
22ND ANNUAL CHURCH & CHARITY LAW SEMINAR

Mississauga – November 12, 2015

2015 Essential Charity Law Update

By Esther S.J. Oh, B.A., LL.B. and Ryan M. Prendergast, B.A., LL.B.


estheroh@carters.ca rprendergast@carters.ca
1-877-942-0001

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 estheroh@carters.ca rprendergast@carters.ca
 1-877-942-0001

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OVERVIEW OF SELECTED TOPICS

Federal Budget 2015

Federal Legislative and Regulatory Update

Ontario Legislative and Regulatory Update

Corporate Law Update


Highlights of Recent CRA Publications

Selected Case Law

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A. FEDERAL BUDGET 2015



- Budget 2015, announced April 21, 2015
- Contains a number of important proposed amendments relating to the charitable and not-for-profit sector, which include:
 - Exempt capital gains tax on the donation of proceeds of private shares or real estate
 - Permit registered charities to invest in limited partnerships
 - Expand foreign entities eligible for registration as qualified donees
 - Introduce Social Finance Accelerator Initiative, a program to encourage social finance in Canada

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- Budget 2015 did not include
 - The stretch tax credit for charitable giving proposed by Imagine Canada
 - An administrative mechanism to provide an extension of the 36-month period announced in Budget 2014 in which an estate donation can be treated as a gift in a terminal return as part of a graduated rate estate
 - Follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations

For more information see: Charity Law Bulletin No. 363 at <http://www.carters.ca/pub/bulletin/charity/2015/chylb363.pdf>

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1. Proposed Capital Gains Exemptions of Private Shares and Real Estate

- Department of Finance released draft legislation proposals to amend the ITA on July 31, 2015 (pending adoption by new government)
- Included are exemptions from capital gains tax for certain dispositions involving real estate or private corporation shares
 - Where cash proceeds are donated to a qualified donee within 30 days of sale
 - Dispositions are to be arm's length dispositions of real estate or private corporation shares
 - Donors must be resident in Canada
 - The rule applies to sales in 2017 and subsequent taxation years but anti-avoidance rules may deny exemption
- For more information see: Charity & NFP Law Bulletin No. 370 at: <http://www.carters.ca/pub/bulletin/charity/2015/chylb370.pdf>

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2. Proposed that Charities Can Invest in Limited Partnerships

- Pending adoption of draft legislation of July 31, 2015, registered charities or RCAA's with an interest in a partnership will not be seen as carrying on a business if:
 - The partnership investment is a limited liability partnership
 - Members deal at arm's length with each general partner of the partnership
 - The charity only holds 20% of the fair market value of the interest of all members
- This is intended to help charities diversify their investment portfolios to better support their charitable purposes and give them flexibility to use innovative approaches to addressing social problems
- New subsection 253.1(2) will apply to investments made after April 20, 2015

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3. Other Budget 2015 Proposals

- Bill C-59, which implemented certain provision of Budget 2015 received Royal Assent on June 23, 2015, allows foreign charitable organizations that receive a gift from the Government, to apply for qualified donee status
 - Qualified donee status will be granted for a 24 month period from the date chosen by the Minister, usually no later than the date the gift was made
 - Activities include disaster relief, urgent humanitarian aid, or activities in the interest of Canada
 - Foreign entities eligible to apply has been expanded to include "foreign charitable foundations" as opposed to just charitable organizations
- Proposes to spend \$150 million towards social housing providers that wish to pre-pay long-term and non-renewable mortgages without penalty
- Includes a commitment to social entrepreneurs by implementing a "social finance accelerator" to assist in having social finance proposals ready to attract private investment

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B. FEDERAL LEGISLATIVE AND REGULATORY UPDATE

1. Anti-Terrorism Act, 2015, Bill C-51

- Received Royal Assent on June 18, 2015
- Charities operating in conflict areas may be particularly affected by the proposed amendments, which include
 - *Criminal Code* will be amended to create an offense for knowingly advocating or promoting the commission of terrorism offenses in general
 - *Security of Canada Information Sharing Act, 2015* will authorize and facilitate the sharing of information among government agencies (e.g., CRA) in situations where there is "activity that undermines the security" of Canada
 - The *Secure Air Travel Act* will create a "no-fly list" for identifying and responding to persons who engage in an act that threatens transportation security or travel

