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## Mohawk College

Hamilton – December 17, 2013

### 2013 Essential Charity Law Update

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### OVERVIEW OF SELECTED TOPICS

- A. Federal Budget 2013
- B. Other Recent Federal Initiatives
- C. Highlights of Recent CRA Publications
- D. Corporate Law Update
- E. Selected Case Law

For more information on these topics, please see an article by the author titled "Essential Charity Law Update" for the Law Society of Upper Canada at <http://www.carters.ca/pub/article/charity/2013/tsc1112.pdf>

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### A. FEDERAL BUDGET 2013

- On March 21, 2013 the federal government announced the 2013 Federal Budget ("Budget 2013")
- The Budget included a so-called "First-Time Donor's Super Credit" ("FDSC") to encourage new donors
- However, the Budget included little from the Standing Committee on Finance ("SCOF") Report, which was released in February 2013 and was intended to be taken into consideration for Budget 2013
- Given the present economy, the charitable sector is lucky that there were any new charitable donation tax incentives at all included in Budget 2013



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- Hopefully, some of the other recommendations from the SCOF Report will make their way into future federal budgets, such as the "Stretch Tax Credit for Charitable Giving" proposed by Imagine Canada
- A portion of Budget 2013 was implemented on June 26, 2013 through the enactment of Bill C-60, *Economic Action Plan 2013 Act, No. 1*
- Portions of Budget 2013 were implemented through Bill C-4, *Economic Action Plan 2013 Act, No. 1*, which received Royal Assent on December 12, 2013, while other provisions in Bill C-4 are to come into effect at later specified dates

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**1. Temporary One Time Donation Tax Credit for "First-Time Donors"**

**TEMPORARY**

- This new tax credit, implemented through Bill C-60, is designed to encourage donors who have not donated within the last five years to give to charity and is only available where neither a donor nor his or her spouse or common-law partner has claimed a charitable donation tax credit in the five previous tax years
- When applicable, there is to be an additional one time 25% tax credit for "first-time" donations of up to \$1,000 of a gift, provided that the gift is made in cash
- Therefore, for a gift of \$1,000, an additional tax credit of \$250 is available
- However, the FDSC can only be claimed once between 2013 and 2017 tax years

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**2. Early Collection of Amounts Owing from Donation Tax Shelters**

- Bill C-60 permits CRA to proceed with collection actions on 50% of the disputed tax, interest or penalties that result from the disallowance of a donation claimed with respect to a tax shelter
- CRA will be able to proceed with these actions even before the ultimate liability of the donor has been determined through the objection and appeal process
- While donation tax shelter schemes should be discouraged, it is arguably unfair to permit CRA to collect taxes, fines, and penalties before the tax payer has exhausted all avenues of appeal



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**3. Extension of Reassessment Period for Donors to Registered Tax Shelters**

- As part of its effort to balance the budget, the federal government has taken a hard line on various tax loopholes, particularly those involving tax shelters
- This change, set out in Bill C-4, is deemed to have come into force on March 21, 2013, and extends the normal reassessment period with respect to participants in a tax shelter or "reportable transactions" where the information return required to be filed by the tax shelter or reportable transaction is not filed on time, or at all, by a period of a further 3 years after the date that the information return has been filed (for a total of 6 years)



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**4. New Rules Concerning Collection of GST/HST on Paid Parking Affecting Charities**

- As of January 1, 2014, Budget 2013 (Bill C-4) will amend the *Excise Tax Act* to clarify that public sector bodies, i.e., municipalities, universities, public colleges, school authorities, hospital authorities, charities, non-profit organizations or government are not exempt from collecting and remitting HST/GST on supplies of paid parking



**5. Repeated Focus on Transparency and Accountability in the Charitable Sector**

- The federal government will encourage donations and further enhance public awareness, reduce red tape, and increase transparency and accountability in the charitable sector, by working with organizations in the sector, including Imagine Canada



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**6. Federal Government Recommits to Supporting Social Finance**

- The federal government will continue to "bring together key players in the non-profit and private sectors to develop investment-worthy ideas and tap the potential of the social finance marketplace to promote economic growth and prosperity"



