Healthcare Philanthropy: Check-Up 2019

Wednesday, May 22nd, 2019

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Carters/Fasken Healthcare Philanthropy: Check-Up 2019

Half-Day Seminar, May 22, 2019

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Carters Professional Corporation / Fasken Martineau
Healthcare Philanthropy: Check-Up 2019

Half-Day Seminar, May 22, 2019

Agenda

7:45 am – 8:25 am	**Registration & Breakfast**
8:25 am – 8:30 am	**Opening Remarks** *M. Elena Hoffstein / Terrance S. Carter*
8:30 am – 9:15 am	**Essential Charity Law Update (including Case Law Update)** *Brittany Sud – Associate, Fasken*
9:15 am – 10:00 am	**The Coming of the ONCA (We Hope) and What to Start Thinking About** *Theresa L.M. Man – Partner, Carters Professional Corporation*
10:00 am – 10:20 am	**Refreshment & Networking Break**
10:20 am – 11:10 am	**Critical Privacy Update for Charities - Esther Shainblum** *Esther Shainblum, Associate, Carters Professional Corporation*
11:10 am – 11:40 am	**PPDDAs Have Arrived (The Evolution of Political Activities)** *M. Elena Hoffstein, Partner Fasken*
11:40 am	**Questions**
11:50 am	**Closing Remarks** *M. Elena Hoffstein / Terrance S. Carter*

FACTS

IFLR 1000 Financial and Corporate (2019) ranks 48 of our lawyers across Canada, South Africa and England

Chambers Canada (2019) awards Fasken Employment Law Firm of the Year for 2018 and recognizes 93 of our lawyers in 36 practice areas

Fasken receives **Mansfield Certification**. This designation confirms that for the last year the Firm has considered women and/or visible minorities in 30% or more of at least 70% of all its senior positions

The Best Lawyers in Canada (2019) awards Fasken Labour and Employment Law Firm of the Year and recognizes 201 of our lawyers in 56 practice areas

Chambers Global (2019) recognizes 55 of our lawyers in 25 practice areas across the Globalwide, African-wide, South African and Canadian categories

WTR 1000 (2019) recognizes Fasken as a leading trademark firm and five of our lawyers as leaders in their field

Benchmark Canada (2018) recognizes 65 of our litigators, including two lawyers listed in its Top 25 Women in Litigation and six listed in its 40 & Under Hot List

Who's Who Legal (2018) recognizes Fasken as the Global Mining Law Firm of the Year, for the fourth straight year. The Firm is a ten-time winner of this award

IFLR 1000 Financial and Corporate (2018) ranks 48 of our lawyers across Canada, South Africa and England

The Legal 500 Canada (2019) ranks Fasken as a top tier firm in seven areas and recognizes 99 of our lawyers across 30 areas, six of them Tier 1

The 2018 Canadian Legal Lexpert Directory recognizes 200 of our lawyers in 34 practice areas

Chambers Canada (2018) awards Fasken Banking Law Firm of the Year for 2017 and recognizes 89 of our lawyers in 35 practice areas

Chambers High Net Worth (2018) ranks our Firm top tier (Band 1) in Private Wealth Law and recognizes three of our lawyers in the area, including two as top tier (Band 1)

AT A GLANCE

Fasken's more than 700 lawyers, in ten offices across four continents, are always ready to navigate legal challenges and capitalize on business opportunities for you. As a leading international business law and litigation firm, we offer experience and expertise across a number of countries and across a wide range of industries and practice areas to suit the needs of organizations worldwide. Clients rely on us for practical, innovative and cost-effective legal services. We solve the most complex business and litigation challenges, providing exceptional value and putting clients at the centre of all we do.

Our Clients

We advise corporate clients, government agencies, regulatory authorities, non-profit bodies and individual clients. As our client, you benefit from our:

- **Commitment to quality** – Our legal practice is rooted in the relationships we build with clients. That means a comprehensive and sustained focus on the highest level of service throughout our entire Firm to meet and anticipate your evolving needs. Quite simply, we start building relationships by listening to you, our client. We gauge our success from clients like you who continue to entrust us with their most pressing matters.

- **Cogent advice** – Known for our ability to think strategically and deliver practical solutions, we have extensive experience acting for clients on domestic and international issues. Our lawyers are often asked to comment on legal issues affecting business and are quoted regularly in the media.

- **International reach** – To meet your needs worldwide, we have teams of lawyers and professionals working in our offices across Canada, Europe, Africa and Asia.

Our Expertise

We have top-ranked lawyers in a wide range of industries and practice areas:

Practice Areas

- Antitrust/Competition & Marketing
- Banking & Finance
- Corporate Finance and Securities
- Corporate Social Responsibility Law
- Corporate/Commercial
- Environmental
- Estate Planning
- Government Relations and Strategy
- Indigenous Law
- Insolvency & Restructuring
- Intellectual Property
- International Trade & Customs Law
- Investment Management
- Labour, Employment & Human Rights
- Litigation and Dispute Resolution
- Mergers & Acquisitions
- Political Law
- Privacy and Cybersecurity
- Private Client Services
- Private Equity & Venture Capital
- Procurement
- Real Estate
- Tax Law

Industries

- Construction
- Energy
- Financial Services
- Franchising
- Health
- Infrastructure & Public-Private Partnerships
- Insurance
- Life Sciences
- Mining
- Real Estate
- Retail
- Technology, Media and Telecommunications
- Transportation

Markets

- Africa
- Americas
- Asia Pacific
- Europe

Selected Experience

We have advised clients in a wide-range of industries on complex matters including:

The **Special Committee of Magna International Inc.** in the development and defence of Magna's novel and ultimately successful collapse of its dual-class share structure.

CGI Group Inc. on its US$1.07 billion cross-border acquisition of Stanley, Inc.

Uranium One Inc. on its proposed $1.5 billion transaction with ARMZ, a Moscow-based uranium mining company.

Infrastructure Québec on the $470 million Centre Hospitalier de l'Université de Montréal project, the first health public-private partnership (P3) to close in Québec.

Independent directors of Grant Forest Products in the $400 million sale of mills in Canada and the US to Georgia-Pacific, as part of Grant's reorganization.

Addax Petroleum Corporation on its $8.2 billion acquisition by The Sinopec Group, the largest overseas acquisition ever by a Chinese state-owned company.

MDS Inc. on the sale of its instrument division to Danaher Corporation for US$650 million.

Gold Reserve Inc. before the Ontario Superior Court of Justice in successfully restraining Rusoro Mining Ltd. from proceeding with a hostile takeover bid for the company because of alleged conflicts of interest and confidentiality violations.

EnStream LP, a mobile commerce joint venture company owned by Canada's three leading wireless operators, on multiple aspects of the development, structuring and launch of Zoompass, a breakthrough mobile money transfer and payment service.

Various parties in relation to the high-profile cross-border insolvencies of Nortel, AbitibiBowater and Quebecor World.

Kerry (Canada) Inc. in a dispute with former employees over the use of surplus in the employee pension plan by plan administrators, culminating in a landmark decision by the Supreme Court of Canada in favour of Kerry, with wide implications for employers, pension plan administrators and employees of Canadian companies.

Export Development Canada which, along with a syndicate of lenders, extended a term credit facility of up to $700 million to Air Canada.

ING Canada with respect to its transformation from a Canadian subsidiary of ING Group into an independent Canadian-listed and widely-held company, including advice on regulatory matters and its rebranding as Intact Insurance.

The Royal Bank of Scotland on Canadian bank and securities regulatory and antitrust matters in connection with the UK government becoming a 58% majority stakeholder in the bank.

A consortium led by **The Royal Bank of Scotland** on Canadian aspects of its successful competitive bid for Dutch bank ABN AMRO, the largest financial services merger in history.

The **underwriters led by TD Securities** on more than $10 billion in equity and debt offerings for TD Bank Financial Group in 2008 and 2009.

Key parties, including the issuer trusts and Desjardins Group, in the landmark Canadian $32 billion Asset-Backed Commercial Paper restructuring.

A **syndicate of European banks** and **a core group of North American banks** on the refinancing by Bombardier of US$6.24 billion letter of credit facilities.

The **Special Committee of Alcan Inc.** in Alcan's $38.1 billion acquisition by Rio Tinto, to form the world's leader in aluminum.

The **lenders** for $460 million in financing in support of an agreement between the Government of Alberta and BBPP Alberta Schools to design-build-finance-maintain 18 state-of-the-art schools in Alberta, the largest ever Canadian schools P3 transaction.

Issuers (including **Inmet Mining, IAMGOLD First Quantum Minerals, Gold Wheaton Gold and First Uranium**) and underwriters on more than $2.5 billion in mining equity financings in 2009.

Tyco Safety Products in a dispute with one of its competitors before The Federal Court of Canada resulting in a landmark patent decision and a clear victory for Tyco.

The **lenders** for the construction bank financing and long term bond financing for the $759 million Niagara Health System Alternative Financing and Procurement project, Infrastructure Ontario's first full design-build-finance-maintain hospital project.

The Bank of Nova Scotia in litigation before the Supreme Court of Canada resulting in the SCC issuing a precedent-setting decision in favour of the bank concerning the recovery of the proceeds of fraud.

FACTS

Best Lawyers in Canada (2019) lists one of our lawyers for their expertise in the area of Charities/Non-Profit Law

Chambers Canada (2018) ranks our firm nationwide in Charities and recognizes one of our lawyers in this practice area

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

Three of our lawyers are recognized in the **Canadian Legal Lexpert Directory (2015)** for their Charities/Not-for-Profit work

Lexpert has presented the Zenith Award to multiple members of our group

CHARITIES AND NOT-FOR-PROFIT

Charities and not-for-profit organizations enrich the lives of people and communities every day. But managing charitable organizations is a heavy responsibility. Directors, officers and employees of charitable organizations face increased regulations and growing scrutiny of both their operations and governance. Fasken's Charities and Not-for-Profit Group can help you navigate the complex laws and regulations governing the creation, organization, and ongoing administration of charities and not-for-profit entities.

Our Clients

Our team has a long history of helping not-for-profit organizations and charities build the right legal foundation for success. We have extensive expertise in all areas of charity and not-for-profit law both nationally and internationally. We advise a large number of hospitals, healthcare service agencies, professional governing bodies and associations, community service agencies, charitable organizations and community foundations as well as private family foundations and non-profit corporations including RCAAAs and clubs.

Our expertise in fundraising, donations and legacy planning is further enhanced by our team's:

- **Regulatory expertise** – We can help you navigate the increasingly complex regulatory environment, including the complex new disbursement quota rules and new privacy legislation that apply to charities and not-for-profits.
- **In-depth tax knowledge** – Based on in-depth understanding of Canadian and provincial tax legislation, we can help resolve any tax issues that may arise, such as obtaining charitable status, helping charities and donors maximize the tax efficiency of their charitable gifts and helping to develop investment strategies for donated gifts.
- **Expertise in planned giving** – Most Canadians contribute to charities throughout their lifetime, but few continue this support through a gift in their will or estate plan. This is a missed opportunity. Our practitioners take the time to understand your values and vision to ensure your legacy planning is fulfilled in a tax efficient manner.
- **International legal expertise** – We have experience helping charities to carry out their activities abroad in accordance with applicable regulatory rules.

Our Expertise

- Establishing and advising hospital foundations and other parallel foundations
- Advising on amalgamation of hospitals and other charities
- Advising on foreign operations of operating charities
- Fundraising issues and charitable gaming
- Advising charities on CRA audits
- Advising international charities
- Advising on donor advised funds
- Advising donors on effective charitable gifting
- Intellectual property
- Labour and employment law
- HST
- General legal matters including real estate
- Risk management
- Advocacy
- Defence and administration of charitable bequests
- Directors and Trustees duties and liabilities
- Incorporation organization and regulation of charity

FACTS

The Best Lawyers in Canada (2019) lists eight of our lawyers for their Trusts & Estates expertise

Chambers High Net Worth (2018) ranks our firm at Band 1 in the area of Private Wealth Law - Canada and lists three of our lawyers as notable practitioners

Who's Who Legal: Canada (2017) recognizes three of our lawyers in Private Client, and names one as a Most Highly Regarded Individual in the area

The Canadian Legal Lexpert Directory (2017) recommends six partners as leading practitioners in the area of Estate & Personal Tax Planning

Chambers High Net Worth (2017) ranks our firm at Band 1 in the area of Private Wealth Law and ranks three of our lawyers, including two as top tier (Band 1)

The Best Lawyers in Canada (2018) lists six of our lawyers for their Trusts & Estates expertise

Who's Who Legal: Canada (2016) recognizes four of our lawyers in the area of Private Client

Who's Who Legal: Private Client (2016) recognizes four of our lawyers

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 advisors to develop an integrated estate plan which meets your values and objectives, while minimizing the impact of income taxes and probate fees.

Our Clients

- International families
- Entrepreneurs
- Non-profit organizations
- Private foundations
- Global trust corporations

The plans we develop with you may include:

- Wills
- Domestic contracts
- Succession plan for your business
- Charitable giving strategy to fulfill your social capital legacy
- Powers of attorney
- Trusts

Notre expertise

Our experience includes the following:

- 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 US citizens or dual residents of Canada and the United States or Canadians who own US situs property
- Assisting new immigrants to Canada to establish trusts to take advantage of the five-year Canadian tax holiday
- Advising 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 clients with marriage contracts and family law planning
- 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
- Assisting with the administration of the estate or trust
- Advising executors and trustees
- Acting as their agents in the day-to-day administration of the estate
- Attending 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
- Distributing assets to beneficiaries
- Assisting executors and trustees with estate and trust administration, and executors' and trustees' accounts

The Fasken Advantage

Fasken Martineau is one of the world's leading international business law and litigation firms with more than 700 lawyers with offices in Canada, the United Kingdom and South Africa.

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 to address your needs in an integrated manner.

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.

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Private Client Services

Your family.
Your business.
Your wealth.
You.

FASKEN

As a high-net-worth individual, family-owned or privately managed business, you face dynamic and unique challenges.

Our approach

We believe it's important to bring a multi-disciplinary, collaborative approach to complex personal, estate, family and business issues to customize strategies that meet the needs of the private client. This includes understanding your personal goals, multijurisdictional tax considerations, estate and business succession goals, liquidity events and philanthropic intentions.

We provide comprehensive, integrated legal solutions and access to a network of top advisory relationships to provide you with high-end personalized advice.

Our comprehensive Private Client offering includes:

- Estate and Succession Planning
- Tax planning
- Philanthropy
- Estate and Trust Administration
- Estate, Trust & Shareholder Disputes
- Family Business Succession
- Corporate governance
- Liquidity event planning and execution
- Corporate Finance
- Private M&A

Our clients

Our private clients include successful individuals, families and their enterprises across generations, industries and cultures.

We understand the need to consider differing requirements in the context of your unique situation in order to service all of your needs.

Private Client Services group ranked as **Band 1 for Private Wealth Law – Canada**

- Chambers High Net Worth 2018

Our lawyers ranked in the areas of **Banking & Finance: Financial Services Regulation (Canada), Tax (Canada), and Corporate/M&A (Canada)**

- Chambers Canada 2019

Our lawyers ranked in the area of Trusts and Estates, including past recognition for Elena Hoffstein (2016) and Corina Weigl (2017) as "Lawyer of the Year" in Toronto

- The Best Lawyers 2018

Our lawyers recognized for their expertise in **Charities/ Not-For-Profit, Corporate Tax, Litigation – Corporate Tax, Estate Planning & Personal Tax Planning, and Investment Funds & Asset Management (Tax Aspects)**

- Canadian Legal Lexpert Directory 2018

Continuing success requires collaboration with your stakeholders and advisors. **We can help.**

For over a century, generations of families have turned to Fasken for legal advice to protect what matters most. Whether you're passing down the family business to the next generation or looking for new capital, we can help.

Private Wealth & Family offices

Private Companies

Wealth
Preserve your assets

Transfer your wealth in an orderly way by developing income splitting strategies, customizing your retirement and succession plan and putting in place other tax efficient plans for multi-jurisdictional property or family interests.

Governance
Take control of your corporate wheelhouse

Learn how to effectively navigate the complex corporate governance landscape by implementing best practices, structures and governance tools to ensure your business stays on track.

Planning
Create a lasting legacy

As you introduce the next generation into your business or wish to capitalize on an exit strategy, we can help to transition your wealth for generations to come.

Your Business
Realize value in your business

From proactive preparation for liquidity events to the most sophisticated and structurally complex transactions, learn how our relationship capital can drive your transactions to completion.

Philanthropy
Manage your charitable portfolio

Leave your mark by defining your charitable giving goals, designing a lasting financial legacy or engaging in mentoring and philanthropy.

Contact us to discuss how we can help you realize your goals.

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CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

CARTERS CHARITY FIRM PROFILE

A 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 wide range of legal services to its charitable and not-for-profit clients, as well as to individuals, corporations and businesses. With offices in Toronto, Ottawa and Orangeville, Carters provides assistance to clients across Canada and internationally with regard to all aspects of charity and not-for-profit law. Five of the lawyers at Carters have been recognized by *Lexpert*, and three have been recognized by *Best Lawyers in Canada*, as leaders in their fields in Canada. Carters has also been ranked by *Chambers and Partners*, an international rating service for lawyers. The lawyers and staff at Carters are committed to excellence in providing clients with complete legal solutions for their unique needs.

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 incorporation, charitable registrations, fundraising, taxation, development of national and international structures, as well as related areas of corporate and commercial law, contracts, real estate and leasing, intellectual property and technology (i.e. trade-marks and copyrights), technology, labour, employment, human rights, estates and trusts, charity tax audits, and the evolving area of privacy law and anti-spam.

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, as well as 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, construction liens, employment, corporate/commercial, shareholder disputes, personal injury, product liability, intellectual property, and charity and not-for-profits, real estate disputes. Carters also undertakes litigation audits, policy reviews and liability risk management in an effort to limit exposure to liability for its clients.

WITH INTERNATIONAL RELATIONSHIPS

Carters has full access to specialized national and international legal services through its relationship with Fasken, an international business law firm, 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. 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.

