluded any common law entitlements beyond ESA standards



b) Why did *Dufault* violate ESA, but *Bertsch* did not?

- *Dufault*:
  - Clauses allowing termination “at any time” and at employer’s “sole discretion” violated ESA protections
    - Section 53: Requires reinstatement after job-protected leave
    - Section 74: Prevents termination as retaliation for exercising ESA rights
  - Broad definition of “cause” did not meet strict ESA standards for wilful misconduct
- *Bertsch*:
  - Termination clause met ESA standards
  - Court found no “reasonable” alternative interpretation that could lead to an illegal outcome or violate ESA minimums



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c) What should employers expect with future case law in Ontario on the enforceability of termination provisions in employment contracts?

- Increased Scrutiny: Since *Waksdale v Swegon*, 2020 ONCA 391 and recent rulings, courts closely examine termination clauses for ESA compliance
- Uncertainty Remains: Ongoing judicial decisions add uncertainty to enforceability of termination clauses
- *Bertsch* Case Insight: Shows that courts may uphold employer-friendly clauses, but this decision (Oct 7, 2024) could be appealed

- d) How can charities and not-for-profits best prepare for a decision like the one in *Bertsch*, and not like the one in *Dufault*?
- Draft Carefully: Poorly drafted clauses can make contracts unenforceable
  - Review Regularly: Don't assume long-standing contracts are legally secure
  - However, it's impossible to entirely predict how a judge will decide any case
  
  - There are some key lessons to be learned from these decisions:
    - Fixed-Term Contracts: Ensure enforceability to avoid full-term liability
    - Avoid Broad "Cause" Descriptions: Use ESA standards for termination
      - Termination Without Notice: Reference ESA O Reg 288/01 as the standard
    - Avoid "Any Time" Clauses: Avoid terms like "at any time" or "sole discretion"
    - Include ESA Benefits: Ensure benefits continuity in termination clauses



## B. Amendments to the *Employment Standards Act, 2000*

### 1. ***Working for Workers Four Act***

- a) Ontario Bill 149, received Royal Assent on March 21, 2024
- New Part III.1 of the ESA sets out certain requirements and prohibitions related to the content of publicly advertised job postings, not yet in force (to be proclaimed)
    - 8.2 (1) Every employer who advertises a publicly advertised job posting shall include in the posting information about the expected compensation for the position or the range of expected compensation for the position
    - 8.3 (1) No employer who advertises a publicly advertised job posting shall include in the posting or in any associated application form any requirements related to Canadian experience
    - 8.4 (1) Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence
    - Requirement to retain copies of all publicly advertised job postings, and applications, for 3 years



## 2. **Working for Workers Five Act**

- a) Ontario Bill 190, received Royal Assent on October 28, 2024
  - More job posting requirements added to the ESA (not yet in force — to be proclaimed)
    - 8.5 (1) Every employer who advertises a publicly advertised job posting shall include in the posting,
      - (a) a statement disclosing whether the posting is for an existing vacancy or not; and
      - (b) such other information as may be prescribed
    - 8.6 If an employer interviews an applicant for a publicly advertised job posting, the employer shall, within the prescribed time period, provide the applicant with the prescribed information
  - Section 50 of the ESA is amended so that employers retain the right to require evidence of entitlement to sick leave but are not permitted to require a certificate from a qualified health practitioner
  - Section 132 of the ESA, which sets out the fines applicable for convictions under the ESA, is amended to increase the maximum fine for an individual to \$100,000
    - [Reminder: corporations can be fined up to \$500,000 for repeat offences]

## C. Key Takeaways

-  Be careful with fixed-term contracts, and avoid their use for long terms of employment
-  Review and update employment contracts regularly, especially termination clauses
-  Avoid using language describing “just cause” termination in employment contracts
-  Start to prepare publicly advertised job postings in compliance with new ESA requirements



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

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# **Understanding New Changes to the T3010 Charity Return**

**By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.**

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# Carters Annual Charity & Not-for-Profit Law Webinar

November 14, 2024

## Understanding New Changes to the T3010 Charity Return

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.

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### Overview

- T3010 is not just a tax return for accountants to complete, but has real practical implications to charities as well
- T3010 is public information and easily accessible to the public – including donors and the media
- T3010 reflects compliance with the ITA and CRA's policies, such as gifts to non-qualified donees ("QDs"), foreign activities, fundraising ratio
- Transparency and accountability builds trust and loyalty
- T3010 requires reporting information on fundraising, receipted and unreceipted gifts, DAFs, restricted gifts

- Orientation of the T3010
- Select new changes to the T3010



## Orientation of T3010 and Preliminary Issues

Complete information return

When to file T3010

Failure to file T3010

Tips for completing and filing T3010

File the right T3010 form

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### Complete information return includes filing a number of forms

#### Form T3010 [Proper] - 6 sections

- Section A – Identification
- Section B – Directors/trustees and like officials
- Section C – Programs and general information
- Section D – Financial information
- Section E – Certification
- Section F – Confidential data
- Attach financial statements (including notes)

#### 7 Schedules in T3010

- Schedule 1 - Foundations
- Schedule 2 - Activities outside Canada
- Schedule 3 - Compensation
- Schedule 4 - Confidential data
- Schedule 5 - Non-cash gifts
- Schedule 6 - Detailed financial information
- Schedule 8 - Disbursement quota

#### Additional Forms

- T1235, *Directors/Trustees and Like Officials Worksheet*
- T1236, *Qualified donees worksheet / Amounts provided to other organizations*
- T2081, *Excess Corporate Holdings Worksheet for Private Foundations*
- T1441, *Qualifying Disbursements: Grants to Non-Qualified Donees (Grantees)*

### T3010 has 6 Sections

- **Section A – identification of charity** - name, fiscal period being reported, RR number, web address, if it is subordinate to a head body, if it was wound-up/dissolved/terminated, if it is a foundation (if yes, then complete Schedule 1)

**Section A: Identification**

To help you fill out this form, refer to Guide T4033, Completing the Registered Charity Information Return. It can be found at [canada.ca/cra-forms](http://canada.ca/cra-forms).

**Note:** Even if a charity is inactive, an information return must be filed to maintain its registered status.

**Complete the following:**

1. Charity name: \_\_\_\_\_

2. Return for fiscal period ending: \_\_\_\_\_ 3. BN/registration number: \_\_\_\_\_ 4. Web address (if applicable): \_\_\_\_\_

Year: | | | | | Month: | | | | | Day: | | | | |

**A1** Was the charity in a subordinate position to a head body? .....  1510  Yes  No  
If yes, give the name and BN/registration number of the organization.

Name: \_\_\_\_\_ BN (9 digits, 2 letters, 4 digits. Example: 123456789RR0001)

**A2** Has the charity wound-up, dissolved, or terminated operations? .....  1570  Yes  No

**A3** Is the charity designated as a public foundation or private foundation? .....  1600  Yes  No  
If yes, you must complete Schedule 1, Foundations. To confirm the charity's designation, go to [canada.ca/charities-list](http://canada.ca/charities-list) and refer to the charity's detail page.

- **Section B – complete T1235** - information on directors/trustees and like officials who were members of the charity's board of directors/trustees at any time during the fiscal period of the return

**Section B: Directors/trustees and like officials**

**B1** All charities must complete Form T1235, Directors/Trustees and Like Officials Worksheet. Only the **public** information section of the worksheet is available to the public.

**For charities subject to the Ontario Corporations Act.**

As of May 15, 2021, the Canada Revenue Agency no longer collects this information on behalf of the Ontario Ministry of Government and Consumer Services. For more information on filing an Ontario annual information return, visit [ontario.ca/businessregistry](http://ontario.ca/businessregistry).

**Note:** If you would like these individuals to have the authority to communicate with the CRA on behalf of your charity, their name must also appear as an owner for your Business Number (BN). For more information, go to [canada.ca/charities-giving](http://canada.ca/charities-giving), select "Operating a registered charity," then "Making a change to your organization" and see "Change director."

