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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**ESSENTIAL CHARITY &
NFP LAW UPDATE**

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Essential Charity and NFP Law Update
(Current as of February 10, 2017)

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OVERVIEW (in Chronological Order)

- 2017 Federal Budget Highlights
- Recent CRA Publications
- Recent Tax Decisions, Rulings and Interpretations Involving Charities
- Federal Legislation Update
- Provincial Legislation Update
- Other Case Law of Interest

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2017 FEDERAL BUDGET HIGHLIGHTS

- Budget 2017 proposed a number of measures to protect Ecogifts, now in *Budget Implementation Act, 2017, No. 2*, which received Royal Assent on December 14, 2017, including:
 - New ministerial approval in certain situations
 - Private foundations no longer eligible to receive Ecogifts
- Repeal of Additional Corporate Donation Deductions on Medicine for International Aid
- The First-Time Donor Super Credit was allowed to expire in 2017 due to low take-up

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RECENT CRA PUBLICATIONS AND PROGRAMS

- The CRA's Cause-related Marketing Webpage
 - In February 2017, the CRA introduced a new webpage to explain the CRA's interpretation of cause-related marketing
 - The CRA defines cause-related marketing as fundraising activity where a registered charity (or other qualified donee) works with a for-profit entity to promote the sale of the for-profit's items or services on the basis that part of the revenues will be donated to the registered charity

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- New Privacy Disclosure in T2050 Application to Register a Charity Under the ITA
 - The privacy disclosure, added on February 21, 2017, indicates that personal information is being collected under the authority of the ITA to validate the identity and contact information of directors, officers and authorized representatives of the applicant, and for the indirect collection of additional personal information from other internal and external sources, which may be used by the CRA to assess the risk of registration
 - The CRA is also permitted to make the T2050 public if the registration is approved

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- Sweeping changes recommended in Report on political activities
 - On May 4, 2017, CRA published the *Report of the Consultation Panel on the Political Activities of Charities*, prepared after the consultation with the charitable sector, and recommended:
 - Define "political activities" to mean "public policy dialogue and development" and to permit charities to engage in public dialogue
 - Changes to CRA compliance and appeals, audits, communication and collaboration
 - Removal of legislative reference to non-partisan political activities and "political activities"
 - A modern legislative framework that focuses on charitable purposes rather than activities
 - Not clear when CRA will respond to the Consultation Panel's recommendations

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- Online services to come November 2018 (July 21, 2017)
 - Filing T3010 annual returns online
 - Update and manage account information
 - Apply for registration (T2050) and check file status
 - Corresponding with the CRA
- Changes to CRA's Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) (August 9, 2017)
 - Permits support for small businesses in disaster areas under certain circumstances for 2 years after the date of the disaster
- Changes to the Voluntary Disclosure Program
 - On June 9, 2017, proposed changes were announced for the CRA Voluntary Disclosures Program ("VDP")

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- On December 15, 2017, the CRA introduced revised proposals and announced that the changes would be effective March 1, 2018
- The VDP is intended to allow taxpayers to come forward and correct previous omissions in their dealings with the CRA to avoid penalties and prosecutions
- The VDP only applies to registered charities in very limited context of employee source deductions and HST, so the specifics of the proposed changes will be of limited interest to registered charities
- However, the CRA provides a type of informal voluntary disclosure process for charities that have been involved in matters of non-compliance and want to bring themselves back into compliance

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- This process is set out on the CRA webpage entitled, "Bringing Charities Back into Compliance"
- It is a discretionary process
- It is important to conduct a due diligence review identifying all issues of non-compliance before commencing a disclosure process with the CRA
- CRA Announces New Charities Education Program
 - On November 6, 2017, the CRA announced the launch of a new Charities Education Program ("CEP") to provide early support and guidance to registered charities "that will help them comply with their obligations, and to answer any questions they may have regarding their activities, the maintenance of their books and records, and the filing of their annual information return"

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- Under the CEP, a Charity Education Officer ("Officer") from the CRA will conduct an in-person visit with a charity, which will consist of information sharing along with a review of the charity's books and records
- The visit will conclude with the Officer providing a Summary of Findings and Recommendations
- The CRA has stated that 500 visits are expected to be conducted annually and that all charities are eligible to be selected for a CEP visit for a number of reasons, including the fact that a charity is newly registered, on account of certain information from its T3010 return, or because of common areas of non-compliance, such as receipting and reporting issues

