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# The 2016 Annual *Church & Charity Law*<sup>™</sup> Seminar


Mississauga – November 10, 2016

## 2016 ESSENTIAL CHARITY & NPO LAW UPDATE

By Jacqueline M. Demczur, B.A., LL.B.

[jdemczur@carters.ca](mailto:jdemczur@carters.ca)  
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jdemczur@carters.ca  
1-877-942-0001

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TOLL FREE: 1-877-942-0001

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### OVERVIEW OF SELECTED TOPICS

- Recent Changes to Tax Rates and Estate Gifts
- 2016 Federal Budget Highlights
- CRA Publications and Website Updates
- Recent Tax Decisions, Rulings & Interpretations involving Charities
- Corporate Law Update
- Provincial Legislation Update
- Other Case Law of Interest

– See “Update on Charity Law” paper by Theresa Man and Terrance Carter available at <http://www.carters.ca/pub/article/charity/2016/tlmtsc1104.pdf>

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### A. RECENT CHANGES TO TAX RATES AND ESTATE GIFTS

#### 1. Changes to Tax Rates and Donations


- On December 7, 2015, the Minister of Finance announced changes to the federal graduated tax rates for individual taxpayers as of January 1, 2016

Taxable Income	2015 Rates	2016 Rates
\$0 to \$45,282	15%	15%
\$45,282 to \$90,563	22%	20.5%
\$90,563 to \$140,388	26%	26%
\$140,388 to \$200,000	29%	29%
\$200,000 +	29%	33%

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- The proposed amendments include a provision to enable individuals with income over \$200,000 that are subject to the top marginal rate of 33%, to claim a corresponding 33% charitable donation tax credit
- The previous provisions permitted a credit of 15% for the first \$200 donated and 29% for donations over \$200 up to 75% of net income



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#### 2. Changes to Estate Gifts

- The testamentary donation regime has changed from donations by deceased individuals taking place immediately before death to being donations by estate at time of its transfer to charity
- The donation tax receipt is to reflect fair market value at time of actual transfer to charity
- Prior to January 2016, testamentary trusts taxed at the same federal graduated tax rates as individuals
- As of January 1, 2016, similar to other trusts, testamentary trusts are now subject to a federal flat tax at the top marginal rate of 33%, unless the trust is designated as a Graduated Rate Estate (“GRE”)
- GRE is testamentary trust created on individual's death and can last up to 36 months

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- Two important benefits of GREs for testamentary charitable gifting are:
  1. If a donation is made during the GRE period or up to 24 months thereafter, then the donation tax credit can be claimed in year of gift or carried back over 5 time periods, i.e. the 36 months of the GRE and, more importantly, the year of death and the year prior to death when the donation can be claimed against 100% of net income
  2. Gifts of publicly traded shares have nil inclusion rate (i.e. no deemed disposition on death) if made by GRE or former GRE within 60 months
- Churches and charities will want to monitor the administration of estates where they are beneficiaries to ensure maximization of donation tax credits


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**B. 2016 FEDERAL BUDGET HIGHLIGHTS**

**1. Implementation of Federal Budget**

- Federal Budget 2016, announced March 22, 2016
- Subsequent legislation to implement certain portions of Budget 2016 was introduced on April 20, 2016 by Bill C-15, *Budget Implementation Act, 2016 No. 1*, that received Royal Assent on June 22, 2016
- On October 25, 2016, the *Notice of Ways and Means Motion to implement certain provisions of the Budget, 2016, No. 2* (the "*Budget Implementation Act, 2016, No. 2*") received first reading in the House of Commons



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**2. Donation of Sale Proceeds of Real Estate and Shares of Private Corporations**

- In Budget 2016, the Federal Government announced its intention not to proceed with the Budget 2015 proposal to provide a capital gains tax exemption for dispositions involving private corporation shares or real estate where proceeds were donated to a qualified donee within 30 days of disposition
- The decision of the current Federal Government not to proceed with these capital gains tax exemptions has been disappointing for the charitable sector
- However, the proposed rules were complicated and fraught with practical and implementation problems