**Canada Revenue Agency / Agence du revenu du Canada** **Directors/Trustees and Like Officials Worksheet** **Protected B** when completed

You must give us complete information for each director/trustee and like official who, at any time during the fiscal period of this return, was a member of the charity's board of directors/trustees. Directors/trustees and like officials are persons who govern a registered charity. See the reverse for information on filling out this form.

Total number of directors/trustees and like officials: \_\_\_\_\_ Charity name: \_\_\_\_\_ Business number: \_\_\_\_\_ Return for fiscal period ending (YYYY/MM/DD): \_\_\_\_\_

**Note:** If you would like these individuals to have the authority to communicate with the CRA on behalf of your charity, their name must also appear as an owner for your Business Number (BN). For more information, go to [canada.ca/charities-giving](http://canada.ca/charities-giving), select "Operating a registered charity," then "Making a change to your organization" and see "Change director."

Public information				Confidential data			
Last name:		First name:		Initial:		Residential address – Street number and name:	
Term ▶ Start date (Y/M/D):		End date (Y/M/D):		City:	Prov/Terr:	Postal code:	
Position:				At arm's length with other Directors? <input type="checkbox"/> Yes <input type="checkbox"/> No			
Last name:		First name:		Initial:		Residential address – Street number and name:	
Term ▶ Start date (Y/M/D):		End date (Y/M/D):		City:	Prov/Terr:	Postal code:	
Position:				At arm's length with other Directors? <input type="checkbox"/> Yes <input type="checkbox"/> No			
				Phone number		Date of birth (Y/M/D):	

- **Section C – Programs and general information**, 18 questions
  - Questions on programs, fundraising, gifts to QDs, grants to non-QDs, compensation of employees, foreign donors, DQ, DAF
  - Depending on the response, will have to complete Schedule 2, 3, 4, 5, 8, T1236 and/or T1441
- **Section D – Financial information**
  - Complete more detailed Schedule 6 (instead of Section D) if any of the following applies:
    - The charity's gross revenue is more than \$100,000
    - The amount of all property (for example, investments or rental properties) not used in charitable activities or administration was more than \$25,000
    - The charity had permission to accumulate property during this fiscal period
- **Section E – Certification** must be signed by a person who has authority to sign on behalf of the charity
- **Section F – Confidential data** – (a) Address where the charity keeps its books and records, and (b) name and address of person who completed the return

### T3010 has 7 Schedules

Schedules	When the schedule must be completed
Schedule 1, Foundations	<ul style="list-style-type: none"> <li>• Must be completed by all foundations</li> </ul>
Schedule 2, Activities outside Canada	<ul style="list-style-type: none"> <li>• Must be completed if answered "yes" to question <b>C4 Line 2100</b> - i.e., the charity carried on activities outside Canada directly or through intermediaries</li> </ul>
Schedule 3, Compensation	<ul style="list-style-type: none"> <li>• Must be completed if answered "yes" to question <b>C9 Line 3400</b> - i.e., charity had expenses for compensation of employees during the fiscal period</li> </ul>
Schedule 4, Confidential data	<ul style="list-style-type: none"> <li>• Must be completed if answered "yes" to question <b>C7 Line 2700</b> - i.e., charity paid third party fundraisers</li> <li>• Must be completed if answered "yes" to question <b>C10 Line 3900</b>, i.e., charity received donations or gifts of any kind valued at \$10,000 or more from a foreign or non-resident donor</li> </ul>
Schedule 5, Non-cash gifts	<ul style="list-style-type: none"> <li>• Must be completed if answered "yes" to question <b>C11 Line 4000</b> - i.e., charity received non-cash gifts for which it issued official donation receipts</li> </ul>
Schedule 6, Detailed financial information	<ul style="list-style-type: none"> <li>• Must be completed if any of the following applies to the charity, complete Schedule 6 instead of Section D:           <ul style="list-style-type: none"> <li>✓ The charity's gross revenue is <b>more</b> than \$100,000</li> <li>✓ The amount of all property (for example, investments or rental properties) not used in charitable activities or administration was <b>more</b> than \$25,000</li> <li>✓ The charity had permission to accumulate property during this fiscal period</li> </ul> </li> </ul>
Schedule 8, Disbursement quota	<ul style="list-style-type: none"> <li>• Must be completed if answered "yes" to question <b>C17 Line 5850</b> - i.e., the value of the charity's property not used directly in charitable activities or administration exceeds the thresholds (\$100,000 for charitable organizations or \$25,000 for foundations)</li> </ul>

### When to file T3010

- T3010 must be filed within 6 months after fiscal year end
- Effective date of filing – when click “submit” if filed online; postmarked date on the envelope if legible if file by mail; CRA stamp date if hand-delivered

### Failure to file T3010

- Failure to file T3010 on time, charitable registration could be revoked
  - CRA will send reminders to the charity for filing
  - CRA will send a T2051A notice by registered mail, then the charity will have 90 days from the date on the notice to file the T3010
  - Finally, CRA will send T2051B, *Notice of Revocation of a Charity's Registration*, by registered mail, which states the effective date of revocation
- Once charitable status is lost – cannot issue official donation receipts; no longer exempt from income tax; must give all remaining assets to an “eligible donee” or pay a revocation tax equal to the full value of its assets
- Can re-apply for registration after losing charitable status but re-registration is not guaranteed; must file all missing T3010s, and pay a \$500 late-filing penalty

### Tips for completing and filing T3010

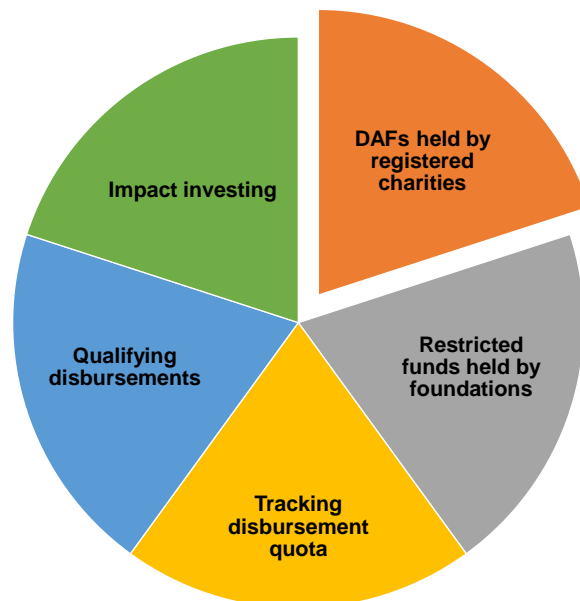
- **T4033** Completing Form T3010 Registered Charity Information Return  
<https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4033/t4033-completing-registered-charity-information-return.html>
- Use the right form
- Ensure information in the form is complete and accurate, with applicable attachments
- File on time
- Keep a copy of all forms filed for the charity's records
- Keep proof of filing (e.g., confirmation of filing in MyBA, post office receipt, take a picture, courier waybill)
- Must attach financial statements to the T3010 (if income over \$250,000, CRA recommends financial statements be professionally audited; otherwise, the treasurer for the charity should sign them)
- If financial statements are not attached, T3010 says charitable registration may be revoked
- Some information is confidential and not available to the public



### File the right T3010 form

- CRA updates the T3010 from time to time, important to file the right form
- **T3010 version 23** – use for fiscal year ending on or before December 30, 2023 – what’s new: Requires charities to report on grants made to non-qualified donees, and to complete T1441
- **NEW T3010 version 24** – released on January 8, 2024 – for fiscal year ending on or after December 31, 2023 or later – **what’s new:**
  - ❖ More reporting on disbursement quota data and calculation (DQ)
  - ❖ Updated questions on grants to non-qualified donees (grantees)
  - ❖ Tracking and reporting on donor advised funds (DAFs)
  - ❖ Tracking and reporting on restricted funds held by foundations
  - ❖ Breakdown of cash or bank accounts and short-term investments
  - ❖ Breakdown of land and buildings in Canada used for charitable programs or administration and those used for other purposes
  - ❖ Report interest and investment income from impact investments
  - ❖ Report interest and investment income from persons not at arm’s length
  - ❖ Removed all references to “10 year gifts”