**7. Amalgamation of the Department of Foreign Affairs and International Trade with CIDA**

- The Department of Foreign Affairs and International Trade and the Canadian International Development Agency were amalgamated into the new Department of Foreign Affairs, Trade, and Development (DFATD)

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**B. OTHER RECENT FEDERAL INITIATIVES**

**1. Technical Tax Amendments Act 2012**

- Bill C-48 received Royal Assent on June 26, 2013, bringing into force the *Technical Tax Amendments Act*
- The key elements of Bill C-48 applicable to charities (which administratively has already been in effect since 2002) are as follows:
  - a) The split receipting rules broaden the circumstances in which a donor is entitled to a charitable gift receipt
    - Donors are now entitled to a charitable gift receipt even if an “advantage” is received as a result of making a gift to charity



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- The amount of the gift is the “eligible amount”, i.e., the fair market value of the property donated minus the value of the “advantage”
- b) Definitions of “charitable organization” and “public foundation” in s. 149.1(1) were amended
  - Large capital contributions from a single person or group of persons not dealing at arm’s length with one another will not preclude an entity from qualifying as a “charitable organization” or a “public foundation”, provided that such person or persons do not control the charity



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- c) There is now an additional basis upon which charitable registration may be revoked under ss. 149.1(2) to (4)
  - Charitable registration can be revoked where a registered charity makes a “gift” to a person or entity other than a “qualified donee”,
  - There is an exception where the transfer was in the course of the charity carrying on charitable activities
- d) The determination of the fair market value of property that is the subject of a gift has been changed in the limited circumstances described in new s. 248(35), (generally where the donor acquired the property less than three years before making the gift)



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e) Section 6(1)(a)(vi) has been added to provide a new exclusion from the calculation of a taxpayer's employment of any benefit under a program offered by an employer to assist in furthering education provided that:

- The benefit is received or enjoyed by an individual other than the taxpayer;
- The employee taxpayer deals with the employer at arm's length; and
- It is reasonable to conclude that the benefit is not a substitute for salary, wages, or other remuneration of the taxpayer

• The exclusion is retroactive, applying to such benefits received on or after October 31, 2011



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## 2. Bill S-14, Fighting Foreign Corruption

- Bill S-14, *Fighting Foreign Corruption Act*, amending the *Corruption of Foreign Public Officials Act*, received Royal Assent on June 19, 2013
- It removed the words "for profit" from the definition of business in s.2 so that it is now defined as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere"
  - The prohibition on bribery and books and records offences now apply to organizations involved in any business or undertaking in a foreign country, regardless of profit motivation or lack thereof



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- This modified definition could impact charities carrying on activities outside of Canada where their programs in a foreign jurisdiction include a "related business" activity permitted under the ITA, or a charitable program that involves an inherently commercial element, such as microfinance
- A second important amendment will repeal the "facilitation payment" exemption provision of the *Corruption of Foreign Public Officials Act* on a date to be fixed by order of the Governor in Council
  - Currently, such facilitation payments are excluded from the prohibition on bribery
  - As a result, in the future, charities could be exposed to possible criminal liability for activities which, up to now, have been permitted

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### 3. Bill S-202 Could Eliminate Credit Card Acceptance Fees for Charities

- Bill S-202, *An Act to Amend the Payment Card Networks Act (credit card acceptance fees)*, received first reading on October 17, 2013
- It proposes to limit credit card acceptance fees charged by "designated payment card networks" to merchants who accept payment by credit card, eliminating credit card acceptance fees being charged to charities
  - Currently, only MasterCard and Visa are proposed to be "designated payment card networks"
- If passed without amendments, Bill S-202 would benefit charities by allowing donations to be made by credit card without additional credit card acceptance fees

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### 4. Bill C-28, Anti-Spam Legislation

- On December 4, 2013, the Minister of Industry announced that Bill C-28 (the "Anti-Spam Legislation") will come into effect on July 1, 2014
- The Anti-Spam Legislation will prohibit the sending of commercial electronic messages unless the sender has consent and the message contains prescribed information
- Final regulations now provide an exemption for messages sent by or on behalf of charities that have a primary purpose of raising funds for the charity
  - This is not a full exemption from all commercial electronic messages from charities
  - This exemption only applies to charities (i.e. non-profit organizations are not exempt)



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## C. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

