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UPDATE ON CHARITY LAW
(Current as of October 4, 2017)

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A. INTRODUCTION

Over the last 12 months there have been a number of legislative and common law developments at the federal and provincial level that impact how charities, as well as not-for-profit corporations, operate in Canada. The purpose of this paper is to provide a brief overview of some of the more important developments in the last year, including changes introduced through the 2017 Federal Budget, new publications from the Charities Directorate of the Canada Revenue Agency (“CRA”), corporate updates under the Canada Not-for-Profit Corporations Act (“CNCA”), the Ontario Corporations Act (“OCA”), the Ontario Not-for-profit Corporations Act (“ONCA”), and the Charities Accounting Act (“CAA”), as well as other federal and provincial initiatives and recent court decisions affecting charities. Within each section of this paper, items are presented chronologically.

B. FEDERAL BUDGET 2017 HIGHLIGHTS

On March 22, 2017, federal Finance Minister, Bill Morneau, tabled the second budget of the Liberal Federal Government (“Budget 2017”). While Budget 2017 emphasized the Liberal election platform focusing on economic growth, job creation and supporting a strong middle class, Budget 2017, like Budget 2016, did not include any new tax incentives for the charitable and not-for-profit (“NFP”) sector, as has been enjoyed in previous federal budgets. Legislation to implement certain proposals from Budget 2017 was introduced on April 11, 2017.

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2 Canada Not-for-profit Corporations Act, SC 2009, c 23.
6 Supra, note 1.
by means of Bill C-44, *Budget Implementation Act, 2017, No. 1* ("Bill C-44"),\(^7\) which received Royal Assent on June 22, 2017. On September 8, 2017 the Minister of Finance released *Legislative Proposals Relating to the Income Tax Act and Explanatory Notes* which included proposals which would implement changes to the Ecological Gifts program mentioned in Budget 2017.\(^8\)

Although Budget 2017 did not dramatically alter the legal and regulatory landscape for charities, there are, nonetheless, a number of important developments of note.

1. **Ecological Gifts**

   The ITA provides for an ecological gifts program where certain donations of ecologically sensitive land or easements, covenants and servitudes on such land ("Ecogifts") give donors enhanced tax incentives. Budget 2017 proposes a number of measures in order to better protect Ecogifts. The implementing legislation for this proposal has yet to be tabled.

   Currently, the ITA permits individual donors of Ecogifts to claim a charitable donation tax credit and corporate donors to claim a charitable donation tax deduction. In this regard, the amount of the donation (up to 100% of net income) may be claimed in a year and unused amounts may be carried forward for up to ten years. In addition, any capital gains associated with the donation of Ecogifts (other than a donation to a private foundation) are exempt from tax. In order to qualify for the Ecogifts program, the Minister of Environment and Climate Change Canada ("ECCC") must: (a) certify that the land is ecologically sensitive and that its conservation and protection is important to the preservation of Canada’s environmental heritage; (b) approve the organization that will receive the gift if it is a registered charity (but approval is not necessary if the organization is the government of Canada, a province, a municipality in Canada, or a municipal or public body performing a function of government in Canada); and (c) certify the fair market value of the donation. In addition, any easements, covenants or servitudes involved must run in perpetuity. As well, in order to ensure donated land is not subsequently used for other

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\(^7\) *Bill C-44, Budget Implementation Act, 2017, No. 1*, 1st Sess, 42nd Parl, 2015-16-17 (assented to 22 June 2017), SC 2017, c 20.

purposes, the ITA imposes a 50% tax of the fair market value of the land upon a recipient who changes the use of the property or disposes of it without the consent of the Minister of ECCC.

Budget 2017 proposes the following changes to apply to transactions or events that occur on or after March 22, 2017:

- Where Ecogifts are transferred between organizations for consideration, the protection offered by the 50% tax may be inappropriately lost. To ensure that transfers of Ecogifts from one organization to another do not result in the loss of this protection, Budget 2017 proposes that the transferee of the property in such a situation be subject to the 50% tax if the transferee changes the use of the property, or disposes of the property, without the consent of the Minister of ECCC.

- Budget 2017 proposes to clarify that the Minister of ECCC has the ability to determine whether proposed changes to the use of lands would degrade conservation protections.

- Currently, an Ecogift that is proposed to be made to a registered charity must be approved by the Minister of ECCC on a gift-by-gift basis. However, approval is not necessary if the recipient organization is the government of Canada, a province, a municipality in Canada, or a municipal or public body performing a function of government in Canada. Budget 2017 proposes to extend the Ministerial approval requirements, on a gift-by-gift basis, to recipients that are municipalities as well as municipal and public bodies performing a function of government. However, Ecogifts proposed to be made to government of Canada or a province would still not require Ministerial approval.

- Budget 2017 proposes that private foundations will no longer be eligible to receive Ecogifts in order to prevent potential conflict of interest. An example of a scenario that may give rise to a conflict is where a director of a private foundation donates an easement in respect of a property to the private foundation so that the individuals responsible for enforcing the private foundation’s rights under the easement would be the same persons as those against whom the rights must be enforced.
In Quebec, where civil law applies, only real servitudes may be donated under the Ecogift program but not personal servitudes because they cannot run in perpetuity. As such, since the conditions associated with real servitudes can be difficult to meet, such donations are infrequently made. To encourage more Ecogifts in Quebec, Budget 2017 proposes that certain donations of personal servitudes may qualify as Ecogifts if they meet a number of conditions, including a requirement that the personal servitude run for at least 100 years.

In this regard, Budget 2017 proposes to amend various sections of the ITA, including subsection 43(2), paragraph 110.1(1)(d), the definition of “total ecological gifts” in subsection 118.1(1), and 207.31.

2. Repeal of Additional Corporate Donation Deductions on Medicine for International Aid

Budget 2017, through Bill C-44, repealed the additional corporate donation deductions on medicine for international aid by repealing paragraph 110.1(1)(a.1) and subsections 110.1(8) and (9) of the *Income Tax Act* (“ITA”), as well as amending subsection 149.1(15) of the ITA. The repeal applies to gifts made after March 22, 2017. The special deduction for corporations was first introduced in the 2007 Budget to allow corporations that make donations of medicines from their inventory to claim a special additional deduction equal to the lesser of 50 percent of the amount, if any, by which the fair market value of the donated medicine exceeds its cost and the cost of the donated medicine. The goal of this deduction was to encourage corporations to provide medicines for the purpose of international aid.

Budget 2017 stated that this measure was to be repealed, “given the high compliance costs for charities and very low take-up.” However, no changes are being made with regard to the normal ability for a corporation to deduct the fair market value of donated medicine.

While it is not clear what is meant by the “high compliance costs” for charities, in order for corporations to claim an eligible medical gift, a charity had to have applied to the Minister of International Development in order to be assessed concerning whether it met specific requirements under regulation 3505, including, among other requirements, that it have

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“sufficient expertise in delivering medicines for use in charitable activities carried on outside Canada”.

3. **Farewell First-Time Donor’s Super Credit, We Hardly Knew You**

   Budget 2017 also confirmed that the First-Time Donor’s Super Credit (“FDSC”) “...will be allowed to expire in 2017 as planned, due to its low take-up, small average amount donated, and the overall generosity of existing tax assistance for charitable donations”. This is not surprising given that the FDSC, first introduced in Budget 2013, was announced as a temporary tax-credit for the 2013 to 2017 taxation years, and *Economic Action Plan 2013 Act, No. 1*, which implemented the FDSC, included their repeal for the 2018 and subsequent taxation years. As a result, those hoping that the FDSC might be extended beyond 2017 will no doubt be disappointed that the eventual repeal of subsections 118.1(3.1), (3.2) and the definition of “first-time donor” in the ITA will proceed in 2018.

4. **Amendments to Anti-terrorism Legislation**

   Budget 2017, through Bill C-44, makes a number of technical and substantive amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, along with coordinating amendments to related legislation. Bill C-44 is largely silent concerning the effective date of the amendments to anti-terrorism legislation, but does state that the trust companies provision comes into force on a day to be fixed by the Governor in Council. Amendments made by Bill C-44 will expand the list of disclosure recipients, allowing for Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") to disclose designated information that is has reasonable grounds to suspect would be relevant to threats to the security of Canada to the Department of National Defence and the Canadian Armed Forces. Bill C-44’s amendments will also expand the list of persons and entities to which record keeping, identification verification and reporting of suspicious transactions and registrations apply to include “trust companies incorporated or formed by or under a provincial Act that are not regulated by a provincial Act”. Under certain circumstances, amendments made by Bill C-44 will

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10 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17.*
also permit FINTRAC to disclose designated information to institutions or agencies of foreign states (including any political subdivisions or territories thereof) or to international organizations with similar powers and duties as FINTRAC’s.

While developing a regime for greater transparency of beneficial ownership concerning corporate entities is an important initiative, Budget 2017’s proposals purporting to “strengthen” the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, and the corresponding legislative amendments in Bill C-44, appear to be expanding Canada’s already robust information collecting and sharing regime, which was most recently bolstered by Bill C-51 that the Liberal Party had campaigned to amend.

C. RECENT CRA PUBLICATIONS

1. New CRA Guidance on Charities That Assist the Aged

On December 8, 2016, the CRA released a guidance entitled: Relieving Conditions Attributable to Being Aged and Charitable Registration (CG-026) dealing with charities that assist the aged (“Guidance”). It replaces the CRA’s Policy Statement CPS-002, Relief of the Aged that was released on July 6, 1990 (“Previous Policy”).

The Guidance provides a much needed and helpful update on the Previous Policy, clarifying what the CRA considers charitable for Canadian charities serving the aged. For example, almost half of the Previous Policy (paragraphs 9 to 15) was in relation to the provision of housing for the aged, which has since been superseded by the CRA’s guidance entitled: Housing and Charitable Registration (CG-022) dealing with charities that provide housing to their beneficiaries.

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a) Age is Not Relevant

The Guidance clarifies that simply having attained a certain age is not a condition that is eligible for charitable relief. Instead, the eligible beneficiary group to be served must be those affected by one or more conditions attributable to being aged. This CRA position is consistent with the common law. Although the Previous Policy also stated that the CRA is of this view, the explanation in the Guidance is much clearer.

b) Conditions attributable to being aged

Since the age of the persons served is not relevant, it is necessary for charities to identify the conditions attributable to being aged for which relief is provided in order to be charitable. In this regard, the CRA provided a list of conditions attributable to being aged that are “generally” recognized by the CRA, including (i) frailty; (ii) social isolation; (iii) decline in motor skills, flexibility, strength, speed of execution, or hand-eye co-ordination; (iv) physical or mental health conditions attributable to being aged; (v) difficulty functioning in, or adapting to, current technology; and (vi) vulnerability to elder abuse.

