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**26th ANNUAL CHURCH &
CHARITY LAW SEMINAR™
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**2019 ESSENTIAL CHARITY AND
NFP LAW UPDATE**

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**26th Annual
Church & Charity Law Seminar™
Toronto – November 7, 2019**

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OVERVIEW (Current as of November 4, 2019)

- Political Activities and Public Policy Dialogue And Development Activities (“PPDDAs”)
- 2019 Federal Budget Highlights
- Advisory Committee on the Charitable Sector
- Report of the Special Senate Committee on the Charitable Sector
- Recent CRA Publications and Programs
- Ontario Corporate Update
- Federal Legislation Update
- CCIC Policy Brief Addressing Direction and Control and Anti-terrorism
- Case Law of Interest

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A. POLITICAL ACTIVITIES AND PUBLIC POLICY DIALOGUE AND DEVELOPMENT ACTIVITIES (“PPDDAs”)

- Bill C-86, that received Royal Assent on December 13, 2018 included amendments to the *Income Tax Act* (“ITA”) to remove the restriction on charities from engaging in political activities
- Bill C-86 added a new definition of charitable activities that includes “public policy dialogue and development activities carried on in furtherance of a charitable purpose” but did not define “public policy dialogue and development activities” (“PPDDAs”)
- On January 21, 2019, the Canada Revenue Agency (“CRA”) released draft CG-027 *Public Policy Dialogue and Development Activities by Charities* together with a new Q&A webpage on PPDDAs by charities
- See following presentation on this issue by Ryan M. Prendergast

B. 2019 FEDERAL BUDGET HIGHLIGHTS

- Budget 2019 was presented on March 19, 2019
- 1. **Journalism:**
 - Budget 2019 proposed tax measures to “provide support to Canadian journalism organizations producing original news”
 - On June 21, 2019, Bill C-97 received Royal Assent, implementing the following changes:
 - Effective January 1, 2020, allowing certain journalism organizations to register as qualified donees under the new category for “registered journalism organizations” (“RJOs”);
 - A refundable labour tax credit for qualifying journalism organizations, applicable to salary or wages starting January 1, 2019; and
 - A temporary non-refundable tax credit for “eligible digital subscriptions” to Canadian news applicable to 2020 and subsequent taxation years

- Some of the requirements for any of these incentives to apply, include:
 - Journalism organization must be classified as a “qualified Canadian journalism organization” (“QCJO”) within meaning of the ITA
 - A QCJO will need to meet eligibility requirements to be developed by an independent panel of experts from the Canadian journalism sector
 - A QCJO must engage primarily in the production of original news content on general interest matters
 - To be eligible as a qualified donee, a QCJO will also need to meet the narrow definition of “qualifying journalism organization”, in which event it could be registered as an RJO

2. Stock Options:

- Budget 2019 proposed to limit the use of the current employee stock option regime for high-income individuals employed at large, long-established, mature firms
- In this regard, the Federal Government tabled a Notice of Ways and Motion to amend the ITA on June 17, 2019
- A Backgrounder was also published to expand on the commentary provided in Budget 2019
- The direct consequence of the new rules, if adopted by the new Government, would be to disallow the additional deduction for charitable donations of securities acquired under an employee stock option agreement above the vesting limit of \$200,000

3. Social Finance Fund:

- Budget 2019 provided further details about the Social Finance Fund first announced in the 2018 Fall Economic Statement
- It is to provide up to \$755 million over the first 10 year period to give charities, non-profits, and other social purpose organizations access to new funding, and connections to private investors
- The investment of \$50 million over two years in the Investment Readiness Program, a pilot program of the Social Finance Fund, which seeks to assist social purpose organizations to successfully participate in the social finance market commenced in mid-2019
 - Organizations can access grants by applying to “readiness support partners”, such as Community Foundations of Canada and Canadian Women’s Foundation

C. ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

- The 2018 Fall Economic Statement released on November 21, 2018 by the Department of Finance announced the Government’s commitment to establish a permanent Advisory Committee on the Charitable Sector
- The Advisory Committee is to regularly consult with charities and advise the Government with respect to important issues facing the charitable sector
- On August 23, 2019, the Minister of National Revenue announced the full membership of the Advisory Committee, which is comprised of 3 senior Government officials (2 from the CRA, and 1 from Finance Canada), as well as 14 appointed sector members