CONVENIENCE AND ACCESSIBILITY

The lawyers and staff at Carters strive to be as accessible to our clients as much 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, 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, webinars 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* (Thomson Reuters), with annual updates;
- Co-editing *Charities Legislation & Commentary*, 2019 Edition (LexisNexis), published annually;
- Contributing to *The Management of Nonprofit and Charitable Organizations in Canada*, 4th Edition (LexisNexis, 2018);
- Co-authoring *Branding and Copyright for Charities and Non-profit Organizations* (LexisNexis, 2014);
- Co-authoring *Branding & Trademarks Handbook for Charitable and Not-For-Profit Organizations* (LexisNexis Butterworths, 2006);
- 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 Daily*, *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*, *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 and internationally by email;
- Speaking nationally and internationally at seminars and conferences for the Law Society of Ontario, the Canadian Bar Association, the Ontario Bar Association, The National Society of Fund Raising Executives, The Canadian Association of Gift Planners, the Society of Trust and Estate Practitioners Canada, 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 1,000 charity and church leaders, members of religious charities, accountants and lawyers; the annual "*Charity & Not-for-Profit Law* Seminar" in Ottawa for more than 400 members of the sector, and co-hosting the annual "Healthcare Philanthropy Seminar" with Fasken;

- Serving as past 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:

- Anti-bribery Compliance
- Anti-terrorism Policy Statements
- CRA Charity Audits
- Charitable Organizations & Foundations
- Charitable Incorporation & Registration
- Charitable Trusts
- Charity Related Litigation
- Church Discipline Procedures
- Church Incorporation
- Corporate Record Maintenance
- Director and Officer Liability
- Dissolution and Wind-Up
- Employment Related Issues
- Endowment and Gift Agreements
- Foreign Charities Commencing Operations in Canada
- Fundraising and Gift Planning
- Gift Acceptance Policies
- Governance Advice
- Human Rights Litigation
- Insurance Issues
- International Trade-mark Licensing
- Investment Policies
- Legal Risk Management Audits
- Legal Audits
- National and International Structures
- Privacy Policies and Audits
- Religious Denominational Structures
- Sexual Abuse Policies
- Special Incorporating Legislation
- Charity 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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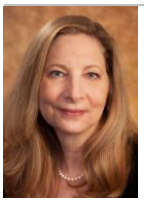

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Healthcare Philanthropy: Check-Up 2019

Essential Charity Law Update (Including *Case Law Update)*

May 22, 2019

Brittany Sud, Associate

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Agenda

- Federal Budget 2019 Highlights
- Update on Special Senate Committee on the Charitable and Not-for-Profit Sector
- CRA Publications and Website Updates
- Other Federal Legislation
- Provincial Legislation Update
- Case Law Update

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Federal Budget 2019 Highlights

Federal Budget 2019 Highlights - Charities and Not-for-Profit Sector

- Journalism
- Donations of Certified Cultural Property
- Social Finance Fund
- National Pharmacare
- Medical expense tax credit
- GST/HST Health Measures
- Cannabis Taxation

Journalism

- New category of qualified donee: “registered journalism organizations”
  - Effective January 1, 2020
- 25% refundable tax credit on salary or wages paid to eligible newsroom employees of qualifying QCJOs
  - Effective as of January 1, 2019
- Temporary, non-refundable 15% tax credit on amounts paid by individuals for “eligible digital subscriptions” with a QCJO
  - Available after 2019 and before 2025

Donations of Certified Cultural Property

- *Heffel Gallery Limited v The Attorney General of Canada*, 2018 FC 605
  - “National importance” test
- Budget 2019 proposes to remove requirement that property be of “national importance”
  - Effective as of March 19, 2019

Social Finance Fund

- Social Finance= the practice of making investments intended to create social or environmental impact, in addition to financial returns
- $755 million Social Finance Fund over 10 years to benefit charitable, non-profit and other social purpose organizations in 2 ways:
  - Access to new funding; and
  - Connection with private investors looking to invest in projects that further social change

Health Related Proposals

- National Pharmacare
- Medical expense tax credit
- GST/HST Health Measures
- Cannabis Taxation

Update on Special Senate Committee on the Charitable and Not-for-Profit Sector

Special Senate Committee on the Charitable and Not-for-Profit Sector Update

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study and report on the impact of federal and provincial laws and policies governing the charitable and not-for-profit sector
- The study and final report on how Canada can better assist the charitable and not-for-profit sector was to be completed by December 31, 2018, but has been extended until September 30, 2019

CRA Publications and Website Updates

Public Policy Dialogue and Development Activities

- On March 15, 2019, CRA announced that charities have less to report than they had for political activities as a result of the new rules on public policy dialogue and development activities (PPDDAs)
- Form T3010, Registered Charities Information Return, and Form T2050, Application to Register a Charity under the Income Tax Act, will be revised for November 2019
- Retroactive change- reporting requirements effective immediately

Report on the Charities Program 2016-2018

- On December 4, 2018, 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 3 years
  - Decrease in applications for charitable status
  - Decrease in charitable registrations
  - Increase in revocations

Report on the Charities Program 2016-2018

- Online services:
  - CHAMP will launch in June 2019
- Registration changes to provide fair and timely service
- Education activities
- Compliance
- Feedback on Outreach Products

Additional CRA Updates

- Effective November 14, 2018, CRA is no longer able to provide peel and stick bar code labels with the T3010 annual information return package
- On November 15, 2018, CRA released a graphic educational tool to clarify the process for “Changing Your Fiscal Year End- What a registered charity needs to do” and showing the impact on the filing of annual returns

Other Federal Legislation

Canada *Not-for-profit Corporations Act*

- On June 26, 2018, Corporations Canada started an online service to file applications for certain exemptions under the *Canada Not-for-profit Corporations Act* ("*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*

Provincial Legislation Update

Ontario *Not-for-Profit Corporations Act, 2010*

- Ontario government has indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010*

Other Changes in Ontario

Social Investments

- As of November 14, 2017, Bill 154, Cutting Unnecessary Red Tape Act, 2017 amended the *Charities Accounting Act* ("CAA") to expressly permit charities to make "social investments" in furtherance of their charitable purposes
- On April 9, 2018, the Ontario Public Guardian and Trustee released the "Charities and Social Investments Guidance", which sets out its interpretation of the social investment framework under the CAA

Payment to Directors & Connected Persons

- On April 1, 2018, amendments to Regulation 4/01: Approved Acts of Executors and Trustees to the CAA came into force permitting charitable corporations operating in Ontario to compensate directors and "persons connected to a director", without a court order, in specific situations

Case Law Update

Recent Cases

- *Faas v. CAMH*, 2019 ONCA 192
- *Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation*, 2019 BCSC 54
- *The McKay Cross Foundation v. ICSS*, 2018 ONSC 6422
- *Canada Without Poverty v. Attorney General of Canada*, 2018 ONSC 4147
- *Markou v The Queen*, 2018 TCC 66
- *McCuaig Balkwill v The Queen*, 2018 TCC 99

Faas v. CAMH, 2019 ONCA 192

- Faas signed donor investment agreement to donate $1,000,000 in 3 equal installments to CAMH for a workplace mental health program that was to be developed over a 3-year period
- First and only installment was paid
- Faas dissatisfied with lack of detail in CAMH's reports and sought refund which was refused
- As a result, Faas brought an application under s. 6 of the CAA
- Court held that Faas had no right to a detailed accounting of CAMH's program and its use of funds and there were no grounds on which to order an investigation by the OPGT

Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation, 2019 BCSC 54

- Allan Markin donated $175,000 to Doukhobor Heritage Retreat Society to be "held permanently by the Vancouver Foundation and invested in accordance with the Vancouver Foundation Act"
- Income from the Fund to be disbursed each year by the Foundation to DHRS "to be used for charitable purposes of supporting Whatshan Lake Retreat and [related] supporting programs"
- Income from the Fund was insufficient to cover costs of the operation of the Retreat and its programs
- DHRS sought money back from Foundation, but Foundation refused
- Court held DHRS entitled to return of Fund because of Foundation's obligations under the Vancouver Foundation Act

The McKay Cross Foundation v. ICSS, 2018 ONSC 6422

- Ms. Cross, through her company, CAM 88 Inc., donated $100,000 to ICSS to purchase a house for her adult grandson with a developmental disability (as well as 2 other disabled men)
- ICSS provided a donation receipt to Ms. Cross
- Conflicting versions of events with respect to the donation
- The McKay Cross Foundation purchased a house and rented it to ICSS and sought return of donation
- ICSS brought summary judgment motion
- Court found no genuine issue requiring a trial and no obligation on ICSS to return the donation

Canada Without Poverty v. Attorney General of Canada, 2018 ONSC 4147

- The question of what “political activities” charities can and cannot engage in has been a source of debate and confusion for decades
- The Canada Without Poverty decision changed the landscape for charities and their role in political activities

Markou v The Queen, 2018 TCC 66

- Group of individuals participated in a leveraged donation program through which they made gifts to a registered charity and obtained charitable donation tax receipts
- Funding for the gifts were partly by cash and partly by interest-free loans
- Appellants not entitled to charitable donation tax credits because the transfer of the funds could not be split into 2 transactions and no part of the transfer was made with donative intent

McCuaig Balkwill v The Queen, 2018 TCC 99

- Issue was what was the fair market value of wine which was donated to 2 charities to be sold at auctions hosted by the charities?
- Court held that the fair market value should not be based on the LCBO's Private Ordering methodology, which is a monopoly, and relied on the CRA's expert instead

Thank You

- Questions?

Disclaimer

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Carters/Fasken Healthcare Philanthropy Checkup 2019
Toronto – May 22, 2019

Critical Privacy Update for Charities

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INTRODUCTION

- This presentation will be a high level overview of select privacy issues affecting charities
- Of general application as well as specific to the health context
- International as well as Canada/Ontario

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A. PIPEDA AND CHARITIES

- Well settled among charities lawyers that charities should be complying with PIPEDA
- The following discussion intended to lay the groundwork for understanding why

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1. Commercial Activity

- The *Personal Information Protection and Electronic Documents Act* ("PIPEDA") applies to any organization that collects, uses, or discloses personal information ("PI") in the course of commercial activities (s. 2(1))
- The nature of the organization (as for-profit or charity) does not determine whether PIPEDA applies
- If a particular activity is determined to be a "commercial activity", then charities could be caught within the scope of PIPEDA

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- Office of the Privacy Commissioner of Canada ("OPC") - "whether or not an organization operates on a non-profit basis is not conclusive in determining the application of the Act"
- Whether an organization is collecting, using or disclosing PI in the course of a commercial activity will vary depending on the facts of each case
- OPC found that a non-profit daycare organization was caught by PIPEDA
  - payment for child care services was seen as a commercial activity

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- OPC found that the non-profit Law School Admission Council was engaged in commercial activity
  - OPC stated that there is no exemption for non-profit or member-oriented organizations
- Charities are increasingly turning to sale of goods and services methods to earn revenue
  - increasing likelihood that revenue-generating activities may be caught by PIPEDA
- It is becoming increasingly complex for a charity (or the OPC or a court) to determine whether an activity falls within the scope of PIPEDA

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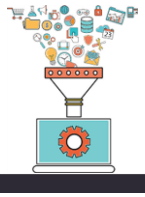
- No bright-line test that can be applied to determine whether an activity is commercial in nature.
- Whether an activity constitutes a commercial activity will vary with the facts of each case
- Uncertainty in predicting whether PIPEDA compliance is required
- Most prudent for charities to assume that the OPC or a court might find that they are engaged in commercial activity and that they are subject to PIPEDA



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- Further, charities in certain provinces may be subject to provincial legislation that has been declared to be substantially similar to PIPEDA
  - British Columbia *Personal Information Protection Act* ("BC PIPA") applies to charities
  - Alberta *Personal Information Protection Act* ("Alberta PIPA") applies to religious societies, housing cooperatives, unincorporated associations, federally incorporated not-for-profits, and organizations incorporated by private Acts

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- Charities should consider compliance with PIPEDA, whether required or not
- Charities should be complying with PIPEDA's underlying "fair information principles"
- By complying voluntarily with PIPEDA, charities can also avoid accidentally breaching PIPEDA requirements if their activities turn out to be commercial - avoiding possible fines and penalties

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2. Public Policy

- No convincing public policy justification for excluding charities from privacy law requirements
- *GDPR* applies to charities, as does BC PIPA, and many charities are also subject to Alberta PIPA
- Many health information custodians under the Ontario *Personal Health Information Protection Act, 2014* (PHIPA) and its counterparts in other provinces are charities
- Charities can and do comply with privacy legislation throughout Canada and elsewhere

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3. Stakeholder Expectations

- There are increasing stakeholder awareness and expectations around privacy, transparency and accountability
- Majority of Canadians make financial donations to charities or not for profits
- Majority of Canadians prefer to donate online
- The privacy interests of many Canadians will turn on the nature of the privacy protections, safeguards and protocols that Canadian charities have in place
- Consumers do not expect different standards of protection to apply depending on whether they are providing their credit card number to a charity or to an online retailer

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- In the 2018 Global Trends in Giving Report, 92 percent of donors said it was important for charities to protect their financial and contact information from data breaches
- By aligning with PIPEDA, charities can maintain the trust and confidence of their donors, clients and other stakeholders, and minimize the risk of reputational damage

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4. Litigation

- Risks associated with privacy breaches and violations including the risk of court action, class action litigation, court awarded damages and reputational injury
- Canadian courts showing an increasing willingness to protect privacy interests
- Privacy-related class action litigation on the rise in Canada - *e.g.* multi million dollar Winnipeg Royal Ballet class action brought by former students for intimate photos taken by instructor and posted online

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- Floodgates have been opened for new privacy-based lawsuits
- The rise of class action lawsuits to remedy privacy breaches poses an existential risk to all organizations
- The standards set out in PIPEDA will shape stakeholder expectations, and possibly court expectations, regarding how an organization should collect, use, disclose and safeguard PI

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B. DATA BREACHES

1. Mandatory Privacy Breach Reporting under PIPEDA

- On November 1, 2018, new breach notification, reporting and recordkeeping obligations came into force under PIPEDA and accompanying regulations
- PIPEDA applies to every organization – including charities - in respect of the personal information that it collects, uses or discloses in the course of commercial activities
- As noted, whether an activity is a "commercial activity" within PIPEDA will depend on the facts of each case – charities should not assume they are exempt from PIPEDA

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- Must report breaches to OPC and notify affected individual (and possibly third parties) when:
  - an organization experiences a **"breach of security safeguards"** involving PI under its control
  - if it is reasonable in the circumstances to believe that the breach creates a **"real risk of significant harm"** to an individual ("RROSH")
- "Breach of security safeguards" means loss of, unauthorized access to or unauthorized disclosure of PI
- "Significant harm" includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property

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- Relevant factors in determining whether a breach of security safeguards creates a RROSH include:
  - the sensitivity of the PI
  - the probability of misuse of the PI
  - any other prescribed factor (none so far)
- Obligations:
  - report the breach to the OPC;
  - notify the affected individual
  - notify any third party (*e.g.* the police, bank, credit reporting agency) that may be able to reduce or mitigate the harm
- Must retain records of all breaches for 24 months regardless of materiality
- Charities should consider voluntary compliance given increasing stakeholder awareness and expectations around privacy, transparency and accountability

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2. Mandatory Privacy Breach Statistics Reporting Under PHIPA

- For those in the health sector, mandatory breach reporting is nothing new
- Under s. 12(2) of PHIPA health information custodians ("HICs") were always required to notify the affected individual of the breach at the first reasonable opportunity and advise them of their right to make a complaint to the Information and Privacy Commissioner ("IPC")
- However, new rules requiring a HIC to notify the IPC of certain types of privacy breaches came into effect on October 1, 2017

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- HICs are now required to report to the IPC regarding seven categories of privacy breaches:
  - Personal Health Information (PHI) used or disclosed without authority
  - Theft of PHI
  - PHI further used or disclosed without authority after a breach
  - Pattern of similar breaches

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  - Disciplinary action against a member of a regulatory College relating to the breach
  - Disciplinary action against another employee or agent relating to the breach
  - Significant breach e.g. sensitive, large volume, PHI of many individuals, more than one HIC
- The new rules are set out in s. 12(3) of the *Personal Health Information Protection Act* ("PHIPA") and Sections 6.3 and 6.4 of Ontario Regulation 329/04 to PHIPA.

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- The regulation also requires each HIC to track privacy breach statistics starting January 1, 2018 and to report annually to the IPC on the number of times PHI in its custody or control was stolen, lost, used or disclosed without authority in the previous calendar year
- The reporting requirement commenced March 1, 2019 and continues annually thereafter

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- The IPC's guidance document provides more detail to HICs on the type of information to be tracked and reported
- For example, HICs are required to report the total number of incidents where PHI was stolen and, within that category
  - Thefts by strangers vs. by internal party
  - Thefts by ransomware or other cyber attacks
  - Theft of unencrypted mobile equipment
  - Theft of paper records
  - The number of individuals affected by each theft
- Similar breakdowns are required for lost PHI and uses and disclosures of PHI without authority
- Each incident is to be counted only once
- HICs are encouraged to track their statistics over the course of the year

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C. RELATED CASE LAW

- Privacy breaches can lead to investigations, complaints, litigation and class actions
- Following is a brief discussion of some recent rulings of interest to charities

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1. *Broutzas* v. *Rouge Valley Health System* 2018 ONSC 6315

- Patient contact information used to sell RESPs
- Proposed class action claimed tort of "intrusion on seclusion"
- Ontario Superior Court of Justice found no intrusion on seclusion - no significant invasion of personal privacy
- No reasonable expectation of privacy in contact information

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2. *R.* v. *Jarvis* - 2019 SCC 10

- High school teacher charged with voyeurism – secretly filmed students' breasts using pen camera
- Supreme Court of Canada held that the students had a reasonable expectation of privacy even in a public place (high school)
- Expands the range of settings and contexts in which individuals will arguably have a reasonable expectation of privacy
- Charities must be vigilant – risks posed by new technologies

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3. OPC Report Of Finding On Equifax And Consultation On Cross-Border Transfers

- On April 9, 2019 the OPC released the report of its investigation of the 2017 data breach involving Equifax Canada Co. and its US parent.
- Surprising reversal of OPC's long-standing position on the transfer of PI under PIPEDA
- OPC's 2009 Guidelines state that the cross-border transfer of PI for processing is a "use" requiring notice to consumers but not consent
- Had been well settled and relied upon by organizations in transferring PI to service providers and others

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- In Equifax the OPC concluded that the transfer of personal information for processing is actually a "disclosure" of PI within the meaning of PIPEDA and that Equifax Canada should have obtained express consent
- Going further, the OPC now states that it views all transfers for processing as disclosures requiring consent, including transfers within Canada, trans-border transfers, and transfers to related entities
- OPC also announced it is conducting a consultation on trans-border data flows as it "revisits" its policy position on this issue
- The consultation will be open until June 28, 2019
- If it stands this is a fundamental change that will have implications for charities that are subject to PIPEDA (or that choose to comply with PIPEDA for the reasons discussed) including:

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  - transfers of PI to a third party, including an affiliated entity, for processing or for other purposes, including trans-border transfers, would be considered to be a disclosure and consent, possibly express consent, would have to be obtained
  - the charity would have to provide clear information to stakeholders about the nature, purpose and consequences of the planned disclosure or cross-border disclosure, and its associated risks
  - the charity would remain accountable for the PI that was disclosed – would need robust written agreements with the third party including roles and responsibilities, reporting and oversight
- The OPC's new position may impose additional costs and obligations on organizations subject to PIPEDA

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D. THE GENERAL DATA PROTECTION REGULATION ("GDPR")

- The GDPR came into force on May 25, 2018 and harmonizes data protection and privacy laws across all EU jurisdictions
- GDPR strengthens and enhances data protection rights for individuals and imposes strict requirements on organizations that handle "personal data"
- GDPR applies to any "processing" of personal data - any operation performed on personal data including collection, use, disclosure or storage
- Organizations to which the GDPR applies must comply or face severe penalties

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1. Why Should Charities in Canada Care About the GDPR?

