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The 24th Annual *Church & Charity Law*TM Seminar

Toronto – November 9, 2017

ESSENTIAL CHARITY & NFP LAW UPDATE

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Church and Charity Law
Seminar
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Essential Charity and NFP Law Update
(Current as of November 3, 2017)

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OVERVIEW

- 2017 Federal Budget Highlights
- Recent CRA Publications
- Recent Tax Decisions, Rulings and Interpretations Involving Charities
- Corporate Law Update
- Federal Legislation Update
- Provincial Legislation Update
- Other Case Law of Interest

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2017 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget legislative development
- Budget 2017 proposed a number of measures to protect Ecogifts, now in Bill C-63, *Budget Implementation Act, 2017, No. 2* tabled October 27, 2017, including:
 - New ministerial approval in certain situations
 - Private foundations no longer eligible to receive Ecogifts
- Repeal of Additional Corporate Donation Deductions on Medicine for International Aid
- The First-Time Donor Super Credit will be allowed to expire in 2017 due to low take-up

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RECENT CRA PUBLICATIONS

- New CRA Guidance: *Relieving Conditions Attributable to Being Aged and Charitable Registration (CG-026)*(December 8 2016)
 - Replaces the CRA's Policy Statement CPS-002, *Relief of the Aged* that was released on July 6, 1990
 - Clarifies what CRA considers charitable for Canadian charities serving the aged
 - Having attained a certain age is not a condition that is eligible for charitable relief
 - Members of the eligible beneficiary group must be those affected by one or more conditions attributable to being aged

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- The CRA provides a non-exhaustive list of conditions: frailty, social isolation, decline in motor skills, flexibility, strength, speed of execution, or hand-eye co-ordination, physical or mental health conditions attributable to being aged, difficulty functioning in, or adapting to, current technology, vulnerability to elder abuse
- The applicant is required to include in its charitable purposes a "purpose description" with the scope of the activities that will be conducted to relieve the conditions attributable to being aged, the eligibility group, and the conditions that will be relieved
- There needs to be a connection between the condition to be relieved and activities to be conducted

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- The CRA's New Cause-related Marketing Webpage
 - On February 11, 2017, the CRA introduced a new webpage to explain the CRA's interpretation of cause-related marketing
 - The CRA defines cause-related marketing as fundraising activity where a registered charity (or other qualified donee) works with a for-profit entity to promote the sale of the for-profit's items or services on the basis that part of the revenues will be donated to the registered charity

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- New Privacy Disclosure in T2050 Application to Register a Charity Under the ITA
 - The privacy disclosure, added on February 21, 2017, indicates that personal information is being collected under the authority of the ITA to validate the identity and contact information of directors, officers and authorized representatives of the applicant, and for the indirect collection of additional personal information from other internal and external sources, which may be used by the CRA to assess the risk of registration
 - The CRA is also permitted to make the T2050 public if the registration is approved

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- Sweeping changes recommended in Report on political activities
 - On May 4, 2017, CRA published the *Report of the Consultation Panel on the Political Activities of Charities*, prepared after the consultation with the charitable sector, and recommended:
 - Define “political activities” to mean “public policy dialogue and development” to permit charities to engage in public dialogue
 - Changes to CRA compliance and appeals, audits, communication and collaboration
 - Removal of legislative reference to non-partisan political activities and “political activities”
 - A modern legislative framework that focuses on charitable purposes rather than activities
 - Not clear when CRA will respond to the Consultation Panel’s recommendations

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- Changes to charitable registration application process (June 29, 2017)
 - Charities Directorate no longer reviewing applications submitted with draft governing documents
 - However, draft revised charitable purposes can still be sent in for existing charities
- Online services to come November 2018 (July 21, 2017)
 - Filing T3010 annual returns online
 - Update and manage account information
 - Apply for registration (T2050) and check file status
 - Corresponding with the CRA
- Changes to CRA’s Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) (August 9, 2017)
 - Permits support for small businesses in disaster areas under certain circumstances for 2 years after the date of the disaster

