Healthcare Philanthropy: Check-Up 2015

June 11, 2015

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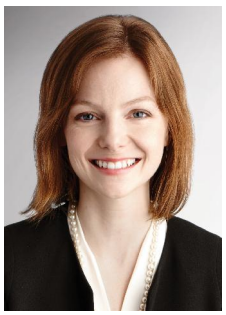

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Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2015

Half-Day Seminar, June 11, 2015

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Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2015

Half-Day Seminar, June 11, 2015

Agenda

7:45 am – 8:25 am	**Registration & Breakfast**
8:25 am – 8:30 am	**Opening Remarks** *Terrance S. Carter / M. Elena Hoffstein*
8:30 am – 9:15 am	**Essential Charity Law Update** *Theresa L.M. Man, Partner, Carters Professional Corporation*
9:15 am – 10:00 am	**The New Era for Estate Donation Rules: How They Will Impact on Charities and Donors** *M. Elena Hoffstein, Partner, Fasken Martineau*
10:00 am – 10:20 am	**Refreshment & Networking Break**
10:20 am – 11:05 am	**Preparing for and Surviving a Charity CRA Audit** *Terrance S. Carter, Carters Professional Corporation*
11:05 am – 11:50 pm	**The Carter Decision and Physician-Assisted Dying: Implications for Healthcare Institutions and their Foundations** *Kathryn L. Beck , Associate, Fasken Martineau* *Rosario G. Cartagena, Associate, Fasken Martineau*
11:50 pm	**Questions and Closing remarks** *Terrance S. Carter / M. Elena Hoffstein*

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Trusts, Wills, Estates and Charities

Members of the Trusts, Wills, Estate and Charities group practising in the ***Charities and Not-For-Profit*** sector provide legal services related to the effective creation, organization and ongoing governance and administration of charities and not-for-profit entities. We advise donors with respect to effective charitable giving as well as the establishment, maintenance and operation charities and not-for-profit entities.

Our ***Estate Planning*** services includes wills, domestic contracts, business succession planning, planned giving, powers of attorney and trusts. We can assist you with your responsibilities in the administration of an estate, a trust or if you are acting as a power of attorney. When your estate planning requires additional expertise, we are able to partner with other experts to ensure all your options are explored.

Our ***Personal Tax Planning*** practitioners offer a broad range of services to assist clients in developing effective strategies for minimizing taxes including probate taxes, within the framework of the will or estate plan. We can provide both cross border and international tax planning.

If you have a trust, will or estate related or a related dispute, we act as a fiduciary or as a beneficiary members of our ***Estate Litigation*** group can represent your interests in the pursuit of an effective solution.

Charities and Not-For-Profit

Every day people's lives are enriched by the work of charitable and not-for profit organizations. The role these organizations play in our society is growing. That growth has been accompanied by a growth in the regulation of these organizations and a greater scrutiny of their governance, including the actions of their directors and officers. The laws around fundraising, donations and legacy planning are complex. If you are involved in the management and operation of one of these organizations, our team of skilled lawyers can help you in understanding and complying with the law as it applies to the management and operation of your organization.

At Fasken Martineau, we work extensively with the charitable sector, providing legal services related to the effective creation, organization and ongoing governance and administration of charities and not-for-profit entities. We assist with the efficient maintenance of the legal affairs of the organization, including advising on administrative and governance matters, compliance and regulatory issues, taxation matters, directors' duties and obligations and members' rights.

Research has indicated that while most Canadians contribute to charities throughout their lifetime, very few continue this support through a gift in their will or estate plan; this is a missed opportunity. Consideration should be given to the tax advantages of testamentary charitable gifts as part of the estate planning process. The two most common types of planned gifts are bequests in wills and gifts of life insurance. Other types of donations include: pledges; payroll deductions; gifts in kind; charitable remainder trusts; charitable gift annuities; gifts of appreciated securities and bonds; in memoria and special occasion gifts. If your estate plan involves leaving a social capital legacy, we can assist you in effectively implementing this legacy.

We count among our clients a large number of hospitals, healthcare service agencies, professional governing bodies and associations, community service agencies, not-for-profit organizations and community foundations as well as private family foundations.

If you are in need of advice concerning the establishment of such an organization or the making of a charitable gift, our practitioners will take the time to understand your values and vision to ensure your legacy planning is fulfilled in a tax efficient manner.

Members of our group belong to professional bodies such as the Society of Trust and Estate Practitioners (STEP), Academy of Trusts and Estates (ACTEC), the Canadian Association of Gift Planners (CAGP) and the Association of Fundraising Professionals (AFP).

Estate Litigation

Members of our practice group have specialized expertise to assist in resolving contentious matters relating to wills, trusts and the administration of estates. We are able to provide effective guidance and, where appropriate, skilled counsel abilities to negotiate, mediate, arbitrate or litigate the matter. Our expertise is recognized by other members of the legal community and we often assist other lawyers in litigation matters concerning wills, estates and trusts and their administration.

Estate and Trust Litigation

We act for executors/administrators/trustees, heirs and beneficiaries, including charitable beneficiaries and persons who feel they have been wrongfully excluded from a share of an estate. We both prosecute and defend claims and seek court direction as best serves the needs of our clients.

We have extensive experience in matters concerning the validity of a will or trust where concerns arise about the maker's mental capacity, undue influence or knowledge or approval of the document. We also act on behalf of family members and dependants of a deceased who seek to vary a will under legislation that allows for the court to give a greater share of the estate to them than they have been given under the will. We act on matters where property has been transferred through joint tenancy or outright transfer during a person's lifetime that may not have been intended as a true gift and where a resulting trust arises. We act on matters where an unjust enrichment or compensation claim for benefits is made for benefits one person has provided to another.

We assist family members where a power of attorney appointment or a court appointment of a legal representative for an incapable adult is required to assist with the person's financial and legal affairs or personal care decisions. We also advise families where there are vulnerable elderly members who require financial protection and act to recover assets for persons who have suffered a loss because of financial abuse or improvident transfers of assets. Where a person is in a position of trust or serves as a fiduciary to another, we bring proceedings to recovery losses resulting from the breach of trust or breach of fiduciary duty.

Estate Administration

We advise estate trustees/executors/administrators as to their responsibilities and obligations in the administration of estates and trusts. This may include court applications to determine the appropriate heirs and beneficiaries of an estate and their respective entitlements (both where there is a will and where a person dies leaving no will), to have persons appointed to administer estates and trusts and to replace executors and trustees appointed under a will with others. We also defend claims by creditors or claimants against an estate or bring claims by the estate for recovery of assets.

We can provide advice and seek court direction where there are questions regarding the proper interpretation of the document, where an amendment to the trust terms is required or where there are issues about how the administration of a trust or the estate is to be undertaken. We give advice on matters relating to the proper preparation of estate/trust accounts, the process of obtaining court approval of the estate/trust accounts, the appropriate remuneration for the trustee/executor/administrator and their ultimate discharge.

Regardless of the specific estate, will or trust issue, our strength is that we will apply our expertise to bring the most effective solution to achieve the goals of our clients.

Estate Planning

An effective estate plan requires a thorough understanding of your values and objectives for your wealth. Once we have worked with you to clarify what these are, our acknowledged leaders in estate planning can develop a well-designed plan to fulfill those values and objectives. The plan we develop with you may include wills, domestic contracts, a succession plan for your business, a charitable giving strategy to fulfill your social capital legacy, powers of attorney and trusts. We will work independently or with your other advisers to develop an integrated estate plan which meets your values and objectives, while minimizing the impact of income taxes and probate fees.

Our services also include assisting with the administration of the estate or trust including advising executors and trustees and, in many cases, acting as their agents in the day-to-day administration of the estate. We can also attend to fiduciary accounting, gathering information on the assets and liabilities of an estate, applying for grants of probate or letters of administration, making all necessary filings with the Canada Revenue Agency and distributing assets to beneficiaries.

The multi-jurisdictional property interests of our clients often require the development of a co-ordinated plan to leverage differing legal and tax regimes. Through our international offices and the reputation of individual members of our group, we have access to experts in other jurisdictions who can assist in this regard.

Our experience includes the following:

- Assisting clients with marriage contracts and family law planning;
- Advising on the use of trusts and powers of attorney to protect clients' assets and ensure safeguarding of those assets and care of clients in the event of long term illness or incapacity;
- Using tax-planned trusts and wills to accomplish one's primary personal and financial objectives while minimizing tax consequences;
- Advising on trust variations and migrations;
- Planning to effectively reduce probate taxes within the framework of the will or estate plan;
- Developing and facilitating succession plans to transfer family business between generations;
- Cross-border will and trust planning for clients who are U.S. citizens or dual residents of Canada and the United States or Canadians who own U.S. situs property;
- Assisting new immigrants to Canada to establish trusts to take advantage of the five-year Canadian tax holiday;

- Advise individuals in planning for emigration from Canada;
- Advising on the appropriate use of insurance;
- Advising on and implementing sophisticated estate freezing and income splitting schemes;
- Assisting executors and trustees with estate and trust administration, and executors' and trustees' accounts;
- Planning to deal with the succession of recreational properties (within and outside Canada) for both Canadian residents and non-residents and minimizing taxes with respect to such succession.

Members of our group belong to professional bodies such as the Estate Planning Council (EPC), Family Firm Institute (FFI), the Society of Trust and Estate Practitioners (STEP), Canadian Association of Family Enterprises (CAFE), Academy of Trusts and Estates (ACTEC), the International Academy of Trusts and Estates Lawyers, the Canadian Association of Gift Planners (CAGP) and the Association of Fundraising Professionals (AFP). When your estate planning requires additional expertise, we are able to partner with the firm's specialists in taxation, insurance and business law and can also assist in resolving estate-related disputes through litigation or mediation *see* ***Estate Litigation****).*

Personal Tax Planning & Wealth Management

The enhancement, accumulation and preservation of wealth require a combination of acumen and insight. Through an organised and effective tax planning, you will reduce, minimize or defer your Canadian and global income tax burden. Our acknowledged leaders in the personal tax planning group can assist you and your advisers to realise and fulfill your objectives in a manner complying with your behaviours and respecting your values. We can assist you in the elaboration of strategies to minimize or defer the tax payable upon your death or by your estate or heirs, including probate taxes within the framework of your will and estate plan.

In the context of closely held companies, we can assist you in customizing your compensation, elaborating income splitting strategies, developing your retirement plan and putting in place other tax efficient plannings. We can assist you in the orderly transfer of your wealth to family members, the planning of your business succession plan and its transfer to family members, employees or other persons.

The multi-jurisdictional property interests of our clients often require the development of a co-ordinated plan to leverage differing legal and tax regimes. Through our international offices and our experience in this field, you benefit from a broad network of professionals both in Canada and abroad who can assist you in all of your planning-related needs.

Our services also include assistance in responding to audit inquiries from tax authorities, negotiating on your behalf, preparing notices of objection and appeals against tax assessments and litigating tax disputes at all judicial levels, including provincial courts, the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada.

Specific areas of personal tax expertise include the following services, in both domestic and international contexts:

- Developing and facilitating succession plans to transfer family business between generations while promoting business' growth and family harmony;
- Advising and implementing sophisticated estate freeze and income splitting schemes;
- Advising on compensation and retirement plan, including deferred income plans and employment benefits;
- Structuring investments and transactions in a tax effective manner;
- Advising on derivatives, tax shelters investments and any other type of investment products or vehicles;
- Advising on the appropriate use of insurance and insurance based products;
- Advising on the use of trusts to minimize the income tax payable or to achieve non-tax objectives;
- Advising on the use of trusts and powers of attorney to ensure the safeguard's continuity of your assets in the event of long term illness or incapacity;
- Advising client on asset protection strategies in a tax effective manner;
- Litigating tax disputes or claims arising out of family business disputes;
- Assisting clients with marriage contracts and family law planning;
- Advising clients having assets or families in multiple-jurisdictions, such as recreational property;
- Advising on cross-border trust planning for US and Canadian citizens or dual residents;
- Structuring non-resident trusts for Canadians or foreigners;
- Establishing trusts for new immigrants in Canada, in order for them to take advantage of the five year Canadian tax holiday or other opportunities;
- Assisting emigrants to properly order their departure from Canada and take advantage of tax planning opportunities;
- Advising on charitable giving including the use of private charitable foundations (see **Charities and Not-For-Profit**);

- Advising on estate planning (see **Estate Planning**).

Assisting clients in these areas requires a thorough knowledge of challenges and obstacles to the ownership and transfer of property. This includes knowledge of tax law, family law, elder law, probate and estate law, wills and wills variation law, trust law, creditors' rights and remedies, corporate law, and the rules of litigation procedures, negotiation and advocacy skills.

Our knowledge enables us to fully understand the problems you are facing and to find the appropriate solutions for your particular situation, whether it is of a mundane or sophisticated nature, and to deliver those services in a highly professional and efficient manner.

Trusts, Wills, Estates and Charities

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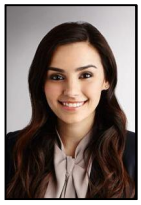

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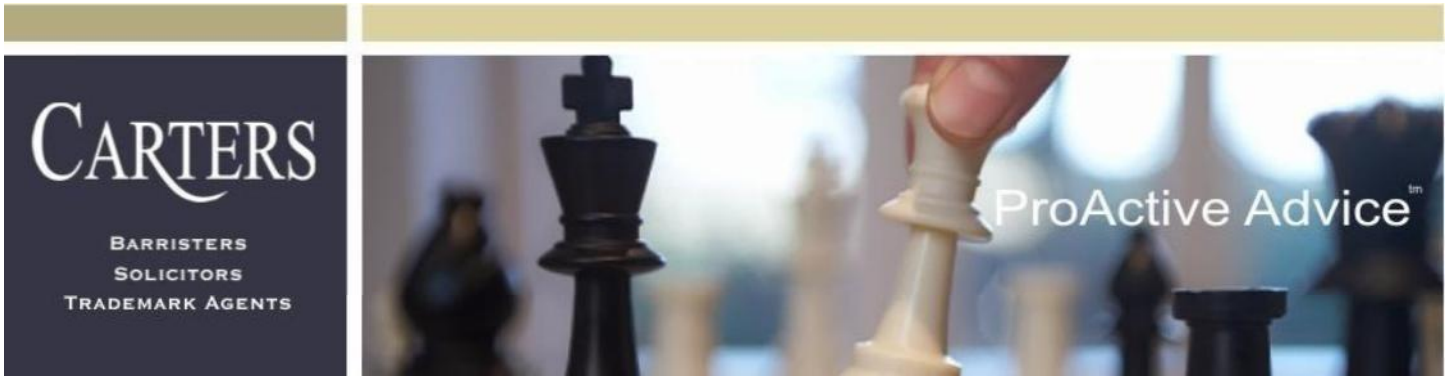

CARTERS FIRM PROFILE

A FULL SERVICE LAW FIRM WITH A FOCUS ON CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Carters Professional Corporation (Carters) is one of the leading firms in Canada in the area of charity and not-for-profit law and is able to provide a full range of legal services to its charitable and not-for-profit clients, as well as to individuals, corporations and businesses. With offices and meeting locations in Toronto, Ottawa, Mississauga and Orangeville, Ontario, Carters provides assistance to clients across Canada and internationally with regard to all aspects of charity and not-for-profit law. The lawyers and staff at Carters are committed to excellence in providing clients with complete legal solutions for their unique needs.

WITH INTERNATIONAL RELATIONSHIPS

Carters has full access to specialized national and international legal services through its relationship with Fasken Martineau DuMoulin LLP (Fasken Martineau), an international business law firm of approximately 770 lawyers, as well as relationships with firms that specialize in tax exempt organizations in other countries. Terrance S. Carter of Carters also acts as legal counsel to the Charities Practice Group at Fasken Martineau. Through these professional relationships, Carters is able to provide its charitable and not-for-profit clients, as well as other clients, with specialized legal services as necessary.

PROVIDING 'PROACTIVE ADVICE'® TO CLIENTS

Carters strives to provide clients with 'Proactive Advice'® in our integrated approach to legal services. Our lawyers are committed to assisting clients in developing short-term and long-term strategic plans in order to avoid legal problems before they occur in all areas of the law. As part of this commitment, Carters has made numerous resource materials available through its websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

WITH SOLICITORS TO HELP YOU AVOID LEGAL LIABILITY

The focus of the solicitors at Carters is in serving charities and not-for-profit organizations through an effective legal risk management approach to the practice of law, and providing legal services in the areas of charity and not-for-profit law, including charitable registrations, fundraising, taxation, and the development of national and international structures, as well as corporate law, contracts, real-estate and leasing, franchising law, intellectual property and technology, i.e. trade-marks and copyrights, labour, employment, human rights, estates and trusts, tax audits, opinions and appeals, and the evolving area of

privacy law and anti-spam. Four of the lawyers at Carters have been recognized by both *Lexpert*, and three have been recognized by *Best Lawyers in Canada*, as leaders in their fields in Canada.

AND A LITIGATION DEPARTMENT TO ASSIST YOU WHEN PROBLEMS ARISE

The litigation lawyers at Carters are experienced in representing clients before all levels of the federal and Ontario courts, before various administrative tribunals and in mediation and other alternative dispute resolution proceedings. Carters' litigation practice encompasses all aspects of litigation and dispute resolution, including mediation, human rights litigation, civil litigation, criminal, construction liens, employment, family, municipal, corporate-commercial, tax appeals, personal-injury, product liability, intellectual property, and real estate disputes, as well as undertaking litigation audits, policy reviews and liability risk management in an effort to limit exposure to liability for clients.

CONVENIENCE AND ACCESSIBILITY

The lawyers and staff at Carters strive to be as accessible to our clients as possible. We can be reached by telephone, fax or e-mail, with a complete listing of our staff and lawyers' contact information available at www.carters.ca, as well as through our office phone system. Client meetings can be held by telephone conferences, by appointment at our offices in Toronto, Ottawa, Mississauga, or Orangeville, or at the client's location as required. When necessary, evening and weekend appointments are possible.

PUBLICATIONS & RESOURCES

In accordance with Carters' commitment to keep clients abreast of changes in the law, the firm regularly publishes articles, checklists, newsletters, and seminar materials concerning a number of areas of the law. All of these materials are made available free of charge at our websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca. To subscribe to our mailing list, please go to our websites and click on the button "Get on our Mailing List" to receive our monthly Charity Law Update – Updating Charities and Not-for-Profit Organizations on recent legal developments and risk management considerations.

EXPERTISE IN CHARITY AND NOT-FOR-PROFIT LAW

Carters has developed extensive expertise in charity and not-for-profit law in support of its work with charities through participation in various forums for professional development, including:

- Development and maintenance of the websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca;
- Authoring the *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Carswell), with annual updates;
- Co-editing *Charities Legislation & Commentary*, 2015 Edition (LexisNexis), published annually;
- Co-authoring *Branding and Copyright for Charities and Non-profit Organizations* (LexisNexis, 2014), a copy of which will be sent under separate cover;
- Co-authoring *Branding & Trademarks Handbook for Charitable and Not-For-Profit Organizations* (LexisNexis Butterworths, 2006);

- Contributing to *The Management of Nonprofit and Charitable Organizations in Canada*, 3rd Edition (LexisNexis, 2014);
- Contributing to the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada, 2002);
- Contributing articles on charity and not-for-profit legal issues for various periodicals, including *The Lawyers Weekly*, *Law Times*, *The Philanthropist*, *Canadian Fundraiser*, *Canadian Association eZine*, *Canadian Journal of Law and Technology*, *U.S. Journal of Tax Exempt Organizations*, *The International Journal of Not-for-Profit Law*, *The International Journal of Civil Society Law*, *Estates and Trust Quarterly* and *The Bottom Line*, and The Canadian Bar Association International Business Law Journal;
- Publication of newsletters: *Charity Law Bulletin*, *Charity Law Update*, *Church Law Bulletin*, and the *Anti-Terrorism and Charity Law Alert*, distributed across Canada by email;
- Speaking nationally and internationally at seminars and conferences for the Law Society of Upper Canada, the Canadian Bar Association, the Ontario Bar Association, The National Society of Fund Raising Executives, The Canadian Association of Gift Planners, the Canadian Society of Association Executives, the Canadian Cancer Society, Institute of Corporate Directors, Pro Bono Law Ontario, The American Bar Association, The Canadian Counsel of Christian Charities, The Christian Legal Fellowship, The Canadian Tax Foundation, Osgoode Hall Law School, Insight Information, the University of Ottawa Faculty of Common Law, Ryerson University's Voluntary Sector Management Program, the University of Waterloo, the Ontario Institute of Chartered Accountants, the University of Manitoba Law School, McMaster University, the University of Iowa, and the New York University School of Law, and the Chartered Professional Accountants (CPA) of Canada;
- Participating in consultations with Canada Revenue Agency (CRA) and the Public Guardian and Trustee on charitable matters; and as agent of the Attorney General of Canada and outside counsel to the Corporate Law Policy Directorate of Industry Canada to provide legal advice on the reform of the *Canada Corporations Act*;
- Hosting the annual "*Church & Charity Law*™ Seminar" in Toronto for more than 900 charity and church leaders, members of religious charities, accountants and lawyers; the annual "*Charity & Not-for-Profit Law* Seminar" in Ottawa for more than 350 members of the sector, and co-hosting the annual "Healthcare Philanthropy Seminar" with Fasken Martineau;
- Serving as members of Canada Revenue Agency's Charities Advisory Committee, the Technical Issues Working Group of CRA's Charities Directorate representing the Canadian Bar Association (CBA), the Uniform Law Conference of Canada's Task Force on Uniform Fundraising Law, the Liability Working Group of the Insurance Bureau of Canada and Voluntary Sector Forum, the Government Relations Committee of the Canadian Association of Gift Planners; the Anti-terrorism Committee and the Air India Inquiry Committee of the CBA, and in consultations with Finance Canada and the Province of Ontario, and the Social Enterprise Panel Consultation for the Ministry of Consumer Services; and
- Participating as founding members and chairs of the Canadian Bar Association and Ontario Bar Association Charity and Not-for-Profit Law Sections, as well as co-founder of the Canadian Bar Association annual Charity Law Symposium.

SPECIFIC LEGAL SERVICES FOR CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

As a law firm experienced in serving charities and not-for-profit organizations, Carters is able to provide specialized legal services in the following areas of charity and not-for-profit law:

Anti-bribery Compliance
Anti-terrorism Policy Statements
Charitable Audits
Charitable Organizations & Foundations
Charitable Incorporation & Registration
Charitable Trusts
Church Discipline Procedures
Church Incorporation
Continuance Under the CNCA
Corporate Record Maintenance
Director and Officer Liability
Dissolution and Wind-Up
Domain Name Management
Ecological Gifts
Employment Issues
Endowment Agreements
Foreign Charities Commencing Operations in Canada
Fundraising and Gift Planning
Gift Acceptance Policies
Human Rights Litigation
Incorporation and Organization
Insurance Issues
Interim Sanctions
International Trade-Mark Licensing
Investment Policies
Legal Risk Management Assessments
Litigation and Mediation Counsel
National and International Structures
Privacy Policies and Audits
Religious Denominational Structures
Sexual Abuse Policies
Special Incorporating Legislation
Tax Compliance
Tax Opinions and Appeals
Trade-Mark and Copyright Protection
Transition Under the ONCA

EXPERIENCE WITH CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Some of the categories of charities and not-for-profit organizations that Carters has acted for in relation to charity and not-for-profit law include the following:

Churches, Dioceses and Related Religious Organizations

Ecological Charities

Educational Institutions in Canada and Internationally

Environmental Organizations

Financially Troubled Charities & Their Directors

Government Agencies

Health Care Organizations

Hospitals and Hospital Foundations

International Missionary Organizations

Lawyers Requiring Counsel on Charitable Matters

Museum Foundations

National and International Charitable Organizations

National Arts Organizations

National Medical Research Foundations

National Religious Denominations

Not-for-Profit Housing Corporations

Not-for-Profit Organizations

Parallel Foundations

Religious and Secular Schools

Religious Broadcasting Ministries

Safety Regulatory Organizations

Seminaries and Bible Colleges

Temples, Synagogues and Other Religious Organizations

Violence Prevention Organizations

Universities and Colleges

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CARTERS/FASKEN MARTINEAU HEALTHCARE PHILANTHROPY: CHECKUP 2015
June 11, 2015

Essential Charity Law Update

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OVERVIEW

Update since our June 2014 presentation

- **Federal Budget 2015**
- **Federal Legislative and Regulatory Update**
- **Ontario Legislative and Regulatory Update**
- **Corporate Law Update**
- **Highlights of Recent CRA Publications**
- **Selected Case Law**

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A. FEDERAL BUDGET 2015

- Budget 2015, announced April 21, 2015
- Contains a number of important proposed amendments relating to the charitable and not-for-profit sector, which include
  - Exempt capital gains tax on the donation of proceeds of private shares or real estate
  - Permit registered charities to invest in limited partnerships
  - Expand foreign entities eligible for registration as qualified donees
  - Introduce Social Finance Accelerator Initiative, a program to encourage social finance in Canada

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- Budget 2015 did not include
  - The stretch tax credit for charitable giving proposed by Imagine Canada
  - An administrative mechanism to provide an extension of the 36-month period announced in Budget 2014 in which an estate donation can be treated as a gift in a terminal return
  - Follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations

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1. Capital Gains Exemption on Donations of Private Shares and Real Estate

- Proposal to exempt individual and corporate donors from tax on the sale of private shares or real estate to an arm's length party if the proceeds are donated to a registered charity within 30 days of the disposition
- Appears to contemplate sale first, then donate
- Anti-avoidance rules address opportunities for tax avoidance within 5 years of the disposition – such as a non-arm's length person repurchases the property after the sale
- The measures will apply for dispositions occurring after 2016

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2. Charities can now Invest in Limited Partnerships

- Registered charities or RCAAAs with an interest in a partnership will not be seen as carry on a business if
  - Limited liability of the partnership interest
  - Members deal at arm's length with each general partner of the partnership
  - Only holds less than 20% of the fair market value of the interest of all members
- Intended to enable charities to diversify their investment portfolios to better support their charitable purposes and give them the flexibility to use innovative approaches to address pressing social and economic needs
- New subsection 253.1(2) will apply to investments made after April 20, 2015

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3. Additional Budget 2015 Proposals

- All foreign charities (not just "charitable organizations") that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities related to disaster relief, urgent humanitarian aid, or in the national interest of Canada
  - Bill C-59, *Economic Action Plan 2015 Act, No. 1*, which is currently in Second Reading
- Includes a commitment to "support social entrepreneurs with innovative solutions" through "the implementation of a social finance accelerator initiative to help develop promising social finance proposals"
- Proposes to spend $150 million towards social housing providers that wish to pre-pay long-term and non-renewable mortgages without penalty

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B. FEDERAL LEGISLATIVE AND REGULATORY UPDATE

1. Implementing Legislation for 2014 Budget

- Bill C-31, *Economic Action Plan 2014 Act, No. 1*, which received Royal Assent on June 19, 2014
  - Increases the carry-forward period for gifts of ecologically sensitive land to 10 years (instead of 5)
  - Removes the exemption for gifts of cultural property made as part of a tax shelter gifting arrangement
  - Gives the Minister power to refuse to register a charity or revoke its registration if it is accepts a "gift" from a "foreign state" listed in the *State Immunity Act*
- Bill C-43, *Economic Action Plan 2014 Act, No. 2,* which received Royal Assent on December 16, 2014
  - Creates new rules regarding estate gifts

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2. *Anti-Terrorism Act, 2015* (Bill C-51)

- Bill C-51 was introduced on January 30, 2015 and is currently in Third Reading at the Senate
- Charities operating in conflict areas may be particularly affected by the proposed amendments, which include
  - *Criminal Code* will be amended to create an offense for knowingly advocating or promoting the commission of terrorism offenses in general
  - *Security of Canada Information Sharing Act, 2015* will authorize and facilitate the sharing of information among government agencies (e.g., CRA) in situations where there is "activity that undermines the security" of Canada
  - The *Secure Air Travel Act* will create a "no-fly list" for identifying and responding to persons who engage in an act that threatens transportation security or travel

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3. Canada's Anti-Spam Legislation ("CASL")

- CASL came into force on July 1, 2014
- CASL impacts how charities and non profit organizations communicate with their donors, volunteers and members
- The regulations include a specific exemption from CASL for select messages sent by registered charities for fundraising purposes
- On March 5, 2015, Compu-Finder, a for-profit organization, received the first CASL-related Notice of Violation and a $1.1 million penalty for non-compliance

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4. Social Enterprise Update (Federal and Provincial)

- On June 10, 2014, Industry Canada published the results of its public consultation on the *Canada Business Corporations Act* ("CBCA")
  - This recommended further consultations about whether existing CBCA provisions are sufficient to enable federal socially responsible enterprises
- In early 2014, a consultation group met to consider possible structures for Ontario social enterprise legislation
  - In May 2014, the group produced a report entitled "Dual Purpose Corporate Structure Legislation," which the Ministry of Government and Consumer Services released on January 29, 2015

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- Report recommends that social enterprise legislation
  - Should protect the social mission and attract investment
  - Should provide clarity for owners and directors, and lower the overall cost of establishing and operating a dual purpose corporation
  - Must balance the interests needed to encourage multiple bottom line businesses
- The Ministry sought public input until May 4, 2015, to explore whether the framework social enterprise legislation should be pursued and how the government should support enterprises with social purposes and private interests

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5. Credit Card Fees Reduced for Charities

- On November 4, 2014, the federal government announced a voluntary agreement with MasterCard and Visa to reduce interchange fees to an average of 1.5% of the transaction value
  - The agreement came into effect April 1, 2015, and will continue for five years
- Bill S-202, currently in the Senate, proposes even further regulation, such as eliminating credit card acceptance fees being charged to charities
- Reduced interchange fees will benefit charities by increasing donations received and lowering administrative costs, therefore allowing donations to have a greater impact on charitable causes

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B. ONTARIO LEGISLATIVE AND REGULATORY UPDATE

1. *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"), New Requirements

- The AODA and its associated *Standards* (regulations) are meant to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures, and premises by January 1, 2025
- Compliance dates for the requirements of each standard are staggered by the type and size of organization
  - Requirements of all standards, except the new Built Environment Standard have begun to be phased in
  - Built Environment Standard will be phased in starting January 1, 2015

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- As of January 1, 2015, the following is required
  - "Large organizations" (more than 50 employees) must ensure that all employees and volunteers are trained on the requirements of the *Integrated Accessibility Standards* and the *Human Rights Code*
  - "Large organizations" must ensure that any feedback processes (i.e., surveys) are accessible to persons with disabilities through either accessible formats or communication supports
  - "Small organizations" (less than 50 employees) must develop, implement, and maintain policies that govern how they achieve or will achieve accessibility
    - "Large organizations" had to do so by 2014

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- As of January 1, 2015, the *Design of Public Spaces Standards (Accessibility Standards for the Built Environment)* will be phased in
  - It is meant to remove barriers in public spaces as well as in new buildings and buildings undergoing major renovations
  - The *Standard* includes areas such as accessible parking; outdoor sidewalks and stairs; service counters; and playgrounds and recreation areas
  - Ontario's *Building Code* has been amended to reflect the *Built Environment Standard*
  - "Large organizations" must be compliant as of January 1 2017
  - "Small organizations" will have limited obligations, such as accessible parking by January 1, 2018

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2. Ontario Human Rights Commission ("OHRC") New Policies and Guidelines

- In 2014, the OHRC released new or updated policies on preventing discrimination based on
  - Pregnancy and breastfeeding (October 2014)
  - Mental health disabilities and addictions (June 2014)
  - Gender identity and gender expression (April 2014)
- The Ontario *Human Rights Code* (the "Code") authorizes the OHRC to prepare, approve and publish human rights policies, to set standards in how to interpret the Code
  - The Human Rights Tribunal must consider such policies if a party requests so
- On November 25, 2014, the OHRC also issued statement on how to prevent and deal with sexual harassment in the workplace

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3. *Public Sector and MPP Accountability and Transparency Act, 2014* (Bill 8)

- Received Royal Assent on December 11, 2014, but not yet proclaimed in force
- The Act authorizes the Ontario government to establish compensation frameworks for certain executives in the broader public sector, including hospitals, school boards, universities, and other Crown corporations
- The mandatory restrictions will apply to those who earn more than $100,000 per year
- Bill 8 raises the possibility of even broader legislation regarding salary caps on other sectors, such as for high-earning employees at other NPOs and charities

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C. CORPORATE LAW UPDATE

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

- Enacted on June 23, 2009 and proclaimed in force on October 17, 2011
- Replaced Part II of *Canada Corporations Act*, which had been in force since 1917
- All CCA corporations had to continue under the CNCA within 3 years, i.e., by October 17, 2014
- As of June 6, 2015, 12,248 of approximately 17,000 Part II CCA not-for-profit corporations had continued
- Dissolution for not meeting the October 17, 2014, deadline is not automatic

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- Before dissolving a corporation, Corporations Canada must first send a notice of pending dissolution after which the corporation will have 120 days to continue
- Corporations Canada initially focussed on corporations that had not filed their corporate summaries and were presumed inactive
  - Since March 2015, it has been sending notices to corporations that are up-to-date with their annual filings but have not yet continued
  - Corporations Canada anticipates that all notices will be sent by Fall 2015
- Part II of The *Canada Corporations Act* will be repealed after all corporations have transitioned or been dissolved
- If you have not yet continued, act now!

