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**THE 25TH ANNUAL CHURCH &
CHARITY LAW SEMINAR
November 8, 2018**

**ESSENTIAL CHARITY AND NFP
LAW UPDATE**


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**25th Annual
Church & Charity Law
Seminar™
Toronto – November 8, 2018**

Essential Charity and NFP Law Update

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A. OVERVIEW (Current as of November 5, 2018)

- 2018 Federal Budget Highlights
- Update on Political Activities by Charities
- Special Senate Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Tax Decisions, Rulings, and Interpretations
- Corporate Update – Federal and Provincial
- Social Investments in Ontario
- Remuneration of Directors Update in Ontario
- Employment Law Update in Ontario
- Other Ontario Legislation Updates
- Case Law of Interest

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B. 2018 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget 2018 presented on February 27, 2018
- There were a number of important changes proposed in the Budget, including:
 - Universities: Definition of “qualified donee” (“QD”) simplified so that universities outside of Canada that are qualified to be QDs are no longer required to also be listed in Schedule VIII of *Income Tax Act*
 - Municipalities: Allows Minister of National Revenue to determine whether they may qualify to be “eligible donees” on case by case basis
 - Trusts: Additional reporting requirements for some trusts related to beneficial ownership, but charities and NFPs are exempt from them for now

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- Journalism: Government is going to review over the next year whether charitable, non-profit journalism may be possibly recognized
- Financial Support: Funding of various charitable and NFP initiatives, generally to be made over a five year period
- Political Activities: It was indicated that clarification was going to come from the CRA on political activity restrictions in response to the May 2017 Report on political activities. (Update: Many developments in this area throughout 2018! See next slide for highlights)

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C. UPDATE ON POLITICAL ACTIVITIES BY CHARITIES

- On July 16, 2018, the Ontario Superior Court of Justice decision in *Canada Without Poverty v AG Canada* struck down ITA provisions restricting the amount of non-partisan political activities that charities may undertake
- On September 14, 2018, Government released draft legislative proposals proposing to remove 10% limits on non-partisan political activities by charities
- On October 2, 2018, the CRA released for consultation a draft guidance, “Charities and Public Policy Advocacy”
- On October 25, 2018, the Government proposed new measures in Bill C-86 to allow a charity to carry out unlimited “public policy dialogue and development activities” in support of its charitable purposes
- See presentation by Ryan Prendergast for details

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D. SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to examine the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada
- The Special Committee has heard from various witnesses on ongoing basis starting in April 2018
- An online questionnaire will be available up to November 16, 2018 for charities and NFPs to answer questions about the challenges facing the sector
 - Access the questionnaire at:
<https://sencanada.ca/en/forms/cssb-your-voice-matters/>
- Its study and resulting report on how Canada can better assist the charitable and NFP sector is to be completed by December 31, 2018, but possibly later

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E. RECENT CRA PUBLICATIONS AND PROGRAMS

- On January 12, 2018, the CRA updated its T4063 Guide to state that the Charities Directorate will not review applications submitted with draft governing documents, but will treat them as incomplete and return them to the applicant
- On February 15, 2018, CRA reminded qualified donees that they have until March 31, 2019 to update their official donation receipts with the CRA's new website URL, which is "canada.ca-charities-giving"
- On February 28, 2018, the CRA posted a video, "Gift Certificates and Gift Cards", outlining when and how registered charities can issue official donations receipts for gift card or gift certificate donations

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- On March 1, 2018, the CRA announced that September 2017 initiative of assigning new business numbers to internal divisions of charities will not be proceeding, *i.e.* status quo is to continue
 - Plan was to give separate business numbers to internal divisions to access CRA's online services via Charities IT Modernization Project ("CHAMP")
 - This step is no longer required, meaning practice of derivative business numbers will continue
- On September 18, 2018, the CRA announced that public release of CHAMP, scheduled for November 2018, will be delayed until June 2019
 - Once in place, CHAMP will provide several new e-services, *e.g.* T2050 and T3010 filings

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F. TAX DECISIONS, RULINGS AND INTERPRETATIONS

- On December 18, 2017, the Tax Court of Canada ("TCC") released decision in *Lichtman v The Queen*
 - Issue was clergy residence deduction eligibility of three ordained Orthodox Jewish rabbis teaching Judaic studies in Jewish school
 - Court held applicants were not eligible because:
 - 1) their activities were not specialized ministry in their religious context
 - 2) "congregation" in its religious context relates to synagogues and not schools
 - Those applying for the deduction must be clergy members whose activities constitute "ministering" to a "congregation"

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- On June 12, 2018, the TCC released decision in *McCuaig Balkwill v The Queen* regarding fair market value ("FMV") of donated wine to be sold at auctions hosted by charities
 - Issue was how to appropriately value wine, *i.e.* \$23,600 (position of charities issuing receipts) vs. \$4700 (CRA's view based on actual auction prices)
 - TCC held that FMV of donated wine should not be based LCBO's Private Ordering pricing, which is a monopoly, and relied on the CRA's expert instead
 - TCC made clear other methodologies possible in determining wine's FMV, provided they are supported with evidence and accurately applied
 - Charities receiving non-cash donations should keep in mind various FMV methodologies and keep full evidence of how calculations reached