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**3. Consultation with Sector on Political Activities**

- By way of background, the PM Mandate Letter to the Minister of Finance dated November 13, 2015, asked the Minister to "[w]ork to allow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and non-for-profit sectors. This will include clarifying the rules governing 'political activity.'"
- This announcement was followed by the wind-down of the audit program directed at political activities of charities as announced by the Minister of National Revenue on January 20, 2016

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- The March 22, 2016, Budget announced that the Government would engage with the public through "stakeholder groups and online consultation" to clarify the rules involving political activities
- On September 27, 2016, the Minister of National Revenue announced the launching of public consultations concerning political activities by charities
  - Online consultations are open until November 25, 2016
  - In-person consultations will follow in major cities by a five person consultation panel
- Charities interested in political activities should complete this online consultation

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**4. Acquisition of Interest in Limited Partnerships by Registered Charities**

- Budget 2016 confirms the announcement in Budget 2015 and now allows registered charities, including private foundations and RCAAAs, to passively invest in limited partnerships without being considered to be carrying on the business of the partnership, provided that:
  - The charity must be a "limited partner" of the partnership (i.e. limited liability);
  - The charity deals at arm's length with each general partner of the partnership; and
  - The charity - together with all non-arm's length entities - holds 20% or less of the fair market value of all interests in the partnership

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**5. Sales and Excise Tax Measures**

- The *Budget Implementation Act No. 1* enacted two charity-related GST/HST measures mentioned in Budget 2016 and related to *Excise Tax Act* ("ETA"):
  1. New ETA Section - A supply of a service rendered to an individual to enhance/alter his/her physical appearance, and not for medical or reconstructive purposes, or a supply of a right entitling a person to such service, is not exempt from GST/HST
  2. New ETA Section - Where a charity receives a donation in exchange for a property/service to the donor, the part of the donation that exceeds the value of property/services supplied will not be subject to GST/HST, subject to certain conditions
- Both sections apply to supplies after March 22, 2016


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**C. RECENT CRA PUBLICATIONS AND WEBSITE UPDATES**

**1. GST/HST Info Sheets**

- On April 6, 2016, CRA released new GST/HST Info Sheets about the Public Service Bodies' (PSB) Rebate that may be claimed by charities/qualifying NPOs
- Charities and qualifying NPOs may be able to recover a percentage of the GST and/or the federal part of the HST paid or payable on its eligible purchases and expenses by claiming a PSB rebate, with the Info Sheets setting out various scenarios based upon the applicable province of residence of the charity



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**2. New Guidance on Becoming a Qualified Donee for Low Cost Housing Corporations ("LCHCA")**

- On April 23, 2016, CRA released new Guidance CG-025, *Qualified Donee: Low-Cost Housing Corporations for the Aged*
- A LCHCA is "a corporation that is constituted exclusively for the purpose of providing low-cost housing accommodation for the aged (55+), no part of the income of which was payable to, or was otherwise available for the personal benefit of, any proprietor, member or shareholder thereof"
- Such accommodation "includes comfortable but modest rental accommodation" at rents that are low relative to rents generally

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**3. Updated Charities Audit Statistics for 2015-2016**

- On May 12, 2016, CRA updated its webpage *The Audit Process for Charities*
- CRA audits roughly 1% of charities each year

Audit Outcomes in 2015-2016

No Change	40
Education Letter	444
Compliance Agreement	111
Voluntary Revocation	22
Penalties and Suspensions	4
Notice of intent to Revoke Issued	21
Annulment	59
Other (includes pre-registration/Part V audits)	25
Total	726

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**4. New Guidance on Requirements for Foreign Charities to become Qualified Donees:**

