

**CANADIAN BAR ASSOCIATION'S  
NATIONAL CHARITY LAW SYMPOSIUM 2015**

**JUDICIAL RENDERINGS — INTERESTING CASES TO CONSIDER**

May 29, 2015

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**A. INTRODUCTION**

This paper is intended to provide a practical overview and commentary on some of the more important Canadian and international court decisions that have been rendered over the past year that impact charities as well as not-for-profit corporations. The paper has been written with a view to equip busy practitioners with an easy to read summary of what they need to know about developments in the law of charities at the judicial level. In this regard, the paper has been organized into various subjects, specifically the relationship between political purposes and charitable purposes, advancement as well as freedom of religion, directors' liability, estate gifts, and charitable receipting issues. Each case that is described below includes a brief statement of why the case is important, followed by a case summary, and ending with a discussion of the issues that practitioners may want to consider in their respective practices.

What this paper does not attempt to do is to provide a comprehensive or academic analysis of the cases or the issues that may arise from them, given the number of decisions and issues that are identified in the paper and the limitation on the length of a paper for a continuing education programme. A more detailed analysis of some of the issues raised in this paper has been done by

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other presenters at this year's National Charity Law Symposium, such as the paper by Professor Kathryn Chan in her thorough analysis of advancement of religion.<sup>1</sup>

## B. POLITICAL V CHARITABLE PURPOSE

In August 2014, two significant international cases, one from New Zealand and one from the United Kingdom, considered the relationship between political purposes and charitable purposes. Although these decisions are not binding in Canada, they are important and potentially persuasive in Canadian courts because they were both decided in Commonwealth jurisdictions with similar common law judicial history to Canada in the area of charity law.

### 1. *Re Greenpeace of New Zealand Incorporated*

#### a) Why this Case is Important

The Supreme Court of New Zealand's decision in *Re Greenpeace of New Zealand Incorporated* ("*Greenpeace*"),<sup>2</sup> marks only the second time<sup>3</sup> that a Commonwealth jurisdiction has held that a political purpose can be a charitable purpose, although the practical value of the decision remains to be seen, even in New Zealand. As such, it will be interesting to see how the decision will be applied in Canada, where organizations that are found to have a political purpose are currently denied charitable status.

#### b) Case Summary<sup>4</sup>

On August 6, 2014, the Supreme Court of New Zealand allowed the appeal from the Court of Appeal decision in *Greenpeace*. The Supreme Court held, by a 3:2 margin, that in some circumstances a political purpose can be a charitable purpose and, therefore, that the political purpose exclusion doctrine, which originated in the reasoning found in *Bowman v Secular Society* ("*Bowman*"),<sup>5</sup> should no longer be applied in New Zealand. Writing for the majority, Chief Justice Elias stated that "political and charitable purposes are not mutually exclusive in all

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<sup>1</sup> Kathryn Chan, "The Advancement of Religion in a Pluralist Society: A response to Professor Waters?" (Paper delivered at the 2015 National Charity Law Symposium, Toronto, 29 May 2015) [unpublished].

<sup>2</sup> [2014] NZSC 105.

<sup>3</sup> The High Court of Australia's decision in *Aid/Watch Incorporated v Commissioner of Taxation*, [2010] HCA 42 was the first.

<sup>4</sup> This case summary includes material from the previously published article "New Zealand Court Finds that a Political Purpose may be Charitable" by Jennifer M Leddy in the July/August 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/aug14.pdf>.

<sup>5</sup> [1917] AC 406 (HL).

cases,”<sup>6</sup> and that, as such, it is possible for a political purpose to be considered as a charitable purpose. Since the reasoning in *Greenpeace* follows the High Court of Australia’s 2010 decision in *Aid/Watch Incorporated v Commissioner of Taxation* (“*Aid/Watch*”),<sup>7</sup> it would be helpful to first provide the highlights of that earlier decision.

In *Aid/Watch*, the High Court held that “in Australia there is no general doctrine which excludes from charitable purposes ‘political objects’.”<sup>8</sup> In its reasons, the High Court emphasized that the Australian constitutional system includes “processes which contribute to the public welfare”<sup>9</sup> and, therefore, that generating public debate through lawful means can be a purpose beneficial to the community within the fourth head of charitable purposes described in the *Pemsel* decision.<sup>10</sup> In this regard, the majority in *Aid/Watch* stated that “the system of law which applies in Australia thus postulates for its operation the very ‘agitation’ for legislative and political changes” which organizations such as *Aid/Watch* engage in, and that “it is the operation of these constitutional processes which contributes to the public welfare.”<sup>11</sup> In 2011, in response to the decision in *Aid/Watch*, the Australian Taxation Office issued a new Tax Ruling, which considered the meaning of “charitable” in light of *Aid/Watch* and other recent Australian case law. The Tax Ruling states that “an entity with a purpose of generating public debate regarding government policy, activities or legislation directed towards subject matters that come within one of the four heads of charity can be charitable.”<sup>12</sup>

In *Greenpeace*, the New Zealand Supreme Court was presented with a similar issue to the one decided in *Aid/Watch*. The Charities Commission in New Zealand had originally denied *Greenpeace*’s application for charitable status because it said that the purpose of promoting peace and disarmament was too political. This decision was upheld by the High Court.

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<sup>6</sup> *Supra* note 2 at para 3.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> *Ibid* at para 48.

<sup>9</sup> *Ibid* at para 45.

<sup>10</sup> *Income Tax Special Commissioners v Pemsel*, [1891] AC 531.

<sup>11</sup> *Supra* note 3 at para 45.

<sup>12</sup> Taxation Ruling TR 2011/4 “Income tax and fringe benefits tax: charities” (12 October 2011), online: Australian Taxation Office <<http://law.ato.gov.au/atolaw/view.htm?Docid=TXR/TR20114/NAT/ATO/00001>> at para 310 [Taxation Ruling].

Greenpeace then appealed to the Court of Appeal. During this appeal, Greenpeace agreed to recommend to a general meeting of members that its objects be changed from simply promoting disarmament to promoting “nuclear disarmament and the elimination of all weapons of mass destruction.”<sup>13</sup> In its reasons, the Court of Appeal agreed

with the submission for Greenpeace that these amendments will remove the element of political contention and controversy inherent in the pursuit of disarmament generally and instead constitute, in New Zealand today, an uncontroversial public benefit purpose.<sup>14</sup>

The Court of Appeal subsequently set aside the decision of the Charities Commission of New Zealand declining to register Greenpeace as a charity. It did so in part because it held that the proposed amendments meant that Greenpeace’s activities were no longer controversial.<sup>15</sup> Additionally, the Court of Appeal held that after the object is amended “it will be clear that the ‘advocacy’ purpose is intended to be ancillary to and not independent from Greenpeace’s primary charitable purposes” and, therefore, that it “would then be designed to meet the [legislative] requirements...and would support Greenpeace’s case that it is now established ‘exclusively for charitable purposes’.”<sup>16</sup> However, despite the finding that if Greenpeace’s objects were amended it could be charitable, which clearly would have been a good result for the organization, Greenpeace challenged the Court of Appeal’s continued “acceptance that the law treats objects which are ‘political’ as non-charitable and prevents registration of an entity with such objects unless they are merely ‘ancillary’ to charitable objects.”<sup>17</sup>

The case then moved to the Supreme Court of New Zealand, which held that a strict exclusion of political purposes is unnecessary (since political and charitable purposes are not mutually exclusive in all cases) and distracts from the underlying inquiry of whether a proposed charitable purpose is for the public benefit within the sense the law recognizes as charitable.<sup>18</sup> The court held that “advocacy, including through participation in political and legal processes, may well be

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<sup>13</sup> *Supra* note 2 at para 6.

<sup>14</sup> *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at para 76.

<sup>15</sup> *Ibid* at para 82.

<sup>16</sup> *Ibid* at para 84.

<sup>17</sup> *Supra* note 2 at para 9.

<sup>18</sup> *Ibid* at para 3.

charitable,”<sup>19</sup> and, in doing so, rejected the common law premise that political purpose and charitable purposes are mutually exclusive.

The “political purpose exclusion doctrine” that was rejected in *Greenpeace* had originated in *Bowman* as a result of Lord Parker’s dictum that “...the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit and therefore cannot say that a gift to secure change is a charitable gift.”<sup>20</sup> The rationale of this statement was followed in the United Kingdom in *National Anti-Vivisection Society v Inland Revenue Commissioners*<sup>21</sup> and *McGovern v Attorney-General*,<sup>22</sup> creating a line of case law that has subsequently been applied through most of the Commonwealth, including Canada.<sup>23</sup> After conducting a thorough review of this case law, the Supreme Court of New Zealand concluded that “it is difficult to construct any adequate or principled theory to support blanket exclusion [of political purposes].”<sup>24</sup> The Supreme Court found that subsection 5(3) of New Zealand’s *Charities Act* (which provides that the presence of a non-charitable purpose, such as advocacy, does not prevent a charity from qualifying for registration provided that the non-charitable purpose is “merely ancillary” to a charitable purpose) does not constitute a codification of a political purpose exclusion, but rather provides an exemption for non-charitable activities if ancillary.<sup>25</sup>

The Supreme Court of New Zealand also dismissed a number of the Court of Appeal’s specific findings. First, the Supreme Court concluded that the Court of Appeal was wrong to emphasize the extent to which a purpose is controversial in deciding whether the purpose is charitable or not.<sup>26</sup> Then, the Supreme Court rejected the idea of a single test of public benefit, which would allow an organization to be considered charitable even in the absence of an analogy to the purposes outlined in the preamble to *The Statue of Charitable Uses Act (1601)*.<sup>27</sup> The Supreme Court instead emphasized that charitable entities must satisfy the law’s well-established “public benefit” test, which requires that for entities with political advocacy as a standalone object “both

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<sup>19</sup> *Ibid* at para 71.

<sup>20</sup> *Supra* note 5 at 442.

<sup>21</sup> [1948] AC 31 (HL).

<sup>22</sup> [1982] Ch 321 (ChD).

<sup>23</sup> Paul Michell, “The Political Purposes Doctrine in Canadian Charities Law” (1995) 12 *The Philanthropist* 3 at 12.

<sup>24</sup> *Supra* note 2 at para 69.

<sup>25</sup> *Ibid* at para 3.

<sup>26</sup> *Ibid* at para 99.