## Select New Issues in T3010 v.24



## #1 - DAFs Held by Charities – NEW in T3010 version 24

- **New question C18** – report donor advised funds (DAF) held during the fiscal period
- CRA defines DAF to mean “a fund segregated into donor accounts, owned and controlled by a registered charity. Each account is comprised of contributions made by individual donors. Donors may provide ongoing non-binding suggestions on payouts from DAFs, but it is the charity's sole responsibility to make such decisions”
- Must report on 4 values:
  - Line 5861 – Total number of DAF accounts held at the end of its fiscal period
  - Line 5862 – Total value of all DAF accounts held at the end of its fiscal period
  - Line 5863 – Value of all donations received to the DAF during the fiscal period
  - Line 5864 – Total value of gifts to qualified donees and grants to non-qualified donees made from DAF during the fiscal period

<b>C18</b> Did the charity hold any donor advised funds (DAF) during the fiscal period? .....	5860	<input type="checkbox"/> Yes	<input type="checkbox"/> No
If <b>yes</b> , provide the following:			
(a) Total number of accounts held at the end of the fiscal period .....	5861	_____	
(b) Total value of all accounts held at the end of the fiscal period .....	5862	\$ _____	
(c) Total value of donations to DAF accounts received during the fiscal period .....	5863	\$ _____	
(d) Total value of qualifying disbursements from DAFs during the fiscal period .....	5864	\$ _____	

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- Concerns
  - Meaning of DAF at law is broader than CRA's definition. DAF can involve advice from donors on various aspects of the DAF, but usually relates to the gifts to be made. This is not just restricted to advice on “payouts from DAFs” as in CRA's definition
  - Does the charity understand what DAF means? Does the charity have the necessary info on DAF required by the T3010? Is the charity required to track a subset of DAFs held by the charity for T3010 reporting because of CRA's narrower definition?
  - Has the charity been tracking DAF in its records? Does the charity track DAF in separate “fund segregated into donor accounts” as required by CRA?
- **Takeaway** – Charities need to review their records well ahead of the filing deadline to make sure they have the necessary information for the T3010 reporting

See Jacqueline M. Demczur, presentation *Donor Advised Funds for Healthcare Charities*, Feb. 13, 2024 <https://www.carters.ca/pub/seminar/charity/2024/Handout-Donor-Advised-Funds-revised-after-JMD-2024-February-13.pdf>

## #2 - Restricted Funds Held by Foundations – NEW in T3010 version 24

- CRA glossary defines “restricted fund” to mean “Restricted funds are funds tied to a specific use and not available for the general purposes of the organization (for example, a fund consisting of contributions that donors specifically direct the registered charity to use to buy a new building). Endowments are one type of restricted fund. Donors create them when they stipulate that the registered charity must maintain the principal amount and only use the income earned on it.”
- T4033 Guide explains that “restricted funds are generally those where a funder (including a donor, grantor, lender, or payer) limits how the funds can be spent. This means the funds are not available for the foundation to use at its sole discretion. For example, a foundation is given government funding to provide relief after a catastrophic earthquake, and can only spend the funds for that relief.”
- **Line 4170 in Schedule 6** – report the value of assets the charity has that do not fall under the other listed categories in lines 4100 to 4166
  - CRA indicates that this amount is to include works of art and other valuables not considered inventory, prepaid expenses, and restricted funds

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- **New question 3 in Schedule 1** (to be completed by foundations) on all restricted fund held by foundations - Must report on 2 values

■ 3 (a) What was the total value of all restricted funds held at the end of the fiscal period?..... ■ 111 \$

(b) Of that amount, what amount was the foundation not permitted to spend due to a funder's written trust or direction? ■ 112 \$

- **Line 111** – Total value of all restricted funds held at the end of fiscal period
- **Line 112** – How much of the amount in line 111 that the foundation is not legally permitted to spend due to a funder's written trust or direction
  - T4033 Guide explains “this means where a funder requires the foundation to preserve the capital (principal), and the foundation is only permitted to spend the income”
- Note that this reporting is required from foundations (in Schedule 1), but not charitable organizations
  - Many charitable organizations hold restricted funds
  - Does it mean that CRA is not concerned about charitable organizations holding restricted funds?

- Concerns
  - Meaning of restricted funds at law is broader than CRA’s definition which is limited to “specific use” or “how the funds can be spent”
  - At law, restricted funds can involve different types of restrictions imposed by the donors or grantors, including restrictions on; time (the period of time it is to be held); use (a specific purpose for which it is to be used); or management (e.g., how to invest the fund, how to manage the fund)
  - Does the charity know what restricted funds are? Does the charity have the necessary info on restricted funds (including endowments) required by the T3010? Is the charity required to track a subset of restricted funds held by the charity for T3010 reporting because of CRA’s narrower definition?
- **Takeaway** – Charities need to review their records well ahead of the filing deadline to make sure they have the necessary information for the T3010 reporting

### #3 - Tracking Disbursement Quota – Additional Info required in T3010 version 24

- Disbursement Quota (“DQ”) is the minimum amount that a charity must spend on its charitable activities or qualifying disbursements (including gifts to qualified donees and grants to non-qualified donees)
- ITA amended on Jan. 1, 2023, increased the DQ rate so that charitable organizations with average value exceeding \$100,000 or foundations with average value exceeding \$25,000, DQ is 3.5% for property up to \$1 million, and 5% for property over \$1 million
- Budget 2022 indicated that the CRA will “improve” the collection of information to better identify whether charities are meeting the DQ, as well as “information related to investments and donor-advised funds held by charities”
- T3010 version 24 contains a new schedule 8 on tracking and reporting DQ calculations

See Theresa Man, presentation *Ins and Outs of the Increased Disbursement Quota*, Feb. 13, 2024 <https://www.carters.ca/pub/seminar/charity/2024/Carters-Fasken-Healthcare-Philanthropy-Webinar-2024-%20February-13%20tm.pdf>

All charities must do basic calculation of the asset base that forms the calculation of the DQ

**Property not used in charitable activities:**

Enter the average value of property not used for charitable activities or administration during:

• The 24 months before the <b>beginning</b> of the fiscal period .....	5900	\$
• The 24 months before the <b>end</b> of the fiscal period .....	5910	\$

- **Line 5900** - average value of property not used directly in charitable activities or administration during the 24 months before the beginning of the fiscal period - This is used to calculate the DQ obligation for the current fiscal
- **Line 5910** – average value of property not used directly in charitable activities or administration during the 24 months before the end of the fiscal period - This is used to calculate the DQ obligation for the next fiscal

2022 fiscal	2023 fiscal	T3010 for 2024 fiscal
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**Line 5900 in T3010 for 2024** – FMV for this 24 month period - To calculate DQ for 2024 fiscal

**Line 5910 in T3010 for 2024** – FMV for this 24 month period - To estimate DQ for 2025 fiscal

**New Question 17 in Section C, and Schedule 8** to track DQ

- **Question 17 (and line 5850)** – asks if the charity has average value of property not used directly in its charitable activities or administration exceeding \$100,000 if the charity is a charitable organization, or exceeding \$25,000 if the charity a public or private foundation
- If so, then their DQ rate is not nil and it has to complete Schedule 8

**C17** In the 24 months before the beginning of the fiscal period, did the average value of your charity's property (cash, investments, capital property or other assets) not used directly in its charitable activities or administration:

(a) exceed \$100,000, if the charity is designated as a charitable organization; or

(b) exceed \$25,000, if the charity is designated as a public or private foundation? ..... **5850**     Yes     No