### 1. Guidance on How to Draft Purposes for Charitable Registration

- On July 25, 2013, CRA released its Guidance on How to Draft Purposes for Charitable Registration
- The Guidance contains CRA's recommended approach to drafting charitable purposes, identifying three key elements of charitable purposes, including:
  - 1) The Charitable Purpose Categories
    - The purpose must be exclusively charitable (subject to limited exceptions) falling within one or more of the following four categories:
      - Relief of poverty
      - Advancement of education
      - Advancement of religion



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**BENEFITS**

- Other purposes that are beneficial to the community in a way that the law regards as charitable and provide a benefit to the public or a sufficient segment of the public
  - It can be met by using the wording of the particular category, (e.g. “advancement of religion”)
  - For the fourth category, it is necessary to specify the particular purpose within that broad category

2) The Means of Providing the Charitable Benefit

- The purpose should define the scope of activities conducted to directly further the purpose and ensure the provision of a charitable benefit

3) The Eligible Beneficiary Group

- The charitable benefit should be provided to the public or a sufficient section of the public

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**GUIDANCE**

- The Guidance provides definitions of the first three categories of charitable purposes which synthesize a complicated body of case law in each category
- This appears to be the first time that a CRA Guidance has provided a definition with respect to the charitable category of advancement of religion, defining it as:
  - “manifesting, promoting, sustaining, or increasing belief in a religion’s three key attributes, which are: faith in a higher unseen power such as a God, Supreme Being, or Entity; worship or reverence; and a particular and comprehensive system of doctrines and observances”
- The Guidance addresses various other factors regarding charitable purposes:

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- Charitable purposes should not be too broad or vague so that CRA can access whether it is exclusively charitable and not open to interpretation
- Organizations pursuing unstated purposes through activities that are not charitable are not eligible for charitable registration or maintaining charitable registration if subject to an audit

**REVIEW**

- The CRA offers a one-time review of:
  - Proposed purposes in draft governing documents of organizations wishing to attain charitable status
  - Proposed amendments to governing documents and a detailed statement of activities of organizations wishing to amend such documents

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## 2. Guidance on Purposes and Activities Benefiting Youth

- On June 24, 2013, CRA Charities Directorate released its Guidance dealing with organizations that benefit youth
- The Guidance replaces the earlier CPS-015 Registration of Organizations Directed at Youth
- The Guidance describes how CRA determines whether an organization that benefits youth is eligible to become a registered charity under the ITA or presumably can continue as a charity if subject to an audit by CRA



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- Whereas the former policy defined youth with respect to age, the new Guidance defines "Youth" as "young people, without restriction to a specific age range, which will now depend on the nature of the charitable purposes and activities in question."
- The Guidance also defines "at-risk youth" as "youth who are in danger of not making a successful transition to healthy and productive adulthood as a consequence of a range of possible issues, including, but not restricted to, learning difficulties, socio-economic environment, social relationships, and family/school situations."
- Purposes that benefit youth may fall under any of the four categories of charity described in the Guidance on How to Draft Purposes for Charitable Registration

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- Eligible beneficiaries are those people who may qualify to receive the benefits from the charitable purpose or from its respective activities
- Purposes may either allow all youth or particular youth to benefit
- The public benefit that is delivered by a charitable purpose needs to be "a reasonably direct result of the purpose and activities"
  - Incidental activities that do not further the purpose will not meet this public benefit requirement
- An organization must use "substantive evidence of a causal connection" to show that an activity can provide a public benefit by structuring and focusing activities to address the identified youth problem

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- An organization can demonstrate structure and focus through:
  - the activity's form (e.g. structured discussions);
  - the communications between qualified individuals and youth; and
  - roles and responsibilities of youth in activities (e.g. allowing youth to participate in supervisory roles)
- The Guidance outlines various examples of charitable purposes and activities relating specifically to youth:
  - Purposes with a "teaching or learning component"
  - Social or recreational activities that further a charitable purpose
  - Sports activities designed to address youth problems, provided that there is a causal link between the activity and the charitable benefit



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### 3. Guidance on the Promotion of Health and Charitable Registration

