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# 21<sup>ST</sup> ANNUAL CHURCH & CHARITY LAW SEMINAR

Mississauga – November 13, 2014

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## 2014 Essential Charity Law Update

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**THE 21st ANNUAL  
CHURCH & CHARITY LAW™ SEMINAR**  
Mississauga – November 13, 2014

**2014 Essential Charity Law Update**

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**OVERVIEW OF SELECTED TOPICS**

- A. Federal Budget 2014
- B. Other Recent Federal Initiatives
- C. Highlights of Recent CRA Publications
- D. Corporate Law Update
- E. Selected Case Law



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**A. FEDERAL BUDGET 2014**

- “Budget 2014” announced on February 11, 2014
- Contrary to expectations, Budget 2014 did not restrict charities’ political involvement
- Budget 2014 contained some surprise new tax incentives for charitable donations
- The charitable deduction or credit from an ecological gift to be carried forward for ten years instead of five. thus benefiting landowners who did not have the income to offset the tax receipt over previous five years



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### 1. Estate Donations

- Budget 2014 proposed that donations made by will and designation donations would be deemed to have been made by the estate at the time the property is transferred to a qualified donee
- Gifts will no longer be deemed to have been made immediately before death



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- Instead, estate trustees will be given more flexibility to allocate the donation made by will among any of the following
  - the taxation year of the estate in which the donation was made
  - an earlier taxation year of the estate
  - the last two taxation years of the deceased person



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- Qualifying donations must be effected by a transfer to a qualified donee within the first 36 months after death
- Estates may continue to claim a donation tax credit in respect of other donations in the year in which the donation is made or in any of the five following years
- The proposed amendments will apply to the 2016 and subsequent taxation years
- Draft legislation was introduced in October 2014

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### 2. De-Registration Power: State Support of Terrorism

- S. 149.1 of the Income Tax Act will be amended to enable the Minister to refuse to register a charity or revoke its registration if it accepts a "gift" from a "foreign state" listed in the *State Immunity Act* (currently Syria and Iran)
  - Provides an expansive definition of a foreign state, including heads of state, and any government departments, "agencies" or "political divisions"



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### 3. Consultation on Non-Profit Organizations

- Non-profit organizations ("NPOs") are entities that are exempt from income tax but are not charities
- Budget 2014 revealed the government's intention to review whether the tax exemption for NPOs is appropriately targeted and whether there are "sufficient transparency and accountability provisions in place"



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### 4. Reducing the Administrative Burden on Charities

- Budget 2014 proposed funding CRA to enable charities to register and file their T3010 Information Returns electronically
- Budget 2014 proposed to amend the *Criminal Code* so that charities can use e-commerce methods for purchasing, processing and issuing lottery tickets and receipts to donors



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## B. OTHER RECENT FEDERAL INITIATIVES

### 1. Canada's Anti-Spam Legislation (CASL)

- CASL came into force on July 1, 2014
- CASL impacts how charities and non profit organizations communicate with their donors, volunteers and members
- The regulations include a specific exemption from CASL for select messages sent by registered charities for fundraising purposes
- For more details, see presentation by Ryan Prendergast titled "Communicating with the Flock in a Post Anti-Spam World"



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## 2. List of Charitable Organizations that Received a Gift from the Crown as Qualified Donees Updated

- Over the past year, CRA made changes to the list of foreign charities that received a gift from the Canadian Crown as "qualified donees" (QDs)
  - A number of charities were removed from the list and two were added
- QDs are eligible to issue official donation receipts
- As of January 1, 2013, these types of QDs will only be registered and listed if they pursue activities related to disaster relief /urgent humanitarian aid or in the national interest of Canada

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## C. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

### 1. Guidance on Ineligible Individuals



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

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- An ineligible individual is someone who has been
  - Convicted of a “relevant criminal offense”
  - Convicted of a “relevant offense” in the last 5 years
  - A director, officer or like official of a charity that engaged in a “serious breach” of the Act and had its registration revoked in the past 5 years
  - An individual who “controlled or managed”, directly or indirectly, a charity that engaged in a “serious breach” of the Act and had its registration revoked in the past 5 years
  - A promoter of a tax shelter involving a registered charity

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- ITA does not require CRA to take action but gives it the authority to use discretionary sanctions to enforce the ineligible individual provisions
- The legislation does not require charities to search or proactively determine whether an ineligible individual is involved in the charity
- If CRA has concerns, it will state these concerns in writing and the organization will be given an opportunity to respond before CRA makes a decision
- After the CRA has made its decision, the organization will be able to object

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- Questions CRA will ask
  - What made the person an ineligible individual?
  - What roles and responsibilities does the ineligible individual have in the organization?
  - How has the organization lessened whatever risk the ineligible individual may pose?
- How to respond to CRA
  - The onus is on the charity to explain and address CRA’s concerns by providing CRA with adequate documentary evidence
- Best practices for charities
  - Charities should practice due diligence, risk assessment, fraud prevention, and financial controls that protect their beneficiaries

