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Charity & NFP Law Update
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Updating Charities and Not-For-Profits on Recent Legal Developments and Risk Management Considerations

January 2025

Sections

Highlights

Publications & News Releases

1. Federal Government Releases Draft Legislation on the Extension of Charitable Donation Deadline for the 2024 Tax Year

By Terrance S. Carter and Jacqueline M. Demczur

On January 23, 2025, the Department of Finance released draft legislation to amend the *Income Tax Act*, extending the deadline for making charitable donations eligible for "tax support" in the 2024 tax year to February 28, 2025. The release of draft legislation was a follow up to the announcement by the Department of Finance on December 30, 2024, concerning the Government's intent to introduce amending legislation as reported in our article posted on January 3, 2025.

Notwithstanding that Parliament has been prorogued and amending legislation will not be introduced until sometime after February 28, 2025, the chances of implementing legislation not being introduced is no longer of any practical concern. This is because it would be extremely unlikely that any political party would vote against remedial tax legislation that assists all charities in Canada as well as tens of thousands of donors who support those charities.

The draft legislation aims to address challenges caused by the Canada Post mail stoppage in late 2024, providing donors with more time to ensure their contributions are received and processed. Further details on the draft legislation and the requirements for eligible donations can be found in the Department of Finance's explanatory notes. The Canada Revenue Agency ("CRA") has confirmed that it will administer the extension as proposed, ensuring that taxpayers and charities have clarity during the tax season.

Key Information for Individual Donors

The specifics of the draft legislation as it affects individual taxpayers are as follows:

- Individuals may claim eligible charitable donations made to charities and other qualified donees ("QDs") up to February 28, 2025, on their 2024 personal income tax return if they choose to do so.
- Donations must be in the form of cash, cheque, credit card, money order, or electronic payment. As such, gifts in kind do not qualify for the extension.
- Donations made via payroll deductions or under a will of an individual that died after 2024 also do not qualify for the extension.
- If donors choose not to claim donations made in 2025 before March 1, 2025, in their 2024 taxation year, they may claim them for 2025 or carry them forward for up to five years.

Key Information for Graduated Rate Estates (GREs) and Corporations

The specifics of the draft legislation as it affects corporations and GREs are as follows:

- Corporations and GREs must have a taxation year that ended after November 14, 2024, (which was the beginning of the Canada Post mail stoppage) and before January 1, 2025.
- If a corporation or a GRE meets the taxation year end condition and makes a gift to a charity or other QDs before March 2025, it may claim the eligible amount of the gift on its 2024 corporate income tax return (for corporations) or its 2024 trust income tax and information return (for GREs).
- If the corporation or the GRE does not deduct the donation on its 2024 corporate or trust income tax return, as applicable, then it can still deduct the amount on its 2025 corporate or trust income tax return or carry forward the amount for five years.

Key information for Charities and Other QDs

- Charities and other QDs are not required to issue separate donation receipts for gifts received during the extension period up to February 28, 2025, but may choose to do so as a courtesy to assist taxpayers who may wish to claim such donations in their 2024 taxation years.
- The date of donation for in-person or electronic donations is the date the charity or other QD receives the gift.
- The date of donation for mailed donations is the postmark date on the envelope.

The CRA has stated that this extension will not affect how charities and other QDs report tax-receipted revenue on their T3010 Registered Charity Information Return ("T3010"). Charities must keep detailed and organized records and continue reporting all official donation receipts issued during their 2025 fiscal period on their 2025 T3010.

2. Pre-Budget Report Recommends Removal of Advancement of Religion as a Charitable Purpose

By Terrance S. Carter, Jennifer M. Leddy

The House of Commons Standing Committee on Finance (the "Committee") released its Report on the Pre-Budget Consultations in Advance of the 2025 Budget (the "Report") in the House of Commons on December 13, 2024, containing 452 recommendations. Recommendation 430 recommends that the Government of Canada "[a]mend the Income Tax Act to provide a definition of a charity which would remove the privileged status of 'advancement of religion' as a charitable purpose."

Although the Government of Canada is not required to adopt the recommendations from the Committee, it will generally, at a minimum, consider the Committee's recommendations in determining what to include in the next federal budget.

On January 6, 2025, the Prime Minister requested the Governor General to prorogue Parliament until March 24, 2025. Prorogation halts all parliamentary business, including the activities of committees. Parliamentary bills that have not received Royal Assent before prorogation "die" and must be reintroduced in the next session. While the future of Recommendation 430, is uncertain, the fact that it made it into the Report of the Committee is concerning and needs to be addressed.

To read the balance of this Bulletin, click here.

3. CRA News

By Theresa L.M. Man

3.1. Public policy dialogue and development activities by registered charities

The Canada Revenue Agency ("CRA") hosted a webinar on public policy dialogue and development activities ("PPDDAs") on October 22, and 24, 2024, and has subsequently posted it in late November 2024 for replay. The webinar is timely with a federal and Ontario election on the horizon for Canada, charities engaging in PPDDAs may wish to become familiar with CRA's guidance, CG-027, Public policy dialogue and development activities by charities ("PPDDAs Guidance"). Charities can also view the webinar as an educational tool to understand the rules involving PPDDAs.

According to the PPDDAs Guidance, registered charities are required to be constituted and operated exclusively for charitable purposes, and all the charities' resources must be devoted to charitable activities carried on by the charity itself. In that regard, the PPDDAs Guidance explains that charitable activities include PPDDAs that further a charitable purpose. PPDDAs generally involve seeking to influence the laws, policies, or decisions of government, whether in Canada or a foreign country.

As long as a charity's PPDDAs are carried on in furtherance of its stated charitable purpose(s), the *Income Tax Act* places no limits on the amount of PPDDAs a charity can engage in. In this context, a charity may devote up to 100% of its total resources to PPDDAs that further its stated charitable purpose(s).