- On August 27, 2013, CRA released a new Guidance on the Promotion of Health and Charitable Registration (CG-021 replacing earlier policies)
- The Guidance states that the promotion of health is a charitable purpose upon which organizations may be eligible for charitable registration
- The Guidance defines the promotion of health as "directly preventing or relieving physical or mental health conditions by providing health care services or products to eligible beneficiaries"
- Promotion of health is a charitable purpose under the following two conditions:



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- It provides services or products to the public, thereby directly preventing and/or relieving a physical or mental condition; and
- It must meet relevant requirements for quality and safety

- Additionally, to be eligible for charitable registration, promotion of health must:
  - Be provided only to eligible beneficiaries (the public or a sufficient section of the public)
  - Not provide unacceptable, non-incident private benefits
- The Guidance divides health related purposes into four categories:



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- Core health care
- Supportive health care
- Protective health care
- Health care products
- The Guidance discusses special topics related to healthcare which may further charitable purposes:
  - Complementary or alternative health care services
  - Physical fitness and wellness
  - Providing information as a charitable activity
  - Providing medical clinics
  - Providing health care services in underserved areas or areas of social and economic deprivation
- Charities may charge fees, as long as the fees do not further a profit purpose



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- The Guidance states that some health-related activities may further other charitable purposes as well, such as relieving poverty, advancing education, and advancing religion in the charitable sense, as described below:
  - There must be “a clear and material connection between the activity and the religion’s key attributes”
  - Eligible beneficiaries are the public at large
  - There are two situations in which health-related activities may further advancement of religion:
    - Providing health care to the public, and by doing so, promoting the doctrines of a religion
    - Providing health care to religious staff, including those retired, in support of religious contribution or service



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#### 4. Guidance on Foreign Activities Changing Rules on Capital Property in a Foreign Country

- On an earlier date (likely in June 2012), Appendix B of CRA Guidance - CG-002 “Canadian Registered Charities Carrying Activities Outside of Canada” was amended
- It is now titled “What if a charity wants to transfer capital property to a non-qualified donee in a foreign country?”
- CRA has now made it much more challenging for a charity operating in a foreign jurisdiction to transfer ownership of capital property to a non-qualified donee:
  - Transferring such ownership is now only permitted in the following three circumstances:
    - If the jurisdiction in which the charity operates prohibits foreign ownership of capital property



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- If the capital property is transferred to relieve poverty by assisting communities develop into self-sufficient communities
- If the charity has proof that it has unsuccessfully made every reasonable effort to gift the capital property to a qualified donee and to sell it at fair market value

- The amendment may also affect the basic elements of a written agreement between the parties in such situations situation, as set out in Appendix F of the Guidance
  - Appendix F will presumably now need to be read subject to the more onerous requirements above

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### 5. New T3010(13) and T4033 Forms Released



- CRA released new T3010 forms for charities with fiscal periods ending on or after January 1, 2013 in response to Budget 2012 amendments (Bill C-38) requiring that charities give more details about their political activities
  - Bill C-38 amended the definition of “political activity” under s. 149.1(1) of the ITA to include “the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee”
  - Bill C-38 also required that charities disclose more information concerning their political activities
- The new T3010(13) asks if the charity carried on any political activities during the fiscal year, including “gifts to qualified donees...intended for political activities.”

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- A charity that participates in political activities must complete Schedule 7 and:
  - describe its political activities, including gifts made to qualified donees intended for political activities
  - explain how these political activities relate to its charitable purpose
  - disclose how it has conducted its political activities
  - disclose the political activity that the funds indicated on line 5032 were intended to support and the amount received from each country outside Canada
- Additionally, CRA has developed a number of pages on its website explaining key aspects of its Policy Statement CPS-022, Political Activities to help charities comply with its political activities requirements

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**6. CRA On Distinction Between Amalgamations, Mergers and Consolidations**

- On August 26, 2013, a new CRA webpage was posted to clarify the important distinction between amalgamations, mergers, and consolidations
- Amalgamations bring memberships, assets, and liabilities of both charities into one new entity
  - The original charities continue as one entity, but are not dissolved
  - New entity may choose which of the original charities' Business Names ("BN") to retain
- Mergers involve the winding up of one or more entity's affairs and the transfer of the wound up entity's assets to another registered charity
  - Wound up charities voluntarily revoke their registration