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2. 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
- CRTC has issued notices of violation and entered into voluntary undertakings with various commercial entities, with various investigations going on since CASL came into force
- On September 4, 2015, CRTC provided an enforcement advisory together with new guidance for CASL compliance

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3. Digital Privacy Act, Bill S-4


- On June 18, 2015, the act received Royal Assent
- The act amends the *Personal Information Protection and Electronic Documents Act (PIPEDA)*
- Most notably, the amendments expand the circumstances in which personal information could be disclosed without the individual's knowledge or consent
- Grants the Privacy Commissioner authority to enter privacy compliance agreements with organizations and potentially enforce these agreements through a court order



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- Permits organizations to disclose personal information with enforcement and security agencies without the knowledge or consent of the individual to another organization
 - in order to investigate a breach of an agreement or a contravention (or anticipated contravention) of a federal or provincial law
 - where it is reasonable to expect that obtaining the consent from the individual for the disclosure would compromise the investigation




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4. Credit Card Fees Reduced for Charities

- On November 4, 2014, the federal government announced a voluntary agreement with MasterCard and Visa to reduce interchange fees to an average of 1.5% of the transaction value
 - The agreement took effect April 1, 2015 and will continue for five years
- Bill S-202, at committee in Senate prior to the recent election, proposed further regulation, such as eliminating credit card acceptance fees being charged to charities
- Reduced interchange fees will benefit charities by increasing donations received and lowering administrative costs, therefore allowing donations to have a greater impact on charitable causes



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C. ONTARIO LEGISLATIVE AND REGULATORY UPDATE

1. Accessibility for Ontarians with Disabilities Act, 2005 ("AODA"), New Requirements


- The AODA and its associated *Standards* (regulations) are meant to achieve accessibility for Ontarians with disabilities with respect 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
 - Requirements of all standards, except the new Built Environment Standard have 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 is required
 - "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
 - "Small organizations" will have limited obligations, such as accessible parking by January 1, 2018

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2. Ontario Human Rights Commission ("OHRC") New Policies and Guidelines

- In 2014, the OHRC released new or updated policies on preventing discrimination based on
 - Pregnancy and breastfeeding (October 2014)
 - Mental health disabilities and addictions (June 2014)
 - Gender identity and gender expression (April 2014)
- The Ontario *Human Rights Code* (the "Code") authorizes the OHRC to prepare, approve and publish human rights policies, to set standards in how to interpret the Code
 - The Human Rights Tribunal must consider such policies if a party requests so
- On November 25, 2014, the OHRC also issued statement on how to prevent and deal with sexual harassment in the workplace

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D. CORPORATE LAW UPDATE

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

- Enacted on June 23, 2009 and proclaimed in force on October 17, 2011
- Replaced Part II of *Canada Corporations Act*, which had been in force since 1917
- All CCA corporations had to continue under the CNCA within 3 years, i.e., by October 17, 2014
- Dissolution for not meeting the October 17, 2014, deadline is not automatic
- As of September 30, 2015, there are 9,327 dissolutions for failure to transition
- As of October 3, 2015, 12,455 of approximately 17,000 Part II CCA not-for-profit corporations had continued
- As of October 14, 2015, there are 3,237 CCA II corporations listed as active

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- Before dissolving a corporation, Corporations Canada must first send a notice of pending dissolution after which the corporation will have 120 days to continue
- Now focussing on corporations that have not filed corporate summaries and are presumed inactive
- After March 2015, Corporations Canada will start sending notices to corporations that are up-to-date with their annual filings but have not yet continued
- Corporations Canada anticipates that all notices will be sent by Fall 2015
- Part II of The *Canada Corporations Act* will be repealed after all corporations have transitioned or been dissolved

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2. Ontario *Not-for-profit Corporations Act* ("ONCA")