D. REPORT OF THE SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector in Canada
- In its year-long study, the Special Committee heard from various sector and government witnesses on an ongoing basis starting in April 2018 through to April 2019
- The final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* was released on June 20, 2019, and made 42 recommendations to the Government of Canada
 - See https://sencanada.ca/content/sen/committee/421/CSSB/Reports/CSSB_Report_Final_e.pdf

- Of the 42 Recommendations, some key ones of interest are:
 - The Tax Court of Canada be given jurisdiction for hearings *de novo* over appeals from Charities Directorate decisions
 - Current three categories of charities to be replaced by two categories, being public and private charities
 - Replace direction and control with an “expenditure responsibility test”
 - Review ITA provisions regarding charities every five years
 - Pilot project to study eliminating capital gains tax on charitable donations of private company shares and real estate
 - Consider means of ensuring that charities do not languish in donor-advised funds
 - Review of “ineligible individual” provisions in the ITA

E. RECENT CRA PUBLICATIONS AND PROGRAMS

- On January 11, 2019, the CRA published its “Report on the Charities Program 2016 to 2018”, which provides registered charities’ statistics, as well as programs and other resources implemented by the CRA over the past three years
 - As of March 31, 2018, there are 86,234 registered charities
 - The number of applications for charitable status decreased from 3,306 to 3,142
 - The number of charitable registrations decreased from 1,693 to 1,569
 - Total number of revocations (voluntary, after audit, and others) increased from 1,372 to 1,562

- CRA states that it will be working on compliance related projects including:
 - Reviewing the boards of registered charities to identify whether there are concerns related to ineligible individuals
 - Reviewing activities involving the acquisition and construction of real estate to ensure such activities further a charitable purpose
 - Reaching out to registered charities that have not been active for several years to confirm that they still meet the requirements for registration
 - Continuing to make automated courtesy calls to notify charities that the due date for filing their completed annual information returns is approaching

- On March 8, 2019, the CRA published an information website, entitled “Virtual Currency”, along with a *Guide for cryptocurrency users and tax professionals*, providing compliance guidelines on digital/virtual currencies
- On June 1, 2019, the CRA launched new digital services through My Business Account, as a product of the Charities IT Modernization Project (“CHAMP”), including:
 - Online filing of T3010 charity returns
 - Ability to update certain information about charity electronically, including addresses and list of directors
 - New online application for charitable status and discontinuing Form T2050 as of September 30, 2019
 - There are some differences between the questions on the online form and Form T2050
 - Paper Form T1789 may still be obtained from CRA

F. ONTARIO CORPORATE UPDATE

- The Ontario Government has indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), but exact timing remains uncertain
- As of December 10, 2018, charities and not-for-profit corporations incorporated under the Ontario *Corporations Act* must keep, at their head office, a register of ownership interests in real property in Ontario along with certain supporting documents
- In December 2018, the Ontario Government announced a joint consultation and review of the *Co-operative Corporations Act* by Ministry of Finance and Ministry of Government and Consumer Services

G. FEDERAL LEGISLATION UPDATE

1. PIPEDA Reforms:

- Effective November 1, 2018, the *Digital Privacy Act* established mandatory data breach reporting and recordkeeping requirements by organizations under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)
- From April 9, 2019 to September 23, 2019, a consultation was done by the Office of the Privacy Commissioner of Canada (“OPC”) on cross-border data transfers of personal information
 - The OPC decided the status quo of not requiring consent could continue but such organizations must be transparent and advise when personal information may be sent to another jurisdiction where it may be accessed by authorities

- On May 21, 2019, the Innovation, Science and Economic Development Canada Minister launched the Digital Charter to lay the foundation for modernizing privacy rules in Canada and proposing reforms to PIPEDA
- See presentation on privacy breaches by Esther Shainblum
- **2. Canada Elections Act:**
 - Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* came into force on June 13, 2019
 - Now imposes reporting requirements on third parties that engage in “partisan activities, partisan advertising, and election surveys” in addition to “election advertising”
 - Regulated activities during both the election period and pre-election period are now covered

3. Cannabis Regulations:

- Bill C-45, the *Cannabis Act*, which received Royal Assent on June 21, 2018, legalized the use of recreational cannabis in Canada
- On October 17, 2019, the final *Regulations Amending the Cannabis Regulations (New Classes of Cannabis)* came into force, legalizing the sale of edible cannabis, cannabis extracts, and cannabis topicals (“cannabis edibles”)
- Health Canada anticipates the products to be made available for sale in mid-December 2019, initially with limited supply
- Employers may potentially face challenges with employees using cannabis edibles at work
- See presentation on off-duty conduct of employees by Barry W. Kwasniewski