- Extra-territoriality - GDPR applies to organizations that are not established in the EU if they:
  - process personal data of individuals in the EU to offer them goods or services (even if no fee is charged); or
  - monitor the behaviour of individuals in the EU
- Merely having a website accessible in the EU will not constitute "offering goods or services." It must be apparent that the organization "envisages offering services to data subjects" in the EU

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- Under the new European Data Protection Board Guidelines (the "EDPB Guidelines"), in order for the application of the GDPR to be triggered
  - The key factor is whether the organization intends to "target" individuals in the EU, either by offering goods or services to them or by monitoring their behaviour

- The EDPB Guidelines set out factors that indicate that goods or services are being offered, including:
  - Mentioning the EU or a member state by name
  - Giving EU addresses or telephone numbers
  - Using an EU domain name such as ".eu"
  - Mentioning EU customers
  - Using EU languages or currencies
  - Offering delivery of goods in EU member states

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- If one or any combination of these factors is present with respect to a Canadian charity, the charity may be caught by the GDPR
- The second type of "targeting" activity triggering application of the GDPR is monitoring of data subject behaviour in the EU
- The behaviour monitored must relate to a data subject in the EU and must take place within the EU
- "Monitoring behaviour" includes tracking individuals on the internet to analyze or predict their personal preferences, behaviours and attitudes

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- EDPB Guidelines provide that "monitoring" means tracking a person on the internet but can also include tracking through other types of network or technology, such as wearable and other smart devices
- EDPB Guidelines – no "intention to target" for monitoring activity but use of the word "monitoring" implies having a specific purpose for the collection and re-use of data about an individual's behaviour within the EU
- EDPB Guidelines - not every online collection or analysis of personal data will automatically count as "monitoring"
  - there must be subsequent behavioural analysis or profiling involving that data, for it to constitute "monitoring"

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- But - examples of monitoring activities given by the EDBP Guidelines include "online tracking through the use of cookies or other tracking techniques such as fingerprinting"
- Not clear whether using cookies on a website accessible to EU residents is enough to trigger the application of the GDPR, potentially capturing Canadian charities
- Other examples of monitoring include targeting advertisements to consumers based on their browsing behavior, CCTV

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2. Implications for Canadian Charities

- If a Canadian charity is caught by the GDPR due to extra territoriality, it must designate a representative within the EU to oversee its GDPR compliance (and to facilitate enforcement?). Failure to do so is a breach of the GDPR, which could lead to penalties
- A Canadian charity may be exempted from this requirement if it can demonstrate that its data processing is "occasional", does not include large scale processing of certain categories of particularly sensitive data, and is unlikely to pose a risk to the rights and freedoms of natural persons
- GDPR imposes other obligations on organizations and provides individuals with a number of rights that organizations must comply with

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- If an organization is subject to the GDPR it should develop a compliance plan and must appoint a representative (unless exempted)
- Organizations that already comply with PIPEDA will be closer to compliance with GDPR but there will be gaps due to additional GDPR requirements that are not reflected in PIPEDA
- Failure to comply with GDPR can lead to fines of 4% of worldwide turnover or €20 million, whichever is higher
- If you think your charity may be subject to the GDPR, obtain legal advice

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E. ONTARIO HEALTH TEAMS

- Closer to home for Ontario health charities
- On April 18, 2018, Bill 74, *The People's Health Care Act, 2019* ("Bill 74") received Royal Assent. Schedule 1 of Bill 74 enacts the *Connecting Care Act, 2019* (the "Act"), which will come into force on a date to be set by proclamation
- The Act introduces Ontario Health Teams (OHTs) - groups of providers and organizations, including hospitals, physicians and home and community care providers, will work as one coordinated team and be clinically and fiscally accountable for the delivery of a full and coordinated continuum of care to a defined geographic population

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- Ontario Ministry of Health and Long Term Care (MOHLTC) has released a guidance document for health providers and organizations interested in applying to be an OHT
- The MOHLTC Guidance sets out a number of criteria that OHTs will be expected to meet, including "digital health"
- "Digital First" – including the provision of digital choices for patients to access care and health information and digital tools to communicate and share information among providers

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- At maturity OHTs will be required to use digital health solutions to support effective health delivery, ongoing quality and performance improvements and better patient experience
- Implications for privacy including secure sharing of PHI among multiple providers/OHT members, providing patients with access to digital PHI, formalizing privacy and security obligations of multiple providers/OHT members, possible designation as a single HIC

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CONCLUSION

- Privacy is an increasingly interesting and volatile area
- Even issues once thought to be well settled are in flux
- Donors and other stakeholders have increasing expectations regarding the use and protection of their personal information by charities
- GDPR could pose a significant risk due to its extra-territorial effect
- The stakes are high - possible reputational damage, loss of stakeholder confidence and possible fines and penalties

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Carters/Fasken Healthcare Philanthropy Checkup 2019
Toronto – May 22, 2019

The Coming of the ONCA (WE HOPE) and What to Start Thinking About

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OVERVIEW

- Status of ONCA
- Overview of ONCA Transition Process
- Overview of Key Elements of The ONCA
- Practical Steps For Transition

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A. STATUS OF ONCA

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") may finally be proclaimed in early 2020!!
- Ontario *Corporations Act ("*OCA") has not been substantively amended since 1953 - Part III of OCA governs non-share capital corporations
- New ONCA will apply to Part III OCA corporations
- Key timeline of ONCA
  - October 25, 2010 - ONCA received Royal Assent
  - 2013 - Original anticipated proclamation date, later delayed to January 2014
  - June 5, 2013 - Bill 85 introduced, proposing changes to ONCA, with ONCA to be proclaimed 6 months after enactment of Bill 85
  - May 2, 2014 - Ontario Legislature dissolved, Bill 85 died on the Order Paper

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  - September 2015 - Ministry announced that the ONCA would come into force after two things have happened
    - Legislature has passed technical amendments to the ONCA and related legislation
    - Technology at the Ministry is upgraded to support these changes and improve service delivery

    and the Ministry would provide the sector with at least 24 months' notice before proclamation
- Technical amendments
  - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017,* was introduced on September 14, 2017, and received Royal Assent on November 14, 2017
  - Bill 154 introduced changes to the OCA, ONCA and Ontario *Business Corporations Act*
  - See *Charity & NFP Law Bulletin* No. 409 at carters.ca

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- Technology - Following the Royal Assent of Bill 154, Ministry's website indicates that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery
- 24 month's notice - Ministry's website also states that it is working to bring ONCA into force as early as possible, with a target of early 2020 - thus giving NFP corporations at least 24 months' notice before the ONCA comes into force
- See Ministry's website for updates https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1
- Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force.

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B. OVERVIEW OF ONCA TRANSITION PROCESS

- ONCA applies automatically upon proclamation, except where overridden by existing corporate documents
- Optional transition process within 3 years of proclamation in order to make the necessary changes to their governing documents
- Prudent to go through the transition process by adopting new by-law and articles of amendment
- If no transition process taken in 3 years, then
  - Corporation will not be dissolved
  - LP, SLPs, by-laws and special resolutions will be deemed amended to comply with the ONCA - will result in uncertainty

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- Not moving the following provisions from by-laws or special resolutions to articles in order to comply with ONCA is fine until articles of amendment are endorsed
  1. Number of directors
  2. Two or more classes or groups of members
  3. Voting rights of members
  4. Delegates under section 130 of the OCA
  5. Distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution

- Share capital social clubs under the OCA will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations A*ct

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C. OVERVIEW OF KEY ELEMENTS OF THE ONCA

1. Incorporation and Corporate Powers

- Removes ministerial discretion to incorporate - incorporation will be as of right
- Obtain certificate of incorporation, not letters patent
- Only one incorporator is needed
- No need to file by-laws or financial statements with the government
- Default by-law will apply if no by-laws adopted within 60 days after incorporation
- Corporation has the capacity, rights, powers and privileges of a natural person, eliminates the concept of a corporation's activities being *ultra vires*
- ONCA will not apply to corporations sole "except as is prescribed"

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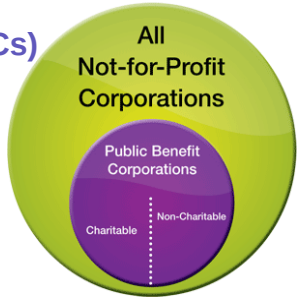
2. Public Benefit Corporations (PBCs)



- All corporations categorized into PBCs and non PBCs
- PBCs include
  - "charitable corporations" - common law definition
  - Non-charitable corporations that receive more than $10,000 (or another amount prescribed in the regulations) in a financial year in funding from public donations or the federal or a provincial or municipal government or an agency of such government - Need to monitor revenue sources and level annually

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- If a non-charitable corporation reaches threshold, deemed to be a PBC in the next financial year, as of the date of the first AGM in that financial year until the end of that financial year
- Public sources means
  - Donations or gifts from persons who are not members, directors, officers or employees of the corporation
  - Grants or similar financial assistance from the federal, provincial or municipal government or government agency

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- Consequences of being a PBC
  - Not more than 1/3 of the directors may be employees of the corporation or its affiliates
  - Higher thresholds for dispensing with appointing an auditor or a person to conduct a review engagement
  - For charitable corporations, net assets on dissolution must be distributed to a Canadian corporation that is a registered charity with similar purposes, or to the government or government agency
  - For non-charitable corporations, net assets on dissolution must be distributed to a PBC with similar purposes, to a Canadian corporation that is a registered charity with similar purposes, or to a government or government agency

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- Upon the liquidation and dissolution of a non-PBC, its net assets must be distributed in accordance with the articles, or if the articles do not address that issue, then rateably to the members (PBCs cannot do this)

3. Financial Review

- Members are required to appoint by ordinary resolution an auditor or person to conduct a review engagement at each annual meeting
- There are rules for exemption

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Public Benefit Corporation (PBC) with GAR of	$100,000 or less (ss.76(1)(b))	May, by extraordinary resolution (80%), decide not to appoint an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than $100,000 but less than $500,000 (ss.76(1)(a))	May dispense with an auditor and have someone else conduct a review engagement. This requires an extraordinary resolution (80%)	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)
	$500,000 or more (by implication of ss.68(1))	An auditor must be appointed annually	Audit is required

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Type of Corp/Gross Annual Revenues (GAR)		Requirements for an Auditor	Audit/Review Engagement
Non-PBC corporation with GAR of	$500,000 or less in annual revenue (ss.76(2)(b))	May, by extraordinary resolution (80%), dispense with an auditor	May dispense with both an audit and a review engagement by extraordinary resolution (80%)
	More than $500,000 in annual revenue (ss.76(2)(a))	May, by extraordinary resolution (80%), dispense with an auditor, and instead appoint a person to conduct a review engagement	May elect to have a review engagement instead of an audit by extraordinary resolution (80%)

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4. Number of Directors and Election

- Minimum 3 directors
- Articles may provide a maximum and minimum range
- For PBCs - not more than 1/3 of the directors may be employees of the corporation or its affiliates (charities can have none)
- Directors are elected at AGMs
- Can have ex-officio directors
- Directors may appoint directors between AGMs - 1 year term, 1/3 cap

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- If different groups of members elect x directors to the board, must structure membership as separate classes - need to consider workarounds
- Directors are no longer required to be members
- Maximum 4 year term for directors (but no limit on number of maximum terms)
- May have staggered terms
- Removal by majority vote of members
- Directors must consent to take office (all consents must be in writing)

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5. Directors and Officers – Powers, Duties and Defence

- Objective standard of care for directors and officers to
  - Act honestly and in good faith with a view to the best interests of the corporation
  - Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Reasonable diligence defence for directors
  - Not liable if fulfilled their duty if they exercise the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances
  - Defence includes good faith reliance on financial statements and reports of professionals

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6. Members

- A corporation must have members
- Articles must set out the classes of members
- If only one class of members, all must be voting
- If two or more classes, articles must provide voting right to at least 1 class
- By-laws must set out the conditions for membership
- Default 1 vote per member, unless articles provide otherwise

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- All classes of members (regardless of voting or non-voting classes) are entitled to vote separately as a class on fundamental changes and certain amendments to articles, including
  - Change to any rights or conditions attached to a class of members or change to the rights of other classes of members relative to the rights of a particular class of members
  - Amalgamation if affects membership rights
  - Continuance to another jurisdiction if affects membership rights
- Thus a class of members could reject a change - effectively resulting in a class veto
- Bill 154 proposes to delay implementation of all membership class votes for at least 3 years after proclamation of ONCA

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- Default rules to terminate membership and member's rights apply (unless articles or by-laws state otherwise) - upon death, resignation, expiry of membership term, liquidation or dissolution, expulsion, or termination
- Articles or by-laws may give directors, members or a committee the power to discipline members or terminate the membership
  - Must set out circumstances and the manner in which the power may be exercised
  - Power must be exercised in good faith and in a fair and reasonable manner - give 15 days notice of a disciplinary action or termination with reasons and must give opportunity for the member to be heard
  - Member may apply for a compliance or restraining order if that power is misused

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7. Members' Meetings

- Notice of meeting - 10 to 50 days before the meeting
- Record date - Directors may fix a "record date" of no more than 50 days before a members' meeting to determine who the members are for purpose of calling a members' meeting
- Voting – optional proxy votes, voting by mail, voting by telephonic or electronic means
- Proxyholders - May require only members are eligible to be proxyholders
- Circulation of financials - Financial statements, auditor's report or report of person who conducted a review engagement, and any further information required by the articles or by-laws must be given to members upon request at least 21 days (or other period prescribed in the regulations) before an AGM

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8. Members' Rights and Remedies

- Members may remove directors by simple majority vote (but not ex officio directors)
- Members have extensive rights and remedies - e.g.,
  - Requisition holding members' meeting (by 10% of voting right)
  - Submit proposals to amend by-laws or require any matter to be discussed at annual meetings (any one member)
  - Submit proposal to nominate directors (by 5% of voting right)
  - Access corporate records, including membership list

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- Dissent and appraisal remedy for non-PBCs - in relation to fundamental changes
- Derivative action, subject to faith-based defiance by religious corporations
- Compliance and restraining orders
- Court ordered wind-up and liquidation

• Must respect these rights, cannot contract out
• Having a smaller membership may reduce the exposure to these rights

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9. Conflict of Laws

• ONCA must be read in conjunction with applicable charity law
• If there is a conflict between the ONCA or its regulations and a provision made in any other legislation that applies to the following
  - A non-share capital corporation, then the provision in the other legislation prevails
  - A charitable corporation, then the legislation applicable to charitable corporations prevails
• Some provisions of the ONCA will not apply to charities

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D. PRACTICAL STEPS FOR TRANSITION

1. Collect governing documents
   - Letters patent, supplementary letters patent
   - All by-laws, including amendments
   - Collect governance related documents - e.g., organizational charts, policies, manuals
2. Review governing documents
   - Do they reflect current governance process? If not, what is current governance process?
   - Are changes desired?
   - Write them down, come up with a wish list

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3. Review the key features of the ONCA
   - This understanding will help the corporation determine how its governance structure and the content of the articles of amendment and by-laws will be impacted
   - Understanding the ONCA framework
     - Rules in the Act
     - Some details in the Regulations
     - Articles and by-laws
   - Three types of rules in ONCA
     - Mandatory rules - cannot be overridden by the articles or by-laws
     - Default rules - by-laws or articles can override
     - Alternate rules - articles/by-laws can include certain optional rules provided by ONCA

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4. Compare ONCA rules with current governance structure and practice
   - Are the current by-laws or the desired governance structure and process inconsistent with ONCA requirements?
   - What to do if current by-laws or desired governance does not comply with ONCA?
5. Prepare articles of amendment and new by-laws
   - Information on articles of amendment not available yet
   - By-law will need to be replaced or substantially revised because the ONCA differs from the OCA
6. Obtain membership approval and filings
   - Need special resolution to approve, then file articles (but not by-laws) with Ministry
   - Other filings, e.g., registered charities will need to file with Canada Revenue Agency

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CONCLUSION

- Monitor ONCA/Bill 154
- Have A committee in charge of the process
- Engage board of directors
- Prepare early
- Seek legal help

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Healthcare Philanthropy: Check-Up 2019

PPDDAs Have Arrived: The Evolution of Political Activities in Canada

May 22, 2019

Elena Hoffstein, Partner

Overview

1. Background: where did it all start and what got us to the recent initiatives.
2. Legislative Amendments
3. Draft Administrative Guidance Concerning Public Policy Dialogue and Development

Background

- 2012 CRA Audit programme to review political activities of charities
  - First targets were environmental charities
  - Later expanded to include poverty, human rights and international development charities.

Background

- On January 20, 2016, the government announced a winding down of the CRA review of registered charities' political activities
- Government clarified that of the 54 audits which were commissioned, of which 30 were completed, only 5 resulted in revocations
- September 2016 – December 2016 – public consultation on rules regarding involvement of charities in political activities
- On May 4, 2017, the CRA published the Report of the Consultation Panel on the Political Activities of Charities (the "Consultation Report")
- In conjunction with release of report, the government announced suspension of remaining audits of charities for political activities initiated in 2012

Background

- Recommendation No. 3

  "the Act should be amended by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to, and furthers, their charitable purposes".

Background

Other recommendations of Consultation Report:

- Changes to CRA compliance, appeals, audits, communication and collaboration
- Removal of legislative references to “non-partisan political activities” and “political activities”
- Modern legislative framework that focuses on charitable purposes rather than activities

Background

- July 16, 2018 The *Canada Without Poverty v. AG Canada* ("CWP") case struck down those provisions of the *Income Tax Act* (the "Act") that restricted the amount of non-partisan political activities that a registered charity could undertake. Provisions infringe on the charity's right of freedom of expression under ss. 2(b) of the Canadian *Charter of Rights and Freedoms*.

  "No justification of ss. 149.1(6.2) that draws a distinction between charitable activities and non-partisan 'political activities' in the nature of public policy advocacy".

Background

- August 15, 2018, Minister of National Revenue (MNR) announced intention to appeal this decision.
- In the meantime MNR indicated the appeal of the CWP decision would not change the direction of the government to take steps to remove the quantitative limits on political activities and to implement Recommendation no. 3 of the Consultation Report.
- Appeal later abandoned by government.

Evolution of the New Legislation

Prior Legislation

149.1 **(6.1)** For the purposes of the definition "charitable foundation" in subsection (1), where a corporation or trust devotes substantially all of its resources to charitable purposes and

(a) it devotes part of its resources to political activities,

(b) those political activities are ancillary and incidental to its charitable purposes, and

(c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the corporation or trust shall be considered to be constituted and operated for charitable purposes to the extent of that part of its resources so devoted.

Prior Legislation

(6.2) Charitable activities [limits to charity's political activities] --

For the purposes of the definition "charitable organization" in subsection (1), where an organization devotes substantially all of its resources to charitable activities carried on by it and

(a) it devotes part of its resources to political activities,

(b) those political activities are ancillary and incidental to its charitable activities, and

(c) those political activities do not include the direct or indirect support of, or opposition to, any political party or candidate for public office,

the organization shall be considered to be devoting that part of its resources to charitable activities carried on by it.

Evolution of the New Legislation

- September 14, 2018, the Department of Finance unveiled draft legislative proposals regarding political activities of charities (the "Proposals"). These Proposals would remove the reference to the "substantially all" test relating to the ability of charities to engage in political activities.
- The explanatory notes that accompanied this draft legislation clarified that the CRA would make the determination of permitted political activities by reference to the common law (of which there was little).