4. Final Report on Foreign Interference in Canadian Democracy Released

By Cameron A. Axford and Martin U. Wissmath

On January 28, 2025, the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions released its Final Report after a 15-month investigation. The Final Report provides an in-depth examination of foreign interference in Canada's democracy and offers 51 recommendations for improvement.

The Commission, led by Commissioner Marie-Josée Hogue, conducted its work in two distinct phases. The first phase focused on foreign interference by state and non-state actors during the 2019 and 2021 federal elections and its implications for electoral integrity. Findings from this phase were initially released in May 2024.

The second phase assessed the Government's ability to detect, deter, and counter foreign interference aimed at Canada's democratic processes.

Over the course of its investigation, the Commission held 39 days of public hearings and 18 in camera sessions. It heard from more than 100 witnesses, including political party representatives, Members of Parliament, senior public servants, Cabinet Ministers, and the Prime Minister, some of whom appeared multiple times. Additionally, 60 experts and diaspora community members contributed through panels and policy roundtables.

The Commission's work also involved an extensive review of tens of thousands of documents, most of which were classified.

In a news release announcing the Final Report, Commissioner Hogue emphasized the thoroughness of the inquiry, noting its role in fostering public understanding of foreign interference and evaluating Government responses. The report highlights the increasing frequency and evolving methods of interference, stating that Canada's democratic institutions have proven resilient to interference, but vigilance remains essential.

The Commission observed that the Canadian Government has implemented measures to address interference but identified areas for improvement. Key issues included delays in responding to threats, insufficient coordination across agencies, flawed communication processes with decision-makers, and a lack of transparency with the public regarding the extent of interference.

Among the 51 recommendations, several do not require legislative changes and could be implemented before the next federal election. The Final Report underscores the need for greater transparency, faster Government action, and improved coordination to counter foreign interference effectively.

The Commission also recommends that the Government provide Parliament with a progress update on implementing its recommendations within a year.

Commissioner Hogue cautioned against complacency regarding foreign interference. She stressed that foreign interference cannot be eradicated entirely and that technological advancements continue to empower malicious actors.

"Democracies around the world are under attack from all sides," said Hogue, "All of us who live in Canada must confront these challenges, together."

5. Impact of the 2024 Fall Economic Statement on the Charitable and Not-For-Profit Sector

By Terrance S. Carter, Urshita Grover, Adriel N. Clayton and Cameron A. Axford

The Department of Finance ("Finance"), released the Federal Government's *2024 Fall Economic Statement* on December 16, 2024. While not the focus of the *2024 Fall Economic Statement*, there are a number of items which are of significance to both the charitable and not-for-profit ("NFP") sector in the event that they are included in a future federal budget. Specifically, the *2024 Fall Economic Statement* proposes changes to reporting requirements for non-profit organizations ("NPOs"), confirms the Federal Government's intention to proceed with relevant legislative proposals relating to tax measures and reproductive service charities, and states that the Government will initiate consultation and dialogue with NPOs regarding anti-money laundering/anti-terrorist financing practices and initiatives.

To read the balance of this article, click here.

6. Ontario Court Considers Oppression in Tragic Ukraine Airlines Flight PS752 Case

By Ryan M. Prendergast

The Ontario Superior Court of Justice considered an application for an oppression remedy under subsection 253(3) of the *Canada Not-for-Profit Corporations Act* ("CNCA") in *Zarei v Association of Families of Flight PS752*, released on December 3, 2024. The plaintiff's son had died on the tragic Ukraine Airlines Flight PS752, which was shot down by the Islamic Republic of Iran in January 2020. Following the incident, Zarei and other surviving family members established the respondent Association of Families of Flight PS752 (the "Association"). As well, Mr. Zarei was the lead plaintiff in the *Zarei v Iran et al* case related to Flight PS752, in which the Ontario Superior Court of Justice had ruled in favour of five plaintiffs and awarded $107 million in damages, though the Association was not involved in that case.

The plaintiff had an ongoing dispute with the Association over whether it conducted itself in accordance with its constating documents, and brought the matter to court, claiming that the Association had acted oppressively by not providing "direct financial support to the members and that it should also fund his efforts to enforce the judgment he received against the Islamic Republic of Iran." Further to this, he sought full financial disclosure, production of directors' and members' meeting minutes, a member list, and an order to hold a members' meeting to discuss the Association's objectives. In the alternative, he also requested various court orders, including a representation order, an injunction freezing the Association's expenditures, and the appointment of a public accountant.

In considering the plaintiff's oppression claim, the court reviewed subsection 253(1) of the CNCA, which provides that:

> on the application of a complainant, a court may make an order if it is satisfied that, in respect of a corporation or any of its affiliates, any of the following is oppressive or unfairly prejudicial to or unfairly disregards the interests of any [member], or causes such a result:
>
> (a) any act or omission of the corporation or any of its affiliates.
>
> (b) the conduct of the activities or affairs of the corporation […]; or
>
> (c) the exercise of the powers of the directors or officers of the corporation […].

The court therefore considered whether Mr. Zarei's claim had satisfied a two-part test which included (1) providing the claimant had reasonable expectation regarding a right in their favour that was infringed, and (2) demonstrating that this expectation was violated by oppressive or unfairly prejudicial conduct.

In evaluating the plaintiff's complaints, the court reviewed the Association's constating documents and its actual activities, and found that the Association's purpose as set out in its Articles of Incorporation were:

> (a) Creating a community for collaboration and support of the families of victims of Flight PS752.
>
> (b) Seeking truth and justice for the victims.
>
> (c) Keeping the memories of the victims alive through memorials and related activities.

While the plaintiff interpreted the first purpose as requiring the Association to provide financial support, the Association board interpreted it as meaning "the community is established for collaboration and support, not that the Association was created to provide financial support." The board, on the other hand, had decided that it would fulfil its purposes not through financial support, but by carrying out certain activities, such as campaigning, holding annual memorial events, and holding rallies. Siding with the board and finding that their interpretation of the Association's purposes fell within the business judgment rule, the court further noted that "providing direct financial support to members could risk the Association's status as a tax-exempt Not-For-Profit corporation."