<sup>27</sup> 43 Elizabeth I c 4.

the methods of promotion used by the entity and the entity's suggestions about how the ends of the idea/abstraction it is promoting should be achieved are important in determining if public benefit exists."<sup>28</sup> It concluded that "the traditional method of analogy to objects already held to be charitable is better policy" than a single test considering only public benefits.<sup>29</sup>

However, despite the Supreme Court's important decision regarding political purposes, it is significant to note that the Court did not open the door for any political purpose to be charitable. Rather, it stated that,

Assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.<sup>30</sup>

Specifically, the Court noted that "public benefit or utility may sometimes be found in advocacy or other expressive conduct. But such finding depends on the wider context."<sup>31</sup> The Court also noted that "advancement of causes will often, perhaps most often, be non-charitable."<sup>32</sup>

Consequently, because of the new facts that arose on appeal, the Supreme Court referred the case back to the body of first instance, now known as the chief executive of the Department of Internal Affairs and the Charities Board, for reconsideration in light of its decision.<sup>33</sup> The final decision has not yet been made public, but given the comment by the Court about the test to be applied it will be interesting to see if Greenpeace is, in the end, granted charitable registration in New Zealand.

#### c) Issues to Consider from *Greenpeace*

While the *Greenpeace* decision is not binding on Canadian courts, there are certainly many aspects of the decision that could be potentially persuasive if a similar matter and fact pattern

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<sup>28</sup> Ian Gult and Rebecca Rose, "Supreme Court declares charities can be 'political,' but no watershed decision" (11 August 2014), online: Bell Gully <<http://www.bellgully.co.nz/resources/resource.03812.asp>> [emphasis in original].

<sup>29</sup> *Supra* note 2 at para 113.

<sup>30</sup> *Ibid* at para 76.

<sup>31</sup> *Ibid* at para 103.

<sup>32</sup> *Ibid* at para 73.

<sup>33</sup> *Ibid* at para 117.

were brought before a Canadian court. As well, the decision could also be useful for practitioners when dealing with either an application for charitable status or an administrative fairness letter from Canada Revenue Agency (“CRA”) proposing revocation or interim sanctions as a result of allegations that the charity in question had been involved in pursuing a political purpose. Relevant considerations include:

- The *Greenpeace* decision recognized that the political purpose exclusion doctrine does not make sense because it presumes that charitable purposes and political purposes must be necessarily mutually exclusive without any basis on which to make such a conclusion. Instead, the New Zealand Supreme Court recognized that if a standalone political purpose can be shown to achieve a public benefit in a way that the courts have found to be charitable then there is no reason why that political purpose could not also be a charitable purpose. The logic of the court is so obvious that the *Greenpeace* decision might prove to be an attractive precedent for the courts in Canada to adopt given the right set of facts. CRA might also be receptive to consider developing an innovative and progressive interpretation of the law, as it has done in other guidance products, such as the Guidance on *Community Economic Development Activities and Charitable Registration*'s expansion of program related investments.<sup>34</sup>
- The fact that the New Zealand Supreme Court found that the relieving provisions of subsection 5(3) of the *Charities Act* (New Zealand)<sup>35</sup>, should not be considered as a codification of the political purpose exclusion doctrine from the *Bowman* line of cases could be used as a precedent for an interpretation by analogy regarding the purpose of the provisions in subsections 149.1(6.1) and (6.2) of the *Income Tax Act* (“ITA”) in Canada.<sup>36</sup> These subsections permit registered charities in Canada (both charitable organizations and charitable foundations) to be involved in political activities that are ancillary and incidental to their charitable purposes, provided, in essence, that they do not involve more than ten percent of the resources of the charity and do not involve the direct or indirect support of, or opposition to, any political party or candidate for public office,

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<sup>34</sup> Guidance CG-014, “Community Economic Development Activities and Charitable Registration” (26 July 2012), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cmtycnmcdvpmt-eng.html>>.

<sup>35</sup> Namely, that the presence of a non-charitable purpose does not prevent a charity from qualifying for charitable registration provided that the non-charitable purpose is “merely ancillary” to a charitable purpose.

<sup>36</sup> RSC, 1985, c 1 (5th Supp) [ITA].

i.e. partisan political activities. Accordingly, in relying upon the reasoning in the *Greenpeace* decision, subsections 149.1(6.1) and (6.2) of the ITA, by analogy, could be viewed not as a codification of the political purpose exclusion doctrine in Canada, but rather as an exemption for other political activities so long as they are ancillary. Consequently, there should be no reason why a standalone political purpose could not be considered a charitable purpose in Canada notwithstanding the provisions of subsections 149.1(6.1) and (6.2) of the ITA in the same manner that subsection 5(3) of the *Charities Act* (New Zealand) was found in *Greenpeace* not to be a codification of the public purpose exclusion doctrine in that country.

- However, the value of the *Greenpeace* decision as a precedent is not without limits. In particular, there are a number of statements made by the New Zealand Supreme Court that not only indicate it will be unusual for a political purpose to be considered a charitable purpose, but also suggest that the test that will need to be used to determine whether there is a charitable purpose includes the same troubling and circular reasoning found in *Bowman* that led to the political purpose exclusion doctrine in the first place. Some statements from the *Greenpeace* decision on this point are as follows:<sup>37</sup>
  - “Advancement of causes will often, perhaps most often, be non-charitable.”<sup>38</sup>
  - “Where an entity seeking charitable status has objects or conducts activities that involve promoting its own views or advocacy for a cause, it may be especially difficult to conclude where the public benefit lies.”<sup>39</sup>
  - “The true rule is that advocacy is ‘charitable in some circumstances and not in others’.”<sup>40</sup>

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<sup>37</sup> For a discussion of these points see: Kathryn Chan, “Backgrounder for Talk on Political Purposes Doctrine” (Paper delivered at the Charities and Not-for-Profit Law Conference – 2014, Continuing Legal Education Society of British Columbia, November 2014), online: <<http://www.cle.bc.ca/PracticePoints/BUS/14-political-purposes-doctrine.pdf>> at 2.1.7.

<sup>38</sup> *Supra* note 2 at para 73.

<sup>39</sup> *Ibid* at para 32.

<sup>40</sup> *Ibid* at para 74, citing LA Sheridan, “Charitable Causes, Political Causes and Involvement” (1980) 2 *The Philanthropist* 5 at 12.

- “If the object of an entity is the promotion of a cause which cannot be assessed as charitable because attainment of the end promoted or the means of promotion in itself cannot be said to be of public benefit within the sense treated as charitable, the entity will not qualify for registration as charitable.”<sup>41</sup>
- “For the reasons discussed by Slade J in *McGovern*, the court would have no adequate means of judging the public benefit of such promotion of nuclear disarmament and elimination of all weapons of mass destruction, taking into account all the consequences, local and international. Whether promotion of these ideas is beneficial is a matter of opinion in which public benefit is not self-evident and which seems unlikely to be capable of demonstration by evidence.”<sup>42</sup>
- In referencing the above statements by the New Zealand Supreme Court, it is not surprising that the Charities Services in New Zealand recently came out with a Guidance on *Political Purposes* which emphasizes just how difficult it will be, in their opinion, for a charity in New Zealand to satisfactorily establish that a standalone political purpose is in fact a charitable purpose.<sup>43</sup> Some of the comments by Charities Services in this regard are instructive:
  - “There is no general prohibition on political advocacy being a charitable purpose, but in a recent ruling the Supreme Court noted that it may be uncommon for political purposes to be charitable purposes.”<sup>44</sup>
  - “The Supreme Court noted that the advancement of causes will often be non-charitable, because it is not possible to say whether the views been promoted are of benefit in a way the law regards as charitable.”<sup>45</sup>

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<sup>41</sup> *Ibid* at para 116.

<sup>42</sup> *Ibid* at para 101.

<sup>43</sup> “Political Purposes”, online: Charities Services <<https://www.charities.govt.nz/apply-for-registration/charitable-purpose/political-purposes/>>.

<sup>44</sup> *Ibid* at 1.

<sup>45</sup> *Ibid* at 2.

- “...it may be difficult in some circumstances to determine whether a political purpose is charitable.”<sup>46</sup>
- As one commentator in New Zealand has said about the *Greenpeace* decision, “We think the *Greenpeace* decision is strangely unhelpful law-making at the technical level. No doubt officials and applicants will find ways to purport to apply it as if it had clarified the law. But it is hard to know what policy it pursues.”<sup>47</sup> As such, the long-term consequences of the *Greenpeace* decision in Commonwealth countries, including Canada, may not be as significant as first thought.
- With regard to this limitation, reference should be made back to the reasoning in the 2010 *Aid/Watch* decision by the High Court in Australia, which remains the more satisfying decision in support of rejecting the political purpose exclusion doctrine. Although the Federal Court of Appeal (“FCA”) in *News to You Canada v Minister of National Revenue*<sup>48</sup> references that the *Aid/Watch* decision distinguishes the Canadian and Australian legislative schemes and, therefore, would appear to close the door on *Aid/Watch*’s applicability in the Canadian context, the decision itself is still valuable from an analogical perspective insofar as the Australian High Court does not revert back to the reasoning in *Bowman* to determine whether a political purpose can have a public benefit, but rather accepts that the “subject matter of many areas of government activity or policy would fall under one of the first three heads of charity or the already established charitable purposes under the fourth head, and where they do, a purpose of generating public debate about that activity or policy will be charitable.”<sup>49</sup>
- Notwithstanding the limitations of the *Greenpeace* decision, it is worth noting that in Canada it is already possible from a practical standpoint to accomplish to a great extent what would be the case if a political purpose was to be recognized as a charitable purpose. This can be done by simply utilizing what CRA already permits as a charitable

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<sup>46</sup> *Ibid* at 4.

<sup>47</sup> Stephen Franks as quoted in an article by Matthew Lark, “SC decision garners problems and prospects for charities” (3 October 2014), online: ADLSI Independent Voice of Law <<http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/10/3/sc-decision-garners-problems-and-prospects-for-charities/>>.

<sup>48</sup> 2011 FCA 192.

<sup>49</sup> Taxation Ruling, *supra* note 12 at para 71.

activity under its Political Activities Policy Statement CPS-022 (“CPS-022”).<sup>50</sup> Specifically, paragraph 7.3 of CPS-022 indicates that a charity will be considered to be involved in a charitable activity (and therefore not included in the ten percent resource test for political activities, under subsections 149.1(6.1) and (6.2) of the ITA<sup>51</sup>) when it makes a representation to an elected representative or public official that the law, policy or decision of any level of government in Canada or a foreign country should be changed, retained, or opposed, including the release of the representation’s entire text to the public, provided that the representation:

- 1) relates to an issue that is connected to the charity’s purposes,
- 2) is subordinate to the charity’s purposes,
- 3) is well reasoned,
- 4) does not contain information that the charity knows or ought to know is false, inaccurate or misleading,
- 5) does not contain an explicit call to action either in the text or in the reference to the text as released, and<sup>52</sup>
- 6) does not include the direct or indirect support of, or opposition to, any political party or candidate for public office.<sup>53</sup>

Since it is not clear whether the reasoning in the *Greenpeace* decision will ever be followed in Canada, practitioners may want to consider using the tools that are already available in accordance with the existing provisions of CRA’s CPS-022 to, in essence, achieve the same practical end result as what could be accomplished through a subordinate political purpose by means of undertaking what CRA already considers to be an acceptable charitable activity.