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

- The *Ontario Corporations Act* ("OCA") has not been substantially amended since 1953
- The new ONCA received Royal Assent on October 25, 2010 and will apply to OCA Part III corporations

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- Bill 85 was introduced on June 5, 2013, and contained key amendments to the ONCA, Bill 85 died on the Order Paper in May 2014 because of the election
- Waiting for a new Bill to be proposed
- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- The Ontario Ministry of Government and Consumer Services indicates that the ONCA is not expected to come into force before 2016
- On September 25, 2014, Premier Wynne indicated support for the ONCA in her "Mandate Letter"

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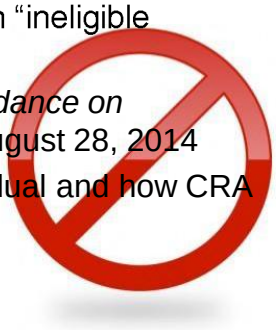
D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

1. *Guidance on Ineligible Individuals*

- Since January 1, 2012, CRA has had the discretion to refuse or revoke the registration of charities or to suspend their receipting privileges if a director, trustee, or like official or any individual who otherwise controls or manages the charity is an "ineligible individual"
- CRA subsequently released the *Guidance on Ineligible Individuals* (CG-024) on August 28, 2014
- It explains who is an ineligible individual and how CRA will use the discretion



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- In general terms, an ineligible individual is one who
  - Convicted of a "relevant criminal offense" and no pardon was received
  - Convicted of a "relevant offense" (financial dishonesty or operation of the organization) in the last 5 years
  - Was a director, officer or like official of a charity that engaged in a "serious breach" of *the Income Tax Act* and had its registration revoked in the past 5 years
  - Controlled or managed, directly or indirectly, a charity that engaged in a "serious breach" of *the Income Tax Act* and had its registration revoked in the past 5 years
  - Was a promoter of a tax shelter, and participating in that tax shelter caused the revocation of an organization's registered status

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- CRA is not required to take action but has the authority to use discretionary sanctions to enforce the ineligible individual provisions
- Charities are not required to search or proactively determine whether an ineligible individual is involved in the charity
- If CRA has concerns, it will state these concerns in writing and the organization will be given an opportunity to respond before CRA makes a decision
- After the CRA has made its decision, the organization will be able to object
- Questions CRA will ask
  - What made the person an ineligible individual?
  - What roles and responsibilities does the ineligible individual have in the organization?
  - How has the organization lessened whatever risk the ineligible individual may pose?

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- Onus is on the charity to explain and address CRA's concerns by providing CRA with adequate documentary evidence
- Charities should practice due diligence, risk assessment, fraud prevention, and financial controls that protect their beneficiaries
- CRA has revoked the registration of two charities, (Jesus of Bethlehem Worship Centre on July 12, 2014, and Friends and Skills Connection Centre on September 13, 2014) in part because a director was previously a director of a charity when it was engaged in conduct that constituted a serious breach of the Act
- Helpful Guidance, but there remain questions about how it will be applied

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2. CRA *Charities Program Update*

- On April 9, 2015, the Charities Directorate released its *Charities Program Update,* which updates charities and the charitable sector on the Charities Directorate's recent programs and activities
- This Update is noteworthy because of the details that it provides on the political activity audit program
- As of March 31, 2015, of the 60 charities selected for a political activity audit, 21 political audits had been completed, 28 were underway and 11 had yet to begin
  - Of the completed audits, 6 charities received education letters, 8 received compliance agreements, 5 received notices of intention to revoke, one chose to voluntarily revoke and one was annulled

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F. SELECTED CASE LAW

Cases related to health issues

1. *Carter v Canada (AG)* (Physician-Assisted Suicide)

- On February 6, 2015, the Supreme Court of Canada unanimously held that physicians may help a competent patient die if the patient
  - Clearly consents to the termination of life, and
  - Has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in his or her circumstances
- This ruling distinguished the SCC's 1993 decision in *Rodriguez*, which upheld the *Criminal Code* provisions against assisted suicide
- For more details see today's presentation

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2. *Hopkins v Kay* (Personal Health Information)

- On February 18, 2015, the Ontario Court of Appeal ruled that the *Personal Health Information Protection Act* does not preclude a claim of invasion of privacy for the unauthorized access to personal health information
- The plaintiffs brought a class action for the tort of intrusion upon seclusion, claiming that patients' personal information was accessed without knowledge or consent
- The hospital tried to dismiss the claim, arguing that the Act provides an exhaustive code for enforcing privacy rights and as such, precludes any tort claims
- The decision will permit plaintiffs to seek claims in common law for privacy breaches in the health care sector, regardless of whether or not the Commissioner has taken any regulatory action

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Cases related to corporate issues

3. *Bekesinski v The Queen* (Director Liability)

- Under section 227.1(4) of the ITA, directors of corporations, including NPOs, may be liable for income tax, employer contributions, interest, and penalties that the corporation owes to CRA
  - This liability exists while a director is serving as well as for two years after a director resigns
- On July 28, 2014, the Tax Court released its decision - both CRA and the Court agree that there was insufficient evidence that the director in question had resigned within the requisite two year period to avoid liability
- It is important that directors practice due diligence while leaving a board by carefully documenting a resignation to avoid potential future liabilities

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4. *McDonald v The Queen* (*De Facto* Directors)

- On September 29, 2014, the Tax Court held that an individual was a *de facto* director and could be liable for company liabilities despite not officially being a director and not presenting himself as a director to third-parties
- The Court held that the potential director "played an important and active role in the overall corporate operations," including managing and controlling employees, having access to corporate books and records, and attending meetings with trust examiners
- Anyone who is not officially a director, including executive directors and other senior management, should ensure that the scope of their roles does not make them a *de facto* director

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Cases related to gift issues

5. *Mulgrave School Foundation* (Restricted Charitable Trusts)

- On October 9, 2014, the British Columbia Supreme Court considered when it could vary a restricted charitable purpose trust
- The Court refused to vary the trust despite the fact that the donor agreed to the change in use
- This case means that once donors have donated donor restricted charitable funds, the donor has no further control or ability to vary the terms of the gift and the court may also not be able to do so
- Charities should be cautious before encouraging donors to make gifts with restrictions unless appropriate wording is included in the gift agreement giving the charity power to vary a restriction

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6. *Vancouver Opera Foundation (Re)* (*Cy-Près* Jurisdiction)

- On March 12, 2015, the BCSC revisited the extent of its inherent (*cy-près*) jurisdiction over charitable trusts and its ability to remedy irregularities in a society's affairs
- Vancouver Opera Foundation applied for an order to amend certain unalterable provisions in its constitution
- After referring to the earlier *Mulgrave* decision, the Court concluded that *cy-près* jurisdiction is too narrow to apply in this case, particularly because any requested changes must reflect the intentions of the original donors and founders, and not be made purely for convenience
- For a Court to use its *cy-près* jurisdiction, the charitable purpose must be impossible and impractical to perform

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7. *Norman Estate v Watch Tower Bible and Tract Society of Canada* (Conditional Gifts)

- Illustrates the confusion and the consequences that can occur when charities use poorly worded gift documents
- 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 it took effect during the donors' lifetime and the Society could keep it
- To avoid unnecessary litigation, the donor and the charity should both obtain legal advice before making or accepting a significant donation

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8. Series of Fraudulent Receipting Cases

- Seven Tax Court decisions on fraudulent receipting were released in November 2014
- These cases illustrate that the Tax Court is intolerant of any issues related to false receipting because it considers individuals responsible for their own tax returns
- 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" and that individuals cannot be protected by bad financial advice, misguided trust, or momentary lapses of judgment

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9. *Scheuer v Canada* (Duty of Care)

- On January 20, 2015, CRA was unsuccessful in moving to strike an action at the Federal Court regarding a claim by a group of Canadian taxpayers that CRA was negligent in failing to adequately warn them about the consequences of participating in a tax shelter donation program
- This decision means that Canadian taxpayers may establish a limited duty of care against CRA in such situations
- The case has been allowed to proceed, although is not clear whether the taxpayers will ultimately succeed in establishing that CRA owes them a private law duty of care

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Cases related to political activities of charities

10. *Re Greenpeace of New Zealand Incorporated*

- On August 6, 2014 the Supreme Court of New Zealand became only the second Commonwealth jurisdiction to hold that a political purpose can be a charitable purpose
  - The Court held that "political and charitable purposes are not mutually exclusive in all cases"
  - Follows the 2010 Australian decision in *Aid/Watch*
- The Court held that finding a public benefit "depends on the wider context" – and referred the case back to the body of first instance
- After the decision, the Charities Service in New Zealand issued a Guidance emphasizing how difficult it will be for a charity to establish a standalone political purpose as charitable in New Zealand

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11. *The Human Dignity Trust v Charity Commission of England and Wales*

- On July 9, 2014, the Tribunal held that promoting and protecting human rights through strategic litigation is not a political purpose or activity
  - Upholding a citizen's constitutional rights does not seek to change the law but rather seeks to enforce and uphold 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
- CRA's stance is similar insofar as upholding human rights to further charitable purposes is seen as "undoubtedly beneficial to the public"

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Cases related to advancement of religion and freedom of religion

12. *Humanics Institute v The MNR*

- On November 17, 2014, the Federal Court of Appeal ("FCA") rejected the Humanics Institute's application for charitable status because its proposed purposes did not constitute advancement of religion in the court's opinion
- Leave to appeal was denied on April 23, 2015
- In its decision, the FCA
  - Found that the purposes were broad and vague
  - Relied on *Amselem*, a SCC constitutional case, which requires organizations to point to a "particular and comprehensive system of faith and worship"
  - Restated its approach from *Fuaran*, that to "simply make available a place where religious thought may be pursued" is insufficient

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13. *Loyola High School v Quebec (Attorney General)*

- Both the majority and the concurring minority opinions provided a robust affirmation of freedom of religion, including the communal aspects of religion
- SCC ruled that requiring religious schools to teach their own religion objectively infringes religious freedoms
- The Court commented on secularism in considering how to balance freedom of religion with state values
  - The majority underlined that secularism does not mean excluding religion and, instead includes "respect for religious differences"
- 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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14. *Trinity Western University ("TWU") v Nova Scotia Barrister's Society*

- On January 28, 2015, the Nova Scotia Supreme Court held that the Nova Scotia Barrister's Society did not
  - Have jurisdiction to deny accreditation of TWU's law school and, consequently, deny TWU graduates of the ability to article in Nova Scotia
  - Reasonably consider the constitutional freedoms of TWU and its graduates
- The Court concluded that "the refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion"

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Other cases

15. *Canada (AG) v Johnstone* (Childcare Obligations)

- On May 2, 2014, the Federal Court of Appeal confirmed that "childcare obligations" are included within the protected human rights ground of "family status"
- Employers must accommodate employees with childcare obligations or potentially face action under applicable human rights legislation
- Legal childcare obligations arise when
  - A child is under the individual's care and supervision
  - The childcare obligation engages the individual's legal responsibility for the child and the individual has made reasonable efforts to meet the obligations
  - The impugned workplace rule interferes in a manner that is more than trivial or insubstantial
- On January 19, 2015, the Ontario Superior Court of Justice applied *Johnstone* in *Partridge v Botony Dental*

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16. *Tsimidis v Certified General Accountants of Ontario* (Discipline Procedures)

- On July 16, 2014, the ONSC found that CGA Ontario breached its duties of natural justice and procedural fairness and made an unreasonable decision in expelling an applicant from its membership
- Neither the written policies nor the procedure followed for disciplining the applicant were adequate given the standard of procedural fairness he was warranted
- This decision highlights the importance of organizations being informed of applicable procedural rights, creating disciplinary policies which give respect to these rights, and enforcing those policies appropriately

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The New Era for Estate Donation Rules and How they will Impact on Charities and Donors

Fasken Martineau DuMoulin LLP
Healthcare Philanthropy - Check-Up 2015

M. Elena Hoffstein
June 11, 2015

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What Will be Covered

A. Taxation of Testamentary Trusts

- Current Rules
- Budget 2014 Changes
- Graduated Rate Estates
- Life Interest Trusts
- Selected Issues

B. Testamentary Charitable Gifts

- Existing Rules - Pre 2014 Budget
- Budget 2014 Changes
- Selected Issues

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A. Taxation of Testamentary Trusts and the GRE

- Taxed at graduated rates applicable to individuals
  - *Inter vivos* trusts taxed at top marginal tax rate
- Can have off-calendar year-end
- No quarterly income tax instalments

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Taxation of Testamentary Trusts Budget 2014: Elimination of Graduated Rates

- March 2013 Federal Budget began consultation process
- Consultation paper released June 3, 2013
- Consultation period ended December 2, 2013
- Proposals included in February 2014 Budget
- August 29, 2014 draft legislation released:
  - flat top rate taxation of trusts – except for GRE and QDT
  - access to certain provisions relating to post mortem planning and charitable giving on death restricted to GRE
  - introduction of New Life Interest Trust Tax Rules
- Legislation in NWMM Oct 10th /Oct 20th 2014 / Bill C-43
- December 16th, 2014 Royal Assent

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Taxation of Testamentary Trusts
Budget 2014: Elimination of Graduated Rates

- Flat top marginal rate will apply effective for 2016 and later years
- Will be required to make tax instalments
- Will have to adopt calendar year-end
- No grandfathering of existing trusts
  - Existing trusts will have deemed year-end December 31st, 2015
- Exceptions:
  a) GRE
  b) QDT

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Taxation of Testamentary Trusts
Graduated Rate Estate

- Graduated Rate Estate ("**GRE**")
  - An estate that arose on and as a consequence of death of individual
  - Can last for up to 36 months after death of individual
  - The estate is at that time a testamentary trust
    - Must maintain testamentary status
    - Must be resident in Canada for entire year
- Estate designates itself as GRE in tax return for 1st year ending after 2015 and no other estate has so designated itself
- Deceased's SIN provided in estate tax return
- Only one estate can be GRE and have graduated rates
- No grandfathering of existing trusts/estates
- Applicable for deaths after 2015

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Graduated Rate Estate Benefits

- Graduated tax rates apply to income retained in the GRE
- Can continue to have off-calendar year
- Exempt from making tax instalments
- Access to new flexible donation tax credit rules for donations by will or estate
- Nil capital gains inclusion on donations of public securities

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Graduated Rate Estate / Selected Issues

- Only one estate can be designated as GRE (implies there may be more than one that may qualify?)
  - multiple wills
  - are there two estates?
  - Government says only one estate even where multiple wills and even if different executors
  - should therefore file combined tax return and joint election
- If fail to designate in 1st return – late designation?
- Only GRE can carry back losses, donation flexibility
- Is 36 months enough? – complex estates; illiquid assets; litigation
- Increased administrative burden for shortened year at termination of GRE
- Life Insurance testamentary trusts will be viewed as testamentary trusts if set up properly, but will not qualify as GRE as they are not part of estate
- Existing trusts/estates – unwind?

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Life Interest Trusts - SS 104 (13.4)

- Applies to life interest trusts where there is a deemed disposition on the death of the life interest beneficiary
  - spouse/common-law partner trusts
  - alter-ego trusts
  - joint spouse/common-law partner trusts
  - self-benefit trusts

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Life Interest Trusts - SS 104 (13.4) (cont'd)

- On the death of life-interest beneficiary (or 2nd death for joint partner trust)
  - Deemed year-end for trust at end of day of individual's death
  - Gain on deemed disposition and all income for that year is deemed payable to/included in life interest beneficiary's income and included in terminal return of deceased life tenant
    - Include in terminal return vs. trust income
    - Trust claims deduction
  - Applicable starting in 2016 (for deaths after 2015)
  - No grandfathering for existing trusts

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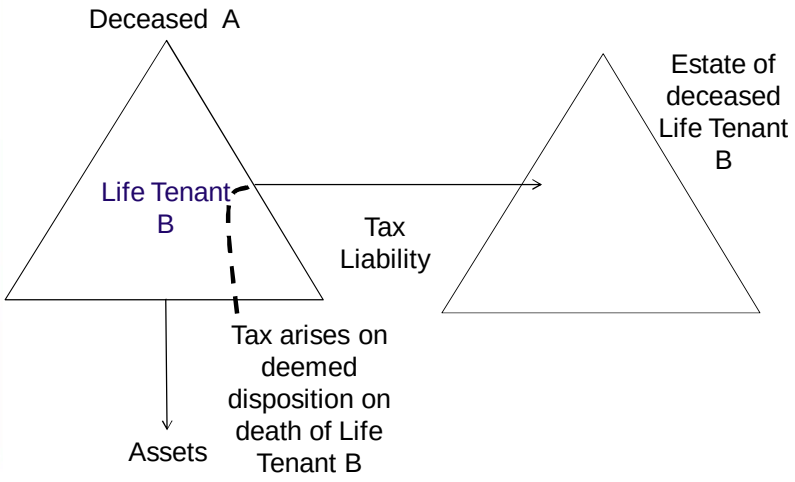
Life Interest Trusts
Deemed Income Inclusion – New 104 (13.4)



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Life Interest Trusts
Deemed Income Inclusion – New 104 (13.4)

- Capital gains on deemed disposition reported on spouse beneficiary's return
- Tax payable by spouse beneficiary's estate but assets remain in the spouse trust
  - Beneficiaries of spouse's estate may be different from spouse trust
  - Terms of trust often cannot be amended

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Life Interest Trusts
Deemed Income Inclusion – New 104 (13.4)

- Joint and several liability – 160(1.4)
  - Trust and life interest beneficiary
  - Explanatory notes released October 30, 2014 indicate that existing s 160(2) empowers MNR to assess liability against the trust and intention is to assess the trust as though it were liable in first instance
  - Query – how will CRA assess? No response yet
  - Experience – 160 (2) not used by auditors to assess but by collections department to enforce payment of tax
  - Even if CRA assesses as Finance intends – what about situation where trust insolvent or assets illiquid?
  - Timing issue – tax becomes owing when terminal return due but trust will only pay after ss 160(2) demand – seems interest will always apply to tax payment

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Other Concerns

- Payment of tax by deceased beneficiary's estate could result in beneficiaries of trust getting windfall and beneficiaries of estate of deceased life tenant getting significantly less than intended (example: blended family) this could affect charities which are beneficiaries of one or other of the estates/trusts
- If life interest trust holds private company shares - to avoid double tax, planning may include wind-up of company and loss carry-back to offset deemed capital gain on death of life tenant

Mismatch:

- Because of s. 104(13.4) capital gains will no longer be reported by life interest trust
- No provisions to amend s. 164(6) to allow life interest trust to elect to transfer capital losses to deceased life tenant's return

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What to Do?

- **TIP**
- If 104(13.4) not amended - consider providing terms in trust requiring trustees to make a distribution to estate or deceased life tenant to fund additional taxes on the deemed disposition on death
- **TRAP?**
  - Will payment of this tax taint possible GRE of deceased life tenant as it may no longer be a testamentary trust? – consider creating current debt?
- **TIP**
- Because no grandfathering - What to do about existing trusts? Consider making distribution to life tenant to allow purchase of life insurance to cover tax liability?
- Wind up trusts?

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B. Testamentary Charitable Gifting

- **Gift by Will**
  - Donation tax credit must be taken in year of death and may be carried back to year prior to death
- **What is gift by Will?**
  - Specific amount, specific property or specific percentage of estate to go to charities
  - Trustee can be given discretion to select charity/charities or trustees can select from among a group of charities
  - Direct designation gifts – RRSP, RRIF, TFSA, life Insurance
  - If intervening life interest with remainder to charities there can be no right to encroach on capital

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Testamentary Gifts - Pre-2014 Budget

- **Gift by Estate/Trust**
  - Trustee has discretion as to amount of gift and whether gift to be made at all and which charity to benefit
- **Charity as Beneficiary**
  - Charity as remainder capital beneficiary of trust
  - Charity as discretionary income or capital beneficiary

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Perceived Problems with Existing Rules

- Lack of flexibility as to when donation tax credit is available
- Led to situations where donation tax credit available in year when there may not be sufficient taxes owing to make use of the credit
- Challenge to match tax liabilities with donation tax credit
- Valuation issues – value of in specie gifts had to be determined as at date of death even though charity might not get assets for some time

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New Rules - Testamentary Charitable Donations

- Donation made by Will and designated donations (RRSP/RRIF/TFSA/LI) deemed to be made by estate at time at which property subject to donation is actually transferred to qualified donee
- Value of gift = value at time of donation
- Estate can carry forward unused credit for 5 years
- These proposals apply to estates generally
- Thus after 2015 any gifts made by Will no longer deemed made by individual immediately before death but rather deemed to be made by estate at time transfer actually made to charity
- In addition, flexibility for GREs

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New Rules - Flexibility WRT Tax Treatment of Charitable Donations

- If estate is a GRE then executors will be able to allocate donation tax credit among
  1. Taxation year of estate in which donation made, or
  2. An earlier taxation year of estate, or
  3. Last two taxation years of deceased individual
- Nil capital gains on donations of publically traded securities, ecological gifts or cultural gifts only available if made by GRE
- Rules will apply to deaths occurring on or after January 1, 2016
- No ministerial discretion to extend time

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New Rules - Tips

- **Tips**
  - Actual transfer must occur from the GRE
  - There can be only one GRE
  - Must be within 36 months after death of individual (time period when estate can be a GRE)
  - Property transferred must be property held by deceased at time of death or property substituted therefor (if estate borrows money to fund the donation, transfer will not qualify)
  - If cannot effect transfer within 36 months - estate can still make gift but Donation Tax Credit will only be available in respect of year of the transfer and next five years

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Issues

- Is 36 months sufficient?
- Implication for complex/contested estates
- Charitable remainder trusts – does transfer of the equitable remainder interest to charity qualify
- ss. 104(13.4)

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Planning Ideas – Life Insurance

- Replace gift by will with life insurance to ensure 36-month deadline is met
- Name charity beneficiary on policy; donor retains ownership
- Direct designation structure qualifies as “estate donation”
- Tax receipt can be used to offset against up to five years of income: final two lifetime returns + three GRE returns

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Planning Ideas - In-Kind Transfers

- Some estates will have illiquid assets that need more than 36 months to transfer
- Executors should consider transfer of property in-kind to charity within 36 month GRE to secure donation tax credit
- Charity sells property

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Planning Ideas - Intermediary Foundations

- Use of “intermediary foundations” to facilitate estate donations i.e. donor advised funds or private foundations
- Single gift and simple administration enables multiple future beneficiary charities
- Life insurance gifts to intermediary charities can change beneficiaries after gift is made – even if charity is owner and beneficiary

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Thank You
Questions?

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CARTERS/FASKEN MARTINEAU HEALTHCARE PHILANTHROPY: CHECK-UP 2015

June 11, 2015

Preparing for and Surviving a Charity CRA Audit

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OVERVIEW

- WHY SHOULD CHARITIES BE CONCERNED?
- CRA AUDIT PROCESS
- PREPARING FOR A CRA AUDIT
- WHAT ISSUES CAN ARISE DURING AN AUDIT?
- CONCLUDING THOUGHTS

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A. WHY SHOULD CHARITIES BE CONCERNED?

- Charities should be concerned because
  - Audits can result in serious consequences, including revocation in egregious cases
  - Where the audit results in intermediate sanctions or revocation, reputational damage may occur
  - Responding to an audit can be expensive
  - Directors, officers, and managers can be found to be "ineligible individuals" in serious situations (see below)
- It is therefore important to understand the audit process and exercise due diligence both when an audit is scheduled as well as before

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B. CRA AUDIT PROCESS

- Auditors examine a charity's financial affairs, its legal obligations under the *Income Tax Act* (Act), and whether it operates for charitable purposes
- There were 845 audits in 2013/2014 fiscal year, excluding political activities audits; these resulted in
  - 112 requiring no action response
  - 514 education letters
  - 139 compliance agreements
  - 4 penalties
  - 36 Notices of Intentions to Revoke
  - 20 voluntary revocations
  - 6 annulments
  - 1 suspension
  - 1 re-registration/pre-registration review
- CRA's political activities audit team is conducting an 60 political activities audits over 2012 to 2016

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- CRA normally takes an education-first approach
- CRA may send reminder letters to charities
- CRA conducts both office and field audits
  - Office audits are conducted in Ottawa, involve a complete review of the charity's file (including T3010s), and may require the charity to submit additional records if requested
  - Field audits are conducted at the charity's premises
    - CRA reviews all information that it has on file
    - The auditor will call the charity to set an appointment
    - The auditors examine primary records, such as the charity's ledgers, journals, and bank accounts
    - A representative of the charity will need to be present to meet with the CRA auditors

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- Prior to an audit occurring, charities will normally be requested to complete an audit questionnaire
- The audit questionnaire asks for information about
  - Charity's objectives and activities, e.g.
    - Describe the charity's objectives and/or mission
    - Provide a complete list of all of the organization's programs, services, and/or projects
  - Political activities, e.g.
    - Describe any involvement the charity has had with partisan or non-partisan political actions
  - Fundraising, e.g.
    - Describe the nature of the fundraising activities including their location and frequency

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- Organizational structure, e.g.
  - Provide a list of all directors/trustees, committees, etc.
- Official donation receipts, e.g.
  - Describe what control the organization has over its donation receipts
- Books and records, e.g.
  - Provide details of all bank accounts, including their purpose and who has signing authority

- The response provided to the audit questionnaire can be critical, as admission of non-compliance may be reflected in a Notice of Intention to Revoke
- Charities need to seek legal and accounting assistance in responding to questionnaire

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1. What Can Trigger an Audit?