The court then considered the plaintiff's specific allegations, including that board members had acted in a politically partisan manner, the Association failed to disclose all books and records and the member's register to him, and misused funds, among others. However, the court found a lack of evidence in support of these allegations, and that where such evidence existed, the board's actions did not amount to oppression.

Finally, the court considered whether the plaintiff had taken reasonable steps to address his concern. It found that Mr. Zarei failed to attend annual general meetings, submit proposals to discuss issues of concern at such meetings, or use other democratic processes available under the CNCA to address his concerns, such as exercising his right to call a meeting under section 167 or seeking to become a director. The court therefore dismissed the plaintiff's application, holding that the Association's actions were neither oppressive nor unfairly prejudicial to Mr. Zarei.

This case provides another glimpse into the court's interpretation and approach to oppression claims under the CNCA, and is a helpful reminder that "not every unmet expectation, even if reasonably held, constitutes oppression", as stated by the court. As well, this case is a lesson for charities and not-for-profits to ensure that their purposes are drafted with clear and specific language, which may help avoid potential disputes such as this one over the interpretation of their purposes.

7. Recent Decisions Involving Tribal Council Include a Review of Remedies Under CNCA

By Esther S.J. Oh and Urshita Grover

7.1. Court Orders Production of Financial Documents for Oppression Remedy under the CNCA

In its December 6, 2024 decision in *Gwich'in Tribal Council et al v Gwichya Gwich'in Council et al*, the Supreme Court of the Northwest Territories reviewed an application made by the Gwich'in Tribal Council ("GTC") and six individual members of the Gwichya Gwich'in Council ("Member Applicants") (collectively, the "Applicants") for relief under the provisions of the *Canada Not-for-profit Corporations Act* ("CNCA") against the Gwichya Gwich'in Council ("GGC"), as one of the respondents. The GTC is comprised of a number of institutions, including four designated Gwich'in organizations ("DGOs"), with one DGO in each of the four Gwich'in communities to represent the interests of the Gwich'in participants in a Comprehensive Land Claim Agreement, dated April 22, 1992 ("1992 Land Claim Agreement"). The GGC is one of the DGOs.

The court reviewed an application for relief of alleged election irregularities pursuant to section 169 of the CNCA (which gives the court jurisdiction to determine any controversy regarding elections), and also reviewed the allegation that the combined effect of financial irregularities (including omission to prepare audited financial statements for many years) and the election irregularities constituted conduct that was oppressive, unfairly prejudicial or unfairly disregards the interests of the Applicants contrary to section 253 of the CNCA.

While it is beyond the scope of this article to review all of the relevant background facts and legal issues raised in this case, two of the central issues from a corporate law perspective under the CNCA were: 1) whether the Applicants had standing to bring an application for a review of the 2023 Election, and 2) whether the Applicants had standing to seek an oppression remedy, together with a determination of what the appropriate remedies would be on both issues.

Based on the applicable background facts, the court determined it was not necessary to make a determination on whether both Applicants had standing to bring an application for a review of the alleged election irregularities. In addition, after reviewing the evidence concerning the alleged election irregularities, the court made a determination that the evidence did not support an oppression remedy.

On the second issue of whether the GTC had standing under section 253 of the CNCA to apply for an oppression remedy, the court determined that the GTC is a "'proper person' to make an application" given the significant nexus between the GTC and the DGOs (of which the GGC is one), in accordance with the 1992 Land Claim Agreement negotiated between the Government of Canada and the GTC, representing the interests of all Gwitch'in. On this point, the court stated:

> "While I would not go so far as to say that the GTC plays an oversight role, or that the GGC is subordinate to the GTC, the principles underlying the [1992 Land Claim Agreement] reflect a careful balance of community autonomy and collective strength. Although both organizations are separate legal entities, the wording and principles of the [1992 Land Claim Agreement] make it clear that there is a strong nexus between the GTC and the GGC and that the interests and activities of one organization affects the other."

After reviewing the evidence concerning the alleged financial irregularities, the court recognized that the GGC had not provided audited financial statements since 2017, thereby violating subsection 172(1) of the CNCA which requires presentation of financial statements at annual meetings and sharing of a summary of financial documents with members. The court also noted the duties of directors and officers under subsection 148(1) to act honestly and in good faith, and under subsection 148(2) to comply with the CNCA. Invoking its authority under subsection 253(3)(i) of the CNCA, the court ruled that the GGC had acted in a manner that was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of the Applicants, and directed the GGC to prepare and provide financial statements from 2017 to 2023 to its members and the GTC within four months after of the court decision.

This case underscores the importance of complying with statutory requirements under the governing corporate legislation that apply to not-for-profit corporations, including, but not limited to, the important statutory obligation to present financial statements to members before each annual meeting. Even though Corporations Canada does not always monitor compliance with the provisions of the CNCA, in the event of a legal action, any non-compliance and/or irregularities in a not-for-profit corporation's operations can be scrutinized by a court and lead a court to order remedial steps including in situations where there is a policy-based reason to provide accountability and transparency in respect of the actions of a corporation.

7.2. Court Ruling Highlights Importance of Procedural Fairness and Respect for Democratic Vote in Overturning Board Decision to Call New Election

In *Blake v Kyikavichik and Gwich'in Tribal Council*, the Supreme Court of the Northwest Territories declared Frederick Blake Jr. duly elected as Grand Chief of the Gwich'in Tribal Council ("GTC") and ordered the Board of Directors of the GTC as a not-for-profit corporation to abstain from holding a new election for the Office of Grand Chief, citing breaches of natural justice and procedural fairness.