While the Guidance indicates that the above list is not exhaustive, if an organization is established to relieve a condition not listed above, the organization would have to demonstrate that such a condition is eligible for relief by providing “objective, reliable, and relevant evidence.” Such evidence could include the following:

- materials from impartial sources, such as articles in established academic and professional journals or publications confirming the benefit of the proposed activities to the identified beneficiaries
- submissions from persons independent of the organization that are qualified by relevant professional bodies or work experience to speak authoritatively on the subject or issue

14 Supra note 12 at para 29.
The Guidance further states that the sufficiency of the evidence will be assessed by the CRA based on the facts of each case, upon considering the “nature of the condition and all relevant information.” As well, the CRA may conduct its own research before making a decision. It is possible that the CRA’s list of acceptable needs associated with aging is not completely realistic or sufficiently broad. For example, the list does not include activities that address financial needs of seniors (such as credit and financial counselling) in light of the fact that debt of seniors has been on the rise in recent years. It is also of concern that the requirements on charities to provide extensive “objective, reliable, and relevant evidence” may prevent the sector from having sufficient flexibility in order to operate activities to relieve the ever-changing needs associated with the aged in Canada.

c) Required Charitable Purposes

To be eligible for charitable registration, the CRA requires that charities that relieve conditions attributable to being aged identify in their charitable purpose the following elements: a “purpose descriptor” (such as “to relieve conditions attributable to being aged”); the scope of the activities that will be conducted to relieve the identified conditions; the eligible beneficiary group; and the conditions attributable to being aged that will be relieved.

The Guidance lists examples of how acceptable purposes would need to be drafted, which is helpful since there were no examples in the Previous Policy. However, the sample purposes are drafted in a very specific and focused manner. Many organizations that provide services to seniors are multi-faceted rather than addressing only one or two of their needs.

d) Acceptable activities

The Guidance stated that the activities conducted to relieve conditions attributable to being aged must be “effectively relieving the condition, either directly or indirectly.” In this regard, “relieving the condition” means “eliminating the presence of, or reducing the negative effects of, the condition.” In other words, there must be a connection between the conditions that need to be relieved and how activities are conducted to relieve the identified conditions.
Therefore, the activities will vary depending on what conditions are intended to be relieved. As with the purposes, the Guidance lists the examples of acceptable activities.

The Guidance also states that any private benefit conferred as part of the delivery of the activity must be “incidental to achieving the charitable purpose (meaning the private benefit is necessary, reasonable, and proportionate to the resulting public benefit).” This is consistent with the requirement to meet the CRA’s policy on the public benefit.15

c) Special Topics

The Guidance makes specific reference to a number of special issues that come up for charities serving the aged in the community. For example, it makes reference to the CRA’s guidance on housing (referred to above). It further clarifies that residents at these facilities are not required to be assessed using an income threshold or other financial criteria, and that the housing does not have to be provided at less than fair market value. It is also helpful that the Guidance specifically clarifies that “[a]n organization can conduct its activities according to specific cultural traditions, in the language of its choice, or according to particular religious beliefs, as long as its benefits are made available to anyone in the eligible beneficiary group described in its purpose.” This is good news because it recognizes the needs of the multicultural population of Canada and thereby the need for activities that are sensitive to cultural background, language, and religious belief.

Of note, the Guidance acknowledges that some activities that relieve conditions attributable to being aged could also further other charitable purposes. It gives the example that providing mobility aids to the aged who have a physical condition could also promote health and therefore must also meet the requirements in the CRA’s Guidance CG-021, Promotion of Health and Charitable Registration. As well, an organization that provides health care products and services must meet the applicable requirements relating to effectiveness, quality and safety set out in that guidance. This requirement is problematic. The CRA’s requirement means that if an

activity could fall within two heads or subcategories of charity, then the charity would need to meet both sets of CRA criteria. In essence, the CRA is requiring that the charity has two thresholds to meet. If it is charitable for a charity to provide health care related services (such as mobility aids, healthy living counselling, etc.) to the aged to relieve a condition associated with aging, that, in and of itself, is already charitable. It is unnecessary to also require the charity to meet the separate requirements in the health care guidance.

2. **CRA’s New Cause-related Marketing Webpage**

On February 11, 2017, the CRA introduced a new webpage to explain Cause-related Marketing, which was further updated on February 21, 2017. In general terms, cause-related marketing is defined by the CRA as fundraising activity where a registered charity (or other qualified donee) works with a for-profit entity to promote the sale of the for-profit’s items or services on the basis that part of the revenues will be donated to the registered charity.

The benefit that the for-profit entity receives under the arrangement is considered an advantage. In order for a registered charity to issue an official donation receipt for a donation, the charity must first be able to calculate the value of any advantage the donor (e.g. the for-profit entity) received. The value of the advantage to a donor is normally subtracted from the amount of the donation in order to calculate the eligible amount of the gift for purposes of the official donation receipt.

However, some advantages are considered by the CRA as too minimal to affect the value of a gift. If the value of all advantages related to a gift is not more than $75 or 10% of the amount gifted to the charity (whichever is less), the charity does not need to subtract those amounts from the gift amount when issuing a receipt. It should be noted that where an advantage is more than 80% of the amount gifted to the charity, the CRA takes the position there was no intention to make a gift and therefore, the charity cannot issue a receipt.

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17 Supra note 9, section 248(30).
Since it can be very difficult to calculate the value of an advantage in cause-related marketing arrangements, the CRA webpage suggests that where a charity is not able to issue an official donation receipt, the for-profit entity may seek professional advice to determine whether the expenses from the cause-related marketing arrangement can be claimed as an advertising expense.

3. **New Privacy Disclosure in T2050 Application to Register a Charity Under the ITA**

On February 21, 2017, the CRA updated the T2050 “Application to Register a Charity Under the *Income Tax Act*”, the application form that must be completed and submitted to the CRA when applying for charitable registration.\(^\text{18}\)

The update to Form T2050 includes a new privacy disclosure on the last page indicating that personal information is being collected under the authority of the ITA in order to validate the identity and contact information of directors, officers and authorized representatives of the applicant organization. The information is also used as a basis for the indirect collection of additional personal information from other internal and external sources, which includes social insurance numbers, personal tax information, and relevant financial and biographical information, which may be used by the CRA “to assess the overall risk of registration with respect to the obligations of registration as outlined in the ITA and the common law.”

The disclosure states that where the application for charitable status is approved, the CRA is permitted to make the form (including any attachments) and copies of the registration letter (including any conditions and warnings contained therein) available to the public, with the exception of the confidential information in Part 5 and Part 6 of the Form T2050. If registration is denied, the information will not be provided to the public. Personal information may also be shared with other government departments and agencies under information-sharing agreements, which may include RCMP, CSIS, as well as foreign governments and agencies in accordance with section 241 of the ITA.

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The CRA privacy disclosure encourages applicant organizations to voluntarily inform directors and officers that their personal information has been collected and disclosed to the CRA for the application process. The CRA privacy disclosure also requires that those signing the T2050 on behalf of the applicant confirm they have read the said privacy disclosure.

4. **Sweeping Changes Recommended in Report on Political Activities**

On May 4, 2017, the CRA published on its website the *Report of the Consultation Panel on the Political Activities of Charities* (the “Report”), prepared after the CRA’s consultation with the charitable sector between September 2016 and December 2016 (the “Consultation”). In conjunction with the release of the Report, the Minister of National Revenue announced, on the same day, the Liberal government’s suspension of all remaining CRA audits of charities for political activities that had been initiated through the 2012 Federal Budget. The suspension is to remain in place pending the implementation of the Report’s recommendation.

The Report states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for changes to the current administrative and legislative framework governing “political activities” by charities. In doing so, the Report provides four recommendations, including the immediate suspension of the political activity audits that was acted upon by the Minister of National Revenue. The CRA had committed to providing a formal response to the Consultation Panel’s recommendations by the end of June 2017, though no formal response has been published as of October 2017.

a) **The Report and Recommendations**

The Report explains that there has been much confusion concerning the limits of what charities can say, how much they can say, and to whom they can speak when it comes to advocating for public policy change. The confusion stems from the often conflated terms

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“activities” and “purposes” in the ITA. While the Report indicates that “political purposes” are prohibited, subsections 149.1 (6.1) and (6.2) of the ITA permit charities to carry out a limited amount of what the Report refers to as “non-partisan political activities” to achieve their charitable purposes. However, many of these key terms remain undefined, and the line between a charity having a political purpose and conducting political activities to achieve its charitable purposes remains unclear.

In particular, the Consultation found a consistent, sector-wide call for legislative change, with many charities stating that administrative changes would be insufficient to address fundamental issues with the current legislative framework over political activities. In response to the Consultation, the Report provided four recommendations to change both the administration of the ITA and the ITA itself with regard to political activities by charities, as well as a broader recommendation to modernize the legislative framework for charities. A brief summary of these recommendations follows.

b) Full Public Policy Dialogue and Development

To eliminate confusion over acceptable activities and how to calculate political activities, the Report recommends that the CRA immediately revise its Policy Guidance CPS-022, Political Activities (the “Political Activities Guidance”) to define “political activities” to mean “public policy dialogue and development” and to expressly permit charities to fully engage in them where doing so would further the charity’s charitable purposes, and they are non-partisan and subordinate to the charitable purposes. In this regard, the Report recommends that the Political Activities Guidance view “public policy dialogue and development” as entailing “providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions.” Examples of such activities provided in the Report include: providing information on their charitable objects to sway public opinion, engaging in advocacy and mobilizing the public to support keeping or changing law or policy, and expressing non-partisan

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20 Supra note 9.
views on social media. This recommended change in terminology from “political activities” to “public policy dialogue and development” is insightful and welcome because it removes the misunderstanding that any contact with a politician is “political” and actually reflects the contribution that charities can make not only to programs but also to social and economic policy development because of their experience and expertise.

The Report also recommends that the CRA remove its policy requirement that charities’ materials reflect all sides of an argument, and instead add a requirement that they be fact-based. It further recommends that charities should not be required to quantify or report on the quantification of political activities on the T3010, Registered Charity Information Return, but instead be required to provide only a narrative description of the nature of public policy dialogue and development work that they undertake.

c) Changes to CRA Compliance and Appeals, Audits, Communication and Collaboration

To enhance clarity and consistency, the Report recommends implementing changes to CRA administration of the ITA in the areas of compliance and appeals, audits, communication and collaborative approaches. The recommendations generally focuses on greater transparency and communication between the CRA and the charitable sector, consistency in information provided, as well as enhanced avenues through which charities can receive guidance on issues, such as an expanded Charities Liaison Officer role and access to the Taxpayers’ Ombudsman.