- On June 16, 2016, CRA issued Guidance CG-023, *Qualified donee: Foreign charities that have received a gift from Her Majesty in right of Canada*, which outlines process for a foreign charity to become a qualified donee ("QD") that has the ability to issue official donation receipts
- If a foreign charity meets the criteria in the Guidance (see below) and has been registered, it will be a QD for a period of 24 months as of the date it received the gift from the federal government
- Foreign charity QD status therefore has limited "shelf life"

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- For registration as a QD, a foreign charity must:
  - Be established or created outside Canada and not be resident in Canada;
  - Have exclusively charitable purposes and activities;
  - Ensure that its income is not payable or otherwise available for the personal benefit of any owner, member, shareholder, trustee, or settlor of the organization;
  - Be the recipient of a gift from Her Majesty in right of Canada; and
  - Currently be undertaking at least one of the following:
    - relief activities in response to a disaster
    - urgent humanitarian aid
    - activities in the national interest of Canada

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**5. Length of Retention for Church Offering Envelopes Changes**

- Effective 2016, but also applicable to the 2015 tax year, church offering envelopes are required to be kept for a 6 year period from the end of the tax year to which the envelope relates, a change from the previous 2 year requirement
- CRA indicated that this change was made to reflect consistency with the ITA provisions related to retention of source d



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### 6. New CRA Infographic to Help Calculate When T3010 Due

- Charities required to file T3010s within 6 months of fiscal year ends
- Late filing can result in the loss of charitable status
- In determining filing deadlines, CRA published a helpful infographic on its website, which outlines filing deadline based on applicable fiscal year

**IF YOUR FISCAL PERIOD END IS**

YOUR T3010 INFORMATION RETURN IS DUE NO LATER THAN

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### D. RECENT TAX DECISIONS, RULINGS & INTERPRETATIONS INVOLVING CHARITIES

#### 1. FCA Confirmed Revocation of Charitable Status For Failure to Maintain Books & Records

- In *Al Uloom Al Islamiyyah Ontario v The Queen* (Feb 2016), the FCA confirmed decision of Minister of National Revenue to issue a Notice of Intent to Revoke a charity's registration for failure to maintain books and records and failure to file an annual information return
- The charity asserted that, given the remedial action that it had taken, revocation was too extreme
- The FCA disagreed and found that failure to maintain books and records was serious and, therefore, revocation was justified
- Underscores the importance of maintaining books and records

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### 2. FCA Confirmed Revocation for Failure to Follow Compliance Agreement

- In *Opportunities for the Disabled Foundation v Minister of National Revenue* (March 2016), the FCA dismissed an appeal of the Minister's proposed revocation
- Previous audit of the charity led to compliance agreement, with same compliance problems again identified in its current audit
- The FCA did not give the charity a second chance given its failure to comply with the compliance agreement and, therefore, upheld the Minister's decision to revoke
- Decision underscores the importance of charities complying with compliance agreements and the need for all board members to monitor compliance
- Loss of charitable status for failure to comply with compliance agreements can lead to applicable directors being found to be "ineligible individuals"

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### 3. CRA Does Not Owe Duty of Care for Disallowed Tax Shelters

- In *Deluca v The Queen* decision (June 2016), the Plaintiff had filed a claim against the Crown and two CRA employees for failing to take prompt actions to warn the public about problems they knew of with a tax shelter and the risks involved in dealing with them
- Ontario Superior Court rejected this claim, stating that the ITA does not impose a duty on the Minister to administer the registration and supervision of registered charities in order to protect taxpayers and that there is no duty to warn taxpayers away from participating in tax shelter schemes that prove unsuccessful

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### 4. FCA Holds That Prevention of Poverty is Not a Charitable Purpose

- In *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue* (June 2016), FCA found that the "prevention of poverty" was not charitable at law
- The FCA stated, in order to satisfy the requirement that a purpose is for the relief of poverty, the person receiving the assistance must then be in poverty
- Absent "an act of Parliament to add prevention of poverty as a charitable purpose", it was not possible for the FCA to take such a step on its own
- The Court confirmed that the Notice of Annulment would be assessed by the same review standard as a revocation of charitable status