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<sup>50</sup> *Policy Statement CPS-022*, “Political Activities” (2 September 2003), online: Canada Revenue Agency, <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>>.

<sup>51</sup> As outlined on page 7, the ten percent resource test under subsections 149.1(6.1) and (6.2) of the ITA permits registered charities in Canada, both charitable organizations and charitable foundations, to become involved in political activities that are ancillary and incidental to their charitable purposes, provided that they do not involve more than ten percent of the resources of the charity and do not involve the direct or indirect support of, or opposition to, any political party or candidate for public office.

<sup>52</sup> *Ibid.*

<sup>53</sup> ITA, *supra* note 36 at subsections 149.1(6.1) and (6.2).

## 2. *The Human Dignity Trust v The Charity Commission for England and Wales*

### a) Why this Case is Important

*The Human Dignity Trust v The Charity Commission for England and Wales* (“*Human Dignity Trust*”), decided by the First-Tier Tribunal (Charity) General Regulatory Chamber (the “Tribunal”) in the United Kingdom, is important because the Tribunal held that promoting and protecting human rights through strategic litigation directed at upholding existing laws and treaty obligations is not a political purpose or political activity that would otherwise preclude charitable status.<sup>54</sup>

### b) Case Summary<sup>55</sup>

On July 9, 2014, the Tribunal released its decision in *Human Dignity Trust*, granting Human Dignity Trust (“HDT”) its appeal to be registered as a charity and, in the process, commenting upon the political purposes doctrine concerning charities that work to further their purposes through strategic litigation involving human rights.

HDT applied to the Charity Commission of England and Wales (the “Charity Commission”) for charitable status in 2011. In October 2013, the Charity Commission refused to register HDT as a charity because it said that HDT’s objects were vague and uncertain and, further, because it believed that HDT had a political purpose, specifically to change the law in foreign states.<sup>56</sup> HDT’s proposed objects consisted of:

to promote and protect human rights (as set out in the *Universal Declaration of Human Rights* and subsequent United Nations conventions and declarations) throughout the world, and in particular (but without limitation):

- the rights to human dignity and to be free from cruel, inhuman or degrading treatment or punishment;
- the right to privacy and to personal and social development; and

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<sup>54</sup> *The Human Dignity Trust v The Charity Commissioner for England and Wales*, [2014] CA/2013/0013.

<sup>55</sup> This case summary includes material from the previously published article “UK Tribunal Provides Precedent for Charities Upholding the Law” by Ryan M Prendergast in the July/August 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/aug14.pdf>.

<sup>56</sup> *Supra* note 54 at para 3.

- to promote the sound administration of the law.<sup>57</sup>

HDT uses test case litigation to challenge the legality of laws around the world that criminalize private consensual sexual activity between same-sex adults. In pursuit of its objects, HDT also provides legal advice and representation through a panel of constitutional and international law experts acting on a pro-bono basis.

On appeal, the Charity Commission maintained that HDT was involved in a mixture of charitable and non-charitable (political) activities which precluded it being granted charitable status. The Charity Commission also maintained that “advancement of human rights” in the list of approved charitable purposes included in section 3(1) of the *Charities Act*<sup>58</sup> should only include human rights accepted by the law of England and Wales.<sup>59</sup>

However, the Tribunal found that HDT’s purpose was not vague and, therefore, did not risk becoming politicized. Additionally, the Tribunal agreed with HDT’s submission that “human rights” should be understood with its natural meaning instead of complicating the inquiry to fit within the law of only England and Wales.<sup>60</sup> The Tribunal then conclusively stated that the Charity Commission’s decision demonstrated a

fundamental misunderstanding of the nature of a constitutional human rights challenge because litigation aimed at upholding a citizen’s constitutional rights does not seek to change the law of the relevant jurisdiction but rather enforces and upholds the superior rights guaranteed by that country’s constitution.<sup>61</sup>

While the Charity Commission argued that HDT’s purpose is political because it seeks to change the law of foreign states, HDT submitted that its work involves upholding existing human rights law, not changing laws. In response, the Tribunal found that challenging a law because it is contrary to a country’s prior commitment to an international treaty or constitutional law is neither a political purpose nor a political activity.<sup>62</sup> The Tribunal emphasized the difference between changing a domestic law through pressure on Parliament versus properly using a

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<sup>57</sup> *Ibid* at para 6.

<sup>58</sup> 2011 c 25.

<sup>59</sup> *Supra* note 54 at para 43.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* at para 3.

<sup>62</sup> *Ibid* at para 101.

constitutional scheme meant to test the laws of a country. It emphasized that “a legitimate constitutional process...occupies a different space from that occupied by domestic law,” and, consequently, concluded that HDT’s activities are an example of this type of “legitimate constitutional process.”<sup>63</sup>

The Tribunal also agreed with HDT’s submissions that strategic litigation, such as HDT’s use of test case litigation to challenge the legality of laws criminalizing consensual sexual activity, provides a public benefit. It further concluded that human rights are a “living instrument” whose scope “may evolve and change from time to time.”<sup>64</sup> The Tribunal applied this more flexible view of human rights to find that strategic litigation can be charitable because it involves both “a particular benefit to those individuals whose human rights are promoted and protected by this means and also a wider benefit to the community at large from having such rights interpreted, clarified, and enforced.”<sup>65</sup>

c) Issues to Consider from *Human Dignity Trust*

*Human Dignity Trust* is the second example (although decided first) over the past year of a court in a Commonwealth jurisdiction providing an interpretation of what does and does not constitute a political purpose as opposed to a charitable purpose. The broad stance taken by the Tribunal in *Human Dignity Trust* parallels the comments in the 2008 Guidance from the Charity Commission for England and Wales on campaigning and political activity by charities.<sup>66</sup> This Guidance endorses a broad approach towards how political activities can support charitable purposes, as well as how some charitable purposes, such as the promotion of human rights, “are more likely than others to lead trustees to want to engage in campaigning and political activity.”<sup>67</sup> This approach taken by the Charity Commission in 2008 has been described as “more benevolent than the prevailing view in Canada”<sup>68</sup>, in part because it does not include a quantitative limit on political activity nor does it refer to political activity that is “ancillary” or

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<sup>63</sup> *Ibid* at para 99.

<sup>64</sup> *Ibid* at para 44.

<sup>65</sup> *Ibid* at para 109.

<sup>66</sup> Charity Commission, *Speaking Out: Guidance on Campaigning and Political Activity by Charities* (March 2008), online: Charity Commission <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300222/cc9text.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300222/cc9text.pdf)>.

<sup>67</sup> *Ibid* at 10.

<sup>68</sup> Maurice Cullity, “Charity and Politics in Canada – A Legal Analysis” (February 2014) 25(4) *The Philanthropist* at 29.

“incidental” to charitable purposes.<sup>69</sup> In this regard, the fact that the Charity Commission previously endorsed such a perspective may have contributed to a legal environment in the UK that was more amenable to the facts presented in the *Human Dignity Trust* decision.

Currently, in its 2010 Guidance on *Upholding Human Rights and Charitable Registration* (the “Guidance”), CRA has recognized that upholding human rights can be seen as furthering charitable purposes under any of the four heads of charity and, additionally, can even be a charitable purpose on its own under the fourth head.<sup>70</sup> As well, the Guidance states that pursuing litigation to uphold the administration and enforcement of the law is an acceptable charitable activity.

While the *Human Dignity Trust* decision does not create new law regarding what is already permitted in Canada, the decision could be a persuasive precedent to reference in the event that CRA was to take the position that a charity was purportedly acting outside of the Guidance by allegedly pursuing a political purpose through overly aggressive attempts to enforce human rights law or similar involvement in strategic litigation to enforce such law. As such, the following are some of the similarities and differences between the *Human Dignity Trust* decision and CRA’s Guidance for practitioners to consider:

- In accordance with the Guidance, CRA considers it an acceptable charitable activity for a charity to challenge a policy which it thinks is inconsistent with human rights laws in court. In doing so, a charity is required to focus on clarifying, not changing the law.<sup>71</sup> However, charities engaging in this type of activity must be careful since the Guidance makes it clear that any type of activity that seeks to approve, change or retain the law, including government policy will be considered political activity and will be subject to the ten percent resource limits set out in subsections 149.1(6.1) and (6.2) of the ITA.<sup>72</sup> As such, charities are required to walk a fine line in order to balance CRA’s position on upholding human rights as a charitable activity or purpose as opposed to becoming involved in political activities.

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<sup>69</sup> *Supra* note 66.

<sup>70</sup> *Guidance CG-001* “Upholding Human Rights and Charitable Registration” (15 May 2010), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghs-eng.html>>.

<sup>71</sup> *Ibid* at para 3.2 and Question and Answer 5 and 5a in Appendix A.

<sup>72</sup> *Ibid*.

- In this regard, in *Human Dignity Trust*, the Tribunal drew a clear line between advocating to change a law broadly and using an established constitutional process to uphold existing laws. Similarly, CRA has stated that “a purpose to uphold the administration and enforcement of customary international law only will be considered too broad and vague for registration,” but “education or research in the use of customary international law in international litigation is consistent with the charitable purpose of upholding human rights.”<sup>73</sup>
- The Tribunal in *Human Dignity Trust* concluded that HDT met the public benefit test because it held that the specific type of litigation that HDT pursued, as it related to human rights, resulted in benefit “to the whole community or a sufficiently appreciable section of it.”<sup>74</sup> CRA takes a similar position, stating that upholding human rights to further charitable purposes includes “activities that seek to encourage, support, and defend human rights that have been secured by law both in Canada and abroad”<sup>75</sup> and that upholding human rights is “undoubtedly beneficial to the public.”<sup>76</sup>

### C. ADVANCEMENT AND FREEDOM OF RELIGION

#### 1. *Humanics Institute v The Minister of National Revenue — Advancement of Religion*

##### a) Why this Case is Important

The decision in *Humanics Institute v The Minister of National Revenue* (“*Humanics*”)<sup>77</sup> represents another case in a line of decisions in which the FCA has rejected an applicant for charitable registration because the proposed charitable purposes did not, in the court’s opinion, constitute advancement of religion.<sup>78</sup> Given that CRA has indicated that it is soon planning to release its much anticipated Guidance on Advancement of Religion, any decision from the FCA dealing with advancement of religion is an important development, even if the facts are somewhat limited, as they are in this case. This is particularly so because the FCA took the

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<sup>73</sup> *Ibid* at Appendix A Question 2

<sup>74</sup> *Supra* note 54 at para 110.