Evolution of the New Legislation

- A draft guidance, *Charities and public policy advocacy* was released on October 2, 2018 ("Draft Guidance"), which was intended to replace the current CRA guidance, CPS-022, *Political Activities*. However, this was later withdrawn.
- On October 25, 2018, the Department of Finance tabled a Notice of Ways and Means Motion to implement the changes noted above. The changes went beyond what was in the Proposals by providing that charitable activities include, without limitation, public policy dialogue and development activities carried on in furtherance of a charitable purpose.
- On December 13, 2018, Bill C-86, *Budget Implementation Act, 2018, No. 2* received Royal Assent. A number of the amendments are retroactive to prior years such as 2008 and 2012 and thus impact suspended audits.

Evolution of the New Legislation

- Bill C-86 amends the *Income Tax Act* in the following ways:
  - it removes the "substantially all" test in ss 149.1(6.1)(6.2) and (6.201);
  - it retains the prohibition on charities from devoting their resources to the direct or indirect support of or opposition to any political party or candidate for public office";
  - it removes the suspension for non-compliance with the "substantially all" test but permitted suspension for devotion of resources to partisan activities;

Evolution of the New Legislation

- it adds new definition of charitable activities to include public policy dialogue and development activities carried on in furtherance of a charitable purpose (the explanatory notes clarify that there are no limitations on this activity); and
- it adds a new ss. 149.1(10.1) which provides that "Subject to subsections (6.1) and (6.2) public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose“ (the explanatory notes clarify that these activities will not be considered to reflect a separate political purpose).

Evolution of the New Legislation

It should be noted that the legislation does not contain a definition of public policy dialogue and development activities but the explanatory notes indicate that these activities "generally involve seeking to influence the laws, policies or decisions of a government whether in Canada or a foreign country" by "providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions".

Draft Guidance

Draft Guidance

- On January 21, 2019, the CRA released a draft guidance, CG-027, *Public policy dialogues and development activities* (the "Draft Guidance"). The Draft Guidance was open to comments until April 23, 2019.
- The following are highlights of the Draft Guidance:
  - The Draft Guidance confirms that public policy dialogue and development activities (referred to as PPDDAs) include "seeking to influence the laws, policies, or decisions of a government, whether in Canada or a foreign country".

Draft Guidance

- PPDDAs can be described as activities a charity carries on to participate in the public policy development process, or facilitate the public's participation in that process.
- A charity can also transfer resources to another qualified donee to support the recipient's PPDDAs.
- As long as a charity's PPDDAs further its stated charitable purpose, the Act places no limit on the amount of PPDDAS a charity can engage in and expenditures toward PPDDAs will be included in determining whether a registered charity has met its disbursement quota.

Draft Guidance

The Draft Guidance includes the following list of PPDDAs from the Consultation Report:

- Providing information
- Research
- Disseminating opinions
- Advocacy
- Mobilizing others
- Representations
- Providing forums and convening discussions
- Communicating on social media

Draft Guidance

It is important to note that there are requirements that charities need to satisfy before they may engage in PPDDAs, namely that:

- the PPDDAs must relate to the charity's stated charitable purpose; and
- the PPDDAs, when considered together with the charity's stated charitable purpose, would meet the public benefit test of the CRA.

In other words, charities may not be established for the sole purpose of engaging in PPDDAs.

No Partisan Political Activity

No Partisan Political Activity

The Draft Guidance confirms that charities are prohibited from partisan political activity. They cannot "directly or indirectly support or oppose a political party or candidate for public office".

Examples of direct support include the following:

- endorsing a candidate over social media;
- telling people on a charity's website not to vote for a political party; and
- making a donation to a political party or a candidate's election campaign.
- making a donation to a political party or a candidate's election campaign.

No Partisan Political Activity

Examples of indirect support or opposition include the following;

- internal planning documents of a charity explicitly confirm it will oppose a political party that takes a different view on certain policy issues; and
- internal minutes of a directors meeting record decision to oppose a candidate in a provincial election.

No Partisan Political Activity

The Draft Guidance gives examples of allowed activities as follows:

- communicating about policy issues either in or outside of an election period, provided they do not identify a political party or candidate; and
- informing the public (on website or social media platforms) the policy positions of political parties and candidates so long as it does so in a neutral fashion, hold all candidates debates, or provide the voting record for all MPs or other levels of government on an issue.

Blogs/ Websites

Blogs/ Websites

The Draft Guidance clarifies that if a charity has a blog or website it is required to monitor these platforms and remove messages that support or oppose a political party or candidate for public office or post a notice that messages that support or oppose a political party or candidate will be removed.

Representatives of a Charity

Representatives of a Charity

The Draft Guidance also provides guidelines on how representatives of charities may personally engage in partisan political activities.

For instance, the Draft Guidance provides that while representatives of a charity, such as directors, are permitted to engage in political processes in their personal, private capacity, they:

- must not use the charity's resources (i.e., office space, supplies, equipment, publications, or human resources) to support their personal political involvement;
- must not use events or functions organized by the charity as a platform to voice their own political views; and
- are encouraged to indicate that their comments are personal rather than the view of the charity.

Finally, the Draft Guidance notes that while the Act permits PPDDAs without restriction there are other legal requirements that a charity must be aware of such as federal and provincial lobbying and election legislation and the common law in different provinces.

Effect of the Proposed Changes

Effect of the Proposed Changes

- The new legislation and the Draft Guidance are a welcome development and will give charities greater opportunities to fulfil their charitable purposes and advocate for the charitable causes they promote.
- Charities should revisit their policies on political advocacy as they may be too restrictive given the new rules.
- The Draft Guidance makes it clear that the government will rely on records to satisfy itself that charities are complying with the new law and charities must keep in mind that the onus is on them to ensure that the PPDDAs are done in compliance with the Act.

Effect of the Proposed Changes

- Records of minutes relating to political activities should demonstrate that the primary consideration in carrying on PPDDAs is to further the stated purposes of the charity and provide a public benefit.
- Absence of records make it difficult to support an argument that the charity is in compliance should an issue arise.
- Expenditures on PPDDAs should be properly characterized and tracked as they now qualify as charitable activities.

Effect of the Proposed Changes

- How will this impact new registrations?
  - The T2050 currently asks questions with respect to any intended “political activities” of a registered charity, which are further addressed in CRA’s guidance on completing the T2050
- How will this impact the T3010, given retroactive application of legislation?
- Both to be updated in the near future

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Political Activities of Charities

APRIL 9, 2019

Charities and Not-For-Profit Bulletin

Introduction

There has been a great deal of activity over the past few years over the role of charities in public policy debates and a number of significant developments recently that have changed the landscape for charities in this area.

Background

The precursor to the recent developments starts with the CRA audit programme of reviewing the political activities of charities which commenced in 2012. The first wave of audits targeted environmental charities but later expanded to include poverty, human rights and international-development charities. The government later clarified that while about 30 charities were audited with respect to political activities, only 5 resulted in determinations to revoke registration, all of which were primarily based on facts that were beyond their involvement in political activities.

In January 2016 the government announced a suspension of the audits and commenced a public consultation on the rules regarding the involvement of charities in political activities.

On May 4, 2017 the CRA published the Report of the Consultation Panel on the Political Activities of Charities (the "Consultation Report").

Recommendation no. 3 of the Consultation Report recommended that "the Act should be amended by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage, without limitation, in non-partisan public policy dialogue and development, provided that it is subordinate to, and furthers, their charitable purposes".

On July 16, 2018 the Ontario Superior Court of Justice struck down those provisions of the *Income Tax Act* (the "Act") that restricted the amount of non-partisan political activities that a registered charity could undertake. The *Canada Without Poverty v. AG Canada* ("CWP") case[1] provided that these provisions infringe on the charity's right of freedom of expression under ss. 2(b) of the Canadian *Charter* of Rights and Freedoms. The court also found that there was "no justification of ss. 149.1(6.2) that draws a distinction between charitable activities and non-partisan 'political activities' in the nature of public policy advocacy".

On August 15, 2018, the Minister of National Revenue announced its intention to appeal this decision[2] but the CWP decision would not change the direction of the government to take steps to remove the quantitative limits on political activities and to implement Recommendation no. 3 of the *Report of the Consultation Panel on the Political Activities of Charities* (the "Report")[3] (See Fasken Bulletin on "Political Activities of Charities: A New World" dated August 21, 2018). To this end, the Act was revised to effectively remove the distinction between 'non-partisan political activities' and 'charitable activities' by confirming that 'public policy dialogue and development' would be included in the definition of 'charitable activities'.

Evolution of the New Legislation

On September 14, 2018, the Department of Finance unveiled draft legislative proposals regarding political activities of charities (the "Proposals"). These Proposals would remove the reference to the "substantially all" test relating to the ability of charities to engage in political activities. The explanatory notes that accompanied this draft legislation clarified that the CRA would make the determination of permitted political activities by reference to the common law (of which there was little).

A draft guidance, *Charities and public policy advocacy* was released on October 2, 2018 ("Draft Guidance"), which was intended to replace the current CRA guidance, CPS-022, *Political Activities*. However, this was later withdrawn.

On October 25, 2018, the Department of Finance tabled a Notice of Ways and Means Motion to implement the changes noted above. The changes went beyond what was in the Proposals by providing that charitable activities include, without limitation, public policy dialogue and development activities carried on in furtherance of a charitable purpose.

On December 13, 2018, Bill C-86, *Budget Implementation Act, 2018, No. 2* received Royal Assent. A number of the amendments are retroactive to prior years such as 2008 and 2012 and thus impact suspended audits.

Bill C-86 amends the *Income Tax Act* in the following ways:

- it removes the "substantially all" test in ss 149.1(6.1)(6.2) and (6.201);
- it retains the prohibition on charities from devoting their resources to the direct or indirect support of or opposition to any political party or candidate for public office";
- it removes the suspension for non-compliance with the "substantially all" test but permitted suspension for devotion of resources to partisan activities;
- it adds new definition of charitable activities to include public policy dialogue and development activities carried on in furtherance of a charitable purpose (the explanatory notes clarify that there are no limitations on this activity); and
- it adds a new ss. 149.1(10.1) which provides that "Subject to subsections (6.1) and (6.2) public policy dialogue and development activities carried on by an organization, corporation or trust in support of its stated purposes shall be considered to be carried on in furtherance of those purposes and not for any other purpose"[4] (the explanatory notes clarify that these activities will not be considered to reflect a separate political purpose).

It should be noted that the legislation does not contain a definition of public policy dialogue and development activities but the explanatory notes indicate that these activities "generally involve seeking to influence the laws, policies or decisions of a government whether in Canada or a foreign country" by "providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions".

Draft Guidance

On January 21, 2019, the CRA released a draft guidance, CG-027, *Public policy dialogues and development activities* (the "Draft Guidance"). The Draft Guidance is open to comments until April 23, 2019.

The following are highlights of the Draft Guidance:

The Draft Guidance confirms that public policy dialogue and development activities (referred to as PPDDAs) include "seeking to influence the laws, policies, or decisions of a government, whether in Canada or a foreign country".

PPDDAs can be described as activities a charity carries on to participate in the public policy development process, or facilitate the public's participation in that process. A charity can also transfer resources to another qualified donee to support the recipient's PPDDAs. As long as a charity's PPDDAs further its stated charitable purpose, the Act places no limit on the amount of PPDDAS a charity can engage in and expenditures toward PPDDAs will be included in determining whether a registered charity has met its disbursement quota.

The Draft Guidance includes the following list of PPDDAs from the Consultation Report:

Providing information – charities may provide information to their supporters or the general public related to their charitable purposes (including the conduct of public awareness campaigns) in order to inform or persuade the public in regards to public policy. Such information must be truthful, accurate, and not misleading.

Research – charities may conduct research into public policy, distribute the research, and discuss the research and findings with the media and with others as they see fit. Note that to advance education as a charitable purpose, a charity's research must meet the criteria in Policy statement CPS-029, Research as a charitable activity.

Disseminating opinions – charities may express opinions on matters related to their charitable purposes to participate in developing public policy, as long as they draw on research and evidence and are not contrary to hate speech laws or other legitimate restrictions on freedom of expression.

Advocacy – charities may advocate to keep or change a law, policy, or decision, of any level of government in Canada, or a foreign country.

Mobilizing others – charities may call on supporters or the general public to contact politicians of all parties to express their support for, or opposition to, a particular law, policy, or decision of any level of government in Canada or a foreign country.

Representations – charities may make representations in writing or verbally to elected officials, public officials, political parties, and candidates, and appear at parliamentary committees, to bring their views to the public policy development process, and may release such materials publicly. Note that a charity engaging in this type of activity may be required to register as a lobbyist organization.

Providing forums and convening discussions – charities may invite competing candidates and political representatives to speak at the same event, or may request written submissions for publication, to discuss public policy issues that relate to the charity's purposes.

Communicating on social media – charities may express their views, and offer an opportunity for others to express their views, in regards to public policy, on social media or elsewhere.

It is important to note that there are requirements that charities need to satisfy before they may engage in PPDDAs, namely that:

- the PPDDAs must relate to the charity's stated charitable purpose; and
- the PPDDAs, when considered together with the charity's stated charitable purpose, would meet the public benefit test of the CRA.

In other words, charities may not be established for the sole purpose of engaging in PPDDAs.

No Partisan Political Activity

The Draft Guidance continues to confirm that charities are prohibited from partisan political activity. They cannot "directly or indirectly support or oppose a political party or candidate for public office".

Examples of direct support include the following:

- endorsing a candidate over social media;
- telling people on a charity's website not to vote for a political party; and
- making a donation to a political party or a candidate's election campaign.

Examples of indirect support or opposition include the following;

- internal planning documents of a charity explicitly confirm it will oppose a political party that takes a different view on certain policy issues; and

- internal minutes of a directors meeting record decision to oppose a candidate in a provincial election.

The Draft Guidance gives examples of allowed activities as follows:

- communicating about policy issues either in or outside of an election period, provided they do not identify a political party or candidate; and
- informing the public about policy positions of political parties and candidates so long as it does so in a neutral fashion, hold all candidates debates, or provide the voting record for all MPs or other levels of government on an issue.

Blogs/Websites

In addition the Draft Guidance clarifies that if a charity has a blog or website it is required to monitor these platforms and remove messages that support or oppose a political party or candidate for public office or post a notice that messages that support or oppose a political party or candidate will be removed.

Representatives of a Charity

The Draft Guidance also provides guidelines on how representatives of charities may personally engage in partisan political activities.

For instance, the Draft Guidance provides that while representatives of a charity, such as directors, are permitted to engage in political processes in their personal, private capacity, they:

- must not use the charity's resources (i.e., office space, supplies, equipment, publications, or human resources) to support their personal political involvement;
- must not use events or functions organized by the charity as a platform to voice their own political views; and
- are encouraged to indicate that their comments are personal rather than the view of the charity.

Finally, the Draft Guidance notes that while the Act permits PPDDAs without restriction there are other legal requirements that a charity must be aware of such as federal and provincial lobbying and election legislation and the common law in different provinces.

Effect of the Proposed Changes

The new legislation and the Draft Guidance are a welcome development and will give charities greater opportunities to fulfil their charitable purposes and advocate for the charitable causes they promote.

Charities should revisit their policies on political advocacy as they may be too restrictive given the new rules.

The Draft Guidance makes it clear that the government will rely on records to satisfy itself that charities are complying with the new law and charities must keep in mind that the onus is on them to ensure that the PPDDAs are done in compliance with the Act.

Records of minutes relating to political activities should demonstrate that the primary consideration in carrying on PPDDAs is to further the stated purposes of the charity and provide a public benefit.

Absence of records make it difficult to support an argument that the charity is in compliance should an issue arise.

Expenditures on PPDDAs should be properly characterized as they now qualify as charitable activities.

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[1] 2018 ONSC 4147.

[2] The appeal of the CWP decision was later abandoned.

[3] Report of the Consultation Panel on the Political Activities of Charities (31 March 2017).

[4] ss. 149.1(10.1) of the *Income Tax Act*.

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BULLETIN | THE HR SPACE

Dazed and Confused about Recreational and Medical Cannabis

READING TIME
3 MINUTE READ

JANUARY 24, 2019

Labour, Employment and Human Rights Bulletin

Recreational cannabis became legal in Canada on October 17, 2018. This has caused confusion for some employers about whether recreational and medical cannabis should be handled differently under human rights law. A guide from the Ontario Human Rights Commission explains how human rights laws apply to each. The guide was drafted for Ontario employers but the principles apply to all employers across Canada.

The recreational use of cannabis is not protected by human rights law unless there is an actual or perceived addiction. Employers can create rules about recreational cannabis usage at work. They can prohibit possession of any recreational cannabis at work even though possession of small amounts is now legal. They can also prohibit employees from reporting to work under the influence of recreational cannabis even if use is legal. Employers can discipline employees for breaching these or other similar rules.

Human rights law continues to apply to cannabis use in the same way it did prior to the legalization of recreational cannabis. It can apply to cannabis use for medical conditions that are a disability, and to cannabis use that is or may be perceived to be an addiction. This is the same way human rights law applies to any other drug use.

Medical Cannabis

Medical cannabis should be treated the same as any other substances used in the treatment of medical conditions. Employers still have the right to request confirmation of a disability-related need to use medical cannabis, and for information about any functional restrictions from the disability or medical cannabis use. Employers are not required to accommodate use of medical cannabis if it creates an undue hardship, for example, a serious safety risk.

If there is no undue hardship, the employer may be required to accommodate the use of medical cannabis including use at work and in different forms. For example, if the medical condition requires use of cannabis during working hours and there is no safety risk, the employer may have a duty to accommodate an employee smoking or vaping on break in compliance with smoke free legislation. Similarly, if an employee consumes medical cannabis through an edible, this may be permitted under the duty to accommodate if it does not interfere with the employee's safe performance of the essential duties of his or her job.

Addiction Issues in the Workplace

Human rights law across Canada prohibits discrimination, and impose a duty to accommodate individuals with disabilities. Disability is broadly defined and includes an addition to drugs. This means an employer has an obligation to accommodate, to the point of undue hardship, an employee who is addicted to recreational cannabis. The same procedural and substantive requirements apply to this type of accommodation as to any other disability.

Suspected or perceived addictions raise special issues. A suspected addiction may trigger a duty to ask an employee about a need for accommodation. A perceived addiction can also trigger this duty to ask about a need for accommodation. It is also protected from discrimination.

Takeaways for Employers

Employers must understand the essential differences between recreational and medical cannabis to effectively manage the impact of cannabis in the workplace.

Recreational cannabis use without an addiction is not protected by human rights law. Employers can discipline employees who breach their rules about recreational cannabis at work. It is only where there is an addiction issue or use is for a medical condition that could be a disability that human rights laws apply. In those situations, the employer must be cautious not to violate an employee's right to be free from discrimination on the basis of disability and of the duty to accommodate.

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BULLETIN | THE HR SPACE

Special Deliveries: What to Do When Employees are Dealing Drugs in the Workplace?

READING TIME
4 MINUTE READ

MARCH 28, 2019

Labour, Employment and Human Rights Bulletin

Drugs in the workplace is unfortunately a growing reality for many employers that often leads to a clash between employers' health and safety obligations and employees' right to privacy. This is especially true when employers wish to search employees' belongings.

It is a well-established principle that employees have a lower expectation of privacy in the workplace and that an employer can, unless there is a restriction in a collective agreement or in another legally binding source, perform a search of an employee's personal belongings when it has reasonable grounds to do so. This principle was recently reiterated and clarified in an arbitration decision rendered in Quebec[1] (available in French only).