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- BN of remaining charity is not affected
- Consolidations involve dissolution of all original bodies and transfer of assets to a new entity
  - All original bodies are wound up and undergo voluntary revocation of their registration
  - New body is given a new BN
- Charities that amalgamate, merge, or consolidate should inform the Charities Directorate before doing so
  - To initiate a request for an amalgamation, merger, or consolidation, charities should follow steps outlined online: <http://www.cra-arc.gc.ca/chrts-qvng/chrts/prtng/chngs/mlqmntns-mrgrs-cnsltdtns-eng.html>

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**D. CORPORATE UPDATE**

**1. Canada Not-for-profit Corporations Act (CNCA)**

**a) Status of CNCA**

- Canada Corporations Act ("CCA") since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of CCA
- Existing CCA corporations required to continue under the CNCA within 3 years - i.e., by October 17, 2014
- Failure will lead to dissolution of the corporation
- According to Industry Canada, there are an estimated 17,000 Part II CCA non-profit corporations.
- As of October 31, 2013, only 2100 or 15% of not-for-profit corporations incorporated under the CCA had continued under the CNCA

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**b) Overview of CNCA Continuance**

- New CNCA rules do not automatically apply to CCA corporations (must apply to continue)
- Charities need to prepare new corporate documents (Articles and By-laws)
- Board and membership approval is required (at least 2/3 for Articles/check current corporate documents for possible higher approval)
- File required documents with Industry Canada
- Industry Canada will issue a Certificate of Continuance
- Charities must send Certificate, Articles and By-laws to CRA and Ontario Public Guardian and Trustee
- If not continued by October 17, 2014, Industry Canada will send out Notices of Intention to dissolve, giving the charity 120 days after the notice to continue

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**c) Basic Framework of the CNCA**

- The CNCA is conceptually structured on a business corporate model which gives enhanced rights of members
- CNCA provides both a general framework and a set of rules for corporations to operate
- Three types of rules in CNCA
  - Mandatory Rules - Cannot be overridden by the articles or by-laws
  - Default Rules - By-laws or articles can override
  - Alternate Rules - Articles/by-laws can include certain optional rules provided in the Act
- It is important to be familiar with the rules before drafting CNCA corporate documents (legal assistance can help)

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**2. New Ontario Not-for-Profit Corporations Act 2010 (ONCA)**

**a) Status of ONCA**

- The *Ontario Corporations Act* ("OCA") has not been substantively amended since 1953
- The new *Ontario Not-for-Profit Corporations Act* ("ONCA") will apply to OCA Part III corporations
- The ONCA received Royal Assent on October 25, 2010, but is not expected to be proclaimed until sometime in 2014
- The Provincial Government announced in September 2013 that proclamation of the ONCA would not occur until at least 6 months after the passing of Bill 85 to amend the ONCA introduced on June 5, 2013
- Defined by-laws and plain language guides have been released online at:  
<http://www.sse.gov.on.ca/mcs/en/Pages/onca6.aspx>

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**b) Overview of ONCA Transition Process**

- Unlike the CNCA
  - Optional transition process for corporations to file articles of amendments or adopt new by-laws to comply with ONCA requirements within 3 years of ONCA proclaimed in force
  - Subject to Bill 85, if no transition process taken:
    - Corporation will not be dissolved
    - LP, SLPs and by-laws will be deemed amended to comply with ONCA requirements, resulting in non-compliant provisions deemed invalid
    - Will result in uncertainty in relation to which provisions remain to be valid
  - Better to do transition process to avoid confusion interpreting by-law provisions
  - Social clubs with share capital will have 5 years to continue

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- However, Bill 85, if passed, will provide for the following amendments to the ONCA:
  - The Public Benefit Corporation threshold, currently \$10,000, may be amended by regulation
  - All directors must consent in writing, and the corporation must keep this in the 'approved form'
  - During the 3-year transition period, Part III OCA Corporations must add to their articles all provisions, by-law provisions, or special resolutions that the ONCA requires to be contained in their articles

AMENDMENTS

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- Any amendments to by-laws will require that all by-law amendments be adopted
- Non-voting classes will have their limited right to vote delayed until at least three years after the rest of the ONCA comes into effect
- As a general rule, if a special act corporation's provisions are inconsistent with the ONCA, the special act prevails
- The ONCA provides that charity law will prevail over the ONCA