<sup>75</sup> *Supra* note 70 at para 3.2.

<sup>76</sup> *Ibid* at para 4.1

<sup>77</sup> 2014 FCA 265.

<sup>78</sup> See for example: *Fuaran Foundation v Canada (Customs and Revenue Agency)* 2004 FCA 181; *Alliance for Life v MNR*, [1999] 3 FCR 504.

opportunity in *Humanics* to reinforce the principles that the FCA, as well as the Supreme Court of Canada (“SCC”), have previously laid down concerning advancement of religion.

Following the decision by the FCA to reject its application for charitable status, the Humanics Institute sought leave to appeal to the SCC. However, leave was denied on April 23, 2015, which underscores the importance of what the FCA had to say in its decision.

b) Case Summary<sup>79</sup>

On November 17, 2014, the FCA released its reasons for upholding the decision of the Minister of National Revenue not to register the Appellant, the Humanics Institute, as a charity because it found that the proposed charitable purposes were broad and vague and that the proposed activities in support of the purposes, particularly the Humanics Institute’s plan to build and maintain a sanctuary and sculpture park, did not constitute advancement of religion.<sup>80</sup> On October 20, 2011, the Humanics Institute wrote to CRA indicating that it would limit its proposed objectives to “its promotion of essential values of religion...and the promotion of education through its scholarship programs in Sri Lanka.”<sup>81</sup>

Although the FCA’s decision in *Humanics* does not lay out much in the way of facts, the Appellant’s factum, which is a matter of public record, outlines that the Humanics Institute is a not-for-profit organization based in Ottawa which “seeks to advance the essential values inherent in all religions of the world through the management and development of a spiritual non-theistic sculpture park.”<sup>82</sup> This and the Humanics Institute’s support of an international scholarship fund constitute its primary activities.<sup>83</sup>

The Humanics Institute argued that the Minister’s requirement that advancement of religion in a charitable sense requires that there be faith in and worship of a supreme being was too narrow a view of religion. This argument was rejected by the FCA because the FCA found that the concept of “Oneness of Reality”, which the Humanics Institute seeks to advance, was too broad

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<sup>79</sup> This case summary includes material from the previously published article “Federal Court of Appeal Rules on Advancement of Religion” by Jennifer M Leddy in the November/December 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/nov27.pdf>.

<sup>80</sup> *Supra* note 77 at para 2.

<sup>81</sup> *Humanics Institute v The Minister of National Revenue*, 2014 FCA 265 (Factum of the Appellant at para 12).

<sup>82</sup> *Ibid* at para 2.

<sup>83</sup> *Ibid* at para 13.

and vague. The argument also failed because the Appellant could not point to a “particular and comprehensive system of faith and worship” or a body of teachings, elements of the definition of religion that the SCC set out in *Syndicat Northcrest v Amselem* (“*Amselem*”).<sup>84</sup> It is interesting that, in *Humanics*, the FCA used a definition of religion from a SCC constitutional case in deciding the qualifications for charitable registration.

Relying on its own decision in *Fuaran Foundation v Canada* (“*Fuaran*”),<sup>85</sup> the FCA also found the Appellant’s proposed activities were not adequate to evidence advancement of religion. The FCA held that building and maintaining a sculpture park is not a targeted attempt to promote religion, as required in *Fuaran* in which the FCA had held that it was insufficient to “simply make available a place where religious thought may be pursued.”<sup>86</sup>

While the Humanics Institute argued that it would promote religion by initiating workshops, seminars, and other educational programs, the FCA held that “merely expressing aspirations does not entitle an applicant to charitable status.”<sup>87</sup> In this regard, the FCA also stated that the Minister may require an applicant to provide “detailed and credible plans” for any proposed activities and that the Humanics Institute, in this case, did not meet this requirement.<sup>88</sup>

The Appellant also failed in both of its *Canadian Charter of Rights and Freedoms* (“*Charter*”)<sup>89</sup> claims. The Court first held that the Minister’s refusal to register the Humanics Institute did not infringe on its section 2(a) freedom of religion, because the Humanics Institute could not establish that the Minister’s decision objectively, as distinct from subjectively, interfered with its freedom of religion. Additionally, the Court also held that the Humanics Institute failed to provide any supporting documentation for its section 2(b) breach of freedom of expression claim.<sup>90</sup> Finally, the Court also held that the Humanics Institute failed in its claim that the

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<sup>84</sup> *Supra* note 77 at para 5 referring to 2004 SCC 47, [2004] 2 SCR 551 at para 39.

<sup>85</sup> 2004 FCA 181.

<sup>86</sup> *Supra* note 77 at para 6 referring to *Fuaran*, *supra* note 85 at para 15.

<sup>87</sup> *Supra* note 77 at para 8.

<sup>88</sup> *Ibid.*

<sup>89</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>90</sup> *Supra* note 77 at para 11.

Minister breached its equality rights under section 15 of the *Charter* because section 15 applies only to individuals, and a not-for-profit corporation, such as the Appellant, is not an individual.<sup>91</sup>

c) Issues to Consider from *Humanics*

Although the decision in *Humanics* does not establish new law concerning what constitutes advancement of religion, it does include a number of issues that practitioners can learn from in understanding what advancement of religion means in a charitable sense.

- *Humanics* confirms that for an organization to be considered charitable for advancement of religion in accordance with the *Fuaran* decision, it must be able to actively promote its religious beliefs, i.e., there must be a targeted attempt to promote these beliefs. It is not enough to “simply make available a place where religious thought may be pursued.”<sup>92</sup> Consequently, CRA will have further ammunition to challenge charitable applications from organizations that fail to show how they actively “promote” their religion.
- It is interesting to note that in CRA’s initial letter<sup>93</sup> refusing to register the Humanics Institute as a charity, CRA quoted from its Summary Policy CSP-R06 on Religion, which states that “to advance religion in a charitable sense...there must be an element of theistic worship, which means the worship of a deity or deities in the spiritual sense.”<sup>94</sup> This letter was dated February 12, 2013. Although CRA has yet to issue its anticipated Guidance on Advancement of Religion, it did issue, in mid-2013, Guidance CG-019, *How to Draft Purposes for Charitable Registration*,<sup>95</sup> as well as Guidance CG-021, *Promotion of Health and Charitable Registration*,<sup>96</sup> both of which reflect a broader definition of advancement of religion than is contained in Summary Policy CSP-R06. Although the 2013 letter from CRA refusing to register the Humanics Institute as a charity gives the impression that CRA’s understanding of advancement of religion was

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<sup>91</sup> *Ibid* at para 12.

<sup>92</sup> *Ibid* at para 6 quoting from *Fuaran*, *supra* note 85 at para 15.

<sup>93</sup> *Supra* note 81 at para 19.

<sup>94</sup> *Summary Policy CPS-R06* “Religion” (25 October 2002), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/csp/csp-r06-eng.html>>.

<sup>95</sup> *Guidance CG-019* “How to Draft Purposes for Charitable Registration” (25 July 2013), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/draftprps-eng.html#N10437>> at paras 32-33.

<sup>96</sup> *Guidance CG-021* “Promotion of Health and Charitable Registration” (27 August 2013), online: Canada Revenue Agency <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hlth-eng.html#N10921ote Promotion of Health>>.

relatively restricted at that time, it is worth noting that CRA has since articulated the much more inclusive definition of advancement of religion based upon the *Amselem* SCC decision that is now reflected in the Guidance on *How to Draft Purposes for Charitable Registration* as well as the Guidance on *Promotion of Health and Charitable Registration*, both of which state that that advancement of religion in a charitable sense:

....[m]eans manifesting, promoting sustaining and increasing belief in a religion's three key attributes; namely, 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. There must be a clear and material connection between the activity and the religion's key attributes to constitute advancement in the charitable sense.<sup>97</sup>

- The decision by the FCA in *Humanics* to apply the more inclusive definition of religion from a constitutional perspective as set out in the *Amselem* decision to one involving charitable status is encouraging for practitioners wanting to rely upon case law that supports a broader interpretation of advancement of religion in a charitable context.

## 2. Loyola High School v Quebec (Attorney General) — Freedom of Religion

### a) Why this Case is Important

The SCC's decision in *Loyola High School v Quebec (Attorney General)* ("Loyola") is important because the Court provided a robust affirmation of freedom of religion, including affirmation of the communal aspects of religion.<sup>98</sup>

### b) Case Summary<sup>99</sup>

On March 19, 2015, in its decision in *Loyola*, the SCC ruled that requiring religious schools to teach their own religion through an objective lens seriously infringes their religious freedoms. In *Loyola*, all seven sitting justices in the majority and concurring minority opinions held that the decision of the Quebec Education Minister ("Minister") that Loyola High School ("Loyola"), a private Catholic school, must teach Catholicism from a neutral perspective interferes with the freedom of religion of Loyola and does not advance the objectives of the Minister's standard

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<sup>97</sup> *Ibid* at para 92 and *supra* note 95 at para 34.

<sup>98</sup> 2015 SCC 12.

<sup>99</sup> This case summary includes material from the previously published article "SCC Delivers Strong Judgment on the Communal Aspect of Freedom of Religion" by Jennifer M Leddy in the March 2015 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/15/mar26.pdf>.

Program on Ethics and Religious Culture (the “ERC Program”) to promote “recognition of others and the common good.”<sup>100</sup>

The ERC Program requires students to study world religions, reflect on ethical questions, and engage in dialogue. Teachers are required to provide instruction in an objective and neutral manner. The Minister can grant an exemption from the ERC Program to private schools if they offer an alternative but equivalent program. Loyola’s request for an exemption was refused because its alternative program proposed to teach all elements of the ERC Program from a Catholic perspective. Loyola subsequently revised its position to say that it would teach world religions objectively but teach Catholicism and the ethics of other religions from a Catholic perspective. The Minister maintained its position that no aspect of the ERC Program, including Catholicism, could be taught from a Catholic perspective.

