

2018 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget 2018 was presented on Feb. 27, 2018
- There were a number of important changes proposed in the Budget affecting charities and NFPs, including:
 - **Universities:** Definition of “qualified donee” (“QD”) was simplified so that universities outside of Canada that are qualified to be QDs are no longer required to also be listed in Schedule VIII of *Income Tax Act*, provided they meet registration requirements
 - **Municipalities:** Allows Minister of National Revenue to determine whether they may be eligible donees vs QDs on a case by case basis

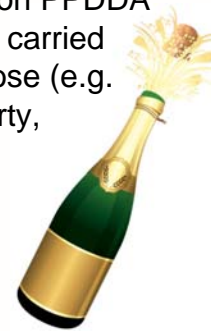


- **Journalism:** Government is going to review over next year whether charitable, non-profit journalism may be possibly recognized (see Fall Economic Statement below for an update)
- **Financial Support:** Funding of various charitable and NFP initiatives, generally to be made over a period of five years



UPDATE ON POLITICAL ACTIVITIES BY CHARITIES

- Over the last few months there have been a number of legislative and regulatory initiatives by the Department of Finance and CRA which replaced the term “political activities” with “public policy dialogue and development activities (PPDDA)”
- The result is that there are now no limits on PPDDA provided it is not a purpose in itself but is carried on in support of the charity’s stated purpose (e.g. advancement of education, relief of poverty, promotion of health) and is non-partisan
- For more see the presentation by Ryan Prendergast



2018 FALL ECONOMIC STATEMENT HIGHLIGHTS

- 2018 Fall Economic Statement was released on November 21, 2018 by the Department of Finance
- Re-confirmed the government’s commitment to allow charities to engage more fully in public policy dialogue
- Announced the government’s commitment to establish a permanent Advisory Committee on the Charitable Sector, which would regularly consult with charities and advise the government with respect to important issues facing the charitable sector



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- Proposed providing up to \$755 million on cash basis over a period of 10 years to establish a Social Finance Fund to provide charities, non-profits, and other social purpose organizations with:
 - (1) access to new funding
 - (2) connections to private investors
- Proposed investing \$50 million over two years in the Investment and Readiness stream, which would assist social purpose organizations to successfully participate in the social finance market
- To support local journalism, the government proposed providing up to \$50 million over five years to support existing news sources in local communities



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- Proposed three new measures to ensure Canadian's continued access to informed and reliable civic journalism (more details will be provided in the 2019 Federal Budget):
 - (1) new category of qualified donee for eligible non-profit journalism organizations, allowing such organizations to issue official donation receipts to donors and receive funding from registered charities
 - (2) refundable tax credit for qualifying news organizations, with effective date to be set for January 1, 2019, to support labour costs
 - (3) temporary and non-refundable 15% tax credit for qualifying subscribers of eligible digital news media

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SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector on Canada
- The Special Committee has heard from various witnesses on ongoing basis starting in April 2018
- Its study and resulting report on how Canada can better assist the charitable and NFP sector was to be completed by December 31, 2018, but has been extended to September 30, 2019



RECENT CRA PUBLICATIONS AND PROGRAMS

- On February 15, 2018, CRA reminded qualified donees that they have until March 31, 2019 to update their official donation receipts with the CRA's new website URL, which is "canada.ca-charities-giving"
- On February 28, 2018, the CRA posted a video, "Gift Certificates and Gift Cards", outlining when and how registered charities can issue official donations receipts for gift card or gift certificate donations
- On March 1, 2018, the CRA announced that September 2017 initiative of assigning new business numbers to internal divisions of charities will not be proceeding, *i.e.* status quo is to continue

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- Plan was to give separate business numbers to internal divisions to access CRA's online services via Charities IT Modernization Project ("CHAMP")
- This step is no longer required, meaning practice of derivative business numbers will continue
- On September 18, 2018, the CRA announced that the public release of CHAMP, scheduled for November 2018, will be delayed until June 2019
 - Once in place, CHAMP will provide several new e-services, e.g. T2050 and T3010 filings

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- On November 14, 2018, the CRA announced that it has stopped providing charities with peel and stick bar code labels for T3010 annual information return packages
- On November 15, 2018, CRA released an infographic (i.e. visual educational tool) "Changing Your Fiscal Year-End: What a registered charity needs to do", providing details on steps that must be taken when a charity changes its fiscal year-end
- On January 11, 2019, the CRA published its "Report on the Charities Program 2016 to 2018", which provides a review of statistics of registered charities, as well as programs and other resources implemented by the CRA over the past three years

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- The number of applications for charitable status decreased from 3,306 to 3,142
- The number of charitable registration decreased from 1,693 to 1,569
- Total number of revocations, including voluntary, after audit, and other revocations, increased from 1,372 to 1,562
- CRA states that it will be working on compliance related projects including:
 - “Reviewing the boards of registered charities to identify whether there are concerns related to ineligible individuals” and
 - “Reviewing activities involving the acquisition and construction of real estate to ensure such activities further a charitable purpose”