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- In this regard, the CRA states that "a CEP visit does not preclude the possibility that the charity could be audited in the future"
- Updates to T4063, Registering a Charity for Income Tax Purposes
 - On January 12, 2018, the CRA updated its T4063, which previously stated that the Charities Directorate would review draft governing documents on a one-time basis
 - The updated T4063 states that the Charities Directorate will not review applications submitted with draft governing documents, and will treat such applications as incomplete
 - The amended T4063 also clarifies that for an application to be considered complete, certified governing documents must be included

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RECENT TAX DECISIONS, RULINGS, AND INTERPRETATIONS INVOLVING CHARITIES

- Income Tax Treatment for Monies Paid to Support Refugees
 - On March 3, 2017, the CRA released technical interpretation 2016-0651661E5 - Payments to Syrian refugees by a church
 - A church inquired about the income tax treatment of payments made by the church to support a Syrian refugee family and asked whether the money received by the family was to be included as income in the family's tax returns

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- In response, the CRA noted that par. 56(1)(u) of the ITA requires social assistance payments received in the year and made on the basis of a means, needs, or income test are to be included in a taxpayer's income, unless they are included in the taxpayer's spouse's or common-law partner's income
- The CRA further noted that income included under par. 56(1)(u) will be offset by a matching deduction under par. 110(1)(f) of the ITA
- As a result, there will be no income tax implications, other than potentially affecting certain income-tested benefits

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- The CRA Issues a Technical Interpretation of Charities Returning Gifts
 - On May 17, 2017, the CRA released technical interpretation 2016-0630351 providing its response to the questions "1) Can a registered charity return a gift of a life insurance policy to a donor?" and "2) If so, what are the tax consequences to the registered charity and to the donor?"
 - The CRA concluded that the answer to these questions is case-specific and the obligation to return a gift is a matter for the court to determine
 - However, it warned that the return of a gift might be treated for ITA purposes as a charity giving a gift to a non-qualified donee which could result in revocation

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FEDERAL LEGISLATION UPDATE

- CASL Private Right of Action Implementation Suspended
 - On June 2, 2017, the government suspended the implementation of the private right of action "in response to broad-based concerns raised by businesses, charities and the not-for-profit sector"
 - Delay to promote "legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk"
 - On July 1, 2017, the 3-year transition period in CASL ended. Best advice is to obtain express consent

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- On December 13, 2017, the Standing Committee on Industry, Science and Technology presented its report "Canada's Anti-Spam Legislation: Clarifications are in Order"
- The report includes a number of recommendations, but of note to charities and not-for-profits, recommendation 8 states:
 - The Committee recommends that the Government of Canada clarify the application of the Act and its regulations to charities and non-profit organizations to ensure that the legislation is clear and understandable to these organizations and do not create unintended costs of compliance

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- Bill C-59 proposes to amend the *Security of Canada Information Sharing Act* and the *Criminal Code*
 - Clarifying that advocacy, protest, dissent or artistic expression will not generally fall under the definition of activity that undermines the security of Canada
 - Inserting "threaten" into the definition, which would not require proof as to the effect of the activity
 - Mandatory review of the list every 5 years (or 5 years after an entity is added)
 - Replacing the offence of "advocating or promoting commission of terrorism offences" (s.83.221 of the Criminal Code), with the offense of "counselling"
 - Bill C-59 was referred to Committee before Second Reading on November 27, 2017

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- *Corruption of Foreign Public Officials Act* was amended on October 31, 2017
 - Repeals the "facilitation payments" exemption from the offence of bribing a foreign public official
 - Charities could be exposed to possible criminal liability for payments to expedite or secure the performance of certain routine activities
- Amendments to the *Trade-marks Act* expected to come into force in early 2019
 - Will eliminate the requirement to use a trademark in Canada before a registration can be obtained

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- Senate Adopts Motion to Appoint Special Committee on Charitable Sector
 - On January 30, 2018, the Senate of Canada debated and adopted a motion to appoint a Special Committee on the Charitable Sector to “examine the impact of federal and provincial laws and policies governing charities, nonprofit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada”
 - The Special Committee, composed of nine members, will be empowered to send for persons, papers and records, examine witnesses, report from time to time and to submit a final report of its findings on or before December 31, 2018