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- CRA has recently revoked the registration of two charities in part because a director was previously a director of a charity when it was engaged in conduct that constituted a serious breach of the Act
  - Jesus of Bethlehem Worship Centre (July 12, 2014)
  - Friends and Skills Connection Centre (September 13, 2014)
- This is a helpful Guidance, but there remain questions about how it will be applied



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### 2. Guidance on Charities that Provide Housing

- On February 8, 2014, CRA released the *Guidance on Housing and Charitable Registration (CG-022)*
- This Guidance sets out the requirements for how such organizations can qualify as a charity to
  - 1) relieve poverty
  - 2) provide specially adapted facilities or services to help eligible beneficiaries overcome or manage conditions associated with age or disability



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- The Guidance outlines that
  - The charitable purpose of relieving poverty may be satisfied if a charity provides “comfortable, modest” housing at below fair market value to eligible beneficiaries
  - Eligible beneficiaries may be “individuals or families that are needy...underprivileged, low-income, of small/limited means, or other judicially recognized synonyms”
  - Eligible beneficiaries can be narrowed by a second characteristic, i.e. seniors who appear poor
- The Guidance is more practical and flexible than the previous policy



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- To qualify as a charity that provides housing to relieve poverty, the charity must
  - Annually assess whether the beneficiaries continue to be eligible
    - The eligibility assessment criteria to assess beneficiaries should include the income, assets and liabilities of the beneficiaries
  - Establish and implement reasonable policies and procedures that address circumstances where individuals and families are no longer eligible
  - Ensure that assistance given to individuals is no more than their need

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- To qualify as a charity that provides housing that includes specially adapted facilities, services, or other amenities, the charity must
  - Ensure that this type of housing helps beneficiaries overcome or manage their particular conditions
- Beneficiaries of such housing do not need to be assessed using financial criteria
- The housing does not need to be provided at less than fair market value



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- When a housing organization applies for charitable status, its statement of activities must include
  - The criteria and process used to select beneficiaries
  - The process used to determine rental rates
  - The policies and procedures used to ensure only eligible beneficiaries receive charitable benefits
  - The proportion of tenants who are not eligible beneficiaries, and whether they pay market rent
  - All goods, services, and associated amenities provided by the organization to eligible beneficiaries and other tenants
  - If any space is leased to commercial tenants, all details of these arrangements and the reason for entering into these arrangements

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### 3. Revised CRA Instruction Guides

- T4063, *Registering a Charity for Income Tax Purposes*
  - Explains how to complete Form T2050, *Application to Register a Charity under the ITA*
  - Addresses whether registration is the correct choice for the organization, provides information about the application review process, and details about how to complete the questions found in Form T2050
- T4033, *Completing the Registered Charity Information Return*
  - Explains how to complete Form T3010
  - The changes to Form T3010 include the term “gifts in kind” instead of “non-cash gifts”, and the requirement to report life insurance premiums



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### 4. Additional New Forms and Worksheets

- T3010, *Registered Charity Information Return*
  - CRA released new T3010 forms for charities with fiscal periods ending on or after January 1, 2013
  - The T3010 (13) and new T3010(14) ask if the charity carried on any political activities during the fiscal year, including “gifts to qualified donees...intended for political activities”
- T1236, *Qualified Donees Worksheet*
  - Charities registered under the ITA can make gifts to qualified donees if they complete the T1236 worksheet to identify these gifts
  - Charities must submit the T1236 with their annual returns

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### 5. CRA Website Updates

- Two new web pages about how charities can change an authorized representative's information and a director, trustee or like official's information (January 2014)
- Charities Media Kit updated (April 25, 2014)
- Charities and their Participation in Political Activities video series (April 26, 2014)
- Two new CRA webinars: “How to donate wisely” and “What is a related business” (April 29, 2014)
- Three web pages addressing matters relating to continuance under the CNCA (June 11, 2014)
- New political activities web page added (July 21, 2014)

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**D. CORPORATE UPDATE**

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

- *Canada Corporations Act* ("CCA") since 1917
- Enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of CCA
- Existing CCA corporations were required to continue under the CNCA within 3 years, i.e. by October 17, 2014
- According to Industry Canada, there are an estimated 17,000 Part II CCA non-profit corporations
- As of October 25, 2014, 9097 not-for-profit corporations had continued under the CNCA
  - Corporations Canada is processing a high number of applications filed close to October 17, 2014

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- Dissolution for not meeting the October 17 deadline is not automatic
- Before dissolving a corporation, Corporations Canada must first give the corporation 120 days notice of its intent to dissolve
- Despite the fact that the deadline has passed, there is still time for federal not-for-profit corporations that have not yet transitioned to the CNCA to do so because the corporation can continue during the 120 day notice period



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**2. Status of the Ontario Not-for-Profit Corporations Act (ONCA)**

- The *Ontario Corporations Act* (OCA) has not been substantially amended since 1953
- The new *Ontario Not-for-Profit Corporations Act* (ONCA) received Royal Assent on October 25, 2010 and will apply to OCA Part III corporations
- Bill 85 was introduced on June 5, 2013 and contained key amendments to the ONCA, which had to be passed before the ONCA could come into force
- Bill 85 died on the Order Paper in May 2014 because of the election
- The not-for-profit sector is currently waiting for a new Bill to be proposed