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- Changes to the Voluntary Disclosure Program
 - On June 9, 2017, proposed changes were announced for the CRA Voluntary Disclosures Program (“VDP”) to be implemented as of January 1, 2018
 - The VDP is intended to allow taxpayers to come forward and correct previous omissions in their dealings with the CRA to avoid penalties and prosecutions
 - The VDP only applies to registered charities in very limited context of employee source deductions and HST
 - The specifics of the proposed changes will therefore be of limited interest to registered charities

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- However, the CRA provides a voluntary disclosure process for charities that have been involved in matters of non-compliance and want to bring themselves back into compliance
- This voluntary disclosure process is set out on the CRA webpage entitled, “Bringing Charities Back into Compliance”
- Serious matters of non-compliance or repeat non-compliance that could lead to a sanction or revocation of charitable status may benefit from a pre-emptive voluntary disclosure to the CRA
- It is important to conduct a due diligence review identifying all issues of non-compliance before commencing a voluntary disclosure with the CRA

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RECENT TAX DECISIONS, RULINGS, AND INTERPRETATIONS INVOLVING CHARITIES

- Income Tax Treatment for Monies Paid to Support Refugees
 - On March 3, 2017, the CRA released technical interpretation 2016-0651661E5 - Payments to Syrian refugees by a church
 - A church inquired about the income tax treatment of payments made by the church to support a Syrian refugee family and asked whether the money received by the family was to be included as income in the family’s tax returns

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- In response, the CRA noted that paragraph 56(1)(u) of the ITA requires social assistance payments received in the year and made on the basis of a means, needs, or income test are to be included in a taxpayer's income, unless they are included in the taxpayer's spouse's or common-law partner's income
- The CRA further noted that income included under paragraph 56(1)(u) will be offset by a matching deduction under paragraph 110(1)(f) of the ITA
- As a result, there will be no income tax implications, other than potentially affecting certain income-tested benefits

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- The CRA Issues a Technical Interpretation of Charities Returning Gifts
 - On May 17, 2017, the CRA released technical interpretation 2016-0630351 providing its response to the questions "1) Can a registered charity return a gift of a life insurance policy to a donor?" and "2) If so, what are the tax consequences to the registered charity and to the donor?"
 - The CRA concluded that the answer to these questions is case-specific and the obligation to return a gift is a matter for the court to determine
 - However, it warned that the return of a gift might be treated for ITA purposes as a charity giving a gift to a non-qualified donee which could result in revocation

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CORPORATE LAW UPDATE

- Corporations Canada dissolves Part II CCA corporations
 - In August 2017 Corporations Canada dissolved the remaining Part II CCA corporations that had not continued by July 31, 2017
 - Apart from a few exceptions, all federal not-for-profit corporations now operate under the CNCA
- Ontario not-for-profit corporations under the OCA are now required to keep records of land ownership
 - Effective as of December 10, 2016, a register of ownership interests in land must be kept at registered office
 - Any corporations incorporated after December 10, 2016 must comply now with new requirements
 - Corporations incorporated prior to December 10, 2016, have until December 10, 2018, to comply with the new record keeping requirements

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- Recent amendments made to the Ontario *Corporations Act* ("OCA")
 - Good news that Ontario government has proceeded with corporate reform for NFP sector
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, passed third reading on November 1, 2017, introduces changes to the OCA, OBCA and Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") to aid proclamation of the ONCA
 - With these amendments, existing OCA corporations will soon benefit from remedial changes long anticipated to come from the ONCA
 - Proposed interim provisions for Part III of the OCA will allow OCA corporations to implement certain ONCA features before the ONCA is proclaimed, including:

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- Special legislation and charity law will prevail over the OCA in the event of a conflict
- Corporations will have the rights of a natural person
- Objective standard of care for directors and officers
- The removal of directors by majority vote of members
- Member meetings may be held by phone or electronic means
- Notice to members may be given by electronic means
- Adoption of pre-incorporation contracts
- A person who is not a member may be a director

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- Pursuant to an extraordinary resolution (80%), decide not to have an audit if annual revenue is less than \$100,000 or an amount prescribed by the regulations
- The court may make an order appointing the required number of directors if a corporation has no directors or members
- The coming into force of these OCA amendments is staggered and complicated
 - Some are scheduled to come into force upon receiving Royal Assent (e.g. member meetings held by electronic means and removal of directors by majority vote)
 - Others will come into effect 60 days after receiving Royal Assent (e.g. objective standard of care for directors and officers)