Facts

The employee was a forklift operator in a meat processing plant. Due to recurring issues with drug use and drug trafficking in the workplace, the employer had recently amended its drug and alcohol policy and had asked the Quebec provincial police ("SQ") to intervene to attempt to eradicate the problem. The SQ sent an undercover agent to the employer's premises.

After a few months of undercover work, the SQ suspected that the employee was involved in drug trafficking at work. Also, other employees referred to the employee as the "postman" because he delivered drugs during his shift. After being informed that a drug transaction had taken place in the workplace, the employer searched several employees' lockers. During the search of the employee's locker, the employer found a scale and cannabis. The employer suspended the employee for one (1) month. In addition to the suspension, the employer requested that the employee sign a last chance agreement. When the employee refused to sign the agreement, the employer terminated his employment.

The union filed a grievance in which they contested the disciplinary measures, alleging that the search conducted by the employer violated the employee's right to privacy and other sections of the Quebec's *Charter of Human Rights and Freedoms*.

Decision

In his decision, the arbitrator applied the principle set out by the Supreme Court of Canada[2] that a breach of the right to privacy will be established only if the person has a reasonable expectation of privacy in a particular space (i.e. a locker). Also, the expectation may vary based on the circumstances.

It is well recognized that a person's expectation of privacy is lower in the workplace. In matters of drug and alcohol in the workplace, employers have the obligation to take the necessary measures to protect the health and safety of their employees in the workplace. Such measures often include the adoption of policies that prohibit the consumption, possession and sale of drugs and alcohol, similar to the one that the employer had adopted in this case. The arbitrator found that an employer can "[translation] *legitimately conduct a search if it has reasonable grounds to believe that a corporate rule has been violated or is being violated, and that the proof of that violation is found in a specific place or on the person of the employee*". Such reasonable grounds may arise from information provided by employees or from the employer's personal observations or from a combination of both.

In this case, the evidence revealed that the employer was dealing with a serious drug trafficking problem that required the intervention of the provincial police. The employer also had to act quickly considering the safety sensitivity of the workplace. Furthermore, the employer's decision to search the employee's locker was based on multiple reliable sources of information. Therefore, the arbitrator found that the employer had reasonable grounds to believe that the employee had violated its drug and alcohol policy and, consequently, to search his locker. The employee was aware of the policy and, following the search, had clearly violated it.

The arbitrator found that the employee could not refuse to sign the last chance agreement unless it contained conditions that violated rules of public order, the law or the collective agreement. The arbitrator found that the return to work conditions were not unreasonable and were imposed in good faith by the employer. This was because the employer operated a safety sensitive business, had a duty to protect the health and safety of its employees, the employee had issues with drugs in the past, and the employer had to ensure that the employee would not commit such acts in the future. Therefore, the employer's decision to terminate the employee's employment was justified.

Takeaways for Employers

This decision predates the legalization of cannabis in Canada. Despite the fact that cannabis is now legal, employers can still set rules governing possession, use, and impairment by cannabis at work. The decision is a reminder of the importance of having clear and updated policies on the matter, the limits of employees' expectations of privacy in the workplace, and the weight that is given to employers' health and safety obligations. With reasonable grounds to believe that an employee is in violation of a drug and alcohol policy, employers can search the belongings of its employees

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[1] *Viandes du Breton inc. et Syndicat des travailleuses et travailleurs de Viandes du Breton (CSN),* 2018 QCTA 386

[2] *R. v. M. (m.R.)*, [1998] 3 R.C.S. 393

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BULLETIN

Privacy Commissioner Issues Key Guidelines for Consent and Inappropriate Data Practices

READING TIME
9 MINUTE READ

JUNE 5, 2018

Privacy and Cybersecurity Bulletin

On May 24, 2018, the Office of the Privacy Commissioner of Canada published two important guidance documents in respect of activities regulated pursuant to the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"):

- Guidelines for Obtaining Meaningful Consent (the "Consent Guidelines"), which includes a checklist for consent and is effective on January 1, 2019; and
- Guidance on Inappropriate Data Practices: Interpretation and Application of Subsection 5(3) effective on July 1, 2018 (the "Data Practices Guidance").

The publication of the above guidance documents comes on the heels of the Commissioner's consultation on consent and the recent updating of guidance on "Recording of Customer Telephone Calls". In this bulletin, we review the Consent Guidelines and Data Practices Guidance and highlight implications for organizations that are subject to PIPEDA.

Guidelines for Obtaining Meaningful Consent

The Consent Guidelines provide that organizations should follow seven key principles in seeking to obtain meaningful consent under PIPEDA. These are reviewed below.

1. Emphasize key elements

Emphasizing key elements in consent (and any associated public-facing privacy policy) can improve an individual's understanding of the consequences of giving consent, and thereby contribute to meaningful consent. The Consent Guidelines provide that organizations must generally put particular emphasis on the following elements:

a) What personal information is being collected, used and disclosed: Organizations should identify all information that will or may be collected, with sufficient precision to permit individuals to understand what they are consenting to.

b) The purpose for which the information is being collected, used or disclosed: Organizations should describe these purposes in sufficient detail to ensure that individuals have a meaningful understanding of them; vague descriptions should be avoided. Any purposes that are not integral to the provision of the organization's products or services, and any uses that would not be reasonably expected given the context, should be emphasized.

c) Information-sharing with third parties: Where organizations share information with a large number of third parties, or where the parties may change over time, an organization should list the types of organizations with which they are sharing information, and give users the ability to access more details if they desire. Any third parties that will be using the information for their own purposes, rather

than for advancing the purposes of the first party, should be emphasized.

d) Whether there is a risk of harm arising from the collection, use or disclosure of information: Organizations should consider emphasizing harms that may be associated with the activity for which consent is sought, including both direct as well as indirect harms (e.g. unauthorized use of information). The risk of harm refers to any risk of significant harm (that is, more than minimal or a mere possibility) after accounting for any mitigating procedures taken by the organization. Individuals must be aware of the consequences of their consent in order for that consent to be meaningful. This includes indirect risks, such as third party misuse of information.

2. Allow individuals to control the level of detail

Organizations should make privacy disclosures more manageable and accessible by allowing individuals to decide how, when, and how much information about an organization's privacy practices the individual accesses at any given time. Layered disclosure is one such approach. Layered disclosure starts by displaying more abstracted, general information, and allows individuals to obtain more detail on discrete topics if they wish. Additionally, privacy disclosures should be readily available so that an individual can return and re-read about an organization's privacy practices. This approach supports meaningful consent, as it allows individuals an opportunity to reconsider and potentially withdraw consent if they object to any of the organization's practices.

3. Provide individuals with clear options to say 'yes' or 'no'

Organizations must not require individuals to consent to the collection, use or disclosure of more information than is necessary for the product or service which is being provided. For a collection, use, or disclosure to be "necessary", it must be integral to the provision of that product or service (i.e. required to fulfill the explicitly specified and legitimate purpose). If any other information is to be collected on an opt-in or opt-out basis, individuals should be able to choose whether or not to consent to the collection of this additional information, and this choice should be clear and accessible, unless an exception to consent applies.

4. Be innovative and creative

Organizations should think about moving away from simply transposing paper-based policies into their digital environments, and seek innovative ways to obtain consent. 'Just-in-time' notices, for example, are an alternative to obtaining all consents 'up-front'. For example, a cell phone application that, rather than asking for access to location data upon installation, asks for this consent the first time the individual attempts to use the application in a way which requires location data, provides more context to the individual and a better understanding of what is being collected and why. Other interactive tools such as videos, or click-through presentations which explain privacy policies, and mobile interfaces, could also be used. Additional information regarding mobile apps is provided in the Commissioner's guidance: "Seizing Opportunity: Good Privacy Practices for Developing Mobile Apps".

5. Consider the target individual's perspective

To ensure that consents and privacy disclosures are user-friendly and understandable, organizations must be mindful of the perspective of target individuals. This involves the use of an appropriate level of language, clear explanations, and a comprehensible display. It also involves consideration of the types of devices that target individuals will be using (laptops, mobile phones, tablets, etc.). Organizations may wish to understand the perspective of target individuals by consulting with them, running pilot tests and focus groups, engaging with privacy experts, and following industry best-practices.

6. Make consent a dynamic and ongoing process

Consent should be an ongoing, dynamic and interactive process (and not a one-off process). Periodic reminders and refreshers about an organization's privacy practices should be implemented, as well as an ongoing and practical ways for individuals to obtain more information.

7. Be accountable: stand ready to demonstrate compliance

Organizations should be ready to prove that they have obtained meaningful consent, including showing that their consent process is understandable and accessible. One such way to do this is for organizations to be aware of these guidelines, as well as the guidance provided by the Commissioner in "Getting Accountability Right with a Privacy Management Program", and to show that they have

followed them.

Additional topics addressed in the Consent Guidelines

Appropriate form of consent

In addition to the seven guiding principles above, the Guideline reminds organizations of the need to consider what type of consent is appropriate given the circumstances. While in some situations implied consent may be adequate, there are some circumstances which will generally require express consent, including: (a) when the information being collected, used or disclosed is sensitive in nature; (b) when an individual would not reasonably expect certain information to be collected, used or disclosed given the circumstances, and (c) when there is a more than minimal risk of significant harm.

Consent and children

Another contextual factor is whether the target individuals include children. When children are involved, organizations should take into account the fact that children will generally have different emotional and cognitive processing abilities than adults. This affects their ability to understand how their personal information is being used, and hence will affect their ability to give meaningful consent. The OPC requires that, for children 13 and under, a parent or guardian give consent on the child's behalf. When the target individuals include minors who are able to provide consent themselves, organizations should still take their maturity into account, and should be ready to show how they have done so.

At the conclusion of the Consent Guidelines, the Commissioner provides a useful checklist of "Should do" and "Must do" action items for organizations seeking to obtain meaningful consent under PIPEDA.

Guidance on Inappropriate Data Practices

Concurrently with publishing the Guidelines, the Commissioner published the Data Practices Guidance, which sets out various considerations that organizations should keep in mind when assessing whether a certain practice may be contrary to subsection 5(3) of PIPEDA.

Subsection 5(3) of PIPEDA is an overarching requirement which provides that: "An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances." In order words, even with an individual's consent, there are certain purposes that would be unacceptable under PIPEDA on the grounds that a reasonable person would not consider them to be appropriate.

Like meaningful consent, whether or not a purpose is inappropriate requires a contextual approach. As summarized in the Data Practices Guidance, the following factors have been applied by the Commissioner and the courts:

- Whether the organization's purpose represents a legitimate need / bona fide business interest;
- Whether the collection, use and disclosure would be effective in meeting the organization's need;
- Whether there are less invasive means of achieving the same ends at comparable cost and with comparable benefits; and
- Whether the loss of privacy is proportional to the benefits (which includes consideration of the degree of sensitivity of the personal information at issue).

In addition, as set forth in the Data Practices Guidance, the Commissioner has established a list of prohibited purposes under PIPEDA, which they have deemed "No-Go Zones." The Commissioner considers that a reasonable person would not consider the collection, use or disclosure of information to be appropriate in these circumstances. Currently, the list of "No-Go Zones" may be summarized as follows:

- Collection, use or disclosure that is otherwise unlawful (e.g. violation of another law);
- Collection, use or disclosure that leads to profiling or categorization that is unfair, unethical or discriminatory in a way which is contrary to human rights law;

- Collection, use or disclosure for purposes that are known or likely (on a balance of probabilities) to cause significant harm to the individual (e.g. bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on credit record or damage to or loss of property);
- Publishing personal information with the intended purpose of charging individuals for its removal (i.e. "blackmail");
- Requiring passwords to social media accounts for the purpose of employee screening; and
- Surveillance by an organization through the use of electronic means (e.g. keylogging) or audio or video functionality of the individual's own device.

While these "No-Go Zones" are important to note, organizations should also remember that the list is not binding, determinative or exhaustive, and that subsection 5(3) requires a contextual analysis. What a reasonable person would consider appropriate is a flexible and evolving concept which will be revisited by the Commissioner from time to time.

Implications for organizations subject to PIPEDA

The Commissioner's guidance documents do not have the force of law and are not binding on organizations. However, they plainly set out the Commissioner's expectations, provide a benchmark against which the Commissioner will assess practices in the context of a complaint, audit or investigation, and provide a useful reference for organizations seeking to comply with PIPEDA.

It is also important to note that, over time, previous Commissioner guidance documents, including "Guidelines for Processing Personal Data Across Borders", have come to set the *de facto* standard and practices under PIPEDA. Organizations should familiarize themselves with the new guidance documents and consider steps to amend practices as necessary. For example, organizations which use mobile and online interfaces can refer to work which is already being done regarding the implementation of privacy icons, and privacy dashboards to help obtain meaningful consent. These and other potential solutions are discussed in the Commissioner's discussion paper, "Consent and Privacy".

Finally, in considering compliance with the new guidelines discussed in this bulletin, organizations should be mindful of the consequences of failing to obtain meaningful consent or failing to process information for appropriate purposes as required by PIPEDA. For example, a failure to obtain meaningful consent from a large number of individuals could undermine the basis upon which key business operations are premised. This could not only render those operations non-compliant with PIPEDA but also give rise to class action litigation risk for a privacy breach (e.g. processing personal information for commercial purposes without adequate consent).

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BULLETIN

Having Privacy in Public: Limits to Unwanted Surveillance in Public Spaces

READING TIME
5 MINUTE READ

MARCH 22, 2019

Privacy and Cybersecurity Bulletin

Summary

People continue to have a reasonable expectation of privacy even when they are in a public space or a space under general surveillance.

Widespread use of surveillance technology in areas open to the gaze of others does not mean there can be no reasonable expectation of privacy.

The Supreme Court of Canada has just reaffirmed that individuals in Canada rightly have an expectation of privacy, even in public areas where surveillance technology may be in use.

The Context

Private sector organizations, employers and public institutions have long taken advantage of readily-available and increasingly accurate surveillance technology. Its careful deployment for legitimate uses has been cautiously approved by the courts and privacy regulators across Canada to ensure that its privacy-invasive characteristics are kept to a minimum necessary in various circumstances.

Surveillance may be used legally, for example, to monitor the integrity of buildings and objects. It also assists in ensuring the safety and security of the persons using them. Rules that may apply include giving notice that surveillance is taking place, giving access to personal images on request and erasing images or recordings after a reasonable time period. Surveillance is also often used in the context of investigations.

However, over time the generalized recourse to various means of surveillance, from the use of sophisticated cameras to drones to web cams integrated into everyday settings has led people to expect that they may be subject to a greater degree of scrutiny or even recording when they are in a public place.

The relatively low cost and miniaturisation of surveillance technology makes it accessible to many consumers. Its ubiquitousness has led some observers to suggest that an ordinary person may not have much of an expectation of privacy when she or he is in public. Just a part of contemporary life, this school of thought said, where privacy is dead and individuals can expect to be under constant scrutiny.

Privacy Expectations in Public Places

The Supreme Court of Canada states that privacy is not an all or nothing concept in Canada. It recognizes that privacy comes with many variations and gradations, depending on a variety of factors. And importantly, by being in a public or semi-public space, a person does not have all expectations of privacy negated with regards to either observation or recording.

A recent privacy case involved interpreting the Criminal Code in regards to a category of sexual offence, voyeurism. The Crown's accusation of voyeurism against a teacher in the *R. v Jarvis* case was the occasion for the Supreme Court to develop, in some detail, the multiple considerations which form part of the composite expectation of privacy an individual may have in many different settings. The guidance given in this case is useful for organizations, employers and administrators who have recourse to surveillance for legitimate safety, security or other purposes, and yet who wish to ensure that individual privacy expectations are still respected.

The Circumstances of the Privacy Violation

Jarvis was a teacher in a middle-school. He used a camera hidden in a pen to take surreptitious pictures of young teen-aged women. Taking images from different angles, he focussed almost exclusively on their breasts. The students were in semi-public spaces within the school: hallways, the cafeteria, or outside but on school grounds.

The school had deployed a video surveillance system of its common areas. Signs indicated that security cameras were in use on a 24 hour basis. There was no audio recording. The school did not allow teachers to change the direction of the cameras nor access the images for their personal use. It also prohibited teachers from making personal videos of students.

Retaining Privacy in Various Settings

An element of the criminal offence of voyeurism is that it must take place in circumstances that give rise to a reasonable expectation of privacy. Can a person be in a public space or a semi-public space and still retain a reasonable expectation of privacy? Yes, said the Supreme Court of Canada, affirming that Parliament had adopted this offence especially to ensure privacy and sexual integrity in an age of ever-evolving technology.

Privacy expectations can be determined by a long list of factors. The Court listed the following and suggested there may be yet others:

- location of the person,
- the nature of the impugned conduct such as observation or recording,
- awareness or consent of the person,
- the manner in which the observation or recording was done,
- subject matter or content of the observation or recording,
- applicable rules, policies and regulations,
- relationship between the person and the perpetrator,
- purpose of the observation or recording, and
- the personal attributes of the person observed or recorded. For example, are they children or young people?

In this case, the young students were at their school, yet subject, without their awareness or consent, to the surreptitious recording of their bodies for sexual purposes by a person whom they trusted, a teacher (who was prohibited by the school from making personal videos of students). Their reasonable expectation of privacy was infringed.

Lessons for Organizations

Organizations, employers and administrators in charge of spaces where security surveillance is employed and its use is posted must pay attention to the possible presence of invasive observational and recording technology used by persons in the space and the potential for vicarious liability for employee conduct. For employers, this means having a clear policy direction that surreptitious observation and recording of fellow employees, clients or users without their consent is, of course, prohibited.

The Jarvis decision also has important implications for shaping and potentially expanding civil liability and responsibility, in tort and otherwise, for privacy violations in Canada that require consideration of whether a plaintiff had a reasonable expectation of privacy.

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Updating Charities and Not-For-Profits on recent legal developments
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APRIL 2019

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Monday, May 6, 2019

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RECENT PUBLICATIONS AND NEWS RELEASES

OPC Signals Policy Change for Data Transfers Across Borders

By Esther Shainblum

On April 9, 2019, the Office of the Privacy Commissioner of Canada ("OPC") released the report of its investigation of the 2017 data breach involving Equifax Canada Co. ("Equifax Canada") and its US-based parent company, Equifax Inc. (the "Report"). The Report signals a sea change on the part of the OPC with respect to cross-border transfers of personal information – a change that could have significant potential implications for charities and not-for-profits.

The Report also identifies a number of contraventions of the *Personal Information Protection and Electronic Documents Act* on the part of both Equifax Canada and Equifax Inc. This *Charity & NFP Law Bulletin* provides an overview of the Report and the potential impact on charities and not-for-profits.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 445.

Legislation Update

By Terrance S. Carter

Bill C-97, *Budget Implementation Act, 2019, No. 1*

On April 8, 2019, Bill C-97, *Budget Implementation Act, 2019, No. 1* ("Bill C-97") was introduced in the House of Commons and received first reading. Bill C-97 proposes to implement certain provisions that impact charities and not-for-profits that were introduced in the 2019 Federal Budget ("Budget 2019"). In this regard, Bill C-97 implements legislative amendments to the *Income Tax Act* and *Excise Tax Act* that were included in the Notice of Ways and Means Motions in Budget 2019 that include: (1) support for Canadian journalism through qualified donee status, a refundable labour credit, and personal income tax credit for digital subscriptions; (2) legislative amendments to remove the requirement that property be of "national importance" in order to qualify for the enhanced tax incentives for donations of cultural property; and (3) health-related proposals, such as the medical expense tax credit for medical cannabis and tax exemptions for certain biologicals, medical devices and health care services.