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### E. CORPORATE LAW UPDATE

#### 1. Corporations Canada Postings Re: *Canada Not-for-profit Corporations Act* ("CNCA")

- January 15, 2016 - *Extending the time for calling an annual meeting of members* posted, which explains policy on how corporations may apply to extend the time for calling an AGM, i.e. such extension is possible if members not prejudiced but cannot be exempt from calling an AGM altogether
- January 16, 2016 - *Public disclosure of corporate information* posted, indicating that information about federal corporations (even if dissolved) is public, including its registered office address and directors' names/addresses

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## 2. Technical Amendments to the CNCA

- On September 28, 2016, the Minister of Innovation, Science and Economic Development tabled Bill C-25, *An Act to Amend the Canada Business Corporations Act, the Canada Cooperative Act, the Canada Not-for-profit Corporations Act and the Competition Act*
- Bill C-25 includes minor technical amendments for CNCA corporations including:
  - New definition of person who has become "incapable";
  - New section requiring the Director to publish a notice of certain decisions by the Director under the CNCA, including when a corporation is deemed non-soliciting, when a corporation is permitted to delay calling of AGMs and when the Director relieves the corporation from certain parts of the CNCA

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## 3. Update on Ontario Not-for-Profit Corporations Act ("ONCA")

- 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
- 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 any earlier than late 2018 or 2019
- 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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## 4. Proxy Form for Members' Meeting Revised by Court:

- In *Jacobs v Ontario Medical Association decision* (August 2016), the Ontario Superior Court reviewed issues related to members' meeting to ratify/reject agreement with Ministry of Health and Long Term Care
- Court ordered proxy form be revised because it was unhelpful and unfair, i.e. it contained one restriction to compel a vote for or against 1 of 3 resolutions and recommended "for" one resolution with no similar recommendation for other resolutions
- Court held that it was "far fairer" to provide no instructions/no recommendations for three resolutions, or to provide instructions but no recommendations
- Underscores that courts will intervene if a proxy will compromise the fair conduct of a meeting

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## F. PROVINCIAL LEGISLATION UPDATE

### 1. Ontario Legislation on Forfeited Property:

- New legislation passed to address situations where corporations, charities and not-for-profits dissolve without properly disposing all their assets
- New legislation to come into force on December 10, 2016:
  - Forfeited Corporate Property Act, 2015* ("FCPA")
  - Escheats Act, 2015* ("EA")
- The FCPA will give the Minister of Economic Development, Employment and Infrastructure sole jurisdiction over forfeited corporate real property
- The PGT under the EA will retain discretionary authority to take possession, and dispose of, forfeited corporate personal property, and the property of heirless deceased persons
- The new legislation will also change the processes by which claimants can recover forfeited corporate property, including failure to continue under the CNCA

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## 2. Quebec Ends Duplicate Registration Process for Registered Charities

- On March 17, 2016, the Québec Budget provided that, effective 2016, charities registered by CRA under the ITA will no longer be required to file a separate application for charitable registration in Québec
- Previously, Quebec required that separate charitable registration be obtained if donations were received from Québec residents
- Donations made prior to January 1, 2016 to a charity registered by CRA will be deemed to have been made to a charity in Québec
- Québec, though, has retained its power to "refuse, cancel or revoke a registration or to modify a designation"

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## 3. Amendments to Ontario Lobbyists Registration Act

- On July 1, 2016, amendments to the *Ontario Lobbyists Registration Act, 1998* ("OLRA") took effect
- Under OLRA, lobbying defined as a paid individual communicating with a public office holder in order to influence a decision with regards to legislation, policy, programs, decisions of the Executive Council, or financial benefits from the Crown
- "In-house lobbyist" is redefined in the OLRA to include any organization, including a charity or not-for-profit, which had employees collectively spending 50 hours a year or more on lobbying