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PROVINCIAL LEGISLATION UPDATE

- On July 10, 2017 proposed Ontario regulations under the CAA authorizing charitable corporations to pay directors in limited situations (see presentation by Ryan Prendergast)
- On September 20, 2017, Ontario Bill 155, Life Leases Act, 2017 was introduced in the Legislative Assembly of Ontario
 - If passed, Bill 155 will be the first piece of legislation in Ontario dealing with life leases, a form of leasehold interest that many senior housing charities and not-for-profits have adopted in recent years

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- Recent amendments made to the *Corporations Act* (“OCA”) and the *Not-for-Profit Corporations Act, 2010* (“ONCA”)
 - Good news that Ontario government has proceeded with corporate reform for NFP sector
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, received Royal Assent on November 14, 2017, introduces significant changes to the OCA and ONCA (see presentation by Theresa Man)
- New amendments to the CAA in Bill 154 on November 14, 2017 now permit charities to make “social investments” (see presentation by Terrance Carter)
- *Fair Workplaces, Better Jobs Act, 2017* (“Bill 148”) received Royal Assent on November 27, 2017
 - Contains major amendments to the *Employment Standards Act, 2000* (see presentation by Barry Kwasniewski)

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- Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017*
 - Received Royal Assent on December 12, 2017, it amends enacts and repeals a number of Acts regulating healthcare in Ontario
 - Amendments to the *Long-Term Care Homes Act, 2007* and new rules to deal with both restraining and confining of residents of a retirement home
- Ontario Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017*, enacts the *Ticket Sales Act, 2017* (yet to be proclaimed), which restricts the sale of tickets to recreational, sporting, cultural or other prescribed events in the secondary market, but provides an exception for registered charities

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- On December 14, 2017, the Minister of Tourism, Culture and Sport introduced Bill 193, *Rowan’s Law (Concussion Safety), 2017*
 - If passed, Bill 193 will provide Canada’s first framework to govern concussion prevention, detection, management and awareness in amateur competitive sports and schools
- O. Reg. 191/11, *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act, 2005* requires that public and private organizations in Ontario file an accessibility report:
 - For designated public sector organizations, such as hospitals and other public bodies, the report is due every 2 years starting December 31, 2013

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- For organizations with at least 20 employees, the report is due every 3 years starting December 31, 2014
- If your organization falls into either of these categories, then your accessibility report was due on December 31, 2017
- Administrative penalties may apply for late filing so best to seek legal advice
- Charities Operating in Quebec are Still Required to Submit an Annual Information Return in Quebec
 - Although registered charities that collect donations from Quebec residents are no longer required to register separately as charities in Quebec, they are still required to file the annual information return TP-985.22-V within 6 months after the charity’s year-end

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CASE LAW OF INTEREST

- Trinity Western University (“TWU”)
 - On November 1, 2016, the Court of Appeal of BC unanimously upheld the decision of the BC Supreme Court to quash the decision of the Law Society of BC
 - On February 23, 2017, the Supreme Court of Canada granted leave to appeal in *Trinity Western University, et al v Law Society of Upper Canada* and in *Law Society of British Columbia v Trinity Western, et al.*
 - Hearings at the Supreme Court of Canada were held on November 30 and December 1, 2017, but no decision has been released to the date of this presentation

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- *Wall v Jehovah’s Witnesses* (Member Discipline)
 - Mr. Wall was disfellowshipped from his congregation for alleged wrongdoing involving “drunkenness”
 - The Alberta Court of Appeal noted that Mr. Wall was not provided with the details of the allegations against him or an explanation of the discipline process, also that Mr. Wall did not receive any written reasons for the decision
 - On April 13, 2017, the Supreme Court of Canada granted leave to appeal, with hearing held on November 2, 2017
 - Case will have significant impact on the extent to which a faith-based organization is able to discipline members without having to adhere to principles of natural justice