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### 3. B.C. Introduces Bill to Create Community Contribution Companies

- B.C.'s Bill 23, *Finance Statutes Amendment Act*, 2012 took effect on July 29, 2013, providing for a new type of company called a "community contribution company" ("CCC")
- CCCs promote social enterprise, allowing the for-profit sector to tap into socially focused investment options
- CCCs must primarily benefit the community through:
  - restrictions on corporate reorganizations to avoid the circumvention of payout restrictions;
  - an "asset lock" that caps dividends on company shares to ensure that profits are retained by the company or directed to the community benefit
- CCCs cannot issue tax receipts, and are not eligible for NPO status



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### 4. Nova Scotia Passes Community Interest Companies Act

- On December 6, 2012, Nova Scotia's *Community Interest Companies Act*, Bill No. 153 received Royal Assent, allowing businesses to seek designation as a "community interest company" ("CIC")
- To qualify for the CIC designation, a company must:
  - have a "community purpose," that being a purpose "beneficial to society at large or a segment of society that is broader than" those related to the CIC
  - have at least three directors who must act in accordance with the company's community purpose
- CICs are restricted in their ability to pay dividends and distribute assets on dissolution, and must either comply with the rules for non-profit organizations or pay tax as a for-profit corporation
- The Act will come into force upon proclamation



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### 5. Ontario Social Enterprise Strategy Announced

- On September 26, 2013, the Ontario Ministry of Economic Development, Trade and Employment announced "Impact - A Social Enterprise Strategy for Ontario" to support social enterprises in Ontario
- Social enterprises "use business strategies to maximize [their] social and environmental impact"
- The Social Enterprise Strategy aims to:
  - Connect, co-ordinate and communicate information to, and about, social enterprise
  - Build the social enterprise brand
  - Create a vibrant social finance marketplace
  - Deliver service, support and solutions
- It is not known when enabling legislation will be introduced

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**E. SELECTED CASE LAW**

**1. *Pal et al v Chatterjee et al*, 2013 ONSC 1329, March 3, 2013**

- The decision involved Toronto Kalibari, an incorporated religious organization governed by a board of nine directors referred to in its by-laws as "trustees"
- On October 10, 2012, a member of the corporation circulated a petition which made various allegations and requested a special meeting of members
  - Two trustees signed the petition
  - A third trustee, although not a signatory to the petition, supported the allegations
- The other six trustees attempted to orchestrate a show cause hearing to remove the three dissident trustees as members of the corporation

 **CASE LAW**

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- The court examined the by-laws of the corporation and determined that there was no method available for the removal of the trustees
- The court found that the termination of the applicants as trustees warranted intervention and that the show cause hearing was being initiated for the improper and oblique purpose of their removal
- The decision is a reminder that corporate proceedings to discipline or terminate a member cannot be commenced for an improper or ulterior purpose



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**2. *Diaferia et al v Elliott et al*, 2013 ONSC 1363, March 7, 2013**

- *Diaferia v Elliott* was an application for an interlocutory injunction preventing a membership meeting discussing whether or not a church's pastor should be dismissed
- Church membership required members to complete a three-step process involving an interview, baptism, and confirmation by church membership vote
- Upon announcement of a meeting of members to discuss the pastor's dismissal on March 3, the pastor announced, with support of 5 members, a meeting to be held on February 24 at which the pastor would ask the elders to consider membership of those that supported him

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- The elders, however, decided that only those who had met the qualification requirements for membership as of February 10, 2013 would be recommended for admission into membership
- Of 14 applicants, 12 were denied membership
- An injunction was sought and granted to prevent the meeting called for March 3
- The court sought to ensure that there was a level playing field for both sides concerning the employment of the pastor
- This case is a reminder that if a procedure for admitting members is in the organization's governing documents, it should be followed, and should be made well known to those who want to become members



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**3. *Prescient Foundation v MNR, 2013 FCA 120, May 1, 2013***