Concerning compliance and audits, the Report’s recommendations include ensuring consistency in the CRA’s application of the compliance continuum and consulting with the sector when identifying thematic audit topics. Concerning appeals, the Report recommends that appeals should be heard by the Tax Court of Canada rather than by way of judicial review at the Federal Court in order to level the playing field and enhance fairness in a system that is currently perceived to be biased in favour of the CRA. Concerning communication and collaboration, the Report recommends reinstating in-person programs, such as Charities Information Sessions and the Charities Partnership and Outreach Program, as well as the establishment of a high-level standing working group to identify and address issues of concern to charities.
d) Removal of Legislative Reference to Non-partisan Political Activities

The third recommendation in the Report is to “[a]mend the ITA by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes”. The Report’s recommendation to delete any reference to “non-partisan political activities” is somewhat unclear, as there is no mention of such term in the ITA. Nonetheless, the recommendation goes on to provide some clarity by proposing to “retire the term “political activities”, which the Report says tends to be understood as partisan. It reasoned that doing so would provide clarity and certainty for the charitable sector and the CRA, and would explicitly allow charities to be fully engaged in “non-partisan public policy dialogue and development.” Similarly, the Report recommends retaining the prohibition on “partisan political activities” and political purposes for charities.

e) A Modern Legislative Framework that Focuses on Charitable Purposes

As a more long-term solution, the Report recommends the modernization of the ITA dealing with charities. Specifically, the Report recommends a focus on charitable purposes rather than activities, an inclusive list of charitable purposes reflecting contemporary issues, and the ability to appeal the Tax Court of Canada’s refusal to register, or to revoke, charitable status.

Building on its mandate, the Report suggests additional legislative changes, including removing the need for charities to maintain “direction and control” of non-qualified donees in certain circumstances. Doing so, the Report states, would enable charities to work with partners “as equals in furtherance of their charitable purposes”. The Report further recommends greater accommodation of social enterprise and social finance models that would benefit the charitable sector.

f) The Way Forward

The current suspension of the political activity audits comes as a result of the Liberal government’s commitment that it would “[a]llow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and
not-for-profit sectors ... [by] clarifying the rules governing “political activity,” with an understanding that charities make an important contribution to public debate and public policy.”

However, notwithstanding the Minister of National Revenue’s announcement of the suspension of ongoing audits of charities for political activities, it remains to be seen how the Federal Government and the CRA will respond to the remainder of the Report’s recommendations. In particular, many of the recommendations touched on issues related to the regulation of charities that are not limited to political activities, and would require extensive changes to the ITA concerning the administration of charities, e.g., providing for an inclusive list of charitable purposes or permitting appeals to the Tax Court of Canada as opposed to the Federal Court of Appeal.

Nonetheless, the Report and the announcement by the Minister constituted extremely good news for the charitable sector and a hope for the future given that the political audits mandated by the previous government in 2012 have been seen as having created an unjustified and unnecessary “chill” effect on charities in Canada with regard to public policy and advocacy.

The CRA is to be commended for the process that it used in this consultation, being a combination of on-line and in-person consultations in seven major cities and appointing a panel of five sector representatives to review the consultation submissions and provide recommendations to the CRA which have now been made public in their report.

5. Changes to Charitable Registration Application Process

In late June 2017, the CRA sent an email to key stakeholders announcing a number of upcoming changes to the charitable registration process. This was subsequently posted on the CRA’s website. The announcement stated that the Charities Directorate would no longer review applications submitted with draft governing documents. Such applications would be considered incomplete and returned to the applicant. The CRA also recommended that trust documents

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include a clause allowing trustees to amend or alter the purpose(s) of the trust in order to meet the legislative and common law requirements for charitable registration. As well, if an applicant believes that the purposes in its governing documents do not accurately reflect its programs, proposed purposes can be included in the application, along with its current certified governing documents. These changes came into effect July 1, 2017.

6. Voluntary Disclosure and Canadian Registered Charities in Context

On June 9, 2017, the Ministry of National Revenue announced changes to the Canada Revenue Agency (the “CRA”) Voluntary Disclosures Program (“VDP”) by publishing two documents outlining the proposed changes as of January 1, 2018, the Draft Information Circular - IC00-1R6 - Voluntary Disclosures Program\(^{24}\) and the Draft GST/HST Memorandum 16.5 – Voluntary Disclosures Program (collectively, the “Proposals”).\(^{25}\) The general purpose of the VDP is to provide taxpayers with an opportunity to voluntarily come forward and correct previous omissions in their dealings with the CRA in order to avoid penalties and prosecutions. The Proposals outline extensive proposed changes to the VDP aimed at preventing abuse of the system by sophisticated taxpayers, including those with offshore accounts in order to avoid detection by the CRA. The Proposals were open for public consultation for a period of 60 days from June 9, 2017. While the VDP has application to non-profit organizations under paragraph 149(1)(l) of the ITA (“NPOs”), it only applies to registered charities in the very limited context of employee source deductions and HST. As such, the specifics of the Proposals will be of limited interest to registered charities, although they have been attracting a lot from the media.

In lieu of the VDP applying to registered charities, other than in the above mentioned limited context, it is important to be aware that the CRA does provide a voluntary disclosure process for charities that have been involved in matters of non-compliance and would like to bring themselves back into compliance.

\(^{24}\) Canada Revenue Agency, Draft Information Circular – IC00-1R6 Voluntary Disclosures Program, (Ottawa: CRA, June 2017), online: [https://www.canada.ca/en/revenue-agency/campaigns/ic00-1r6-voluntary-disclosures-program.html](https://www.canada.ca/en/revenue-agency/campaigns/ic00-1r6-voluntary-disclosures-program.html).

This voluntary disclosure process is set out on the CRA webpage entitled, “Bringing Charities Back into Compliance” (the “CRA Guide”). The CRA Guide encourages registered charities that have been involved in unintentional or accidental matters of non-compliance to contact the Charities Directorate at the CRA in writing, either on a general or no-name basis, or by telephone, in order to provide a “complete and accurate description” of the non-compliance. After contacting the CRA, charities may be required by the CRA to correct the effects of past non-compliance within a reasonable timeframe, enter into a compliance agreement outlining the steps to rectify the non-compliance, or present a plan to demonstrate what action has been taken or what measures will be put into place to prevent future non-compliance. There is nothing, though, in the CRA Guide that promises a particular outcome as there is in certain circumstances with the VDP.

Not every matter of non-compliance warrants proceeding with a voluntary disclosure to the Charities Directorate. However, serious matters of non-compliance or repeat non-compliance that could lead to a sanction (financial penalty or suspension of receipting privileges) or revocation of charitable status, with the associated stigma of directors and officers possibly being found to be “ineligible individuals” under the ITA, may benefit from a pre-emptive disclosure to the Charities Directorate. Since the disclosure must be voluntary, it must be started before the CRA has commenced its audit. The end goal is to have the charity with one or more serious compliance issues end up with a negotiated compliance agreement with the Charities Directorate, as opposed to leaving the charity exposed to the risk of sanctions or revocation if a CRA audit was to occur without a disclosure.

However, in making a voluntary disclosure, the CRA may examine other non-compliance issues not disclosed by the charity. It is, therefore, important to conduct a due diligence review identifying all issues of non-compliance before commencing a voluntary disclosure with the Charities Directorate in order for those non-compliance issues to be afforded the benefits of the voluntary disclosure process.

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Given the limited scope of the CRA Guide to assist charities wanting to come back into compliance compared to the VDP available for for-profits and NPOs (even with the changes outlined in the Proposals), it would be a help to the charitable sector if the Charities Directorate was to develop a more robust voluntary disclosure program for registered charities similar in scope to the VDP. In this regard, in a letter addressed to the Charities Directorate dated August 8, 2017,27 the Charities and Not-for-Profit Law Section of the Canadian Bar Association recommended the development of a guidance dealing with voluntary disclosures by registered charities and that such guidance be addressed by the Charities Directorate of the CRA, as opposed to the Tax Services Offices under the VDP.

Until such guidance is available, charities that discover they are non-compliant should work with legal counsel under the protection of solicitor-client privilege with respect to the current CRA Guide to determine if and how best to make a disclosure to the CRA, and what steps may be necessary to bring the charity back into compliance.

7. **CRA to Update Business Numbers to Provide e-Services Starting in November 2018**

On September 22, 2017, following an e-mail sent to certain stakeholders on July 21, 2017, the Charities Directorate of the Canada Revenue Agency (“CRA”) announced that, once the Charities IT Modernization Project (CHAMP)28 is implemented, registered charities will be able to use their business numbers,29 through the CRA’s “My Business Account” portal,30 to file their information returns online, as well as to update and manage their account information, check file status and received and manage their communications with the CRA. The announcement further states that, over the next few months and until October 2018, charities’ internal divisions

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sharing the business numbers of their head bodies will be assigned unique business numbers so they can access these online services. This process does not require any action from impacted charities, as their internal divisions will continue to operate under the governing documents currently on file with the CRA. More information is expected to be available on the Charities Directorate website soon.

8. **CRA Releases New Guidance on Head Bodies and Internal Divisions**

On September 22, 2017, the CRA published a new guidance, CG-028, “Head bodies and their internal divisions” (the “Head Bodies Guidance”), which outlines the CRA’s requirements for the charitable registration of head bodies and their internal divisions. For the purpose of the Head Bodies Guidance, a head body is a registered charity that has authority over its internal divisions, is resident in Canada, and was either created or established in Canada. The Head Bodies Guidance states that a head body’s governing documents must permit it to exert authority over its internal divisions by taking actions, such as appointing and controlling their boards, approving their budgets and creating them or closing them down. Although “internal division” is not defined under the ITA, the Head Bodies Guidance considers internal divisions to be branches, parishes, sections or other divisions of a registered charity that operate as extensions of and under the authority of the head body, further its charitable purposes, are not separately incorporated but rather operate under the head body’s governing documents and receive donations on their own behalf. Internal divisions have their own charitable numbers and are registered separately with the CRA from the head body but are subordinate to it. To register an internal division, the internal division must submit to the CRA a letter of good standing from the head body outlining the internal division’s relationship with the head body, together with the governing document that created or established the head body. The Head Bodies Guidance also provides information concerning requirements of head bodies and internal divisions after registration, as well as a helpful chart outlining the differences between registered charities, head bodies and internal divisions.

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divisions, and sample scenarios to understand whether or not an organization is an internal division.

9. **Changes to CRA’s CG-014 CED Guidance**

   On September 22, 2017, the Charities Directorate of the CRA announced recent changes to the CG-014 “Community Economic Development Activities and Charitable Registration” (“CED Guidance”) to include exceptions to charitable activities aimed at improving socio-economic conditions in areas affected by a disaster. According to the new Appendix A, a disaster is “a hazard that overwhelms a community’s ability to cope and may cause serious harm to people’s safety, health, welfare, property, or the environment” and it can be a natural phenomenon or the result of human action. Accordingly, the area is presumed to be in need for two years after the date of the disaster, but the charity may continue to work in the area provided it shows continuing need. The new CED Guidance describes the ability of charities to support local small businesses and it provides a list of requirements for charities to show that the benefit the businesses receive is only incidental to the work of the charity.