The court ruling, released on January 14, 2025, was made after the only other candidate in the election, Ken Kyikavichik, lodged a complaint to the GTC Board of Directors alleging violations of the GTC Elections Rules (i.e. including alleged breach of provisions regarding elections procedures contained in the GTC's governing By-law and its Executive Elections Policy and Procedure Manual).

In accordance with the GTC Elections Rules, the GTC Elections Committee carried out an investigation and dismissed the allegations as unfounded. However, the Board reached a different conclusion and ordered a new election.

Mr. Blake asked the court to exercise its power to determine a controversy relating to an election of a director of a not-for-profit corporation under section 169 of the *Canada Not-for-profit Corporations Act* ("CNCA"). Mr. Blake claimed that there were several procedural deficiencies in the decision-making process undertaken by the Board as they failed to adhere to principles of natural justice and procedural fairness. Mr. Blake also argued that the evidence did not establish any substantial irregularity in the election process that justifies calling a new election.

Contrary to Mr. Kyikavichik's claims that the court should dismiss the application, the court found that section 169 of the CNCA was the proper procedural avenue to challenge the Board's decision.

The GTC argued that strictly applying corporate law principles would conflict with Gwich'in's rights to self-government, self-determination, and principles of reconciliation. While acknowledging the GTC's unique role as an Indigenous organization, highlighting its responsibilities in managing lands, waters, and resources in the Gwich'in Settlement Region, as well as providing public functions like housing and language revitalization programs, the court also stated as follows:

> "…section 169 of the [CNCA] specifically gives not-for-profit corporations, their members, and their directors the ability to seize the court with any dispute related to an election. In fact, a judicial review is a discretionary remedy, and the existence of an adequate alternative remedy, such as a statutory recourse, is a reason to deny an application for judicial review".

The court identified several procedural deficiencies in the Board's decision-making process, emphasizing that under section 148 of the CNCA, "Board members have a duty to 'act honestly and in good faith with a view to the best interests of the corporation' and to 'exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstance'."

The court specifically stated that the above duties "…include making decisions in accordance with the principles of procedural fairness and natural justice …, although the level of fairness required will vary depending on the circumstances." While the court did not agree that all of Mr. Blake's allegations of procedural deficiencies were substantiated, the court noted several items where procedural deficiencies did occur, including the Board's failure to provide Mr. Blake with an opportunity to respond to the libel allegations, its inflexibility in refusing to accept Mr. Blake's late-submitted receipts, and a reasonable apprehension of bias of the Board's Vice-Chair.

On the election-related allegations, while the court acknowledged that some violations of the GTC Elections Rules had occurred, such as Mr. Blake's late filing of campaign expense receipts and certain libelous social media posts by his campaign representatives, the court ruled these infractions did not justify overturning the results of the election. In its review of the evidence, the court also found that the allegations of libel in relation to the Gwich'ya Gwich'in Council's ("GGC") application before the court

"seeking various relief related to the governance of the GTC and naming as respondents the GTC and several individuals, including Mr. Kyikavichik and other GTC Board members" were unfounded.

As mentioned at the beginning of this article, the court set aside the Board's decision to call a new election and in declaring Mr. Blake duly elected Grand Chief of the GTC, the court ordered the Board "to abstain from holding a new election for the position of Grand Chief until Frederick Blake Jr.'s term expires or until his position otherwise becomes vacant."

In this case, the court recognized the importance of respecting the democratic choice of voters, noting that the threshold to invalidate an election requires a high threshold of irregularities in order to alter the entire outcome of an election. This decision also underscores the importance of following principles of natural justice and procedural fairness in the decision-making processes of not-for-profit corporations, where such principles may apply.

8. Employment Update

By Barry W. Kwasniewski and Martin U. Wissmath

8.1. Ontario Court of Appeal Affirms Invalidity of Termination Clauses Failing ESA Standards

The Ontario Court of Appeal has affirmed a lower court decision declaring an employment contract's termination clauses unenforceable for failing to comply with the *Employment Standards Act, 2000* (*ESA*). In *Dufault v Ignace (Township)*, released December 19, 2024, the Court of Appeal upheld the finding that the employer's "for cause" termination clause violated the ESA by defining "cause" too broadly. Specifically, the clause allowed termination without notice or pay for conduct that did not meet the ESA's narrow "wilful misconduct" standard, stated in Ontario Regulation 288/01: *Termination and Severance of Employment.* For further information on the lower court decision, please see the March 2024 *Charity & NFP Law Update*.

Following its landmark ruling in *Waksdale v Swegon North America Inc.*, the Court of Appeal confirmed that termination clauses in employment contracts must be read as a whole. If any provision violates the *ESA*, the entire termination clause is invalidated and unenforceable. That could leave termination payments in lieu of reasonable notice owed to employees to be calculated according to the common law, which in many cases is significantly higher than the ESA minimums. Although the termination in this case was "without cause," the unenforceability of the "for cause" clause rendered all termination provisions in the contract void. The court rejected the employer's argument that the "for cause" clause could be severed to save the "without cause" clause, reiterating that *Waksdale* remains binding precedent.

The Court of Appeal also emphasized key principles from employment law: the *ESA* is remedial legislation intended to protect employees, and courts will interpret contracts in a way that encourages employer compliance with statutory minimums. Employers cannot rely on post-termination compliance with the ESA to remedy clauses that were unlawful when drafted.

This ruling underscores the importance of precise drafting in employment contracts. Employers, including for charities and not-for-profits, must ensure that termination provisions strictly adhere to *ESA* standards, as even minor non-compliance can result in significant liability. The case reaffirms that courts will not salvage non-compliant provisions and signals to employers the importance of reviewing contracts to avoid potentially costly disputes.

8.2. Long-term Illness Leave and Placement of a Child Leave added to Employment Standards Act

Ontario workers will soon benefit from expanded leave entitlements under the *Employment Standards Act, 2000 (ESA)*, as a result of Bill 229, the *Working for Workers Six Act*, which received Royal Assent on December 19, 2024 (the "Act"). The Act introduces two new unpaid leave provisions: Placement of a Child Leave and Long-term Illness Leave. Other updates in the *Act* address occupational health and safety, immigration standards, and traffic safety, marking a comprehensive effort to enhance workplace protections across the province.