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G. CORPORATE UPDATE - FEDERAL

- On December 30, 2017, *Canada Corporations Act* ("CCA") and its *Regulations* were repealed
 - All federal NFP corporations under CCA now either transitioned to the *Canada Not-for-profit Corporations Act* ("CNCA") or dissolved
- Since December 2017, uncertified corporate documents available for purchase from Corporations Canada
- On June 26, 2018, Corporations Canada started online service to file applications for certain exemptions under the *Canada Business Corporations Act* and *CNCA*
- On October 4, 2018, Corporations Canada announced a new online service to obtain a certificate of compliance or a certificate of existence for a not-for-profit that is incorporated under the *CNCA*

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H. CORPORATE UPDATE - PROVINCIAL

- On November 14, 2017, Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, received Royal Assent, amending 3 key statutes for the NFP sector:
 - *Ontario Not-for-Profit Corporations Act, 2010* ("ONCA")
 - *Ontario Corporations Act* ("OCA")
 - *Charities Accounting Act* (to be discussed later)
- Ontario government targeting early 2020 for proclamation of the ONCA, with more details on the ONCA in presentation by Theresa Man
- Reminder: Upcoming December 10, 2018 deadline for OCA corporations to prepare updated registers of their ownership interests in real property

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- On November 14, 2017, the following important amendments to the OCA came into force:
 - Meetings of members may be held by telephone or electronic means
 - Members may remove a director from office by majority vote, instead of 2/3rds
 - A person may be a director without being a corporate member, although written consent will be required to be a director
- Then, on January 13, 2018, these amendments came into effect:
 - Corporations have the capacity of a natural person
 - Directors and officers are now subject to a statutory objective standard of care

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I. SOCIAL INVESTMENTS IN ONTARIO

- *Charities Accounting Act* (“CAA”) applies to all charities in Ontario and provides that the *Trustee Act* (which deals with investment powers of trustees) apply to directors holding property for charitable purposes
- Bill 154 amended the CAA as of November 14, 2017
- These CAA amendments now permit charities to make “social investments” when they apply or use trust property to:
 - a) directly further the purposes of the trust and
 - b) achieve a “financial return” for the trust
- “financial return” is defined as an outcome in respect of the trust property that is better for the trust in financial terms than expending all the property

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- In April 2018, the Ontario Public Guardian and Trustee (“OPGT”) released the “Charities and Social Investments Guidance” (the “Guidance”)
 - It sets out the OPGT’s interpretation of the social investment framework under the CAA
 - The Guidance clarifies that “financial return” is not required to be at market rates, and, depending on the terms of investment, it may not require the re-payment of the invested capital
 - This suggests that even where the investment results in a partial loss of capital, it may still qualify as a social investment as long as the investment was directly furthering the charitable purpose of the charity

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- The Guidance recommends that a charity should base its decision to make a social investment on:
 - its charitable purposes and assets (assets may be considered although the CAA does not specifically reference them as consideration for trustees making social investments)
 - the rules and duties that apply to social investing
 - its governing documents, and
 - its directors’ or trustees’ general fiduciary obligations
- The Public Guardian and Trustee, Ken Goodman, will speak more on this issue and others

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J. REMUNERATION OF DIRECTORS UPDATE IN ONTARIO

- On April 1, 2018, amendments to Regulation 4/01 (“Regulation”) of the CAA came into force, providing some relief from common law rules concerning the remuneration of directors by authorizing “charitable corporations” to pay directors and “connected persons”
- Amendments require charities to consider any accompanying guidance which may be prepared
- In May 2018, the OPGT released its guidance
- It provides that a director can be paid for certain services provided to a charity subject to the charity’s fulfillment of certain requirements (see next slide)
- It also states that directors cannot be paid for: (1) being a director or employee; or (2) fundraising/real property transactions, which also applies to connected persons

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- Requirements to authorize payments to directors or connected persons for certain services, including:
 - Board must consist of at least 5 directors, with at least 4 eligible to vote on the payment to the director or connected person
 - Board must believe at time of authorization that the payment is the charity’s best interests
 - Payment amount must be reasonable
- Mandatory disclosure of payments to the members at the annual meeting and in financial statements
- Charities are advised to keep records of everything related to compliance with the Regulation

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K. EMPLOYMENT LAW UPDATE IN ONTARIO

- On October 23, 2018, Bill 47, *Making Ontario Open for Business Act, 2018* ("Bill 47") was introduced
- Bill 47 amends many of the changes that had been introduced last November 2017 in Bill 148, *Fair Workplaces, Better jobs Act, 2017* such as
 - Freezing minimum wage at \$14/hour until at least October 2020 so that there is no increase to \$15/hour in January 2019
 - Replacing the combined 10 days of personal emergency leave per year, 2 of which are paid, with separate unpaid leaves: 3 days for personal illness, 2 for bereavement, and 3 for family responsibilities
 - Removal of equal pay for equal work provisions relating to employment status
- If passed, changes will come into force January 1, 2019