D. **RECENT TAX DECISIONS, RULINGS, AND INTERPRETATIONS INVOLVING CHARITIES**

1. **Income Tax Treatment for Monies Paid to Support Refugees**

   On March 3, 2017, the CRA released technical interpretation 2016-0651661E5 – Payments to Syrian refugees by a church. This technical interpretation was in response to a letter received by the CRA from a church inquiring about the income tax treatment of payments made by the church to support a Syrian refugee family (the “family”). Specifically, the church asked whether the money received by the family was to be included as income in the family’s tax returns, and whether there are any special rules for refugees for income tax purposes.

   In terms of background, the inquiring church was a private sponsor that has established a fund to support a particular Syrian refugee family, and had provided support to the family since they arrived in Canada. The monies provided by the church were to assist the family with their living expenses. The family also received money through the Resettlement Assistance Program provided by the government.
In response to the questions asked, the CRA noted that paragraph 56(1)(u) of the ITA requires social assistance payments received in the year and made on the basis of a means, needs, or income test are to be included in a taxpayer's income, unless they are included in the taxpayer's spouse's or common-law partner's income. The CRA further noted that income included under paragraph 56(1)(u) will be offset by a matching deduction under paragraph 110(1)(f) of the ITA. As such, there will be no income tax implications, other than potentially affecting certain income-tested benefits. Accordingly, the CRA indicated that “if the payments made by the church are assistance made on the basis of “means, needs or income test,” then they are likely social assistance payments for purposes of paragraph 56(1)(u)” of the ITA.

“Social assistance” is not defined under the ITA, but, with reference to paragraph 56(1)(u), the CRA indicated that it is generally understood to mean “aid provided by a government or government agency, although it can be provided by other organizations (such as a church), on the basis of need.” With respect to the means, needs, or income test, the CRA advised that it considers them to be financial tests and describes them as follows: “1. [a]n “income” test, which is a test based solely on the income of the applicant, 2. [a] “means” test, which is similar to an income test, but also takes into account the assets of the applicant, [and] 3. [a] “needs” test, which takes into account the income, assets and financial needs of the applicant.”

In its response, the CRA also noted that subsection 233(1) of the *Income Tax Regulations* requires organizations providing social assistance to report such assistance on Form T5007-Statement of Benefits, unless expressly exempted.

This technical interpretation is helpful to organizations providing assistance to refugees in Canada, as well as all organizations, including NFPs and charities that provide assistance based on a means, needs or income test.

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32 CRC, c 945.
Further information on the provision of social assistance, the resulting reporting requirements and form T5007 can be found on the CRA website, as well as in the CRA’s pamphlet T4055 Newcomers to Canada.

2. Administrative Penalty Assessed for False Statements on Donation Receipts

On April 25, 2017, the Tax Court of Canada (the “Court”) released its decision in Ploughman v The Queen (the “Ploughman Decision”), an appeal by Glenn Ploughman (“Ploughman”), from the CRA’s assessment under section 163.2 of the ITA, often referred to as the third-party penalty provision.

The Court found that Ploughman participated in the making of, or assented to or acquiesced in the making of, false statements by 135 participants in a charitable donation program. The background facts of this case are complex and it is beyond the scope of this paper to describe in detail. However, in general terms, the Court found Ploughman was a creator or promoter of a charitable donation program (“Donation Program”) that was based on the creation of a timeshare property and the donation of vacation ownership weeks to registered charities by participants in the Donation Program. However, timeshare units were never created and therefore vacation ownership weeks were never actually donated by any participants. Each of the 135 official receipts issued to participants in the Donation Program, which stated that each donor had made an in-kind donation of a specified number of “Biennial Weeks Vacation Ownership at Arawak Inn & Beach Resort”, contained a false statement.

Based on the evidence, the Court found that when Ploughman sent a letter to the participants in the Donation Program recommending that they submit their charitable receipts to the CRA, he knew or would reasonably be expected to have known, but for circumstances amounting to culpable conduct, that each of the official receipts contained a false statement. Further the Court found that Ploughman’s indifference concerning the non-existence of the

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timeshare units, the failure to implement other transactional steps on which the Donation Program was based, and his indifference as to whether his recommendation in that letter was well founded, showed an indifference concerning whether the ITA was complied with and thus constituted culpable conduct.

Subsection 163.2(6) of the ITA provides a safe harbour for an advisor who relies, in good faith, on information provided by or on behalf of a person who makes a false statement. However, the Court found that Ploughman’s reliance on the legal opinion letter of Ms. Guindon (the lawyer who had provided the legal opinion concerning the Donation Program as described below) did not satisfy the statutory criteria of subsection 163.2(6) of the ITA. The Court noted that subsection 163.2(6) of the ITA applies only where the advisor is acting on behalf of the person who makes the false statement, but the Donation Program involved a number of participants who were clients of other canvassers, such that Ploughman may not have been acting on behalf of those participants. In addition, the Court found Ploughman was not acting in good faith.

The Donation Program was previously at the centre of a 2015 case, Guindon v Canada. In that case, Guindon, a lawyer without expertise in tax law, provided a legal opinion on the tax consequences of a leveraged donation program and signed 135 charitable receipts totalling $3,972,775 in her capacity as the president of a registered charity. Guindon was found liable under s. 163.2(4) of the ITA for knowingly assisting another taxpayer with making false statements or omissions in a tax return.

3. **CRA Issues a Technical Interpretation of Charities Returning Gifts**

On May 17, 2017, the CRA released technical interpretation 2016-0630351, dated March 31, 2017, and provided its response to the questions “1) Can a registered charity return a gift of a life insurance policy to a donor?” and “2) If so, what are the tax consequences to the registered charity and to the donor?” In 1981, the donor gifted a life insurance policy to a foundation which supports a college. The gift was intended to form a scholarship for a specific program. That program, though it existed at the time of the gift, no longer exists. The donor therefore believed that a condition of the gift was not fulfilled, and requested that the gift be returned. The
The foundation would be willing to do so if the CRA could assure the donor there would be no “negative impact on its registered status”.

The technical interpretation first refers the donor to Guidance CG-016 Qualified donees – Consequences of returning donated property, and notes that in most cases a charity cannot return a gift. It then says that there are some cases in which a charity may be obligated to return gifts due to trust law, but that those are ultimately a decision for the court, rather than the CRA, to make, as those scenarios do not fall under the ITA. As to the tax consequences, the letter points to the rules under the ITA which apply in situations where there was no gift at law or there was a gift at law that needed to be returned, and the charity had given the donor a charitable donation receipt. In such a case, the donor cannot retain the tax benefit of such a receipt.

For the potential impact on a qualified donee, the letter refers to Guidance CG-016 and to the “Returning a gift to a donor” webpage. It recommends that “before returning gifted property, qualified donees should determine if other provincial or federal legislation might affect their ability to legally return donated property.” It further warns that “a registered charity that returns gifted property could be regarded as making a gift to a non-qualified donee or providing an undue benefit, which are contraventions of the Act and could result in sanctions that include revocation of registered status.” The letter ends by saying that the determination of whether the gift can be legally returned is beyond the scope of the technical interpretation. The view is an important reminder that when donors and charities are discussing the potential return of charitable property, the common law and provincial jurisdiction should also be considered in addition to any potential income tax consequences.

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E. CORPORATE LAW UPDATE

1. Corporations Canada Dissolves Part II CCA Corporations

On February 13, 2017, Corporations Canada released a notice advising that all federal corporations created under Part II of the Canada Corporations Act (“CCA”) needed to have completed their transition to the CNCA and have received their certificate of continuance by July 31, 2017. Notwithstanding the original deadline of October 17, 2014 for CCA Part II corporations to continue under CNCA, there were still a number of federal not-for-profit corporations that had not done so and that received notices of pending dissolution from Corporations Canada.

Following this deadline, Corporations Canada dissolved most Part II CCA corporations that had not continued by the deadline. However, Corporations Canada is also continuing to work with a small number of corporations that have filed transition applications but have not completed their continuance due to various deficiencies. Apart from this small exception, all federal not-for-profit corporations now operate under the CNCA or have been dissolved. After all Part II CCA corporations have been continued or dissolved, the process to repeal Part II of the CCA and its regulations can begin. However, Part II CCA corporations dissolved because they failed to transition to the CNCA can apply to be revived and transitioned into the CNCA in one step by submitting Form 4032: Articles of Revival (transition) after having obtained approval from the members. For more information see Corporations Canada’s Revival (transition) guide.  

2. Corporations Canada Increases Online Services

In accordance with a May 17, 2017 announcement, Corporations Canada has begun providing a new service to allow not-for-profit corporations incorporated under the CNCA to submit requests online to amend their articles of incorporation. The service is provided through its Online Filing Centre for a fee of $200. The service standard for the amendment is “Same
day/Next Day Service”. The Online Filing Centre already allows federal not-for-profit corporations to incorporate, file annual returns, and file by-laws online, among other services.

3. **Ontario Corporations Now Required to Keep Records of Land Ownership**

On December 10, 2016, certain provisions of Bill 144, the *Budget Measures Act, 2015* (“Bill 144”),\(^{40}\) which enacted the *Forfeited Corporate Property Act, 2015* (“FCPA”)^{41}\) and the *Escheats Act, 2015* (“EA”),\(^{42}\) came into force creating new recordkeeping obligations for Ontario corporations designed to assist in dealing with situations where corporations dissolve without having properly disposed of all of their assets.

Bill 144 also introduced the new recordkeeping obligations for both new and existing Ontario corporations by way of amendments to the *Ontario Business Corporations Act* (“OBCA”)\(^{43}\) the OCA, and the ONCA (when it comes into force). These amendments provide that Ontario corporations are now required to maintain a register of ownership interests in land in Ontario at their registered office. This includes:

- The identity of each property in Ontario in which the corporation possesses an “ownership interest”;
- The date on which the corporation acquired the property and, if applicable, the date on which it disposed of it; and
- A copy of any deed, transfers or similar documents that contain the municipal address, the registry or land titles division and the property identifier number, the legal description, and the assessment roll number of each property listed on the register, if any.

“Ownership interest” is an undefined term thereby implying that these measures could extend to both legal and beneficial ownership in real property. These may also include where the corporation has an interest in property by way of lease or other arrangement. These requirements are unique to Ontario, as currently other jurisdictions in Canada in which charities

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\(^{40}\) *Budget Measures Act, 2015*, SO 2015, c 38 - Bill 144.

\(^{41}\) *Forfeited Corporate Property Act, 2015*, SO 2015, c 38, Schedule 7.