4. Consultation on Proposed *Uniform Informal Public Appeals and Crowdfunding Act* (“Proposed Uniform Act”):

- The Uniform Law Conference of Canada (“ULCC”) released a *Uniform Informal Public Appeals Act* in 2011 (“2011 Act”), but so far only Saskatchewan has adopted it
- Saskatchewan’s *Informal Public Appeal Act* was applied to the distribution of funds raised in the Humboldt Broncos crowdfunding campaign which raised over \$15 million on the GoFundMe platform
- The ULCC released a Consultation Paper in September 2019, seeking feedback from interested persons and organizations until January 15, 2020, for the Proposed Uniform Act, which revises the 2011 Act
- It is possible that other provinces may also introduce similar legislation
- See *Charity & NFP Law Bulletin* No. 455:
<http://www.carters.ca/pub/bulletin/charity/2019/chylb455.pdf>

H. CCIC POLICY BRIEF ADDRESSING DIRECTION AND CONTROL AND ANTI-TERRORISM

- The Canadian Council for International Co-operation (“CCIC”), a national association representing international development and humanitarian organizations, released a policy brief that discusses how registered charities that want to operate outside Canada are seriously restricted in effectively working with their partners by:
 - The CRA’s requirements that registered charities exercise direction and control over funds they disburse through third parties that are not registered charities or other types of qualified donees; and
 - Canada’s onerous anti-terrorism regime
- In this regard, CCIC made significant recommendations to reform both frameworks
- See <https://ccic.ca/wp-content/uploads/2019/10/Directed-Charities-and-Controlled-Partnerships-Final.pdf>

I. CASE LAW OF INTEREST

- ***The McKay Cross Foundation v ICSS, 2018 ONSC 6422 (October 30, 2018)***
 - Application to dismiss a claim made by plaintiffs for return of a \$100,000 donation to a registered charity, *Innovative Community Support Services*
 - Court considered the evidence and agreement between both parties to determine if donated funds were specific purpose charitable funds
 - Court found that donation was made with no strings attached; agreement was “too vague to be enforceable” and email exchanges did not indicate that donation was for a specific purpose
 - Charities and donors should enter into proper gifting agreements prior to donations being made, especially if gift is intended to have specific purpose

- ***Friends of Toronto Public Cemeteries Inc. v Mount Pleasant Group of Cemeteries* (“MPGC”), 2018 ONSC 7711 (December 31, 2018), appeal to be heard on November 13/14, 2019 in Court of Appeal**
 - Plaintiffs claimed that MPGC was a trustee of the cemeteries, had improperly appointed directors, and did not comply with its governing legislation
 - Court examined MPGC’s complicated corporate and trust history going back to 1826 and found that
 - MPGC was subject to the trust and governance provisions of its 1826 and 1849 Acts
 - The current directors of MPGC had not been validly appointed as trustees in accordance with its 1849 Act

- MPGC continues to hold its assets as trustee of the trust created by 1826 Act and amendments
- Trust administered by MPGC is a charitable trust
- MPGC is a trustee subject to the *Charities Accounting Act* (“CAA”)
- The funding and operation of visitation centres and funeral homes are beyond the scope of the stated purpose of a “cemetery or cemeteries or places for the burial of the dead”
- The Court stated that
 - “...a blanket statement that *no* charitable corporations hold their assets in trust is simply too broad to be sustained.”
 - “Care must be taken to examine the corporate and trust history to determine what conclusion best fits the facts.”

- ***Hemming v Jazz.FM 91 Inc*, 2018 ONSC 7781 and 7783 (December 14 and 21, 2018)**
 - Case arose from a dispute between an incorporated registered charity and a group of dissident members seeking a membership list, including email addresses, in accordance with the statutory provisions of the Ontario *Corporations Act*
 - Charity refused to release members' email addresses arguing obligation to protect its members' privacy
 - Court ordered charity to provide email addresses
 - In doing so, the court also ordered costs be paid by the charity to convey message that the best way to deal with a dissident group is at the members' meetings and not misusing the corporation's money by "tossing roadblocks in the way of democracy"

