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# THE OTTAWA REGION CHARITY & NOT-FOR-PROFIT LAW SEMINAR

Ottawa – February 12, 2015

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## 2015 Essential Charity & NPO Law Update

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By Jennifer Leddy, B.A., LL.B.

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LAW SEMINAR**  
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**OVERVIEW OF SELECTED TOPICS**

- Federal Legislative and Regulatory Update
- Ontario Legislative and Regulatory Update
- Corporate Law Update
- Highlights of Recent CRA Publications
- NPO Status Update
- Selected Case Law

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**A. FEDERAL LEGISLATIVE AND REGULATORY UPDATE**

**1. 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
- For more details, see presentation by Ryan Prendergast titled "Compliance Practices in a Post Anti-Spam World"



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### 2. List of Charitable Organizations that Received a Gift from the Crown as Qualified Donees Updated

- Over the past year, CRA updated the lists of qualified donees with respect to foreign charities that received a gift from the Canadian Crown and with respect to prescribed universities outside Canada
- A number of charities were removed from the list of foreign charities, and three were added
  - Foreign charities will only be registered and listed if they pursue activities related to disaster relief / urgent humanitarian aid or in the national interest of Canada
- Changes to the list of prescribed universities were the result of April 3, 2014 amendments to Schedule VIII of the *Income Tax Regulations*, which struck and added certain universities outside Canada

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### 3. Social Enterprise Update (Federal and Provincial)



- On June 10, 2014, Industry Canada published the results of its public consultation on the *Canada Business Corporations Act* ("CBCA")
  - This recommended further consultations about whether existing CBCA provisions are sufficient to enable federal socially responsible enterprises
- In early 2014, a consultation group met to consider possible structures for Ontario social enterprise legislation
  - In May 2014, the group produced a report entitled "Dual Purpose Corporate Structure Legislation," which the Ministry of Government and Consumer Services released on January 29, 2015

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- The Report recommends that social enterprise legislation
  - Should protect the social mission and attract investment
  - Should provide clarity for owners and directors, and lower the overall cost of establishing and operating a dual purpose corporation
  - Must balance the interests needed to encourage multiple bottom line businesses
- The Ministry is seeking public input until May 4, 2015, to explore whether the framework social enterprise legislation should be pursued and how the government should support enterprises with social purposes and private interests

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#### 4. Implementing Legislation for 2014 Budget

- Bill C-31, *Economic Action Plan 2014 Act, No. 1*, which received Royal Assent on June 19, 2014
  - Increases the carry-forward period for gifts of ecologically sensitive land to 10 years (instead of 5)
  - Removes the exemption for gifts of cultural property made as part of a tax shelter gifting arrangement
  - Gives the Minister power to refuse to register a charity or revoke its registration if it is accepts a “gift” from a “foreign state” listed in the *State Immunity Act*
- Bill C-43, *Economic Action Plan 2014 Act, No. 2*, which received Royal Assent on December 16, 2014
  - Creates new rules regarding estate gifts

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#### 5. 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 will take effect April 1, 2015 and will continue for five years
- Bill S-202, currently in the Senate, proposes even 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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#### 6. Anti-Terrorism Act, 2015 (Bill C-51)

- Bill C-51 was introduced on January 30, 2015
- Will have an impact on charities operating in conflict areas and within faith communities
- The Criminal Code will be amended to provide for an offense of knowingly advocating or promoting the commission of terrorism offenses in general
- The *Security of Canada Information Sharing Act, 2015* will authorize and facilitate the sharing of information among government agencies (i.e., CRA) in situations where there is “activity that undermines the security” of Canada

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**B. 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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**3. Public Sector and MPP Accountability and Transparency Act, 2014 (Bill 8)**

- Received Royal Assent on December 11, 2014, but not yet proclaimed in force
- The Act authorizes the Ontario government to establish compensation frameworks for certain executives in the broader public sector, including hospitals, school boards, universities, and other Crown corporations
- The mandatory restrictions will apply to those who earn more than \$100,000 per a year
- Bill 8 raises the possibility of even broader legislation regarding salary caps on other sectors, such as for high-earning employees at other NPOs and charities



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**C. 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* ("CCA"), which had been in force since 1917
- Existing CCA corporations had to continue under the CNCA within 3 years, i.e., by October 17, 2014
- As of January 27, 2015, 11,400 of approximately 17,000 Part II CCA not-for-profit corporations had continued
  - Approximately 8,800 corporations continued in 2014
- Dissolution for not meeting the October 17 deadline is not automatic

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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.
- If you have not yet continued, act now!