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TAX DECISIONS, RULINGS AND INTERPRETATIONS

1. On April 9, 2018, the TCC released its decision on split receipting and donative intent in *Markou v The Queen*, 2018 TCC 66



- Involved an appeal of an assessment made under the ITA for filings of a group of individuals who had participated in the leveraged donation program
- The TCC concluded that “split gifts require that the gift portion of a transaction be separated from the non-gift portion, and that the gift portion be supported by donative intent.”
- The 80% threshold in s.248(3) of the ITA will only be considered where the CRA and courts are able to split the transfer into two transactions and identify the appropriate donative intent

80%

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2. On June 12, 2018, the TCC released decision, *McCuaig Balkwill v The Queen*, regarding fair market value (“FMV”) of donated wine to be sold at auctions hosted by charities
 - Issue was how to appropriately value wine, *i.e.* \$23,600 (position of charities issuing receipts) vs. \$4,700 (CRA’s view based on actual auction prices)
 - TCC held that FMV of donated wine should not be based LCBO’s Private Ordering pricing, which is a monopoly, and relied on the CRA’s expert instead
 - TCC made clear other methodologies possible in determining wine’s FMV, provided they are supported with evidence and accurately applied
 - Charities receiving non-cash donations should bear in mind various FMV methodologies and keep full evidence of how calculations reached



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CORPORATE UPDATE – FEDERAL

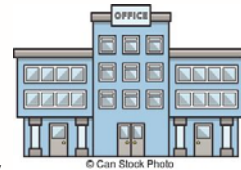
- On December 30, 2017, *Canada Corporations Act* (“CCA”) and its *Regulations* were repealed
 - All federal NFP corporations under CCA now either transitioned to the *Canada Not-for-profit-Corporations Act* (“CNCA”) or dissolved
- Since December 2017, uncertified corporate documents available for purchase from Corporations Canada
- On June 26, 2018, Corporations Canada started online service to file applications for certain exemptions under the CNCA and *Canada Business Corporations Act*
- On October 4, 2018, Corporations Canada announced a new online service to obtain a certificate of compliance or a certificate of existence for a not-for-profit that is incorporated under the CNCA

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CORPORATE UPDATE – ONTARIO

- Ontario government has indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), but exact timing remains uncertain
- As of December 10, 2018, charities and not-for-profit corporations incorporated under the OCA must keep, at their head office, a register of ownership interests in real property in Ontario along with certain supporting documents
- In December 2018, the government announced a joint consultation and review of the *Co-operative Corporations Act* by Ministry of Finance and Ministry of Government and Consumer Services



OTHER RECENT CHANGES IN ONTARIO

1. Social Investments in Ontario

- *Charities Accounting Act* (“CAA”) applies to all charities in Ontario and provides that the *Trustee Act* (which deals with investment powers of trustees) apply to directors holding property for charitable purposes
- Bill 154 amended the CAA as of November 14, 2017
- These CAA amendments now permit charities to make “social investments” when they apply or use trust property to:
 - directly further the purposes of the trust and
 - achieve a “financial return” for the trust
- “financial return” is defined as an outcome in respect of the trust property that is better for the trust in financial terms than expending all the property



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- In April 2018, the Ontario Public Guardian and Trustee (“OPGT”) released the “Charities and Social Investments Guidance” (the “Guidance”)
 - It sets out the OPGT’s interpretation of the social investment framework under the CAA
 - The Guidance clarifies that “financial return” is not required to be at market rates, and, depending on the terms of investment, it may not require the repayment of the invested capital
 - This suggests that even where the investment results in a partial loss of capital, it may still qualify as a social investment as long as the investment was directly furthering the charitable purpose of the charity



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- The Guidance recommends that a charity should base its decision to make a social investment on:
 - its charitable purposes and assets (assets may be considered although the CAA does not specifically reference them as consideration for trustees making social investments)
 - the rules and duties that apply to social investing
 - its governing documents, and
 - a director’s or trustee’s general fiduciary obligation
- The Guidance recognizes that charities making social investments must also comply with CRA requirements
 - This would include complying with requirements for program-related investments under CRA Guidance (CG-014) on community economic development activities



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2. Remuneration of Directors in Ontario

- On April 1, 2018, amendments to Regulation 4/01 (“Regulation”) of the CAA came into force concerning remuneration of directors by authorizing “charitable corporations” to pay directors and “connected persons” in certain limited situations
- Amendments require charities to consider any accompanying Guidance which may be prepared
- In May 2018, the OPGT released its Guidance
- The Guidance provides that a director can be paid for certain services provided to a charity, subject to the charity’s fulfillment of specific requirements
- The Guidance also states that directors and “connected persons” cannot be paid for: (1) being a director or employee or (2) fundraising/real property transactions