\(^{42}\) *Escheats Act, 2015*, SO 2015, c 38, Schedule 4.

\(^{43}\) RSO 1990, c B.16.
and NFPs might incorporate are not required to maintain such registers. While for some corporations the creation and maintenance of such registers will likely be straightforward, it is anticipated that corporations with a history in the province will need time and effort in order to review all prior documentation dealing with their ownership interests in land.

Corporations incorporated after December 10, 2016 must comply with the new recordkeeping requirements immediately. For corporations that were incorporated prior to December 10, 2016, they will have two years, i.e., until December 10, 2018, to comply with the new requirements.

4. **Bill 154 - Amendments to the ONCA**

Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154"),{44} was introduced in the Legislative Assembly of Ontario on September 14, 2017. In addition to other proposed amendments affecting charities and not-for-profits discussed below, Bill 154 introduces amendments to the ONCA substantially similar to those contained in Bill 85, *Companies Statute Law Amendment Act, 2014* ("Bill 85"),{45} which had died on the order paper upon the dissolution of the Provincial Parliament on May 2, 2014.

In this regard, Bill 85 had proposed a new section 207 of the ONCA that would have required that Part III OCA corporations amend their articles of incorporation by the end of the three-year transition period, even though the ONCA also contained a deemed amendment provision (subsection 207(6)). The new section 207 of the ONCA, as proposed in Bill 154, provides an extended period of validity for certain by-laws and special resolutions not added to the articles even beyond the three-year anniversary of the section coming to force. The by-laws and special resolutions that may be valid are listed in the proposed subsection 207(3) as:

- A provision respecting the number of directors of the corporation;
- A provision providing for two or more classes or groups of members;
- A provision respecting voting rights of members;

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A provision respecting delegates made pursuant to section 130 of the OCA;

A provision respecting the distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution.

Subsection 167(5.1) of the ONCA, as proposed in Bill 154, also prescribes a transition provision whereby, on the day the section comes into force, the articles of a charitable corporation are deemed to be amended in accordance with sub-subclause 167(1)(d)(i)(A) of the ONCA with regard to the distribution of property upon dissolution.

New proposed subsection 4(1.1) in Bill 154, provides that the ONCA does not apply to corporations sole, except as prescribed. As well, new proposed section 207.1 authorizes the Lieutenant Governor in Council to prescribe provisions of the ONCA and the regulations that are to apply to corporations sole and to prescribe modifications, if any.

5. Bill 154 - Amendments to the OCA

Notwithstanding the introduction of Bill 154 proposing amendments to the ONCA, it will still be a number of years before proclamation of the ONCA. As such, of immediate interest to Ontario not-for-profit corporations is that Bill 154 also contains proposed amendments to the OCA to allow Part III OCA not-for-profit corporations to enjoy some of the modernized rules contained in the ONCA and other changes that would provide more flexibility to their operations. The following are the key changes in this regard.

- Special legislation and charity law will prevail over the OCA in the event of a conflict. (The OCA is currently silent on this issue.)
- Corporations may hold members’ meetings by telephonic or electronic means, unless the by-laws of a corporation provide otherwise. (Currently, the OCA does not permit members’ meetings to be held by telephonic or electronic means.)

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47 Supra note 3, new section 117.1 will be inserted.
48 Ibid, new section 125.1 will be inserted.
Corporations will have the full capacity, rights, powers and privileges of a natural person; it will not be necessary for a by-law to be passed in order to confer any particular power on a corporation or its directors; and a corporation’s acts will be valid even if the corporation acted contrary to its instrument of incorporation, its by-laws or the OCA.\textsuperscript{49} (The OCA currently provides that corporations have the capacity of a natural person (\textit{i.e.} the corporation can engage in the same lawful activity as an individual person such as entering into contacts), and may exercise its powers outside of Ontario to the extent permitted by the jurisdiction in which it exercises those powers. The OCA also grants specific powers to not-for-profit corporations.\textsuperscript{50})

A corporation may sell, lease or exchange all or substantially all of its undertaking or all or substantially all of a part of its undertaking if authorized to do so by a special resolution.\textsuperscript{51} (This provision provides better clarity on when a corporation may sell all or substantially all of its undertaking.\textsuperscript{52})

Corporations may adopt contracts entered into prior to incorporation and thereby be bound by such contracts and the person who purported to act on behalf of the corporation ceases to be bound by or entitled to the benefits under the contract.\textsuperscript{53} (The OCA is currently silent on this issue.)

Directors and officers will be subject to a statutory objective standard of care, \textit{i.e.} by acting honestly and in good faith with a view to the best interests of the corporation and exercising the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.\textsuperscript{54} (The OCA is currently silent on this issue and therefore directors and officers are subject to the subjective standard of care under common law.)

\textsuperscript{49} \textit{Ibid}, new section 126.1 will be inserted, and the following provision will no longer apply: clauses 23(1)(a) to (p) and (s) to (v), subsection 23 (2), and sections 59, 274, and 275.

\textsuperscript{50} \textit{Ibid}, sections 274, 275, 23(1) and 133.

\textsuperscript{51} \textit{Ibid}, new section 126.2 will be inserted and clause 23(1)(m) will longer apply.

\textsuperscript{52} \textit{Ibid}, clause 23(1)(m).

\textsuperscript{53} \textit{Ibid}, new section 126.3 will be inserted.

\textsuperscript{54} \textit{Ibid}, new section 127.1 will be inserted.
• Directors may be removed by a simple majority vote. However *ex officio* directors may not be removed from office.55 (The OCA currently requires two-thirds vote to remove a director.56) A director elected by a group of members that has an exclusive right to elect the director may be removed only by a resolution passed by a majority of the votes cast by the members of that group at a general meeting.57 (The OCA is currently silent on this issue). However, the new rules would not affect the operation of any provision respecting the removal of directors contained in the letters patent, supplementary letters patent or by-laws in place prior to the proclamation of these amendments to the OCA.58

• Members may, by an extraordinary resolution (i.e. 80% of the votes cast at a members’ meeting), decide not to appoint an auditor and not to have an audit in respect of a financial year if the corporation had annual revenue in that financial year not exceeding $100,000 or a different amount prescribed by the regulations.59 (Currently, an audit exemption requires the consent in writing by all members.60 Replacing the word “income” with “revenue” provides greater clarity on its meaning. Permitting the $100,000 threshold be changed by regulations provides more flexibility.)

• The by-laws of a corporation may permit non-members (with their consent in writing) to be elected to the board of directors.61 (Currently, directors are required to be members of the corporation.62 However, the following corporations currently may elect non-members to their board if so permitted by their by-laws: hospitals within the meaning of the *Public Hospitals Act*, corporations that operate recognized stock

55 Ibid, new subsection 127.2(1) and (3) will be inserted, and s. 67 will no longer apply.
56 Ibid, sections 133 and 67.
57 Ibid, new subsection 127.2(2) will be inserted.
54 Ibid, new subsection 127.2(4) will be inserted.
59 Ibid, new section 130.1 will be inserted, and section 96.1 will no longer apply.
60 Ibid, sections 133 and 96.1.
61 Ibid, subsection 286(3) will be amended.
62 Ibid, subsections 286(1) and (2).
exchanges, and corporations under Part V of the OCA (other than a pension fund or employees’ mutual benefit society).63

- If a corporation has no directors or members, the court may make an order appointing the required number of directors.64 (This is not currently permitted under the OCA.)
- Notice of members’ meetings may be given by electronic means if conditions specified in the *Electronic Commerce Act, 2000* are met.65 (The OCA currently does not permit notice of members’ meeting be given electronically.)
- A corporation may not export out of the OCA (i.e. continue from the OCA to another jurisdiction) unless the laws of that other jurisdiction provide that the corporation continues to be liable for its obligations, that any existing cause of action, claim or liability to prosecution is unaffected, that actions and proceedings by or against the corporation may continue to be prosecuted, and that rulings, orders or judgments in favour of or against the corporation may be enforced.66 (The OCA is currently silent on these requirements.)

Bill 154 also amends various sections of the OCA in order to accommodate the filing, keeping and searching of documents in electronic format. As well, Bill 154 expands the Minister’s regulation-making powers in respect of the content, form, format and filing of various documents. The Minister, or a person designated by the Minister, will have the power to enter into agreements authorizing a person or entity to provide business filing services.

Companies that have objects in whole or in part of a social nature that are incorporated under the OCA will have five years after the proclamation of subsection 4(1) of Schedule 7 of Bill 154 to continue by special resolution under the ONCA, the OBCA or the *Co-operative Corporations Act*,67 otherwise they will be dissolved. If a social company has more than one class of shareholders, the continuance must be approved by each class of shareholders by a separate

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63 *Ibid*, subsection 286(3).
64 *Ibid*, new subsection 288(4) will be inserted.
65 *Ibid*, sections 93, 161 and 296 will be amended such that notice must be given “in writing”. Section 6 of the *Electronic Commerce Act, 2000* (SO 2000, c 17) provides, with limited exceptions in section 31, that documents in writing can be in electronic form where they are (a) accessible by the other person so as to be usable for subsequent reference; and (b) capable of being retained by the other person."
66 *Ibid*, new subsection 313(1.0.1) will be inserted.
67 RSO 1990, c C.35.
vote. Twenty-five years after this new provision comes into force, the OCA will no longer apply to social companies that are incorporated by or under a general statute but will continue to apply to social companies incorporated by or under a special statute.\(^{68}\)

There are also other proposed amendments to the ONCA that are complementary to or consistent with the ONCA. These include: only insurance companies under Part V of the OCA may be incorporated under Part II or III of the OCA,\(^ {69}\) companies will no longer be permitted to apply for supplementary letters patent to convert into corporations with or without share capital;\(^ {70}\) only insurers may apply for supplementary letters patent to convert a company into a public company, a private company or a corporation without share capital;\(^ {71}\) and the Minister may cancel under subsection 317(1) of the OCA for sufficient cause certain orders and other documents.\(^ {72}\)

Lastly, a word of caution to those who are interested in reading the proposed OCA amendments contained in Schedule 7 of Bill 154 in relation to when which provision would take effect. Schedule 7 contains 85 sections. Different sections come into force on different dates, with section 85 listing which sections would come into force on the 25\(^{th}\) anniversary of the said proclamation, on the day when Bill 154 receives Royal Assent, on the 60\(^{th}\) day after Bill 154 receives Royal Assent, on the day when the ONCA comes into force, or on the 3\(^{rd}\) anniversary after Bill 154 receives Royal Assent; with the balance of sections coming into force on a day named by proclamation of the Lieutenant Governor.\(^ {73}\)

F. FEDERAL LEGISLATION UPDATE

1. Budget Implementation Act, 2016, No. 2 Passes

On December 15, 2016, Bill C-29, A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures (the “Budget

\(^{68}\) Supra note 3, section 2 will be amended and new section 2.1 will be inserted and re-enacted

\(^{69}\) Ibid, sections 17 and 118.

