# 2015 CANADIAN BAR ASSOCIATION NATIONAL CHARITY LAW SYMPOSIUM

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# JUDICIAL RENDERINGS – INTERESTING CASES TO CONSIDER

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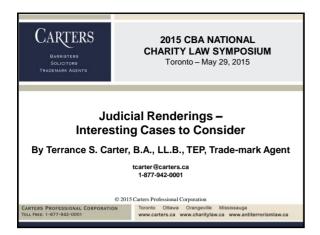
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0\	/ERVIEW	
•	Political vs Charitable Purpose Advancement and Freedom of Religion Directors' Liability Estate and Restricted Gifts Charitable Receipting Issues	
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# A. POLITICAL PURPOSE / CHARITABLE PURPOSE

1. Re Greenpeace of New Zealand ("Greenpeace")

a) Why this Case is Important

• Only the second time that a Commonwealth jurisdiction held that a political purpose can be a charitable purpose

b) Case Summary

• "Political and charitable purposes are not mutually exclusive in all cases"

• Follows the 2010 Australian decision in Aid/Watch

• Did not open the door though, for any political purpose to be charitable because finding a public benefit "depends on the wider context"

• Referred the case back to the body of first instance

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#### c) Issues to Consider from Greenpeace

 Greenpeace is not binding in Canada, but may be persuasive because the reasoning recognizes that the political purpose exclusion doctrine does not make sense



- It might be an attractive precedent for Canadian courts or for CRA in developing new policies and guidances
- Greenpeace could be useful for finding that ITA ss. 149.1(6.1) & (6.2) should not be considered a codification of the political purpose exclusion doctrine
- · Greenpeace's precedential value may be limited as it
  - Shows that it will be unusual for a political purpose to be considered a charitable purpose, and
  - Suggests that the test to determine a charitable purpose reverts back to the reasoning in the original political purposes exclusion doctrine, e.g.,

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 "Advancement of causes will often, perhaps most often, be non-charitable"

- "[If] 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"
- After the decision, the Charities Service in New Zealand came out with a Guidance which emphasizes how difficult it will be for a charity in New Zealand to establish a standalone political purpose as a charitable purpose
- As such, long-term consequences of Greenpeace in Canada may not be as significant as first thought
  - It is likely best to refer back to the more satisfying reasoning in the 2010 Aid/Watch decision

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- Although the Federal Court of Appeal ("FCA") in News to You Canada acknowledges that Aid/Watch distinguishes the Canadian and Australian legislative schemes, the decision is still analogically valuable because the Australian High Court does not revert back to the reasoning in Bowman
- In Canada, it is already possible to carry out limited advocacy activities under what CRA permits as charitable activities in CPS-022, Political Activities, which achieves to a great extent what a political purpose would do if it was recognized as a charitable purpose
  - E.g. making a representation to public officials that the laws, policies, or government decisions in Canada or abroad should be changed, retained or opposed, including publishing the representations, will be charitable, if it:

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1)	Relates to	an is	ssue	connected	to	the o	charity	's
	nurnoses							

- 2) Is subordinate to the charity's purposes
- 3) Is well reasoned
- 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, &
- Does not include the direct or indirect support of, or opposition to, any political party or candidate for public office
- Since it is not clear whether the Greenpeace reasoning will ever be followed in Canada, practitioners may want to consider using the tools already available in CRA's CPS-022

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2. The Human Dignity Trust v The Charity Commission for England and Wales ("Human Dignity Trust")

# a) Why this Case is Important

 Held that promoting and protecting human rights through strategic litigation is not a political purpose or activity

#### b) Case Summary

- The Tribunal found that upholding a citizen's constitutional rights does not seek to change the law of the relevant jurisdiction but rather seeks to enforce and uphold those superior rights; and as such is not political
- Strategic litigation to enforce human rights will be seen as charitable where it involves a benefit to the individual as well as the community at large from interpreting such rights

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# c) Issues to Consider from Human Dignity Trust

- The Tribunal's stance parallels the broad approach in the Charity Commission's 2008 Guidance on political activity by charities
- The Charity Commission's approach is more benevolent than CRA's more recent approach in its 2010 Guidance Upholding Human Rights and Charitable Registration, which recognizes that



- Upholding human rights can further charitable purposes or be a charitable activity
- Pursuing litigation to uphold the administration and enforcement of the law is a charitable activity
- CRA's stance is similar to Human Dignity Trust insofar as upholding human rights to further charitable purposes is seen as "undoubtedly beneficial to the public"

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•	Consequently, while Human Dignity Trust does not
	create new law regarding what is already permitted in
	Canada, it could be a persuasive precedent if CRA took
	the position that a charity was acting outside of its
	Guidance on Upholding Human Rights

