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**The 2020 Ottawa Region
Charity & Not-for-Profit Law
Seminar
February 13, 2020**

2020 Essential Charity & NFP Law Update

By Jennifer M. Leddy, B.A., LL.B.

jleddy@carters.ca

1-877-942-0001

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TOLL FREE: 1-877-942-0001

Ottawa Toronto Orangeville
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

2

OVERVIEW (Current as of February 7, 2020)

- 2019 Federal Budget Highlights
- Report of the Special Senate Committee on the Charitable Sector
- Advisory Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Federal Legislation/Corporate Update
- Ontario Corporate Update
- Case Law of Interest

OVERVIEW



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A. 2019 FEDERAL BUDGET HIGHLIGHTS

- Budget 2019 was presented on March 19, 2019
- 1. **Journalism:**
 - Budget 2019 proposed tax measures to “provide support to Canadian journalism organizations producing original news”
 - On June 21, 2019, Bill C-97 received Royal Assent, implementing the following changes (now in force):
 - Allowing certain journalism organizations to register as qualified donees under the new category for “registered journalism organizations” (“RJOs”);
 - A refundable labour tax credit for qualifying journalism organizations, applicable to salary or wages as of January 1, 2019; and
 - A temporary non-refundable tax credit for “eligible digital subscriptions” to Canadian news for expenses made after 2019 and before 2025

- Some of the requirements for any of these incentives to apply, include:
 - Journalism organization must be classified as a “qualified Canadian journalism organization” (“QCJO”) within meaning of the ITA
 - A QCJO will need to meet eligibility requirements to be developed by an independent panel of experts from the Canadian journalism sector
 - A QCJO must engage primarily in the production of original news content on general interest matters
 - To be eligible as a qualified donee, a QCJO will also need to meet the narrow definition of “qualifying journalism organization”, in which event it could be registered as an RJO
- On December 20, 2019, CRA released a Guidance document, providing further information on these tax measures, and clarifying requirements for designation as a QCJO



2. Stock Options:

- Budget 2019 proposed to limit use of the current employee stock option regime for high-income individuals employed at large, long-established, mature firms
- The direct consequence of the proposed changes would be to disallow the additional deduction for charitable donations of securities acquired under an employee stock option agreement above the vesting limit of \$200,000
- A public consultation to get input from stakeholders on various aspects of the proposed changes ended on September 16, 2019
- On December 19, 2019, the Federal Government issued an Update indicating that the implementation of the proposed changes would be delayed as the input received during the consultations is being reviewed
- More details on the proposed changes will be provided in Budget 2020



3. Social Finance Fund:

- Budget 2019 provided further details about the Social Finance Fund first announced in the 2018 Fall Economic Statement
- It is to provide up to \$755 million on cash basis over a period of 10 years to provide charities, non-profits, and other social purpose organizations with access to new funding, and connections to private investors
- The investment of \$50 million over two years in the Investment Readiness Program, a pilot program of the Social Finance Fund, seeks to assist social purpose organizations to successfully participate in the social finance market
 - Organizations can access grants by applying to “readiness support partners”, such as Community Foundations of Canada



B. REPORT OF THE SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector in Canada
- In its year-long study, the Special Committee heard from various sector and government witnesses on an ongoing basis starting in April 2018 through to April 2019
- The final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* was released on June 20, 2019, and made 42 recommendations to the Government of Canada
 - See https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf

- Of the 42 Recommendations, some key ones are:
 - The Tax Court of Canada be given jurisdiction for hearings *de novo* over appeals from Charities Directorate decisions
 - Current three types of charities to be replaced by two categories, being public and private charities
 - Replace direction and control with an “expenditure responsibility test”
 - Review ITA provisions regarding charities every five years
 - Pilot project to study eliminating capital gains tax on charitable donations of private company shares and real estate
 - Consider means of ensuring that charities do not languish in donor-advised funds
 - Review of “ineligible individual” provisions in the ITA



C. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

- The 2018 Fall Economic Statement released by the Department of Finance announced the Government's commitment to establish a permanent Advisory Committee on the Charitable Sector
- The Advisory Committee is to regularly consult with charities and advise the Government with respect to important issues facing the charitable sector
- On August 23, 2019, the Minister of National Revenue announced the full membership of the Advisory Committee, which is comprised of 3 senior Government officials (2 from the CRA, and 1 from Finance Canada), as well as 14 appointed sector members

- On December 17 and 18, 2019, the Advisory Committee met in Ottawa and discussed the importance of fostering the relationship between the charitable sector and the Federal Government
- The members identified the following priority themes:
 - Evolving the institutional framework to effectively advance public purposes and maximize sector impact;
 - Ensuring financial sustainability within the charitable sector; and
 - Establishing modern governance for the charitable sector