- The Ontario Corporations Act ("OCA") has not been substantially amended since 1953
- The new 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, but Bill 85 died on the Order Paper in May 2014 because of the election
- On September 17, 2015 the Ontario Ministry of Government and Consumer Services announced that ONCA cannot come into force until:
 - The Legislative Assembly passes a number of amendments to the legislation and related acts
 - Technology is upgraded to support these changes

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- The Ontario government will bring the ONCA into force at the "earliest opportunity and will provide the sector with at least 24 months' notice before proclamation"
- This means that proclamation cannot occur before the end of 2017 at the earliest, but more likely sometime in 2018
- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- Organizations that need to update their by-laws and letters patent should move forward under OCA instead of waiting for implementation of the ONCA




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E. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

1. *Guidance on Ineligible Individuals*

- Since January 1, 2012, CRA has had the discretion to refuse or revoke the registration of charities or RCAAs 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 26, 2014
- It explains who is an ineligible individual and how CRA will use their discretion



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- In general terms, an ineligible individual is one who
 - Convicted of a "relevant criminal offense" and no pardon was granted
 - Convicted of a "relevant offense" in the last 5 years ("relevant" means financial dishonesty or operation of the organization)
 - Was a director, officer or like official of a charity that engaged in a "serious breach" of the *Income Tax Act* and had its registration revoked in the past 5 years
 - Controlled or managed, directly or indirectly, a charity that engaged in a "serious breach" of the *Income Tax Act* and had its registration revoked in the past 5 years
 - Was a promoter of a tax shelter that involved a registered charity or RCAA which had its registration revoked for reasons including participation in the tax shelter

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- CRA is not required to take action but has the authority to use discretionary sanctions to enforce the ineligible individual provisions
- Charities are not required to search or proactively determine whether an ineligible individual is a director or controls or manages 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
- Some questions CRA may consider when making a decision include:
 - 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?

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- Onus is on the charity to explain and address CRA's concerns by providing CRA with adequate documentary evidence
- Charities should practice due diligence, risk assessment, fraud prevention, and implement financial controls within their governance and operations
- CRA has revoked the registration of two charities, (Jesus of Bethlehem Worship Centre on July 12, 2014, and Friends and Skills Connection Centre on September 13, 2014) 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
- Guidance is helpful, but there remain questions about how it will be applied

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2. CRA Website Updates

- Budget 2015 - Supporting the Charitable and Non-Profit Sector (July 15, 2015)
 - Contains two pages dedicated to questions and answers pertaining to charities from the 2015 Budget as well as a message from the Director General
- Charities and Political Activities (July 14, 2015)
 - An educational resource for charities that provides insight on political activities audits and procedures and how they are selected and conducted

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- As of Sept 30, 2015, CRA has completed 28 of 60 planned political activities audits with the following results:

- Clean	1
- Education letter	7
- Compliance agreement	13
- Notice of intention to revoke	5
- Voluntary revocation	1
- Annulment	1

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- Audit Process for Charities (July 14, 2015)
 - This page provides information for charities concerning audits and the audit process for charities
 - CRA has reported 781 audits for 2014/2015
- Advisory on partisan political activities (August 21, 2015)
 - In light of the recent federal election campaign, CRA published further information in relation to partisan political activities
 - Charities should note in particular that among the list of partisan political activities either criticizing or praising the performance of candidate or political party is now included

NON-PARTISAN DEMOCRACY

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F. SELECTED CASE LAW

1. *Bekesinski v The Queen* (Director Liability)

- Under section 227.1(4) of the ITA, directors of corporations, including NPOs, may be liable for income tax, employer contributions, interest, and penalties that the corporation owes to CRA
 - This liability exists while a director is serving as well as for two years after a director resigns
- On July 28, 2014, the Tax Court released its decision - While the court agreed with CRA the director resignation form was likely backdated and inauthentic, the court found for the appellant based on the evidence before the court
- This case underscores the importance of maintaining complete and up-to-date corporate records, including director resignation forms

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2. *McDonald v The Queen* (De Facto Directors)