Additionally, and as proposed in Budget 2019, Bill C-97 includes draft legislative amendments to strengthen Canada's anti-money laundering and anti-terrorist financing regime. In this regard, and of interest to charities and not-for-profits, the *Criminal Code of Canada* will be amended to criminalize

concealment of the origin of funds in the case of recklessness. Additionally, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* will be amended to allow the Governor in Council to make regulations defining "virtual currency" and "dealing in virtual currencies", and to amend disclosure obligations relating to designated information.

Further details on the above proposed changes, as introduced in Budget 2019, are available in *Charity & NFP Law Bulletin* No. 443.

Proposed Regulatory Amendments under the *Child Care and Early Years Act, 2014* and *Education Act*

On April 4, 2019, the Ontario Regulatory Registry announced a consultation to seek feedback on proposed regulatory amendments under the *Child Care and Early Years Act, 2014* ("CCEYA") and *Education Act*. The proposed amendments are based on feedback from previous consultations with the child care sector, and are intended to ease compliance for licensees and providers, which may include charities and not-for-profits.

The amendments would reduce administrative burdens by removing duplicative requirements under O Reg 137/15 (General) and O Reg 138/15 (Funding, Cost Sharing and Financial Assistance) under the CCEYA. Further, the amendments would increase the choice and availability of child care services by giving licensees and providers the flexibility to offer programming options that meet their community's needs through amendments to O Reg 137/15 and O Reg 138/15 under the CCEYA, and O Reg 221/11 (Extended Day Programs) under the *Education Act*. Finally, the amendments would clarify and align requirements in order to create a consistent standard of care across Ontario for all child care settings through amendments to O Reg 137/15 under the CCEYA and O Reg 221/11 under the *Education Act*.

Ontario Bill 66, *Restoring Ontario's Competitiveness Act, 2019*

On April 3, 2019, Ontario Bill 66, *Restoring Ontario's Competitiveness Act, 2019* was brought into force after receiving Royal Assent. Bill 66 amends the *Employment Standards Act, 2000*, among other acts, to reduce the regulatory burden on businesses, including charities and not-for-profits, when entering into work hour agreements and averaging agreements with employees, as well as with regard to employment standards educational posters required under the *Employment Standards Act, 2000*. Further details on the changes introduced through Bill 66 are available in the January 2019 *Charity & NFP Law Update*.

CRA Publishes Compliance Guides on Digital Currency

By Ryan M. Prendergast

On March 8, 2019, the Canada Revenue Agency ("CRA") published an information website on *Digital Currency,* which defines "digital currency" by way of reference to Bitcoin stating that "Bitcoins are not controlled by central banks or any country, […] can be traded anonymously, […] can be bought and sold in return for traditional currency, and can also be transferred from one person to another." The information website further states that transactions involving digital currency are governed, for tax purposes, by the rules for barter, which are described in the CRA's Interpretation Bulletin IT-490, *Barter Transactions*. The information website also states that gains or losses resulting from buying and selling digital currency like a commodity may constitute taxable income or capital, as determined in accordance with Interpretation Bulletin IT-479R, *Transactions in Securities*. Finally, the information website states that the CRA is very active in pursuing cases of non-compliance.

On the same date, the CRA also released its *Guide for cryptocurrency users and tax professionals* (the "Cryptocurrency Guide") which defines "cryptocurrency" as a type of "alternative currency" such as Bitcoin, and as a "digital asset" (also referred to as a "crypto asset" or "altcoin"), that works as a medium of exchange but that is not legal tender. This suggests that the CRA considers the terms "digital currency", "digital asset" "cryptocurrency", "crypto asset", "alternative currency", and "altcoin", at least to some extent, interchangeable.

The Cryptocurrency Guide states that the CRA "generally" treats cryptocurrency like a commodity for purposes of the ITA and that transactions involving cryptocurrencies are "generally" treated as either business income or capital gain, depending on the circumstances. In this regard, the Cryptocurrency Guide describes when earnings or losses from a disposition of cryptocurrency may be considered either business income/losses or capital gains/losses, including a number of examples involving cryptocurrency trading and cryptocurrency mining, and when cryptocurrency should be considered capital property or inventory.

The Cryptocurrency Guide further states that "in general" possessing or holding a cryptocurrency is not taxable and that only a disposition "could" have tax consequences, such as with regard to: i) the sale or gift of cryptocurrency; ii) a trade or exchange of cryptocurrency, including the exchange of one type of cryptocurrency for another; iii) the conversion of cryptocurrency into government-issued currency, such as Canadian dollars; and iv) the use of cryptocurrency to buy goods or services.

Regarding gifts of cryptocurrency, and of interest to charities and not-for-profits, CRA document 2013-0514701I7 provides that the fair market value of Bitcoin at the time of the transfer to a qualified donee must be used to determine the eligible amount of the gift for tax purposes and, subject to the deeming rule applicable to gifts in kind, the eligible amount of the gift may be less than its fair market value. The CRA website *Determining fair market value of non-cash gifts* provides additional information on gifts in kind.

As such, the Cryptocurrency Guide recommends that reasonable methods be used in order to value all transactions for each type of cryptocurrency or separate digital asset, for example, by consistently choosing an exchange rate taken from the same exchange broker or an average of midday values across a number of high-volume exchange brokers. The Cryptocurrency Guide also requires that adequate books and records be kept for all cryptocurrency transactions for at least 6 years, including the date of the transactions, the receipts of purchase or transfer of cryptocurrency, the value of the cryptocurrency in Canadian dollars at the time of the transaction, the digital wallet records and cryptocurrency addresses, a description of the transaction and the other party (even if it is just their cryptocurrency address), the exchange records, accounting and legal costs, and the software costs related to managing tax affairs.

Neither the Cryptocurrency Guide nor the webpage on Digital Currency address issues related to cryptocurrency and registered charities. However, reference to these documents will be important in the context of registered charities receiving gifts of and receipting cryptocurrency. In this regard, the reaffirmation that cryptocurrency is considered by the CRA to generally be a commodity and subject to the deeming rules applicable for gifts in kind will be significant in issuing receipts, as well as the books and records that should be kept related to transactions in order to support any valuation given.

CRA Responds to 2017 Consultation Panel Report on Political Activities of Charities

By Terrance S. Carter

On March 7, 2019, the Minister of National Revenue issued its response (the "Response") to the Report of the Consultation Panel on the Political Activities of Charities published in May 2017 (the "Report"). The Report provided various recommendations on the administrative and legislative framework governing political activities at the time, discussed in *Charity & NFP Law Bulletin* No. 403. While the Federal Government had committed to providing a formal response in 2017, that timeline was not kept. However, although an official written response was not provided, the government did take various steps in response

to the recommendations in the Report. The Response now marks the government's final response to each of the four recommendations outlined in the Report.

Recommendation 1 is to "revise the CRA's administrative position and policy." The Response points to the draft guidance on public policy dialogue and development activities ("PPDDAs"), discussed in *Charity & NFP Law Bulletin* No. 438, for which the CRA is currently accepting feedback.

Recommendation 2 is to "implement changes to the CRA's administration of the *Income Tax Act* (ITA)." The Response indicates that funding of up to $5.3 million is being provided over the next five years to the CRA for enhanced sector outreach and education. The CRA has also implemented the Charities Education Program. Further, the Response states that the additional administrative changes and initiatives will be made, such as new communication and engagement methods, and updating its webpages that discuss the audit process and other topics of interest to Indigenous communities.

Recommendation 3 is to "amend the [ITA] by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in [PPDDAs]." The Response points to the legislation introduced through Bill C-86, *Budget Implementation Act, 2018*, which implemented the PPDDA regime, also discussed in *Charity & NFP Law Bulletin* No. 438. It further indicates that the suspension on the Political Activities Audit Program has been lifted and that affected charities will be contacted by the CRA. Finally, the Response also states that, as a result of the Bill C-86 amendments, the government has discontinued its appeal in the *Canada Without Poverty v AG Canada* decision, discussed in *Charity & NFP Law Bulletin* No. 425.

Recommendation 4 is to "modernize the legislative framework governing the charitable sector." The Response states that the government is establishing a permanent Advisory Committee on the Charitable Sector, as discussed in the March 2019 *Charity & NFP Law Update*. $3.2 million in new funding will be provided to the CRA over the next five years to support this initiative.

While the Response has been long-awaited, it is clear that the government has taken the recommendations of the Report into consideration through various government initiatives. The Response therefore brings a certain degree of finality to the debate over political activities and the evolution of PPDDAs over the last two years, and provides a helpful overview of the work that the government has undertaken in response to the Report.

Ontario Bill 47 Creates Province-Wide Super Agency to Replace LHINs

By Esther Shainblum

On April 18, 2018, Bill 74, *The People's Health Care Act, 2019* ("Bill 74") received Royal Assent. Schedule 1 of Bill 74 enacts the *Connecting Care Act, 2019* (the "Act"), which will come into force on a date to be set by proclamation. While the Act is expansive, the following is a brief overview of select portions that may affect charities and not-for-profits.

The Act will establish a new province-wide health "super agency", known as Ontario Health, which will ultimately take over the province's Local Health Integration Networks ("LHINs") – which themselves recently took over the former Community Care Access Centres – as well as a number of independent provincial health agencies, including Cancer Care Ontario. The Act also provides Ontario Health and the Minister of Health and Long Term Care ("Minister") with broad powers to integrate the province's health system. Ontario Health can integrate the health system through funding changes (subsection 31(a)), through facilitating and integrating the integration of persons, entities or services (subsection 31(b)) or by issuance of a facilitation decision pursuant to which parties or services are integrated by agreement of the parties (section 32).

Under section 33, the Minister may also make integration orders pursuant to which the Minister will require health service providers or integrated care delivery systems ("ICDs", a group of persons or entities designated by the Minister that meets the conditions prescribed in the Act) to integrate, including:

- provide all or part of or cease to provide all or part of a service;
- cease operating, dissolve or wind up its operations;
- amalgamate with one or more persons or entities;
- co-ordinate services or partner with another person or entity; and/or
- transfer all or substantially all of its operations to one or more persons or entities.

While the Act is part of a larger health care reform plan through which ICDs, other groups of providers and other organizations will provide a coordinated continuum of care to a defined geographic population, the Act does not provide for any particular governance structure for ICDs, and notably does not require them to be not-for-profit.

There are some constraints currently in place for LHINs that will also be placed on the Minister's integration powers regarding religious-based, not-for-profit and charitable providers, as follows:

- Paragraph 33(2)(a) of the Act provides that the Minister shall not unjustifiably, as determined under section 1 of the *Canadian Charter of Rights and Freedoms*, require a religious organization to provide a service that is contrary to the religion related to the organization.
- Paragraph 33(2)(b) of the Act provides that the Minister shall not require the transfer of property held for a charitable purpose to a person or entity that is not a charity.
- Paragraph 33(2)(c) of the Act provides that the Minister shall not require a person or entity that is not a charity to receive property from a person or entity that is a charity and to hold the property for a charitable purpose.
- Paragraph 33(2)(g) of the Act provides that the Minister shall not require a not-for-profit health service provider or ICD to amalgamate with for-profit health service providers or ICDs.
- Paragraph 33(2)(h) of the Act provides that the Minister shall not require a not-for-profit health service provider or ICD to transfer all or substantially all of its operations to a for-profit health service provider or ICD.

There are no similar constraints on the powers of Ontario Health under sections 31 and 32.

However, subsection 37(1) of the Act provides that if an integration decision requires a health service provider or ICD to transfer property that it holds for a charitable purpose, all gifts, trusts, bequests, devises and grants shall be deemed to be gifts, trusts, bequests, devises and grants to the transferee. Subsection 37(2) provides that, if such property being transferred was originally gifted for a specific purpose pursuant to a will, deed or other document, the transferee must use it for the specified purpose. From a charities law perspective, if the specified purpose can no longer be fulfilled, such as in a case in which the charitable property was originally gifted to support the operations of a charity that has been ordered to cease operations, the charity's stakeholders may want to consider seeking legal advice in order to ensure that its charitable assets are dealt with appropriately and, as much as possible, in accordance with the donors' intentions.

The sweeping changes introduced by the Act will likely result in several years of uncertainty in Ontario's health care system, affecting thousands of organizations, entities and individuals. There may be risks to smaller providers, including charitable and not-for-profit providers, particularly if they have charitable assets that they wish to deploy in accordance with donors' intentions. Charities and not-for-profits involved in the provision of health care in Ontario may need to obtain independent legal advice in order to develop appropriate strategies for managing or addressing these risks under the new legislation.

Applying for Federal Incorporation and Charitable Status

By Esther S.J. Oh and Terrance S. Carter

This *Charity Law Bulletin* ("*Bulletin*") provides a brief overview of the general steps that are required in order to incorporate a federal corporation under the *Canada Not-for-profit Corporations Act* ("CNCA"), and apply for registration as a "charity" under subsection 149.1(1) of the ITA. This *Bulletin* assumes that the charity will carry out its activities primarily in the Province of Ontario, and therefore this *Bulletin* provides some commentary on a few of the more important issues relevant to charities operating in that province. This *Bulletin* does not provide a complete summary of all issues to be considered when incorporating and applying for charitable status given the complexity of the requirements that may apply to an organization under the CNCA and the ITA. Organizations wanting to incorporate and apply for charitable status should work with their legal counsel to review and address all applicable issues.

This *Bulletin* will focus on the incorporation procedures to be undertaken pursuant to the current regime established by Corporations Canada under the CNCA. While charities operating across Canada will also need to consider other compliance issues including, but not limited to, extra-provincial registrations, privacy, fundraising, investment powers, as well as legal risk management issues, those legal issues are beyond the scope of this *Bulletin*. This *Bulletin* has been prepared using plain language as much as possible in order to facilitate understanding of the issues described in this *Bulletin* by those volunteers of charities who may not necessarily have any legal background. As such, footnotes to authorities are not included, although references to resource websites are provided where appropriate.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 446.

Employee Dismissed for Vaping Cannabis and Driving Employer's Car

By Barry W. Kwasniewski

On April 18, 2018, a labour arbitration board in Saskatchewan (the "Board") released its decision in *The Town of Kindersley v Canadian Union of Public Employees Local 2740* in which the Board upheld an employer's decision to dismiss a unionized employee for improper use of his medically prescribed cannabis. This decision is a reminder to charities and not-for-profits that the accommodation of an employee's needs with respect to medical cannabis does not give an employee licence to use the substance in whichever way the employee sees fit. Rather, employees are expected to abide by company policies, rules, and workplace accommodation agreements and also conduct themselves responsibly in their use of

the substance. While this decision was released in 2018, the principles relating to workplace accommodation and the use of medically prescribed cannabis are important, especially in light of the recent legalization of recreational cannabis in Canada in October 2018, and the potential of the increased use of both medical and recreational use of cannabis across Canada as discussed in *Charity & NFP Law Bulletin* No. 431.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 447.

Changes to Trademarks Definition and Registrability Coming

By Sepal Bonni

As previously reported in the November 2018 *Charity & NFP Law Update*, significant changes to Canada's trademark law will take effect on June 17, 2019.

One notable change is that the definition of "trademark" will be amended from "a *mark* that is used by a person…" to "a *sign or combination of signs* that is used or proposed to be used by a person…" The word "sign" is also defined as "includ[ing] a word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign". The *Trademarks Act* has therefore been significantly broadened to include protection for these non-traditional trademarks. However, these non-traditional trademarks may be more difficult to secure and may require the applicant to furnish evidence of extensive use and promotion prior to obtaining a registration certificate.

The new law also includes utilitarian function as a universal bar to registrability, codifying Canadian case law. In particular, the amendments to the Act state that "a trademark is not registrable if, in relation to the goods or services in association with which it is used or proposed to be used, its features are dictated primarily by a utilitarian function." This prohibition against utilitarian function will apply to all marks under the amended Act, not only to distinguishing guises, as is currently the case. Further, it appears that the amendments to the Act do not make it possible to overcome functionality objections by filing evidence of acquired distinctiveness, as is the case in the USA.

An example of this doctrine is the USA case involving Hershey Chocolate & Confectionary Corporation ("Hershey"). Hershey filed a trademark application for the design of their candy bar that was described by Hersey as "a configuration of a candy bar that consists of twelve equally-sized recessed rectangular panels arranged in a four panel by three panel format with each panel having its own raised border within

a large rectangle". The United States Patent and Trademark Office examiner denied the application on the basis that even if the individual features of the candy bar design were not considered functional, the combination of all of the features together were considered functional, since the configuration was to help break the chocolate bar into bite sized pieces. However, ultimately, Hersey provided extensive evidence that established the design as a whole had acquired distinctiveness and the configuration was granted trademark protection in the USA. It will be interesting to see how a similar case will be decided in Canada with the new prohibition.

Charities and not-for-profits should continue to monitor these amendments and strategies should be devised to maximize the scope of protection of trademark portfolios.

Court Denies Leave to Non-Profit to be Represented by Non-Lawyer

By Ryan M. Prendergast

On March 19, 2019, the Ontario Superior Court of Justice denied leave to a non-profit corporation, the Humane Society of Canada for the Protection of Animals and the Environment (the "Society"), to be represented by a person who is not a lawyer. This motion, which was decided in *Canada Trust v Public Guardian and Trustee, 2019 ONSC 1768*, was in the context of an estate matter where the deceased had willed the residue of her estate to be divided equally among four charities, including the Society. The executor sought court direction on the question of whether it would be in the public interest to execute the gift, worth approximately $90,000, to the Society due to the Society's "serious deficiencies in its management" that resulted in its charitable revocation, as reported in the July/August 2015 *Charity & NFP Law Update*. The Society moved for leave to be represented by Mr. Michael O'Sullivan, a non-lawyer who is the chairman and CEO of the Society, the Humane Society of Canada Foundation, and also a director of a the Ark Angel Foundation, whose charitable revocation was reported in the February 2019 *Charity & NFP Law Update*. Mr. O'Sullivan further deposed that it was his view that "a charity's money should not be spent on lawyers."

In finding that Mr. O'Sullivan was not reasonably capable of advocating on behalf of the Society, the court looked to his past conduct representing the other corporations as well as his conduct so far in the present application. The court commented that Mr. O'Sullivan's advocacy in one proceeding "doubled the Society's liability to the plaintiff" because of unfounded allegations and frivolous requests, while another proceeding resulted in the award of substantial costs against the corporation "taking into account its

vexatious conduct and unfounded allegations of impropriety against others." In the present application, the court noted that Mr. O'Sullivan's written materials demonstrated that he did not understand the issues nor how to present them to the benefit of the Society, which would result in frivolous positions and cost more money to the Society and parties impacted by the proceeding. Further, because he was also the sole witness to proceeding, the court found that taking on an additional role as an advocate would cause confusion.