Writing for the majority, Justice Abella found that the Minister’s decision disproportionately infringed on the religious freedoms of the Loyola community because “preventing a school like Loyola from teaching and discussing Catholicism from its own perspective does little to further the ERC Program’s objectives while at the same time seriously interfering with religious freedom.”<sup>101</sup> Justice Abella also emphasized that the Minister’s decision was unreasonable because it assumed that a confessional program could not achieve the goals of the ERC Program. She underscored that simply requiring a religious school’s teachers to discuss other religions would not harm religious freedoms, but that the “government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for sectarian purpose.”<sup>102</sup> Ultimately, the majority found that requiring religious teachers to ignore their own religious beliefs amounted to this type of government control over religious practice. Consequently, the majority held that “measures that undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.”<sup>103</sup>

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<sup>100</sup> *Supra* note 98 at para 11.

<sup>101</sup> *Ibid* at para 80.

<sup>102</sup> *Ibid* at para 63, citing Justice Dickson in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 347.

<sup>103</sup> *Ibid* at para 67.

Significantly, both the majority and concurring minority opinions affirmed that religion has communal aspects that are protected by the *Charter*. The majority decided that it was not necessary to determine whether Loyola as a corporation has the right to freedom of religion under the *Charter* because the Loyola community who “seek to offer and wish to receive a Catholic education” are protected by the *Charter*.<sup>104</sup> By contrast, the minority easily concluded that “the communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola.”<sup>105</sup>

The minority would have allowed religious organizations such as Loyola to rely on the guarantee of freedom of religion found in section 2(a) of the *Charter*.<sup>106</sup> Writing for the minority, Chief Justice McLachlin and Justice Moldaver stated that:

The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.<sup>107</sup>

The concurring judges also commented on how international human rights instruments, including the *Universal Declaration of Human Rights*,<sup>108</sup> recognize the communal character of religion. They concluded that an organization meets the requirement for section 2(a) protection if (a) it is constituted primarily for religious purposes and (b) its operation accords with these religious purposes.<sup>109</sup>

A central question before the Court was how to balance freedom of religion with the values of the state when regulating religious schools. In this regard, the majority underlined that secularism does not mean excluding religion. On the contrary, secularism includes “respect for

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<sup>104</sup> *Ibid* at para 6.

<sup>105</sup> *Ibid* at para 91.

<sup>106</sup> *Ibid* at para 135.

<sup>107</sup> *Ibid* at para 94.

<sup>108</sup> GA Res 217 A (III), UN Doc A/810 at Article 18.

<sup>109</sup> *Supra* note 98 at para 100.

religious differences” and that “through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities.”<sup>110</sup>

While the majority and minority opinions agreed that the Minister interfered with the freedom of religion of Loyola by requiring it to teach Catholicism from a neutral or non-religious perspective, they disagreed with respect to teaching about the ethics of other religions. The majority held that teaching the ethics of other religions in a neutral way would not interfere with Loyola’s freedom of religion because “in a multicultural society, it is not a breach of anyone’s freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way.”<sup>111</sup> By contrast, the minority held that to expect Loyola teachers to ensure “that all viewpoints are regarded as equally credible or worthy of belief would require a degree of disconnect from, and suppression of, Loyola’s own religious perspective that is incompatible with freedom of religion.”<sup>112</sup>

The majority allowed the appeal, set aside the Minister’s decision, and returned the matter to the Minister for reconsideration.<sup>113</sup> The minority held that it was unnecessary to send the matter back for reconsideration. Instead, the minority would have ordered the Minister to grant an exemption to Loyola.<sup>114</sup>

### c) Issues to Consider from *Loyola*

The decision in *Loyola* provides new insight into how the communal aspect of religion might potentially be applied in future advancement of religion or freedom of religion case law. Some particular points for practitioners to consider in this regard include:

- In *Loyola*, both the majority and minority opinions provide critical affirmations of freedom of religion, which will be reassuring for both individuals and religious organizations. This is reflected in the majority’s statement that:

Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in

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<sup>110</sup> *Ibid* at paras 43-44.

<sup>111</sup> *Ibid* at para 71.

<sup>112</sup> *Ibid* at para 162.

<sup>113</sup> *Ibid* at para 81.

<sup>114</sup> *Ibid* at para 165.

protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.<sup>115</sup>

The majority also confirmed that Justice Dickson’s approach in *R v Big M Drug Mart*<sup>116</sup> appropriately formulated religious freedom on the idea “that no one can be forced to adhere to or refrain from a particular set of religious beliefs.”<sup>117</sup> The minority further emphasized that “requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom.”<sup>118</sup>

- As well, both the majority and the concurring minority opinions specifically affirmed that freedom of religion is not only an individual right, but also has a communal aspect, including “manifestation through communal institutions and traditions.”<sup>119</sup> While the majority did not think it was necessary to decide whether corporations “enjoyed religious freedoms,”<sup>120</sup> the concurring minority opinion added that this communal aspect should be protected by section 2(a) of the *Charter*.<sup>121</sup>
- In this regard, although the majority did not find that Loyola was entitled to section 2(a) protection, it did not rule it out. The minority concurring opinion did strongly state that the religious freedom guarantee in section 2(a) of the *Charter* applies to organizational claimants. Writing for the minority concurring opinion, Chief Justice McLachlin and Justice Moldaver stated that, in order to be applied to organizations, the two-part test from *Amselem* for determining whether a claimant’s freedom of religion under section 2(a) has been breached must be clarified but not abandoned. In particular, they stated that it should not be as difficult as feared to assess whether an organization’s “sincerity of belief” is, in fact, “made in good faith and is neither a fiction nor an artifice.”<sup>122</sup> They clarified that in order to demonstrate a sincere belief, which a mere legal person cannot do, “an organizational claimant must show that the claimed belief or practice is consistent

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<sup>115</sup> *Ibid* at para 47.

<sup>116</sup> [1985] 1 SCR 295, 18 DLR (4th) 321, 18 CCC (3d) 385.

<sup>117</sup> *Supra* note 98 at para 59.

<sup>118</sup> *Ibid* at para 160.

<sup>119</sup> *Ibid* at para 60.

<sup>120</sup> *Ibid* at para 33.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid* at para 138.

with both the purpose and operation of the organization.”<sup>123</sup> Because the majority in *Loyola* did not take such a clear approach, it is likely that this issue may need to be re-litigated in the near future, and “when it does...[the] *Loyola* concurrence will be very persuasive.”<sup>124</sup>

- The majority decision differed from the concurring minority judges in that the majority held that the “requiring *Loyola* to teach about the ethics of other religions in a neutral, historical and phenomenological way would not interfere disproportionately with the relevant Charter protections.”<sup>125</sup> The majority therefore held that “in a multicultural society, it is not a breach of anyone’s freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way.”<sup>126</sup> The majority on this point appear to be attempting to balance the rights of religious organizations with the expectations of a secular state.
- During its analysis, the SCC provided several important comments about the meaning of secularism with regard to the role of religious groups in a secular society. For example, Justice Abella stated that “a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests.”<sup>127</sup> She further stated that “a secular state respects religious differences, it does not seek to extinguish them,” and, consequently, emphasized that states should take a form of neutrality where they both “affirm and recognize the religious freedom of individuals and communities.”<sup>128</sup> In the subsequent SCC decision in *Mouvement laïque québécois v Saguenay (City)* on April 15, 2015, Justice Gascon mirrored these comments when he stated that “a neutral public space free from coercion, pressure and judgement on the part of public authorities in matters of spirituality is intended to protect every person’s freedom and dignity.”<sup>129</sup> In finding that reciting prayers at the start of a

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<sup>123</sup> *Ibid.*

<sup>124</sup> Kirk Andrews, “*Loyola v Quebec, Part II: Freedom of Religion for Religious Organizations*” (2 April 2015) *The Court*, online: Osgoode Hall Law School <<http://www.thecourt.ca/2015/04/02/loyola-v-quebec-part-ii-freedom-of-religion-for-religious-organizations/>>.

<sup>125</sup> *Supra* note 98 at para 71.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid* at para 43.

<sup>128</sup> *Ibid* at paras 43-44.

<sup>129</sup> 2015 SCC 16 at para 74.

municipal council's public meetings violated religious liberties, Justice Gascon further underlined that "sponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions."<sup>130</sup>

- It is likely that the SCC's reasoning in *Loyola* will have some impact on upcoming decisions in numerous provinces concerning the future of the proposed Trinity Western University law school, as legal action on this subject progresses its way through the courts in 2015 and, potentially, even later.<sup>131</sup>

#### D. DIRECTORS' LIABILITY

In mid-2014, Justice Campbell of the Tax Court of Canada ("TCC") wrote two decisions that both underline the importance of properly determining who is a director of a corporation, including a not-for-profit corporation, in order to clearly predict, limit, and manage who may be liable for any unpaid corporate liabilities.

##### 1. *Bekesinski v The Queen* — Proper Documentation

###### a) Why this Case is Important

The decision in *Bekesinski v The Queen* ("*Bekesinski*")<sup>132</sup> provides a strong reminder of the importance of following due diligence in documenting when a person ceases to be a director, particularly with regard to limitation periods involving director liability.

###### b) Case Summary<sup>133</sup>

On July 28, 2014, the TCC released its decision in *Bekesinski*, in which it considered whether a director had properly resigned within the two-year limitation period under the ITA.<sup>134</sup>

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<sup>130</sup> *Ibid* at para 64.

<sup>131</sup> In *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, the Nova Scotia Supreme Court was the first Canadian court to rule on the accreditation of the proposed law school at Trinity Western University ("TWU"). It found that the Nova Scotia Barristers' Society ("NSBS") did not have jurisdiction to deny accreditation to the law school and that even if it did the NSBS did not reasonably consider the constitutional freedoms of TWU and its graduates. The NSBS has since sought leave to appeal to the Nova Scotia Court of Appeal. A similar case began in Ontario in late January 2015 and TWU launched a lawsuit against the Law Society of British Columbia, which voted to deny accreditation, in December 2014.

<sup>132</sup> 2014 TCC 245.

<sup>133</sup> This case summary includes material from the previously published article "Directors and De-Facto Directors Liable for Unpaid Corporate Liabilities" by Ryan M Prendergast in the November/December 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/nov27.pdf>.

In 2010, CRA assessed Mr. Bekesinski, as a director, \$477,546.08 for failure to remit source deductions. Under section 227.1(4) of the ITA, “no action or proceeding to recover any amount payable by a director of a corporation...shall be commenced more than two years after the director last ceased to be a director of that corporation.”<sup>135</sup> In response to the assessment, Mr. Bekesinski contended that he had resigned in 2006, and, that therefore he was not liable, as the limitation period had passed. As such, the Minister was barred from making such an assessment. CRA argued that it was only informed of the resignation after legal proceedings commenced and that it believed the resignation was backdated, inauthentic, and irrelevant.