The *ESA* changes provide expanded leave rights for employees. Placement of a Child Leave entitles workers who have been employed for at least 13 weeks with the employer up to 16 weeks of unpaid leave when a child is placed in their care for adoption or under specific surrogacy arrangements. Additionally, Long-term Illness Leave allows employees up to 27 weeks of unpaid leave if they are unable to work due to a serious medical condition, supported by a certificate from a healthcare practitioner. The Placement of a Child Leave provisions will take effect six months after Royal Assent, on June 19, 2025, while the Long-Term Illness Leave provisions will come into force on a date to be proclaimed by the Lieutenant Governor.

Employers should act promptly to update workplace policies to be compliant with these revised *ESA* standards.

8.3. New Regulation Requires Employers to Provide Employment Information Before Work Begins

Ontario Regulation 477/24 (the "Regulation"), made under the *Employment Standards Act, 2000* (*ESA*), mandates employers to provide written employment details to employees before their first day of work. Published in *The Ontario Gazette* on December 14, 2024, the Regulation requires employers with 25 or more employees to provide the employer's legal name, contact details, initial workplace, pay rate, pay schedule, and expected hours of work.

The Regulation comes into force on July 1, 2025. Charities and not-for-profits with 25 or more employees should review their onboarding practices to ensure compliance, as changes to Ontario employment law continue to promote greater transparency in employment relationships.

9. Privacy Update

By Esther Shainblum and Martin U. Wissmath

9.1. Privacy Breaches at the CRA Highlight Need for Modernized Safeguards and Accountability

The Privacy Commissioner of Canada, Philippe Dufresne, appeared before the Standing Committee on Access to Information, Privacy and Ethics on December 5, 2024, to address privacy breaches at the Canada Revenue Agency (CRA). These incidents, including over 31,000 breaches reported between 2020 and 2023, underscore critical vulnerabilities in safeguarding personal data within federal institutions.

In the opening statement published on the Office of the Privacy Commissioner (OPC) of Canada's website, Dufresne detailed the findings of a February 2024 Special Report to Parliament, which investigated a 2020 credential-stuffing attack affecting the CRA and Employment and Social Development Canada. Subsequently, additional breaches linked to Canada Emergency Response Benefit (CERB) fraud were identified, impacting up to 15,000 individuals.

A credential-stuffing attack involves cybercriminals using stolen username-password combinations, often obtained from data breaches, to gain unauthorized access to accounts. These attacks exploit

the common practice of reusing passwords across multiple sites and can compromise sensitive information at scale.

The CRA's retrospective reports revealed a broader pattern of unauthorized data use, necessitating significant reform in breach notification and incident response protocols, according to the privacy commissioner. Key recommendations from the OPC include enhanced breach response frameworks, timely reporting obligations, and comprehensive support for affected individuals. While the CRA has taken steps toward compliance, Dufresne emphasized the necessity of embedding privacy safeguards within government programs and modernizing Canada's outdated Privacy Act to reflect contemporary digital challenges. Amid escalating cyber threats, Dufresne called for permanent funding to address systemic risks and reaffirmed the OPC's commitment to advancing privacy protections across federal institutions.

Charities and not-for-profits, often entrusted with sensitive donor and beneficiary data, can draw valuable lessons from the privacy commissioner's emphasis on robust safeguards and accountability, highlighting the need for vigilance and transparency in their own data protection practices.

9.2. B.C. Court Upholds Privacy Order Against U.S. Company's Facial Recognition Software

Clearview AI Inc. v. Information and Privacy Commissioner for British Columbia is a case in which the Supreme Court of British Columbia dismissed a petition for judicial review by Clearview AI Inc. ("Clearview"), a U.S.-based company that provides facial recognition services. The court, in its December 18, 2024 judgment, upheld a decision by the B.C. Office of the Information and Privacy Commissioner, which found that Clearview was in violation of B.C.'s *Personal Information Protection Act* (*PIPA*).

Clearview operates a facial recognition search engine that collects images of faces from the internet. The company provides its services to third parties, including law enforcement. A joint investigation was launched by the privacy commissioners of British Columbia, Alberta, Quebec, and the federal privacy commissioner, which determined that Clearview was collecting personal information without consent and for improper purposes under privacy laws. In a December 2021 order, The B.C. Information and Privacy Commissioner (the "Commissioner") ordered Clearview to stop offering its services in British Columbia, make best efforts to stop collecting "(i) images and (ii) biometric facial arrays" from individuals without their consent, and delete the data already collected. Clearview then sought judicial review of the Commissioner's decision.

In its review, the court addressed three issues: whether *PIPA* applied to Clearview, whether the Commissioner erred in interpreting "publicly available" information or "reasonable purpose" under *PIPA*, and whether the Commissioner's order was unnecessary, unenforceable, or overbroad. The court applied a correctness standard of review to the jurisdictional question of whether *PIPA* applied to Clearview, and a reasonableness standard to the Commissioner's statutory interpretations and the order.

For the first issue, the court found that *PIPA* applied to Clearview, as the company's activities had a "real and substantial connection" to British Columbia, given that the database included images of individuals in the province.

The court held that the Commissioner reasonably interpreted the definition of "publicly available" information in the *PIPA Regulations*. The court agreed that social media content, unlike the listed examples of directories, registries, and publications, is dynamic and users maintain a level of control over their privacy settings. The Commissioner's finding that Clearview's use of publicly available images for biometric purposes did not constitute a reasonable purpose under *PIPA* was also upheld.

Further, the court ruled that the order was necessary and enforceable, highlighting that Clearview had the technical means to comply, and the "best efforts" standard allowed for flexibility. Finally, the court

held that the order was not overbroad, as *PIPA* protects the personal information of individuals within the province, not just residents.