- Audits are triggered for different reasons, including:
  - Random selection
  - Follow-up on a previous audit or compliance issue
  - Red flags from a T3010 filing
  - Public complaints or media attention
  - Involvement with an abusive tax shelter
  - CRA review of a segment of the charitable sector
  - Related audits and internal CRA referrals
  - Confirm that assets have been distributed after revocation to eligible donees (arm's length charities)
  - Help CRA understand the purposes and activities of an organization applying for charitable status

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2. CRA Audit Response

- CRA's audit response will detail audit findings and set out the factual and legal basis of any proposed compliance actions
- If no compliance concerns exist, CRA will send a letter confirming this and stating that the charity's status will not change
- Where concerns exist, the Charities Directorate can issue
  - Education letters
  - Administrative Fairness Letters (AFLs), which may
    - Propose compliance agreements
    - Impose intermediate sanctions (including penalties and suspensions)
    - Take steps to revoke or annul charitable status

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- Education letters
  - Education letters are the most common result of an audit; in 2013/2014, 61% of audited charities received an education letter
  - Are primarily used for minor non-compliance issues
  - Do not adversely affect a charity's registration
  - Provide guidance to the charity so that it can take the required steps to become fully compliant
  - Usually require no additional response from the charity
- Note, however, that CRA is not required to adopt an education first approach, and can proceed to enforcement of compliance

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- Administrative Fairness Letters
  - AFLs are issued when non-compliance is more serious and may propose compliance agreements, intermediate sanctions, revocation, or annulment
  - The charity has 30 days to provide a written response
  - It may be possible to seek an extension
  - It is important to respond to every allegation in an AFL
  - CRA will consider all representations and will then
    - Decide no compliance action is necessary
    - Propose a compliance agreement
    - Impose intermediate sanctions
    - Take steps to revoke or annul
- Failure to respond can result in penalties and/or revocation or annulment

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- Compliance Agreements
  - Are issued if non-compliance is serious but does not warrant revocation or annulment
  - Sets out the non-compliance issues, necessary remedial actions, and a timeline for changes
  - Are negotiated, signed, and dated by representatives of both the charity and CRA
    - Negotiation is key so that the terms of the agreement reflect the charity's side of the story
  - Can appear benign, but are problematic because, once signed, the charity is agreeing with CRA's allegations of non-compliance
  - Compliance Agreements are not binding on CRA

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- Intermediate Sanctions
  - Are used in more serious cases of non-compliance and impose financial penalties and suspensions
  - Financial penalties can include penalties, such as
    - 125% on the eligible amount of any gift falsely reported on a receipt
    - 105% on the amount of any undue benefit provided
  - Suspensions of tax-receipting privileges can result from failing to
    - Keep proper books and records
    - Provide complete and accurate T3010s
  - Penalties can be imposed in conjunction with compliance agreement, suspension, or revocation

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- Revocation
  - Can occur if an audit determines that the charity ceased to comply with the Act, e.g. it failed to
    - Devote all of its resources to charitable purposes
    - Maintain adequate books and records
    - Maintain adequate direction and control
  - CRA will send a Notice of Intention to Revoke
  - After 30 days, CRA can publish the notice of revocation in the Canada Gazette as well as on its website
  - A revocation tax of 100% of a revoked charity's remaining assets is due one year after Notice of Intent to Revoke, unless the charity expends its assets on charitable activities or transfers those assets to an "eligible donee" (arm's length charity)

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- Annulment
  - Is rare, occurring in only 0.7% of audits in 2013/2014
  - Occurs when original registration was granted in error or because the organization no longer qualifies as a registered charity due to a change in the law
  - Annulled charities are no longer exempt from income tax and cannot issue official donation receipts after the date of annulment
  - However, annulled charities are not subject to 100% revocation tax and can therefore keep their assets after annulment

  - Annulled registered charities may possibly continue to be exempt as non-profit organizations

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3. Appeal Process

- A charity has a right to object to the following decisions
  - *Notice of Intention to Revoke*
  - *Notice of Annulment*
  - *Notice of Assessment* (financial penalties)
  - *Notice of Suspension* (tax-receipting privileges)
- If a charity receives one of these notices, it can file an objection with CRA's Appeals Branch
- An objection must be filed within 90 days
- The Appeals Branch reviews decisions made by the Charities Directorate

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- If a charity disagrees with the Appeals Branch's decision, it has the right to appeal to either
  - Federal Court of Appeal (FCA) regarding notices that annul, refuse to register or revoke registration
    - An appeal must be filed within 30 days
    - In turn, can seek leave to appeal to the Supreme Court (SCC)
  - Tax Court of Canada regarding intermediate sanctions, including assessments of penalties or notices of suspension of tax-receipting privileges
    - An appeal must be filed within 90 days
    - In turn, can appeal to the FCA
    - A charity can then seek leave to appeal to the SCC

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C. PREPARING FOR A CRA AUDIT

1. Preliminary Matters in Communicating with CRA

- What follows is based on the presumption that an audit by CRA has been scheduled
- However if an audit has not been scheduled, charities should still practice due diligence and carry out the following steps as a self-audit process
- If an audit is called, it is important to work with the charity's lawyers and accountants early in the process
  - Do not wait until the audit is complete
  - Lawyers and accountants can help guide what information to disclose
  - Lawyers can help to establish solicitor-client privilege

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- Section 231.1(1)(d) of the Act requires that any person on the premises during an audit must give "all reasonable assistance" to a CRA auditor
- Respond quickly and do not ignore CRA
- Choose carefully which employee or volunteer will represent the charity with CRA, as CRA will be taking notes of the responses provided
- Be cooperative, polite and professional with CRA, but do not provide more information than asked for
- Charities can informally request that CRA provide further information about the progress or specifics of the audit

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2. Dealing with Privacy and Privilege Issues

- CRA is authorized to obtain information relevant to the administration and enforcement of the Act
- CRA may ask a charity to provide its communications, including all emails in its database
  - Charities should be cautious about their use of email, as they can help or hinder the charity's side of the story during an audit
- CRA can also obtain personal information about employees and donors
  - CRA can require charities to disclose employees' personal information without their consent
  - CRA can also request donor information

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- CRA cannot view documents subject to legal privilege, such as solicitor-client privilege
  - Solicitor-client privilege protects advice received from a lawyer
  - It can be waived if the charity is not careful when sharing communications, such as sharing legal opinions with third-parties
- If an auditor requests a document that a charity suspects is privileged, the charity should place the document in a sealed package and retain the package until a judge provides an order about its status (ss.232(3.1))

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3. Understanding the Charity's Obligations

- Because it is impossible to predict an audit's timing, it is important for charities to understand their obligations
- CRA does not expect or require perfection, but charities are expected to exercise due diligence
  - E.g., charities must keep general ledgers or other books of final entry for 6 years from the end of the last tax year to which they relate or, if the charity is revoked, for 2 years after revocation (ss. 230(4))
  - However, there may be circumstances where these records should be kept permanently, such as endowment agreements
- Charities should document any uncertainties they have and seek clarification from CRA, as well as their lawyers and accountants

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4. Preparing Before an Audit

- Charities must keep up-to-date books and records, including documents and historical information
  - Ready access to clean books shows CRA that the charity is transparent and is exercising due diligence
  - This information should be organized so that it can
    - Tell the charity's compliance and financial history
    - Allow for logical and timely disclosure
- Document, at the outset of each project, which charitable purpose the project is furthering and how expenditures achieve those purposes

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- If charities find areas of non-compliance, they should deal with them before an audit is scheduled and document all remedial steps
- Charities may also want to consider, upon advice of legal counsel, possible informal voluntary disclosure of any non-compliance that cannot be fixed before an audit starts
  - Contact CRA in writing with a complete and accurate description of the non-compliance
    - The duration and extent of the problem
    - The amount of resources involved
    - How the non-compliance arose
  - A charity can also contact CRA on a no-name basis through legal counsel

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- The board of directors has an important role, it should
  - Approve all changes to charitable programs
  - Regularly review corporate objects or purposes
  - Review and then approve all T3010 annual returns along with financial statements
- Charities should exercise early due diligence by
  - Avoiding excessive salaries and fundraising costs
  - Ensuring appropriate contracts are in place when transferring funds outside of Canada
  - Keeping copies of all gift receipts issued, payroll accounts, and bank statements
  - Drafting and retaining minutes of all board, members, and committee meetings
- Do a review of the charity's website and it's links

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- Charities should be prepared to produce and make adequate copies of the following during an audit
  - T3010s and financial statements
  - Books and records (general ledger, cash receipt/disbursement journals, working papers)
  - Listing of bank accounts and all bank records
  - Listing of all cash donation receipts with the receipt number, name of donor, and amount reconciled to the financial statements & bank deposits
  - Listing of all gift-in-kind donation receipts, including the receipt number, name of donor, description, fair market value of property, and eligible amount
  - Duplicates of all charitable receipts issued

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- Reconciliation and breakdown of reported expenditures
- All expense source documentation (contacts, invoices, receipts, statements, cancelled cheques)
- Details of the charity's activities supported by brochures, pamphlets, publications, membership and fundraising correspondence, newsletters, etc.
- All governing documents, including letters patent/articles, and by-laws
- Updated minute book with minutes of meetings of directors, members and all committees
- Listing of directors and trustees, their positions, occupations, relationship to others, and details of any remuneration or other compensation received
- Payroll documentation (T4s)
- Agency agreements and/or contracts for services

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D. WHAT ISSUES CAN ARISE DURING AN AUDIT?

1. Inadequate Books and Records

- Inadequate books and records is the most commonly cited finding during a CRA audit
- CRA's threshold for adequate books and records is high, but CRA cannot be arbitrary in its expectations
- Registered charities must maintain all books and records at the address in Canada on file with CRA
  - Charities must contact CRA to change this address
  - Concern about cloud servers located outside of Canada
- A charity must exercise due care regarding the accuracy of the books, e.g. charities must maintain
  - Proper control in the recording of all deposits
  - Minutes of meetings

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- Books and records must enable CRA to determine if there are any grounds for revocation and should include
  - An accurate record of total revenue
  - Returned cheques to verify payments
  - Invoices that support all expenses and all payments must be supported by documentation
- Charities must ensure the information in their returns, schedules, and statements is factual and complete
  - Discrepancies will raise CRA concerns
- Charities must be consistent in fulfilling their reporting requirements, e.g. by using either a cash or an accrual method of accounting

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2. Charitable Purposes are Broad and Vague

- A charity must be established with clear purposes that are recognized as charitable
- The wording of charitable purposes cannot be overly broad and vague
  - Broad objects occur when they are too expansive and do not express a direct or tangible charitable benefit
  - Vague purposes occur when they are ambiguous and can be interpreted in many different ways
- CRA may assist in modifying unacceptable purposes where other areas of non-compliance found in the audit are not serious

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3. Gifts to Non-Qualified Donees

- Other than performing its own charitable activities, a charity can also gift to "qualified donees"
- Qualified donees include: other registered charities, RCAAAs, a municipality in Canada, the UN and its agents, prescribed universities, certain housing corporations, certain charitable organizations outside of Canada, and the federal and provincial governments
- Gifts to non-qualified donees can result in revocation
- Charities transferring resources to other entities must maintain direction and control

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4. Failure to Adequately Direct and Control Activities

- Where a charity conducts activities through an intermediary, it must be in a position to establish that its activities are carried on by the charity itself
- Activities carried out by an agent or contractor must be done through an agreement, in order to evidence direction and control
  - The Charities must obtain receipts of expenditures in order to evidence ongoing control
- board of directors must exercise independent direction and control, without interference by an outside body

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5. Operating an Unrelated Business

- Related business is permitted (not private foundations)
- Related businesses are run substantially (90%) by volunteers or are linked and subordinate to its purposes
- A business will be linked if it
  - Is a necessary concomitant of its charitable programs
  - Is an offshoot of a charitable program
  - Uses excess capacity within a charitable program
  - Sells items that promote the charity
- Business activities may not be sufficiently linked to the charity's purposes
- A charity participating in an unrelated business activity can be revoked

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6. Political Activities

- In addition to its regular audit activities, CRA has been directed to increase audits of political activities
- Although the basic rules regarding political activities by charities have not significantly changed, charities which become involved in political activities will be more vulnerable to an audit
- Political activities undertaken by a registered charity will fall within one of three categories

  a) Charitable activities (i.e. advocacy)

  b) Political activities (limited to 10% of the resources of the charity)

  c) Prohibited partisan activities
- Undertake political activities with great caution!

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7. Alleged Terrorist Activities

- It is against Canadian public policy for a charity to directly or indirectly finance or otherwise support terrorist activities
- Bill C-51 will also criminalize advocating or promoting the commission of terrorist offences "in general"
- Charities must ensure compliance with best practice guidelines, including CRA's Avoiding Terrorist Abuse Checklist, and other international guidelines
  - Financial Action Task Force
  - US Department of the Treasury
  - Charity Commission for England and Wales
- The onus is on the charity to prove that it is not involved directly or indirectly in terrorist activities

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8. Private Benefits

- Private benefit is only acceptable if it is minor and incidental to a charity's purpose
- This means that any private benefit must be necessary, reasonable and proportionate to the resulting public benefit
- Examples of possible unreasonable private benefits
  - Payment of excessive salaries
  - Payment of excessive housing or other personal expenses
  - Promotion of books or videos where excessive profits accrue to religious leaders
- Reasonable and proportionate reimbursement for expenses incurred is permissible

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9. Failure to File a T3010 or Filing Incorrectly

- This is a commonly cited compliance issue
- Charities must, within 6 months of the end of their fiscal periods, file a T3010 Information Return
- Examples of incorrect T3010 line items include
  - Understating total revenue and/or expenses
  - Under-reporting total gifts to qualified donees
  - Incorrectly reporting investment/interest income
  - Not reporting total compensation of employees
  - Inaccurately reporting taxable receipts
- Charities must complete all required schedules and/or worksheets associated with the T3010

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10. Improperly Issuing Donation Receipts

- Regulation 3501 sets out the required contents of official receipts, e.g.
  - Name and Internet website of CRA
  - The description and amount of any advantage
  - Name and address of the donor
  - Content varies depending on whether the receipt is for a gift of cash or a gift in kind
- Receipts should not be issued for donated services or where the fair market value (FMV) of a gift in kind or an "advantage" cannot be determined
- The onus is on the charity to show the FMV is accurate and has been properly determined

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11. Involvement with Ineligible Individuals

- The ineligible individuals provisions came into force on January 1, 2012
- CRA can refuse to register, suspend receipting privileges, or revoke registration if an ineligible individual is on the board or part of senior management or is in a position to control or manage the charity
- CRA began to enforce these provisions in summer 2014
  - It has revoked the registration of two charities in part because a director was previously a director of a charity when it was engaged in conduct that constituted a serious breach of the Act and was revoked
- More details see CG-024, *Ineligible Individuals*

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12. Improper Investments

- A charity can and should invest surplus funds or assets to generate additional revenue for its charitable purposes
- The *Trustee Act* (Ontario) sets out the basis of the "prudent investor" standard that applies to investments by charities
- CRA has questioned high risk investments of charitable resources as a breach of fiduciary duty
- It is questionable, though, whether CRA has the constitutional jurisdiction to do so, given provincial jurisdiction over charitable property

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E. CONCLUDING THOUGHTS

- The above overview has outlined important steps for a charity may want to consider if an audit is scheduled
- Additionally, charities and their professional advisors can reduce future CRA challenges by following these suggested steps before an audit is scheduled and exercising early due diligence
- If non-compliance issues come to a charity's attention before an audit is scheduled and cannot be remedied, the charity should speak with legal counsel and consider the possibility of an informal voluntary disclosure

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Healthcare Philanthropy: Check-Up 2015
The Carter Decision on Physician-Assisted Dying

Fasken Martineau DuMoulin LLP
Healthcare Philanthropy - Check-Up 2015

Rosario G. Cartagena & Kathryn Beck
June 11, 2015

FASKEN MARTINEAU

Presentation Outline

Part I: The *Carter* Decision Explained

1. The Ruling
2. The Context
3. The Findings
4. What's Next?

Part II: Exploring the Implications

1. The Debate Continues
2. What's Next for Healthcare Institutions

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Part I.
The *Carter* Decision Explained

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Carter v. Canada – The Ruling

- On February 6, 2015 the Court held that:

The Prohibition on Physician-Assisted Dying was void insofar as it deprives a competent adult of such assistance where

(1) the person affected clearly consents to the termination of life; and

(2) The person has a grievous and irremediable medical condition (including illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

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Carter v. Canada – The Context: How Did We Get Here?

- **Sue Rodriguez (1993)**

- (SCC) 5-4 majority: upheld ban on physician-assisted suicide
- Committed suicide the year after with help from anonymous physician

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The Context: After Sue Rodriguez

- **February (1994)** – Special Senate Committee
- **February (1994)** – Jean Chretien told MPs that they had a free vote on legalizing physician-assisted suicide
- **June (2007)** – Ipsos Reid survey found 76% of Canadians supported right to die when diagnosed with incurable disease
- **December (2009)** – Dying with Dignity Committee consulted with Quebecers (mandate from Legislature)
- **November (2011)** – Royal Society of Canada report indicating that euthanasia should be legal in Canada

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The Context: After Sue Rodriguez

Private Members Bills/Senator Initiated*

• March 1991	Private Member's Bill C-351
• May 1991	Private Member's Bill C-203
• June 1991	Private Member's Bill C-261
• December 1992	Private Member's Bill C-385

• February 1994	Private Member's Bill C-215
• November 1996	Bill S-13 Senate
• April 1999	Bill S-29

• March 2014	Two MP Private Members Bills
• June 2014	Bill 52 (*An Act respecting end-of-life care* in Quebec.

*From Blair Henry, "Medical Aid in Dying" (March 16, 2015) Sunnybrook Veterans Centre Interprofessional Rounds.

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The Context: After Sue Rodriguez

- **April** (2011): **BC Civil Liberties Association** filed a lawsuit on behalf of:
  - Gloria Taylor (suffered from ALS),
  - Dr. William Schoichet, (family doctor), and
  - Ms. Carter and Mr. Johnson, (married couple who accompanied Lee Carter's 89-year-old mother, Kay Carter, to Switzerland to end her life).

Challenged the law that makes it a criminal offense to assist individuals to die on the basis of s.7 and 15 of the *Charter*.

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The Context: Who Were The Claimants?

- **Gloria Taylor**
  - Diagnosed with ALS December, 2009

- "…what I fear is a death that negates, as opposed to concludes, my life."

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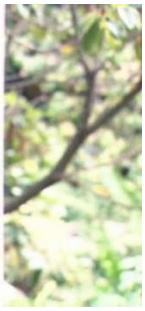
The Context: Who Were The Claimants?

- **Lee Carter & Hollis Johnson**
- Kay was diagnosed with spinal stenosis in 2008



- DIGNITAS clinic
- Believed the law created undue hardship i.e. expense, inconvenience & fear of prosecution

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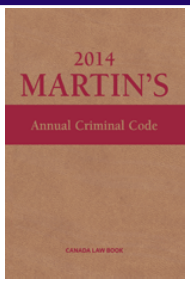
The Context: How Was the Case Judicially Considered?

Section 241(b):
everyone who aids or abets a person in committing suicide commits an indictable offence

Section 14:
no person may consent to death being inflicted on them



June 2012
The BC Supreme Court - the right to assisted dying is protected by the *Charter*

October 2013
The BC Court of Appeal - overturned the BC S.C. decision (SCC's 1993 decision in Rodriguez was binding)

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Carter v. Canada – *The SCC Findings*

- **The criminal laws violate the *Charter (s.7)*.**
- Denies the s.7 rights of individuals to have control over choices that are fundamental to their lives and cause unnecessary suffering.
- Deprives seriously ill Canadians' rights to life, liberty and the security of the person - not in accordance with the principles of fundamental justice (overbroad).
- Parliament can protect vulnerable people while still allowing competent, seriously ill and suffering adults the right to a physician-assisted death.

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The SCC Findings: Rodriguez versus Carter?

Reminder:

- **Rodriguez:** prohibitions deprived the applicant of her security of the person, but in a manner that was in accordance with the principles of fundamental justice.

Why the shift?

1. The majority in *Rodriguez* did not address the right to life
2. The principals of "overbreadth" and "gross disproportionality" had not been identified
3. Substantive change to the Section 1 analysis (*Alberta v Hutterian Brethren of Wilson Colony*)
4. The changes in the social and factual landscape over the past 20 years

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Global Landscape Overview

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Carter v. Canada – *What's Next?*

- The declaration is suspended for 12 months

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Part II. Exploring the Implications

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…the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition

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"It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons"

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The debate continues…

- Will there be additional standards for **eligibility**?
- What **safeguards** should be put in place?
- What role for **health professionals** other than physicians (if any)?
- How will refusals, including **conscientious objections**, be handled?
- **Where** will physician-assisted dying take place? (and where should it take place?)

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Eligibility Requirements

- Up to what point must patient be competent? Completion of advanced directive? Making of the decision at the time? Death?
- Any role for substitute decision-makers?
- What about mature minors?
- Further limits, e.g. residency requirements, terminal illness

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Safeguards

- How many physicians must review the request?
- Should there be an additional level of review (before or after)?
- Additional review requirements where mental illness is involved or suspected?
- Requirement for multiple requests from the patient? Reflection periods?
- Family consultations?

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By whom?

- Who is on the care team and what are their roles?
  - Physicians
  - Nurses
  - Pharmacists
  - Social workers
  - Others health professionals

- What (if any) role for delegation?

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Handling of Refusals

- SCC decision invalidates criminal prohibition — it **does not** mandate that a physician assist a patient in dying if so requested
- CMA internal poll (2013):
  - 20% of physicians would be willing to participate in voluntary euthanasia
  - 42% would refuse
  - 23% don't know
  - 15% didn't answer

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Conscientious Objection

- Many regulators recognize a right of conscientious objection, however, controversial issues remain:
  - Is there an obligation to refer?
  - What constitutes an "effective referral"?

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Conscientious Objection

- Some policy options being discussed:
  - Requirement for an effective referral
  - Referral to an independent body or within institution (Bill 52 in Quebec)
  - Published list of willing providers (“self-referral”)

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Where will PAD be carried out?

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Role of Institutions

- Providing end-of-life services
- Handling staff refusals
- Ensuring continuity of care
- Engaging with and educating staff, patients, community and other stakeholders
- Establishing policies

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Quebec's Approach – Bill 52

Every institution must:

- offer end-of-life care and ensure it is provided in continuity and complementarity with any other care that is or has been provided to them (s. 7)
- adopt a policy with respect to end-of-life care (s. 8)
- executive director of the institution must report annually to the board of directors on the carrying out of the policy (s. 8)
- include a clinical program for end-of-life care in its organizational plan (s. 9)
- if the institution operates a local community service centre, include the provision of end-of-life care at the patient's home in the institution's organizational plan (s. 9)

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Quebec's Approach – Bill 52

- "institution" means any institution governed by the *Act respecting health services and social services* (chapter S-4.2) that operates a **local community service centre**, a **hospital centre** or a **residential and long-term care centre**…"
- "end-of-life care" means palliative care provided to end-of-life patients and medical aid in dying
- "medical aid in dying" means care consisting in the administration by a physician of medications or substances to an end-of-life patient, at the patient's request, in order to relieve their suffering by hastening death

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Refusals – Bill 52

- Physicians practicing in institutions who refuse a request for any reason other than that the patient does not meet the specified criteria **must notify the executive director of the institution** (or other designated person)
- Executive director or designated person must then take the necessary steps to find another physician willing to deal with the request (s. 31)
- Similar "referring up" procedure for physicians practicing in private health facilities

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Oregon's Approach

- In Oregon, health care institutions and systems have the right to decline to provide physician-assisted dying (and to restrict professionals in their systems from doing so if professionals are so informed in advance)
- Note: 94% of assisted deaths occur at home with at least one healthcare worker present (but not administering)

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Where an institution opts out…

Excerpt from: *The Oregon Death with Dignity Act: A Guidebook for Health Care Professionals*

3.3 Systems that elect not to participate in the Oregon Death with Dignity Act should notify patients and health care professionals in advance.

3.4 Health care systems and health care professionals need to develop guidelines to ensure continuity of patient care should the system or health care professional be unwilling or unable to participate in the Oregon Act. Skilled and humane care should be provided until transfer of care is complete, so that abandonment does not occur.

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Where an institution opts out…

3.5 Expectations about care of the patient who chooses to participate in the Oregon Act need to be communicated to employees so that continuity of care can be maintained. […]

3.6 Health care systems need to develop a process for the resolution of conflicts.

3.7 Patients and health professionals have the right to privacy and freedom from harassment or intimidation, whether they choose to participate in the Oregon Death with Dignity Act or not.

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Where should PAD be carried out?

Should physician-assisted dying take place in **hospitals**?

…in **residential and long-term care facilities**?

…in **palliative care hospices**?

…in the **home**?

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Where end-of-life occurs now

- Polls suggest 70 to 80% of Canadians indicate they would prefer to die at home if supports were available
- According to Statistics Canada data, 64.7% of Canadians died in hospital
- In Ontario:
  - 59.3% of deaths occurred in hospitals
  - 73% of individuals admitted to hospital with a primary diagnosis of palliative died in hospital beds

Sources:
http://www.chpca.net/media/330558/Fact_Sheet_HPC_in_Canada%20Spring%202014%20Final.pdf
http://hpco.ca/qhpcco/
http://www.hqontario.ca/Portals/0/Documents/eds/synthesis-report-eol-1412-en.pdf

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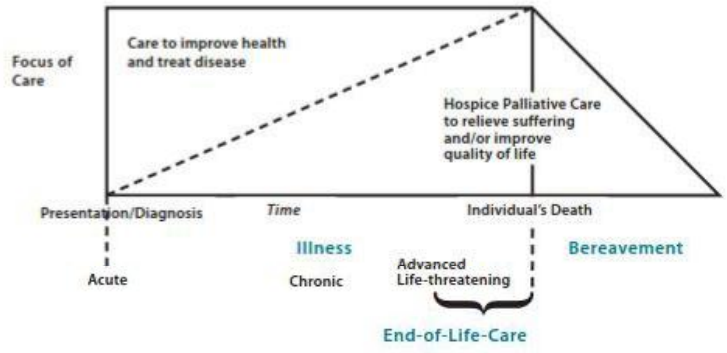
Palliative and End-of-Life Care



Source: Advancing High Quality, High Value Palliative Care in Ontario, December 2011 (Government of Ontario, LHINs and Quality Hospice Palliative Care Coalition of Ontario)
http://hpco.ca/qhpcco/Declaration_of_Partnership_English.pdf

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End-of-Life Continuum

Defining "end-of-life care" (Bill 52)

palliative care for end-of-life patients + medical aid in dying = end-of-life care

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Still a taboo subject…

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What can be done now?

- Continue (or start) a robust dialogue about end-of-life care with staff, administrators, patients and other stakeholders, including:
  - End-of-life care
  - Advanced care planning
  - Continuity of care considerations
- Get involved in the broader discussion (federal, provincial consultations)
- Update policies, procedures etc. (but not yet)

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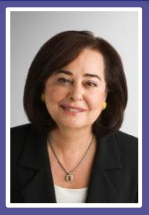
REFERENCE MATERIALS

Testamentary Charitable Giving - The New Regime



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Testamentary Charitable Giving - The New Regime

Draft legislation released by the Department of Finance on August 29, 2014 implements measures introduced in the Federal Budget 2014. This legislation received Royal Assent on December 16, 2014 and will apply to deaths occurring on and after January 1, 2016. The new rules change significantly the manner in which testamentary charitable gifts will be dealt with under the Income Tax Act RSC 1985, c.1 (5th Supp.) ("ITA").

Current Regime

Currently, (for pre 2016 deaths) the ITA provides that a charitable gift made by will (often referred to as a "Gift by Will") is deemed to have been made by the donor immediately prior to death. This is advantageous because it ensures that the donation tax credits arising from the gift may be used in the deceased's terminal return to offset tax liability arising from the deemed disposition of his or her capital assets immediately prior to death. To the extent that these donation tax credits are not exhausted in the donor's terminal return, a one-year carry-back of the credits to the year preceding the year of death is permitted.

The Canada Revenue Agency ("CRA") has issued many publications outlining its position as to what constitutes a "Gift by Will", and in general, requires that: (i) the terms of the Will provide for a donation of a specific property, a specific amount or a specific percentage of the residue of the estate; (ii) it is clear from the terms of the Will that the executors are required to make the donation; (iii) the estate is in a position to make the donation after the payment of debts; and (iv) the donation is actually made.

Currently, the value of a Gift by Will for charitable receipting purposes is determined on the date of the individual's death regardless of when the charity actually receives property from the estate.

If a gift does not qualify as a "Gift by Will", it may qualify as a charitable gift made by an estate or testamentary trust. In other cases, a distribution made to a charity from a testamentary trust will not be considered a charitable gift eligible for donation tax credits but instead will be considered a distribution made in satisfaction of the charity's capital interest in the testamentary trust and no donation tax credit will be available.

Donation tax credits are also available when a charity is designated as beneficiary under a life insurance policy or registered retirement savings plan (RRSP) or registered retirement income fund (RRIF) or tax free savings account (TFSA).

The New Regime

The new legislation introduces significant changes to this testamentary charitable gift regime for the 2016 and subsequent taxation years both as to timing and recognition of charitable gifts for tax purposes.

Donations made by will and designated donations (RRSP, RRIF, TFSA, and life insurance) will be deemed to be made by the estate at the time when the property is transferred to a charity and no longer will be considered to have been made immediately before the donor's death.

As well, the fair market value ("FMV") of the gift for tax receipting purposes is to be determined at the time of the transfer of property rather than the FMV at the date of death.

The legislation builds some new flexibility into the ability to use of the donation tax credits in respect of estate gifts by will and designated donations by permitting the executors or trustees of a "graduated rate estate" ("GRE") to allocate the tax credits among:

- the terminal or last taxation year of the donor;
- the taxation year preceding the taxation year of death; and
- the taxation year of the Estate in which the donation is made and up to two (2) prior years of the estate

The concept of GRE was introduced in the 2014 Federal Budget and refers to an estate that arises on or as a consequence of the death of an individual, can exist for up to thirty-six (36) months after death, and qualifies as a personal trust and a testamentary trust. It is only a GRE that enjoys the benefits of the flexibility to allocate the donation tax credit among different tax years and thus if an estate is to benefit from this flexibility the property must be transferred to charity within 36 months after death.

An additional requirement is that the property to be transferred to the charity by the GRE must be property held by the deceased at date of death or property substituted therefor.

Current annual charitable donation limits of 100% of net income for the donor's last taxation year or for the taxation year preceding the taxation year of death will continue to apply.

An estate other than a GRE will continue to be able to claim the charitable donation tax credit in respect of other donations in the year in which the donations are made or in any of the five following years.

It is also noted that the rules relating to the tax free transfer of publicly traded securities to charity will now be limited to gifts of publicly traded securities made by the GRE.