D. RECENT CRA PUBLICATIONS AND PROGRAMS

- On March 8, 2019, the CRA published an information website and *Guide for cryptocurrency users and tax professionals*, providing compliance guidelines on digital/virtual currencies
- On June 1, 2019, the CRA launched new digital services through My Business Account, as a product of the Charities IT Modernization Project (“CHAMP”), including:
 - Online filing of T3010 charity returns
 - Ability to update certain information about charities electronically
 - New online application for charitable status



- In November 2019, the CRA released a GST/HST Ruling indicating that meals supplied by charities to seniors are not generally taxable
 - Charity was a registered charity for income tax purposes and a charity for GST/HST purposes, despite not being registered for GST/HST purposes
 - CRA ruled that the charity’s supply of food and beverages to residents of the facility would be exempt supplies pursuant to s.4 of Part V.1 of Sch.V to the *Excise Tax Act*, and not be subject to GST/HST
 - This section provides an exemption to supplies of food and beverages made by charities to seniors, underprivileged individuals, or individuals with a disability, and which are made under a program established and operated to provide prepared food to these individuals in their places of residence

- In November 2019, CRA released a revised Form T3010 with an accompanying guide
 - Most notable change was replacing questions for “political activities” with questions on public policy dialogue and development activities (“PPDDAs”) that were introduced to the ITA in December 2018



E. FEDERAL LEGISLATION/CORPORATE UPDATE

1. *Canada Elections Act*:

- Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* came into force on June 13, 2019
- Now imposes reporting requirements on third parties that engage in “partisan activities, partisan advertising, and election surveys”, in addition to “election advertising”
 - Regulated activities during both the election period and pre-election period are now covered



2. Corporations Canada’s “Digital-first Approach”

- Corporations Canada has adopted a “digital-first approach” to encourage the use of digital services
- For online filing services, PDF forms can no longer be downloaded from their website (unless specifically requested), and only online forms may be used
- However, where online filing services are unavailable, PDF forms continue to be available on the website
- Corporations Canada has also introduced new service fees and service standards for CNCA corporations and federal cooperatives, in addition to express services being made available in certain situations



F. ONTARIO CORPORATE UPDATE

- The Ontario Government had indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), but an Update released by the Government now indicates that the launch date is expected to move “beyond early 2020”
 - This is because of the Government upgrading technology to support the changes introduced by the ONCA, and to improve service delivery
 - Once the ONCA is in force, Ontario not-for-profit corporations will have 3 years to comply with the ONCA by amending their governing documents



G. CASE LAW OF INTEREST

- ***Chouman v Omar Al-Farooq Islamic Society, 2019 BCSC 754 (May 15, 2019)***
 - The BC Supreme Court granted oppression remedy against three societies governed by the BC *Societies Act* and five individuals purporting to act on behalf of the societies, on the basis that failing to follow the societies' by-laws and removing the petitioners as directors and members to gain control of the societies was oppressive and unfairly prejudicial behaviour
 - The respondents could not excuse their failure to follow the societies' by-laws by calling their behavior a mere failure to adhere to technical formalities
 - This case serves as a reminder that it is essential to comply with corporate law requirements outlined in the by-laws of an organization, and to do so in a reasonable and fair manner



- ***Promised Land Ministries v R, 2019 TCC 145 (June 28, 2019)***
 - The Court upheld CRA's decision to suspend the receipting privileges and qualified donee status of Promised Land Ministries ("PLM") for one year, for failing to maintain proper books and records, including invoices, receipts, and vouchers, for expenditures made on activities outside of Canada, and for failing to comply with a compliance agreement from a previous CRA audit, wherein PLM had agreed to take corrective measures to maintain proper books and records for its activities outside of Canada
 - PLM argued that its poor recordkeeping was due to problems with its former accountants, and that obtaining receipts for expenses on mission trips of the Pastor abroad was difficult as they were "cash economies"



- The Court found these to be “self-serving” arguments as PLM was aware of the requirements set out in the Agreement, and having been put on notice, it was up to PLM to find ways to substantiate its expenses for mission trips outside of Canada, even in “cash economies” where receipts may be difficult to obtain
- CRA suggested a voucher book could be used in cash economies where details of the expenses could have been recorded and signed by the individuals receiving the funds
- PLM could also not blame accountants for inadequate recordkeeping as PLM had the ultimate responsibility for maintaining proper books and records

- ***Watto v Immigration Consultants of Canada Regulatory Council, 2019 FC 1024 (July 30, 2019)***
 - The Federal Court held that the discipline section (s.158) of the *Canada Not-for-profit Corporations Act* (“CNCA”) does not restrict the power to discipline a member, or to terminate their membership to only “the directors, the members or any committee of directors or members of a corporation”
 - While the wording of the section may be construed narrowly, a broader interpretation was more consistent with the CNCA
 - Further, if Parliament had intended to limit the power to discipline members or circumscribe the class of persons who may exercise this power, it would have done so expressly