- A week later, officers of the charity appeared before the Divisional Court, requesting a stay of the order
- The Court ordered disclosure of the email addresses on the basis that it does not cause harm and that "[l]evelling the playing field for dissidents enhances member democracy"
- This case serves as a reminder for charities to comply with the statutory obligation to provide membership lists, and the willingness of the court to read the statute in favor of the members' rights in a dispute

- ***Faas v CAMH*, 2019 ONCA 192 (March 11, 2019), aff'g 2018 ONSC 3386 (June 6, 2018)**
 - The Faas Foundation and its principal (“Faas”) made an application under s.6 of the CAA for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds (\$1mil) donated by Faas
 - In upholding the motion judge’s decision, the Court of Appeal found no error in the motion judge’s decision not to exercise the court’s discretion to make an order under s.6(3) of the CAA, as it was not of the opinion that the public interest would be served by an OPGT investigation
 - The Court also agreed with the motion judge that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH’s program and use of funds

- ***Chouman v Omar Al-Farooq Islamic Society*, 2019 BCSC 754 (May 15, 2019)**
 - The BC Supreme Court granted oppression remedy against three societies governed by the BC *Societies Act* and five individuals purporting to act on behalf of the societies, on the basis that failing to follow the societies’ by-laws and removing the petitioners as directors and members to gain control of the societies was oppressive and unfairly prejudicial behaviour
 - The respondents could not excuse their failure to follow the societies’ by-laws by calling their behavior a mere failure to adhere to technical formalities
 - This case serves as a reminder that it is essential to comply with corporate law requirements outlined in the by-laws of an organization, and to do so in a reasonable and fair manner

- ***Watto v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1024 (July 30, 2019)**
 - The Federal Court held that the discipline section (s.158) of the *Canada Not-for-profit Corporations Act* CNCA does not restrict the power to discipline a member or to terminate their membership to only “the directors, the members or any committee of directors or members of a corporation”
 - While the wording of the section may be construed narrowly, a broader interpretation was more consistent with the CNCA
 - Further, if Parliament had intended to limit the power to discipline members or circumscribe the class of persons who may exercise this power, it would have done so expressly

- ***Bose v Bangiya Parishad Toronto*, 2019 ONSC 5625 (September 30, 2019)**
 - The case involved a cultural association and a religious congregation, both of which were NFPs incorporated under the Ontario *Corporations Act*, and had operated in tandem through a common board of directors and issued consolidated financial statements
 - However, a dispute arose in 2016 and the religious congregation, under a self-proclaimed board, excluded the cultural organization from the community centre that it owned but which had been used by both the organizations for years prior to the dispute
 - In dismissing the stay pending appeal, the Court found that the balance of convenience was “even or tilted slightly towards the earliest restoration of member democracy to the Religious Congregation” in order to end the “wrong usurpation” of the religious congregation

- Cases on the importance in maintaining adequate books and records
 - ***Ark Angel Foundation v MNR, 2019 FCA 21 (January 30, 2019)***
 - In this case, Ark Angel's charitable status was revoked by the CRA because the Foundation had failed to maintain adequate books and records under s.230(3) of the ITA, and failed to devote all of its resources to charitable purposes, in part when it paid consultation fees to a director
 - In upholding the CRA's decision, the Court reiterated the need to maintain adequate books and records to allow the CRA to be able to assess whether the charity was in compliance with ITA obligations

- ***Many Mansions Spiritual Center Inc v MNR, 2019 FCA 189 (June 24, 2019), leave to appeal to SCC requested***
 - The Federal Court of Appeal upheld the CRA's decision to revoke Many Mansions' charitable status for failure to comply with various requirements of the ITA, including failing to maintain adequate books and records; conferring a private benefit to its pastor; and engaging in activities inconsistent with its charitable object
 - The Court emphasized the importance of maintaining adequate books and records, which is a foundational obligation for significant charitable privileges

– ***Promised Land Ministries v R*, 2019 TCC 145 (June 28, 2019)**

- The Tax Court of Canada upheld CRA’s decision to suspend the receipting privileges and qualified donee status of Promised Land Ministries for one year, for failing to maintain proper books and records, including invoices, receipts, and vouchers, for expenditures made on activities outside of Canada, and for failing to comply with a compliance agreement from a CRA audit
- These 3 cases confirm the importance for charities to maintain proper books and records for the CRA to be able to assess compliance with the ITA’s requirements
 - Failure to do so may lead to the suspension or revocation of the charitable status, or other penalties by the CRA

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