Some Implications

The new rules appear to provide more flexibility for testamentary charitable gift planning but that flexibility comes at a price.

It will allow executors to claim donation tax credits for testamentary charitable gifts for five different tax periods (the year prior to death, the year of death, and three years of the estate) as opposed to just two tax periods (the year prior to death and the year of death). It will also create more flexibility by apparently eliminating the need for testamentary donations to qualify as "Gift by Wills" so long as the transfer of property to the charity takes place within 36 months of death.

The new rules also provide certainty as to when to value testamentary charitable gifts for charitable receipting purposes - namely, upon the date of receipt of property by the charity. This should eliminate the current divergence of positions taken by charities as to whether the value of the charitable receipt is the value of the donated property on the date of death or the value of the donated property at the time the charity receives it.

Although this flexibility and clarity is in large part welcome, it will provide extra pressures on executors of estates. Executors will need to ensure that estate property is transferred to charities within thirty-six (36) months of death in order to qualify for the ability to allocate donation tax credits in the year of death or the year prior to death. This thirty-six (36) month period may be difficult to meet if (i) the estate is involved in litigation (family law act claims, dependent relief claims, will challenges), (ii) the estate's assets are illiquid (real estate, private company shares), (iii) the donation is made after the death of a life tenant (under current rule such gifts would be claimed in the year of death if the life estate qualified as a charitable remainder trust (no right to encroach on capital during life tenant's lifetime). Moreover, even in ordinary circumstances, if the value of estate property increases or decreases following death, then depending upon the tax outcomes, executors could be criticized for either moving too quickly or waiting too long to transfer property to charities within the 36 month period.

The new regime does not appear to specifically deal with the treatment of gifts to a charity on the death of an intervening life interest (commonly referred to as charitable remainder trusts), which can qualify as a "Gift by Will" under the current regime so long as the trustees have no right to encroach on the capital in favour of the life tenant. The new rules contemplate that the property that is the subject of a testamentary charitable gift must be transferred to a qualified donee within thirty-six (36) months of death. While a residual interest in a charitable remainder trust is a property interest that can be transferred to a qualified donee within thirty-six (36) months of death, it is only that property interest and not the actual underlying property of the charitable remainder trust that can be transferred prior to the death of the life tenant. As a result, there remain some questions as to manner in which testamentary charitable remainder trusts will be dealt with under the new rule.

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The Supreme Court of Canada Decision: Physician-Assisted Death

Health Bulletin

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In Canada it has historically been a criminal offence to assist another person in ending his or her own life. This includes the inability of a person to seek a physician-assisted death. This law was recently overturned with the Supreme Court of Canada decision in *Carter v. Canada (Attorney General)*[1]. The main issue was whether the prohibition on physician-assisted dying found in the *Criminal Code*[2] violated the claimants' rights under sections 7 and 15[3] of the *Charter of Rights and Freedoms*[4]. The claimants defined physician-assisted death and physician-assisted dying as a "situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient."[5]

The Court held that provisions in the *Criminal Code* infringes s.7 of the *Charter*, depriving adults of their right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The Court specifically considered the application of the law in the case of "a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[6]

The issue of physician-assisted suicide or physician-assisted death had been previously reviewed by the Court twenty years ago in *Rodriguez v. British Columbia (Attorney General)*[7]. In *Rodriguez*, the Court upheld a "blanket prohibition on assisted suicide",[8] however the debate over physician-assisted suicide since that period has continued. For example, in the House of Commons between 1991 and 2010, there were six private member's bills which sought to decriminalize assisted suicide. The Senate also issued a report on assisted suicide and euthanasia in 1995 and more recently, in 2011 the Royal Society of Canada published a report that recommended the *Criminal Code* be revised to permit assistance in dying. Furthermore, at present "[t]he Quebec National Assembly's Select Committee on Dying with Dignity issued a report in 2012, recommending amendments to legislation to recognize aid in dying as appropriate end-of-life care (now codified in *An Act respecting end-of-life care*, not yet in force)."[9] In *Carter v. Canada*, the Court distinguished *Rodriguez* and ultimately, found that the question fundamentally came to balancing on the one hand the autonomy and dignity of a competent adult seeking death as a response to a grievous and irremediable medical condition and on the other, the sanctity of life and the need to protect the most vulnerable in society.[10] The following is an overview of the decision.

Facts

The following claimants challenged the constitutionality of the provisions of the *Criminal Code* that together prohibit the provision for assistance in dying in Canada: T who was diagnosed with a fatal neurogenerative disease (ALS) in 2009; C and J who had traveled to Switzerland in order to use the services of an assisted suicide clinic for C's mother; a physician willing to participate in physician-assisted dying if it were legal; and the British Columbia Civil Liberties

Association.

Procedural History

The British Columbia trial judge ruled that the prohibition against physician-assisted dying violates s.7 of the *Charter* and that the rights of competent adults, suffering intolerably, as a result of irremediable medial conditions is not justified under s.1 of the *Charter*[11]. The Attorney General of British Columbia appealed the decision to the British Columbia Court of Appeal. The British Columbia Court of Appeal allowed the appeal on the basis that the trial judge was bound to follow the Court's decision in *Rodriguez*[12]. The parties challenged the decision to the Supreme Court of Canada.

Analysis

In its s.7 *Charter* analysis the Court made specific findings on life, liberty or security of the person. The following is a summary of their reasoning:

(i) Life

In particular, the Court held that a prohibition on physician-assisted dying deprives some individuals of life and that an individual's choice about the end of life is entitled to respect.[13]It reasoned that although s.7 is rooted in the value of human life, it is also engaged during the passage to death. They distinguished *Rodriguez* and concluded that the sanctity of life "is no longer seen to require that all human life be preserved at all costs".[14]

(ii) Liberty or Security of the Person

With respect to security of the person, the Court stressed that these rights include a protection of individual autonomy and dignity, including "control over one's bodily integrity free from state interference".[15] The core of the reasoning was stated as follows:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.[16]

(iii) Principles of Fundamental Justice

When a court finds that a violation of s.7 of the *Charter* has occurred, it must then decide whether the interference with a person's life, liberty or security of the person is in a way that also violates the principles of fundamental justice. In particular, the Court will consider whether the interference is arbitrary, overbroad, and grossly disproportionate. Essentially this means that the state cannot deprive a person of constitutional rights arbitrarily or in a way that is overbroad or grossly and disproportionately diminishes their worth and dignity.[17]

The Court held that provisions of the *Criminal Code* do not arbitrarily limit an individuals' rights because the object of the prohibition on physician-assisted death is to protect vulnerable individuals from ending their life.[18]However, the Court did find that a blanket prohibition on physician-assisted death is overbroad because not every person that wishes to commit suicide is vulnerable, there may in fact be individuals who have a considered, rational decisions for ending their own lives.[19]Finally, the Court found that the impact of the prohibition was very severe and grossly disproportionate to its objective as it "impos[ed] unnecessary suffering on affected individuals, depriv[ing] them of the ability to determine what to do with their bodies and how those bodies will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assisted in dying".[20]

(iv) Section 1

As with all *Charter* decisions, in order to justify infringement of a right, the government must demonstrate that: (i) there is a rational connection between the infringement and the benefit sought; (ii) the limit on the right is reasonable and that there are no less harmful means of achieving the goal (minimal impairment); and (iii) the beneficial effect of the law is in the greater public good.

Firstly, the Court found that the government's "absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from being induced to take their own lives in times of weakness".[21]

On the other hand, the Court held that with respect to minimal impairment, the risks could be adequately addressed by using proper safeguards.[22]As a result, the absolute prohibition is not minimally impairing. The Court reasoned that this particular aspect of the test was the crux of the case and included most of the evidence reviewed at trial. The trial judge upon reviewing all of the evidence concluded that, "a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them."[23]The Court did not re-examine the trial judge's factual findings on social and legislative facts because the standard of review for trial judge's findings of fact cannot be reversed unless the trial judge has made a 'palpable and overriding error'. Although the government introduced evidence which it argued demonstrated that the host of problems Belgium experiences with physician-assisted suicide continues, the Court agreed with the trial judge's position that "it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on Belgian evidence".[24]

Furthermore, the Court rejected Canada's position on the necessity of a blanket prohibition (in the government's view there are too many sources of error and factors that could give rise to a patient dying by mistake or on purpose). Ultimately, the Court concluded that because "there is no reason to think that the injured, ill and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying,"[25]an assessment at the individual level is already part of the medical system. As a result, the blanket prohibition should not apply.

Lastly, the Court held that because the law is not minimally impairing there was no need to review the impact of the law on protected rights against the beneficial effect in terms of the greater public good.[26]

Future

(i) Federal and Provincial Impact

Carter v. Canada has potential to truly impact the administration of healthcare at the federal and provincial level. Even though the Court issued a declaration of invalidity and suspended the current laws (ss. 241 and 14 of the *Criminal Code*) for twelve months, the length of time it will take Parliament and legislators to draft new legislation, regulations and amendments to current legislative regimes may take longer than one year. It is also clear based on the Court's ruling that because health is an area of concurrent jurisdiction (Parliament and the provinces can legislate on the issue), "aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation."[27]Due to the federal-provincial relationship, the province's position and role will need to be factored into the policy and legislative documents to be considered.

(ii) Interpretation of the law

Furthermore, it can be postulated that the various provincial medical associations, colleges, insurance bodies, hospitals, hospital associations, relevant agencies of the provincial ministries of health, and any other healthcare institutions where physicians have privileges to perform these types of procedures will need to develop strict guidelines, codes of ethics, and policies

and procedures to be in compliance with the legislative and regulatory regimes created.

Particularly noteworthy for physicians is the Court's statement that, "[n]othing in this declaration would compel physicians to provide assistance in dying." [28]As a result, the Court was unequivocal in stating that a physician's decision to participate in assisted death is a matter of conscience and sometimes, religious belief.[29] The *Charter* rights of patients and physicians will need to be reconciled in any future legislative and regulatory response to this judgment.

Most interestingly will be the application of the test in the context of mental health. The test as stated by the Court is, "physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."[30] The court does not limit the illness or disease to that of a physical nature and thus the medical condition could arguably include mental illness or mental disease, albeit as experienced by a capable adult person making a decision to end his or her life. Mental health is a complex area of health law and thus, the application of *Carter v. Canada* will need to be rigorously explored and defined.

(iii) Societal System of Values

Lastly, it should also be pointed out that society's views vis-à-vis the decision in *Carter v. Canada* will undoubtedly affect Parliament and provincial legislatures' approach when making policy-making decisions. Understandably so, health care is patient-centred and whether or not patients accept physician-assisted death as standard medical practice will ultimately be based on society's overall system of values.

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[1] *Carter v. Canada (Attorney General)* 2015 SCC 5

[2] Sections 241 and 14, *Criminal Code*, R.S.C. 1985, C.C-46

[3] Since the Court concluded that the prohibition on physician-assisted suicide violates s.7 of the *Charter* it decided not to consider s.15 of the *Charter*.

[4] *Canadian Charter of Rights and Freedom*s, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[5] *Supra* note 1 at para 40. Note: although the claimants did not define 'physician-assisted suicide', for the purposes of this paper, it has the same meaning.

[6] *Supra* note 1 at para 147.

[7] *Supra* note 1 at para 35. Note: in *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 ("*Rodriguez*") the majority of the Court "rejected the proposition that the prohibition infringes the right to life under s.7 of the *Charter* (namely that the) principles of fundamental justice…overbreadth and gross disproportionality did not impose a new legal framework under s.7."

[8] *Supra* note 1 at para 5.

[9] *Supra* note 1 at para 7. See: *An Act respecting end-of-life care*, CQLR, c. S-32.0001.

[10] *Supra* note 1 at para 2.

[11] British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1

[12] British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213

[13] *Supra* note 1 at para 63.

[14] *Ibid*. See. *Rodriguez* at p. 595.

[15] *Supra* note 1 at para 64. See: *Rodriguez* at p. 587-88.

[16] *Supra* note 1 para 66.

[17] *Supra* note 1 para 81.

[18] *Supra* note 1 para 84.

[19] *Supra* note 1 para 86.

[20] *Supra* note 1 para 90.

[21] *Supra* note 1 at para 99. Note: the government only needs to demonstrate a causal connection between the infringement and benefit: see *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199 at para. 153.

[22] *Supra* note 1 at para 104.

[23] *Supra* note 1 at para 105.

[24] *Supra* note 1 at para 112.

[25] *Supra* note 1 at para 115.

[26] *Supra* note 1 at para 122.

[27] *Supra* note 1 at para 52.

[28] *Supra* note 1 at para 132.

[29] *Ibid.*

[30] *Supra* note 1 at para 127.

Canada's Anti-Spam Law: Frequently Asked Questions for Non-Profits and Charities

Charities and Not-For-Profit Bulletin

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Charities and Not-For-Profit

Canada's anti-spam law (referred to as "**CASL**") will come into force on July 1, 2014. CASL has serious ramifications for a wide-range of organizations that promote their products, services and activities in Canada. Many non-profit organizations and charities have raised a variety of questions regarding CASL and its anti-spam regime. Below are some questions and answers that may assist non-profit organizations and registered charities in their CASL compliance activities.[1]

1. Does CASL apply to non-profit organizations?

Yes, CASL can apply to non-profit organizations. CASL applies to an organization that sends "commercial electronic messages". Email is the most common form of "electronic message" subject to CASL. However, for CASL to apply, the message must also be "commercial", in that it must, in whole or in part, encourage the participation in commercial activity.

Although many messages sent by non-profit organizations are not commercial, some messages may have a commercial character. Many non-profit organizations engage in activities that generate revenue: they charge fees for products, services or to participate in activities – for example, membership fees generally, or registration fees for particular events. Although the non-profit organization is not itself a commercial enterprise, to the extent that it engages in an activity that generates revenue (or has some other commercial character), any electronic message that is sent in support of that activity could be subject to CASL. Also, if a non-profit organization sends messages that promote another person's commercial activities, those messages could be subject to CASL.

For example, a non-profit organization may circulate a newsletter by email. As long as that newsletter contains no advertisements for commercial activities (whether of the organization or any other person), then it would not likely be subject to CASL. If that newsletter did contain these sorts of advertisements, then it may be subject to CASL – and if so, could only be sent in prescribed circumstances (as discussed below).

2. Does CASL apply to registered charities?

Yes, CASL can apply to registered charities. CASL applies to registered charities in the same way as it applies to other non-profit organizations – with one significant exception: CASL does not apply to messages that are about charitable fundraising activities. Specifically, any commercial electronic message (e.g., email) sent by a registered charity

that "has as its primary purpose raising funds for the charity" is not subject to CASL. This broad exclusion likely captures most (if not all) of the types of messages normally sent by registered charities that may otherwise fall under CASL.

For example, Industry Canada (one of the two government bodies responsible for CASL's regulations) has advised some organizations that it has adopted a broad interpretation of "fundraising" relative to the Canada Revenue Agency's definition of "fundraising". Under this broad definition of fundraising, the following types of messages would be excluded from CASL:

- messages that promote upcoming fundraising events for a registered charity (even if corporate sponsors of those events are mentioned);
- messages that promote charitable activities where some portion of the funds raised will go to cost-recovery for those activities; and
- messages that promote events where the proceeds of ticket or registration fees will go to the registered charity (e.g., performing arts or cultural institutions).

3. What if a message has a "commercial" character? Is it subject to CASL?

Not necessarily, as CASL has numerous exclusion provisions. For example, CASL does not apply to:

- messages sent in response to a request, inquiry or complaint or that are otherwise solicited by the recipient;
- messages sent to a person who is engaged in a commercial activity and consists solely of an inquiry or application related to that activity; or
- messages sent by or on behalf of an individual to another individual with whom they have a personal or family relationship (as defined in the regulations to CASL).

Also, there is a provision that excludes fundraising messages sent by registered charities from the scope of CASL, as noted above.

4. Does CASL's anti-spam regime apply to telephone calls, facsimile transmissions or social media?

Although CASL applies to "electronic messages" in a general sense, CASL does not apply to:

- an interactive two-way voice communication between individuals;
- a facsimile message to a telephone account;
- a voice recording sent to a telephone account (e.g., a voicemail message); or
- broadcast messaging, including tweets and social media broadcasts.

For many non-profit and charitable organizations, CASL compliance is largely limited to email messages.

5. What if CASL applies to a given electronic message?

If a message is subject to CASL, an organization can only send the message if all of the following apply:

- there is an **authorized basis** to send the message – namely, either
    - the sender has the recipient's **express consent**,

- the sender has the recipient's **implied consent** (pursuant to various grounds for implied consent set out in CASL), or
- the circumstances fall within one of the **exceptions to consent** set out in CASL;

- the message contains certain **content requirements** (generally, sender identification and contact information); and
- the message contains an easy to use **unsubscribe mechanism**.

Organizations will need to review the provisions of CASL that describe the various forms of implied consent and exceptions to consent as part of preparing for CASL.

6. What should organizations do to prepare for CASL?

It is important that organizations "audit" the types of electronic messages that they send – taking into account the types of messages, the types of recipients and the organization's relationship with those recipients.

Once an organization understands the sorts of electronic messages that it sends, it can then determine which of them is or is likely to be subject to CASL, and take steps to comply with the message content and unsubscribe requirements in CASL. For example, if a non-profit organization determined that a newsletter has a commercial component, it would then need to assess the various intended recipients to determine whether the organization had their express or implied consent to send the message, or if consent was not needed according to CASL.

Organizations will also need to determine how they will effect an unsubscribe mechanism, which includes tracking unsubscribe requests and giving prompt effect to them (but no later than 10 business days from the date of the request).

Organizations may decide to insert the required message content together with an unsubscribe mechanism in all or most messages, and without specifically considering whether it is required to do so by CASL. This is not necessarily an effective approach. Including an unsubscribe mechanism in messages that are not subject to CASL may be confusing to recipients and/or may have unintended consequences.

If an organization allows its personnel significant latitude to promote the organization or its activities via electronic messages, that organization should consider adopting an anti-spam policy to help educate personnel and guard against breaches of CASL.

For more information about how CASL applies to non-profit organizations and registered charities, or for assistance in CASL compliance (including an anti-spam policy), please contact us.

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[1] CASL also governs other activities, notably the installation of computer programs. However, most organizations in the non-profit and charity sector would not

likely engage in activities that would fall within that aspect of CASL.

Broader Public Sector Compensation Restraint and Accountability Remain Top of Mind in Ontario

Health Law Bulletin

March 31, 2015

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It has been an eventful month in the area of broader public sector accountability.

The Ontario Sunshine List was released on March 27, 2015. Perhaps not coincidentally,

a NDP private member's bill, Bill 78 *Transparent and Accountable Health Care Act, 2015,* passed second reading in the Ontario legislature on March 26, 2015. The Bill proposes to, among other things, greatly extend the reach of compensation restraint, salary disclosure and oversight laws in the healthcare sector, and to mandate the public disclosure of OHIP payments, including to physicians.

Meanwhile, the *Broader Public Sector Executive Compensation Act, 2014* was proclaimed in force on March 16, 2015. The Act gives broad power to the government to establish "compensation frameworks" for executives in the broader public sector from time to time. The definition of "broader public sector" under the new Act broadly includes, among others, public hospitals, community care access centres, and many "public bodies" under the *Public Service of Ontario Act, 2006.* While no compensation frameworks have yet been announced, the government has strongly hinted it will use the frameworks to introduce hard pay caps for broader public sector executives.

These developments will be of particular interest to those in the health sector in Ontario.

NDP Private Members' Bill on Health Sector Accountability Passes Second Reading

On March 11, 2015, France Gélinas, the NDP's health critic introduced Bill 78, the *Transparent and Accountable Health Care Act, 2015.* The Bill passed second reading in the Ontario legislature on March 26, 2015 and was referred to the Standing Committee on Social Policy.

1. Extending the Reach of the BPSAA, Sunshine Act, Ombudsman and Auditor General

The Bill proposes to extend the reach of Part II.1 of the BPSAA to all "major health sector organizations". Part II.1 of the BPSAA restrains executive compensation increases and performance pay for "designated employers".[1] At present, public health hospitals are the only entities in the health sector that are subject to those restraints.

In addition, the Bill would broaden the reach of the *Public Sector Salary Disclosure Act, 1996*—the law that establishes Ontario's annual Sunshine List disclosure. It would give the Auditor General the power to audit "major health organizations" and "publicly-funded suppliers" and would also make those entities subject to oversight by the Ontario Ombudsman.

The term "major health organization" would include any person or entity that receives $1 million or more in public funds from the Ministry of Health and Long-Term Care in a year. As currently drafted, the Bill could include for-profit corporations, such as for-profit independent health facilities, long-term care homes and out-of-hospital premises.

The same requirements would also extend to "publicly-funded suppliers". The Bill defines a "publicly-funded supplier" as a person or entity that receives, directly or indirectly, $1 million or more per annum in public funds from major health sector organizations or from other publicly-funded suppliers.

We expect significant pushback, in particular, to extending these accountability and compensation restraint requirements to for-profit entities. The category of "publicly-funded suppliers" will likey also give rise to concern given its broad definition.

2. Publication of OHIP Payments
The Bill would also require the Minister of Health and Long-Term Care to publish an annual statement of payments made by OHIP, notably to physicians. Disclosure would be required wherever a person or entity received $100,000 or more from OHIP in a given year. The Bill would require that the disclosure be accompanied by a cautionary statement reminding readers that the amounts represent gross payments rather than net income of an individual physician or practice.

The publication of OHIP billings is a controversial subject. Proponents of disclosure point to the need for transparency in the spending of public dollars and note that Manitoba and British Columbia already disclose this information. Opponents argue that disclosure may breach the privacy of individual physicians and is open to misinterpretation given that many physicians must cover significant overhead costs from their gross billing amount.

We expect the proposed Bill will be the subject of vigorous debate at Committee.

New BPS Executive Compensation Act in Force

The *Broader Public Sector Executive Compensation Act, 2014* came into force on March 16, 2015. The Act applies to public hospitals and a broad range of other entities in the broader public sector, including community care access corporations, entities that are prescribed as "public bodies" under the *Public Service of Ontario Act, 2006* (other than Commissions) as well as others.[2]

The Act applies to any designated executive who is entitled to receive (or could potentially receive) $100,000 or more in a calendar year and who:

- is the head of the designated employer, regardless of whether the title of the position or office is chief executive officer, president or something else,
- is a vice president, chief administrative officer, chief operating officer, chief financial officer or chief information officer or holds any other executive position or office, regardless of the title of the position or office, or
- is the director of education or a supervisory officer of a designated employer that is a board within the meaning of the *Education Act*.

The Act does not itself establish specific compensation restraints but rather gives broad power to the government to establish "compensation frameworks" from time to time. To the extent the government enacts a compensation framework that applies to a particular type or group of executives, the framework will effectively take the place of applicable restraints under Part II.1 of the *Broader Public Sector Accountability Act* (BPSAA) as they apply to those executives.

The government has not yet announced specific compensation frameworks. The government has indicated that it will use the frameworks to introduce hard pay caps on broader public sector executives. It has been suggested that such caps could be set at $418,000 (twice the Premier's salary).

We have published additional commentary on the *Public Sector and MPP Accountability and Transparency Act, 2014.*

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[1] Briefly, Part II.1 of the BPSAA: (a) prohibits compensation increases for "designated executives" until Ontario ceases to have a budget deficit, subject to certain very limited exceptions; and (b) restricts the overall amount of performance pay that can be paid to all non-union employees by a designated employer.

[2] The following is the full list of "designated employers" under the Act: (1) Every hospital within the meaning of the *Public Hospitals Act* and the University of Ottawa Heart Institute/Institut de cardiologie de l'Université d'Ottawa; (2) Every board within the meaning of the *Education Act*; (3) Every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements. (4) Hydro One Inc. and each of its subsidiaries; (5) Independent Electricity System Operator, (6) Ontario Power Generation Inc. and each of its subsidiaries. (7) Every community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*. (8) Every body prescribed as a public body under the *Public Service of Ontario Act, 2006* that is not also prescribed as a Commission public body under that Act. (9) The corporation known as Ornge, incorporated under the *Canada Corporations Act* on October 8, 2004 as Ontario Air Ambulance Services Co. (10) Subject to subsection (2), every other authority, board, commission, committee, corporation, council, foundation or organization that may be prescribed for the purposes of this section.

Public Sector and MPP Accountability and Transparency Act, 2014

Health Law Bulletin

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The Public Sector and MPP Accountability and Transparency Act, *2014* (the "Act") recently received Royal Assent.[1] The Act provides the government the authority to create comprehensive compensation frameworks for certain employers in the broader public sector, and implements a number of measures to enhance "accountability and transparency" in the government and the public sector. While the Act contains many amendments, including those relating to MPP expenses, the focus of this Bulletin is on the impact of the Act on employers, particularly health entities in the broader public sector, and on the amendments made to the *The Excellent Care For All Act*, 2010 ("ECFAA").

Executive Compensation

The Act provides government with the authority to establish "compensation frameworks" governing the compensation of certain executives in the broader public sector. These frameworks may include mandatory caps on executive pay. The Act also gives the government the power to obtain additional information regarding compensation from broader public sector employers and establishes mechanisms to recover any amounts paid that may be contrary to the legislation. In addition, the Act provides the government with the ability to make directives relating to compensation frameworks.

Compensation restraints have been in place for the public and broader public sectors for several years. At present, certain broader public sector organizations are governed by compensation restrictions under the *Broader Public Sector Accountability Act*, *2010* (the "BPSAA"). The provisions under the BPSAA primarily restrict executive and office holder compensation and cap the performance pay organizational "envelope" for all non-unionized employees (not only executives). The compensation frameworks contemplated by the Act, are intended to displace the compensation restraints set out in the BPSAA, part 2(1).[2]

Business Plans

The BPSAA has been amended to provide authority to the management board of cabinet to issue directives requiring certain designated broader public sector organizations to prepare and publish business plans and any other specified business or financial documents of the entity. In addition, management board of cabinet would be authorized to make guidelines for the preparation and publication of such plans and documents by publicly funded organizations that are not required to comply with the same obligations that designated broader public sector organizations are required to adhere to. It is worth

noting, that while the guidelines are not necessarily binding they can, and have been, incorporated into transfer payment agreements.

Consistent with the structure of other directive obligations under the BPSAA, hospitals and LHINs may be required to prepare attestations confirming their compliance with any such directives.

The Excellent Care For All Act

As it relates to the ECFAA, the Act:

- Extends the scope beyond public hospitals to include "*health sector organizations*" (defined to include long-term care homes, community care access centres and any other organization provided for in the regulations that receives public funding);
- Adds the defined term "*patient or former patient*" which includes a patient or former patient of a hospital, a resident or former resident of a long-term care home, and a client or former client of a community care access centre, in addition to a person with the authority to consent to the treatment or the other matter on behalf of the patient or former patient where the individual is or was incapable with respect to the treatment or other matter at issue;
- Expands the scope of the Ontario Health Quality Council to include the performance of health sector organizations with respect to patient relations; and
- Adds Section 13 (Patient Ombudsman) appointing a patient ombudsman to respond to complaints from patients or former patients and their caregivers against public hospitals, long-term care homes, and community care access centres.

The functions of the patient ombudsman include: (i) receiving and responding to complaints from patients and former patients of a health sector organization and their caregivers, and from any other prescribed persons; (ii) facilitating the resolution of complaints; and (iii) undertaking investigations of complaints made by made by the individuals noted above as well as on his/her own initiative.

The patient ombudsman will further have extensive powers including the power to require any officer, employee, director, shareholder or member of any health sector organization or any other person who provides services through or on behalf of a health sector organization to furnish or produce documents, things or information that, in his/her opinion, relate to a matter being investigated. In addition, the patient ombudsman will have the authority to summon any of the individuals mentioned above and/ or any patient or former patient and examine them under oath; as well as the power to enter and inspect the premises of a health sector organization with consent and/or pursuant to a warrant.

Creation of the patient ombudsman has raised several issues. For example, the fact that the patient ombudsman will be appointed by the Lieutenant Governor in Council and employed by the Ontario Health Quality Council (i.e. an employee of an agency of the government) has been questioned. Being an officer of the Legislature of Ontario, appointed by the assembly, and reporting to the Legislature presents concerns with respect to accountability and objectivity as well as with the appearance of objectivity and accountability.[3] Another issue that has been raised, is that that focusing on the individual patient fails to address the systemic issues that exist within the health care system and that are at the root of the issues affecting patients. Similarly, it has beenargued that exempting the largest single budget item in Ontario from oversight by the Provincial Ombudsman and putting in place somebody who does not have the power

to conduct the kind of systemic oversight that the Provincial Ombudsman has, is problematic. Finally, there has been some concern that the Act prevents the patient ombudsman from investigating for-profit organizations, such as retirement homes. This is considered to be problematic, given, among other things, the number of reported instances of abuse by patients of these homes.

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[1] In March, 2014 the Minority Liberal government introduced Bill 179, the Public Sector and MPP Accountability and Transparency Act, 2014 which contemplated a large number of amendments to various accountability legislative regimes that regulate the public sector and broader public sector in Ontario. In April 2014, Bill 179 died on the order table. In July, 2014, Bill 8 (Public Sector and MPP Accountability and Transparency Act, 2014) was introduced. Bill 8 received Royal Assent on December 11, 2014.

[2] When a compensation frame work is put in place, it will displace the compensation restraints set out in the BPSAA but it will not repeal them.

[3] In response to this concern, the government maintains that the Health Quality Ontario is an arm's-length agency of the government; that the patient ombudsman will report publicly; that there will be a dedicated budget offered to the patient ombudsman so that he/she can operate independently; and that the Ontario Ombudsman will have oversight over the patient ombudsman.

Ensuring Long Term Disability Insurance | The HR Space

Labour, Employment and Human Rights Bulletin

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Labour, Employment & Human Rights

In addition to workers' compensation and the disability benefits provided under other government programs, Canadian employers may choose to provide employees with disability benefits. Most Canadian employers who provide long-term disability benefits do so through insured plans. However, Canadian life and health insurers have in the past indicated that at least 10% of Canadian employees entitled to long-term disability benefits are under uninsured plans (PDF).