- On September 29, 2014, the Tax Court held that an individual was a *de facto* director and could be liable for company liabilities despite not officially being a director and not presenting himself as a director to third-parties
- The Court held that the potential director "played an important and active role in the overall corporate operations," including managing and controlling employees, having access to corporate books and records, and attending meetings with CRA trust examiners
- Anyone who is not officially a director, including executive directors and other senior management, should ensure that the scope of their roles does not make them a *de facto* director

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3. *Mulgrave School Foundation* (Restricted Charitable Trusts)

- On October 9, 2014, the British Columbia Supreme Court ("BCSC") considered whether it could vary a restricted charitable purpose trust
- The BCSC refused to vary the trust despite the fact that the donor agreed to the change in use
- This case serves as an important reminder that once donors have given donor restricted charitable funds, the donor has no further control or ability to vary the terms of the gift and the court may also be unable to vary the terms of the gift
- Charities should be cautious before encouraging donors to make gifts with restrictions unless appropriate wording is included in the gift agreement giving the charity power to vary a restriction

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4. *Humanics Institute v The Minister of National Revenue (Advancement of Religion)*

- On November 17, 2014 the Federal Court of Appeal upheld the Minister's decision not to register Humanics Institute as a charity because its purposes were broad and vague and its activities did not advance religion or education in a charitable sense
- Humanics had failed to show the existence of a "particular and comprehensive system of faith and worship" or a body of religious teaching and doctrine
- Federal Court of Appeal held it is insufficient to build a sculpture park and "simply make available a place where religious thought may be pursued" and that "merely expressing aspirations" (without detailed and credible plans on proposed activities) is insufficient to qualify for charitable status

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5. *Vancouver Opera Foundation (Re) (Cy-Près Jurisdiction)*

- On March 12, 2015, the BCSC revisited the extent of its inherent (cy-près) jurisdiction over charitable trusts and its ability to remedy irregularities in a society's affairs
- Vancouver Opera Foundation applied for an order to amend certain unalterable provisions in its constitution
- After referring to the earlier *Mulgrave* decision, the Court concluded that cy-près jurisdiction is too narrow to apply in this case, particularly because any requested changes must reflect the intentions of the original donors and founders, and changes cannot be made purely for convenience
- For a Court to use its cy-près jurisdiction, the charitable purpose must be impossible and impractical to perform

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6. *Loyola High School v Quebec (Attorney General)*

- On March 19, 2015 both majority and the concurring minority opinions of the Supreme Court provided robust affirmation of freedom of religion, including the communal aspects of religion
- SCC ruled that requiring religious schools to teach their own religion objectively infringes religious freedoms
- The Court commented on secularism in considering how to balance freedom of religion with state values
 - The majority underlined that secularism does not mean excluding religion and, instead includes "respect for religious differences"
- The majority returned the matter to the Minister for reconsideration, while the minority would have ordered the Minister to grant Loyola an exemption
- Further comments will be provided by Jennifer Leddy in her presentation later today

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7. *Trinity Western University v Law Society of Upper Canada*

- On July 2, 2015, the Ontario Superior Court of Justice (Divisional Court) upheld the Law Society of Upper Canada's ("LSUC") decision to deny accreditation to Trinity Western University's ("TWU") proposed law school
- The Court found that this was reasonable because of institutional discrimination
- The Court relied on the fact that the LSUC's statutory authority was not only concerned about academic competence, but also included a broad mandate to advance the cause of justice, maintain the rule of law, and act in the public interest

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- This case was distinguished from TWU v NSBS by the Ontario court on the grounds of the enabling legislation to the LSUC
 - The Court held that since it was formed, the LSUC has had broader statutory authority and greater control over educational qualifications for admission to the Bar than the NSBS
- TWU concluded hearings with the LSBC at the BC Supreme court on August 26, 2015, in defense of the LSBC's reversal of their decision to accredit TWU's law school graduates (Judgement reserved)
- The judgement in this case has not been released to date
- Further comments will be provided by Jennifer Leddy in her presentation later today

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8. *Habitat for Humanity Canada v Hearts and Hands for Homes Society (Affiliation Agreements)*