If **yes**, you **must** complete Schedule 8 – Disbursement quota

- **Schedule 8** has 2 Steps
  - Step 1 calculates the DQ obligation for the fiscal year the charity is reporting, and whether the DQ is met, or if there is excess or shortfall
  - Step 2 calculates the estimated DQ obligation for the next fiscal year in order that the charity can plan ahead

Disbursement quota		Schedule 8
<b>Important:</b> If you complete this section, you must answer <b>yes</b> to question C17.		
For more information, go to <a href="http://Canada.ca/charities-disbursement-quota">Canada.ca/charities-disbursement-quota</a> .		
<b>Step 1. Calculating the disbursement quota requirement for the current fiscal period</b>		
Average value of property not used in charitable activities or administration (line 5900 from your return) .....		805 \$
If permission to accumulate property has been granted, enter the total amount accumulated less all disbursements made for the specified purpose (add all amounts from lines 5500 minus all amounts at lines 5510 from <b>all returns</b> to date covered by the permission to accumulate property period) .....		810 \$
Line 805 minus line 810 (if negative, enter 0) .....		815 \$
<b>If line 815 is \$1,000,000 or less</b>		
Multiply line 815 by 3.5% .....		820 \$
<b>If line 815 is over \$1,000,000</b>		
Line 815 minus \$1,000,000 .....		825 \$
Line 825 multiplied by 5% .....		830 \$
Line 830 plus \$35,000 .....		835 \$
Enter the amount from line 820 or line 835. This is your charity's disbursement quota requirement for the current fiscal period .....		840 \$
Total expenditures on charitable activities (line 5000 of your return) .....		845 \$
Total amount of grants made to non-qualified donees (line 5045 of your return) .....		850 \$
Total amount of gifts made to qualified donees (line 5050 of your return) .....		855 \$
Add lines 845 to line 855 .....		860 \$
Line 860 minus line 840. This is your charity's disbursement quota excess or shortfall for the current fiscal period .....		865 \$
If a shortfall exists (line 865 is negative), your charity can draw on disbursement excesses from the five previous fiscal periods to help it meet its shortfall. If no excesses are available to draw on, your charity can try to spend enough the following year to create an excess that it can carry back to cover the shortfall.		
<b>Step 2. Estimating the disbursement quota requirement for the next fiscal period</b>		
Average value of property not used in charitable activities or administration prior to the next fiscal period (line 5910 from your return) .....		870 \$
<b>If line 870 is \$1,000,000 or less</b>		
Multiply line 870 by 3.5% .....		875 \$
<b>If line 870 is over \$1,000,000</b>		
Line 870 minus \$1,000,000 .....		880 \$
Line 880 multiplied by 5% .....		885 \$
Line 885 plus \$35,000 .....		890 \$
The amount shown at line 875 or line 890 is your charity's estimated disbursement quota requirement for the next fiscal period.		

- **Line 5750** - amount for which the charity has received CRA's written approval to reduce its DQ for the fiscal period
  - Use Form T2094 - *Registered Charities: Application to Reduce Disbursement Quota* to apply for a DQ reduction
  - If CRA grants DQ reduction, the charity must amend the T3010 return for the fiscal period in which the shortfall occurred to include the approved amount on line 5750 – Use Form T1240, *Registered Charity Adjustment Request*

**Permission to reduce disbursement quota:**

If the charity has received approval to make a reduction to its disbursement quota, enter the amount for the fiscal period ..... **5750** \$

#### #4 - Qualifying Disbursements – updated reporting requirements in version 24

- ITA was amended on June 23, 2022 (Bill C-19) to allow charities to make qualifying disbursements
  - Making gifts and “otherwise making resources available” to qualified donees (QDs)
  - Making grants and “otherwise making resources available” to non-QDs (grantees)
- CRA Guidance CG-032 Registered charities making grants to non-qualified donees <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html>
- Reporting requirements are in the T3010 version 23
- T3010 version 24 and T1441 contains some minor updates
- Use Form T1441 to report grants made to a grantee that total more than \$5,000 during the fiscal period
- Use Form T3010 to report grants totalling \$5,000 or less during the fiscal period

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- **Section C, C2** – charity must describe ongoing and new programs that began in the fiscal period, including (1) its own activities carried on through its employees, volunteers, and intermediaries, and (2) qualifying disbursements to both QDs and non-QDs
  - **Section C, C3 Line 2000** – report gifts to QDs
  - **Section C, C4 Line 2100** – activities outside Canada, but not qualifying disbursements
  - **Schedule 6 - Line 5045** - report total amount of grants to non-QDs

• **Section C, C16** – lines 5840, 5841, 5842, 5843

<b>C16</b> Did the charity make qualifying disbursements by way of grants to non-qualified donees (grantees) in the fiscal period? .....	<b>5840</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
If <b>yes</b> , you <b>must</b> complete lines 5841, 5842 and 5843.			
Did the charity make grants to any grantees totalling more than \$5,000 in the fiscal period? .....	<b>5841</b>	<input type="checkbox"/> Yes	<input type="checkbox"/> No
If <b>yes</b> , you <b>must</b> complete Form T1441, Qualifying Disbursements: Grants to Non-Qualified Donees (Grantees).			
Enter the number of grantees that received grants totalling \$5,000 or less in the fiscal period.....	<b>5842</b>	_____	
Enter the total amount paid to grantees that received grants totalling \$5,000 or less in the fiscal period .....	<b>5843</b>	\$	_____

- **Line 5840** – made a grant to non-QD (grantee) in the fiscal period?  
if yes, then complete lines 5841, 5842, and 5843
  - **Line 5841** – made grants to non-QDs (grantees) totalling more than \$5,000?  
If yes, then complete T1441 (see next slide)
  - **Line 5842** – number of non-QDs (grantees) that received total \$5,000 or less in grants during the fiscal period
  - **Line 5843** – total amount of all grants to non-QDs (grantees) that received a total of \$5,000 or less during the fiscal period

• **T1441**

- report number of grantees that received grants totalling more than \$5,000 during the fiscal period
- Complete information for each grant - name of grantee, purpose of grant, amount of cash disbursements, amount of non-cash disbursements, country and country code of where grant activities carried out, (unless permission is obtained due to safety concerns)

Total number of grantees to which the charity made grants totalling more than \$5,000 in the fiscal period: <input type="text"/>	
Name of grantee	
Purpose of the grant	
Amount of non-cash disbursements \$	Amount of cash disbursements \$
If outside Canada, each country code and country where the activities were carried on	
Name of grantee	
Purpose of the grant	
Amount of non-cash disbursements \$	Amount of cash disbursements \$
If outside Canada, each country code and country where the activities were carried on	



## #5 – Impact Investing – NEW in T3010 version 24

- New T3010 version 24 requires reporting of impact investments made
- CRA explains “impact investments are investments in companies or projects with the **intention** of having a measurable positive environmental or social impact and generating a positive financial return”
- **Schedule 6, Line 4190** – Value of all impact investments including those reported in any other line
- **Schedule 6, Line 4576** – Amount from line 4580 that represents the total interest and other income the charity received or earned from impact investments

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- However, CRA’s definition of “impact investment” is different from the definition of the synonymous term, “social investment”, under the Ontario *Charities Accounting Act* (“CAA”)
  - Ontario Office of the Public Guardian and Trustee (“PGT”) in its *Charities and Social Investments Guidance* (the “PGT Guidance”) explains that “social investment means using a charity’s funds to directly further its purposes and achieve a financial return. Social investments fall on a continuum ranging between charitable expenditures at one end and purely conventional investments at the other.”
  - The CAA does not require that a “positive financial return” be gained because “‘financial return’ is not required to be at market rates and depending on the terms of the investment, may not require a re-payment of the investment capital” (i.e. it would be acceptable even if a partial loss of capital occurs, so long as the investment was directly in furthering the charitable purposes of the charity)
- Due to the differences in how the CRA and PGT define “impact investment” and “social investment”, it is important that charities do the necessary due diligence to ensure compliance with both
- Not clear if “impact investments” are PRIs under CRA’s CED policy