In *Bekesinski*, the court had to decide whether the resignation had, in fact, been backdated. This would determine whether Mr. Bekesinski continued to be a director after 2006 and, consequently, if he would be liable for the corporate debt. Because Mr. Bekesinski did not provide any documentary evidence to corroborate his resignation and because the Minister did not provide any expert evidence in respect to the ink dating of the document, the case was decided primarily on credibility.<sup>136</sup> In reaching her decision, Justice Campbell found that there were no significant contradictions between Mr. Bekesinski’s evidence and the evidence provided by his witnesses. Consequently, although Justice Campbell stated that she believed the resignation was backdated, she found for the appellant due to a lack of evidence to the contrary.

c) Issues to Consider from *Bekesinski*

While the facts in *Bekesinski* are poor and the appellant won despite suspicion about his failure to properly notify CRA of his resignation, the case is still noteworthy because it underscores the importance of properly documenting all details surrounding a resignation by a director and any other details concerning the timeline related to being a director. In this regard:

- Directors of not-for-profit corporations should remember the importance of the two year limitation rule under the ITA and ensure that they clearly document when they stop or resign from being a director

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<sup>134</sup> *Supra* note 132.

<sup>135</sup> *Supra* note 36.

<sup>136</sup> *Supra* note 132 at para 30.

- Although due diligence was not argued in this case, due diligence is, generally, the only defence, apart from having resigned in accordance with subsection 227.1(4) of the ITA, to avoid related liabilities.
- Justice Campbell’s clear statements about her suspicions of Mr. Bekesinski’s resignation obviously underscore that backdating is fraudulent and must be avoided at all times.
- However, the facts in *Bekesinski* do not address the issue of whether it would be possible for a director to sign a resignation letter dated as of the current date but confirming a prior verbal resignation deemed to be effective from the earlier date of resignation.

## 2. McDonald v The Queen — De Facto Directors

### a) Why this Case is Important

In *McDonald v The Queen*<sup>137</sup> (“*McDonald*”), the TCC held that an individual was a *de facto* director based on his role in the corporation, and was therefore held liable for company liabilities despite the fact that the individual did not legally hold the role of director, did not hold an official role, and did not present himself as a director to any third-parties.

### b) Case Summary<sup>138</sup>

On October 24, 2014, Justice Campbell of the TCC considered whether Mr. McDonald was a *de facto* director during the relevant time period notwithstanding the fact that he was never formally appointed as a director. Justice Campbell concluded that, based on the FCA’s decision in *Wheeliker v The Queen*<sup>139</sup> and the TCC’s decision in *Hartrell v The Queen*,<sup>140</sup> an individual could be found to be a *de facto* director based solely on his role in the corporation. In *McDonald*, if the Appellant was found to be a *de facto* director, he would be liable under section 227.1 of the ITA for unpaid remittances.<sup>141</sup> Determining this issue was a question of fact.

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<sup>137</sup> 2014 TCC 315.

<sup>138</sup> This case summary includes material from the previously published article “Directors and De-Facto Directors Liable for Unpaid Corporate Liabilities” by Ryan M Prendergast in the November/December 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/nov27.pdf>.

<sup>139</sup> 99 DTC 5658, 1999 CanLII 9297 (FCA).

<sup>140</sup> 2006 TCC 480.

<sup>141</sup> *Supra* note 36 at para 21.

Justice Campbell found that, on the facts, Mr. McDonald “played an important and active role in the overall corporate operations,” including having access to corporate books and records, managing and controlling employees, and attending meetings with trust examiners.<sup>142</sup> Justice Campbell therefore determined that “it was the Appellant’s expertise that was at the heart of the operation of the Company”<sup>143</sup> and concluded “that an individual need not be involved in all facets of...corporate operations to be held to be a *de facto* director.”<sup>144</sup>

Justice Campbell found that, based on the facts, Mr. McDonald was “at the centre of the heartbeat of the Company’s activities”<sup>145</sup> and “had sufficient control, both direct and indirect, over the corporate affairs to be held liable as a *de facto* director.”<sup>146</sup>

c) Issues to Consider from *McDonald*

*McDonald* identifies some important lessons for former directors of not-for-profit corporations and for other individuals who may be considered *de facto* directors at law.

- In general terms, to be considered a *de facto* director, courts will normally consider an individual’s ability to influence and control management of a corporation by making representations and participating in directorial acts.<sup>147</sup> This may, but does not necessarily include directly representing oneself in the capacity as a director to a third party.
- Anyone who is not officially a director within a not-for-profit corporation, including an executive director or other senior management positions, should be careful to ensure that the scope of their duties does not inadvertently make them a *de facto* director, since the

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<sup>142</sup> *Supra* note 137 at para 27.

<sup>143</sup> *Ibid* at para 28.

<sup>144</sup> *Ibid* at para 29.

<sup>145</sup> *Ibid* at para 31.

<sup>146</sup> *Ibid* at para 30.

<sup>147</sup> *Hay v Canada*, [2004] TCJ No 29 (TCC) at para 31.

*McDonald* decision serves as an important indication that such a finding can result in unforeseen and potentially costly personal liability.<sup>148</sup>

- Although there is no fixed rule for determining who is a *de facto* director, *de facto* directors generally can include:
  - “Those who were duly elected but may lack some qualification under the relevant company law that disqualifies them from legally being directors;
  - Former directors whose term of office has expired but who have continued to act as directors; or
  - Those who simply assume the role of director without any pretence of legal qualification.”<sup>149</sup>
- Specifically, a director can be found to assume the role of a director without legal qualification when he or she “perform[s] functions that are typically reserved for directors, such as giving instruction in the corporation’s name and make[ing] financial and administrative decisions on the corporation’s behalf.”<sup>150</sup>
- Mere possession of director-like authority, though, will not automatically confer director status on an officer or senior employee, for example, in many large companies senior officers are often given significant powers and responsibilities.<sup>151</sup> In this regard, it should be noted that in *Mosier v The Queen*, the TCC held that this mere possession of director-

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<sup>148</sup> Individuals acting in a chief executive role (i.e., as an executive director or president, or some other similar title) under the Carver Policy Governance Model should be mindful that they might unwittingly become exposed to personal liability as a *de facto* director because of the significant responsibility that acting under this governance model exposes them to. For example, an executive director under the Carver model serves as “a single point of delegation” and is “accountable for meeting all of the board’s expectations for organized performance.” See John Carver and Miriam Carver, “Carver’s Policy Governance Model in Nonprofit Organizations” *policygovernance.com* online: <<http://www.carvergovernance.com/pg-np.htm>>.

<sup>149</sup> Ryan Morris and Les Chaiet, “On the Hook: Directors Liability for Corporate Tax Transgressions” (May 2005) 15(3) *Taxation Law*, online: McMillan <<http://www.mcmillan.ca/Files/OntheHook-DirectorsLiability.pdf>> at 13 from *Re Lo-Line Electric Motors Ltd*, [1988] 2 All ER 692.

<sup>150</sup> Adrienne Woodyard, “Defining De Facto” (20 March 2015) *Focus Tax Law*, online: The Lawyers Weekly <<http://www.lawyersweekly.ca/articles/2343>> at 12.

<sup>151</sup> *Supra* note 149 at 13.

like authority will not be enough to make someone a *de facto* director as there must be “something more than a mere usurpation of office.”<sup>152</sup>

## E. ESTATE AND RESTRICTED GIFTS

### 1. *Norman Estate v Watch Tower Bible and Tract Society of Canada* — Conditional Gifts

#### a) Why this Case is Important

The decision of the British Columbia Court of Appeal (“BCCA”) in *Norman Estate v Watch Tower Bible and Tract Society of Canada* (“*Norman Estate*”)<sup>153</sup> is important because it illustrates the confusion and the resulting consequences that can occur when poorly worded gift documentation is used by a charity.

#### b) Case Summary<sup>154</sup>

In the June 2014 *Norman Estate* decision, the BCCA considered the validity of a donation made pursuant to a conditional donation agreement and agreed with the trial judge that the conditional gift in question was an *inter vivos* gift rather than a testamentary gift, meaning it took effect during the lifetime of the donors.<sup>155</sup> Consequently, the Watch Tower Bible and Tract Society (the “Society”) was entitled to keep the gift.

The facts in this case are key to understanding the decision of the BCCA. In this regard, Lloyd and Lily Norman (the “Normans”) made regular monetary gifts to the Society, a registered charity. On June 5, 2001, Mr. Norman sent a \$200,000 cheque to the Society indicating “For N.I. Demand Loan” in the memo line, with a cover letter stating

My understanding of such a loan ..., in the case of an emergency, or other, the return of such a portion can be requested. Otherwise, on the death of both parties of the suppliers of loan, these funds will remain the property of the [Society].<sup>156</sup>

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<sup>152</sup> [2001] TCJ No 692, 2001 CanLII 829 at para 29.

<sup>153</sup> 2014 BCCA 277.

<sup>154</sup> This case summary includes material from Theresa LM Man’s paper “Gifting Issues” presented at the Ontario Bar Association’s Institute 2015 (4 February 2015) available for purchase by Ontario Bar Association members at: [https://cbaapps.org/OBA\\_Store/Details.aspx?DirectPubId=4995](https://cbaapps.org/OBA_Store/Details.aspx?DirectPubId=4995) and from the previously published article “When is a Conditional Charitable Gift Effective?” by Jacqueline M. Demczur in the July/August 2014 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/14/aug14.pdf>.

<sup>155</sup> *Supra* note 153.

<sup>156</sup> *Ibid* at para 5.

The Society responded to the Normans and explained two different possible arrangements: an “Interest-Free Demand Loan”, whereby the remaining balance of the loan upon the death of the lender would be turned over to the estate for distribution under the will and a “Conditional Donation Agreement”, whereby the remaining balance of the loan would automatically remain with the Society upon the death of the lender. The Normans and the Society subsequently entered into a confusing Conditional Donation Agreement in an attempt to confirm the latter arrangement. This agreement provided, in part, that

The Watch Tower Bible and Tract Society of Canada (SOCIETY) acknowledges the receipt of a voluntary conditional donation in the amount of \$200,000.00 ... (hereinafter called FUNDS) to be held for the use and benefit of SOCIETY for the purpose of advancing the work of Jehovah’s Witnesses of preaching the good news about Jehovah’s Kingdom according to the judgment and sole discretion of the SOCIETY. The initial voluntary conditional donation is accepted from the following DONOR(S): Lloyd E. and Lily Norman ...