When an employer provides disability benefits that are not insured there is a risk that the benefits will not be paid in the event of insolvency of the employer, with serious consequences for former employees relying on those benefits. This issue has come to public attention over several decades upon the insolvency of several high-profile employers.

Changes to Canadian bankruptcy legislation to protect uninsured disability benefits were considered, but not adopted. Instead, changes to the *Canada Labour Code* and Ontario's *Insurance Act* have added protections.

New Federal Requirement

As of July 1, 2014 for employees who are subject to the *Canada Labour Code* (rather than provincial employment legislation), every employer that provides benefits to its employees under a long-term disability plan must insure the plan with a licensed insurer. If, before that date, an employer provided benefits under a long-term disability plan that was not insured, it may continue to provide benefits under that plan but only to each employee who, before that date, was being paid benefits or submitted an application for the payment of benefits.

New Ontario Requirement

Also in July 2014, Ontario passed changes to the Insurance Act (Ontario) with similar effect for all other employees in Ontario, to come into effect on a date to be determined. When that comes into force, no person shall provide long-term disability benefits in Ontario unless the benefits are:

- payable under a contract of insurance undertaken by a licensed insurer; or
- provided under a registered pension plan.

For this purpose, long-term disability benefits means payments or benefits payable to an individual for a period of not less than 52 weeks or until recovery, retirement or death,

whichever period is shorter.

The Rest of the Country

It remains to be seen whether other provinces will adopt similar requirements. Both Alberta and British Columbia already require disclosure by an employer to its employees where disability benefits are not insured. While this may encourage bargaining over disability benefits, no protection is provided for uninsured benefits in the event of insolvency of the employer.

What Should Employers Do?

The shift to mandatory insurance of disability benefits will reduce flexibility for employers who have provided benefits on an uninsured basis. To ensure compliance:

- Employers with employees who are subject to the *Canada Labour Code* should confirm that any long-term disability plan they provide meets the new federal requirements.
- Other employers with uninsured long-term disability plans for Ontario employees should investigate obtaining insurance for their plans.
- Employers with uninsured long-term disability plans for employees elsewhere in Canada may wish to review their plans and disclosure to employees, and monitor regulatory developments in the jurisdictions where they have employees.

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CHARITY LAW UPDATE

MAY 2015

EDITOR: TERRANCE S. CARTER

Updating Charities and Not-For-Profits on recent legal developments and risk management considerations.

MAY 2015

SECTIONS

HIGHLIGHTS

Carters Professional Corporation and Fasken Martineau invite you to attend the Healthcare Philanthropy: Check- Up 2015 on Thursday, June 11, 2015

The 2015 National Charity Law Symposium is being hosted by The Canadian Bar Association on May 29, 2015

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RECENT PUBLICATIONS AND NEWS RELEASES

.NGO and .ONG Domain Names Now Available

By Sepal Bonni

As of May 6, 2015, .ngo and .ong domain names are now available for use by charities, non-governmental organizations ("NGOs") and not-for-profits in Canada and around the world. These new domain names provide a unique way for charities and not-for-profits to portray and distinguish their work in an increasingly crowded online world. Public Interest Registry ("PRI"), the entity that administers the .org domain name, launched the .ngo and .ong domain names in response to concerns from the sector about the need for a closed domain that would help donors immediately know if a website was legitimate and, therefore, feel confident in supporting the organization.

PRI launched the .ngo and .ong domain names in conjunction with its new global OnGood directory of NGOs. Organizations that qualify for and purchase the new domain names will receive both a .ngo (for English users) and .ong (for Romance languages, including French and Spanish) domain name, as well as a customizable online profile on the searchable OnGood directory. This profile allows charities and not-for-profits to showcase their work, collect donations, and link to their other online and social media presence. The database is meant to have a global reach and create a community of like-minded organizations.

Because credibility and donor trust were two significant factors in the push to create the new domain names, PRI has established a validation process that organizations must complete before they can register a .ngo or .ong domain name. Unlike the .org domain name, which can be used by individuals, not-for-profits, or corporations, in order to qualify for a .ngo and .ong domain name, potential registrants must self-certify that they meet seven eligibility criteria. Additionally, the registrant must provide either a registration number, if it is already registered with a NGO or charitable body, such as Canada Revenue Agency, or a supporting letter of reference if no such documentation is available. The seven eligibility criteria require that the organization:

- focuses on acting in the public interest;
- does not recognize profits or retain earnings;
- has limited government influence;
- has staff/members who are independent actors and are not parts of political parties;

- actively and regularly pursues its mission;
- operates in a structured manner; and
- acts with integrity within the bounds of law.

PRI will conduct regular reviews to ensure that organizations with a .ngo or a .ong domain name continue to meet the eligibility criteria.

The new domain names provide an interesting new opportunity for charities and not-for-profits to further establish their online presence and portray themselves to potential donors in a new light. As the new domain names become increasingly recognizable, it is likely that donors will gravitate towards the names. Already, in the first two weeks of availability, over 500 organizations are profiled on the OnGood directory and over 1400 .ngo and .ong domain names have been registered.

Legislation Update

By Terrance S. Carter

Economic Action Plan 2015 Act, No. 1

Bill C-59, *Economic Action Plan 2015 Act, No. 1* (the "Bill C-59"), is currently in Second Reading in the House of Commons and has been referred to the Standing Committee on Finance for study. The Standing Senate Committee on National Finance has also commended its Pre-Study of Bill C-59. The Legislative Summary released by Parliament indicates that although "[e]stablished legislative practice would have this bill followed by a second budget implementation bill [...] it is possible that there will be only one bill implementing the April 2015 budget" because of the federal election scheduled for October 2015.

Bill C-59 will implement some of the income tax and related measures proposed in the April 21, 2015 Federal Budget ("Budget 2015"), which contained a number of important measures of benefit to the charitable and not-for-profit sector. In particular, Bill C-59 amends subparagraph 149.1(1)(a)(v) of the definition of "qualified donee" and subsection 149.1(26) of the *Income Tax Act* ("ITA"). Both amendments will change the current ITA references from "foreign organization" to "foreign charity." The combined result of these amendments will be to clarify that both foreign charitable organizations and foundations are eligible for registration as qualified donees under the ITA, as originally proposed by Budget 2015. Details regarding the other provisions of Budget 2015 affecting charities have yet to be announced.

Division 2 of Part 3 of Bill C-59 enacts the *Prevention of Terrorist Travel Act*, which is discussed in more detail in the article on *New Anti-Terrorism Legislation Introduced*, below.

See Federal Budget 2015: Impact on Charities, *Charity Law Bulletin* No. 363, for further discussion of proposed amendments of Budget 2015.

Bill C-51, Anti-terrorism Act, 2015

Since last reported on in our April 2015 *Charity Law Update*, Bill C-51, *Anti-terrorism Act, 2015* has been passed in the House of Commons, moved to Second Reading in the Senate and has been referred to the Standing Senate Committee on National Security and Defence. In addition to introducing two new pieces of legislation, the *Security of Canada Information Sharing Act* and the *Secure Air Travel Act*, Bill C-51 enhances the powers given to the Canadian Security Intelligence Service "to address threats to the security of Canada," provides law enforcement agencies with enhanced ability to disrupt terrorism offences and terrorist activity, makes it easier for law enforcement agencies to detain suspected terrorists "before they can harm Canadians," creates new terrorism-related offences, and expands the sharing of information between government institutions.

For a discussion of the impact of Bill C-51 on charities and not for profits, see *The Impact of Bill C-51 on Charities and Not for Profits*, *Anti-Terrorism and Charity Law Bulletin* No. 39.

Digital Privacy Act

As reported in previous *Charity Law Updates*, Bill S-4, the *Digital Privacy Act*, was passed by the Senate on June 16, 2014, and was subsequently referred to the Standing Committee on Industry, Science and Technology. The Committee reported the Bill without amendment on April 22, 2015, and Bill S-4 is now proceeding to the Report Stage and Second Reading in the House of Commons. Bill S-4 proposes amendments to the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), among which is the provision that under certain circumstances organizations will be allowed to disclose personal information to other organizations or to the individual's next of kin without the individual's knowledge or consent.

For more information on how Bill S-4 affects PIPEDA, see *Charity Law Bulletin* No. 341, *Digital Privacy Act Proposes Amendments to PIPEDA*.

BC Workers Compensation Amendment Act, 2015

On May 14, 2015, Bill 9, the *Workers Compensation Amendment Act, 2015* (the "Act"), received Royal Assent in the British Columbia legislature. The Act expands the powers of WorkSafeBC, an independent

agency governed by a Board of Directors but appointed by the government to work alongside workers and employers. The Act expands WorkSafeBC's ability to deal with non-compliance and increases employers' obligations in respect of workplace health and safety, particularly in the area of inspections and investigations, where a new two stage incident investigation process is being implemented. Further new powers granted to WorkSafeBC by the Act include the power to issue a stop work order at workplaces found to have a high risk of serious injury, serious illness or death to a worker, or reoccurring non-compliance with a provision of the Act, and on the spot fines of up to $1000 for less serious contraventions of the Act.

Charities and not for profits in BC which are subject to the *Workers Compensation Act* should familiarize themselves with the new regulatory requirements and prepare to revise their internal incident investigation policies as necessary, or otherwise face consequences including financial penalties.

CRA News

By Linsey E.C. Rains

CRA Updates T4063, Registering a Charity for Income Tax Purposes

On May 8, 2015, CRA released an updated T4063, *Registering a Charity for Income Tax Purposes*. This guide is intended to help applicants for charitable registration complete Form 2050, *Application to Register a Charity under the Income Tax Act*, which was last updated in 2011.

CRA Releases Updated GST/HST Guidelines and Information for Charities

In May 2015, CRA released an updated GST/HST Info Sheet (GI-067) *Basic GST/HST Guidelines for Charities* and an additional GST/HST Info Sheet (GI-066) *How a Charity Completes its GST/HST Return*. These versions replace the previous versions from June 2011. The new Info Sheets reflect the changes regarding GST/HST that have occurred in some provinces since 2011. GI-067 explains when charities must comply with specific GST/HST rules, such as when a charity is required to register for GST/HST purposes, including when a charity qualifies as a small supplier. GI-066 outlines the specific steps a charity must take to complete its GST/HST return. GST10 *Application or Revocation of the Authorization to File Separate GST/HST Returns and Rebate Applications for Branches or Divisions* was also updated. This form can be used by public service bodies, charity, and qualifying non-profit organizations who want to file separate GST/HST returns and rebate applications as separate branches or divisions.

National Volunteer Week Speech Highlights First-Time Donor's Super Credit

On May 6, 2015, CRA posted an April 15, 2015 speech given by the Honourable Kerry-Lynne D. Findlay, the Minister of National Revenue ("Minister"), at an event hosted by the Vancouver Fire Fighters' Charitable Society, a registered charity in honour of National Volunteer Week. The Minister drew attention to three charities-related non-refundable tax credits, the First-Time Donor's Super Credit, the Volunteer Firefighters' Tax Credit and the Search and Rescue Volunteers Tax Credit.

CRA Commencing Legal Action Against CBC for Disclosure of Donor Names

On May 15, 2015, CRA issued a statement that it has sent final notice to the CBC and will commence legal action to recover confidential taxpayer information that CRA inadvertently sent to CBC on November 24, 2014. CBC published the information, which, according to the CBC report, contained details about donations of cultural property, including donors' identities and donation values, on November 25, 2014. On the day of publication, CRA released a statement characterizing the breach as an accidental disclosure and reported it to the Privacy Commissioner of Canada. Both CRA statements indicate CBC was aware the information was protected, but CBC continues to refuse to return it to CRA. Under section 241 of the *Income Tax Act*, CRA has an obligation to keep taxpayer information, including certain information from registered charities and donors, confidential. As a public broadcaster, it will be interesting to see whether CBC's officials and representatives fall under the jurisdiction of section 241, as it also applies to government entities other than CRA.

Federal Court of Appeal Hears Case on Direction and Control

By Jennifer M. Leddy

On May 26, 2015, the Federal Court of Appeal heard the appeal in *Public Television Association of Québec v Minister of National Revenue*. The primary issue in this case is whether the Public Television Association of Québec (the "Appellant") retained a sufficient degree of direction and control over its resources when it transferred funds to Vermont Public Television ("VPT"), an American television station that broadcasts in southern Québec, or acted as a conduit for Canadian donations to VPT. The decision in this case has been reserved, but the written arguments (factums) of the parties and the Intervener, Imagine Canada, are publically available by contacting the court.

The Appellant is a not-for-profit corporation formed for the purpose of advancing education through the production, distribution, and promotion of non-commercial, educational television programming. It has been a registered charity since September 21, 1990. On August 23, 2011, the Appellant received a Notice

of Intention to Revoke, following an audit for the fiscal period of June 30, 2005 to June 30, 2006. However, the question of adequate direction and control was not raised until April 4, 2013, in the response to the Appellant's Notice of Objection, which had been filed on November 11, 2011.

In its factum, the Appellant submits that it has produced to Canada Revenue Agency ("CRA") convincing evidence, including agreements, minutes of directors meetings and bank statements to demonstrate that it has direction and control over the funds it raises, choice of programs broadcast by VPT and that it pays a fair price for the programming it purchases through VPT. The Appellant also presents arguments based on the Canada-US Tax Convention that the transfers to VPT should also be treated as gifts to a registered charity. CRA in its responding factum sets out facts to support its position that the Appellant is simply acting as a conduit for receipting purposes for VPT in Canada.

Charity lawyers will be particularly interested in the factum of the Intervener, Imagine Canada. It reflects a carefully crafted argument that CRA's *Guidance CG-002, Canadian Registered Charities Carrying out Activities Outside Canada* and its predecessors misinterpret the law on which they are based. Imagine Canada argues that the Federal Court of Appeal decisions upon which CRA relies do not require written agreements between the Canadian charity and foreign intermediary but only that the charity be able to provide a sufficient account of how its resources are used by the intermediary in light of the particular context and operational realities and that the charity have a "reasonable expectation" that the resources be used only for charitable purposes. Imagine Canada concluded that the CRA Guidance "is so narrowly and erroneously drafted that charities should not reasonably be expected [...] to rely on [it]."

Given the arguments presented in the factums, the decision by the Federal Court of Appeal in *Public Television Association* will invariably be an interesting decision to read and one that lawyers and charities that operate outside of Canada will want to carefully study.

Federal Court Upholds Solicitor-Client Privilege Principles

By Ryan M. Prendergast

Canada (National Revenue) v Revcon Oilfield Constructors Incorporated, a judgment of the Federal Court released on April 23, 2015, discusses solicitor-client privilege during tax planning. The decision is the result of a summary application made by Canada Revenue Agency ("CRA") through the Minister of National Revenue, after Revcon Oilfield Constructors Incorporated ("Revcon") failed to produce material to the CRA in connection with a reorganization that it undertook in 2011. CRA requested the material

pursuant to section 231.7 of the *Income Tax Act* (ITA), though Revcon asserted solicitor-client privilege over the material and refused to provide it.

The ITA, at s. 231.7, defines "solicitor-client privilege" as "the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication."

The materials in dispute fell into four categories:

1. Items that would identify Law Firm X, an undisclosed law firm which was retained by the Respondent's counsel for the purposes of the restructuring transactions being audited [the Law Firm X claim].
2. Items which include "shorthand tax law language used by Law Firm X that describes the Transactions in a manner that could potentially be prejudicial to the Respondent's interests" [the Nomenclature claim].
3. Items which include Law Firm X's opinion respecting the transactions or the work product of Law Firm X's legal retainer [the Structuring claim].
4. Items which were communications for the purpose of obtaining legal advice or assistance [the Legal Advice claim].

The Court rejected the Law Firm X claim and the Nomenclature claim. The judge concluded, in line with well-established principles of solicitor-client privilege, that only documents containing legal advice were privileged. Charities and not-for-profits should be reminded that although CRA cannot view documents subject to legal privilege, legal privilege can be waived if the charity or not-for-profit is not careful when sharing communications, such as sharing legal opinions with third-parties. If an auditor requests a document that a charity or not-for-profit suspects is privileged, the organisation should place the document in a sealed package and retain the package until a judge provides an order about its status.

New Anti-Terrorism Legislation Introduced

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

The Federal government in May 2015 introduced several new pieces of legislation relating to anti-terrorism in Canada. One of the Acts is the *Removal of Serious Foreign Criminals Act*, which proposes

to amend several federal Acts in an effort to streamline the removal of foreign nationals who commit serious crimes in Canada, allow for the mandatory transfer of foreign criminals back to their country of origin and render foreign criminals ineligible for a record of suspension. Among its contents is a provision for making all foreign nationals, and some permanent residents sentenced to more than six months for a serious crime in Canada, ineligible for a criminal record suspension, as well as a provision allowing Canada to transfer a criminal without their consent where provided for under the terms of a future treaty. This Act is currently in First Reading in the House of Commons.

Also in May 2015, the *Prevention of Terrorist Travel Act* was introduced alongside amendments to the *Canadian Passport Order* ("CPO"). These amendments are part of *Economic Action Plan 2015 Act, No. 1*, the legislation implementing Budget 2015, and are thus currently in Second Reading at the House of Commons. The amendments to the CPO will grant Federal Court judges the ability to cancel, refuse or revoke passports as a preventative measure to stop an individual from committing a terrorism offence, as defined by the *Criminal Code*, or for the national security of Canada or a foreign country or state. The revocation of a passport could last for up to 10 years. The *Prevention of Terrorist Travel Act* pertains to judicial proceedings involving a CPO decision. Among other provisions, the Act stipulates that during a proceeding, on the Minister's request, a judge must hear submissions on evidence in the absence of the public and the applicant and their counsel, and the judge must ensure that the applicant is provided with only a summary of the evidence if in the judge's opinion it would be injurious to national security or endanger the safety of any person if disclosed.

Economic Action Plan 2015 Act, No. 1 also implements changes to section 55(3) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, as alluded to in Budget 2015. These changes will require that the Financial Transactions and Reports Analysis Centre of Canada, if it has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence, disclose the information to an agency or body that administers the securities legislation of a province.

The legislation described above reflects the Federal government's increased focus on addressing terrorist activity. These measures are generally reflective of the approach towards terrorist activity as found in legislation such as Bill C-51, as discussed in *Anti-Terrorism and Charity Law Bulletin* No. 39, *The Impact of Bill C-51 on Charities and Not for Profits*. Also like Bill C-51, the legislation described above may raise concerns for Canadian charities and not for profits, specifically those operating in conflict zones or otherwise becoming the subject of investigation by law enforcement and other agencies. Close attention

to the development of this legislation will be important so that every organization may conduct a close pro-active review of charitable activities and due diligence procedures to ensure limitation of risk for the organization itself, as well as its directors, officers, employees, and members.

CRA Comments on Services Performed by Volunteer Firefighters

By Ryan M. Prendergast

On April 29, 2015, Canada Revenue Agency ("CRA") released a technical interpretation (CRA # 2014-0559501E5) describing what type of activities are likely to be considered "primary services" or "secondary services", in relation to the definition of "eligible volunteer firefighting services" in the *Income Tax Act* ("ITA"). This CRA View is only available in French. While it does not address the search and rescue volunteer credit under section 118.07 of the ITA, in 2014, the ITA was amended to allow volunteer firefighters or volunteers who perform search and rescue services and who perform 200 hours of eligible service to claim a tax deduction.

"Eligible volunteer firefighting service" is defined under subsection 118.06(1) of the ITA as:

> services provided by an individual in the individual's capacity as a volunteer firefighter to a fire department that consist primarily of responding to and being on call for firefighting and related emergency calls, attending meetings held by the fire department and participating in required training related to the prevention or suppression of fires, but does not include services provided to a particular fire department if the individual provides firefighting services to the department otherwise than as a volunteer.

In this CRA View, CRA was asked, in particular, whether activities such as monthly practices, including simulations of interventions, and prevention visits, such as visits to homes to inspect fire alarm systems, fall within the above definition. In response, CRA provided general comments concerning its interpretation of 118.06(1). Although the ITA itself does not refer to "primary" or "secondary" services in relation to the volunteer firefighter tax credit, CRA administers the credit by referring to the services in the above definition, i.e., responding to and being on call for firefighting and related emergency calls as a firefighter; attending meetings held by the fire department; and participating in required training related to the prevention or suppression of fire as "primary services". Other activities are also eligible for the credit as "secondary services", such as time spent repairing and maintaining vehicles and equipment used by the fire department. Generally, the number of hours devoted to primary services must exceed the number of hours devoted to secondary services. In this regard, CRA stated that assessing such activities will be a question of fact and that in this specific situation, the monthly practices may be primary services

where they include a portion related to the prevention or extinguishing of fires, but that prevention visits or verification of fire alarms were secondary services as they are not included in the definition at 118.06(1) of the ITA.

This commentary is noteworthy as more provinces introduce similar legislation. For example, Manitoba recently introduced a tax credit for volunteer firefighters as part of its 2015 Budget.

Re-Capping Employer Liability for Wrongful Acts of Their Employees

By Barry W. Kwasniewski, *Charity Law Bulletin* No. 366, May 27, 2015

In *KL v 1163957799 Quebec Inc cob as Calypso Water Park Inc and Calypso Theme Waterpark, and Curtis Strudwick* ("*KL*"), the Ontario Superior Court of Justice considered a motion by the corporate defendant ("Calypso") to strike the plaintiff's pleadings regarding Calypso's liability for the alleged sexual assault of KL, the plaintiff, by an employee of Calypso, on the ground that the pleadings disclosed no reasonable cause of action. On April 14, 2015, Justice Smith dismissed Calypso's motion. In his reasons, Justice Smith provided a thorough review of the Supreme Court of Canada's decision in *Bazley v Curry* ("*Bazley*"), which established the test for vicarious liability of an employer for the acts of an employee. Although this decision represents only a procedural step on the way to a final decision in *KL*, it is useful as a reminder to employers, including charities and not-for-profits, concerning how the courts will determine potential employer liability for the acts of its employees. This *Charity Law Bulletin* reviews the comments by the court in *KL*. This *Charity Law Bulletin* reviews the comments by the court in *KL*.

BC Societies Act Received Royal Assent

By Theresa L.M. Man

On May 14, 2015, the BC *Societies Act* (the "Act") received Royal Assent. Once in force, the Act will replace the current *Society Act*, enacted in 1977, which governs approximately 27,000 societies. This modernization of the incorporation and governance framework for non-profit corporations corresponds with recent modernization brought by the federal *Canada Not-for-profit Corporations Act* and the Ontario *Not-for-Profit Corporations Act, 2010*, which the sector is still waiting to be proclaimed.

The Act contains new measures including distinguishing "member funded" societies from societies that are funded by public donations or government, which will influence public disclosure requirements and governance restrictions; imposing duties and rules on senior managers; requiring a "member proposal" be added to the agenda of a members' meeting if the proposal is signed by 5% or more of the society's voting

members; and implementing a new online filing system for incorporation, bylaw changes, and other filings at the corporate registry.

Once the Act is proclaimed, a pre-existing society must transition under the Act within two years by filing a constitution, by-laws (consolidated into a single set of bylaws) and a statement of directors and registered office of the society. Notice of enabling regulations and a timetable for implementation of the Act is pending.

Recent Submissions to HoC Standing Committee on Finance's Study on Terrorist Financing

By Terrance S. Carter

As reported in the April 2015 *Charity Law Update*, at the request of the House of Commons Standing Committee on Finance ("Committee"), Carters Professional Corporation (represented through Terrance S. Carter) appeared on April 30, 2015 to make a submission to the Committee with regard to its study of the cost, economic impact, frequency and best practices to address the issue of terrorist financing, both here in Canada and abroad. A supplemental submission was made by Carters to the Committee on May 8, 2015, to bring to the Committee's attention the earlier recommendations made by the Subcommittee of the Standing Committee on Public Safety and National Security ("Subcommittee") in their report in 2007, which recommendations were consistent with those contained in the earlier Carters submission.

Also appearing before the Committee on April 30, 2015 was Samuel Schwisberg, in-house legal counsel for the Canadian Red Cross, who was appearing on behalf of the Canadian Bar Association Charities and Not-for-Profit Law Section ("CBA"). Mr. Schwisberg made a superb submission, stating that charities can be an important asset in countering terrorism given their outreach to communities both within Canada and outside Canada.

In his comments before the Committee, Mr. Schwisberg provided an accurate reflection of the current impossible situation faced by charities wanting to comply with Canada's complex anti-terrorism legislation in conflict areas by explaining that:

> Even for a larger organization, the way the law is constructed now... Picture me at a board of directors. They ask me, "Are we compliant with all the laws of Canada?" Can I state that with any great confidence, given the way the law is stated? It is quite possible that some would-be terrorist, three years down the road, after getting treatment at an emergency response unit, a MASH we've set up there, goes and commits an act of terrorism.

> If you look at the pure writing of the law, the literal meaning of the law, we could be held liable for that. There is a lot of reliance on prosecutorial discretion, which we don't feel is consistent with the rule of law. In our submission, there needs to be more clarity in the law so that charities have a clear understanding of what they can and cannot do.

This very clear depiction of the conundrum faced by charities wanting to work in the international arena, particularly those charities providing assisting in conflict areas, reflect why change in legislation and in enhanced guidance from CRA, as explained in the recommendations made by CBA, the Subcommittee and Carters, is so important for the government to consider at this point in time.

Maintaining "Control and Discretion" in the United States

By Jacqueline M. Demczur

On March 13, 2015, the Internal Revenue Service ("IRS") released LTR 201511033 ("the Letter"), which is a final adverse determination by the IRS revoking the tax-exempt status of an "American Friends of" organization, because it did not exercise full control and discretion over how funds donated to it were used by its related foreign organization. In the Letter, the IRS described why it concluded that the actions of the "American Friends of" organization in question (identifying details such as the name of the organization have been redacted from the Letter) resulted in the organization being a mere conduit for the foreign organization in question.

In the United States, organizations referred to as "American Friends of" organizations are used to raise tax-deductible funds to support the tax-exempt purposes of foreign organizations, which must correspond to the purposes described in section 170 and subsection 501(c)(3) of the *Internal Revenue Code* (the "Code"), which set out the requirements for tax-exempt status as well as the tax deductions for charitable gifts. Specifically, "American Friends of" organizations must comply with the requirements in IRS Revenue Ruling 63-252, which contains five examples of tax-deductibility involving foreign organizations and concludes that if "contributions [are] subject to control by the domestic organization" or "the foreign organization is merely an administrative arm of the domestic organization," the contributions are tax deductible. This ruling therefore underscores the importance of an "American Friends of" organization retaining control and discretion over all payments, disbursements, and grants made by it.

In the Letter, the IRS highlighted a number of ways in which the organization in question failed to demonstrate sufficient control and discretion. These include making payments to personnel, including the

director, of the foreign organization without being able to provide sufficient documentation regarding the identity of the recipients or the exempt purpose of the payment. Additionally, the IRS maintained that the "American Friends of" organization could not provide records to show that:

- the making of grants was within the exclusive power of the board of directors;
- the board of directors reviewed all requests for funds;
- the board of directors required that the grantees could provide periodic accounting; and
- the board of directors could, at its discretion, refuse to make grants.

Due to these findings, the IRS determined that the organization no longer qualified for tax-exempt status under the Code.

Although the legislative schemes regarding charitable contributions to foreign organizations are different in Canada and the United States, this Letter illustrates interesting parallels between the "control and discretion" analysis in the United States and the "direction and control" analysis in Canada. It is also noteworthy that some lawyers in the United States, including Victoria B. Bjorklund and Morey O. Ward, in their recent continuing legal education presentation at Georgetown Law, have called for the IRS to use this Letter as an opportunity to create an updated precedential guidance on this important topic. Additionally, among other recommended best practices, they also suggested that "American Friends of" organizations should review, in advance, all requests for funds, analyze such requests and approve only those which are satisfactory and reflective of their own purposes, as opposed to providing blanket support of a general nature to a foreign organization. When combined with the fact that, in Canada, the Federal Court of Appeal recently heard the appeal in *Public Television Association of Québec v Minister of National Revenue* (see the separate article above on this case in this *Charity Law Update*), which considers Canadian law on this topic, it is clear that the question of contributions to foreign organizations is becoming a topic of greater importance for charities on both sides of the border.

Court of Final Appeal Deems Hong Kong Family Foundation a Trustee

By Theresa L.M. Man

On May 18, 2015, the Court of Final Appeal in Hong Kong, in Final Appeal No. 9 of 2014, made the final judgement concerning the will and ensuing legacy of Nina Wang, who, before her death in 2007, was Asia's richest woman. The value of the assets involved in the estate is approximately US $4.2 billion. The Court considered whether the Wang family-led Chinachem Charitable Foundation Ltd. (the "Foundation")

was a beneficiary under Ms. Wang's will and could use the properties bequeathed to it as an absolute gift, or whether the Foundation was a trustee and must use the properties in accordance with the directions in the will. The Court held that the Foundation was a trustee, in the process limiting its ability to freely use the funds. The appeal was delayed by five years due to protracted contentious probate proceedings arising out of the allegation that Ms. Wang's 2002 will was superseded by another will made in 2006 in favour of her personal *feng shui* consultant, Tony Chan.

The facts are interesting. In 2002, Ms. Wang executed a "homemade" will with the help of her sister but no lawyer. In Clause 1 of her will, Ms. Wang set out that "All of my properties shall be bequeathed to [the Foundation]." Clause 2 states as follows: "[1] I wish to entrust [the Foundation] to the supervision of a managing organization jointly formed by the Secretary General of the United Nations; the Premier of the PRC Government as well as the Chief Executive of the Hong Kong Special Administrative Region. [2] Under its supervision, [i] not only must [the Foundation] continue all the projects which it has undertaken since its establishment to enable their developments continuously, but [ii] it must also continue to achieve the purpose of setting up a fund and a Chinese prize of worldwide significance similar to that of the Nobel Prize."