- Pursuant to a CRA audit in 2008, CRA issued a notice of intention to revoke Prescient Foundation's charitable registration based on three key issues:
  - 1) Prescient donated \$500,000 to a foreign non-qualified donee
  - 2) Prescient was involved in the sale of a farm, where sale proceeds were routed on a tax-free basis "for the private benefit of certain taxpayers"
  - 3) Prescient had "failed to maintain adequate books and records" by only providing CRA with several relevant documents and not allowing CRA to verify information in the Foundation's financial statements and registered charity information returns



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- The Federal Court of Appeal ("FCA") held that the revocation of Prescient's registration for the gifts to the non-qualified donee was unfounded since there was no legislative basis at that time to enforce such position despite CRA's administrative position and proposed amendments not yet in force
- Regarding books and records, the FCA stated that CRA must "(a) clearly identify the information which the registered charity has failed to keep, and (b) explain why this breach justifies the revocation of the charity's registration thereby questioning CRA's determination of books and records
- Prescient is seeking leave to appeal to the Supreme Court of Canada



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**4. *Guindon v The Queen*, 2013 FCA 153, June 12, 2013**

- CRA assessed a penalty of \$564,747 against Guindon under section 163.2 of the ITA
  - Guindon had provided a legal opinion on the “The Global Trust Charitable Donation Program” charitable donation scheme
  - She also issued 134 charitable donation receipts
- S. 163.2 provides for monetary penalties assessable against third parties who knowingly, or through gross negligence, participate in, promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return
- The Tax Court of Canada (“TCC”) held that the section 163.2 penalties to be applied were of a criminal nature, as per s. 11 of the *Charter*



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- The Tax Court’s decision was overturned on appeal by the FCA on the basis that:
  - Guindon failed to serve a notice of constitutional question when she sought a finding that a section of the Act was invalid, inoperative or inapplicable
    - The TCC therefore had no jurisdiction to consider whether s. 163.2 created a criminal offence under s. 11 of the *Charter*
  - The FCA also held that proceedings under section 163.2 are in place to maintain discipline, compliance or order “within a discrete regulatory and administrative field of endeavour” and are, therefore, not criminal in nature
- On September 11, 2013, Guindon filed for leave to appeal to the Supreme Court of Canada



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**5. *RC v District School Board of Niagara*, 2013 HRTO 1382, August 13, 2013**

- This application was commenced by self-described atheists asking the Tribunal to consider whether materials explaining atheism should have the same protection and ability to be available to students as materials explaining or promoting mainstream religions, such as Christianity or Islam
- To answer this question, the Tribunal needed to decide whether atheism should be considered a “creed”, and thus a protected ground under the Ontario Human Rights Code (“Code”)
- The Tribunal decided that atheism is a “creed” for purposes of protection under the Code



**CASE LAW**

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- However, the Tribunal did not have to decide whether atheism is a “religion” for purposes of the Code, since “creed” is a broad term that includes religion
- As such, the Tribunal decision is not expected to impact the definition of religion for purposes of “advancement of religion” under the common law in becoming a registered charity under the ITA
- Equally important is that the decision also confirmed that religious groups can be granted permission to distribute religious materials at schools, provided that such opportunity is offered to all creeds on an equal basis and that the materials are distributed outside the classroom

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**6. Chabad v MNR, 2013 FCA 196, August 23, 2013**

- CRA issued a notice of intention to revoke after audit determined that Cheder Chabad had issued unsubstantiated donation receipts for \$10 million worth of gifts in kind
- Cheder Chabad brought an application to stay the publication of the revocation in the Canada Gazette
- Court applied applicable test from *RJR-MacDonald*
- On the issue of irreparable harm (where charities have traditionally been unsuccessful at the Federal Court of Appeal) the Court took into account the fact that Cheder Chabad had few assets it could liquidate in order to operate the school for the school year, and the unexpected financial hardship of the parents for tuition fees if part of the fees was no longer receiptable

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- On the balance of convenience, the court took into account the impact that the publication of revocation would have on the 180 students who attended the school
- Taking into consideration the difficulty the students would have in finding a new school immediately before the start of the school year, and the shortfall in liquid assets that the school had to continue operating, the court found that the balance of convenience weighed in favour of granting a stay
- Court ordered a delay of publication in the Canada Gazette until December 31 to permit an orderly liquidation of assets and permit the charity to plan operations without status as a registered charity



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