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L. OTHER ONTARIO LEGISLATION UPDATES

- The Ontario *Children, Youth and Family Services Act, 2017* ("CYFSA") and four of its supporting regulations came into force on April 30, 2018
 - The CYFSA replaced the Ontario *Child and Family Services Act*, with these key changes:
 - Age of protection has been increased to include 16 and 17 year olds, who may be found to be in need of protection subject to their circumstances
 - While the mandatory duty to report applies only to children younger than 16, under the CYFSA a person may make an optional report in respect of a child who is 16 or 17

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- Procedures to show respect for the culture of children under protection, including Indigenous children, by keeping children in their home communities, where possible
- Providing great accountability and oversight over child protection service providers
- Charities and NFPs working with children and youth in Ontario should work with their legal counsel to revise their child protection policy in accordance with the updated reporting requirements under the CYFSA

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- On November 1, 2018, the Ontario *Police Record Checks Reform Act, 2015* and its regulations came into force, implementing a new standardized regime for these police record checks, including vulnerable sector checks
 - Vulnerable sector checks are used to determine an individual's suitability to work or volunteer in a position of trust or authority over vulnerable persons
 - Charities and NFPs that work with children or other vulnerable persons will need to be aware of these updated procedures that apply to their employees and volunteers when obtaining or updating vulnerable sector checks

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M. CASE LAW OF INTEREST

- *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (January 31, 2018)
 - Two applications were brought challenging the constitutional validity of policies of the College of Physicians and Surgeons of Ontario, which required physicians, even those who object to certain medical procedures (e.g. abortions, medical assistance in dying), to provide patients with referrals
 - Court held that the policies infringed the physicians' right to freedom of religion, but was justified as a reasonable limit under the *Charter*
 - The Court held that there must be a balancing of the right to freedom of religion against the right of patients to equitable access to health care

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- *John Doe (GEB #25) v The Roman Catholic Episcopal Corporation of St. John's*, 2018 NLSC 60 (Mar.16, 2018)
 - Plaintiffs had been abused by teachers as residents of an orphanage linked to the Roman Catholic Episcopal Corporation of St. John's (the "Archdiocese"), with plaintiffs claiming the Archdiocese was vicariously liable for this abuse.
 - Court held that the Archdiocese was not vicariously liable, as the orphanage and Archdiocese were separate corporate entities that operated without blurring these boundaries
 - Vicarious liability for the actions of an employee or subordinate requires that there is a close connection between the defendant and the enterprise which gave rise to the tortious conduct

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- *Faas v CAMH, 2018 ONSC 3386* (June 6, 2018)
 - The Faas Foundation and its principal (“Faas”) made an application under s.6(3) of the CAA for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds donated by Faas
 - Courts have discretion to make orders under s.6(3) of the CAA if it is of the opinion that the public interest would be served by a PGT investigation
 - The court denied the application on grounds that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH’s program and use of funds donated by him to CAMH
 - Courts are reluctant to interfere with a charity’s operations unless the public interest is being affected

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- *Abrams v Judean Benevolent & Friendly Society, 2018 CarswellOnt 12595* (June 6, 2018)
 - Plaintiff sued the Society for breach of contract regarding purchase of cemetery plots for his family, when the plaintiff discovered, years later, that one plot already had someone buried in it
 - The Society argued that this plot’s reservation was cancelled when the plaintiff’s son ceased being a Society member, as its current bylaws allow only members to be buried in the plots
 - The Society was found to have breached the contract given its inability to prove that the current bylaws were same as those in place at time of purchase
 - Records, including historical records, regarding rights of members should be maintained

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- *PT v Alberta, 2018 ABQB 496* (June 27, 2018)
 - Constitutional challenge to Alberta’s Bill 24 to be heard by Court of Appeal in December 2018
 - *Schools Act* amended by Bill 10 (2015) and Bill 24 (2017) to empower voluntary student organizations, with focus on vulnerable minorities, e.g. LGBTQ+, with enhanced protections, e.g. prohibition on informing parents about child’s involvement in a “gay-straight” or “queer-straight alliance”
 - June case involved unsuccessful interim injunction seeking stay of information prohibition clause and prohibiting Minister of Education from defunding or de-accrediting schools for non-compliance with the related attestation clause in the *Schools Act*

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- Wall Decision
 - On May 31, 2018, the Supreme Court of Canada (“SCC”) upheld religious autonomy in *Wall* decision: 2018 SCC 26
 - Court will not interfere in religious doctrine matters, and procedural rules requiring doctrinal interpretation
- Trinity Western University Decisions (“TWU”)
 - On June 15, 2018, the SCC upheld the denial of accreditation regarding TWU’s law school due to TWU’s mandatory covenant in decisions: *LSBC v TWU, 2018 SCC 32; TWU v LSUC, 2018 SCC 33*
 - The SCC indicated that whether a state actor (e.g. Law Society of BC) may review a mandatory covenant of an institutions will depend on the facts and a reasonable balancing of harms and benefits
- See presentation by Terrance Carter & Jennifer Leddy

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