In order to interpret the role of the supervisory body referred to in Clause 2(1) of the will, the Court considered whether the language was imperative and sufficiently clear in depicting Ms. Wang's intentions. It also attempted to read the will in context and as a whole. After referring to a line of relevant case law, including UK and Canada cases, the Court concluded that the "most appropriate legal terms [to apply to the will] are those that most naturally and simply give effect to Nina's intentions." It therefore held that Clause 2(1) was only precatory and that the "correct interpretation of Clause 2(2) is that it imposes a trust for charitable purposes."

After determining that the Foundation was a trustee, the Court concluded that establishing a "managing organization," as referred to in Clause 2(1), was within the inherent jurisdiction of the courts' scheme-making power over the administration of charitable trusts because "there is a strong public interest in this important benefaction having a clear and sounder legal basis than the language of Nina's home-made will." The Court recommended that a scheme allowing for the administration of the charitable trust in Ms. Wang's will be prepared and submitted to the High Court for approval.

This case illustrates the importance in drafting a clear will, particularly when the will involves a large donation, in order to ensure that the wishes of the testator are met. Although this case is in a different

jurisdiction, it is interesting to see how the legal principles involving special purpose charitable trusts in the context of an estate gift to a charity are interpreted based on cases in the Commonwealth.

Joint Comments on Draft Financial Action Task Force

By Nancy E. Claridge and Sean S. Carter

The Financial Action Task Force ("FATF") Best Practices Paper ("BPP") on Combating the Abuse of Non-Profit Organisations (Recommendation 8) was first written in 2002, in the wake of the September 11 terrorist attacks. The purpose of the BPP is to set out specific examples of good practice which may, among other benefits, assist countries and non-profit organisations ("NPOs") in their implementation and adherence of Recommendation 8, as well as assist financial institutions in the proper implementation of the risk-based approach when providing financial services to NPOs, and guide donors who are providing funding to NPOs.

Since its inception, a limited update of the best practices paper was conducted in 2013, followed by a report on Risk of Terrorist Abuse in Non-Profit Organisations in June 2014, which, along with additional input and examples of best practice from governments and the private sector, led to further revisions. On April 28, 2015, 70 NPOs from 28 countries submitted joint comments on the current draft.

These joint comments from NPOs emphasize that the BPP's primary purpose should be to "provide guidance for governments" and support outcomes that do not over-regulate NPOs. The comments advise that the BPP should be cognizant that the overall risk of terrorist abuse of the NPO sector is actually very low, both in numbers and geography. By implementing these recommendations, the BPP will be more persuasive among stakeholders, and allow them to take appropriate risks without fear of drastic enforcement measures.

Australia 2015 Budget Impacts Charities

By Esther S.J. Oh

On May 12, 2015, the Australian Government tabled that country's Budget 2015. Several proposed measures will affect the operation of public benevolent institutions and health promotion charities in Australia ("Eligible Organizations"), including proposed amendments to the fringe benefits tax ("FBT"), a tax payable by employers who provide fringe benefits to their employees. While certain fringe benefits, such as meals and entertainment, were uncapped in previous legislation, under the proposed amendments employees will be able to access a cap of up to a grossed-up amount of $5000 worth of fringe benefits,

separate from the general FBT amount. As employers, Eligible Organizations were previously subject to uncapped exemptions under the FBT in this regard, and were able to provide fringe benefits to employees tax-free. This assisted in attracting quality employees these types of organizations without paying high private-sector salaries. It is not yet clear how far-reaching these proposed amendments will be and whether they will affect all charities and not-for-profits currently eligible for FBT exemptions.

Another item of interest for charities and non-profits is the Australian government's commitment to continue funding for the National School Chaplaincy Program for the next four academic years ending in the year academic year 2017 -2018. This program will assist approximately 2900 schools in Australia engage the services of a school chaplain to provide pastoral care to students in schools. While Canada does not have similar programs to those Australian initiatives outlined above, charities in Canada may find it of interest to be aware of developments occurring in the charitable sector in other commonwealth jurisdictions.

IN THE PRESS

Federal Budget 2015: Impact on Charities by Ryan M. Prendergast, Linsey E.C. Rains and Terrance S. Carter, *Gift Planning in Canada*, Vol 20, Number 4, April 30, 2015.

Federal Government to Match Donations to Nepal Earthquake Relief Fund by Terrance S. Carter and Ryan M. Prendergast, *Hilborn Charity eNews*, May 4, 2015.

Federal Budget Offers Good News for Charities, by Ryan M. Prendergast, Linsey E.C. Rains, and Terrance S. Carter, *Law Times*, May 4, 2015

Office of the Privacy Commissioner Comments on Requirements for Opt-in Consent by Sepal Bonni and Terrance S. Carter, *Hilborn Charity eNews*, May 12, 2015.

CBA National Charities and Not-for-Profit Law Section Newsletter – an interview with Terrance S. Carter regarding "How Bill C-51 will Affect Charities Doing International Relief Work", May 2015

RECENT EVENTS AND PRESENTATIONS

The University of Montreal Faculty of Law hosted a conference entitled "The Law of Charity" on Friday May 8, 2015 including a panel discussion on "Charities and Political Activity" with Terrance S. Carter as a presenter.

Canadian Council for International Co-operation (CCIC) hosted a seminar on Wednesday, May 13, 2015 entitled "The Three Hot Legal Issues for Charities Operating Abroad," presented by Terrance S. Carter.

Imagine Canada Sector Source hosted a webinar entitled "Update on Ineligibility Requirements: CRA's Policy on Ineligible Individuals" on Thursday, May 21, 2015, presented by Ryan M. Prendergast.

UPCOMING EVENTS AND PRESENTATIONS

2015 National Charity Law Symposium is being hosted by the Canadian Bar Association on Friday, May 29, 2015. Terrance S. Carter will present on the topic "Judicial Renderings to Consider."

BDO LLP is hosting an evening seminar "Managing the Risk" on Wednesday June 3, 2015, with a session entitled "Basic Legal Risk Management for Charities and Non-Profits" to be presented by Terrance S. Carter.

Healthcare Philanthropy: Check-Up 2015, is being co-presented by Carters and Fasken Martineau for the 11th anniversary on Thursday, June 11, 2015. Two topics to be presented are as follows:

- "Essential Charity Law Update" presented by Theresa L.M. Man
- "Preparing for and Surviving a Charity CRA Audit" presented by Terrance S. Carter

Imagine Canada Sector Source will host a webinar entitled "Volunteer Agreements: Managing Volunteer Relations and Reducing Risk Plus Employment Law Update" on Thursday, June 18, 2015, presented by Barry W. Kwasniewski.

CSAE Summer Summit will include a session entitled "Avoiding Board Meeting Nightmares" on Thursday July 9, 2015, presented by Theresa L.M. Man and Terrance S. Carter.

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CHARITY LAW BULLETIN NO. 365

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EDITOR: TERRANCE S. CARTER

OPT-IN VERSUS OPT-OUT? FEDERAL PRIVACY COMMISSIONER COMMENTS ON CONSENT

By Sepal Bonni and Terrance S. Carter*

A. INTRODUCTION

On April 7, 2015, the Office of the Privacy Commissioner of Canada ("OPC") released PIPEDA Report of Findings #2015-001 "Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program."[1] This report provides findings from an investigation initiated by the OPC of Bell's advertising program after the OPC received "an unprecedented number of public complaints" shortly after Bell announced, in August 2013, that it would use customers' personal information to enable targeted ads. The main issue on which the investigation focused was whether Bell should be able to use opt-out consent in which individuals are included in the advertising program unless they specifically opt-out, or if express opt-in consent should be used. In this regard, the finding is noteworthy for its extensive discussion of the factors used to determine whether an organization can rely on opt-in or opt-out consent when it collects, uses, or discloses its individuals' personal information. Charities and not-for-profits must be aware of these factors in situations when they engage in commercial activity, such as the selling, bartering, or leasing of donor, membership, or other fundraising lists. This *Charity Law Bulletin* briefly describes PIPEDA's consent requirements and outline what the new Bell report has added to the OPC's understanding of consent, underscoring the importance for charities and not-for-

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[1] *PIPEDA Report of Findings #2015-001*, "Results of Commissioner Initiated Investigation into Bell's Relevant Ads Program" (7 April 2015), online: Office of the Privacy Commissioner <https://www.priv.gc.ca/cf-dc/2015/2015_001_0407_e.asp>.

profits which collect, use and disclosure sensitive personal information to adopt an opt-in consent approach.

B. CONSENT TO USE INDIVIDUALS' PERSONAL INFORMATION

1. PIPEDA

Under Schedule 1, Principle 3 in the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") organizations must obtain "knowledge and consent of the individual [...] for the collection, use, or disclosure of personal information, except where appropriate."[2] Consent can be either opt-in, where an individual must provide a positive agreement to a stated purpose, or opt-out, where an organization can assume consent unless the individual opts-out.

PIPEDA applies to "every organization in respect of personal information that (a) the organization collects, uses or discloses in the course of commercial activities."[3] This statement would initially appear to remove charities and not-for-profits from the reach of PIPEDA. However, under section 2(1), "commercial activity" is defined as:

> any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists (emphasis added).[4]

It is important for charities and not-for-profits to understand that the above noted definition is very broad. The language referring to "any particular transaction" and activity that "is of a commercial character" is relevant to charities. This phrasing means that it is likely that "non-profit or charitable organizations that engage in limited commercial activities that are ancillary to their primary functions would nevertheless be subject to the Act."[5] The "selling, bartering or leasing of donor, membership or other fundraising lists," which is specifically included in the above noted PIPEDA definition of

[2] SC 2000, c 5.
[3] *Ibid*, s. 4(1).
[4] *Ibid*.
[5] Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector – An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002) page PIP-7.

commercial activity, is the primary example of when charities and not-for-profits will need to consider the consent provisions.[6]

2. Previous OPC Findings

In past findings, the OPC has generally preferred opt-in consent, stating that "opt-in consent is the most appropriate and respectful form for organizations to use."[7] For example, in 2002, almost immediately following the introduction of PIPEDA, the Privacy Commissioner of Canada, in what appears to be the earliest finding considering the appropriate form of consent, commented that:

> I have a very low opinion of opt-out consent, which I consider to be a weak form of consent reflecting at best a mere token observance of what is perhaps the most fundamental principle of privacy protection. Opt-out consent is in effect the presumption of consent - the individual is presumed to give consent unless he or she takes action to negate it. I share the view that such presumption tends to put the responsibility on the wrong party. I am also of the view that inviting people to opt in to a thing, as opposed to putting them into the position of having to opt out of it or suffer the consequences, is simply a matter of basic human decency.[8]

The OPC has also confirmed its preference for opt-in consent in its Fact Sheet on how to determine the appropriate form of consent. The Fact Sheet states that opt-in consent "is the strongest form of consent, and is keeping with the spirit of PIPEDA."[9] It also states that:

> An organization is encouraged to use this form of consent wherever appropriate, taking into consideration the reasonable expectations of the individual. This form of consent is least likely to give rise to misunderstandings and complaints.[10]

In order for an organization to take the opposite approach and properly rely on opt-out consent, it must consider both the sensitivity of the information at issue and the reasonable expectations of the organization's customers.[11] Both of these factors are equally important. Additionally, organizations

[6] *Ibid* at s. 2(1).
[7] *PIPEDA Case Summary #2003-192* "Bank does not obtain the meaningful consent of customers for disclosure of personal information" (1 April 2004), online: Office of the Privacy Commissioner <https://www.priv.gc.ca/cf-dc/2003/cf-dc_030723_01_e.asp> [*#2003-192*].
[8] *PIPEDA Case Summary #2002-042: Air Canada allows 1% of Aeroplan membership to 'opt-out' of information sharing practices* (17 January 2005), online: Office of the Privacy Commissioner <https://www.priv.gc.ca/cf-dc/2002/cf-dc_020320_e.asp>.
[9] "Determining the appropriate form of consent under the Personal Information Protection and Electronic Documents Act" (28 September 2004), online: Office of the Privacy Commissioner <https://www.priv.gc.ca/resource/fs-fi/02_05_d_24_e.asp>.
[10] *Ibid*.
[11] *Supra* note 2. See Principles 4.3.4 and 4.3.5.

must consider not only these factors, but also the fact that the OPC has set out four further conditions, all of which must be satisfied, before relying on opt-out consent:

1) The personal information must be demonstrably non-sensitive in nature and context.
2) The information-sharing situation must be limited and well defined as to the nature of the personal information to be used or disclosed and the extent of the intended use or disclosure.
3) The organization's purposes must be limited and well-defined, stated in a reasonably clear and understandable manner, and brought to the individual's attention at the time the personal information is collected.
4) The organization must establish a convenient procedure for easily, inexpensively, and immediately opting out of, or withdrawing consent to, secondary purposes and must notify the individual of the procedure at the time the personal information is collected.[12]

If all of the above conditions are not satisfied, the organization cannot rely on opt-out consent and must instead obtain express opt-in consent.

3. The OPC's Comments in the Bell Investigation

The OPC's recent finding in its investigation of Bell follows its previously indicated preference towards opt-in consent. The OPC found that Bell's opt-out mechanism was inadequate, particularly because it failed to give customers an express (opt-in) choice to participate in the advertising program. In this most recent finding, the OPC confirmed that opt-in consent is required based primarily on two key factors, as provided by PIPEDA:

1) the degree of sensitivity of the personal information involved, and
2) the reasonable expectations of the individuals.[13]

[12] *#2003*-192, *Supra* note 4.
[13] See footnote 11 and Principles 4.3.4 and 4.3.5.

Regarding the second factor, the Bell decision appears to be the first OPC finding to provide a clear description of how "reasonable expectations" is to be considered in this context. It states that:

> Reasonable expectations is an objective standard which requires that our Office consider all of the relevant contextual factors surrounding the practice in question, including the type of services the organization offers, and the nature of the relationship between the organization and its customers. These contextual factors must not be considered in isolation but rather, evaluated as a whole.[14]

It is also interesting to note that the OPC assessed Bell's infrastructure and the "nature and breadth of its services" when considering the sensitivity of the information that Bell had access to.[15] While Bell maintained that the breadth of the information it used in its advertising program did not "render it, in aggregate, more sensitive than its constituent elements," the OPC disagreed and found that the breadth of information retained by Bell as a whole was more sensitive that the individual elements of the information.[16]

Overall, the OPC concluded that Bell's survey mechanism for opt-out consent "lacked validity and contained questions that were unduly complex or leading"[17] and because of the degree of sensitivity of the personal information collected, and the reasonable expectations of the individuals, opt-in consent to the advertising program must be obtained.

C. APPLICATION TO CHARITIES AND NOT–FOR-PROFITS

The broad concepts and additional commentary that this finding provides are useful for all organizations, including charities and not-for-profits, to apply when considering what the appropriate form of consent is in their particular context.

For charities and not-for-profits that are involved in the selling, leasing, or bartering of donor, membership or other fundraising lists, it is important that they remember that such activity is considered "commercial activity" under PIPEDA, and, therefore, PIPEDA's consent provisions will apply in such

[14] *Supra* note 1 at para 78.
[15] *Ibid* at para 73.
[16] *Ibid* at paras 74-75.
[17] *News Release*, "Bell advertising program raises privacy concerns" (7 April 2015), online: Office of the Privacy Commissioner <https://www.priv.gc.ca/media/nr-c/2015/nr-c_150407_e.asp>.

contexts. Further, the disclosure of personal information with third parties could form the basis of an alleged privacy breach as is the case with the $750M class-action lawsuit filed against Bell this month.[18]

As the Bell finding reiterates, opt-in consent is the recommended and most unequivocal form of consent. Therefore, in order to avoid an investigation from the OPC or potential lawsuits, organizations choosing to use opt-out consent should carefully review the context in which they do so in order to ensure that they are satisfying all of the conditions laid out by the OPC and are complying with PIPEDA's consent provisions.

[18] "Bell faces $750M lawsuit over allegedly selling customer data" (17 April 2015), online: CBC News <http://www.cbc.ca/news/canada/windsor/bell-faces-750m-lawsuit-over-allegedly-selling-customer-data-1.3037545>.

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CHARITY LAW BULLETIN NO. 364

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EDITOR: TERRANCE S. CARTER

EMPLOYER LIABLE FOR DISMISSAL AND ONTARIO *HUMAN RIGHTS CODE* DAMAGES

By Barry W. Kwasniewski*

A. INTRODUCTION

Bray v Canadian College of Massage and Hydrotherapy ("*Bray*"),[1] a recent decision from the Ontario Superior Court of Justice (Small Claims Court), illustrates what can go wrong if an employer attempts to unilaterally impose workplace related changes on an employee after that employee returns to work following a leave of absence, such as a pregnancy or parental leave. Additionally, it underscores that employers cannot treat employees differently based on grounds protected by the Ontario *Human Rights Code* (the "Code").[2] In his decision dated January 31, 2015, Deputy Judge Winny broadly canvassed the law on constructive dismissal, damages in lieu of notice, and discrimination, as well as aggravated and punitive damages. Deputy Judge Winny consistently found in favour of the plaintiff. Although the plaintiff had limited her claim to $25,000, because it was brought in Small Claims Court, Deputy Judge Winny assessed total damages for reasonable notice, discrimination, and punitive damages at $42,700. He therefore awarded the plaintiff $25,000 plus interest. Although *Bray* was decided in Small Claims Court, the decision has important lessons for employers in Ontario, including charities and not-for-profits, which will be reviewed in this *Charity Law Bulletin*.

B. FACTS

Kelly Bray, the plaintiff, is a registered massage therapist who was employed by the Canadian College of Massage and Hydrotherapy (the "College") on a part-time basis since 2004. Ms. Bray worked an

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[1] 2015 CanLII 3452 (ON SCSM).

[2] RSO 1990, c H 19.

average of 25 hours a week teaching classes, supervising clinics, and supervising outreach programs.[3] In October 2012, she went on maternity leave[4] for one year and was scheduled to return in October 2013.

During the spring and summer 2013, Ms. Bray was omitted from the distribution list concerning scheduling for the September 2013 term. On July 10, 2013, she received a draft schedule and subsequently emailed the College's Director of Education to enquire about whether she would be leading treatments when she returned as she had done before her leave. The Director's response included the following statement:

> Let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment.[5]

After being informed that she would not be leading treatments and receiving the above email, Ms. Bray filed a complaint with the Ontario Ministry of Labour. In November 2013, the Ministry of Labour asked Ms. Bray to put in writing a summary of the July events. Deputy Judge Winny inferred that the Ministry of Labour informed the College of this complaint shortly thereafter.

Ms. Bray returned to work as planned in October 2013. Because she no longer had a lead teaching position, Ms. Bray's schedule was reduced to 19 hours a week and her gross weekly pay was reduced by approximately one-third. Ms. Bray was then informed, in an email dated December 16, 2013, that she would not be scheduled for any classes, clinics, or outreach for the January term. She was told that "you are not being removed, at this time we simply do not require your services for this upcoming term."[6] Ms. Bray subsequently withdrew her complaint to the Ministry of Labour and commenced litigation.

C. DECISIONS AT TRIAL

Deputy Judge Winny found in favour of the plaintiff on the following issues: constructive dismissal, reasonable notice, damages for breaches of the Code, and punitive damages. He dismissed the plaintiff's claims for damages for reprisal and aggravated damages.

[3] *Supra* note 1 at paras 4-5.
[4] Sections 46, 47 and 48 of the Ontario *Employment Standards Act, 2000* include job-protected pregnancy and parental leave of up to 52 weeks.
[5] *Ibid* at para 10.
[6] *Ibid* at para 20.

1. Constructive Dismissal

Deputy Judge Winny found that the College's letter on December 16, 2013 resulted in constructive dismissal of the plaintiff stemming from a unilateral reduction in hours, responsibilities, and income. In this regard, he stated that "it is well-established that at common law, an employer has no inherent right to lay off an employee, even temporarily."[7] He further concluded that "it is difficult to imagine a more fundamental term of employment than the payment of remuneration,"[8] that the plaintiff was indefinitely dismissed, and, consequently, that even if any alleged misconduct was true, "the indefinite layoff or suspension was not a proportionate response to it."[9]

2. Reasonable Notice Damages

The College contended that Ms. Bray was limited to eight weeks notice under the *Employment Standards Act, 2000* ("ESA")[10] However, Deputy Judge Winny held that the College did not sufficiently advise or instruct Ms. Bray to read its Employee Policy Handbook and, even if it had, the termination provisions in the Handbook were not "sufficiently clear to exclude the common law requirement for reasonable notice and limit the employer's responsibility to the statutory minimums under the *Employment Standards Act*."[11] Considering that Ms. Bray was a nine-year employee with supervisory responsibilities and that there were limited teaching positions available, Deputy Judge Winny concluded that eight months was an appropriate notice period. This would result in $26,000 in reasonable notice damages. Taking into account other employment income earned by Ms. Bray during the notice period reasonable notice damages were reduced to $17,700.

3. Discrimination Contrary to the Ontario *Human Rights Code*

Ms. Bray claimed that she was discriminated against based on the grounds of sex and family status, which is prohibited under s. 5(1) of the Code. Additionally, s. 53(1) of the ESA states that:

> Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

[7] *Ibid* at para 23.
[8] *Ibid* at para 27.
[9] *Ibid* at para 28.
[10] SO 2000, c 41.
[11] *Supra* note 1 at para 38.

S. 46.1(1) of the Code authorizes a civil court finding an infringement of a Code-protected right to make

> An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.

This is available if the complainant can prove (i) that he/she is a member of a group protected by the Code, (ii) that he/she was subjected to adverse treatment, and (iii) that protected characteristic was "a factor" in the adverse treatment."[12] Deputy Judge Winny found that Ms. Bray was able to prove each of these factors. In assessing the appropriate amount of monetary damages several cases were reviewed, including the recent decision in *Partridge v Botony Dental Corporation* ("*Partridge*"), in which the plaintiff's employment was also terminated shortly after she returned from maternity/parental leave.[13] In *Partridge*, the employer was found liable for discrimination based on family status and damages for injury to feelings, dignity and self-respect were assessed at $20,000. The court ruled that the same amount should be awarded to Ms. Bray.

4. Aggravated Damages

In part because there was no medical evidence, Deputy Judge Winny found that Ms. Bray was unable to prove her claim for aggravated damages. He also considered the fact that "courts must be careful not to make damages awards which overlap in a manner which results in over-compensation."[14]

5. Punitive Damages

Ms. Bray was awarded punitive damages in the amount of $5,000. The court concluded that the College acted in bad faith towards Bray in failing to disclose or properly investigate a complaint it had received about her. According to a College witness, this complaint led to the decision to schedule no work hours starting in January, 2014. The College maintained that it took this measure as a disciplinary approach in response to that complaint. However, because the College did not disclose the complaint to Bray or give her a chance to respond to it, the Court found this violated

[12] *Peel Law Association v Pieters* (2013), 116 OR (3d) 81 (CA) at paras 54-61.
[13] [2015] OJ No 266 (SCJ). For a more detailed discussion of this case see "Ontario Court of Applies 'Family Status' Test for Discrimination" in *Charity Law Update* (March 2015), online: <http://www.carters.ca/pub/update/charity/15/mar26.pdf>.
[14] *Supra* note 1 at para 70.

the duty of good faith in the performance of a contract, as recently articulated by the Supreme Court of Canada in *Bhasin v Hrynew*.[15] In the result, this breach was considered sufficient to support a punitive damages award.

D. CONCLUSION

The *Bray* decision underlines the legal risks that employers face when employees on job-protected ESA leaves of absence return to work. The decision also highlights that discriminatory conduct against such employees contrary to the *Code* may result in increased damage awards in civil claims. With respect to employment contracts, *Bray* underscores the importance of including clear termination provisions if employers want to contractually limit liability. As noted in the decision, unless the employer can prove that the policy regarding termination rights was in fact communicated to the employee, they will have no legal effect. All employers, including charities and not-for-profits, must be aware of their legal rights and obligations when employees return after a leave of absence.

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FEDERAL BUDGET 2015: IMPACT ON CHARITIES

By Ryan M. Prendergast, Linsey E.C. Rains and Terrance S. Carter*

A. INTRODUCTION

On April 21, 2015, Finance Minister Joe Oliver introduced the Economic Action Plan 2015 ("Budget 2015").[1] Budget 2015 contains a number of important proposed amendments of benefit to the charitable and not-for-profit sector, which the Budget describes as "an engine of economic activity, employing some two million Canadians across the country". These amendments include a capital gains tax exemption for individual and corporate donors upon disposition of private shares or real estate; permitting registered charities, including private foundations and registered Canadian amateur athletic associations ("RCAAAs") to invest in limited partnerships; and the introduction of the Social Finance Accelerator Initiative, a program to encourage social finance in Canada.

Although Budget 2015 contains good news for the charitable sector, it is worth noting that the Budget did not include the Stretch Tax Credit for Charitable Giving proposed by Imagine Canada, or an administrative mechanism to provide an extension of the 36-month period announced in the 2014 Federal Budget in which an estate donation can be treated as a gift in a terminal return as many in the charitable sector had hoped for. Nor was there any follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations ("NPOs") under subsection 149(1)(l) of the *Income Tax*

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[1] The full text of the Budget 2015 document can be viewed at http://www.budget.gc.ca.

Act ("ITA"), and most importantly, there were thankfully no new compliance requirements imposed on charities, as there have been in previous Federal Budgets.

This *Charity Law Bulletin* provides a summary and commentary of these and some of the other more significant provisions from Budget 2015 as they affect charities and NPOs.

B. SUMMARY OF 2015 BUDGET

1. Budget 2015 Implements Measures to Exempt Capital Gains on Donations of Private Shares and Real Estate

Although new tax incentives for charities were not expected from the Federal Government given its desire to introduce a balanced budget, Budget 2015 introduces some welcome exemptions for capital gains which many within the charitable sector have been advocating for since 2012.

In this regard, Budget 2015 introduces a new capital gains exemption for private shares and real estate when these assets are sold and the proceeds donated to a registered charity, subject to the anti-avoidance measures discussed below. These measures are stated in Budget 2015 as being in response to earlier recommendations made in the February 2013 Report of the Standing Committee on Finance's study on Tax Incentives for Charitable Giving in Canada (the "Tax Incentive Study").[2] In this regard, Donald K. Johnson, a prominent philanthropist, and numerous other representatives of the charitable sector, including the Canadian Association of Gift Planners ("CAGP"), argued for the implementation of the measures found in the Tax Incentive Study. In addition to his submission for the Tax Incentive Study,[3] Mr. Johnson had also advocated for the implementation of the exemption from capital gains on publicly listed shares in 2006.

Budget 2015 proposes to exempt individual and corporate donors from tax on the sale of private shares or real estate to an arm's length party if the proceeds are donated to a registered charity within 30 days

[2] Report of the Standing Committee on Finance, "Tax Incentives for Charitable Giving in Canada", February 2013, 41st Parliament, 1st Session, http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5972482&File=0

[3] Donald K. Johnson, "Stimulating Charitable Giving While Reducing the Deficit", submission to the House of Commons Standing Committee on Finance, Hearings on Tax Incentives for Charitable Donations, http://www.parl.gc.ca/Content/HOC/Committee/411/FINA/WebDoc/WD5340612/411_FINA_TIFCD_Briefs%5CJohnsonDonaldKE.pdf

of the disposition. Where a portion of those proceeds is donated, the capital gains exemption would apply only to that portion.

Budget 2015 notes that certain donations of shares or real property already receive beneficial tax treatment, e.g., donations of publicly listed shares as noted above, together with donations of ecologically sensitive land and certified cultural property gifted to certain qualified donees. An issue of concern for providing beneficial tax treatment for donations of private shares or real estate may have been that valuation issues might arise in these transactions making them susceptible to tax avoidance. Such concern has been addressed by the measures proposed in Budget 2015 by making the exemption available only where:

> ...cash proceeds from the disposition of the private corporation shares or real estate are donated to a qualified donee within 30 days after the disposition; and
>
> the private corporation shares or real estate are sold to a purchaser that is dealing at arm's length with both the donor and the qualified donee to which cash proceeds are donated.

As such, valuation issues on the gift are avoided by requiring that the private shares or real estate are sold and the proceeds or a portion of those proceeds are transferred to the registered charity, and that the purchaser be at arm's length from both the donor and the qualified donee. These measures are generally consistent with the recommendations made by Mr. Johnson, the CAGP, and other advocates making submissions to the House of Commons Standing Committee on Finance.

In addition, Budget 2015 proposes further anti-avoidance rules in order to address other possible opportunities for tax avoidance where, within five years after the disposition:

> the donor (or a person not dealing at arm's length with the donor) directly or indirectly reacquires any property that had been sold;
>
> in the case of shares, the donor (or a person not dealing at arm's length with the donor) acquires shares substituted for the shares that had been sold; or
>
> in the case of shares, the shares of a corporation that had been sold are redeemed and the donor does not deal at arm's length with the corporation at the time of the redemption.

Where these rules apply, Budget 2015 indicates that the exemption from capital gains will be reversed by including the exempted amount in the income of the donor in the year of the re-acquisition by the donor or non-arm's length person, or redemption of the shares.

There remains some uncertainty concerning exactly how these rules are to apply, as the proposed implementing legislation contained in the Notice of Ways and Means Motion states only that "[t}he Act (*Income Tax Act*) is modified to give effect to the proposals relating to Donations Involving Private Corporation Shares or Real Estate described in the budget documents tabled by the Minister of Finance in the House of Commons on Budget Day." While this budgetary hand-waving will allow the Federal Government more time to fine-tune how the ITA will be amended to implement these provisions, only the final form of the implementing legislation will detail how these provisions will be put in place.

What is interesting, though, is that Budget 2015 states that these measures, "will apply in respect of dispositions occurring after 2016." Presumably, this wording about timing was chosen because it is more appealing than saying that this measure will have no impact until 2017 notwithstanding that the Federal Government is able to take credit for this proposed reform more than one and half years before it will be of any benefit to registered charities.