The court dismissed Clearview's petition, upholding the Commissioner's decision. The judgment affirms that provincial privacy laws apply to organizations that collect personal information from the internet, even when those organizations are located outside of the province. The decision emphasizes the need to obtain consent for the collection and use of personal information and the importance of protecting individual privacy. The court also found that it is not enough for a company to rely on the public availability of information, particularly given the harms that may result from mass collection and use of such data.

This decision underscores the importance of compliance with Canadian privacy laws, which applies to organizations based outside Canada. For charities and not-for-profits in Ontario and across the country, the ruling serves as a reminder to prioritize transparency and consent when handling personal data. Organizations should review their practices to ensure alignment with evolving privacy standards and mitigate risks of non-compliance.

10. IP Update

By Sepal Bonni and Cameron A. Axford

10.1. Trademark Opposition Initiated by WE Charity Fails

In a recent decision by the Trademarks Opposition Board (TMOB), WeWork Companies Inc. ("WeWork") was successful at defending an opposition proceeding initiated by WE Charity against two trademark applications owned by WeWork. *WE Charity v WeWork Companies Inc.* was decided on November 26, 2024.

The issue before the TMOB was whether WeWork's two trademark applications for WE trademarks caused confusion with WE Charity's established trademarks, which are associated with charitable and educational services. WE Charity argued that WeWork's trademarks could mislead the public into believing there was a connection between the two entities, potentially harming WE Charity's reputation and brand identity.

However, the TMOB rejected WE Charity's oppositions. A key factor in its decision was WE Charity's failure to provide sufficient evidence to support its claims. While WE Charity asserted extensive use and advertising of its WE trademarks, it did not submit any evidence demonstrating this use. This lack of evidence significantly hampered We Charity's case.

The TMOB also considered the inherent distinctiveness of the marks in question. It found both WeWork's and WE Charity's WE trademarks to be inherently weak, meaning the trademarks lacked inherent distinctiveness. The term WE is considered suggestive, if not descriptive, of both organizations' activities – community-focused services for WE Charity and collaborative workspaces for WeWork. Without evidence of acquired distinctiveness through extensive use and promotion, neither party's marks were considered strong trademarks or afforded a wide ambient of protection.

The TMOB also analyzed the nature of the goods and services offered by each organization. They found a clear distinction between WeWork's focus on commercial real estate, co-working spaces, and related services, and WE Charity's emphasis on charitable fundraising, educational services, and community building. This difference in the nature of services further reduced the likelihood of confusion between the trademarks.

The TMOB acknowledged the high degree of resemblance between the marks. However, it emphasized that the similarity of marks alone is not decisive, especially when dealing with weak marks. The differing nature of the services and business operations played a more significant role in mitigating the potential for confusion.

Ultimately, the TMOB concluded that WeWork had successfully demonstrated there was no reasonable likelihood of confusion between its WE marks and those of WE Charity. The dissimilarity of the services and the inherent weakness of both parties' marks weighed heavily in WeWork's favour.

This case highlights the importance of **proactive trademark protection** and **distinct branding** for charities to avoid public confusion and safeguard their reputation. Charities should register their trademarks, monitor for infringement, and ensure their branding is unique to prevent conflicts with unrelated entities, while also being prepared to enforce their rights legally if necessary. It also highlights the challenges faced by organizations relying on inherently weak trademarks, particularly when facing opposition from other entities using similar marks in different commercial spheres.

11. AI Update

By Martin U. Wissmath and Cameron A. Axford

11.1. First EU *AI Act* Provisions Come into Effect February 2025

The European Union (EU) *Regulation (EU) 2024/1689*, known as the *AI Act*, is now in force, marking the world's first comprehensive legislation aimed at regulating artificial intelligence (AI) systems. The European Parliament passed the AI Act on March 13, 2024, as reported in the March 2024 *Charity & NFP Law Update*, and it was signed on June 13, 2024. The AI Act complements existing laws like the *General Data Protection Regulation* (GDPR), and establishes obligations for AI providers and deployers to address risks not fully covered by existing frameworks. Officially in force as of August 1, 2024, its implementation will occur in stages, with the most significant provisions applying between 2025 and 2027.

The first provisions of the *AI Act* come into effect On February 2, 2025. Much like the GDPR, it will apply not only to those in the EU, but organizations around the globe who do commercial and non-commercial activities with those in the EU. It is therefore essential that Canadian charities and not-for-profits understand their obligations.

The *AI Act* provides clear definitions and introduces a risk-based regulatory framework to manage AI-related risks, categorized into four levels: unacceptable, high, limited and minimal risk.

Providers (developers or manufacturers) face stricter responsibilities, such as meeting data quality and transparency standards, while deployers (users of AI systems) must ensure proper implementation and compliance.

The *AI Act's* provisions will be phased in over time:

- August 1, 2024: The Act takes effect but imposes no immediate requirements.
- February 2, 2025: Prohibitions on unacceptable-risk AI systems begin. For context, unacceptable risk AI systems include those that present significant health/safety risks to individuals or their civil/privacy rights, including systems which facilitate social credit/social scoring systems or invasive biometric systems like real-time facial recognition.
- August 2, 2025: Rules for general-purpose AI, governance, confidentiality, penalties, and "notified bodies" (designated independent organizations that assess compliance with legislation) come into force.
- August 2, 2026: Most remaining provisions apply, including those for high-risk systems, which are those with safety or fundamental rights implications, such as AI in critical infrastructure, education, worker management, or medical devices, and systems regulated by other EU product safety laws.
- August 2, 2027: Final provisions become effective.

The *AI Act* applies to providers, deployers, importers, distributors, and manufacturers linked to the EU market. It also has extraterritorial reach, covering non-EU companies if their AI outputs are used within the EU. Canadian companies offering AI systems to EU users must assess whether their systems fall into the prohibited, high-risk, or general-purpose AI categories and comply accordingly. Notably, free and open-source AI systems are generally excluded unless classified as high-risk or prohibited. The AI Act also does not apply to research and development prior to market entry, nor to AI systems "specifically developed and put into service for the sole purpose of scientific research and development."