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## Conclusion

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T3010 is a complicated form – not just a tax form, there are legal implications on how the questions are designed and how the answers evidence compliance with the ITA and CRA's policies

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T3010 is public information and easily accessible to the public

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Important for charities to have clear understanding of the T3010

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Complete T3010 early, do not be caught by surprise

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Consult professional advice to complete it, consider seeking board review and approval

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

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# **Remuneration of Directors of Charities in Ontario: What is Allowed & What's Not**

**By Esther S.J. Oh, B.A., LL.B &  
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Integrated Practice, Proactive Advice

## **Carters Annual Charity & Not-for-Profit Law Webinar**

November 14, 2024

### **Remuneration of Directors of Charities in Ontario: What is Allowed & What's Not**

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#### **Overview of Presentation**

- A** Setting the Context
- B** Overview of Key Requirements in the Regulation
- C** Additional Considerations
- D** Case Studies
- E** Key Takeaways
- F** Resource Materials

## A. Setting the Context

- Prior to the amendment of Regulation 4/01 under the *Charities Accounting Act* (“CAA”) (Ontario) (the “Regulation”) in April 2018, directors of registered charities could not receive direct or indirect remuneration from the charity, unless authorized by a court order or a consent order under section 13 of the CAA approved by the Public Guardian and Trustee (“PGT”)
  - According to case law principles (i.e. common law), directors of registered charities cannot receive direct or indirect remuneration from the charity they are serving, unless authorized by court order
  - This prohibition, however, does not prevent directors of charities from being reimbursed their reasonable out-of-pocket expenses
- Shortly after the Regulation was amended, the PGT released a guidance document to the Regulation in May 2018, *Payments to Directors & Connected Persons* (the “Guidance”)
- Common law continues to apply, but there are more options available under the Regulation and the Guidance to authorize payments to a director (or a person connected to a director) without obtaining a court order or section 13 consent order
  - All applicable requirements in the Regulation and Guidance must first be met



- While most charities are aware of the Regulation and Guidance, there is not always a clear understanding of the steps to be taken in order to comply with legal requirements
- This presentation provides a brief overview of some of the key requirements outlined in the Regulation, including:
  - What payments are allowed
  - What payments are not allowed
  - Considerations to be reviewed by a charity’s board before approving a payment in accordance with the Regulation
  - Overview of other requirements in the Regulation and Guidance
- The second part of this presentation will review fictitious fact scenarios (inspired by real-life examples) in order to help guide charities and their boards
  - In reviewing the case studies, reference will be made to requirements in the Regulation and the Guidance, as appropriate
- Additional resource materials (including links to the Regulation and the Guidance) are provided on the last slide for further information

## B. Overview of Key Requirements in the Regulation

### 1. Application to incorporated charities

- The Regulation states a “corporate trustee” may “...make payments from the charitable property acquired by it to any of the following persons, for goods, services or facilities provided to it” in accordance with the Regulation:
  1. A director of the corporate trustee
  2. A person connected to a director of the corporate trustee
- This means the Regulation cannot be used to pay trustees of charitable trusts or non-incorporated charitable organizations
  - The Guidance uses the terminology of “charitable corporations” (instead of “corporate trustee”)
  - For purposes of this presentation, we use the term “charity” to describe an incorporated charity
- While the members of the governing board for a charity may be called different terminology (e.g. elders, council members, stewards, governors or another term), this presentation uses “directors” to describe the governing board



### 2. Who is a “person connected to a director” under the Regulation?



1. A spouse, child, parent, grandparent or sibling of the director (“Family Member”);
    - The Guidance uses broader wording which suggests other family members (other than the ones listed) might be included in this definition, as follows: “Family members, including: spouse, child, parent, grandparent or sibling of the director”
  2. Employer of the director or of a Family Member of the director;
  3. A corporation with share capital, if, singly or jointly, the director or a Family Member of a director beneficially owns, controls or has direction over more than 5% of the corporation’s shares;
  4. A corporation without share capital, if singly or jointly, the director or a Family Member of a director beneficially owns, controls or has direction over more than 20% of the outstanding voting membership interests of the corporation;
  5. A corporation with or without share capital for which the director or a Family Member acts as director or officer;
  6. A partnership in which the director or Family Member is a partner, or in which a corporation that is connected to the director is a partner;
  7. A partner in a partnership in which the director or Family Member is a partner, or in which a corporation that is connected to the director is a partner
- This presentation and the Guidance uses “Connected Person” to describe the above
    - The Regulation uses “person connected to a director”

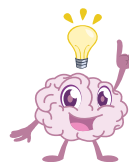
### 3. What payments are “not” permitted under the Regulation?

- The Regulation does “not” authorize any of the following:
  - “Remuneration or other direct or indirect payment for services provided by a director as a director or employee” of the charity
  - “Direct or indirect payment for providing fundraising services or for selling goods or services for fundraising purposes”
  - “Direct or indirect payment made in connection to the purchase or sale of real property”
- This means directors of a charity cannot be paid for the following:
  - Payment to serve as a director
  - Payment to serve as an employee of the charity (while a director)
  - Payment for fundraising services and goods/services relating to fundraising
  - Payments involving the purchase or sale of real property



### 4. Considerations to be reviewed by the charity’s board before approving a payment

- Payments made under the Regulation:
  - “Must be made with a view to the [charity’s] best interests”;
  - “Must be in an amount that is reasonable for the [charity] to pay for the goods, services or facilities that are provided”;
  - “Must not result in the amount of the [charity’s] debts and liabilities exceeding the charitable property’s value, or render the [charity] insolvent”; and
  - Must not exceed the maximum amount set out in an agreement to be paid for the goods, services or facilities to be provided (see next slide)
- In practice, most charities review the first and second bullet points above, but normally omit to consider the last bullet point
  - The third bullet point is often not relevant
- The board’s consideration of all applicable requirements should be documented in board minutes as evidence of the board’s due diligence





## 5. Steps to be taken before authorizing a payment

- If a charity's board of directors decides it would like to authorize payment for goods, services or facilities under the Regulation, the following steps must first be taken:
  - Every director of the charity must agree in writing to a maximum amount that the charity can pay for the goods, services or facilities
    - If the goods, services or facilities are to be provided by a Connected Person that person must also agree in writing to the maximum amount;
    - Payment cannot exceed the maximum amount in the agreement, unless the agreement has been amended
  - Every director of the charity (excluding the director to receive the payment and the director connected to the Connected Person) must agree in writing that he or she is “satisfied that the payment is being made in accordance with the requirements, and within the restrictions, of the Regulation”; and
  - The board must have considered any additional requirements set out in the Guidance
- The above steps are commonly omitted by charities



## 6. Other requirements that apply under the Regulation

- There must be at least 4 directors on the board (excluding the director to receive the payment / the director connected to the Connected Person, as applicable)
- The total number of persons receiving payment under the Regulation must not exceed 20% of the number of directors on the board (excluding the director to receive the payment / the director connected to the Connected Person, as applicable)
- The director (who is to receive the payment from the charity and the director connected to the Connected Person, as applicable) must not attend or participate in the board discussion regarding the proposed payment and must not vote on the matter
  - This should clearly be documented in the board minutes of the charity



- The board must ensure that information regarding the payments to a director and/or a Connected Person in a given year is:
  - Noted in the charity's financial statements for that year, and
  - Placed before its members at an annual meeting of the members
- If a charity proceeds with the proposed payment to a director or a Connected Person, it is important to maintain proper documentation showing the board's due diligence steps to comply with the Regulation and Guidance
- Directors who fail to comply with the requirements in the Regulation and the Guidance could be found in breach of their fiduciary duties and could even be found liable to repay the funds on a joint and several basis
- Reference should be made to section 12 of the Guidance for examples of the types of documentation to be kept by a charity