\(^{70}\) Ibid, clause 34(1)(q).

\(^{71}\) Ibid, subsection 34(10).

\(^{72}\) Ibid, subsection 317(1).

\(^{73}\) Supra note 44, section 85 of Schedule 7.
Implementation Act, 2016, No. 2”),74 which was released October 19, 2016 and implements portions of the 2016 Federal Budget, received Royal Assent. Of primary interest to charities is clause 42 of the Budget Implementation Act, 2016, No. 2, which implements amendments to the definition of total charitable gifts, total cultural gifts, and total ecological gifts in subparagraph 118.1(1) of the ITA, specifically with regard to gifts made by an individual’s graduated rate estate. Clause 42 of the Budget Implementation Act, 2016, No. 2 also implements the changes to ITA subparagraphs 118.1(5.1) and 118.1(19)(c), which deal with gifts by an individual’s graduated rate estate and excepted gifts in respect of the gift of non-qualifying securities. These changes apply to the 2016 and subsequent taxation years.

Also potentially of interest to charities and NFPs is clause 71 of the Budget Implementation Act, 2016, No. 2, which adds Part XIX Common Reporting Standards to the ITA, and came into force on July 1, 2017. Part XIX “implements the reporting and due diligence standards of the Common Reporting Standard … developed by the Organisation for Economic Co-operation and Development that underpins the automatic exchange of financial account information.” It will require financial institutions to report certain information to the CRA on reportable accounts.

2. CASL Private Right of Action Implementation Suspended

On June 2, 2017, the Governor General in Council issued an Order in Council (the “new Order in Council”)75 amending Order in Council P.C. 2013-1323,76 the Order fixing the coming into force dates for sections of CASL. The new Order in Council repealed a paragraph in Order in Council P.C. 2013-1323 that set the date for the coming into force of a private right of action under CASL.

74 Bill C-29, A second Act to implement certain provisions of the budget tabled in Parliament on March 22, 2016 and other measures, 1st Sess, 42nd Parl, 2015-16-17 (assented to 15 December 2016).
Innovation, Science and Economic Development Canada issued a press release to accompany the repeal, explaining that the government is suspending the implementation of the private right of action “in response to broad-based concerns raised by businesses, charities and the not-for-profit sector.” The press release notes that what is needed is “a balanced approach that protects the interests of consumers while eliminating any unintended consequences for organizations that have legitimate reasons for communicating electronically with Canadians.” As such, a parliamentary committee will be asked to review the legislation. The Canada Gazette further noted that the delay was for the purpose of promoting “legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk.”

3. **End of CASL Transition Period**

On July 1, 2017, an important provision of Canada’s anti-spam legislation (“CASL”), the transition period in section 66 of CASL, ended. When CASL came into force on July 1, 2014, section 66 of CASL provided a three-year transition period for implied consent for organizations to have been able to send commercial electronic messages arising out of existing business or non-business relationships. Implied consent under CASL, *e.g.* donations to registered charities or membership in non-profit organizations, is generally tied to a statutory time limit of two years or less. However, during the transition period, implied consent arising from existing business or non-business relationships created prior to July 1, 2014 was effective until the end of the three-year period. The intention of the transition period was to permit organizations to which CASL applies to obtain express consent from these individuals. As of July 1, 2017, this transition period ended.


78 Supra note 75.

79 An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, SC 2010, c 23.
Implied consent obtained after July 1, 2014 is still valid, though such implied consent is subject to the normal time limitations under CASL and was not impacted by the transition period.

G. PROVINCIAL LEGISLATION UPDATE

1. Amendment to the Ontario Employer Health Tax will Impact Registered Charities

As a matter of background concerning amendments that recently came into force, as of January 1, 2014, the amount of annual remuneration that may be exempt from Ontario’s Employer Health Tax (“EHT”) is $450,000, up from the previous $400,000. EHT is a payroll tax that all employers in Ontario are required to pay on the total remuneration paid to employees in a given year. The basic rule is that eligible employers are exempt from EHT on the first $450,000 of their total annual remuneration paid out. The amount of tax that employers are required to pay varies depending on the amount of remuneration paid. Currently the tax rates vary between 0.98% - 1.95%. Employers cannot claim the EHT exemption, though, if their annual payroll (including payroll of associated employers) is above $5 million. Eligible employers who are registered charities, however, can claim the EHT exemption even if their annual payroll is above $5 million.

As of January 1, 2017, amendments to the Employer Health Tax Act Regulations came into force whereby registered charities with two or more qualifying “charity campuses” are now permitted to claim an EHT exemption for each qualifying “charity campus”. What qualifies as a “charity campus” is summarized on the Ministry of Finance’s website and is stated as including, “all of a registered charity’s locations that are in one building, or on one parcel of land (property), or on contiguous properties (properties that touch along a boundary or at a point). If a registered charity has branches, sections, parishes, congregations or other divisions (internal divisions), a “charity campus includes all of the locations of the registered charity and all of the locations of any of its internal divisions that are in one building, or on one property or on contiguous properties.”

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An “associated employer” is any employer “who is connected by ownership by a combination of ownership and relationships between individuals” (e.g. relatives, blood, marriage, adoption). Because there is only one available EHT exemption for an employer in any given year, associated employers, whether they are associated for the entire year, or only for a specific period of time throughout the year, must consider their combined total remuneration paid to determine whether they qualify for the EHT exemption. Employers that are associated with a registered charity, however, are not required to include the registered charity’s total annual remuneration to determine whether they qualify for the EHT exemption, and are not required to share its EHT exemption with the registered charity.

2. Proposed Ontario Regulations Authorizing Charitable Corporations to Pay Directors in Limited Situations

On July 10, 2017, the Office of the Public Guardian and Trustee of Ontario (“PGT”) posted Proposal Number 17-MAG008 (the “Draft Amendments”), which contained draft amendments to Ontario Regulation 4/01 under the CAA. The Draft Amendments were open to public comment until August 29, 2017. The Draft Amendments proposed to amend Ontario Regulation 4/01 to provide relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them by outlining certain circumstances where charitable corporations would be authorized to pay directors and related persons for goods, services, or facilities. The current Ontario Regulation 4/01 does not address director remuneration. The Draft Amendments would not apply to directors of unincorporated associations or trustees of charitable trusts.

Currently, in order for directors of charitable corporations to receive remuneration in a capacity other than as a director, charitable corporations and their directors must obtain a consent order from the PGT under section 13 of the CAA. This process can be time intensive and generally requires the assistance of legal counsel. The Draft Amendments would simplify this process by dispensing with the need for a consent order in prescribed circumstances for

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82 Approved Acts of Executors and Trustees, O Reg 4/01.
charitable corporations. Under the Draft Amendments, directors would continue to be prohibited from receiving direct or indirect payment for services they provided in their capacity as directors or employees of the charitable corporation, for fundraising services, for selling goods or services for fundraising, or in connection to the purchase or sale of real property.

Before payments could be made to a corporate director or a related person, the charitable corporation would first need to meet a number of conditions set out in the Draft Amendments. For example, the amount paid must be reasonable considering the goods or services received; the amount must be paid with a view to the best interests of the charity; and the amount paid must not cause the charity to become insolvent. Before the payments may be authorized, all of the charity’s directors, as well as any persons connected to the directors that provide goods, services, or facilities, must agree in writing to a maximum amount that can be paid and directors, other than the one to be paid or connected to the person to be paid, must agree in writing that the payment meets the requirements laid out in the Draft Amendments. Further, the board must have (a) at least five voting directors for every director who is either receiving payment or connected to a person receiving payment, and (b) a minimum of four voting directors excluding such director. The director that is to be paid, and any related person, cannot attend the meeting during which the decision about payment is made.

The Draft Amendments, if enacted into law will ease the process for incorporated charities that want to rely upon their board members who can provide services in another capacity without the need for a consent order. As such, incorporated charities should continue to follow developments with respect to the Draft Amendments should they wish to be able to remunerate their directors in another capacity.

3. **Bill 154 - Amendments to the CAA**

In addition to the proposed amendments to the ONCA and to the OCA mentioned above under Corporate Law Update, Bill 154 also proposes changes to CAA permitting “social investments”. The CAA applies to all charities in Ontario and provides in section 10.1 that sections 27 to 31 of the *Trustee Act,*83 dealing with investment powers by trustees, apply to trustees and

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83 RSO 1990, c T.23.
charitable corporations holding property for charitable purposes.\textsuperscript{84} Schedule 2 of Bill 154 proposes to amend the CAA by adding sections 10.2 to 10.4 to permit “social investments” by trustees and charitable corporations holding property for charitable purposes and to exclude the application of the Trustee Act (with minor exceptions) with regard to “social investments.”

The Ministry of Economic Development and Growth, in conjunction with the Ministry of the Attorney General, has been working over the last few years to explore possible legislative changes to facilitate increased social investing by charities in Ontario. The end result of these efforts is the proposed amendments to the CAA in Schedule 2 of Bill 154, which appear to have been based to a great extent on the legislative wording contained in Part 14A of the Charities (Protection and Social Investment) Act 2016 of England and Wales.\textsuperscript{85}

a) Provision of social investments under Bill 154

Subsection 10.2(1) of the CAA, as proposed by Bill 154, provides that a “social investment” is made when a trustee applies or uses trust property in order to: a) “directly further the purposes of the trust,” and b) achieve a “financial return” for the trust. Subsection 10.2(3) defines “financial return” as an “outcome in respect of the trust property [that] is better for the trust in financial terms than expending all the property.” Subsection 10.2(4) states that the fact that a social investment may have other results, in addition to furthering of the purposes of the trust and the achievement of a financial return, does not “prevent it from being regarded as the making of a social investment.” In addition, subsection 10.2(5) states that a social investment, for the purposes of sections 10.3 and 10.4 (dealing with the power, limitation and duties involved with a social investment), “is not, for that reason alone, an investment for any other purpose.”

Proposed subsection 10.3(1) establishes the specific power of trustees to use or apply trust property to make a social investment. However, in accordance with subsection 10.3(2), a social investment may not be made “in relation to trust property that is subject to a limitation on capital being expended for the purposes of the trust, unless the trustee expects that making the social investment will not contravene the limitation or the terms of the trust allow for such an

\textsuperscript{84} Supra note 5, s. 10.1.
\textsuperscript{85} Charities (Protection and Social Investment) Act 2016 (UK), c 4.
investment.” In addition, subsection 10.3(4) provides that the power to make a social investment may be restricted or excluded by the terms of the trust.

Section 10.3 also limits the application of the *Trustee Act* for charities making social investments. Specifically, subsection 10.3(3), provides that sections 27 to 29 of the *Trustee Act* do not apply to the making of social investments, with the exception of subsections 27(3) and (4) dealing with mutual funds and common trust funds, subject to “necessary modifications.”