21

- ***Benito v Immigration Consultants of Canada Regulatory Council, 2019 FC 1628 (December 18, 2019)***
 - Following the *Watto* decision, the Court held that s.158 of the CNCA permits disciplinary matters to be decided by a one person panel of the Discipline Committee, and the person does not need to be a director or member of the corporation
 - A plain reading of the section allows the Immigration Consultants of Canada Regulatory Council to “make by-laws that give power to discipline members of the organization and set out the circumstances and manner in which that power should be exercised”
 - Further, principles of interpretation allow for the word “members” in s.158 to also mean “member”, giving a single person the power to discipline

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22

- ***Bose v Bangiya Parishad Toronto, 2019 ONSC 5625 (September 30, 2019)***
 - The case involved a cultural organization and a religious congregation, both of which were incorporated under the Ontario *Corporations Act*, and had operated in tandem through a common board of directors and issued consolidated financial statements
 - While the cultural organization was properly organized under its incorporating statute, with members and holding proper elections; the religious congregation was never properly organized from a formal, corporate law perspective
 - An application for stay pending appeal was brought against Belobaba J.’s order to hold an election for the board of directors of the religious congregation, with the order being based on the principle of shareholder/member democracy

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- In dismissing the stay pending appeal, the Court reasoned that Belobaba J.'s recognition that members of the cultural organization were *de facto* members of the religious congregation was "a finding of fact or mixed fact and law based on undisputed evidence"
- Since for decades the voting members of the religious congregation were also members of the cultural organization, in order to end the "wrong usurpation" of the religious congregation and to ensure "the earliest restoration of member democracy to the Religious Congregation," an election was required
- The Court found that even if an appeal was later allowed, the appellants had failed to establish that they would suffer irreparable harm



- ***The Canadian Islamic Trust Foundation v The Muslim Community of Edmonton Mosque and Muslim House, 2019 ABQB 872 (November 13, 2019)***
 - The Court held that a by-law adopted by the Society in 2014 was invalid because it failed to get the proper approval of its founding organization ("Foundation"), as required by the Society's pre-existing 1997 by-law
 - In doing so, the Court rejected the Society's argument that the required approval had been granted on the Foundation's behalf by an individual, Mr. Chaudhary
 - The Society failed to provide proper evidence that
 - (i) Mr. Chaudhary had valid authority to approve the Society's 2014 by-law on the Foundation's behalf, (ii) that he had an official position in the Foundation, or (iii) any information outlining the basis on which Mr. Chaudhary had valid authority to act as the Foundation's representative

- In addition, the Court found that contrary to the Society's position in court, there was earlier email correspondence demonstrating the Society's own belief that the Foundation had not approved the 2014 by-law
- The Foundation's arguments that there were irregularities in the process to obtain membership approval, including invalid status of voting members for the 2014 by-law, and alleged irregularities in the process used to call the membership meeting for the approval of the 2014 by-law were rejected by the Court due to lack of necessary evidence

INVALID

- ***Church of Atheism of Central Canada v MNR, 2019 FCA 296 (November 29, 2019)***
 - In this case, the Court made the following findings:
 - Atheism is not a religion;
 - Charitable registration is a privilege, not a right, that functions as an indirect tax subsidy to encourage work carried out by registered charities;
 - "[T]he requirement that the belief system have faith in a higher Supreme Being or entity or reverence of said Supreme Being is not always required when considering the meaning of religion"

27

- In response to CACC’s *Charter* arguments, the Court responded as follows:
 - s.2(a) freedom of conscience and religion was not violated because despite the right to practice atheistic beliefs being protected, the refusal to not grant charitable registration did not “interfere in a manner that is more than trivial or insubstantial with the appellant’s members’ ability to practice atheistic beliefs” since CACC could continue with its purpose and activities without registration
 - s.15 equality rights did not apply to CACC because this section only applied to individuals
 - With respect to s.17 multicultural heritage provisions, following precedent, the Court found the section to be an interpretative, not a substantive provision that can be violated



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28

- ***UAlberta Pro-Life v Governors of the University of Alberta, 2020 ABCA 1 (January 6, 2020)***
 - The Court found that the *Charter* applies to how the University of Alberta sets conditions that affect the freedom of expression by its students on campus
 - In this case, a student association had organized an on-campus demonstration with the University’s approval, which attracted groups of counter-protestors
 - When Pro-Life requested permission for another demonstration, the University required payment of \$17,500 for security, or Pro-Life could hold the event indoors (“Security Decision”)
 - The Court held that the University’s action was subject to the *Charter* because education by means of freedom of expression has been the core purpose of the University since it was established by the government

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- The Court further reasoned that the grounds of the University are physically designed to ensure that students learn, debate and share ideas in a community space that is “hospitable to a pursuit of the truth about all things without a prescribed predefinition of truth before the pursuit begins”
- After taking the tone and content of expression of Pro-Life’s event into consideration, and recognizing the degree of deference available to the University under the judicial review framework, the Court found that the University’s Security Decision was not a reasonable and proportional limitation on Pro-Life’s freedom of expression

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