The *AI Act* addresses many challenges posed by AI but acknowledges the need for ongoing regulatory development. Although existing EU directives cover employee protections, stakeholders argue for updates to address AI-specific risks more explicitly. As industries continue to adopt AI technologies, calls for either new laws or adjustments to existing regulations grow. This evolving landscape increases the complexity of legal compliance, requiring organizations to stay informed and proactive in meeting their international obligations.

12. AML/ATF Update

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

12.1. Proposed Revisions to FATF Recommendations Aim to Promote Financial Inclusion

The Financial Action Task Force (FATF) is undertaking revisions to its Recommendations as part of its ongoing efforts to address unintended consequences of anti-money laundering and counter-terrorist financing (AML/CFT) measures. These changes are designed to better align FATF standards with measures that promote financial inclusion.

Central to the proposed revisions are updates to Recommendation 1 and its Interpretive Note, with corresponding adjustments to Recommendations 10 and 15 and relevant Glossary definitions. The revisions aim to strengthen the application of the risk-based approach by emphasizing proportionality and simplified measures. By doing so, FATF seeks to provide governments, financial institutions, and supervisors with clearer guidance and greater confidence when implementing simplified measures in low-risk scenarios. The key areas of proposed revisions are as follows:

1. Clarification of Proportionality in the Risk-Based Approach

   A significant aspect of the proposed revisions involves replacing the term "commensurate" with "proportionate" in Recommendation 1. This change aims to provide clearer guidance on the application of measures corresponding to the level of identified risk. The proposed definition of "proportionate" in this context is:

   "A proportionate or commensurate measure or action is one that appropriately corresponds to the level of identified risk and effectively mitigates the risks."

By aligning its language with financial inclusion stakeholders and frameworks, FATF seeks to enhance understanding and implementation of proportionality. This adjustment is intended to ensure AML/CFT measures are applied in a manner that does not overburden financial institutions or create barriers to financial access.

1. Supervisory Role in Risk Mitigation

   FATF proposes amendments requiring supervisors to "review and take into account the risk mitigation measures undertaken by financial institutions/DNFBPs [Designated Non-Financial Businesses and Professions]". This aims to address overcompliance arising from a partial understanding of risks.

2. Encouragement of Simplified Measures

   In recognition of the importance of simplified measures in fostering financial inclusion, FATF suggests replacing the phrase "countries may decide to allow simplified measures" with "countries should allow and encourage simplified measures." This change introduces an explicit requirement for countries to create environments that actively facilitate the implementation of simplified measures for lower-risk situations.

3. Technological Advancements in Customer Identification

   FATF is considering updates to reflect advancements in digital identity systems. Specifically, the revisions propose adding a qualification to the reference to "non-face-to-face customer-identification and transactions" as higher-risk situations. The addition of "unless appropriate risk mitigation measures have been implemented" acknowledges that technological innovations can effectively address risks traditionally associated with remote customer identification.

Implications of the Revisions

The proposed revisions are designed to strike a balance between effective risk management and the promotion of financial inclusion. By refining language, emphasizing proportionality, and encouraging simplified measures, FATF seeks to mitigate overcompliance and enable broader access to financial services. These changes also reflect an acknowledgment of technological advancements that have reshaped the financial landscape, ensuring that the FATF Recommendations remain relevant and effective in the digital age.

12.2. Proposed Amendments to Canada's AML/ATF Regulations Aim to Enhance Compliance and Address Emerging Risks

Canada's anti-money laundering and anti-terrorist financing (AML/ATF) regime is undergoing significant regulatory updates to address evolving risks and align with international standards. The amendments, published in the *Canada Gazette* (Part I, Volume 158, Number 48) on November 30, 2024, state that they aim to strengthen the integrity of the financial system, protect national security, and respond to criticisms and recommendations from various reviews and inquiries, including the 2022 Commission of Inquiry into Money Laundering in British Columbia and Canada's 2018 Parliamentary Review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA). These changes also implement commitments made in federal budgets from 2022 to 2024 and state that they are intended to prepare Canada for its 2025–26 mutual evaluation by the Financial Action Task Force (FATF), the global AML/ATF standard-setting body.

The proposed amendments target six key areas. First, they introduce a requirement for traders to report the importation and exportation of goods to the Canada Border Services Agency (CBSA) under the PCMLTFA. This measure seeks to detect, deter, and disrupt trade-based financial crime—a growing risk in international commerce.

Second, the amendments enhance the ability of regulated entities to share information among themselves to detect money laundering, terrorist financing, and sanctions evasion. While this measure increases collaboration, privacy protections remain a priority, with oversight by the Office of the Privacy Commissioner of Canada.

Third, the regulations strengthen corporate beneficial ownership transparency. Reporting entities would be required to notify the federal beneficial ownership registry of material discrepancies between their records and a company's filings if a high risk of money laundering or terrorist financing is suspected.

The remaining updates expand AML/ATF requirements to new financial service providers, including factoring companies, cheque-cashing businesses, and financing or leasing entities. This extension addresses gaps in the regulatory framework, mitigates risks posed by these sectors, and ensures compliance with FATF standards, creating a more level playing field across financial services providers in Canada.

The information-sharing provisions in the proposed amendments to Canada's AML/ATF regulations are particularly noteworthy for charities and not-for-profits as they are frequently subject to complex regulatory environments and cross-border activities, and may face unique challenges as they navigate the balance between compliance and privacy obligations. While the measures aim to enhance the detection of financial crimes, the practical implications for charities and not-for-profits remain to be seen, particularly regarding the oversight of privacy protections and the potential administrative burden of increased reporting requirements.