2. 2015 Budget Provides Charities with More Flexibility to Diversify through Investing in Limited Partnerships

A key measure of Budget 2015 responds to the charitable sector's requests for clarity on the issue of whether registered charities, including private foundations, can invest in limited partnerships without risking their charitable status. CRA's current position relies on partnership law and is set out in paragraph 16 of its policy statement CPS-019, *What is a Related Business?*.[4] CRA's position is that charities who become limited partners in a limited partnership are carrying on a business rather than merely making a passive investment. Two significant results of CRA's current position are that (1) the limited partnership's business must meet the definition of a related business in order for the investment to be acceptable and (2) private foundations are prohibited from making such investments because they are prohibited from carrying on any type of business under the ITA. In this regard, Budget 2015

[4] CRA Policy Statement, CPS-019, *What is a Related Business?* (31 March 2003), online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-019-eng.html>.

proposes amendments to the ITA which will allow all registered charities (including private foundations) and RCAAAs to passively invest in limited partnerships.

Budget 2015 directly attributes the introduction of this measure to the Tax Incentive Study, which, in turn, refers to the early 2012 submissions of Philanthropic Foundations Canada[5] and Community Foundations of Canada.[6] Since then, a number of other sector representatives, including the National Charities and Not-for-Profit Law Section of the Canadian Bar Association,[7] the Pension Investment Association of Canada and the Canadian Association of University Business Officers,[8] have also lobbied for changes to the limited partnerships guidelines. Accordingly, the proposed ITA amendments are described in Budget 2015 as having a two-fold purpose, to enable "charities to diversify their investment portfolios to better support their charitable purposes" and to give charities "the flexibility to use more innovative approaches to address pressing social and economic needs," which will be welcomed by many in the sector.

The Supplementary Information and Notices of Ways and Means Motions contained in Budget 2015 propose to amend sections 149.1 and 253.1 of the ITA. New subsection 149.1(11) is deemed to have come into force on April 21, 2015 and establishes how the fair market value of a member's interest in a partnership is to be determined for the purposes of the section 188.1 penalties and the section 149.2 excess corporate holdings rules. Subsection 253.1(2), which will apply to investments made after April 20, 2015, is being introduced to establish that a registered charity or RCAAA with an interest in a partnership will not be seen as carrying on a business if the following conditions are met:

> by operation of any law governing the arrangement in respect of the partnership, the liability of the member as a member of the partnership is limited;

[5]Philanthropic foundations Canada, Submission to the Standing Committee on Finance (January 2012), online: <http://www.parl.gc.ca/Content/HOC/Committee/411/FINA/WebDoc/WD5340612/411_FINA_TIFCD_Briefs/PhilanthropicFoundationsCanadaE.pdf>.
[6]Community Foundations Canada, Letter to the Standing Committee on Finance (2 February 2012), online: <http://www.parl.gc.ca/Content/HOC/Committee/411/FINA/WebDoc/WD5340612/411_FINA_TIFCD_Briefs/CommunityFoundationsofCanadaE.pdf>.
[7]Canadian Bar Association, National Charities and Not-for-Profit Law Section, Submission to the Standing Committee on Finance – Pre-budget Consultations 2013, online: <http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6264805/412_FINA_PBC2013_Briefs/CanadianBarAssociationE.pdf>; Canadian Bar Association, National Charities and Not-for-Profit Law Section, Pre-budget Consultation 2015, online: <http://www.parl.gc.ca/Content/HOC/Committee/412/FINA/WebDoc/WD6615327/412_FINA_PBC2014_Briefs/CanadianBarAssociation-e.pdf>.
[8] Pension Investment Association of Canada, Submission to the Minister of Finance (16 March 2015), online: <http://www.piacweb.org/files/15-03-16-Finance-with-CAUBO-re%20ITA-Section-253.1.pdf.>

> the member deals at arm's length with each general partner of the partnership; and
>
> the member, or the member together with persons and partnerships with which it does not deal at arm's length, holds interests in the partnership that have a fair market value of not more than 20% of the fair market value of the interests of all members in the partnership.

Budget 2015 indicates that charitable organizations and public foundations can continue to carry on related businesses through limited partnerships in addition to making passive investments in accordance with the ITA amendments. As well, future ITA amendments are anticipated in order to have the rules for non-qualifying securities and loanbacks that currently apply to donations of shares also apply to donations of interests in limited partnerships. Finally, the ITA's excess corporate holdings rules referenced in sections 149.1, 149.2, and 188.1 will likely undergo further amendment to accommodate Budget 2015's intention that these rules "'look through' limited partnerships" to place similar restrictions on registered charities and RCCCA's interests in limited partnerships.

3. Gifts to Foreign Charitable Foundations

On January 1, 2013, the ITA was amended as a result of measures proposed in the 2012 Federal Budget to allow foreign charitable organizations that receive a gift from the Government of Canada to apply for qualified donee status if they pursue activities related to disaster relief, urgent humanitarian aid, or in the national interest of Canada.

Budget 2015 now proposes to further amend these provisions by expanding those foreign entities eligible for registration as a "qualified donee" to include "foreign charitable foundations". Under the ITA, qualified donees can generally issue donation tax receipts for gifts received from individuals and corporations, and are also eligible to receive gifts from other qualified donees, including registered charities. Currently, subsection 149.1(26) permits "a foreign organization" that has received a gift from Canada and meets the other applicable requirements to apply for qualified donee status. This allows donors in Canada to make gifts to these foreign organizations and receive the same tax treatment for those gifts as if the foreign organization was a Canadian registered charity. Currently, however, paragraph 149.1(26)(a) of the ITA requires that the foreign organization be a "charitable organization". In this regard, CRA has required that foreign organizations applying for qualified donee status in

Canada meet the definition of a "charitable organization" under the ITA, i.e., that it "have purposes and activities that are exclusively charitable, and mainly carry on its own charitable activities."[9]

A likely unintended consequence of this provision is that foreign organizations that do not meet the definition of "charitable organization" in Canada, because they do not generally carry on their own activities and gift more than 50% of their income to other charities, are not eligible for qualified donee status. As such, Budget 2015 will amend these provisions to change the wording in the ITA from "the foreign organization is a charitable organization that is not resident in Canada" to "foreign charity is not resident in Canada". Presumably, since "foreign charity" is not defined in the ITA, this will expand qualified donee status to foreign organizations that would be "charitable foundations" within the meaning of the law in Canada.

While it is not clear why these recent provisions needed this fine tuning, presumably the Federal Government had a foreign organization in mind to donate to that would not have been eligible for qualified donee status despite receiving a gift from it. Budget 2015 indicates that these measures will apply on Royal Assent to the enacting legislation.

4. Social Finance Accelerator Initiative

Budget 2015 includes a commitment by the Federal Government to "support social entrepreneurs with innovative solutions" by announcing "the implementation of a social finance accelerator initiative to help develop promising social finance proposals." In this regard, Budget 2015 defines "social finance" to mean "an innovative approach to mobilizing multiple resources of capital that delivers both a social value and an economic return."

While short on details, Budget 2015 states that Employment and Social Development Canada will launch a programme entitled "Social Finance Accelerator Initiative" to assist social entrepreneurs in having their social finance proposals become "investment ready" in order to better attract private investment through initiatives such as workshops, advisory services, mentorship, networking opportunities, and investor introductions. As Budget 2015 provides no further explanation of what the

[9] CRA, Foreign charitable organizations that have received a gift from Her Majesty in right of Canada, http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/gftsfrmhrmjsty-eng.html

initiative will involve, interested social entrepreneurs will have to wait for more details to be released by the Federal Government.

The announcement of this initiative follows previous policy commitments by the Federal Government to support social finance in the 2014 Federal Budget, which described the Federal Government's commitment to partner with organizations, businesses, and NPOs to build momentum in Canada around the use of social finance.[10] Hopefully, more details will be forthcoming from the 2015 Budget commitment to social finance than what resulted from the earlier commitments made in the 2014 Federal Budget.

5. Cooperative and Non-Profit Social Housing

Budget 2015 proposes to spend $150 million towards social housing providers that wish to pre-pay long-term and non-renewable mortgages without penalty. This initiative is slated to start in 2016-2017 and stretch over four years. The initiative aims to address the problem that non-profit housing providers run into when holding long-term and non-renewable loans at interest rates above the national average, making it difficult for them to refinance their outstanding mortgage balance, or access funds for capital repairs, without significant penalties.

In this regard, Budget 2015 proposes to eliminate the mortgage prepayment penalty on long-term, non-renewable loans held with Canada Mortgage and Housing Corporation, allowing non-profit housing providers to access private sector loans at current lower rates, freeing up funds that may ultimately be used to improve the conditions and quality of affordable housing offered by co-operative and non-profit social housing providers.

6. Improving Canadians' Access to Computer Equipment and Digital Skills

Starting in 2016-2017 and extending over two years, Budget 2015 proposes spending $2 million towards expanding the Computer for Schools Program originally founded in 1993 by Industry Canada and the TelecomPioneers.[11] The program is set to be renamed to reflect this expansion. The Computers for Schools Program operates in cooperation with all provinces and territories in collecting and

[10] For more information about Budget 2014, read our summary in *Charity Law Bulletin No. 330*, online: http://www.carters.ca/pub/bulletin/charity/2014/chylb330.pdf.

[11] "Computers for Schools" Industry Canada, online: -ope.nsf/eng/Home.

donating refurbished government computer equipment to organizations, including NPOs. NPOs that currently take part in the program include those that support low-income Canadians, seniors, and new Canadians. The expanded funds are proposed to increase the number of NPOs eligible for participation.

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SEPARATING FACT FROM FICTION: POLITICAL ACTIVITIES REVISITED

By Terrance S. Carter and Linsey E.C. Rains[*]

A. INTRODUCTION

It has been over three years since the Honourable Joe Oliver, then Minister of Natural Resources, fired the proverbial shot across the bow in the political activities debate by releasing his unprecedented "open letter" on January 9, 2012. The letter did not explicitly target registered charities, but rather "environmental and other radical groups" threatening "to hijack" the regulatory system "to achieve their radical ideological agenda" and delay government supported projects "to undermine Canada's national economic interest."[1] However, given the timing of his comments, the House of Commons Standing Committee on Finance's ("Standing Committee") December 15, 2011 announcement of its study on charitable giving, as well as other public statements by the federal government, many in the sector and media speculated that the federal government was utilizing Canada Revenue Agency ("CRA") to take aim at environmental charities under the guise of reviewing the political activities rules that apply to all registered charities. This speculation was fuelled in great part by the passing of Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* ("Budget 2012").[2]

One adverse consequence of these statements and the resulting speculation is the difficulty in separating fact from fiction in accurately assessing how the federal government's increased focus on registered

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[1] The Honourable Joe Oliver, Minister of Natural Resources, "An open letter from Minister Oliver on our energy markets and the regulatory process" (9 January 2012), online: <http://www.nrcan.gc.ca/media-room/news-release/2012/1911>.

[2] Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*, 1st Sess, 41st Parl, 2012, (assented to 29 June 2012), SC 2012, CHAPTER 19.

charities' political activities is really impacting the sector. Allegations of political interference and administrative unfairness are a serious business that should not be blindingly accepted or easily ignored. However, the intersection of registered charities and political activities is not a new phenomenon and a clearer understanding of the legislative framework and regulatory history is important to appreciate the current issues. Accordingly, this *Charity Law Bulletin* ("Bulletin") refers to a number of secondary and primary sources in order to add some needed background and context to the current debate and clarify the publicly documented facts so far. In particular, the Bulletin reviews the pre-Budget 2012 political activities climate, key Budget 2012 provisions, CRA's implementation of Budget 2012, and recent statements from CRA and the Minister of National Revenue ("Minister") to help readers differentiate between the federal government's political agenda and the public response of the federal regulator.

B. BACKGROUND

After publication of the above referenced comments by the Minister of Natural Resources on January 9, 2012, the launch of an inquiry into the foreign funding of charities by the Honorable Senator Nicole Eaton,[3] and the release of the federal government's *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* ("Counter-terrorism Strategy")[4] in February of 2012, offered little to ease sector concerns. In addition to identifying specific registered charities and their funders, Senator Eaton made the following comments regarding the rationale behind the inquiry:

There is political manipulation. There is influence peddling. There are millions of dollars crossing borders masquerading as charitable foundations into bank accounts of sometimes phantom charities that do nothing more than act as a fiscal clearing house. They dole out money to other charities without disclosing what the money is for. This inquiry is about how billionaire foreign foundations have quietly moved into Canada and, under the guise of charitable deeds, are trying to define our domestic policies.[5]

[3] *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (2 February 2012) , online:<http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/047db_2012-02-02-e.htm> at 1350 . On February 2, 2012, Senator Eaton gave notice of an inquiry into "the interference of foreign foundations in Canada's domestic affairs and their abuse of Canada's existing Revenue Canada charitable status."

[4] Public Safety Canada, "Harper Government confronts terrorist threats through new strategy" (9 February 2012), online: <http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20120209-eng.aspx>.

[5] *Debates of the Senate*, 41st Parl, 1st Sess, Vol 148 (28 February 2012), online: <http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/054db_2012-02-28-e.htm> at 1710.

Senator Eaton's comments, coupled with the federal government's Counter-terrorism Strategy, which cited the threat of domestic issue-based extremism as including "the promotion of various causes such as animal rights, white supremacy, environmentalism and anti-capitalism,"[6] added to the sector's perception of federal government bias.[7]

The subsequent implementation of Budget 2012, to amend the *Income Tax Act*'s ("ITA") provisions related to registered charities' political activities and introduce requirements for registered charities to disclose foreign funding, added more fuel to the fire.[8] In fact, Budget 2012 made specific reference to recent concerns being "raised that some charities may not be respecting the rules regarding political activities" and "calls for greater public transparency related to the political activities of charities, including the extent to which they may be funded by foreign sources."[9] Since then proponents on all sides of the debate, i.e. politicians, academics, members of the sector, the legal community, and the media, have taken up arms — lobbing accusations and formulating various theories of how the political activities of registered charities have come to be a focus of CRA's charitable compliance activities, creating an unfortunate chill across the sector.[10]

C. PRE-BUDGET 2012 CLIMATE

In sorting through fact from fiction, it is important to point out the role of different parts of the federal bureaucracy. The Department of Finance Canada ("Finance") is responsible for preparing the budget and developing tax policy and legislation in accordance with the federal government of the day's agenda.[11] CRA is tasked with "supporting the administration and enforcement of the program legislation,"

[6] Government of Canada, *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* (February 2012), online: <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rslnc-gnst-trrrsm/rslnc-gnst-trrrsm-eng.pdf> at 9.

[7] See e.g. Marcel Lauzière, "[illegible] funding" *The Toronto Star* (15 March 2012); Charles Lewis, "Faith and politics not separate, United Church tells Conservative senator" *National Post* (21 June 2012); Robert B. Hayhoe, "US Non-Profits Funding Advocacy in Canada" *Charities and Not-for-Profit Newsletter* (February 2012); Terrance S. Carter and Nancy E. Claridge, "[illegible]-Terrorism Strategy Targets Environmentalism" *Anti-Terrorism & Charity Law Alert* (30 May 2012).

[8] *Supra* note 2.

[9] The Honourable James M. Flaherty, Minister of Finance, *Jobs, Growth, and Long-Term Prosperity: Economic Action Plan 2012*, tabled in the House of Commons (29 March 2012), online: <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf> at 204.

[10] The recent history of the debate is well documented elsewhere, see e.g. Dean Beeby, "[illegible] widen into political activities", *The Toronto Star* (10 July 2014); Jack M. Mintz, "CRA has been charitable", *Financial Post* (15 October 2014); Gareth Kirby, *An Uncharitable Chill: A Critical Exploration of How Changes in Federal Policy and Political Climate are Affecting Advocacy-Oriented Charities* (M.A., Royal Roads University, 2014), online: http://garethkirkby.ca/wp-content/uploads/2014/08/G-Kirkby_UncharitableChill_ThesisPublicV.pdf.

[11] "About the Department of Finance Canada" (10 October 2008), online: Department of Finance Canada <http://www.fin.gc.ca/afc/index-eng.asp>.

including the ITA provisions related to registered charities.[12] The federal government for its part, i.e., the elected politicians forming the government, has chosen to regulate the political activities of registered charities under the ITA for three decades. Registered charities have had legislative authority to carry out limited political activities beginning with the 1985 tax year and the introduction of subsections 149.1(6.1) and (6.2) of the ITA. These original amendments to the ITA were described by the federal government at the time of their introduction as "a relieving measure" and served to "clarify that registered charities are allowed to engage in non-partisan political activities that are ancillary and incidental to their charitable purposes."[13]

Since 1987, CRA and its predecessors have issued numerous publications, policies, and guidance, which set out its interpretation of the ITA's political activities provisions and reflect what Canadian courts have said about registered charities' political activities.[14] These policies have not always been well received. For example, one commentator in 2002 described the then current law and administrative policies as frustrating and confusing, with the latter causing "an element of fear" amongst charities "because the stakes are very high," i.e. the potential for revocation of registered charity status.[15] However, in 2003, CRA released its still current Policy Statement CPS-022, *Political Activities* ("CPS-022") after extensive consultations with the sector.[16] Although a thorough review of CPS-022 and the circumstances leading up to these sector consultations is beyond the scope of this Bulletin, the consensus at the time was that the policy was generally well received.[17] In fact, there appears to have been only one

[12] *Canada Revenue Agency Act*, SC 1999, c 17 s 5.
[13] The Honourable Michael H. Wilson, Minister of Finance, *Securing Economic Renewal: Budget Papers*, tabled in the House of Commons (23 May 1985), online: <http://www.budget.gc.ca/pdfarch/1985-pap-eng.pdf> ("The proposed change recognizes that ancillary and incidental advocacy activities in support of its charitable goals are an appropriate use of a charity's resources. These include activities such as advertising, rental of facilities or mailings to influence public opinion towards the organization's views on public policy matters related to its charitable purposes. However, activities of a purely partisan nature such as supporting or opposing a political party or candidate would not be permitted.") at 59.
[14] See e.g. IC87-1, *Registered Charities—Ancillary and Incidental Political Activities* (25 February 1987) [Cancelled]; *Registered Charities Newsletter –Summer 1996, No. 6*, online: <http://www.cra-arc.gc.ca/E/pub/tg/charitiesnews-06/news6-e.html>.
[15] Richard Bridge, "The Law Governing Advocacy for Charitable Organizations: The Case for Change" Vol 17, No 2 *The Philanthropist* (2002), online: <http://thephilanthropist.ca/index.php/phil/article/view/83/83> at 13.
[16] Policy Statement CPS-022, *Political Activities* (2 September 2003), online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-022-eng.html>.
[17] See e.g. Arthur B.C. Drache, CM, QC, "NGOs and Political Activity: The Canadian Rules" in International Center for Not-for-Profit Law, "Political Activities of NGOs: International Law and Best Practices" (November 2009) 12 *The International Journal of Not-for-Profit Law* 10, online: <http://www.icnl.org/research/journal/vol12iss1/ijnl_vol12iss1.pdf> ("The rules are primarily administrative but as we have noted, CPS-022 offers wide-ranging guidance and also shows that within the statutory limits, the Canadian government wants to allow a fair level of political activity. On a subjective note, I might add that while there was a period where the sector chafed under rules which were not clear, the major problems of determining what can and cannot be done have mostly disappeared in Canada with the publication of CPS-022.") at 19.

case on political activities in the courts since CPS-022 was released.[18] The absence of cases has previously been cited to suggest CPS-022 "has achieved a balanced approach in addressing ... [the political activities] debate in Canada."[19] Perhaps even more telling, is that CPS-022 has not been substantially changed in response to the Budget 2012 amendments.

D. BUDGET 2012 AMENDMENTS

The Budget 2012 amendments to the ITA were introduced "to ensure that charities devote their resources primarily to charitable, rather than political, activities, and to enhance public transparency and accountability."[20] It is important to note that these amendments did not result in significant changes to the political activities rules, i.e., subsections 149.1(6.1) and (6.2) were not amended. Rather, the definition of "political activities" was added to subsection 149.1(1) to include gifts from one registered charity to another when the purpose of the gift may reasonably be considered to support the political activities of the recipient registered charity. The definition of "charitable purposes" in subsection 149.1(1) was expanded to prevent gifts that further political activities from counting as a charitable purpose.[21] The amendments also empowered the Minister to suspend a registered charity's receipting privileges for a one year period for failing to report information on its Form T3010, *Registered Charity Information Return* or for excessive political activities, i.e., the use of more than 10% of its resources.[22]

E. ADDITIONAL BUDGET 2012 INITIATIVES

Budget 2012 included an $8 million funding commitment (which has now been expanded to a $13.1 million commitment)[23] from the federal government, which directed CRA to "[e]nhance its education and compliance activities with respect to political activities by charities" and "[i]mprove transparency

[18] *News to you Canada v MNR*, 2011 FCA 192 (CanLII). (The FCA held that a recent Australian case which expanded the scope of acceptable political activities in Australia did not apply in Canada given the "express limits in subsections 149.1(6.1) and (6.2) regarding the conduct of political activities by a charity") at paras 28-29.
[19] Terrance S. Carter & Theresa L.M. Man, "Charities Speaking Out: The Evolution of Advocacy and Political Activities by Charities in Canada" (Paper delivered at the New York University National Center on Philanthropy and the Law's Nonprofit Speech in the 21st Century: Time for a Change? Conference, New York, NY, 29 October 2010), online: <http://www1.law.nyu.edu/ncpl/resources/documents/TCarterpaperformatted.pdf> (See the discussion at pages 27-42 for a thorough review of CPS-022) at 54.
[20] *Supra* note 9 at 189.
[21] Additional minor amendments were made to subsections 149.1(6) and (10).
[22] See paragraphs (e), (f), and (g) of subsection 188.2(2) and subsection 188.1(2.1) of the ITA.
[23] October 21, 2014 Sessional Paper obtained and distributed by Imagine Canada on January 26, 2015, Part d(i), online:<http://www.imaginecanada.ca/sites/default/files/8555-412-761.pdf>.

by requiring charities to provide more information on their political activities, including the extent to which these are funded by foreign sources."[24]

Budget 2012 also connected these transparency and accountability measures to the previously mentioned Standing Committee study, as initiated by the federal government.[25] These two factors are noteworthy insofar as they indicate CRA did not initiate the political activities compliance program, but was directed to do so by the federal government. In particular, the information CRA has publicly provided prior to[26] and during its implementation of the Budget 2012 initiatives stated that it had not received any political interference concerning how it is to carry out those initiatives.

F. CRA'S IMPLEMENTATION OF BUDGET 2012 INITIATIVES

CRA's implementation of the Budget 2012 initiatives has resulted in a mix of educational measures and increased compliance activities by the Charities Directorate.[27] For example, CRA has established a team in the Charities Directorate's "Compliance Division to carry out audits that focus specifically on political activities"[28] and developed web based resources including a self-assessment tool, a series of short videos, and an online list of questions and answers.[29] However, it is the increase in compliance activities that is drawing the most attention from the press and the sector. In this regard, Cathy Hawara, the Director General of the Charities Directorate of CRA, made the following statements concerning how its compliance activities are carried out:

> ...the Charities program is managed in a fair and impartial manner, without political direction as to which charities should or should not be subjected to review and audit. This is critical to our role as a credible and effective regulator of

[24] *Supra* note 9 at 205.
[25] *Ibid* at 204.
[26] See e.g. the testimony of Cathy Hawara, Director General of CRA's Charities Directorate before the Standing Committee. When asked whether CRA receives "instructions on which charities you have to investigate?" Ms. Hawara responded, "No, we don't receive instructions like that...The audit plan is developed each year by the charities directorate. We then have the opportunity to review the complaints we receive from the public...So we are developing a balanced program with several components, including high-risk files, meaning abusive tax shelters and false receipts. We are also able to review the complaints we receive, but this all falls under the charities directorate." Standing Committee on Finance, Evidence, 41st Parl, 1st Sess, No 38 (31 January 2012), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5347871&File=0> at 1610.
[27] For a detailed description of the Charities Directorate's educational activities, changes to forms and publications, statistics on its compliance activities, and how it selects files for its political activities audits, see CRA, "Charities Program Update – 2014" (26 February 2014), online: http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/chrtsprgrm_pdt-2014-eng.html.
[28] Cathy Hawara, Director General of CRA's Charities Directorate, (Speech delivered at the Canadian Bar Association's National Charity Law Symposium, 10 May 2013), online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/lwsympsm-eng.html>.
[29] Available online: http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/menu-eng.html.

> the charitable sector. CRA employees act with the utmost integrity and professionalism in carrying out their responsibilities to administer and apply the provisions of the *Income Tax Act* that relate to registered charities.[30]
>
> We recognize the need to be as transparent and accountable as possible about how we administer our program. This doesn't come as a surprise to us. When we began implementing the measures announced in Budget 2012, we were very deliberate in articulating our framework and the underlying principles related to our compliance program – we were going to stay true to those principles as we embarked on our work related to political activities. As I have made clear in the past, the process for identifying which charities will be audited (for any reason) is handled by the Directorate itself and is not subject to political direction.[31]

In addition to CRA's public statements, the current Minister, whose responsibility for CRA is set out in the *Canada Revenue Agency Act*,[32] has recently provided statistical information concerning the number of political activities audits to be undertaken. In particular, the Minister advised that:

> As a result of Budget 2012, the CRA will conduct 60 audits related to the political activities of charities over a four year period. As of October 21, 2014 [...] 40 political activity audits were underway (this includes some which commenced prior to Budget 2012). Of these audits, 13 have been completed.[33]

The Minister's statistical information also revealed that the number of formal complaints regarding the political activities of registered charities spiked from under 27 a year in 2008-2009, 2009-2010, and 2010-2011 to 139 in 2011-2012 and 159 in 2012-2013.[34] This more than fivefold increase in formal complaints occurring over the 2011-2012 period indicates the increased interest in political activities by the public likely resulted from the statements of federal government representatives in the period leading up to Budget 2012, rather than from a pre-existing public concern requiring a legislative remedy. As such, these statistics underscore the fact that prior to Budget 2012 the political activities of registered charities were not high on the public's radar, which, in turn, suggests that the controversy over political activities has been a construct of the federal government, as opposed to a CRA initiative or government response to public outcry.

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[30] *Supra* note 28.
[31] Cathy Hawara, Director General of CRA's Charities Directorate, (Speech delivered at the Canadian Bar Association's National Charity Law Symposium, 23 May 2014), online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/2014-lwsympsm-eng.html>.
[32] *Supra* note 12, ss 6(2).
[33] *Supra* note 23.
[34] *Ibid*.

G. CONCLUSION

Although the legislative framework and regulatory history relating to the political activities of registered charities is longstanding, public comments by various representatives of the federal government prior to the implementation of Budget 2012 have contributed to the current climate of fear surrounding political activities. In this regard, it is important to differentiate between the political manoeuvrings of those who created the current climate and those tasked with undertaking the administration and enforcement of the Budget 2012 initiatives. As well, CRA itself is effectively absent from the debate, due in large part to the confidentiality provisions of the ITA, which prevent CRA officials from disclosing taxpayer information except in certain circumstances.[35]

Despite the stated importance of charities needing to be part of public policy debate in Canada,[36] the federal government's unjustified allegations in recent years about charities purportedly misusing their statutory right to participate in political activities, fewer charities are prepared to enter the risky arena of political activities. This is a regrettable development notwithstanding CRA's recent efforts at providing educational resources about what registered charities can do with regard to political activities. In trying to separate fact from fiction concerning the debate about political activities by charities over the last three years, the facts point back to the unwarranted allegations made by the federal government on an issue which for almost 10 years had been a topic of little, if any, discussion or debate within the sector, the public, or CRA.

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[35] Section 241 of the ITA sets out the circumstances under which CRA officials can disclose information about registered charities.
[36] *Supra* note 16 at section 2.

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BIOGRAPHIES

THERESA L.M. MAN, B.SC., M.MUS., LL.B., LL.M.

Theresa L.M. Man joined Carters in 2001, becoming a partner in 2006, to practice in the area of charity and not-for-profit law, after having practiced at a law firm in Toronto and having been a sole practitioner in Markham for four years. Ms. Man is recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. Ms. Man is vice chair of the Executive of the Charity and Not-for-Profit Law Section of the Ontario Bar Association and is an executive member of the Canadian Bar Association Charities and Not-for-Profit Law Section. She is a member of the Canadian Tax Foundation, and has been actively involved with and is a legal advisor to numerous charities. She has been a speaker at various seminars, including the Annual *Church & Charity Law*™ Seminar and seminars hosted by the Canadian Bar Association, Ontario Bar Association, the Canadian Association of Gift Planners, and Imagine Canada (Charity Tax Tools), among others. Ms. Man has also written on charity and taxation issues for various publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS*, and *Charity Law Bulletin*. She is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell in 2013.

Before embarking on the study of law, Ms. Man earned her Master of Music and partially completed doctoral studies at Southwestern Baptist Theological Seminary in Fort Worth, Texas. This has enabled her to serve as minister of music and organist in various churches in Regina, Saskatchewan and in the greater Toronto area.

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LL.M. (Tax Law), Osgoode Hall Law School, 2008
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Elena Hoffstein is engaged in personal tax and estate planning, family business succession planning, wills and trusts, corporate reorganizations, marriage contracts and charities and not for profit law. Elena also represents clients in both contentious and non-contentious estate litigation matters including will challenges, mental capacity matters, applications for advice and direction of the court and passing of fiduciary accounts.

Elena has been ranked by Lexpert as one of the most frequently recommended Toronto private client and charity law practitioners and as one of the top 500 lawyers in Canada. Martindale-Hubbell has given her a rating of AV. In 2006, she received the Ontario Bar Association Award of Excellence in Trusts and Estates in recognition of her leadership and contribution to estates and trusts law. Elena is also a recipient of Lexpert's prestigious Zenith award for business law and business of law.