## C. Additional Considerations

- There may be other requirements / restrictions on payments to a director of a charity, including from the following:
  - General corporate legislation (such as the *Canada Not-for-Profit Corporations Act* or the *Ontario Not-for-Profit Corporations Act* )
  - The charity's governing documents, or
  - Canada Revenue Agency, Charities Directorate
- Comments are not provided concerning the above, as these are beyond the scope of this presentation
- Charities may obtain professional advice for specific questions that may arise

## D. Case Studies

### **Case Study #1**

*A director of a registered charity has a long history with the charity, and dedicates significant amounts of time serving the charity. The director also has specialized skills and knowledge which the charity uniquely needs. The board feels it would be in the best interests of the charity to hire this individual as a paid employee, but at the same time the board does not want to lose this person as a valued board member. If the board approves the decision by majority resolution, can this director become a paid employee of the charity?*

### **Commentary**

- The Regulation states as follows:
  - “2.1(4) This section does not authorize any of the following:
    1. Remuneration or other direct or indirect payment for services provided by a director as a director or employee of the corporate trustee, as the case may be, in that capacity...
- Approval by a court order or section 13 consent order will be required to authorize this proposed arrangement
- Alternatively, the director may resign from the board

### **Case Study #2**

*A director's sibling owns a small restaurant that is incorporated and wholly owned by the director's sibling. The director's sibling wants to provide meals on a weekly basis to support the charity's programs to assist individuals experiencing food insecurity. The director's sibling only wants to be reimbursed for the cost of the food (which is far below fair market value for the actual meals being provided). The board feels this would be in the best interest of the charity. Is this permitted under the Regulation and the Guidance?*

### **Commentary**

- Under subsection 2.1(3) of the Regulation, “persons connected to a director” includes the following:
  - A corporation with share capital, if owned, controlled or there is direction over more than 5% of the corporation's shares by a Family Member of a director
  - This situation involves a proposed payment to a Connected Person
  - The board must review the applicable requirements in the Regulation and the Guidance to determine whether or not this is permitted
- There are a number of different considerations from the Regulation and the Guidance to be reviewed, which are listed on the following slides:

- a) Determination of best interest of the charity (section 8 of the Guidance)
  - The board must first carry out a detailed analysis of the background facts to determine whether or not the proposed payment is in the best interest of the charity, including:
    - The good, service or facility would be beneficial to the charity
    - There is a contemplated advantage to the charity in using the services of the director or Connected Person over hiring someone else to provide the services
      - In this case study, the restaurant (owned by the director's sibling) has offered to provide services at less than fair market value. This is a financial advantage
  - Other requirements would need to be reviewed, including whether the charity can afford the cost of the goods, services or facilities without any adverse impact on its activities
- b) Agreement documenting maximum payment amount and other requirements in Guidance (see sections 7, 9 and 10 of the Guidance)
  - If the charity's board determines that the proposed arrangement is in the charity's best interests, the board will need to determine a payment amount that is "reasonable" by reviewing several considerations, including the following:
    - The market price for similar goods, services or facilities in similar circumstances;
    - The value to the charity of the goods, services or facilities

- Then, every director of the charity and the Connected Person must agree in writing to the maximum payment amount
- Every director who voted on the matter must agree in writing that he or she is satisfied that "...the payment is being made in accordance with the requirements, and within the restrictions, of the Regulation"
- The board must review and consider whether any other requirements apply under the Guidance
- c) Requirement for amendments to the agreement, if applicable
  - Once the maximum amount set out in that initial agreement has been fully paid, an amendment to the agreement will need to be entered into for any other payments
- d) Requirement involving number of directors voting on a proposed payment
  - The charity must have 4 or more directors eligible to vote on the payment to the person connected to the director
  - The minutes of the board meeting(s) should record the fact that the conflicted director left the room and was not present for the discussion and vote on the matter

### **Case Study #3**

*A director has some land that he/she wants to donate to the charity. The location of the land is ideal to support the charity's expansion of charitable programs. The director does not want to receive any payment of the land, but only wants enough money to pay for costs to remove the director's heavy equipment from the property to the director's home. The board believes this is in the best interest of the charity. Can the charity pay the director a small payment to cover the director's requested costs?*

### **Commentary**

- The Regulation states that it does not authorize any of the following (see subsection 2.1(4)):
  - “3. Direct or indirect payment made in connection to the purchase or sale of real property.”
- Approval by a court order or section 13 consent order will be required to authorize this proposed payment
- Given the small payment amount being requested by the director, this is not likely a practical or cost-effective solution



### **Case Study #4**

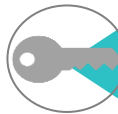
*The CEO (a paid employee of a charity) has a daughter who has the educational and professional experience which the charity uniquely needs for the next phase of its charitable programs. The board believes this is in the best interest of the charity to hire her. Can the CEO's daughter become a paid employee of the charity?*

### **Commentary**

- The Regulation and the Guidance apply to the proposed payments to directors of charities (and Connected Persons)
  - The CEO is not a director of the charity and therefore no common law prohibitions apply
  - Since the CEO normally attends and participates at board meetings, the CEO should leave the room and refrain from participating in board discussions concerning the proposed employment of the CEO's daughter.
    - This should be recorded in the minutes of the board meeting



## E. Key Takeaways



The Regulation provides more options to authorize payments to a director or Connected Person without obtaining a court order or s. 13 consent order



To review whether its possible to make a payment under the Regulation, a charity should first review whether the recipient of a proposed payment is a director or Connected Person



Next, a charity should consider whether the nature of the proposed payment is one permitted under the Regulation / Guidance



If the proposed payment is permitted under the Regulation / Guidance, a charity must carefully ensure whether all the requirements in the Regulation / Guidance been met and documented



When in doubt, charities should seek legal advice

## F. Resource Materials

- For additional information, reference can be made to the following:
  - Ontario Regulation 4/01 under the *Charities Accounting Act* (Ontario)  
<https://www.ontario.ca/laws/regulation/010004>
  - Office of the Public Guardian and Trustee, *Payments to Directors & Connected Persons* (last updated August 1, 2021)  
[https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization\\_of\\_payments.html](https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization_of_payments.html)
  - Ryan M. Prendergast, “Remuneration of Directors of Charities: What’s New?” (May 30, 2018) <https://www.carters.ca/pub/webinar/2018/Remuneration-of-Directors-of-Charities-2018-05-30.pdf>
  - Ryan M. Prendergast, “OPGT Releases Guidance on Payments to Directors” *Charity & NFP Law Bulletin No. 421* (May 31, 2018)  
<https://www.carters.ca/pub/bulletin/charity/2018/chylb421.pdf>



[Esther S.J. Oh](#), B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management. Ms. Oh has written articles for *The Lawyer's Daily*, [www.carters.ca](http://www.carters.ca) and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual Charity & Not-for-Profit Law Seminars and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.