- However, CRA's Guidance contains some important differences from the *Human Dignity Trust* decision, e.g.,
  - In Canada, charities must walk a fine line in order to balance CRA's position on upholding human rights as a charitable activity or purpose as oppose to becoming involved in political activities
  - In doing so, charities must "respect the prohibition on political purposes and the limitation on political activities"; thus CRA has not gone as far in recognizing activities that uphold human rights

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# **B. ADVANCEMENT AND FREEDOM OF RELIGION**

 Humanics Institute vs The Minister of National Revenue ("Humanics") – Advancement of Religion

## a) Why this Case is Important

- Humanics represents another case in a line of decisions from the FCA in which an applicant for charitable status was rejected because its proposed purposes did not constitute advancement of religion in the court's opinion
- This is particularly relevant because the FCA reinforced the principles that it and the Supreme Court of Canada ("SCC") have previously set out on this topic
- · Leave to appeal to the SCC was denied on April 23, 2015

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# b) Case Summary

- Humanics Institute's ("Institute") primary objective is to "advance the essential values inherent in all religions of the world through...a spiritual non-theistic sculpture park"
- · In its decision, the FCA
  - Found that "Oneness of Reality" that the Institute seeks to advance, was too broad and vague
  - Relied on Amselem, a SCC constitutional case, which requires organizations to have to point to a "particular and comprehensive system of faith and worship" or body of teachings
  - Restated its approach from Fuaran, that to "simply make available a place where religious thought may be pursued" is insufficient

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_	stated	merely	expressing	aspirations	does	not	entitle
	an ann	licant to	charitable	status"			

#### c) Issues to Consider from Humanics

- Since its initial refusal to register the Institute, a more inclusive definition of religion appears in CRA Guidances
- Humanics does not create new law, but is helpful in understanding advancement of religion, e.g.,
  - Confirms that organizations must be able to show they actively promote their religious beliefs
  - Applies a constitutional perspective of advancement of religion as opposed to only a charity law perspective
    - This is encouraging for practitioners wanting to rely on case law that supports a broader interpretation of advancement of religion in the charitable context

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2. Loyola High School vs Quebec (Attorney General) ("Loyola") – Freedom of Religion

#### a) Why this Case is Important

 Both the majority and the concurring minority opinions provided a robust affirmation of freedom of religion, including the communal aspects of religion

## b) Case Summary

- The SCC ruled that requiring religious schools to teach their own religion objectively seriously infringes religious freedoms
- The majority returned the matter to the Minister for reconsideration, while the minority would have ordered the Minister to grant Loyola an exemption

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- Majority: it is not necessary to determine whether a corporation has the right to freedom of religion if the community members have such protection
- Minority: an organization has s. 2(a) Charter protection if it is constituted primarily for religious purposes and its operation accords with these purposes
- The Court commented on secularism in considering how to balance freedom of religion with the values of the state
  - The majority underlined that secularism does not mean excluding religion and, instead includes "respect for religious differences"
  - It emphasized that "through this form of neutrality, the state affirms and recognizes...religious freedom"

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## c) Issues to Consider from Loyola

- · Provides new insight into how the communal aspect of religion could be applied in future case law, i.e.,
  - Religion's "manifestation through communal institutions and traditions"
- In Mouvement laïque québéois v Saguenay (City) on April 15, 2015, the SCC mirrored the Loyola decision,
  - "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"
- · It is likely that Loyola will impact upcoming decisions about the proposed Trinity Western University Law School

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#### C. DIRECTORS' LIABILITY

1. Bekesinski vs The Queen ("Bekesinski") - Proper **Documentation** 

# a) Why this Case is Important

· Emphasized the importance of following due diligence in documenting when a person ceases to be a director

b) Case Summary		
<ul> <li>Was the resignation as a director backdated?</li> </ul>		
<ul> <li>If so, this would determine whether the "director" would be liable for the corporate debt</li> </ul>	-	
<ul> <li>Because of a lack of evidence, the case was decided primarily on credibility</li> </ul>		
<ul> <li>Consequently, the judge found for the director although she believed the resignation had been backdated</li> </ul>		
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c) Issues to Consider from <i>Bekesinski</i>		
<ul> <li>This case underscores the importance of properly documenting all details surrounding a resignation by a director and the timeline related to being a director, e.g.,</li> </ul>		
<ul> <li>Although due diligence was not argued in this case, it is, generally, the only defence, apart from having resigned in accordance with subsection 227.1(4) of the ITA, to avoid related liabilities</li> </ul>		
The judge's clear statements about her suspicions of the resignation underscore that backdating is fraudulent and must be avoided		_
The facts in Bekesinksi do not address whether it would be possible for a director to sign a resignation letter with a current date to confirm a prior verbal resignation deemed to effective from the earlier date  www.cherkylew.ca  www.cherkstea.		
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2.	McDonald vs	The Queen	("McDonald") -
	Do Eacto Diro	ctore	