- On July 18, 2015 the B.C. Supreme Court upheld a claim in specific performance for a provision within an affiliation agreement requiring that upon disaffiliation from the national umbrella organization, an affiliate must transfer its assets to the umbrella organization
- The Court held that the affiliate organization breached a number of requirements for affiliates including failure to adhere to service standards of the umbrella organization in carrying out its operations
- After the umbrella organization provided an opportunity to bring the affiliate back into compliance with the agreement over a period of three years, the umbrella organization took steps to disaffiliate due to continued non-compliance



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9. Public Television Association of Quebec v Minister of National Revenue ("PTAQ") (Direction and Control)

- On July 22, 2015 the Federal Court of Appeal upheld the Minister's decision to revoke PTAQ's charitable status
- PTAQ had entered into agreements for broadcasting and fundraising with a charitable US broadcaster
- PTAQ was audited by CRA who found that PTAQ failed to devote all of its resources to charitable activities who then issued a Notice of Intent to Revoke
- PTAQ objected to CRA and Appealed to CRA's appeals branch who upheld the Minister's decision

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- PTAQ appealed the Minister's decision to the FCA
- There the Court found, after reviewing the documentary evidence on record, that PTAQ failed to demonstrate that they maintained direction and control
- The Federal Court of Appeal decision on PTAQ demonstrates that while intermediary agreements are given weight in deciding direction and control, courts will not hesitate to look past these agreements where they are not implemented according to the provisions set out in the agreement
- It is important that charities not only draft agreements that reflect the Act, but also that they can demonstrate that they are implemented in accordance with their terms on an ongoing basis

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10. Guindon v Canada (Third-Party Penalties)


- On July 31, 2015, The Supreme Court of Canada dismissed the appeal
- The Court held that third party penalties imposed according to section 163.2 of the ITA do not attract protection under the *Canadian Charter of Rights and Freedoms*
- The Appellant was a lawyer without expertise in tax law who provided a legal opinion on the tax consequences of a leveraged donation program and signed 135 charitable receipts totalling \$3,972,775, in her capacity as president of a registered charity
- CRA had assessed a third party penalty against the Appellant in the amount of \$564,747 against Appellant, who appealed to TCC

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11. Glover v The Queen (Donative Intent)

- In 2003 the Appellant participated in a tax shelter gifting arrangement
- He donated \$29,952 and received 64 licenses for a wholesale price of \$468 each rather than for their retail price of \$1499 each
- The Appellant then donated the licenses to the tax shelter and received a tax receipt for \$65,984 based on the combined value of the cash donation plus the value of the licenses
- On August 5, 2015 the Court decided that the gifting arrangement was not valid; to constitute a valid gift the must be a voluntary transfer of property
- Similar decisions were recently released in *Mariano v The Queen* and *Moshurachak v The Queen*



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12. Humane Society v MNR (Undue Benefit)

- The Humane Society was issued a Notice of Intention to Revoke by CRA following a CRA audit of the 2006 fiscal year, for an alleged reimbursement of \$250,000 to the Humane Society's director
- Of the reimbursed funds CRA was of the opinion that \$69,343.18 was not in relation to charitable expenditures
- On August 18, 2015, the FCA held that revocation of the charitable status of the Humane Society was reasonable because "it was within a range of justifiable outcomes for the Appeals Directorate to conclude that the personal benefits...constituted serious non-compliance with the applicable provisions of the Act"

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13. Bope v. The Queen (Donations and Donation Receipts)

- Appellant claimed tax credits for cash donations of \$3,800 made in year 2009 despite an income of roughly \$40,000 for that year
- Tax credits were disallowed by MNR; on May 12, 2015, disallowance was upheld by TCC because:
 - The donation receipt did not meet requirements in ITA Regulation 3501(1)
 - Appellant provided no objective evidence to rebut MNR assumption no donation was made
 - i.e. there were no cheques, no ATM withdrawal slips, or any other records
- Case has no precedential value, but serves as a helpful reminder:
 - for charities to ensure their receipts conform to ITA Regulation 3501(1)
 - for donors to retain their records of objective evidence to support charitable donation credits or deductions

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