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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, which had to be passed before the ONCA could come into force
- Bill 85 died on the Order Paper in May 2014 because of the election
- The not-for-profit sector is currently waiting for a new Bill to be proposed

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- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- The Ontario Ministry of Government and Consumer Services indicates that the ONCA is not expected to come into force before 2016
- On September 25, 2014, Premier Wynne indicated support for the ONCA in her "Mandate Letter"



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**D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS**

**1. Guidance on Ineligible Individuals**

- As of January 1, 2012 CRA has the discretion to refuse or revoke the registration of charities or to suspend their receiving 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 28, 2014
- It explains who is an ineligible individual and how CRA will use the discretion
- For more details see presentation by Cathy Hawara titled "CRA Policy Guidance Update"

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**2. Guidance on Charities that Provide Housing**

- On February 8, 2014, CRA released the *Guidance on Housing and Charitable Registration* (CG-022)
- This Guidance sets out the requirements for how such organizations can qualify as a charity to
  - 1) relieve poverty
  - 2) provide specially adapted facilities or services to help eligible beneficiaries overcome or manage conditions associated with age or disability



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- The Guidance outlines that
  - The charitable purpose of relieving poverty may be satisfied if a charity provides "comfortable, modest" housing at below fair market value to eligible beneficiaries
  - Eligible beneficiaries may be "individuals or families that are needy...underprivileged, low-income, of small/limited means, or other judicially recognized synonyms"
  - Eligible beneficiaries can be narrowed by a second characteristic, i.e. seniors who appear poor
- The Guidance is more practical and flexible than the previous policy



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- To qualify as a charity that provides housing to relieve poverty, the charity must
  - Annually assess whether the beneficiaries continue to be eligible
    - The eligibility assessment criteria to assess beneficiaries should include the income, assets and liabilities of the beneficiaries
  - Establish and implement reasonable policies and procedures that address circumstances where individuals and families are no longer eligible
  - Ensure that assistance given to individuals is no more than their need

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- To qualify as a charity that provides housing that includes specially adapted facilities, services, or other amenities, the charity must
  - Ensure that this type of housing helps beneficiaries overcome or manage their particular conditions
- Beneficiaries of such housing do not need to be assessed using financial criteria
- The housing does not need to be provided at less than fair market value



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- When a housing organization applies for charitable status, its statement of activities must include
  - The criteria and process used to select beneficiaries
  - The process used to determine rental rates
  - The policies and procedures used to ensure only eligible beneficiaries receive charitable benefits
  - The proportion of tenants who are not eligible beneficiaries, and whether they pay market rent
  - All goods, services, and associated amenities provided by the organization to eligible beneficiaries and other tenants
  - If any space is leased to commercial tenants, all details of these arrangements and the reason for entering into these arrangements

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### 3. CRA Website Updates

- Charities Media Kit updated (April 25, 2014)
- Charities and their Participation in Political Activities video series (April 26, 2014)
- Two new CRA webinars: "How to donate wisely" and "What is a related business" (April 29, 2014)
- Three web pages addressing matters relating to continuance under the CNCA (June 11, 2014)
- New political activities web page added (July 21, 2014)
- New video on the First-time Donor's Super Credit (January 30, 2015)

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### E. NPO STATUS UPDATE

#### 1. CRA Releases NPO Risk Identification Project "NPORIP") Report

- Non-profit organizations ("NPOs") is a tax-exempt club, society, or association that is not a charity and was organized and operated exclusively for social welfare, civic improvement, recreation, or any other purpose except for profit (section 149(1)(l) ITA)
- On February 17, 2014, CRA released a report summarizing findings from a three-year project examining NPO tax compliance, which
  - Showed that many NPOs carried on activities with a profit motive, likely because they believed that the source of funding does not matter as long as the profits further the NPO's purpose



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- Highlighted that volunteers, who often do not fully understand tax legislation, lead many NPOs
- Concluded that education and outreach in the non-profit sector are necessary to improve compliance with tax requirements
- Budget 2014 announced the Government's intention to review whether the income tax exemption for NPOs is properly targeted and whether sufficient transparency provisions are in place
- There has been nothing released by the Government to follow-up on the Budget 2014 announcement, but this may reoccur in the 2015 budget



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## 2. NPO Status and Fundraising Events

- On May 20, 2014, CRA issued an interpretation on the requirements of NPO status under paragraph 149(1)(l) of the ITA, and whether a fundraising event could qualify as a NPO
- NPOs may undertake fundraising activities without risking their tax-exempt status
- However, where fundraising is so significant that it becomes the purpose of the organization, the NPO risks losing its status
- CRA focused on whether the fundraising event was already part of an organized club, society, or association