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- Where threshold met, then organization must register, with the duty to register being placed upon the senior officer of the organization, not an individual
- A section was added granting the Integrity Commissioner of Ontario investigative powers for matters of suspected non-compliance
- Punishment for committing an offence was increased to a fine of not more than \$25,000 for the first offence and not more than \$100,000 for subsequent offences
- The amended rules provide protection to any person who discloses information to the Registrar or gives evidence in a proceeding or investigation by prohibiting various forms of retaliation (i.e. “whistle blower” protection)

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## G. OTHER CASE LAW OF INTEREST

### 1. Trinity Western University (“TWU”)

- In *Trinity Western University v Law Society of Upper Canada* (“LSUC”), the Ont. Court of Appeal on June 29, 2016, upheld the LSUC’s decision to deny accreditation to the proposed law school on the basis of institutional discrimination
- On July 26, 2016, the Nova Scotia Court of Appeal affirmed the lower court decision that the N.S. Barrister Society did not have the jurisdiction to refuse accreditation
- On November 2, 2016, B.C. Court of Appeal upheld decision of B.C. S.C. to quash Law Society of B.C.’s decision to reject TWU as approved faculty of law
  - BCCA found the Benchers fettered their discretion by agreeing to be bound by a members’ referendum without considering Charter rights of equality and freedom of religion

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### 2. Discriminatory Will Provision Ruled Invalid:

- In *Royal Trust Corporation of Canada v The University of Western Ontario* (Feb 2016), the Ontario Superior Court reaffirmed the common law prohibition against enforcing testamentary trusts that offend public policy
- Provisions in the disputed Will provided for the establishment of a fund that was to be restricted to certain candidates on the basis of race, gender and sexual orientation e.g. - an award for “Caucasian (white) male single heterosexual students”
- Whether such provisions can be saved based upon the Court’s inherent *cy-près* jurisdiction will depend upon the specific wording of each Will

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### 3. Affiliation Agreement Upheld by BC Court of Appeal

- On May 20, 2016, the B.C. Court of Appeal upheld a claim for specific performance pursuant to an affiliation agreement in the appeal of *Habitat for Humanity Canada v Hearts and Hands for Homes Society* (“HHHS”)
- As an affiliated member, HHHS was required to enter an affiliation agreement with Habitat, but a dispute arose when HHHS failed to comply with the requirements under the agreement
- As a result, Habitat disaffiliated, HHHS and proceeded to enforce the provision of the affiliation agreement to require the net assets of HHHS be transferred to Habitat

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- Lessons Learned from this Case:
  - Courts are willing to uphold reasonable provisions set out in an affiliation agreement
  - It is important for parties to comply with disaffiliation process set out in own policies/agreements
  - When structuring the disaffiliation mechanism, consider the purpose and fairness of the process, as well as how a disaffiliation policy can assist affiliates experiencing difficulty by providing a defined way for them to remain in or return to good standing
  - Before entering into an agreement, affiliates should be given an opportunity to provide input to the terms
  - Parties should confirm in the affiliation agreement and constating documents their respective purposes and how they align with each other

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### 4. Alberta Court of Appeal Affirms Court’s Jurisdiction to Review Unfair Church Discipline

- On September 8, 2016, the Alberta Court of Appeal (“ABCA”) in *Wall v Judicial Committee for the Highwood Congregation of Jehovah’s Witnesses* followed a line of cases affirming that courts have jurisdiction to review decisions made by a religious organization where discipline or expulsion is carried out in a manner inconsistent with natural justice principles
- This case involved the expulsion of Mr. Wall, for “alleged wrongdoing involves drunkenness”
- In making its decision, the ABCA noted that Mr. Wall was not provided with the details of the allegations against him or an explanation of the discipline process, and he did not receive any written reasons for the decision for him to be “disfellowshipped”

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