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

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# **Charities Working with Non-Charities: What are the Options?**

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

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## Carters Annual *Charity & Not-for-Profit Law* Webinar

November 14, 2024

### Charities Working with Non-Charities: What are the Options?

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

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#### Overview of Presentation

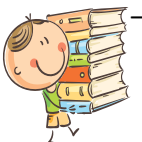
- A Why is this Topic Important?
- B What is Meant by "Non-Charity"?
- C What are the Options for Charities Wanting to Work with Non-Qualified Donees?
- D Key Considerations with the Own Activities Regime
- E Key Considerations with the Qualifying Disbursement Regime
- F Score Card Comparison Between Own Activities Regime and Qualifying Disbursement Regime

## A. Why is this Topic Important?

- Registered charities frequently interact with non-charities in the course of their operations
- This can include working with suppliers of goods and services, contractors and professionals, such as accountants and lawyers, to assist in carrying on operations
- As long as the charity does not pay more than fair market value for the goods and services it acquires from non-charities, and those goods and services are needed to achieve the charitable purposes of the charity, then there is no concern
- However, when a charity is working with a non-charity in order to deliver charitable programs and activities of the charity, then it becomes more complicated
- At that point it becomes necessary to know what a charity can and cannot do when working with non-charities in carrying on charitable programs and activities
- That is the focus of this presentation at a high-level



- For a more detailed and technical discussion of the options, reference can be made to the following resources from Carters:
  - “*Review and Commentary on the CRA’s Final Guidance on Qualifying Disbursements*” Charity & NFP Law Bulletin No. 524 dated January 31, 2024, <https://www.carters.ca/pub/bulletin/charity/2024/chylb524.pdf>
  - “*The New Qualifying Disbursement Regime*” by Terrance S. Carter on February 13, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Handout-New-Qualifying-Disbursement-Regime-revised-after-TSC-2024-February-13.pdf>
  - “*A Deeper Dive into QDs and DQs: Qualifying Disbursements and Disbursement Quota Regimes*” by Terrance S. Carter on April 3, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Deeper-Dive-into-%20QDs-and-DQs-Qualifying-%20Disbursements-and-Disbursement-Quota-Regimes-tsc.pdf>
  - “*Issues to Consider in Working with the Qualifying Disbursement Regime*” by Terrance S. Carter on September 20, 2024, <https://www.carters.ca/pub/seminar/charity/2024/Issues-to-Consider-Working-with-the-Qualifying-Disbursement-Regime-TSC-Sept-20-2024-rev-after.pdf>
  - “*Draft Qualifying Disbursement Guidance Poses Practical Challenges for Charities*” Charity & NFP Law Bulletin No. 519 dated January 25, 2023, <https://www.carters.ca/pub/bulletin/charity/2023/chylb519.pdf>

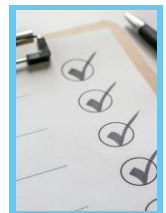


## B. What is Meant by “Non-Charity”?

- The term “non-charity” for this presentation means any organization located inside or outside of Canada, that is not a Canadian registered charity or other type of “qualified donee” (defined below) that becomes involved in delivering charitable programs and activities for a registered charity
- Qualified donees consist of a list of entities set out under ss 149.1(1) of the *Income Tax Act* (“ITA”), the largest group of which are Canadian registered charities
- Registered charities are able to make gifts to all categories of qualified donees, including other registered charities



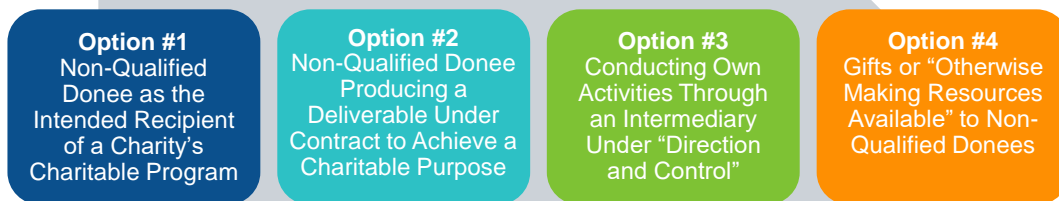
- The full list of qualified donees from the ITA is set out below for ease of reference:
  - a registered charity (including a registered national arts service organization)
  - a registered Canadian amateur athletic association
  - a registered journalism organization
  - a registered housing corporation 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 His Majesty in right of Canada has made a gift
  - His Majesty in right of Canada, a province, or a territory
  - the United Nations and its agencies
- His Majesty in right of Canada, a province, or a territory, and the United Nations and its agencies are qualified donees that do not have to be registered to be recognized as such



- Given that registered charities can make gifts to qualified donees, it is relatively straightforward for a registered charity to work with other qualified donees to implement charitable programs and activities
- The problem arises when registered charities need to work with non-charities that are not qualified donees
- For the balance of this presentation non-charities are referred to by the more technically correct term of “non-qualified donees”

### C. What are the Options for Charities Wanting to Work with Non-Qualified Donees?

- The following are the options for registered charities wanting to work with non-qualified donees to achieve the charitable purposes of the charity:



## Option # 1 Non-Qualified Donee as the Intended Recipient of the Charity's Charitable Program

- The Canada Revenue Agency (“CRA”) guidance CG-014 “Community economic development activities and charitable registration” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/community-economic-development-activities-charitable-registration-014.html> provides examples of charities supporting non-qualified donees as legitimate charitable purposes
  - a) Promoting commerce or a particular industry or trade for the public benefit, such as agriculture, horticulture or craftsmanship
  - b) Improving the socio-economic conditions for the public benefit in an area of social and economic deprivation, including areas affected by a disaster, such as restoring local small businesses to prevent community deterioration
- The CRA policy CPS-026 “Guidelines for the registration of umbrella organizations and title holding organizations” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-026-guidelines-registration-umbrella-organizations-title-holding-organizations.html> contemplates that an umbrella organization can fund non-charitable entities with the provision of services that are narrowly focused on increasing, enhancing, or improving the non-charitable entity's services to charitable beneficiaries (*i.e.* the public)

## Option #2 Non-Qualified Donees Producing a Deliverable under Contract to Achieve a Charitable Purpose

- This option can occur when a charity, such as a research charity, contracts with a researcher to undertake research needed by the charity to achieve a charitable purpose under specific terms of reference by means of making, for instance, a research grant
- This option could also include an educational charity awarding an educational grant to a non-qualified donee in order to develop new curriculum content
- What is important with Option #2 is that the charity must have a detailed contract in place that clearly sets out the charitable purpose of the charity that is to be achieved and the specifics of the deliverables that the non-qualified donee is being contracted to do on its own and the timelines for completion
- However, the recipient non-qualified donee is not required to operate under the ongoing “direction and control” of the charity in fulfilling the contract

## Option #3 Conducting Own Activities Through an Intermediary Under “Direction and Control” (“Own Activities Regime”)

- In addition to a charity carrying on its own activities through its own staff, volunteers and directors, a charity can also carry out its own charitable programs and activities through third-party intermediaries, such as contractors, agents, or joint venture participants
- However, this option requires that the activities of the intermediary be done under the “direction and control” of the charity in order to show that the program is the own activity of the charity
- More details on the Own Activities Regime are set out in section D below



## Option #4 Gifts or “Otherwise Making Resources Available” to Non-Qualified Donees (“Qualifying Disbursement Regime”)

- A new option for charities working with non-qualified donees became available in June 2022 as a result of amendments to the ITA
- The new Qualifying Disbursement Regime option allows charities to make gifts or “otherwise making resources available” to non-qualified donees, provided that to do so achieves a charitable purpose of the charity
- CRA describes a qualifying disbursement to a non-qualified donee as a “grant”, although the term “grant” has different meanings within the charitable sector
- This option, though, involves complying with a significant list of “accountability requirements” established by the CRA
- More details on the new Qualifying Disbursement Regime are set out in section E below

## D. Key Considerations with the Own Activities Regime – Option #3

- CRA has published two guidance documents to explain the Own Activities Regime and the requirement to comply:
  - CG-002 “Canadian registered charities carrying on activities outside Canada” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/guidance-002-canadian-registered-charities-carrying-activities-outside-canada.html>; and
  - CG-004 “Using an intermediary to carry on a charity’s activities within Canada” <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/using-intermediary-carry-a-charitys-activities-within-canada.html>
- In essence, everything that the charity does through a third-party intermediary must be seen as being done as an activity of the charity itself rather than that of the third-party intermediary
- This is to be accomplished in the opinion of the CRA by the charity exercising “direction and control” over the activities of the intermediary
- This includes reviewing the status and activities of an intermediary to make sure it has the necessary capacity and will follow through with the intended charitable activities