- Guidance elaborates upon the Regulation requirements to authorize payments to directors or “connected persons” for certain services, including:
 - Board must consist of at least 5 directors, with at least 4 eligible to vote on the payment to the director or connected person
 - Board must believe at time of authorization that the payment is the charity’s best interests
 - Payment amount must be reasonable
- Guidance provides more detail on the mandatory disclosure of payments to the members at the annual meeting and in financial statements
- Guidance states that charities are advised to keep records of everything related to compliance with the Regulation



3. Other Legislation Updates in Ontario

- The Ontario *Children, Youth and Family Services Act, 2017* (“CYFSA”) and four of its supporting regulations came into force on April 30, 2018
 - The CYFSA replaced the Ontario *Child and Family Services Act*, with the following key changes:
 - Age of protection has been increased to include 16 and 17 year olds, who may be found to be in need of protection subject to their circumstances
 - While the mandatory duty to report applies only to children younger than 16, under the CYFSA a person may make an optional report in respect of a child who is 16 or 17



- Procedures to show respect for the culture of children under protection, including Indigenous children, by keeping children in their home communities, where possible
- Providing great accountability and oversight over child protection service providers
- Charities and NFPs working with children and youth in Ontario should work with their legal counsel to revise their child protection policy in accordance with the updated reporting requirements under the CYFSA



- On November 1, 2018, the *Ontario Police Record Checks Reform Act, 2015* and its regulations came into force, implementing a new standardized regime governing police record checks including vulnerable sector checks
 - Vulnerable sector checks are used to determine an individual’s suitability to work or volunteer in a position of trust or authority over vulnerable persons
 - Charities and NFPs that work with children or other vulnerable persons will need to be aware of these updated procedures that apply to their employees and volunteers when obtaining or updating vulnerable sector checks



CASE LAW OF INTEREST (in chronological order)

- ***John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John’s, 2018 NLSC 60 (Mar.16, 2018)***
 - Plaintiffs had been abused by teachers as residents of an orphanage linked to the Roman Catholic Episcopal Corporation of St. John’s (the “Archdiocese”), with plaintiffs claiming the Archdiocese was vicariously liable for this abuse
 - Court held that the Archdiocese was not vicariously liable, as the orphanage and Archdiocese were separate corporate entities that operated without blurring these boundaries

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- **Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall, 2018 SCC 26**
 - On May 31, 2018, the Supreme Court of Canada (“SCC”) upheld religious autonomy in *Wall* decision
 - Court will generally not interfere in religious doctrine matters and procedural rules requiring doctrinal interpretation
- **Trinity Western University Decisions (“TWU”)**
 - On June 15, 2018, the SCC upheld the denial of accreditation regarding TWU’s law school on the basis that its mandatory covenant on sexual conduct was discriminatory
 - The Court held that refusal of accreditation balanced the effects on religious freedom with the Law Societies objectives of protecting the public interest by ensuring diversity and equality in the profession

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- **Faas v CAMH, 2018 ONSC 3386 (June 6, 2018) (under appeal)**
 - The Faas Foundation and its principal (“Faas”) made an application under s.6(3) of the CAA for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds donated by Faas
 - Courts have discretion to make orders under s.6(3) of the CAA if it is of the opinion that the public interest would be served by a PGT investigation
 - The court denied the application on grounds that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH’s program and use of funds
 - Courts are reluctant to interfere with a charity’s operations unless the public interest is being affected

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- ***The McKay Cross Foundation v ICSS, 2018 ONSC 6422 (October 30, 2018)***
 - Application to dismiss a claim made by plaintiffs for return of a \$100,000 donation to a registered charity, *Innovative Community Support Services*
 - Court considered the evidence and agreement between both parties to determine if donated funds were specific purpose charitable funds
 - Court found that donation was made with no strings attached; agreement was “too vague to be enforceable” and email exchanges did not indicate that donation was for a specific purpose
 - Charities and donors should enter into proper gifting agreements prior to donations being made, especially if gift is intended to have specific purpose

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- ***Friends of Toronto Public Cemeteries Inc. v Mount Pleasant Group of Cemeteries (“MPGC”), 2018 ONSC 7711 (December 31, 2018)***
 - Plaintiffs claimed that MPGC was a trustee of the cemeteries, had improperly appointed directors, and was not in compliance with its governing legislation
 - Court examined MPGC’s complicated corporate and trust history going back to 1826
 - The Court found that
 - MPGC was subject to the trust and governance provisions of its 1826 and 1849 Acts
 - The current directors of MPGC had not been validly appointed as trustees in accordance with its 1849 Act

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- MPGC continues to hold its assets as trustee of the trust created by 1826 Act and amendments
- Trust administered by MPGC is a charitable trust
- MPGC is a trustee subject to the CAA
- The funding and operation of visitation centres and funeral homes are beyond the scope of the stated purpose of a “cemetery or cemeteries or places for the burial of the dead”

– The Court stated that

- “...a blanket statement that *no* charitable corporations hold their assets in trust is simply too broad to be sustained.”
- “Care must be taken to examine the corporate and trust history to determine what conclusion best fits the facts.”


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