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- Bill 154 also includes substantially similar amendments to the ONCA as those previously in Bill 85 (which had died on the order paper in 2014), with the addition of several new amendments, including:
 - Bill 154 provides that the ONCA will not apply to corporations sole “except as is prescribed”
 - Exempting the application of the ONCA to corporations sole had never come up in prior consultations
 - The ONCA already has a mechanism dealing with special act corporations
 - Consent to be a director must be in writing
 - Threshold to be considered a public benefit corporation

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- Circulation of annual financial statements to members
- Optional proxy votes
- Delay implementation of membership class votes
- Transition from OCA to ONCA
 - Certain provisions from by-laws or special resolutions will continue to be valid indefinitely until articles of amendment are endorsed
- Distribution of net assets on winding up or dissolution of public benefit corporations
- By-law amendments by directors
- Coming into force date of the ONCA is unknown and these ONCA amendments will take effect on varying dates

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FEDERAL LEGISLATION UPDATE

- CASL Private Right of Action Implementation Suspended
 - On June 2, 2017, the government suspended the implementation of the private right of action “in response to broad-based concerns raised by businesses, charities and the not-for-profit sector”
 - Delay to promote “legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk”
 - On July 1, 2017, the 3-year transition period in CASL ended. Best advice is to obtain express consent

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- Bill C-59 (on Anti-terrorism) Proposes to Amend the *Security of Canada Information Sharing Act* and the *Criminal Code*
 - Clarifying that advocacy, protest, dissent or artistic expression will not generally fall under the definition of activity that undermines the security of Canada
 - Inserting “threaten” into the definition, which would not require proof as to the effect of the activity
 - Mandatory review of the list every 5 years (or 5 years after an entity is added)
 - Replacing the offence of “advocating or promoting commission of terrorism offences” (s.83.221 of the *Criminal Code*), with the offence of “counselling”

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- *National Security and Intelligence Committee of Parliamentarians Act* and Regulations in force as of October 6, 2017
 - Makes several amendments to other acts, including *Access to Information Act*, the *Privacy Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
- *Corruption of Foreign Public Officials Act* was amended on October 31, 2017
 - Repeals the “facilitation payments” exemption from the offence of bribing a foreign public official
 - Charities could be exposed to possible criminal liability for payments to expedite or secure the performance of certain routine activities

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- Amendments to the *Trade-marks Act* expected to come into force in early 2019
 - Will eliminate the requirement to use a trademark in Canada before a registration can be obtained
- Bill C-51, *an Act to amend the Criminal Code...*
 - Proposes to repeal the offence of obstructing or violence to or arrest of officiating clergyman or minister and the offence of disturbing religious worship or certain meetings (s. 176 of the *Criminal Code*)

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PROVINCIAL LEGISLATION UPDATE

- Proposed Ontario regulations under the CAA authorizing charitable corporations to pay directors in limited situations (see presentation by Ryan Prendergast)
- Proposed amendments to the CAA in Bill 154 would permit charities to also make "social investments" (see presentation by Terrance Carter)
- Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017*
 - Introduced on September 27, 2017, it amends enacts and repeals a number of Acts regulating healthcare in Ontario
 - Amendments to the *Long-Term Care Homes Act, 2007* and new rules to deal with both restraining and confining of residents of a retirement home

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- Ontario Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017*, enacts the *Ticket Sales Act, 2017*, which restricts the sale of tickets to recreational, sporting, cultural or other prescribed events in the secondary market, but provides an exception to registered charities
- Charities Operating in Quebec are Still Required to Submit an Annual Information Return in Quebec
 - Although registered charities that collect donations from Quebec residents are no longer required to register separately as charities in Quebec, they are still required to file the annual information return TP-985.22-V within 6 months after the charity's year-end