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- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- The Ontario Ministry of Government and Consumer Services indicates that the ONCA is not expected to come into force before 2016
- On September 25, 2014, Premier Wynne indicated support for the ONCA in her "Mandate Letter"



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**3. Manitoba Bill 46, 2013**

- Repeals Manitoba's *Charities Endorsement Act*, effective December 31, 2013
- Charities that were previously required to apply for authorization to solicit funds no longer need to do so

**4. Ontario Bill 36, Local Food Act, 2013**

- Provides a non-refundable tax credit to eligible persons involved in the business of farming in Ontario
- Eligible persons who donate Ontario agricultural products to eligible community food programs will receive a provincial tax credit worth 25% of the fair market value of the donation

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

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

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



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

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**E. SELECTED CASE LAW**

**1. *Re Fenton Estate*, 2014 BCSC 39**



- The deceased directed his executor to establish a private charitable trust, which was to hold the gifted capital in trust in perpetuity
- The will directed the trustee to reinvest a portion of the Trust's income to protect the capital from inflation
- However, the will restricted the trustee to distributing only net annual income and not any capital
- Because of this, the Trust could not meet the 3.5% disbursement quota required under the ITA to maintain charitable status

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- The British Columbia Supreme Court authorized a "total return investment strategy" to allow the trustee to encroach on capital gains in any year necessary
- This was allowed despite the fact that doing so was prohibited under the will
- The strategy was achieved by adding capital gains to income to meet the 3.5% disbursement quota
- This avoided jeopardizing the trust's charitable status



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## 2. *Penman v Penman, 2014 ONCA 83*

- The trial judge found that the appellant abdicated her duties as a trustee by delegating all her powers, duties, and authority, and that she failed to act properly when she did not consider whether the proposed investments were appropriate, failed to inquire about the proposed investments, and failed to follow up about their status
- The ONCA upheld the trial judge's ruling that the limitation of liability in the trust deed did not protect trustees where trustees improperly delegated their powers or discretion
- This case demonstrates that trustees are not immune from being personally liable for their errors or omissions

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## 3. Supreme Court of Canada (SCC) Grants Leave to Appeal in *The Queen v Guindon, March 2, 2014*

- The TCC originally held that the s. 163.2 penalties assessed against Guindon were of a criminal nature, as per s. 11 of the *Charter*
- The TCC overturned the resulting penalty on the basis that CRA did not respect Guindon's s. 11 *Charter* rights
- In June 2013, the FCA overturned the TCC's decision and held that Guindon should have been obligated to serve a notice of constitutional question and therefore the TCC could not consider s. 11 of the *Charter*
- The FCA also held that s. 163.2 was not criminal
- The SCC hearing is scheduled for December 5, 2014

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**4. *Neville v National Foundation for Christian Leadership*, 2014 BCCA 38**

- The SCC denied leave to appeal on whether a charity had to return "donations" made to it by the appellants because CRA disallowed them a tax credit
- At trial, the BCSC stated that the appellants' purpose was to donate to a foundation that supported Christian students attending Christian schools
- The appellants understood that their daughter would receive a scholarship or bursary from the Foundation and that there was no guarantee of a tax benefit
- Accordingly, the court held that the primary purpose of the gift was fulfilled and the gift was not vitiated by not being considered a gift for tax purposes

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**5. *The Human Dignity Trust v Charity Commission of England and Wales* ("HDT") (July 9, 2014)**

- HDT uses test case litigation to challenge the legality of existing laws
- HDT applied for charitable status
- The Tribunal found that challenging a law because it is contrary to a prior commitment to an international treaty or constitutional law is not a "political" purpose
- The Tribunal emphasized the difference between changing a domestic law through pressure on Parliament versus properly using a constitutional scheme meant to test the laws of a country

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**6. *Re Greenpeace of New Zealand Incorporated* (August 6, 2014)**

- The SCNZ held that:
  - "Advocacy, including through participation in political and legal processes, may well be charitable"
  - "An assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit"



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**7. Pankerichan v Djokic, 2014 ONCA 709**

- Upheld the lower court decision concerning a dispute over which individuals had authority to manage the property of a religious organization pursuant to the *Religious Organizations Lands Act (Ontario) (ROLA)*
- Applicants sought declaratory relief that the elected executive board representatives of a local congregation of the Serbian Orthodox Diocese of Canada held the real property of the congregation in trust
- The elected representatives had been supplanted by the temporary trusteeship by the Diocese under its constitution following a dispute over the forced retirement of the congregation's priest

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- The Court found that the governing documents of the Diocese permitted the imposition of a trusteeship and that there was no conflict with ROLA
- The Court noted that a consistent method has emerged with how Canadian courts deal religious property
  - where a dispute concerning property can be resolved by reference to the governing documents of the religious body, its history, and context, the courts will find ways to resolve the dispute without reference to doctrine or other religious matters
  - American “neutral principles of law” doctrine was not applicable in the Canadian context

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