Proposed section 10.4 prescribes the duties of trustees with regard to making social investments. These duties are (i) the trustee has to “satisfy him, her or itself that it is in the interests of the trust to make the social investment, having regard to the benefit expected to be achieved for the trust” before making a social investment (paragraph 10.4(1)(b)); (ii) the trustee has to periodically “review the social investment of the trust property” (subsection 10.4(2)); and (iii) in both cases, before making a social investment and as part of their on-going review, a trustee “shall” determine whether, in the circumstances, advice should be obtained respecting the proposed social investment, and if so, obtain and consider the advice (paragraph 10.4(1)(a) and subsection 10.4(3)). According to subsection 10.4(4), reliance on advice obtained in accordance with this proposed section is not a breach of trust, something which will no doubt encourage trustees and directors of charities to seek out advice. However, there is nothing in Bill 154 which defines what type of “advice” should be obtained. Finally, subsection 10.4(5) states that the above duties of trustees cannot be restricted or excluded by the terms of the trust, which in accordance with subsection 10.2 (6) would include the constating documents of a charitable corporation.

b) Commentary

While the proposed amendments to the CAA authorising charities to make social investments is a positive development by the provincial government in support of the charitable sector in Ontario, and in particular foundations, the wording of the proposed amendments raises a number of questions and issues that will need to be addressed if Bill 154 is enacted as currently drafted. Some of those issues are highlighted below.
1) As a result of Bill 154, charities will generally need to categorize investment decision making into one of three categories:

   i) An investment as a prudent investor under the *Trustee Act* that is focused on a financial return;

   ii) A social investment under the proposed amendments to the CAA in Bill 154 that is focused on a hybrid approach of directly furthering the purposes of the charity *and* achieving a financial return; or

   iii) A program related investment (“PRI”) under the Canada Revenue Agency (“CRA”) *Guidance on Community Economic Development Programs* (CED Guidance),\(^86\) that permits the use of an investment vehicle to “directly further one or more of a charity’s charitable purposes,”\(^87\) and in doing so “may generate a financial return, [although] they are not made for that reason.”\(^88\) If an investment meets the CRA definition of a PRI, the value of the PRI would not be included in the asset base for the calculation of the 3.5% disbursement quota, i.e., “property not used directly in charitable programs or administration” under the ITA.\(^89\) However, the disbursement would not be considered to be a charitable expenditure for purposes of meeting the 3.5% disbursement quota obligation of the charity, other than with regard to possibly including lost opportunity costs of the PRI.\(^90\) Most importantly, if an investment by a charity constituted a PRI in the opinion of the CRA, then the charity would be required to evidence a significant degree of “direction and control,”\(^91\) as described in the CED Guidance in order to avoid jeopardizing its charitable status.

   It remains a question of fact to be determined in the circumstances of each case whether a trustee would have made an investment under one of the above categories, or possibly

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\(^{87}\) *Ibid* at para 69.

\(^{88}\) *Ibid* at para 40.

\(^{89}\) *Supra* note 9, subsection 149.1(1).

\(^{90}\) *Supra* note 86 at para 68.

\(^{91}\) *Ibid* at para 47.
two categories, *e.g.* as a social investment *and* a PRI. However, the absence of a clear
definition in the proposed amendments in Bill 154 concerning what a social investment is
and what it is not could result in confusion for charities in deciding on what type of
investment to embark. For example, the determination of when a social investment might
cross the line and become a PRI under the CRA CED Guidance and become subject to audit
by the CRA should be the subject matter of discussion and co-ordination between the
Province of Ontario and the CRA with the issuance of some type of complementary
guidance to assist charities. Otherwise, it is possible that the CRA could conclude that
what a charity intended to be a social investment was in fact a PRI subject to the CED
Guidance, but without there being adequate direction and control or an exit plan from
such investment as required by the CED Guidance.

2) Charities that hold “endowments” where there is a limitation on the expenditure of
capital will need to determine whether making a social investment will contravene “the
limitation or [whether] the terms of trust allow for such an investment” as required by
proposed subsection 10.3(2) of the CAA. This will mean that the charity will need to
undertake a careful inventory of their investments to determine if there is any
documentation for *inter vivos* or testamentary gifts that may contain any limitation on
the expenditure of capital (including a determination of whether the definition of capital
includes realised capital gains or not) and, if there was a limitation, then either avoiding
using such funds in making a social investment or, if they are going to make a social
investment, then documenting why the trustees have concluded that they “expect” that
the contemplated social investment will not contravene the limitation on expenditure of
capital as a permitted exception under proposed subsection 10.3(2) of the CAA.

3) As explained above, proposed subsection 10.2(6) of the CAA states that the constating
documents of a charitable corporation form part of the trust for purposes of a social
investment, and proposed subsection 10.3(4) states that the terms of a trust may restrict
or exclude the power to invest in social investments. Therefore, where a power clause in
the constating documents (such as letters patent, articles of incorporation or articles of

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92 *Ibid* at para 51.
continuance) expressly states that the property of the charity is to be invested in accordance with a specific investment power (such as a prudent investment power), the question arises whether such express investment power precludes the ability of the charity to invest in a social investment. Similarly, if a charitable corporation is incorporated in a province outside Ontario and the charity carries on operations in another province as well as in Ontario, then the question is whether the charity is permitted to make social investments in Ontario where the constating documents of the charitable corporation call for charitable funds to be invested in accordance with the trustee act of the province in which the charity was incorporated.

4) Since Bill 154 proposes that sections 27 to 29 of the Trustee Act will not apply to social investments (except for subsections 27(3) and (4), dealing with mutual funds and common trust funds “with necessary modifications”), then the statutory protection from liability available to trustees with regard to prudent standard investments under subsection 27(8) of the Trustee Act will not be available when making social investments. Although proposed subsection 10.4(4) of the CAA states that reliance upon “advice” does not constitute breach of trust, the language in the proposed subsection does not provide the same extent of protection as clearly stating that a trustee is “not liable for loss” as currently provided for in section 28 of the Trustee Act. This loss of statutory protection should be a matter of some concern for trustees and directors of charities contemplating making social investments.

5) As indicated above, the proposed subsection 10.4(1) will impose a new mandatory obligation on trustees and directors of charitable corporations that they “shall determine whether, in the circumstances, advice should be obtained [...] and if so, obtain and consider the advice” before making a social investment. However, if the process to make a social investment is so nuanced that the board of a charity must consider whether they need to obtain advice (which will likely involve seeking legal advice), it raises the question about whether the proposals are in fact as practical as they should be, particularly since there is no guidance in Bill 154 concerning from whom a charity should seek advice. Remedial legislation to assist charities should be sufficiently clear on its face that lay
people on the board of trustees or directors of a charity should be able to decide if they wish to pursue a particular course of action without being required to consider retaining individuals to advise them.

While it is commendable that the Province of Ontario is undertaking a statutory initiative to assist charities in Ontario to access charitable capital for social investments, there are numerous questions and issues associated with the proposed legislation that will need to be thought through and addressed in order to avoid uncertainty and possible confusion for charities. As a result, charities, and particularly foundations, will want to closely monitor the progress of Bill 154 to see if there is clarification provided in the form of guidance, regulations, or possibly even amendments if determined to be necessary.

4. Charities Operating in Quebec are Still Required to Submit an Annual Information Return in Quebec

Although charities registered with the CRA that collect donations from Quebec residents are no longer required to register separately in Quebec, charities that operate in Quebec are still required to file the annual information return TP-985.22-V. The information return TP-985.22-V is mandatory for any charity that is "carrying on activities in Quebec" and it must be filed within 6 months after the charity's year-end.

H. OTHER CASE LAW OF INTEREST

1. Unfunded Cheque Results in Unenforceable Gift

In the decision of Teixeira v Estate of Maria Markgraf, released January 20, 2017, the Ontario Superior Court of Justice (“Court”) considered the validity of a gift of money that the donor did not actually have. The issue of the validity of a gift was raised when the payor, Maria Markgraf (“Markgraf”), made an inter vivos gift to the payee, Arlindo Teixeira, her long-time neighbour (“Teixeira”), in the form of a $100,000 cheque, despite having only $81,732 in her account.

The facts of the case were not in dispute: in appreciation for the kindness shown to her by Teixeira, Markgraf wrote a cheque for $100,000 payable to Teixeira and instructed a family
member to deliver it. Even though Markgraf had other investments with her bank amounting to a total of greater than $100,000, the account on which the cheque was drawn had only $81,732, which caused the cheque to be returned to Teixeira. By then, Markgraf had passed away, so Teixeira brought an application against the estate to enforce the gift.

In considering the issue at hand, the Court looked at the necessary elements for a valid gift: i) donative intent; ii) acceptance; and iii) sufficient delivery. It found that Markgraf had “voluntarily intended” to make the $100,000 gift and, even though she may have been mistaken as to the funds available in her account, this was sufficient to meet the donative intent element of a valid gift. The second element of acceptance was also satisfied, as Teixeira had accepted the cheque and attempted to deposit it at his bank. With regard to the third element for a valid gift, the Court acknowledges that, while not a necessary part of a contract, delivery is a basic requisite of gifts. Moreover, the Court states that “there must be an efficient delivery of the gifted property or some accepted substitute. As a rule the gift must be literally given away.” As the Court found that this third element had not been satisfied in this case, it thereby rendered the gift invalid.

The Court stated that the delivery by cheque “is neither money nor representation of money, it is only a direction to the drawer’s bank” and, thus, the gift is not complete until the cheque has cleared. In this case, because Markgraf’s account did not have sufficient funds, the Court found that the delivery of the cheque was not complete. As a result, the gift was consequently not perfected and was unenforceable. Furthermore, the decision confirmed the equitable principle of estoppel was not applicable to the facts of this case.

While this case did not involve a charity, it does serve as a reminder to charities, as well as donors, that all three elements of a gift must be present in order for the gift to be valid. Even where clear donative intent and acceptance of the gift are present, a gift may fail where it cannot be properly delivered to the intended recipient.

2. “Armchair Rule” Used by Court to Determine if Gift was an Endowment or Expendable

In The Paul Sugar Palliative Support Foundation v. Creighton Estate, released February 27, 2017, the Supreme Court of BC was called on to interpret an unclear testamentary gift to determine whether the gift was intended to be a capital endowment to be held and invested
with only the income to be expendable, or whether the full amount of the capital of the gift was intended to be expendable. While this case was only an oral decision with limited precedential value because of a lack of facts and no reference to case law, it will be of interest to legal counsel who may be called upon to determine whether a testamentary gift constitutes an endowment or is expendable.