Any future funds advanced will be accepted by the SOCIETY and held according to this agreement if the DONOR(S) so indicates in a letter sent with any future funds.

DONOR(S) may personally request in writing the refund of all or any part of the FUNDS from the SOCIETY and such request shall be honoured. No request for a refund may be made by a power of attorney, an estate, or legal representative. The SOCIETY shall, however, in its sole discretion, consider refund requests from such parties, particularly if any financial need is being experienced by any who are DONORS and keeping in mind the best interests of all concerned. The total sums refunded shall not exceed the total of FUNDS.

After the death of all DONORS, the remainder interest that may exist in the balance of FUNDS held by the SOCIETY according to this agreement shall be in SOCIETY.<sup>157</sup>

Subsequent to the agreement, the Normans paid a total of \$310,000 to the Society, of which \$60,000 was turned into outright gifts for which the Society issued donation receipts. Mr. Norman survived his wife. On Mr. Norman’s death, a balance of \$250,000 remained from the funds advanced under the agreement. The Society issued a charitable donation receipt for \$250,000, but Mr. Norman’s estate (the “Estate”) claimed that the Society was not entitled to the \$250,000 and sued for the return of the funds to the Estate.

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<sup>157</sup> 2013 BCSC 2099 at para 16.

The trial judge held that the agreement created an *inter vivos* trust because the Normans intended the agreement to have immediate effect and the agreement created gifts with a subsequent condition.<sup>158</sup> In the process of reaching her decision, the trial judge held that the correct test for evaluating whether a disposition is testamentary continues to be set out in *Cock v Cooke*.<sup>159</sup> This test states that to determine the nature of a disposition, a court must first consider whether the person who executed the disposition intended that it only take effect after his or her death and then examine whether the gift is dependent on the death of the donor for its vigour and effect. In reaching her decision, the trial judge pointed to the Normans' cover letter, which said that upon the Normans' deaths "these funds will remain the property" of the Society.<sup>160</sup>

On appeal, the BCCA held that the Estate failed to demonstrate that the trial judge made a palpable and overriding error in finding the Normans' intention was to transfer an immediate proprietary interest in the donations to the Society. In upholding the trial decision, Justice MacKenzie of the BCCA referenced the trial judge's statement that:

The Conditional Donation Agreement on its face did have immediate effect and the extrinsic evidence is consistent with that conclusion. The Conditional Donation Agreement itself was not revocable, although the Normans had the right to a refund of their donations in accordance with its terms... the [Society] obtained both an immediate and future interest in the funds and the Normans' rights in respect of the funds became subject to the Conditional Donation Agreement.<sup>161</sup>

In this regard, the BCCA agreed with the trial judge's decision that the gift was a transfer of a proprietary interest to the Society during the Normans' lifetimes and therefore that the transfer was *inter vivos* based on the following findings: the Normans were bound by the terms of the agreement, which they could not revoke at any point; the Normans did not have the unrestricted opportunity to dispose of the property as they saw fit; the Normans could revoke their donations, but only in compliance with the terms of the agreement; the Normans could not revoke the agreement itself; and the Society could spend the funds at its discretion in the interim.<sup>162</sup> As a result, the Society was entitled to keep the funds in question.

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<sup>158</sup> *Ibid* at para 25.

<sup>159</sup> (1886) LR 1P 241 at 243 in *Norman, BCSC*, supra note 157 at para 20.

<sup>160</sup> *Supra* note 157 at paras 27 and 41.

<sup>161</sup> *Supra* note 153 at para 28 from *Norman, BCSC*, supra note 157 at para 54.

<sup>162</sup> *Ibid* at para 34.

c) Issues to Consider from *Norman Estate*

This case illustrates the need for careful drafting when preparing donation agreements, particularly with regards to whether a gift is to be effective immediately or at a future time, in particular upon death. In this regard, the following issues are worth considering:

- In *Norman Estate*, the BCCA reiterated that the test for determining whether a disposition is testamentary or *inter vivos* is whether the person executing the agreement intended it to take effect immediately or after his/her death.
- The *Norman Estate* case showed that it is possible for a conditional donation agreement to be used to create a charitable gift where the gifted property remains with the charity after the death of the donor, notwithstanding that this was an unusual application of a conditional gift.
- Most importantly though, the *Norman Estate* decision serves as a good lesson that to avoid unnecessary litigation between a charity and a donor or donor's estate it is important for the donor as well as the charity to obtain legal advice before making or accepting a significant donation, particularly when it includes complicated terms.<sup>163</sup>

2. *Mulgrave School Foundation (Re)* — Restricted Charitable Gifts

a) Why this Case is Important

This decision in *Mulgrave Foundation (Re)*<sup>164</sup> (“*Mulgrave*”) is important because it confirms that once donors have donated funds as a restricted charitable purpose trust, the donor loses any further interest in such funds once the gift is complete and that the consent of the donors is insufficient to change the restriction in the purpose of a gift.

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<sup>163</sup> “Norman v Watchtower Bible and Tract Society of Canada” (17 October 2013), online: The Pemsel Case Foundation <<http://www.pemselfoundation.org/content/norman-v-watchtower-bible-and-tract-society-canada>>.

<sup>164</sup> 2014 BCSC 1900.

b) Case Summary<sup>165</sup>

On October 9, 2014, the British Columbia Supreme Court (“BCSC”) released its decision in *Mulgrave*, in which it considered a request by the Mulgrave School Foundation (the “Foundation”) to vary a restricted gift for a particular purpose. The BCSC declined to vary the restrictions on the donations and, in the process, interpreted how to apply section 3(4) of British Columbia’s *Charitable Purposes Preservation Act* (the “Act”).<sup>166</sup> The Court concluded that a donor’s change of intent is not determinative, and does not provide the directors of a charity with initial authority to change the terms of a gift if they decide to use restricted funds for another purpose without court approval, which may not necessarily be available.

In *Mulgrave*, the Foundation sought an order allowing it to apply two large restricted donations of \$250,000 and \$861,217.50 toward the construction of a new senior school facility for the Mulgrave School. The donors had originally made the donations with two restrictions, i.e., that the funds be used to create an endowment and that the endowment be used to support scholarships at Mulgrave School. The donors consented to their donations being varied so that they could be used for the construction of the facility. The Foundation’s application, however, was opposed by the Attorney General of British Columbia, on behalf of the Crown, based on its responsibility over charities in British Columbia and its interpretation of section 3(4) of the Act.

The Foundation submitted that the BCSC has inherent jurisdiction over charitable matters and can alter endowment or purpose restrictions regarding how to apply the income of the fund. The Foundation relied on section 3(4) of the Act, which states:

If a charity holding discrete purpose charitable property is unwilling or unable to continue to keep, administer and use the property to advance the discrete purpose, the court may make whatever orders, including arrangements, it considers appropriate, including transferring the property to a new charity, so that the property is kept, administered and used to

- a) advance the discrete purpose, or

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<sup>165</sup> This case summary includes material from the previously published article “Court Refuses to Vary the Terms of a Restricted Gift” by Ryan M Prendergast and Terrance S Carter in the January 2015 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/15/jan29.pdf>.

<sup>166</sup> [SBC 2004] CHAPTER 59.

- b) advance another charitable purpose that the court considers is consistent with the discrete purpose.<sup>167</sup>

Section 3(4) can be read as a general codification of the court's inherent common law *cy-prés* jurisdiction to vary property donated for a particular charitable purpose where it is impossible or impracticable for the charity to continue using the property for that purpose. However, the Foundation provided no evidence that it was either impossible or impracticable for the Foundation to continue using the donated funds for their stated purpose of providing scholarships to Mulgrave School. Counsel for the Foundation urged the Court to interpret section 3(4) widely to apply the Act even where it was not impossible or impractical.<sup>168</sup> After considering the lack of any evidence showing an impossibility or impracticality of carrying out the intended purpose in accordance with the court's *cy-prés* power, the BCSC refused to allow the donations intended to be used for scholarships to be used for the construction of the school.

c) Issues to Consider from *Mulgrave*

The Court's decision in *Mulgrave* underscores that when gifts are given with a restricted charitable purpose, such as buying equipment for a hospital, funding scholarships or other types of endowments, such gifts will generally be seen as having being impressed with a restricted charitable purpose trust. Restricted charitable purpose gifts, in general, refer to gifts that are given for a charitable purpose subject to restrictions, limitations, conditions, directions or other restricting factors either related to the use of the gift or the time during which the gift can be applied.<sup>169</sup> This type of trust is becoming a more frequent fundraising vehicle, as donors become more sophisticated with their giving and demand greater accountability from charities with regard to their donation. In this regard, a few practical issues for practitioners to consider when dealing with restricted charitable purpose gifts include the following:

- For a donor, the advantage of utilizing a restricted charitable purposes gift is that it imposes a trust on the charity and as such it ensures that a charity must follow the donor's directions. However, the disadvantage of a restricted charitable purpose trust is that by

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<sup>167</sup> *Ibid.*

<sup>168</sup> *Supra* note 164 at para 28.

<sup>169</sup> Jane Burke-Robertson, Terrance S Carter, and Theresa LM Man, *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Toronto: Carswell, 2015) at 17-2.

accepting such gifts the charity obviously loses flexibility in how the gifted funds can be applied.

- A charity must ensure that any restrictions imposed on a gift by a donor are compatible with the general charitable purposes of the charity.
- Charities and their boards of directors that use restricted charitable purpose trust funds for purposes other than those imposed by the donor put their directors at risk of being found personally liable for breach of trust.
- If a charity's needs change to the restricted gift and a donor agrees how a restricted charitable gift can be changed, simply having a donor's consent to such a change is not determinative of whether the change can be made. The determinative factor is whether the gift agreement included a power to vary the restriction in favour of the charity.
- Where there is no power in favour of the charity to vary, then at common law the courts have the authority to vary a restricted charitable purpose trust, but only when it becomes impossible or impracticable for the charity to fulfil the restriction in accordance with the court's inherent *cy-près* doctrine and/or in accordance with legislative authority as is the case with the *Charitable Purposes Preservation Act*<sup>170</sup> in British Columbia.<sup>171</sup>
- However, applications to court to vary a restricted charitable purpose trust can be costly and time-consuming, particularly for charities with limited budgets, and court approval may not always be available where the charity cannot satisfy the court that the restriction in question is either impossible or impracticable.
- In deciding whether or not to vary the restricted charitable purpose gift in *Mulgrave*, the BCSC concluded that "unfortunately, as laudable as the Foundation's initiative and intent is, the petitioner has not met the necessary conditions to obtain the relief sought."<sup>172</sup> This

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<sup>170</sup> *Supra* note 166.