#### a) Why this Case is Important

 An individual was a de facto director based on his role in the corporation and was liable for company liabilities despite the fact that he was not legally a director and did not present himself as a director to any third-parties

#### b) Case Summary

- An individual can be a de facto director based solely on his or her role in the corporation even if he or she is not involved in all aspects of corporate operations
  - Duties such as having access to corporate records, managing and controlling employees, and attending meetings with trust examiners will be considered

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#### c) Issues to Consider from McDonald

- Courts will consider an individual's ability to influence and control management of a corporation
- There is no fixed rule for determining who is a de facto director, but de facto directors can include
  - Individuals who were duly elected but may lack some qualification
  - Former directors whose term of office has expired but who have continued to act as directors or
  - Individuals who simply assume the role of director without any pretence of legal qualification
- Mere possession of director like authority though, will not automatically confer director stature on an officer or a senior employee

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# D. ESTATE AND RESTRICTED GIFTS

1. Norman Estate vs Watch Tower Bible and Tract Society of Canada ("Norman Estate") - Conditional Gifts

#### a) Why this Case is Important

 Illustrates the confusion and the consequences that can occur when charities use poorly worded gift documents

# b) Case Summary

- The donors made regular monetary gifts to the Society including a cheque marked as a demand loan
- The donor and charity then entered into a confusing "Conditional Donation Agreement"
- · After the donors' deaths, their Estate sued for the funds
- The Court found the gift was inter vivos, so took effect during the donors' lifetime and could be kept by the Society

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# c) Issues to Consider from Norman Estate

- Illustrates the need for careful drafting, particularly with regards to whether the gift is to be effective immediately or in the future, e.g.,
- A court application was necessary to confirm that a conditional donation agreement could create a charitable gift where the gifted property remains with the charity after the donor's death
- To avoid unnecessary litigation between a charity and an estate, the donor and the charity should both obtain legal advice before making or accepting a significant donation



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2. Mulgrave School Foundation (Re) ("Mulgrave") – Restricted Charitable Gifts

#### a) Why this Case is Important

 Confirms that once a donor has donated restricted funds, the donor loses any further interest in such funds if the gift is complete, and, as such, that the donor's consent is insufficient to change the restriction

# b) Case Summary

- · In Mulgrave, the British Columbia Superior Court
  - Declined to vary the donation's restrictions, and, in the process, interpreted how to apply s. 3(4) of British Columbia's Charitable Purposes Preservation Act
  - Held that a donor's change of intent does not provide directors with authority to change the terms of a gift

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 Concluded that although the Foundation's intent was laudable, it did not prove that using the funds for their stated purpose was impossible or impracticable

# c) Issues to Consider from Mulgrave

- Charities must ensure that any donor restrictions are compatible with their charitable purposes
- If restricted funds are used for different purposes, directors may be found personally liable
- If a charity wants to change how to use a restricted gift, having the donor's consent is not determinative
- At common law, the courts have an inherent power to vary a restricted charitable purpose trust through the cy-près doctrine, but only if it is impossible or impracticable for the charity to fulfil the restriction

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#### E. CHARITABLE RECEIPTING ISSUES

- · In late 2014, the SCC and the Tax Court considered a number of interesting charitable receipting cases
  - The SCC heard the appeal in Guindon v The Queen and has not yet released its decision
    - This upcoming decision in Guindon will likely have a significant impact on the Minister of National Revenue's future approach to third party penalties and charitable receipting issues
- Seven Tax Court decisions on fraudulent receipting were released in November 2014

#### a) Why these Cases are Important

- Illustrate that the Tax Court is intolerant of any issues related to false receipting because it considers individuals responsible for their own tax returns

# b) Case Summaries

- These informal procedure cases were heard by the same judge and relate to the same donation scheme
- The judge stated that "fiscal disobedience is a societal concern'
  - Individuals cannot be protected by bad financial advice, misguided trust, or momentary lapses of judgment

# c) Issues to Consider from the False Receipting Cases

- Practitioners should ensure the charities they work with follow the rules while issuing tax receipts, but individual taxpayers cannot rely on a screen of bad advice
- While none of these decisions referred to CRA penalties, donors need to be aware that CRA can impose penalties in situations involving false donation receipts