The last will of the testator provided for a gift to the Vancouver Foundation ("VF") "to be added to the capital of the Paul Sugar Palliative Support Foundation" (the "PSPSF"). The PSPSF is currently a registered charity and, according to the PSPSF website, the Vancouver Foundation manages PSPSF’s funds. Complicating matters was the fact that the testator, while he was alive, had established the PSPSF as a “permanent fund” through an inter vivos deed of gift to the VF (the “Deed of Gift”), but which fund had not been actualised before the testator died because the minimum monetary threshold had not been reached. The terms of the PSPSF stated that the VF was to “hold the capital of the fund permanently, and...invest and administer it in accordance with the provisions of the Vancouver Foundation Act”.

To aid in its interpretation of the will, the court relied upon the “armchair rule”, which it explained was the rule where “the court has to endeavour to place itself in the position of the testator at the time when the last will was made, and give due weight to the circumstances" when called upon to interpret an unclear provision in the will in question. While the court gave no reference to case law as authority for this rule, the "armchair rule" was originally set out in Boyes v Cook, where the High Court of Justice of England and Wales originally stated that "[the court] may place [itself], so to speak, in the testator’s arm-chair, and consider the circumstances by which he was surrounded when he made his will to assist [it] in arriving at his intention", and was more clearly articulated in Re Burke, a 1959 Ontario Court of Appeal decision. Utilizing this rule and based on the testator’s previous gifts to the V, as well as the understanding of the lawyer who drafted the will (who was also the executor of the will), the court found that the testator had apparently intended that the gift be given to the PSPSF without limitations, and that the term "capital" was not intended to limit how the gift was to be used. The court held that, despite the gift’s initial appearance to be an endowment based upon the wording of the last will of the testator as well as the wording of the Deed of Gift that had been referenced in the will, the
testator had not intended that the capital of the testamentary gift be held and invested as an endowment. The balance of the decision dealt with the question of costs of the court application.

This decision underscores the importance of ensuring that testamentary charitable gifts are carefully drafted to ensure that they accurately reflect what the testator actually intends. Otherwise, the estate or the charity may be forced to make an expensive and potentially contentious court application for a judicial interpretation, which might include applying the “armchair rule” in order to determine what the testator had really intended, sometimes with surprising results, as with this decision.

3. SCC Grants Leave to Appeal from Case Involving Unfair Church Discipline

On April 13, 2017, the SCC granted leave to appeal in the decision of Wall v Judicial Committee for the Highwood Congregation of Jehovah’s Witnesses (“Wall”). Leave to appeal was sought by the Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses and the Highwood Congregation of Jehovah’s Witnesses (the “Congregation”). The SCC has assigned the hearing date of November 2, 2017. In the Wall case (which was released on September 8, 2016), a majority on the Alberta Court of Appeal affirmed that courts have the legal jurisdiction to review decisions made by a religious organization where discipline or expulsion of a member was carried out in a manner that does not reflect principles of natural justice.

In finding that Mr. Wall’s expulsion from the membership in the Congregation was done using procedures that did not reflect principles of natural justice, the Alberta Court of Appeal noted that Mr. Wall was not provided with the details of the allegations made against him or an explanation of the discipline process that he would face prior to expulsion; he was not advised whether there would be a record of the proceedings, nor did he receive a written reasons of either the Judicial Committee or the Appeal Committee.

The SCC’s ruling on this case will have a significant impact on how charities and not-for-profits are able to discipline their members vis-à-vis principles of natural justice.
4. Orders Amending By-laws Outside the Jurisdiction of Arbitrators

On May 30, 2017, the Ontario Superior Court of Justice delivered its decision in Cricket Canada v Bilal Syed, whereby it partially allowed an application by Cricket Canada, a national sports organization incorporated under the CNCA, to set aside in part an arbitral award (the “Award”) that had ordered Cricket Canada to include specific provisions in its by-laws in order to implement the arbitrator’s decision.

The Award concerned a claim by a candidate for Cricket Canada’s board of directors who, after an unsuccessful bid for directorship, challenged the organization in arbitration before the Sport Dispute Resolution Centre of Canada (the “SDRCC”). Among other things, the claimant argued the election had not been carried out in accordance with Cricket Canada’s by-laws, and that the process had been compromised by discrimination and a lack of neutrality.

At the end of the proceeding, the arbitrator found no discrimination. However, he did find some “improprieties” in the election process. Specifically, the Award ordered Cricket Canada to amend its by-laws to include the following: i) that any person involved in selecting the members of the Nomination Committee be prohibited from running in the election; ii) that candidates who, as members of the board of a provincial sports organization, had voting rights to elect the board of Cricket Canada, must resign their position before the election; and iii) to prohibit the exchange of benefits for votes.

Cricket Canada brought an application before the Ontario Superior Court of Justice (“Court”) to challenge the portion of the Award instructing it to amend its by-laws. It alleged that, even though there was no formal arbitration agreement as required by Cricket Canada’s dispute resolution policy, the extent of the jurisdiction granted to the arbitrator was reflected in the provisions of the SDRCC Code, as well as in the party submissions in the arbitration. The Court agreed these documents did not grant the arbitrator the jurisdiction to order a change in the by-laws and policies of Cricket Canada because these were not part of the dispute. In the words of the Court: “[w]hile the Arbitrator could consider the by-laws as they affected [the claimant’s] candidacy, he had no jurisdiction to tell Cricket Canada that they should be changed.”

In the view of the Court, the aspects of the Award challenged by Cricket Canada were each a “core issue of internal governance” and outside the scope of authority of the arbitrator,
who had been called to determine the procedural fairness of the election process and not the rules that governed that process, provided such rules were in compliance with the CNCA. Following previous decisions suggesting that, absent gross irregularities in the electoral process, a decision maker should not readily interfere with the internal governance of a corporation, the Court asserted that “[n]on-profit organizations […] should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair.” Finally, the Court concluded that introducing changes to Cricket Canada’s by-laws, policies and procedures was a matter for the members to decide after their own negotiations and consultations, and could not be imposed unilaterally by the arbitrator.

5. **Tribunal Upholds Religious School Right to Reject Applicants Based on Creed**

On July 5, 2017, in *HS v The Private Academy*, the Human Rights Tribunal of Ontario (the “HRTO”) dismissed three applications by a same-sex married couple (the “Parents”) alleging discrimination by an Evangelical Christian school (the “School”) that refused to admit their child into its preschool program. The Parents argued the School discriminated with respect to services against their child because of sex, creed, family status and marital status. However, the School responded that it was entitled to rely on the exemption in section 18 of the Ontario *Human Rights Code* (the “Code”) because it, as a “special interest organization”, is primarily engaged in serving the interest of persons identified by a particular creed and it is entitled to restrict participation to parents who subscribe to its creed. This decision provides an important precedent concerning the application of the protection contained in section 18 of the Code for organizations primarily dedicated to providing services, goods and facilities to individuals identified by any of the prohibited grounds of discrimination, such as creed, sex, age, marital status, family status or disability, in their specific communities without the obligation to extend equal treatment to the broader public.

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a) Background

The School was established as an alternative to the public school system for parents who shared the same Evangelical Christian values and traditions. It provided a “biblically-based curriculum in a Christ-centred learning environment”, where “the school functions as an extension of the home, to support parents in their ‘responsibility before God’ to raise and teach children.” Specifically, the School provided parents with a handbook (the “Handbook”) containing its Mission Statement, Statement of Faith, Core Family Values, and Lifestyle Policy, which include the beliefs that a human being exists from the time of conception and that marriage is between one man and one woman.

b) Special Interest Organization Exemption

Section 1 of the Code prohibits discrimination when providing “services, goods and facilities” based on a person’s “creed” or “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability.” However, section 18 of the Code provides special interest organizations with an exception to the section 1 prohibition when the organization is “primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination.”

In applying the requirements in section 18, the HRTO applied the following three-part test adopted in two cases of the tribunal: Kostiuk v. Toronto Community Housing Corporation and Martinie v. Italian Society of Port Arthur:

1. Is the entity a religious, philanthropic, educational, fraternal or social institution or organization?
2. Is the institution or organization “primarily engaged in serving the interests of persons identified by a prohibited ground”?
3. Is the membership or participation in the institution or organization restricted to those identified by that prohibited ground?

94 Ibid, section 18.
While recognizing the harm caused by discrimination and the disadvantages that members of different groups face, the HRTO found the School had met all three elements and that it may rely on section 18 of the Code as a full defence to what would otherwise be discrimination. The School was allowed to restrict admission only to those who shared its professed creed.

The adjudicator further clarified that section 18 did not preclude special interest organizations from providing services to the broader community as long as they are “primarily engaged” in servicing members of a group identified by a prohibited ground, as it was in this case.

The HRTO held that the prohibited ground was the School’s creed, and that the Handbook had a clearly stated mission to support parents who shared the faith-based beliefs supported by the School. It further held that, even though the Parents did not object to their child learning different views, “[t]o obligate the school to admit a child whose parents do not share those beliefs is to encroach on the rights of the parents served by the school to practice the creed and religion they sincerely believe in.”

c) Commentary

This tribunal decision serves as a useful reminder that charities and not-for-profits, and particularly religious organizations, may be exempt from the requirement to provide equal treatment with respect to services, goods and facilities, without discrimination, under section 1 of the Code if they meet the requirements for the exemption under section 18 of the Code. However, the record of the HRTO on this point consists of very few decisions and the courts have yet to directly address what constitutes the requirements for the exemption under section 18 of the Code, although some principles can be drawn from the Christian Horizons case. Therefore, religious organizations that wish to rely on the section 18 exemption should remember that the protection provided under section 18 will largely depend upon the circumstances of each case and whether it meets the three elements referred to above.
I. CONCLUSION

The breadth and number of developments that have occurred in the area of charity law during the last 12 months underscore how complicated the law involving charities has become in Canada. As such, it is increasingly important for practitioners who are interested in working with the charitable sector to keep abreast of developments in the law with regard to charities as they occur. Hopefully this paper will have been of some help in this regard.
UPDATE ON CHARITY LAW
Current as of October 4, 2017

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J. CASE LAW APPENDIX

Boyce v Cook, (1880) 14 Ch D 53
Cricket Canada v Bilal Syed, 2017 ONSC 3301
HS v The Private Academy, 2017 HRTO 791
Kostiuk v. Toronto Community Housing Corporation, 2012 HRTO 388
Ontario Human Rights Commission v Christian Horizons, 2010 ONSC 2105
Ploughman v The Queen, 2017 TCC 64
Re Burke, [1960] OR 26; 20 DLR (2d) 396
Teixeira v Estate of Maria Markgraf, 2017 ONSC 427
The Paul Sugar Palliative Support Foundation v Creighton Estate, 2017 BCSC 502
Wall v Judicial Committee for the Highwood Congregation of Jehovah’s Witnesses, 2016 ABCA 255