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## F. SELECTED CASE LAW

### 1. Canada (AG) v Johnstone (Childcare Obligations)

- On May 2, 2014, the Federal Court of Appeal confirmed that "childcare obligations" is included within the protected human rights ground of "family status"
- All employers must therefore accommodate employees with childcare obligations or face discriminating under applicable human rights legislation
- Legal childcare obligations arise when
  - A child is under the individual's care and supervision
  - The childcare obligation engages the individual's legal responsibility for the child
  - The individual has made reasonable efforts to meet the childcare obligations
  - The impugned workplace rule interferes in a manner that is more than trivial or insubstantial



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### 2. Neville v National Foundation for Christian Leadership (Charitable Donation Tax Credits)

- On May 29, 2014 the Supreme Court denied leave to appeal on whether a charity had to return "donations" because CRA disallowed them a tax credit
- The trial judge stated that the appellants' purpose was to donate to a foundation that supported Christian students attending Christian schools
- The appellants understood that their daughter would receive a scholarship or bursary from the Foundation and that there was no guarantee of a tax benefit
- Accordingly, the British Columbia Court of Appeal held that the primary purpose of the gift was fulfilled and the gift was not vitiated by not being considered a gift for tax purposes

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**3. *Tsimidis v Certified General Accountants of Ontario* (Discipline Procedures)**

- On July 16, 2014, CGA Ontario was found to have breached its duties of natural justice and procedural fairness, and to have made an unreasonable decision in expelling an applicant from its membership
- Neither the written policies nor the procedure followed for disciplining the applicant were adequate given the standard of procedural fairness he was warranted
- This decision highlights the importance of organizations becoming informed of applicable procedural rights, creating disciplinary policies which give respect to these rights, and enforcing those policies appropriately

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**4. *The Human Dignity Trust v Charity Commission of England and Wales* ("HDT") (Political Purpose)**

- HDT uses test case litigation to challenge the legality of existing laws
- HDT applied for charitable status
- On July 9, 2014 the Tribunal found that challenging a law because it is contrary to a prior commitment to an international treaty or constitutional law is not a "political" purpose
- The Tribunal emphasized the difference between changing a domestic law through pressure on Parliament versus properly using a constitutional scheme meant to test the laws of a country

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

- Under section 227.1(4) of the *Income Tax Act*, 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 in which both CRA and the Court thought that there was insufficient evidence that the director in question had resigned within the requisite two year period to avoid liability
- It is important that directors practice due diligence while leaving a board by carefully documenting a resignation to avoid potential future liabilities

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**6. *Re Greenpeace of New Zealand Incorporated (Political Purpose)***

- On August 6, 2014 the SCNZ held that:
  - “Advocacy, including through participation in political and legal processes, may well be charitable”
  - “An assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit”



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**7. *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 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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**8. *Mulgrave School Foundation (Restricted Charitable Trusts)***

- On October 9, 2014, the British Columbia Supreme Court (“BCSC”) considered when 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 stands for the proposition that once donors have donated donor restricted charitable funds, the donor has no further control or ability to vary the terms of the gift and the court may also not be able to do so
- 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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**9. *Humanics Institute v The Minister of National Revenue (Advancement of Religion)***

- On Nov. 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 could not point to a "particular and comprehensive system of faith and worship"
- 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" is insufficient to garner charitable status

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**10. *Trinity Western University ("TWU") v Nova Scotia Barrister's Society (Constitutional Religious Freedoms)***

- On January 28, 2015, the Nova Scotia Supreme Court held that the Nova Scotia Barrister's Society ("NSBS") did not
  - Have jurisdiction to deny accreditation of TWU's law school and, consequently, deny TWU graduates of the ability to practice in Nova Scotia
  - Reasonably consider the constitutional freedoms of TWU and its graduates
- The Court concluded that "the refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion"

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**11. *Carter v Canada (Attorney General) (Physician-Assisted Suicide)***

- On February 6, 2015, the Supreme Court of Canada ("SCC") unanimously held that physicians may help a competent patient die if the patient
  - Clearly consents to the termination of life, and
  - Has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in his or her circumstances
- Euthanasia for minors, persons with psychiatric disorders or minor medical conditions would not fall within these parameters

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- This ruling distinguished the SCC's 1993 decision in *Rodriguez*, which upheld the *Criminal Code* provisions against assisted suicide
- The SCC declared sections 241(b) and 14 of the *Criminal Code* on assisted suicide invalid but suspended the declaration for one year to give time for a legislative response
- Nothing in the declaration would compel physicians to provide assistance in dying
- The *Charter* rights of patients and physicians would need to be reconciled in the legislative response

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