Elena articled with the firm in 1978-79 and returned in 1980 after being called to the Bar and became a partner in 1986. She is director of the Toronto office's Wealth Management and Charities practice group.

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Estate Litigation

Charities and Not-For-Profit

Estate Planning

Health

Tax

Education

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MA,
Columbia University, 1970

LLB,
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Year of Call

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Languages

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French

Italian

Presentations

- Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2015, Charities and Health Law Groups Seminar, June 11, 2015
- Critical Guidance for the Planning and Administration of Foreign Assets, Litigation and Administration of Foreign Trusts and Assets, Ontario Bar Association Professional Development, April 9, 2015
- The Future of Assisted-Dying in Ontario: After Carter, Health Law Group (Fasken Martineau Institute), April 2, 2015
- Charitable Gifting Strategies, Federated Press, 15th Tax Planning for the Wealthy Family, September 11, 2014
- Impact on Estate Planning, STEP, September 10, 2014
- Top Drafting Strategies: Trusts and Wills, A Practical Guide to Tax Considerations For Succession Planning, OBA Professional Development, May 29, 2014
- When Good Gifts Go Bad (and How to Avoid it) - Navigating Donor-Restricted Gifts and Testamentary Giving, CAGP Webinar, April 30, 2014
- Tax Implications of the 2014 Federal Budget, Tax Group Seminar, February 19, 2014
- Case Law Update, Estate Planning Conference, January 7, 2014
- Estate Planning and the Taxation of Trusts, Canadian Bar Association, Continuing Legal Education, Tax Law for Lawyers, 2001-2014
- Accelerating Change, AFP Congress 2013, November 18, 2013

- Powers of Attorney for Personal Care and Advance Planning, STEP Program, November 7, 2013
- When to Issue Charitable Receipts and Other Mysteries, and Testamentary Gift Planning Considerations, Options and Strategies, Canadian Council of Christian Charities Conference, September 24, 2013
- New Not-For-Profit Corporations, Fasken Martineau Business Law CLE, September 17, 2013
- Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2013, Charities and Health Law Groups Seminar (Fasken Martineau Institute), June 11, 2013
- New Not-for-Profit Corporations Acts, Charities and Health Law Groups Seminar (Fasken Martineau Institute), May 31, 2013
- Gifts by Will - Demystifying the Confusion, Institute of Law Clerks of Ontario, May 9, 2013
- Gifts by Will - Demystifying the Confusion, 20th Annual National CAGP – ACPDP Conference – National Capital Region, April 17-19, 2013
- The Current State of Donation Arrangements, Tax Market Brief, CICA, March 7, 2013
- Annotated Alter Ego Trust and Discretionary Trust, Law Society of Upper Canada, March 5, 2013
- Charitable Gift Planning, Estate Planning Conference, The Community Foundation of Mississauga, February 11, 2013
- Ensuring Compliance for Registered Charities and Not-For-Profit Organizations, 10th Annual Foundation, Endowment and Not-For-Profit Investment Summit, January 16, 2013
- Practical Issues Arising from the CRA Guidance on Fundraising, Ontario Bar Association, November 13, 2012
- Tax Effective Estate Planning for the International Client: Use of Trusts, Federated Press, November 8, 2012
- Revisiting the Attribution Rules, Canadian Tax Foundation, 2012 Ontario Tax Conference, October 29-30, 2012
- Selected Tax and Non-Tax Consideration in Drafting Wills, Ontario Bar Association, October 24, 2012
- Family Trusts Under CRA Microscope, Estates and Trusts Practitioners Forum, Langdon Hall, October 15-16, 2012
- Charitable Gift Planning, 12th Annual Tax Planning for the Wealthy Family, Federated Press, September 10-11, 2012
- The New Canada Not-for-Profit Corporations Act, Charities and Not-For-Profit Group Seminar (Fasken Martineau Institute), June 7, 2012
- Life, Death and Taxes: Planning Strategies for the Final Exit, 2012 Tax Law For Lawyers Conference, Canadian Bar Association, June 1, 2012
- The In's and Out's of CRA's New Fundraising Guidance, Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2012, May 16, 2012
- You're Worth More Than You Realize: Why You Should Make a Will, CAGP Leave a Legacy Series, May 14, 2012
- Protecting Your Client: Reading Financial Statements with a Critical Eye, CBA/OBA 2012 National Charity Law Symposium, May 4, 2012
- When to Issue Charitable Receipts and Other Mysteries, Annual National CAGP-ACPDP Conference, April 19, 2012

- Regulatory Update, 9th Annual Foundation, Endowment and Not for Profit Summit, January 18, 2012
- Challenges and Opportunities in Charitable Giving - Death Taxes and Estate Planning, Jewish Foundation of Greater Toronto Professional Advisory Committee, December 1, 2011
- Selected Estate Planning Issues, KPMG, October 25, 2011
- The Best Laid Plans: How Spousal Trusts Go Awry, Langdon Hall, October 17-18, 2011
- The Intensive Short Course on Legal Risk Management for Charities and Not-for-Profit Organizations, Osgoode Hall Law School Professional Development CLE, October 5-6, 2011
- Legacy Planning - The Do's and Don'ts of Preserving a Congregations Mission and Vision, ATRI, September 23, 2011
- Charitable Gift Planning, Tax Planning for the Wealthy Family, Federated Press, September 14-15, 2011
- Estate Planning - Meeting Client Needs and Avoiding Family Strife, Stonegate Presentation, June 1, 2011
- Intercharity-Transfers Between Hospitals and Foundations - What You Need to Know, Healthcare Philanthropy: Check-Up 2011, May 31, 2011
- Estate Planning Trips and Traps – Some Lessons from the Trenches, Community Foundation of Grey Bruce, May 26, 2011
- Business Succession Plans and Estate Freezes, Business Law Summit, May 17, 2011
- 6 Minute Lawyer – Recent Developments In The Charitable Sector, April 27, 2011
- Post DQ What to Do, CAGP, April 13, 2011
- Client Competency - Your Aging Client and You - Legal Considerations, BMO Retirement Advisory Committee, April 8, 2011
- Annotated Trust, LSUC, February 17, 2011
- Considerations in Gift Planning, February 16, 2011
- What's New from CRA, Implications of Disbursement Quota Reform and Estate Administration Issues, UJA, January 13, 2011
- Trust Controlled Corporations, STEP, December 9, 2010
- RDSP's and Estate Planning Issues for Family Members with Disabilities, London Estate Planning Council, November 18, 2010
- Tax Planning for Migration to and from Canada, Federated Press, November 9, 2010
- Solicitors as Attorneys, OBA, October 31, 2010
- Your Aging Client and You, BMO, September 13, 2010
- You're Worth More Than You Realize, CAGP, July 14, 2010
- Healthcare Philanthropy: Check-Up 2010, Trusts, Wills, Estates and Charities Group Seminar, June 10, 2010
- Tax Law for Lawyers, CBA, June 5, 2010
- Managing Endowments in Difficult Economic Times, Annual National CAGP-ACPDP Conference, May 13, 2010
- New and Unusual Gifts, LSUC, April 30, 2010

- Healthcare Philanthropy – The Year in Review, 2010
- Exercise of Discretion – Managing Endowments in Difficult Economic Times, 2010
- Exercise of Discretion – What is a Trustee to do?, December 1, 2009
- Maximizing a Charitable Gift, Association of Fundraising Professionals Greater Toronto Chapter - Congress 2009, November 30, 2009
- Creative Gifting Strategies, Association of Fundraising Professionals Annual 2009 Conference, November 30, 2009
- RDSP's and Estate Planning Issues for Family Members with Disabilities, London Estate Planning Council, November 16, 2009
- Tax Planning for Migration to or From Canada – Conflicts of Laws in Migration Tax Planning with Wills and Trusts, November 9, 2009
- Exercise of Discretion – What is a Trustee to Do, October 1, 2009
- Trust Controlled Corporation, Cidel Provence Conference 2009, September 10, 2009
- Healthcare Philanthropy: Check-Up 2009, June 11, 2009
- Gifts by Wills: The Essential Do's and Don'ts, CBA/OBA 2008 National Charity Law Symposium, May 7, 2008
- The Elderly Donor, CAGP 15th Annual National Conference, April 23-25, 2008
- No Contest Clauses in Wills & Trusts, LSUC The Six-Minute Estates Lawyer, April 8, 2008
- Taxation of Trusts and Estates: Tax Considerations for Estates and Trusts Practitioners-A Practical Planning Approach, Ontario Bar Association Charities Section Program, March 3, 2008
- Use of Private and Public Foundations, Canadian Tax Foundation Fifty-Ninth Annual Tax Conference, November 25-27, 2007
- Donor Rights and Remedies, Association of Fundraising Professionals Congress 2007, November 14, 2007
- Unusual & New Gifts - Recent Developments in the Law, 2007 Annual Church & Charity Law Seminar, November 7, 2007
- Trusts and Estates that Control Corporations, LSUC 10th Annual Estates and Trusts Summit, November 5, 2007
- Current Issues in Tax Planning with Trusts, Canadian Tax Foundation, 2007 Ontario Tax Conference, October 29-30, 2007
- Incentive Trusts, Trusts, Trustees, Trusteeships II, OBA Professional Development Program, September 24, 2007
- Family Law and Estates: Trustee and Guardianship Issues, The Family Law Summit: A Multidisciplinary Perspective, The Law Society of Upper Canada, May 11, 2007
- Hospitals and Foundations Seminar Series: New Developments in Planned Giving and Charity Law, May 1, 2007
- Gone but Not Forgotten - The Annotated Discretionary Trust, The Ontario Bar Association (OBA) 2007 Institute of Continuing Legal Education, Trusts and Estates Program, February 6, 2007
- A Pot-Pouri of Six-Minute Issues, Special Lectures 2006, LSUC Annual Estates & Trusts Summit, November 2-3, 2006
- Charitable Trusts and Cy-Près-Trusts, Trustees, Trusteeships - All You Need to Know and More, Ontario Bar Association Continuing Legal Education Program, September 18, 2006

- When is an Advantage Not an Advantage - Issues Arising from the Proposed Split Receipting Regime, Canadian Bar Association, Continuing Legal Education, Fourth National Symposium on Charity Law, May 11, 2006
- Charities and Not-for-Profits CLE Primer II, April 26, 2006
- Healthcare Philanthropy: Check-Up 2006, April 5, 2006
- What Every Family Law Lawyer Should Know About Estate Law, The Law Society of Upper Canada Continuing Legal Education Special Lectures 2006 Family Law, April 3-4, 2006
- Asset Protection Using Trusts, The Six-Minute Estates Lawyer 2006, The Law Society of Upper Canada, March 22, 2006
- To Act or Not to Act: Vexing Issues Facing Trustees, OBA (Ontario Bar Association) Institute of Continuing Legal Education Trusts & Estates Program, January 23, 2006
- Thorny Issues Arising in the Administration of Estates, Special Lectures 2005, 8th Annual Estates and Trust Summit, The Law Society of Upper Canada (LSUC), November 30 and December 1, 2005
- AFP Conference, November 29 - December 2, 2005
- Professional Obligations Regarding Client Disclosures, STEP Canadian National Conference, June 6, 2005
- Privacy Law and the Estates and Trusts Practice in Canada: A Discussion, STEP Canadian National Conference, June 6, 2005
- New Disbursement Quota Rules Under Bill C-33, CBA/OBA 3rd National Symposium on Charity Law, May 6, 2005
- CAGP Annual Conference, April 13-16, 2005
- Why the 'Simple' Estate Plan Usually is Not: A Brief Update in Key Estate Planning, Personal Tax Update for Estates & Family Lawyers Program, Ontario Bar Association (OBA), April 5, 2005
- Beneficiaries' Rights to Trust Information: Commentary in Light of the Privy Council Case of *Schmidt v. Rosewood*, Law Society of Upper Canada, Continuing Legal Education, Six-Minute Estate Lawyer 2005, February 8, 2005
- Drafting Airtight Trusts - Avoiding Tax and Other Traps, Special Lectures 2004, Seventh Annual Estates and Trusts Summit, The Law Society of Upper Canada, December 1-2, 2004
- Not-for-Profit Charities, Presentation, October 26, 2004
- Alter Ego Trusts/Joint Partner Trusts - Tips, Traps and Planning, Canadian Tax Foundation 2004 Ontario Tax Conference, October 18-19, 2004
- Introduction to Charities Law, Institute of Law Clerks of Ontario, 14th Annual Conference for Law Clerks, May 15, 2004
- The Dream Team: Gifts of Private Company Shares, CAGP Workshop, April 16, 2004
- Disbursement Quotas: What They Are and How to Comply, OBA/CAGP 2nd National Symposium on Charity Law, April 14-17, 2004
- Estate Administration Issues with Charitable Gifts, Hospitals and Foundations Seminar Series: Healthcare Philanthropy - Challenges and Solutions, February 10, 2004
- Charitable Gifting: Issues for Donors and the Charity, presenter, Hospitals and Foundations Seminar Series, Healthcare Philanthropy: Challenges and Solutions, February 10, 2004
- Incentive Trusts, Special Lectures 2003, Estates and Trusts Forum, The Law Society of Upper Canada, November 19-20, 2003

- Endowed and Restricted Gifts: What the Gift Planner Needs to Know, CAGP (Canadian Association of Gift Planners) 10th Annual National Conference, April 30-May 3, 2003
- Alter Ego Trusts and Joint Partner Trusts - Tips and Traps, Special Lectures 2002, Estates and Trusts Forum, The Law Society of Upper Canada, November 20-21, 2002
- Family and Estate Law Issues for the Power of Attorney, Law Society of Upper Canada - Capacity, Consent & Substitute Decisions Program/Dealing with Family Law Issues in the Context of Incapacity, February 21, 2002
- Current Issues in Estate Planning, LSUC Special Lectures, 2001 Estates & Trusts Forum, November 2001
- Estate Planning for Small Business Owners, CBAO 2001 Institute of Continuing Legal Education, February 1-3, 2001
- Inter Vivos and Testamentary Estate Planning and Cross-Border Factors, Osgoode Hall Law School, Trusts, Wills & Estates Course, October 13, 2000
- Critical Non-Tax Considerations in Estate Planning, 52nd Annual Tax Conference, Canadian Tax Foundation, September 24-27, 2000
- Trusts in the Business Context, Estates and Trusts Forum, The Law Society of Upper Canada, November 24-25, 1998
- Income Tax Consequences of Creative Probate Planning, Canadian Tax Foundation 1998 Ontario Tax Conference, September 9-10, 1998
- Multi-Jurisdictional and Separate Situs Wills, International Estate Planning Conference, The Canadian Institute, October 20-21, 1994
- Trends in Estate Planning, BMO Team Event, June 19, 2014
- Advanced Philanthropic Planning: Tips and Traps, STEP Canada 16th National Conference, June 16, 2014
- Charitable Gifting Strategies, TD Webinar, July 8, 2014

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- "Budget 2015 - Canada", Tax Bulletin, April 22, 2015
- "The 2014 Federal Budget and Changes to Testamentary Charitable Giving", STEP Inside Vol13, Issue No. 2, May 1, 2014
- "Charities Legislation and Commentary", Annual Update, January 1, 2014
- "Charitable Giving in Canada", Carswell, November 5, 2013
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- "October 24, 2012 Notice of Ways and Means Motion - Amendments of Interest to Charities", Charities and Not-For-Profit Bulletin, November 22, 2012
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- "Tax Measures in Budget 2010", Taxation Bulletin, March 5, 2010
- "New Canada Not-For-Profit Corporations Act", Charity Law Bulletin, February 10, 2010
- "Summary of the New Canada Not-for-Profit Corporations Act", February 4, 2010
- "Good Government Act: Good News for Ontario Charities seeking to generate Ancillary Revenue", Charity and Health Law Bulletin, January 27, 2010
- "Private Foundations and Community Foundations", Canadian Tax Foundation Fifty-Ninth Annual Tax Conference, November 27, 2007
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- "Estate Planning and the Taxation of Trusts - The Annotated Discretionary Trust", 2007 Tax Law for Lawyers, National Tax Law CLE Program, June 1, 2007
- "Beneficiary Designations and Resulting Trusts", The Law Society of Upper Canada, The Six-Minute Estate Lawyer, April 10, 2007
- "Joint Tenancies - Avoiding Some of the Pitfalls", Trusts, Wills, Estates and Charities Bulletin, April 1, 2007
- "Making Donations in Wills and Trusts - Tips and Traps", The Lawyers Weekly, December 1, 2006
- "New Disbursement Quota Rules Under Bill C-33", The Philanthropist, Vol. 20, No. 4., November 1, 2006
- "What Every Family Lawyer Should Know About Estate Law", Law Society of Upper Canada Special Lectures 2006, Family Law, November 1, 2006
- "Trusts, Trustees, Trusteeships - All You Need to Know and More", Charitable Trusts and Cy-près, September 18, 2006
- "Making Donations Through a Will or Trust: Struggling with CRA Interpretations", STEP INSIDE, Vol. 4 No.1, July 1, 2006
- "Giving the Gift That Lasts", Globe and Mail, Your Guide to Giving & Estate Planning LEAVE LEGACY™ GTA Advertising Supplement, May 26, 2006
- "Thorny Issues Arising In the Administration of Estates", by M. Elena Hoffstein and Corina S. Weigl, 8th Annual Estates and Trusts Summit, November 30, 2005

- "Recent Tax and Non-Tax Developments Affecting Estate Plans", OBA Operation Update 2005, October 7, 2005
- "To Act or Not to Act: Vexing Issues Facing Trustees", STEP Conference, June 1, 2005
- "Professional Obligations Regarding Client Disclosures", STEP Conference, June 1, 2005
- "An Overview of the New Canada Not-for-profit Corporations Act ", Charities and Not-for-Profit Law Bulletin, February 1, 2005
- "Budget Proposals - March 23, 2004", March 23, 2004
- "Incentive Trusts", Article, November 1, 2003
- "Summary of Disbursement Quota Rules", Paper, June 16, 2003
- "Selected tax aspects of planned giving", by M. Elena Hoffstein, June 1, 2003
- "Alter Ego Trusts and Joint Partner Trusts - Tips and Traps", Paper, November 1, 2002
- "Butterworths Financial and Estate Planning for the Mature Client", Chapter 3, "Snowbirds", updated, February 1, 2002
- "Current Charitable Gifting Issues", Update 2001, UJA Federation of Greater Toronto, June 20, 2001
- "Private Foundations and Community Foundations", Personal Tax Planning, Burpee & Schusheim, May 1, 2001
- "Estate Planning - Recent Developments in the Law", by Maria Elena Hoffstein, January 1, 2000

Memberships and Affiliations

- American Bar Association
- American College of Trust and Estate Counsel (ACTEC)
- Canadian Association of Family Enterprise (CAFÉ)
- Canadian Association of Gift Planners (CAGP)
- Canadian Bar Association
- Member of Executive Committee Charity and Not-for-Profit Section and member of following sub-committees:
- Probate Fees Committee
- The Canadian Bar Association (Ontario)
- Charities Committee
- The Canadian Bar Association (Ontario)
- Trusts and Estates Section Subcommittee making submissions with respect to proposals to amend the Family Law Act
- Canadian Centre for Philanthropy
- Canadian Tax Foundation
- Estate Planning Council of Toronto
- Family Firm Institute (FFI)
- International Academy of Estates & Trust Law

- Law Society of Upper Canada (and former head of section of Estate Planning and Administration, Bar Admission Course) and following sub-committees:
- Sub-Committee of The Law Society of Upper Canada commenting on Bills 108, 109 and 110 (substitute decision-making and consent to treatment)
- Professional Standards Sub-Committee
- Ontario Bar Association (past chair of Charity and Not for Profit section, currently on executive committee)
- Society of Trust and Estate Practitioners (STEP) (and currently on Toronto executive committee)
- Advisory Committee to Attorney General (Ontario) on Hague Convention on the International Recognition of Trusts

Rankings and Awards

- Ontario Bar Association Award of Excellence in Trusts and Estates in recognition of leadership and contribution to estates and trusts law (2006)
- Recipient of Lexpert's prestigious Zenith Award
- *Best Lawyers in Canada* 2011-2015 as a leading practitioner in Tax Law, and Trusts and Estates
- *Canadian Legal Lexpert Directory* 2010-2014 as among the leading 500 lawyers in Canada and as "Most frequently recommended" in the fields of Charities/Not-for-Profit-Law and Estate & Personal Tax Planning
- *Who's Who Legal 100* 2014 for Private Client
- *Who's Who Legal: Canada* 2014 for Private Client
- Martindale-Hubbell "AV" rating
- *Practical Law Company* - "Highly recommended" for private client matters

Community Involvement

- Member, BMO Retirement Advisory Council
- Member, Planned Giving Committee SickKids Foundation
- Member, Planned Giving Committee Toronto General and Western Hospital Foundation
- Member, Planned Giving Committee St. Michael's Hospital Foundation
- Past Director, The Clarke Institute of Psychiatry Foundation (now called the Centre for Addiction and Mental Health)
- Past Director, Canadian Mothercraft Society

TERRANCE S. CARTER, B.A., LL.B, TEP, TRADE-MARK AGENT

Terrance Carter, as the Managing Partner of Carters, practices in the area of charity and not-for-profit law, and has been recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*. Mr. Carter is also a registered Trade-mark Agent and acts as legal counsel to the Toronto office of the national law firm Fasken Martineau DuMoulin LLP on charitable matters.

Mr. Carter is a co-author of *Corporate and Practic Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation & Commentary*, 2015 Edition (LexisNexis Butterworths), a contributing author to *The Management of Nonprofit and Charitable Organizations in Canada* (2014 LexisNexis Butterworths), co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths) and the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada).

Mr. Carter is a member of the Government Relations Committee of the Canadian Association of Gift Planners (CAGP), the Association of Fundraising Professionals, a past member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, a past member of the Imagine Canada Technical Advisory Committee, a past member of CRA's Charity Advisory Committee and the Uniform Law Conference of Canada Task Force on Uniform Fundraising Legislation, Past Chair of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA) and past Chair of the Charity and Not-for-Profit Law Section of the Ontario Bar Association (OBA), and was the 2002 recipient of the AMS - John Hodgson Award of the OBA for charity and not-for-profit law. He is also a member of the Intellectual Property Institute of Canada, the Association of Fundraising Professionals, and the American Bar Association Tax Exempt Section, and has participated in consultations with the Public Guardian and Trustee of Ontario, the Charities Directorate of CRA, Finance Canada, and was a member of the Anti-terrorism Committee and the Air India Inquiry Committee for the CBA.

Mr. Carter has written numerous articles and been a frequent speaker on legal issues involving charity and not-for-profit law for the Law Society of Upper Canada, the CBA, the OBA, the Association of Fundraising Professionals, the American Bar Association, the CAGP, the Canadian Tax Foundation, The Institute of Chartered Accountants, the CSAE, the New York University School of Law, the University of Ottawa Faculty of Common Law, Ryerson University, McMaster University, the University of Waterloo Master of Tax program, Queensland University of Technology (Brisbane, Australia), University of Manitoba Law School as well as the C.D. Howe Institute.

Mr. Carter is also the editor of, and a contributor to *www.charitylaw.ca*, *www.churchlaw.ca*, *www.carters.ca*, and *www.antiterrorismlaw.ca*, as well as Chair of the annual *Church & Charity Law*™ Seminar, and a founder and past co-chair of the CBA National Charity Law Symposium.

PRACTICE AREAS: Charity and Not-for-Profit Law, Fundraising, Gift Planning, National and International Strategic Planning, Charity Tax and Trusts, Intellectual Property and Corporate and Commercial Law.

EDUCATION: B.A. (Joint Honours), and a McGill University Scholar, McGill, 1975
LL.B., Osgoode Hall Law School, 1978

CALL TO THE BAR: Ontario Bar, 1980

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Areas of Practice

Corporate/Commercial

Health

Corporate Social Responsibility Law

Life Sciences

Government Relations & Ethics

Education

JD,
University of Toronto, 2010

MA, International Relations
University of Toronto, 2010

BA (Hons), Political Studies
Queen's University, 2007

Year of Call

Ontario, 2011

Languages

English

Kathryn is an associate practicing in the area of Health Law. She is a corporate lawyer who regularly drafts agreements and advises clients on governance matters, including by-laws, board policies and board education and training manuals. She advises on a variety of health regulatory and public policy matters, including on the application of health legislation such as the *Health Insurance Act*, the *Commitment to the Future of Medicare Act*, the *Independent Health Facilities Act*, and others.

She is well versed in broader public sector transparency and accountability laws applicable to the health sector in Ontario. Kathryn provides advice relating to regulatory compliance, including compliance advice in relation to lobbying, elections law, and domestic and international standards for anti-bribery and anti-corruption.

Representative Experience

- *The Vents du Kempt Wind Power project completes financing*
  Counsel to Enercon GmbH regarding the Vents du Kempt Power Project Financing
- *Advised international extractive industry issuer regarding anti-corruption issues and compliance requirements*
  Counsel to an international extractive industry issuer regarding anti-corruption issues and compliance requirements
- *Symbility Solutions completes acquisition of Marshall & Swift/Boeckh's claims division*
  Advised Symbility Solutions Inc. and Automated Benefits Corp.

Presentations

- Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2015, Charities and Health Law Groups Seminar, June 11, 2015
- The Future of Assisted-Dying in Ontario: After Carter, Health Law Group (Fasken Martineau Institute), April 2, 2015
- New Not-for-Profit Corporations Acts, Charities and Health Law Groups Seminar (Fasken Martineau Institute), May 31, 2013
- Payment for Performance Outcomes, Health Law Group Seminar (Fasken Martineau Institute), June 20, 2012
- UK Bribery Act, Global Mining Group Seminar (Fasken Martineau Institute), March 6, 2012
- PDAC Primer, Global Mining Group Seminar, February 24, 2012

Publications

- "BPS Compensation Information Directive Issued", Health Law Bulletin, April 13, 2015

- "Broader Public Sector Compensation Restraint and Accountability Remain Top of Mind in Ontario", Health Law Bulletin, March 31, 2015
- "Public Sector and MPP Accountability and Transparency Act, 2014", Health Law Bulletin, December 22, 2014
- "Canadian Government releases updated CSR strategy: key developments", Corporate Social Responsibility Bulletin, November 21, 2014
- "Are You Ready? New AML/ATF Requirements Come Into Force", Financial Institutions Bulletin, January 7, 2014
- "Corruption Perception Index 2013 Released", Corporate Social Responsibility Law Bulletin, December 20, 2013
- "Approaches to regulating self-referral in Canada", Health Law in Canada, Volume 34, No. 2, November 30, 2013
- "Proposed Regulation Changes Could Have Significant Implications for Future and Existing IHFs in Ontario", Health Law Bulletin, August 29, 2013
- "Bill 85 Proposes Amendments to the Ontario Not-For-Profit Corporations Act and Other Corporate Statutes", Charities and Not-For-Profit and Health Bulletin, July 18, 2013
- "Update: Proclamation of ONCA Delayed to January 2014", Health Law and Charities and Not-For-Profit Bulletin, April 2, 2013
- "Progressive Conservatives Introduce Bill 5 - Comprehensive Public Sector Compensation Freeze Act ", Health Law Bulletin, March 19, 2013
- "HPRAC Recommends Changes to the Sexual Abuse Provisions in the RHPA", Health Law Bulletin, July 19, 2012
- "Bill 41 Proposes Changes to Health Regulatory Colleges' Investigating and Reporting Responsibilities", Health Law Bulletin, June 15, 2012
- "Freedom of Information and Protection of Privacy Act: Implications for Ontario Hospital Foundations", Health Law Bulletin, April 11, 2012
- "FIPPA and Ontario Hospitals: Issues for Shared Service Entities", Health Law in Canada, LexisNexis Canada, February 17, 2012
- "FIPPA and Ontario Hospitals: Issues for Shared Service Entities", Health Law Bulletin, November 29, 2011

Memberships and Affiliations

- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Law Society of Upper Canada
- Board Member, Toronto East General Research Ethics Board

Rosario G. Cartagena

Associate

Toronto

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Rosario Cartagena is a member of the Health Law Group in Fasken Martineau's Toronto office. She assists in drafting a variety of agreements, as well as advising on corporate governance, public policy, government relations, privacy and health regulatory compliance.

Rosario is a Certified Information Privacy Professional/Canada (CIPP/C) and has a Certificate in Health Law from Osgoode Law School.

Rosario summered, articled and was an associate at a large national law firm before joining a large healthcare agency of the Ministry of Health. She worked in this capacity for a few years before joining Fasken Martineau as an associate in 2014.

Areas of Practice

Health

Life Sciences

Government Relations & Ethics

Corporate Governance

Education

JD cum laude,
University of Ottawa, 2009

MSc, Medical - Public Health Sciences
University of Alberta, 2005

BSc (Hons), Biology
Brandon University, 2003

Year of Call

Ontario, 2010

Languages

English

Spanish

Presentations

- Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2015, Charities and Health Law Groups Seminar, June 11, 2015
- The Future of Assisted-Dying in Ontario: After Carter, Health Law Group (Fasken Martineau Institute), April 2, 2015

Publications

- "The Supreme Court of Canada Decision: Physician-Assisted Death", Health Bulletin, February 16, 2015

Memberships and Affiliations

- Member, Ontario Bar Association
- Member, Canadian Bar Association
- Member, Law Society of Upper Canada

Community Involvement

- Managing Editor-in-chief, Health Law in Canada Journal, 2014 - Present
- Regular Peer Reviewer, Canadian Medical Association Journal, 2013 - Present
- Chair, Society for the Young and Politically Engaged, 2013 – Present
- Legal Member, Sunnybrook Hospital Research Ethics Board, 2012 - Present
- Member-at-large, Ontario Bar Association, Privacy Law Section, 2012 – Present
- Membership Committee Member, University Club of Toronto, 2012 – Present
- Alternate Legal Member, Holland Bloorview Kids Rehabilitation Hospital, 2012 – 2015