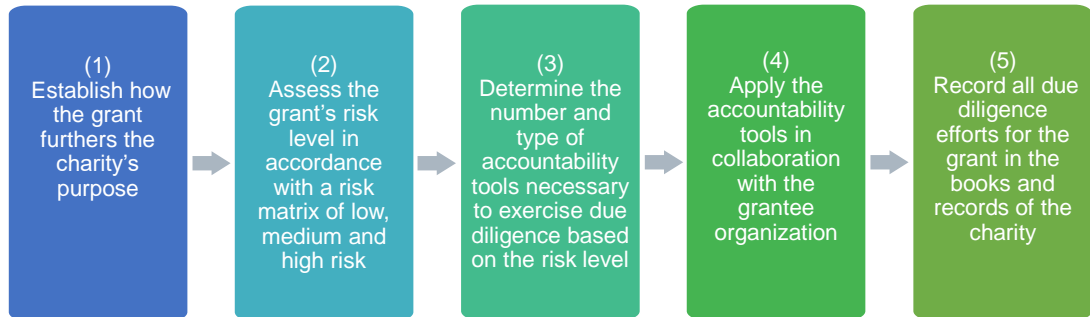
- CRA explains that “direction and control” can best be evidenced by the charity entering into an agreement with the intermediary above \$5,000
- The type of agreement depends upon the type of intermediary relationship that is involved
  - Agent
  - Consultant or contractor
  - Joint venture participant
  - Co-operative participant
- An agreement under the Own Activities Regime needs to include amongst others, a detailed statement of activities that the intermediary is to accomplish on behalf of the charity, with ongoing “direction and control” from the charity, periodic transfer of resources, and regular reporting by the intermediary back to the charity, including the provision of back up receipts and other books and records from the intermediary







- CRA released its final version of guidance CG-032 “Registered charities making grants to non-qualified donees” on December 19, 2023 <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/charities-making-grants-non-qualified-donees.html>
- Guidance CG-032 explains the process of making a qualifying disbursement to a non-qualified donee (“grant” to a “grantee organization”) as involving five steps:

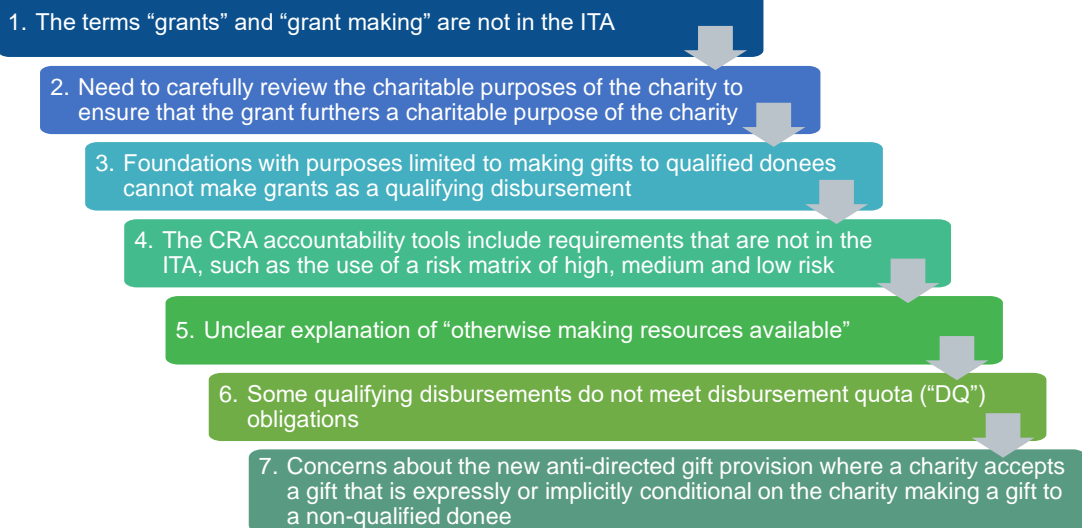


- The accountability tools that the CRA requires is depicted by the CRA as follows:



- While written agreements may not be necessary for non-recurring grants of \$5,000 or less, the CRA generally recommends the use of written agreements which are generally extensive in scope

- The challenges with the Qualifying Disbursement Regime in the form of grants to non-qualified donees (a “grantee organization”) include the following:



## F. Score Card Comparison Between Own Activities Regime (Option #3) and Qualifying Disbursement Regime (Option #4)

Own Activities Regime (Option #3)	Score	Qualifying Disbursement Regime (Option #4)	Score
1. Focus on the charity being the <u>directing mind</u> with an intermediary <u>carrying out instructions</u> received from the charity	✗	1. Focus on <u>supporting the activities of the grantee organization</u> but only in furthering a charitable purpose of the donor charity	✓
2. More of a <u>hierarchical top down</u> relationship	✗	2. More of a <u>collaborative relationship</u>	✓
3. The funds or resources are <u>not gifted</u> , instead they are transferred to an intermediary as <u>an extension of the charity</u> by means of a contractual agreement	✗	3. The funds or resources are <u>either gifted or are otherwise made available</u> to the grantee, allowing the grantee autonomy to carry on its programs as an independent party	✓
4. The applicable <u>regulatory due diligence</u> is in the form of <u>ongoing “direction and control”</u> by the charity over the activities of the intermediary	✓	4. The applicable <u>regulatory due diligence</u> is in the form of <u>applying risk matrices</u> and following <u>extensive accountability requirements</u> rather than providing ongoing “direction and control”	✗
5. An <u>agreement is needed</u> to reflect “ <u>direction and control</u> ” over own activities of the charity <i>e.g.</i> contract for service or co-operative participation	✓	5. For qualifying disbursements <u>above \$5,000 (or below)</u> but expected to be made on an ongoing basis), <u>a grant agreement is recommended</u> to address a significant degree of risk assessment and accountability requirements	✗

Own Activities Regime (Option #3)	Score	Qualifying Disbursement Regime (Option #4)	Score
6. As the intermediary is acting as an <u>extension of the charity</u> under the "direction and control" of the charity, the charity <u>may be exposed to liability</u> by the intermediary	✗	6. Grant arrangement could <u>avoid the unintended consequences</u> for a charity carrying on its <u>own activities through an intermediary</u> , such as incurring liability to third parties under an agency relationship	✓
7. Charitable programs done through an intermediary <u>will count toward the disbursement quota</u> of the charity	✓	7. Qualifying disbursements in the form of "otherwise making resources available" <u>will not count towards the disbursement quota</u> of the charity	✗
8. Contracting with an intermediary to allow the intermediary <u>to purchase land</u> is subject to <u>significant restrictions</u>	✗	8. <u>Gift of real estate</u> should be carefully documented but is generally <u>less restrictive</u>	✓
9. Contracting with an intermediary in Canada "may" <u>attract HST/GST</u> (need expert HST advice)	✗	9. Making a qualifying disbursement to a grantee in Canada <u>will not attract HST/GST</u> (need expert HST advice)	✓
10. <u>Less onerous</u> reporting requirements in Form T3010	✓	10. <u>More onerous</u> reporting requirements in Form T3010 and Form T1441	✗



[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, 2024), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2019 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*. Mr. Carter is a former member of CRA Advisory Committee on the Charitable Sector, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections.

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## Resource Sponsor



- **LexisNexis** - 1-800-668-6481, <https://store.lexisnexis.ca/en>

### Book List

[Charities Legislation & Commentary, 2024 Edition](#) (newest edition coming in December 2024)

[Branding & Copyright for Charities & Non-Profit Organizations](#), 3rd Edition;  
[The Management of Non-Profit and Charitable Organizations in Canada](#), 5th edition (newest edition coming in December 2024)

## Resource Materials

- **Canadian Association of Gift Planners (CAGP)**, <https://www.cagp-acpdp.org/>, and **CAGP Foundation**, <https://www.cagpfoundation.org/>
- **Canadian Centre for Christian Charities (CCCC)**, <https://www.cccc.org>
- **Imagine Canada**, <https://imaginecanada.ca/en/membership>  
With [Imagine Canada Membership](#), find community with other leaders who share your vision of strong non-profit infrastructure and engagement.
- **ONN (Ontario Nonprofit Network)**, <https://theonnc.ca> and <https://nonprofitresources.ca/>