As such, the court denied leave to the Society to be represented by Mr. O'Sullivan and ordered it to file a notice of appointment of solicitor within 15 days, exceeding which it would not be entitled to participate in the application. Further, the court awarded costs to the executor, fixed at $22,000, to be deducted from the gift at issue, and the remaining $68,000 to be paid into court until further order. The court also added the Public Guardian and Trustee ("PGT") to the application as a party to have conduct over the application, despite the Society's objection. The court commented that the PGT had a "long-established role in the exercise of the *parens patriae* function of the Crown", had the expertise in the matter, and also conducted the investigation. As a result, the court stated that the "Public Guardian is the only logical candidate" to have carriage over the application.

It is not uncommon for charities to receive gifts from the estate of donors. When executing gifts from the estate to charities, the executor may raise concerns regarding the public benefit of such a gift if the organization has been shown to have issues in the way it is operated. As such, charities need to ensure that their assets and operations are properly managed. Further, the case serves as a reminder that it is best to consult with legal professionals when dealing with court proceedings. While being self-represented may appear to save money at the outset, a representative who is unfamiliar with court procedure or unable to advocate effectively for the organization may end up costing it more money and more reputational damage. Since the finance of charities come primarily from donors, the use of its assets, especially in court proceedings, should be spent responsibly and carefully.

Consultation on Social Finance Fund Announced

By Jacqueline M. Demczur

Employment and Social Development Canada ("ESDC") is seeking public input through an online engagement process ("Consultation") concerning support for social purpose organizations ("SPOs") through a Social Finance Fund. The Social Finance Fund was initially proposed through the 2018 Fall

Economic Statement, as discussed in *Charity & NFP Law Bulletin* No. 435. Through the Consultation, which was announced on March 18, 2019, ESDC indicated that it is exploring avenues for supporting SPOs "in building their capacity to innovate and move towards participation in social finance opportunities." To carry this out, ESDC aims to offer support for SPOs over a two-year period, with the aim of helping them scale their practices and improve their participation in the social finance market.

The Consultation follows after the September 2018 release of the Social Innovation and Social Finance Strategy Co-Creation Steering Group's report on social innovation and social finance ("Report"), discussed in the September 2018 *Charity & NFP Law Update*. The Report proposed twelve recommendations, including recommendations that would improve participation in social finance opportunities and specifically to "improve social purpose organizations' access to federal innovation supports."

A Discussion Guide has been published that provides a background on social innovation and social finance in Canada and discusses how ESDC's Investment and Readiness Stream will support SPOs. In this regard, it indicates that the Investment and Readiness Stream will fund projects that support investment readiness, with a focus on four areas, including: (1) building SPOs' technical capacity to access investments, funds and revenue sources; (2) impact measurement and knowledge mobilization; (3) emergence and growth of social finance intermediaries; and (4) early-stage innovations.

ESDC is seeking feedback, particularly from SPOs and associated groups; national and regional service delivery organizations, social finance intermediaries and associated groups; and entrepreneurs, social innovators, academics, experts and associated groups. The Consultation is open until May 31, 2019, and interested groups may respond by completing an online questionnaire, or by email to nc-social_innovation_sociale-gd@hrsdc-rhdcc.gc.ca.

Special Senate Committee Update

By Jennifer M. Leddy

In April, the Special Senate Committee on the Charitable Sector (the "Committee") continued to hear from witnesses on the impact of laws and policies on the charitable and not-for-profit sector and the impact of the voluntary sector in Canada. Videos of the hearings are available on the Committee website and transcripts are normally made available a couple weeks after the meeting.

On April 1, 2019, the Committee heard from various departments of the government, including the CRA, Public Services and Procurement Canada, Department of Finance, as well as Innovation, Science, and Economic Development Canada, amongst others. Other witnesses included the chief economist of Imagine Canada, the senior community planning consultant from the Social Planning Network of Ontario, and a professor in the department of politics and public administration at Ryerson University. A selection of topics discussed included government initiatives, such as the CRA's IT Modernization Project ("CHAMP"), and attracting individuals to the non-profit sector. Employment and human resources in the non-profit sector were identified as being of particular significance and recommendations were made, for example, to implement a federal student loan forgiveness program for those working in the non-profit sector.

On April 8, 2019 the Committee heard witnesses from the volunteer sector, including representatives from United Way Canada, Association of Fundraising Professionals, Imagine Canada, and the Muttart Foundation. Topics discussed focused on adapting the understanding of volunteerism to include the contribution of the younger generation, issues of funding, and strategies to improve employment in the sector such as improving job stability.

The Committee also held a round table discussion with legal experts to discuss various matters relating to the regulation of charities. Amongst the topics discussed were: the types of registered charities; the "destination of funds" test; the 3.5% disbursement quota; and an "expenditure responsibility test" compared to the test for direction and control and donations of private shares and real estate.

The April 1 and April 8, 2019 meetings were the last series of meetings held by the Committee, which will now begin to prepare its report, which is expected to be released in September 2019.

IN THE PRESS

Charity & NFP Law Update – March 2019 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Federal Budget 2019: Impact on Charities and Not-for-Profits, *Charity & NFP Law Bulletin* No. 443 was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Federal Budget Allows Donations to Canadian Journalism is an article by Theresa L.M. Man and Ryan M. Prendergast that was published on April 15, 2019 in The Lawyer's Daily. This article is based on

Charity & NFP Law Bulletin No. 443 which was authored by Theresa Man, Ryan Prendergast, Esther Shainblum, Terrance Carter and Sean Carter.

Robust Social Media Policy Vital for Charities, Not-For-Profits is an article by Terrance S. Carter and Luis Chacin that was published on April 18, 2019 in The Lawyer's Daily.

RECENT EVENTS AND PRESENTATIONS

Practice Management Tools was presented by Ryan M. Prendergast and Terrance S. Carter at the Ontario Bar Association Young Lawyer Division - Charity Program in Toronto on April 5, 2019. The handout is available at the Ontario Bar Association website for those who have membership login details.

Gift Acceptance Policies – Hot Policies for Hot Gifts was presented by Theresa L.M. Man and Terrance S. Carter at the CAGP 26th National Conference on Strategic Philanthropy in Montreal, Quebec, on April 10, 2019.

Legal Challenges in Social Media for Charities and NFPs was presented by Terrance S. Carter on Wednesday April 17, 2019. This is the first session of six in the **Spring 2019 Carters Charity & NFP Webinar Series** and is available "on demand" **here**.

UPCOMING EVENTS AND PRESENTATIONS

Healthcare Philanthropy Seminar, co-hosted by Carters and Fasken in Toronto will be held on Wednesday May 22, 2019. Click **here** for registration details.

Spring 2019 Carters Charity & NFP Webinar Series will be hosted by Carters Professional Corporation on Wednesdays starting April 17, 2019. Click here for online registration for one or more individual sessions. Topics to be covered are as follows:

- **Protecting Your Brand in the Digital Age** by Sepal Bonni on Wednesday May 1, 2019 from 1:00 to 2:00 pm ET
- **Critical Privacy Update for Charities and NFPs** by Esther Shainblum on Wednesday May 15, 2019 from 1:00 to 2:00 pm ET

- **Charities and Politics: Where Have We Been and Where Are We Going** by Ryan M. Prendergast on May 22, 2019 from 1:00 to 2:00 pm ET
- **The Coming of the ONCA (We Hope) and What to Start Thinking About** by Theresa L.M. Man on Wednesday June 5, 2019 from 1:00 to 2:00 pm ET
- **Clearing the Haze: Managing Cannabis in the Workplace in Ontario** by Barry W. Kwasniewski on Wednesday June 12, 2019 from 1:00 to 2:00 pm ET

CBA Charity Law Symposium, hosted by the Canadian Bar Association Charity & Not-for-Profit Law Section, will be held on Monday May 6, 2019. Jacqueline M. Demczur will present on the topic **Primer on Donor Advised Funds and Current Issues**.

Volunteer Ottawa is hosting a VO Workshop entitled **Duties and Liabilities of Directors and Officers of Charities and NFPs** on May 14, 2019 from 9:30 to 11:30 am.

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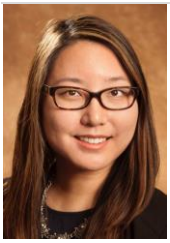

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OPC SIGNALS POLICY CHANGE FOR DATA TRANSFERS ACROSS BORDERS

By Esther Shainblum*

A. INTRODUCTION

On April 9, 2019, the Office of the Privacy Commissioner of Canada ("OPC") released the report of its investigation of the 2017 data breach involving Equifax Canada Co. ("Equifax Canada") and its US-based parent company, Equifax Inc. (the "Report").[1] The Report signals a sea change on the part of the OPC with respect to cross-border transfers of personal information – a change that could have significant potential implications for charities and not-for-profits.

The Report also identifies a number of contraventions of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA")[2] on the part of both Equifax Canada and Equifax Inc. This *Charity & NFP Law Bulletin* provides an overview of the Report and the potential impact on charities and not-for-profits.

B. BACKGROUND

As reported in the September 2017 *Charity & NFP Law Update*, a massive data hacking at Equifax Inc., the credit rating and monitoring company, compromised the personal information of about 143 million

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[1] Office of the Privacy Commissioner of Canada, PIPEDA Report of Findings #2019-001, *Investigation into Equifax Inc. and Equifax Canada Co.'s compliance with PIPEDA in light of the 2017 breach of personal information* (9 April 2019), online: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-001 ["Report"]. See also Esther Shainblum, "Equifax Breach Demonstrates What Not to Do", *Charity & NFP Law Update* (September 2017), online: http://www.carters.ca/pub/update/charity/17/sep17.pdf#es3.

[2] SC 2000, c 5.

Americans and about 19,000 Canadians.[3] The personal information of Canadians accessed by the hackers included names, addresses, dates of birth and social insurance numbers,[4] placing these individuals at risk of identity theft. The hackers had exploited a flaw in Equifax's computer system – a flaw that Equifax knew about but had not corrected – to gain access to consumers' personal information between May and July 2017. Although Equifax Inc. learned about the breach on July 29, 2017, it did not make it public until September 7, 2017.[5]

The breach and its handling led to complaints filed with the OPC on a number of grounds, including the fact that Canadian consumers did not expect their personal information to be in the US.[6]

C. ISSUES REVIEWED IN THE REPORT

In the Report, the OPC examined a number of issues relating to whether Equifax Inc. and Equifax Canada had complied with various requirements of PIPEDA, including:

- whether the personal information of Canadians held by Equifax Inc. was protected by safeguards appropriate to the sensitivity of the information;

- whether the personal information of Canadians held by Equifax Canada was protected by safeguards appropriate to the sensitivity of the information;

- whether Equifax Canada demonstrated adequate accountability for protecting personal information of Canadians;

- whether there was adequate consent by Canadians for the collection of their personal information by Equifax Inc. and for the disclosure of their personal information to Equifax Inc. by Equifax Canada; and

[3] Esther Shainblum, "Equifax Breach Demonstrates What Not to Do", *Charity & NFP Law Update* (September 2017), online: http://www.carters.ca/pub/update/charity/17/sep17.pdf#es3
[4] Report, *supra* note 1 at paras 1-6, 21, 24.
[5] *Ibid.*
[6] *Ibid* at para 4.

- whether the mitigation measures offered by Equifax Canada were adequate to protect the Canadians affected by the breach from unauthorized use.

In its findings, the OPC examined the two entities' information security practices, policies and activities and determined that both Equifax Inc. and Equifax Canada had contravened these PIPEDA principles. The Report identified a number of deficiencies in both Equifax Inc. and Equifax Canada's privacy and security practices and stated that Equifax Canada suffered from "serious and systemic" issues that it knew about but failed to correct in a timely way.[7]

D. CROSS-BORDER TRANSFERS OF PERSONAL INFORMATION

Perhaps the key development emerging from the Report is the OPC's new position on cross-border transfers of personal information. Although the OPC had previously characterized the cross-border transfer of personal information for processing as a "use" requiring notice to consumers but not consent[8], the Report completely alters that position. The OPC concluded that the transfers of personal information from Equifax Canada to Equifax Inc. constituted the "disclosure" of personal information within the meaning of PIPEDA and that Equifax Canada should have obtained express consent.[9]

Acknowledging that this position is a departure from its previous guidances, the OPC found that Equifax Canada had acted in good faith in failing to obtain express consent for its disclosures to Equifax Inc.[10]

The Report also states that individuals should be given choices with respect to the collection, use and disclosure of their personal information, such as, in this case, the choice not to sign up or to obtain free credit reporting by mail, thereby avoiding the collection by and disclosure to Equifax Inc.[11]

The specific context of the Equifax breach should be noted:

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[7] *Ibid* at para 147.
[8] *Ibid* at para 111. See also Office of the Privacy Commissioner of Canada, *Guidelines for Processing Personal Data Across Borders* (last modified 27 January 2009), online: https://www.priv.gc.ca/en/privacy-topics/personal-information-transferred-across-borders/gl_dab_090127; and Office of the Privacy Commissioner of Canada, *Guidelines for Processing Personal Data Across Borders* (last modified 27 January 2009), online: https://www.priv.gc.ca/en/privacy-topics/personal-information-transferred-across-borders/gl_dab_090127/
[9] Report, *supra* note 1 at paras 101, 107, 110.
[10] *Ibid* at para 111.
[11] *Ibid* at para 109.

- The OPC determined that Equifax Inc. was a third party with respect to Equifax Canada based on a number of considerations, including the fact that Equifax Canada represented itself as a separate entity in its online Privacy Policy and Terms of Use available at the time of the breach.[12]

- The OPC noted in the Report that Canadians purchasing direct-to-consumer products would have been unaware that their personal information was being collected by and disclosed to a third party outside of Canada. Equifax Canada's webpages, its Privacy Policy and its Terms of Use all presented to Canadians that the direct-to-consumer products were being provided by Equifax Canada,[13] when in fact their information was being collected by Equifax Inc. and additional personal information was subsequently being disclosed by Equifax Canada to Equifax Inc. in the United States.[14] Further, in light of those representations, an individual would not reasonably expect their personal information to be collected by or disclosed to Equifax Inc.;[15]

- Large volumes of extremely sensitive information were being collected and disclosed. The OPC pointed out that more robust forms of consent are required for more sensitive information.[16]

However, notwithstanding these fairly unique details, there is no indication in the Report that the OPC's new position turns on the specific context of the case – namely the particular sensitivity of the information and individuals' reasonable expectations. On the contrary, the OPC actually characterizes its new position as an "evolution from previous findings and guidance"[17] and, in its consultation document, discussed below, states that:

> the OPC's view is that transfers for processing, including cross border transfers, require consent as they involve the disclosure of personal information from one organization to another. Naturally, other disclosures between organizations that are not in a controller/processor relationship, including cross border disclosures, also require consent.[18]

[12] *Ibid* at paras 58, 99.
[13] *Ibid* at paras 61 – 63, 65, 66, 68.
[14] *Ibid* at para 108.
[15] *Ibid* at para 107.
[16] *Ibid*.
[17] *Ibid* at n 13.
[18] Office of the Privacy Commissioner of Canada, *Consultation on transborder dataflows* (last modified 29 April 2019) online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transborder-dataflows/

E. CONSULTATION ON PROCESSING PERSONAL DATA ACROSS BORDERS

The OPC has announced that it is committed to consulting with stakeholders on this change to its position on cross-border transfers of personal information. In its consultation document, the OPC reiterates its position that consent to data transfers is required and that individuals should be able to choose, under PIPEDA, whether their personal information will be disclosed outside Canada.[19] The consultation document outlines various points upon which it is requesting feedback and input from interested parties.[20] The consultation will be open until June 4, 2019.

F. IMPLICATIONS FOR CHARITIES AND NOT-FOR-PROFITS

If the OPC's position as expressed in the Report stands in its present form, it will have significant implications for charities and not-for-profits that are subject to PIPEDA (or that choose to comply with PIPEDA for the reasons outlined in our other publications), including:

- transfers of personal information from a charity or not-for-profit to a third party for processing or for other purposes, including trans-border transfers, would be considered to be a disclosure and consent, possibly express consent, would have to be obtained;

- transfers of personal information from a charity or not-for-profit to an affiliated entity for processing or for other purposes, including trans-border transfers, would be considered to be a disclosure and consent, possibly express consent, would have to be obtained;

- the charity or not-for-profit would have to provide clear information to stakeholders about the nature, purpose and consequences of the planned disclosure or cross-border disclosure, and its associated risks;

- the charity or not-for-profit would have to inform individuals of the options available to them if they do not wish to have their personal information disclosed to the third party;

[19] *Ibid*.
[20] Additional information on the consultation, including a list of questions for stakeholders, is available at: Office of the Privacy Commissioner of Canada, *Supplementary discussion document – Consultation on transborder dataflows* (last modified 23 April 2019) online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transborder-dataflows/sup_tbdf_201904/

- individuals could elect not to consent to the disclosure and the charity or not-for-profit would have to accommodate their refusal or revocation of consent; and

- the charity or not-for-profit would remain accountable for the personal information that has been disclosed and must have robust written agreements with the third party that set out the roles and responsibilities of each party as well as reporting and oversight arrangements to ensure compliance.

The OPC's new position may therefore impose additional costs as well as rather onerous requirements on organizations subject to PIPEDA.

G. CONCLUSION

Charities and not-for-profits that are subject to PIPEDA, or that choose to comply with PIPEDA, should closely monitor the progress of this issue, as well as the consultation process and may even wish to make a submission to the OPC consultation. Charities and not-for-profits that may use third party processors or that may transfer or disclose personal information to processors or to other third party organizations within or outside of Canada, should re-examine both their privacy policies as well as their respective agreements with those third parties in order to ensure that appropriate accountability, consent and oversight structures are in place.

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FEDERAL BUDGET 2019: IMPACT ON CHARITIES AND NOT-FOR-PROFITS

By Theresa L.M. Man, Ryan M. Prendergast, Esther Shainblum, Terrance S. Carter and Sean S. Carter*

A. INTRODUCTION

On March 19, 2019, Finance Minister Bill Morneau tabled the fourth budget of the Liberal Federal Government ("Budget 2019").[1] Similar to previous budgets by the Liberal Government, Budget 2019 again focuses on investing in the middle class, economic growth, as well as advancing reconciliation with Indigenous peoples in Canada.

This *Charity & NFP Bulletin* provides a summary and commentary on these and other provisions from Budget 2019 that impact the charitable, not-for-profit ("NFP"), and health sectors. In this regard, Budget 2019 includes a number of important tax incentives and amendments. The most important are the addition of registered journalism organisations as qualified donees, as well as amendments to the *Income Tax Act* ("ITA") and the *Cultural Property Export and Import Act* to ensure that existing special tax incentives will continue to be available for donations of cultural property of outstanding significance to designated institutions in Canada, such as museums and public art galleries, notwithstanding a recent court decision that had raised uncertainty in this regard. In addition, amendments are proposed to the *Excise Tax Act*

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[1] Canada, *Budget 2019: Investing in the Middle Class*, (19 March 2019) online: <https://budget.gc.ca/2019/docs/plan/toc-tdm-en.html>.

("ETA") to expand the list of GST/HST–exempt health care services to include a multidisciplinary health care service, as well as the creation of a $755 million Social Finance Fund.