12.3. US Department of Justice Proposes Significant Updates to FARA Regulations

On December 20, 2024, the U.S. Department of Justice (DOJ) published a Notice of Proposed Rulemaking (NPRM) aimed at updating and clarifying the regulations under the *Foreign Agents Registration Act* (FARA). These proposed changes address longstanding ambiguities, particularly in the application of key exemptions and the handling of informational materials, while also modernizing compliance processes to reflect technological advancements. Canadian charities, not-for-profit organizations, and activists engaging in U.S. policy work should be aware that they might need to register under FARA if acting on behalf of a "foreign principal," as the U.S. Justice Department has increased enforcement of this broad-reaching law. For more background information on FARA, please see our September 2022 *Charity & NFP Law Update*.

Among the most significant updates are revisions to FARA's exemptions, particularly the commercial and legal exemptions. The commercial exemption applies to nonpolitical activities that further "bona fide trade or commerce" or "activities not serving predominantly a foreign interest." The NPRM introduces substantial changes to clarify the application of this exemption, including an explicit acknowledgment that it applies to both commercial entities and nonprofits. It also proposes regulatory exclusions that would bar reliance on the exemption in cases where the activities are influenced by, or primarily benefit, foreign governments or political parties, or involve entities directed by such foreign actors.

To further guide compliance, the DOJ proposes a "totality-of-the-circumstances" test to determine whether activities predominantly serve foreign or domestic interests, considering factors such as the degree of foreign influence and public knowledge of the agent's relationship with the foreign principal.

The NPRM also seeks to clarify the legal exemption, which allows attorneys to represent foreign principals in legal proceedings without registering under FARA. However, activities that constitute political advocacy, such as lobbying for policy changes, remain outside its scope.

Another major area of focus is the modernization of regulations regarding informational materials. Currently, FARA requires agents distributing informational materials to include conspicuous disclosure statements and file copies with the DOJ. The NPRM proposes a definition of "informational materials" tied to activities intended to influence U.S. policies or public opinion, aligning the regulations with the statute's intent. The proposed changes also reflect the adoption of the FARA eFile system, simplifying compliance by making registrant information easier to access and search. Disclosure requirements for informational materials would also be updated to include the name of the country or territory of the foreign principal, with specific rules depending on the distribution medium. Additionally, all requests for information or advice would require conspicuous disclosure of the agent's relationship with the foreign principal, extending transparency requirements to routine communications.

The NPRM includes broader updates aimed at streamlining compliance and improving administrative processes. For example, all registration fees would now need to be paid electronically through the

eFile system, eliminating manual submissions. Requests for advisory opinions would require detailed information about an entity's leadership and affiliations with foreign governments.

These proposed changes represent a significant step toward modernizing FARA and addressing long-standing compliance challenges. While the revisions aim to provide greater clarity, particularly regarding exemptions, the inclusion of new regulatory exclusions and expanded definitions may introduce additional compliance burdens and legal risks for practitioners. As the NPRM progresses, stakeholders should closely assess its implications and prepare for potential adjustments to their compliance strategies. The DOJ's efforts underscore the importance of transparency in activities involving foreign principals while seeking to balance regulatory clarity with enforcement adaptability in an evolving global landscape.

13. Charities Legislation & Commentary, 2025 Edition

The *2025 Charities Legislation & Commentary*, co-edited by Terrance S. Carter, M. Elena Hoffstein and Professor Adam Parachin, was published on December 24, 2024, and is now available. This consolidation provides an updated tool to facilitate charity law research by setting out excerpts from, and in some cases the entire text of approximately 145 key federal and Ontario statutes and 75 regulations that apply to charities. New to the 2025 edition is commentary on the most recent amendments to the *Income Tax Act* which will affect charities, including changes to the alternative minimum tax regime as it relates to charitable giving, discussion of draft legislation proposing to amend reporting rules for bare trusts and express trusts and proposing to remove fundraising expenditures from expenditures included towards the calculation of the disbursement quota, discussion of draft legislation proposing to amend reporting rules for bare trusts and express trusts and proposing to remove fundraising expenditures from expenditures included towards the calculation of the disbursement quota, and discussion on of the new *Foreign Influence Transparency and Accountability Act* and changes to the *Criminal Code* relevant to Canada's anti-money laundering and anti-terrorist financing regime, among other topics. Order the book by clicking here.

In the Press

Charity & NFP Law Update – November 2024 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Upcoming Events

The Ontario Bar Association is hosting a webinar on the topic of Navigating Conflicts of Interest for Charities and Not-for-Profits on Wednesday February 26, 2025 from 12:00 pm to 1:30 pm EST. Esther Shainblum, a Partner at Carters Professional Corporation will be a speaker at this event.

The Canadian Association of Gift Planners (CAGP) Conference 2025 will be held April 9-11, 2025 in Edmonton Alberta at the Westin Edmonton. Mr. Terrance Carter will be a Guest Speaker as part of a panel discussion on "Sector Priorities for Engaging Government: Improving Data, Granting to Non-Qualified Donees, and a Secretariat for the Charitable Sector" on Wednesday April 9th from 2:15 pm to 3:15 pm.

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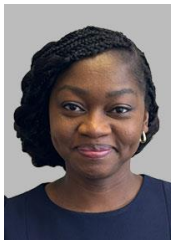

Jefe ("Jay-Fay") Olagunju, Student-at-Law (LPP), Jefe is a Law Practice Program (LPP) Candidate at Carters, bringing some experience in charity law and legal research. She has previously led a volunteer network of young professionals, where she delivered presentations, organized events, and collaborated with senior management. Called to the Nigerian Bar in 2008, Jefe is currently pursuing her call to the Canadian Bar. She holds an LL.B from the University of Benin, an MBA specializing in Human Resources Management (MBA HRM) from Edinburgh Business School, and the Certified Human Resources Practitioner (CHRP) designation from the Human Resources Professionals Association (HRPA).

Acknowledgements, Errata and other Miscellaneous Items

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