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- Court Finds That Parent Charity is Permitted to Change Governance Structure
 - On September 12, 2017, the Ontario Superior Court of Justice released its decision in *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*, 2017 ONSC 5409
 - Annual general meeting passing new by-law changing the governance model from an open-membership to a closed-membership model with voting rights for OSPCA’s board
 - Court held that by-law was lawfully passed by voting members and that the OSPCA owed “no legislative or other accountability” to its affiliates
 - The Court further held the board acted in the best interests of the OSPCA and that it was “entitled to deference under the Business Judgment Rule”

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- *Teixeira v Markgraf Estate*, 2017 ONCA 819 (Oct 26, 2017) (Effective date of Gift by Cheque)
 - The trial court had held that a gift by means of a \$100,000 cheque was unenforceable when the cheque could not be cashed due to insufficient funds
 - The Court of Appeal stated that cheques are directions by the drawer to the bank to pay money to a payee and can be revoked by the drawer before the cheque is cashed
 - It also stated that a gift by cheque is not complete until the cheque has been cashed or has cleared, and that the death of a cheque drawer prior to the cheque being cashed would subsequently revoke the bank’s authority to pay funds to the payee

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- *ET v Hamilton Wentworth District School Board*, 2017 ONCA 893 (Nov 22, 2017) (Religious Accommodation)
 - The Court of Appeal for Ontario upheld the trial court’s judgement that dismissed the request for accommodation on religious grounds submitted by a Greek Orthodox Christian who claimed that his sincerely-held religious beliefs required him to shelter his two primary school-aged children from “false teachings”
 - The Court of Appeal held that there was no evidence of the appellant’s or his children’s religious freedom being violated, and that exposing children to contrary views alone, without other relevant factors, did not amount to an infringement of religious freedom under the *Charter*

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- The Court of Appeal acknowledged that the appellant had a legitimate fear that his children could be persuaded to abandon their religious beliefs if their teachers were to actively endorse the moral positions of the “false teachings”
- In this regard, the Court stated that “[t]he mores contained in [a school board’s program to promote inclusivity] can conflict with parental religious views, particularly if it is premised on the proposition that true acceptance of another person can only be achieved by embracing all of their self-understandings”
- If such a program were to undermine a parent’s ability to transmit religious faith, this could justify accommodation on religious grounds

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- *Lichtman v The Queen*, 2017 TCC 252 (Dec 18, 2017)
 - The Tax Court of Canada considered whether three ordained rabbis teaching Judaic studies in a Jewish elementary day school were “ministering to a...congregation” in order to be eligible for the clergy residence deduction under the ITA
 - The court stated that an individual is required to meet a two-fold test for status and function:
 - Status: requires the individual to be a member of the clergy or of a religious order, or a regular minister of a religious denomination
 - Function: whether the individual is performing one of the functions outlined in s. 8(1)(c)(ii) of the ITA, such as “ministering to a diocese, parish or congregation”

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- The court concluded that there was no consensus on the spirituality of Torah education or that learning Torah “is any more of a spiritual or religious act than it is an academic and intellectual pursuit”
- The court found the appellant’s duties were those that “would be typically required of any teacher in a typical school setting”, as opposed to those of a synagogue rabbi
- Reviewing the context and a purposive interpretation approach to the word “congregation” in the ITA, the court found that elementary school students gathered for Jewish religious education and instruction were not a congregation

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- *Chinese Benevolent Association of Edmonton v Chinatown Multilevel Care Foundation*, 2018 ABQB 8 (Jan 5 2018)
 - The plaintiffs sought a declaration that the bylaws adopted by the Chinatown Multilevel Care Foundation in 2009 were invalid and that the governing bylaws were those adopted in 1985
 - The court found that the members of the Foundation were the same as the directors at the time of the 2009 meeting in which the new bylaws were adopted, and that only those individuals were entitled to receive notice of and vote on the 2009 bylaws
 - Objections to the validity of a bylaw must be brought on a timely basis

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- *Milberg v North York Hockey League*, 2018 ONSC 496 (Jan 22, 2018)
 - Mr. Milberg brought an application alleging he was denied procedural fairness when the North York Hockey League (“NYHL”) decided to suspend him from attending any NYHL games for the remainder of the season due to his behaviour at one of his son’s games
 - The Court stated that “Private actors often engage in activities that have a very ‘public dimension’”
 - However, following the jurisprudence in this area (not including *Wall*), the Court held that “public law” decisions that engage judicial authority to review must ultimately emanate from the exercise of statutory power by the government

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