<sup>171</sup> Donovan Waters, "Administrative and Cy-Près Judicial Scheme Making: The Fate of these Applications in Canada Today" (presented at the 2010 National Charity Law Symposium, April 30, 2010), online: <<http://www.carters.ca/pub/article/charity/2010/waters0430.pdf> at 6> at 6.

<sup>172</sup> *Supra* note 164 at para 32.

underlines the fact that the nature of the charity's or the donor's intent is not determinative in deciding whether or not the necessary conditions for requesting relief are met.

- The *Mulgrave* decision is a good reminder that charities need to be cautious before donors are encouraged to make gifts with restrictions unless appropriate power to vary in favour of the charity has been included in the gift agreement.

## F. CHARITABLE RECEIPTING ISSUES

Late 2014 saw the SCC and the TCC tackle a number of interesting cases on the issue of charitable receipting. In particular, on December 5, 2014 the SCC heard the appeal of the FCA's decision in *Guindon v The Queen*<sup>173</sup> ("*Guindon*") and the TCC rendered its decision in a series of seven false receipting cases in November of 2014. The former case dealt with the issue of the Minister of Revenue's assessment of third party penalties against a lawyer who made false statements in relation to the issuing of receipts in a charitable donation scheme. Although the SCC has not yet released its decision in *Guindon*, when released, the decision will likely have a significant impact on the Minister of Revenue's future approach to third party penalties and charitable receipting issues. On the other hand, the latter TCC cases, discussed below, clearly illustrate the TCC's intolerance with regard to the issuing of false receipts.

### 1. Seven Cases in November 2014

#### a) Why these Cases are Important

In the following series of cases, the TCC emphasized that individual taxpayers remain responsible for their own tax returns despite receiving bad financial advice. It also underscored that individuals must take responsibility for their own actions and roles under the ITA and cannot be protected behind a screen of bad financial advice, misguided trust, momentary lapses of judgment, or not reviewing their returns.

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<sup>173</sup> 2013 FCA 153.

b) Case Summaries<sup>174</sup>

On November 18, 2014, the TCC released seven judgements dealing with false receipting heard over 3 days before the same judge in September 2014. These cases were heard under the TCC's informal procedure process.

All of these cases relate to a fraudulent tax donation scheme operated by an accounting and tax services corporation in Vancouver. The scheme involved the issuance of approximately \$12 million in false charitable donation receipts. The set of cases are: *Abootaleby-Pour v The Queen*,<sup>175</sup> *Bani v The Queen*,<sup>176</sup> *Izkendar v The Queen* (“Izkendar”),<sup>177</sup> *Vekkal v The Queen* (“Vekkal”),<sup>178</sup> *Rasuli v The Queen*,<sup>179</sup> *Nocon v The Queen* (“Nocon”),<sup>180</sup> and *Komarynsky v The Queen*<sup>181</sup> (collectively referred to as the “Appellants”). In each of these cases, CRA took the position that the receipts for the charitable donations were forged. The Court disallowed the false receipts in all cases.

In all of the cases, the Minister alleged that the Appellants purchased false charitable donation receipts from their accountants, Fareed Raza and Sheem Raza (the “Accountants”) at various times during the period 2003 to 2009. The Accountants were charged with fraud for making false statements on the related income tax returns. In such cases, the Appellants have the onus of disproving the Minister's assumptions, while the Minister then has the corresponding burden of establishing that the Appellants made a misrepresentation attributable to neglect, carelessness, or willful default under subparagraph 152(4)(a)(i) of the ITA.

CRA presented common evidence in all seven cases. In 2009, CRA's Vancouver Tax Services Office discovered that a number of the Accountants' clients had made large donations to the Mehruz Children Welfare Trust (the “Trust”). The donation pattern appeared abnormal because the taxpayers' donations represented a significant portion of their net income (between 8 to 11

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<sup>174</sup> This case summary and issues to consider include material from the previously published article “Recent False Receipting Cases from the Tax Court of Canada” by Theresa LM Man in the January 2015 *Charity Law Update* available online at: <http://www.carters.ca/pub/update/charity/15/jan29.pdf>.

<sup>175</sup> 2014 TCC 343 [*Abootaleby-Pour*].

<sup>176</sup> 2014 TCC 340 [*Bani*].

<sup>177</sup> 2014 TCC 344.

<sup>178</sup> 2014 TCC 341 [*Vekkal*].

<sup>179</sup> 2014 TCC 346 [*Rasuli*].

<sup>180</sup> 2014 TCC 345.

<sup>181</sup> 2014 TCC 342.

percent) and were out of character with past giving patterns.<sup>182</sup> In 2010, CRA launched a criminal investigation, from which CRA uncovered that receipts for the Trust seized at the Accountants' offices were different from the official receipts issued by the Trust. The charitable status of the Trust was voluntarily revoked in October 2012.

The exact details regarding circumstances of the donations and the tax returns prepared by the Accountants vary in each of the seven cases, but the result was the same. In reaching the decisions to disallow the receipts, the Court was satisfied that the Appellants knowingly purchased false donation receipts, knowingly made false representations in respect of the donations, and could not deny responsibility because they did not read the tax returns prepared by the Accountants or placed their trust in a third party preparer of income tax returns. For example, in *Nocon*, the Court found that Mr. Nocon was equally blameworthy, and could not shift the blame to the Accountants.<sup>183</sup> The judge emphasized that “taxpayers cannot be absolved of responsibilities for misrepresentations made in their tax returns on the grounds that they failed to read the return before they signed and filed them.”<sup>184</sup> The judge also emphasized that it is implausible that the Appellant in *Izkendar* would give the Accountants money in cash immediately after learning about the charity,<sup>185</sup> and that some Appellants were not in the financial position to make the alleged donations.<sup>186</sup>

In *Vekkal*, the Court concluded that while the Accountants instigated the false donation receipt scheme, the Appellants “should not be spared.”<sup>187</sup> The judge referred to the full analysis in *Vekkal* throughout the other shortened cases. In *Vekkal*, the judge stated that “Parliament has made it clear that taxpayer conduct of this sort is not acceptable. Fiscal disobedience is a societal concern.”<sup>188</sup> The judge specifically referred to the SCC’s finding in *Knox Contracting Ltd v Canada*, where the SCC stated that:

Those who [. . .] evade the payment of income tax not only cheat the State of what is owing to it, but inevitably increase the burden placed upon the honest taxpayers. It is ironic that those who evade payment of

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<sup>182</sup> *Bani*, *supra* note 176, at para 9.

<sup>183</sup> *Supra* note 180.

<sup>184</sup> *Abootaleby-Pour*, *supra* note 175 at para 22.

<sup>185</sup> *Supra* note 177 at para 19.

<sup>186</sup> *Vekkal*, *supra* note 178 at para 29; *Rasuli*, *supra* note 179 at para 25.

<sup>187</sup> *Supra* note 178 at para 36.

<sup>188</sup> *Ibid* at para 36.

taxes think nothing of availing themselves of the innumerable services which the State provides by means of taxes collected from others.

The entire system of levying and collecting income tax is dependent upon the integrity of the taxpayer in reporting and assessing income. If the system is to work, the returns must be honestly completed. [. . .]<sup>189</sup>

c) Issues to Consider from the False Receipting Cases

From the cases referenced above, it is evident that the TCC has taken a strong stance on fraudulent receipts and has repeatedly emphasized the role and responsibility of individual taxpayers. That said, it must be remembered that these cases were decided by the TCC as informal procedure cases, and therefore lack formal precedential value. A few key points to consider from these cases include:

- While practitioners should ensure that charities they work with follow the rules while issuing tax receipts or risk facing revocation of registration,<sup>190</sup> individual taxpayers cannot rely on a screen of bad advice. Specifically, taxpayers cannot use excuses such as bad advice, misguided trust, momentary lapses of judgment, or not reviewing their returns.
- None of the court decisions in these cases included any reference to penalties imposed by CRA in respect to the reassessment of the donors. It is therefore not clear if any penalties were at play. However, even if no penalties were assessed against the donor in these cases, this does not mean that penalties cannot be sought in similar reassessments. Donors should always be aware that CRA can impose penalties in situations involving false donation credits.
- Likely due to the TCC considering a number of cases involving fraudulent charitable receipts, CRA posted a warning about risks associated with gifting tax shelter schemes in November 20, 2014. This warning reminded taxpayers that if they claim credits based on such schemes their assessments will be withheld until the relevant tax shelter has been

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<sup>189</sup> *Ibid* at para 36 quoting [1990] 2 SCR 338, 1990 CanLII 71 (SCC).

<sup>190</sup> While the registration of the Mehruz Children's Trust was voluntarily revoked, the registration of each of the charities involved in the June, July, and August cases and in the April cases was revoked by CRA for, amongst other violations, improperly issuing gift receipts.

audited.<sup>191</sup> Although this specific issue is not the same as the one considered by the TCC, the larger issue of taxpayers taking personal responsibility regarding their role in the tax system remains applicable in both situations.<sup>192</sup>

## G. CONCLUSION

It is clear from the depth and breadth of the issues raised in the cases summarized above that the judicial renderings emanating from the courts, both in Canada and internationally, over the past twelve months have been particularly fruitful. As well, since the common law dealing with charities is for the most part consistent across Canada (with the exception of Quebec as a civil law jurisdiction) and because the ITA provisions dealing with charities are national in scope, it is important for practitioners who advise charities and not-for-profits to keep abreast of developments in the law across Canada. It is also important for charity lawyers to monitor decisions proceeding from other common law jurisdictions since some of those cases may very well serve as bell-weather trends in charity law that may be coming to Canada at some point in the future.

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<sup>191</sup> “Warning: be cautious if you are thinking of participating in a gifting tax shelter scheme” (20 November 2014), online: Canada Revenue Agency <[http://www.cra-arc.gc.ca/nwsrm/lrts/2014/1141120-eng.html?utm\\_source=mediaroom&utm\\_medium=email](http://www.cra-arc.gc.ca/nwsrm/lrts/2014/1141120-eng.html?utm_source=mediaroom&utm_medium=email)>.

<sup>192</sup> Doug Carroll “CRA Warns on Gifting Tax Shelters” (23 January 2015) *Advisor.ca*, online <<http://www.advisor.ca/tax/tax-news/cra-warns-on-gifting-tax-shelters-173374>>.