B. JOURNALISM

1. Support for Canadian Journalism

In the 2018 Federal Budget ("Budget 2018") the Government proposed funding over five years to support the continued existence of news sources that provide "trusted, local perspectives, as well as accountability in local communities."[2] In addition, Budget 2018 also introduced that the Government was considering new models to enable private giving and philanthropy for "trusted, professional, non-profit journalism and local news".[3] The *2018 Fall Economic Statement* ("Economic Statement")[4] discussed in *Charity & NFP Law Bulletin* No. 435 announced a new category of qualified donee for eligible non-profit journalism organizations, a refundable tax credit for qualifying news organizations, and a temporary non-refundable tax credit for subscribers of digital news media, the details of which were to be provided in Budget 2019.[5]

As a follow up to these initiatives, Budget 2019 proposed the following tax measures in greater detail to "provide support to Canadian journalism organizations producing original news":

- Allowing journalism organizations to register as qualified donees;
- A refundable labour tax credit for qualifying journalism organizations; and
- A non-refundable tax credit for subscriptions to Canadian digital news.

It should be noted that Budget 2019 states that the "… Government will establish an independent panel of experts from the Canadian journalism sector to assist the Government in implementing these measures, including recommending eligibility criteria."

[2] Canada, *Budget 2018: Equality and Growth: A Strong Middle Class*, (27 February 2018) online: <https://www.budget.gc.ca/2018/docs/plan/toc-tdm-en.html> at 183.
[3] *Ibid* at 184.
[4] Canada, Department of Finance, "2018 Fall Economic Statement: Investing in Middle Class Jobs" (21 November 2018), online: <https://www.budget.gc.ca/fes-eea/2018/docs/statement-enonce/fes-eea-2018-eng.pdf> [Economic Statement].
[5] *Ibid* at 41.

Each of the proposed measures are summarized below. However, the application of these measures will depend on whether or not an organization is a "qualified Canadian journalism organization" ("QCJO"). A QCJO is defined as a corporation, partnership or trust that meets certain eligibility criteria and, in accordance with proposed amendments to the ITA, is "designated at that time by a body prescribed" for the purposes of the definition of QCJO under section 248 of that ITA. Eligibility requirements to be a QCJO are extensive, and include, for example, that the chairperson (or other presiding officer) and at least 75 per cent of the directors of the QCJO must be Canadian citizens, that it is primarily engaged in the production of original news content, and that it must not be significantly engaged in the production of content for a government, Crown corporation, or government agency.

a) Qualified Donee Status

Budget 2019 proposes to add a new category of qualified donee for "registered journalism organizations". Qualified donees are entities that can issue receipts for donations and can also receive gifts from registered charities and include entities such as registered charities. Since a number of registered charities already engage in journalism in the magazine sphere under the heading of advancement of education, it will be interesting to see how attractive qualified donee status as a registered journalism organization is to existing registered charities.

In order to obtain qualified donee status, an organization will first have to be a QCJO that applies to the Canada Revenue Agency and meets additional criteria. Similar to the QCJO status, these criteria are extensive and include that registered journalism organizations be limited to corporations or trusts that are "constituted and operated for purposes exclusively related to journalism", that "any business activities it carries on are related to its purposes" and that registered journalism organizations are not "factually controlled by a person (or a group of related persons)."

As qualified donees, registered journalism organizations will have the benefits of being qualified donees, *i.e.*, they can issue receipts for donations and receive gifts from registered charities. However, they will also have the obligations of qualified donee status, meaning QCJOs with registered journalism organization status will be publicly listed, have to file annual information returns that are available to the public, issue receipts in accordance with the ITA regulations and maintain books and records as required under the ITA. Non-compliance with these obligations

will also mean that registered journalism organizations are exposed to monetary penalties, suspension of receipting status, or revocation of status in the same manner as other qualified donees. An interesting difference between registered journalism organizations and registered charities is that the information return filed by registered journalism organizations must report "the names of any donors that make donations of over $5,000 and the amount donated."

Budget 2019 states that this measure will apply as of January 1, 2020.

b) Refundable Labour Tax Credit

In addition to being eligible for registered journalism organization status, Budget 2019 also proposes to introduce a 25 per cent refundable tax credit on salary or wages paid to eligible newsroom employees of qualifying QCJOs. As with registered journalism organization status, QCJOs must also meet additional criteria or be excluded from eligibility for the credit. Expenses that are eligible for the credit will include, "salary or wages paid to eligible newsroom employees in respect of a taxation year and will be reduced by the amount of any government or other assistance received by the QCJO in the taxation year." Budget 2019 also notes that registered journalism organizations will also be entitled to this tax credit in respect of eligible expenses.

The independent panel of experts referenced in Budget 2019 in relation to the implementation of these tax measures will consider eligibility criteria for the purposes of this measure. In this regard, Budget 2019 indicates that the measure will apply on or after January 1, 2019, and that the panel will recognize eligible organizations as of that date, "to ensure that the credit is available as intended."

c) Personal Income Tax Credit for Digital Subscriptions

A temporary, non-refundable 15 per cent tax credit is also proposed by Budget 2019 on amounts paid by individuals for "eligible digital subscriptions" with a QCJO. The tax credit allows individuals to claim up to $500 in costs paid for "eligible digital subscriptions", up to a maximum credit of $75 per year. An "eligible digital subscription" is one that provides a taxpayer with access to digital content provided by a QCJO. Again, a QCJO will need to meet additional criteria in order for content to be eligible for the credit.

Budget 2019 states that the credit will be available to amounts paid after 2019 and before 2025.

C. DONATIONS OF CERTIFIED CULTURAL PROPERTY

Budget 2019 proposes to amend the ITA and the *Cultural Property Export and Import Act* to remove the requirement that property be of "national importance" in order to qualify for the enhanced tax incentives for donations of cultural property.

By way of context, the ITA provides enhanced income tax incentives for the disposition of certified cultural property to institutions and public authorities designated by the Minister of Canadian Heritage in order to ensure that important cultural property remains in Canada for the benefit of Canadians. The incentives include a tax exemption for capital gains realized on the disposition of cultural properties to those designated institutions and, when disposition is by way of a gift to those institutions, the provision of a charitable donation tax credit (for individuals) or deduction (for corporations) to donors, for up 100 per cent of their net income.

Currently, to qualify for the incentives, a donated property must have been issued a certificate by the Canadian Cultural Property Export Review Board. The certification will require the property to meet two requirements, among others: (a) it must be of "outstanding significance" by reason of its close association with Canadian history or national life, its aesthetic qualities or its value in the study of the arts or sciences; and (b) it must be of "national importance" to such a degree that its loss to Canada would significantly diminish the national heritage. These requirements are set out in the *Cultural Property Export and Import Act* and are also used to regulate the export of cultural property out of Canada.

A court decision by the Federal Court of Canada in *Heffel Gallery Limited v The Attorney General of Canada*, released on June 12, 2018 and discussed in the August 2018 *Charity & NFP Law Update*, which relates to the export of cultural property, interpreted the "national importance" test as requiring that cultural property have a direct connection with Canada's cultural heritage. This decision has raised concerns that certain donations of important works of art that are of outstanding significance but of foreign origin may not qualify for the enhanced tax incentives. To address these concerns, Budget 2019 proposes to amend the ITA [subparagraph 39(1)(a)(i.1), paragraph 110.1(1)(c), and paragraph (a) of the definition total cultural gifts in subsection 118.1(1)] and the Cultural Property Export and Import Act [subsections 32(1) and 33(1)] to remove the requirement that property be of "national importance" in order to qualify for the enhanced tax incentives for donations of cultural property. No changes are proposed that would

affect the export of cultural property. This measure will apply in respect of donations made on or after March 19, 2019.

D. SOCIAL FINANCE FUND

Budget 2019 provides more details on establishing a Social Finance Fund announced in the Economic Statement. In the Economic Statement, the Government proposed to provide up to $755 million on a cash basis over a period of 10 years to establish a Social Finance Fund. Social finance refers to the practice of making investments intended to create social or environmental impact, in addition to financial returns. The Social Finance Fund would be used to benefit charitable, non-profit, and other social purpose organizations in two ways: (1) to have access to new funding, and (2) to be connected with private investors who are looking to invest in projects that further social change. Creating a Social Finance Fund was one of the key recommendations put forth by the Social Innovation and Social Finance Strategy Co-Creation Steering Group (comprised of experts in the charitable and not-for-profit sector with the task of providing recommendations to the Government with respect to the development of social innovation and social finance strategy). The Economic Statement indicates that details on the funding will be released in 2019.

Budget 2019 explains that the Social Finance Fund will work as follows: (a) funding will be managed through professional investment managers with expertise in social impact reporting and a proven ability to promote inclusive growth and diversity in the social finance market, to be selected through a competitive selection process in the fall of 2019; (b) the fund manager(s) will invest in existing or emerging social finance intermediary organizations that have leveraged private or philanthropic capital for co-investment; and (c) the fund manager(s) will be required to leverage a minimum of two dollars of non-government capital for every dollar of federal investment, with the exception of investments for Indigenous-led or Indigenous-owned funds.

Budget 2019 also announces the following under the Social Finance Fund: (a) a minimum of $100 million will be allocated towards projects that support greater gender equality by leveraging existing philanthropic and private sector funds towards this purpose in order to help them reduce the social and economic barriers faced by diverse groups of Canadians of all genders; and (b) a $50 million investment will be made in the newly proposed Indigenous Growth Fund.

The Government also proposed in the Economic Statement that it will invest $50 million over two years in an Investment and Readiness stream, for social purpose organizations to improve their ability to successfully participate in the social finance market. Budget 2019 indicates that the two-year investment of $50 million will commence starting in 2019–2020 and this funding will support more robust business planning, provide technical assistance and enable social purpose organizations to develop impact measurement tools to monitor progress achieved.

E. HEALTH RELATED PROPOSALS

Budget 2019 includes a number of measures aimed at the Canada's health care system, a key component of the charitable and NFP sector in Canada. These measures include the following:

1. Moving Forward on Implementing National Pharmacare

   Although the Government is still awaiting the final report of the Advisory Council on the Implementation of National Pharmacare, which was announced in Budget 2018, Budget 2019 announces that, based on the Advisory Council's work to-date, the Government will be creating the Canadian Drug Agency. Budget 2019 proposes that the Government will provide Health Canada with $35 million over four years, starting in 2019–2020, for the Canadian Drug Agency Transition Office, which will in turn work with the provinces and territories to develop a vision and mandate for the Canadian Drug Agency. Once established, Budget 2019 envisions that, in addition to negotiating drug prices, which Budget 2019 predicts will reduce the cost of drugs in Canada by $3 billion per year in the long term, this new national drug agency will be tasked with working with the provinces, territories and other partners to evaluate the effectiveness of new drugs, to recommend which drugs represent the best value-for-money and to develop a national formulary of prescription drugs.

2. Making High Cost Drugs for Rare Diseases More Accessible

   Budget 2019 also proposes a national strategy for high-cost drugs for rare diseases. In this regard, Budget 2019 proposes to invest up to $1 billion over two years, starting in 2022–2023, to help Canadians suffering from rare diseases access the high-cost drugs they need.

3. Medical Expense Tax Credit

   Budget 2019 proposes to amend the ITA so that expenses incurred to access cannabis for medical purposes after October 17, 2018, when the new *Cannabis Act* and regulations thereunder came into

effect, can qualify for the medical expense tax credit. The Government will also be reviewing the tax treatment of fertility-related medical expenses under the medical expense tax credit.

4. GST/HST Health Measures

Budget 2019 proposes to make an expanded list of biologicals, medical devices and health care services exempt from GST/HST under the ETA as follows:

- Donated human ova and in vitro embryos to be used in assisted reproductive procedures, supplied after March 19, 2019, will be exempt from GST/HST. These biologicals will then align with human sperm, which is already exempt

- Foot care devices ordered by licenced podiatrists and chiropodists after March 19, 2019 will be exempt from GST/HST

- Health care services rendered by a team of team of health professionals, such as doctors, physiotherapists and occupational therapists, whose services are GST/HST-exempt when supplied separately, will be GST/HST exempt so long as 90 per cent or more of the service is rendered by such health professionals acting within the scope of their profession. This measure will apply to multidisciplinary health services supplied after March 19, 2019.

5. Cannabis Taxation

Budget 2019 proposes that effective May 1, 2019, edible cannabis, cannabis extracts (including cannabis oils) and cannabis topicals will be subject to excise duties imposed at a flat rate based on the quantity of tetrahydrocannabinol ("THC") contained in the product. The new flat rate will replace the existing *Excise Act, 2001* regime, which is based on a different calculation and is apparently subject to compliance issues. The current excise duty regime and associated rates for fresh and dried cannabis, and seeds and seedlings, will be unaffected. Current exemptions will continue to apply to fresh and dried cannabis and cannabis oils that contain no more than 0.3 per cent THC, as well as to pharmaceutical cannabis products that have a Drug Identification Number and can only be acquired through a prescription.

F. ANTI-MONEY LAUNDERING (AML) AND ANTI-TERRORISM FINANCING (ATF)

Although the language in Budget 2019 dealing with AML/ATF issues focusses primarily on money laundering, the Budget implementing legislation will require amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("PCMLTFA"), which includes provisions dealing not only with money laundering, but also with terrorist financing. The PCMLTFA is foundational to the current information sharing regime within the Federal Government and agencies in Canada. Budget 2019 identifies that it intends to fill "gaps", devote funds to and strengthen what is already a robust information sharing regime.

Budget 2019 provides some specifics in this regard, stating that the PCMLTFA will be amended "to expand the definition of designated information", although no details are provided. What is evident is that the Federal Government intends to further expand the information sharing regime in Canada, and as such registered charities will want to carefully monitor this increase in information sharing by the Federal Government both inside and outside of Canada.

Budget 2019 also proposes to amend the *Criminal Code* so that the offence of money laundering, which currently requires intent to conceal and knowledge or belief with regard to the origin of the funds, would also criminalize the conduct when there is simply "recklessness." How this lowered threshold for the crime of money laundering will impact registered charities and NFPs is not clear at this time but will certainly require careful review once the implementing legislation is introduced with proposed changes to the *Criminal Code*.

G. FUNDING INITIATIVES TO SUPPORT THE CHARITABLE AND NFP SECTOR

Budget 2019 proposes funding for the following charities and NFPs:

1. <u>Support for Science, Research and Technology Organizations</u>

   - For Stem Cell Network, a proposed $18 million over a period of three years starting in 2019-2020

   - For the Brain Canada Foundation's Canada Brain Research Fund, a proposed $40 million over a period of two years starting in 2020–2021

   - For the Terry Fox Research Institute, up to $150 million over a period of five years starting in 2019-2020

   - For Ovarian Cancer Canada, a proposed $10 million over five years beginning in 2019–2020

- For Genome Canada, a proposed $100.5 million over five years beginning in 2020–2021

- For Let's Talk Science, a proposed $10 million over two years, starting in 2020–2021

2. Support for Artists and Cultural Events

   - For the Canada Music Fund, a proposed $20 million over a period of two years starting in 2019-2020

   - For the Canada Arts Presentation Fund, a proposed $16 million over two years starting in 2019-2020

   - For the Building Communities Through Arts and Heritage Program and the Celebration and Commemoration Program, a proposed $24 million over two years starting in 2019–2020

3. Employment for Persons with Intellectual Disabilities and Autism Spectrum Disorders

   - For the Canadian Association for Community Living, in partnership with the Canadian Autism Spectrum Disorders Alliance for the Ready, Willing and Able program, a proposed $12 million over three years starting in 2019-2020

4. Ensuring a Safe and Healthy Sport System

   - For Canadian sports organizations in general, a proposed $30 million over five years starting in 2019-2020

5. Improving Emergency Medical Response in Western Canada

   - For Shock Trauma Air Rescue Service (STARS), a proposed one-time investment of $65 million in 2018–2019

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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*, *The Best Lawyers in Canada*, and *Chambers and Partners*. Mr. Carter is also a registered Trade-mark Agent and acts as legal counsel to the Toronto office of the national law firm Fasken on charitable matters.

Mr. Carter is a co-author of *Corporate and Practic Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation & Commentary*, 2019 Edition (LexisNexis Butterworths), a contributing author to *The Management of Nonprofit and Charitable Organizations in Canada, 4th Edition* (2018 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, a Past Chair of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA) and a 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 Ontario, 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 a past co-chair of the CBA National Charity Law Symposium.

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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. 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 co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She has also written on charity and taxation issues for various publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS*, and *Charity Law Bulletin.*

Ms. Man is vice chair 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.

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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ESTHER SHAINBLUM, B.A., LL.B., LL.M., CRM

From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses for Canada, a national, not-for-profit, charitable home and community care organization. In that capacity Ms. Shainblum provided support to the board, management and staff in a variety of areas including governance, risk management, privacy and access to information, compliance and corporate/commercial matters. Before joining VON Canada, Ms. Shainblum was Senior Policy Advisor to the Ontario Minister of Health, advising the Minister on a wide range of portfolios, including hospitals, long term care and health care professions. Earlier in her career, Ms. Shainblum practiced health law and corporate/commercial law at McMillan Binch and spent a number of years working in policy development at Queen's Park.

Ms. Shainblum obtained her Bachelor of Arts degree in Political Science from McGill University, her law degree from Osgoode Hall Law School and her Master of Laws, Health Law from Dalhousie Law School, Health Law Institute. She also holds the Canadian Risk Management Designation (CRM).

Ms. Shainblum practices in the areas of charity and not for profit law, health law, and privacy law.

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M. Elena Hoffstein's practice is focused in all areas of estate planning and family business succession planning, corporate reorganization both pre and post mortem planning. She also advises on cross border and international matters, will, trusts and marriage contracts. Elena is also a recognized leader in charity law advising both charities and donors on effective legislative, tax and regulatory matters and on tax effective charitable gifting.

Elena frequently advises clients on family business succession and planning, corporate reorganizations. Having regards to different legal and tax regimes, Elena ensures that multi-jurisdictional property and family business interests are protected.

Representing clients in both contentious and non-contentious estate litigation matters, Elena assists with will challenges, mental capacity matters, applications for advice, direction of the court and the passing of fiduciary accounts.

Elena is recognized as a leading expert in charity and not for profit law. In Elena’s charity law practice, she advises charity clients on legislative, tax and regulatory matters and provides proactive advice to both charities and donors on tax effective charitable gifting.

In recognition of her leadership and career contributions, Elena received the Ontario Bar Association’s “Award of Excellence in Trusts and Estates.” She is also a recipient of Lexpert’s “Zenith Award” and has earned the preeminent “AV” ranking in Martindale-Hubbell’s Peer-Review Ratings. She is a

frequent speaker at the Canadian Tax Foundation, Society of Trusts and Estates Practitioners conferences, the Law Society of Upper Canada , The Ontario Bar Association and Canadian Association of Gift Planners. She is a co-author of Charity Law in Canada and co- editor of charities Legislation and Commentary.

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Brittany Sud's estates and trusts practice is focused on planning and administrative matters. She assists high net worth clients, entrepreneurs and professionals with wills, powers of attorney, domestic contracts and trusts.

Brittany has developed and implemented cohesive estate plans for clients, reflecting their financial objectives and both short and long-term goals. She has advised on probate planning, family business succession planning, asset protection strategies and disability planning. Brittany's estate administration practice includes preparing applications for probate and administering the Canadian estates of non-residents.

Outside law, Brittany plays softball and tennis and enjoys travelling and cooking. A dedicated volunteer, Brittany works with the United Jewish Appeal, Jewish National Fund, One Family Fund and Baycrest Foundation.

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