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- O. Reg. 191/11, *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act, 2005* requires that public and private organizations in Ontario file an accessibility report:
 - For designated public sector organizations, such as hospitals and other public bodies, the report is due every 2 years starting December 31, 2013
 - For organizations with at least 20 employees, the report is due every 3 years starting December 31, 2014
 - If your organization falls into either of these categories, then your next accessibility report will be due December 31, 2017

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CASE LAW OF INTEREST

- Trinity Western University ("TWU")
 - On November 1, 2016, the Court of Appeal of BC unanimously upheld the decision of the BC Supreme Court to quash the decision of the Law Society of BC
 - On February 23, 2017, the Supreme Court of Canada granted leave to appeal in *Trinity Western University, et al v Law Society of Upper Canada* and in *Law Society of British Columbia v Trinity Western, et al.*
 - By orders dated July 27 and July 31, 2017, the hearing is scheduled for November 30 and December 1, 2017 and motions for leave to intervene were granted

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- *Wall v Jehovah's Witnesses* (Member Discipline)
 - Mr. Wall was disfellowshipped from his congregation for alleged wrongdoing involving "drunkenness"
 - The Alberta Court of Appeal noted that Mr. Wall was not provided with the details of the allegations against him or an explanation of the discipline process, also that Mr. Wall did not receive any written reasons for the decision
 - On April 13, 2017, the Supreme Court of Canada granted leave to appeal, with hearing held on November 2, 2017
 - Case will have significant impact on the extent to which a faith-based organization is able to discipline members without having to adhere to principles of natural justice

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- Tribunal Upholds Religious School Right to Reject Applicants Based on Creed
 - On July 5, 2017, in *HS v The Private Academy*, the Human Rights Tribunal of Ontario dismissed three applications by a same-sex married couple alleging discrimination by an Evangelical Christian school that refused to admit their child into its preschool program
 - Ontario *Human Rights Code* ("OHRC"), s.1 requires that equal treatment with respect to services, goods and facilities, be provided without discrimination
 - OHRC, s.18 provides an exception to s.1 when the organization is "primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination"

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- The Tribunal applied a three step test adopted in previous tribunal decisions with regard to the section 18 exemption:
 1. Is the entity a religious, philanthropic, educational, fraternal or social institution or organization?
 2. Is the institution or organization "primarily engaged in serving the interests of persons identified by a prohibited ground"?
 3. Is the membership or participation in the institution or organization restricted to those identified by that prohibited ground?
- The Tribunal found that the school was exempt from the requirements under s.1 of the Code because it met all aspects of the three part test in s.18.

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- Court Finds That Parent Charity is Permitted to Change Governance Structure
 - On September 12, 2017, the Ontario Superior Court of Justice released its decision in *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*
 - Annual general meeting passing new by-law changing the governance model from an open-membership to a closed-membership model with voting rights for OSPCA's board
 - Court held that by-law was lawfully passed by voting members and that the OSPCA owed "no legislative or other accountability" to its affiliates
 - The Court further held the board acted in the best interests of the OSPCA and that it was "entitled to deference under the Business Judgment Rule"

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- *Ahmed v Hossain*, 2017 ONSC 5660 (Sep 22, 2017)
 - The applicants claimed that the trustees of Danforth Community Center ("DCC"), a not for profit, charitable corporation, serving as a Mosque for members of the Sunni Muslim faith, unlawfully took control of the board of directors and purported to bar the applicants from entering the Mosque and from running for any administrative office of the DCC for 10 years
 - The Ontario Superior Court held that neither the board of trustees nor the members had the right under the corporation's constitution or the Ontario *Corporations Act* to dissolve the board of directors or to oust the applicants

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- Ktunaxa Nation's Freedom of Religion (Nov 2, 2017)
 - This case arose after Ministerial approval of a ski resort development in an area of spiritual significance for the Ktunaxa people
 - After consultation with the Ktunaxa people, they rejected the project claiming it would drive "Grizzly Bear Spirit" away from their sacred land
 - The Supreme Court of Canada held that the approval did not violate the Ktunaxa's right to freedom of religion, as it did not interfere with their freedom to believe or to manifest their belief
 - The Court stated that the *Charter* could not protect the presence of "Grizzly Bear Spirit" itself or the subjective spiritual meaning that the Ktunaxa derived from it

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