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

Ottawa – February 11, 2016

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## 2016 Essential Charity and Not-for-Profit Law Update

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**The 2016 Ottawa Region  
Charity & Not-for-Profit Law  
Seminar**  
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**2016 Essential Charity and Not-for-Profit  
Law Update**

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**OVERVIEW OF SELECTED TOPICS**

- Federal Budget 2015
- Federal Legislative and Regulatory Update
- Ontario Legislative and Regulatory Update
- Corporate Law Update
- CRA Updates
- Selected Case Law


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**A. FEDERAL BUDGET 2015**

- Budget 2015, announced April 21, 2015
- Contains a number of important proposed amendments relating to the charitable and not-for-profit sector, which include:
  - Exempt capital gains tax on the donation of proceeds of private shares or real estate
  - Permit registered charities to invest in limited partnerships
  - Expand foreign entities eligible for registration as qualified donees
  - Introduce Social Finance Accelerator Initiative, a program to encourage social finance in Canada




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- Budget 2015 did not include
  - The stretch tax credit for charitable giving proposed by Imagine Canada
  - An administrative mechanism to provide an extension of the 36-month period announced in Budget 2014 in which an estate donation can be treated as a gift in a terminal return as part of a graduated rate estate
  - Follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations

For more information see: Charity Law Bulletin No. 363 at (<http://www.carters.ca/pub/bulletin/charity/2015/chylb363.pdf>)



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**1. Proposed Capital Gains Exemptions of Private Shares and Real Estate**

- Department of Finance released draft legislation proposals to amend the ITA on July 31, 2015 (pending adoption by new government)
- Included are exemptions from capital gains tax for certain dispositions involving real estate or private corporation shares
  - Where cash proceeds are donated to a qualified donee within 30 days of sale
  - Dispositions are to be arm's length dispositions of real estate or private corporation shares
  - Donors must be resident in Canada
  - The rule applies to sales in 2017 and subsequent taxation years but anti-avoidance rules may deny exemption

For more information see: Charity & NFP Law Bulletin No. 370 at: (<http://www.carters.ca/pub/bulletin/charity/2015/chylb370.pdf>)

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**2. Proposed that Charities Can Invest in Limited Partnerships**

- Pending adoption of draft legislation of July 31, 2015, registered charities or RCAAAs with an interest in a partnership will not be seen as carrying on a business if:
  - The partnership investment is a limited liability partnership
  - Members deal at arm's length with each general partner of the partnership
  - The charity only holds 20% of the fair market value of the interest of all members
- This is intended to help charities diversify their investment portfolios to better support their charitable purposes and give them flexibility to use innovative approaches to addressing social problems
- New subsection 253.1(2) will apply to investments made after April 20, 2015

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### 3. Foreign Entities

- Bill C-59, which implemented certain provision of Budget 2015 received Royal Assent on June 23, 2015, allows foreign charitable organizations that receive a gift from the Government, to apply for qualified donee status
  - Qualified donee status will be granted for a 24 month period from the date chosen by the Minister, usually no later than the date the gift was made
  - Activities include disaster relief, urgent humanitarian aid, or activities in the interest of Canada
  - Foreign entities eligible to apply has been expanded to include “foreign charitable foundations” as opposed to just charitable organizations

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## B. FEDERAL LEGISLATIVE AND REGULATORY UPDATE

### 1. Anti-Terrorism Act, 2015, Bill C-51

- Received Royal Assent on June 18, 2015 but expected to be revamped by the Liberal Government
- Charities operating in conflict areas may be particularly affected by the proposed amendments, which include
  - *Criminal Code* create an offense for knowingly advocating or promoting the commission of terrorism offenses in general
  - *Security of Canada Information Sharing Act, 2015* authorizes and facilitates the sharing of information among government agencies (e.g., CRA) in situations where there is “activity that undermines the security” of Canada
  - The *Secure Air Travel Act* creates a “no-fly list” for identifying and responding to persons who engage in an act that threatens transportation security or travel

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### 2. 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
- CRTC has issued notices of violation and a warrant and entered into voluntary undertakings with various commercial entities, with various investigations going on since CASL came into force
- On September 4, 2015, CRTC provided an enforcement advisory together with new guidance for CASL compliance

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### 3. Digital Privacy Act, Bill S-4


- On June 18, 2015, the act received Royal Assent
- The act amends the *Personal Information Protection and Electronic Documents Act* (PIPEDA)
- Most notably, the amendments expand the circumstances in which personal information could be disclosed without the individual’s knowledge or consent
- Grants the Privacy Commissioner authority to enter privacy compliance agreements with organizations and potentially enforce these agreements through a court order



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- Permits organizations to disclose personal information with enforcement and security agencies without the knowledge or consent of the individual to another organization
  - in order to investigate a breach of an agreement or a contravention (or anticipated contravention) of a federal or provincial law
  - where it is reasonable to expect that obtaining the consent from the individual for the disclosure would compromise the investigation



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### 4. Changes to Tax Rates and Donations

- On December 7, 2015, the Minister of Finance announced changes to the federal graduated tax rates for individuals

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 to claim a corresponding donation tax credit "on the portion of donations made from income that is subject to" the new top marginal rate of 33%
  - The current provisions permit 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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- Prior to January 1, 2016, testamentary trusts were taxed at the same federal graduated tax rates as individuals
- As of January 1, 2016, testamentary trusts are now subject to a federal flat tax at the top marginal rate for individuals unless the trust is designated as a Graduated Rate Estate ("GRE") in accordance with the GRE definition in subsection 248(1) of the *Income Tax Act*
- The introduction of GREs was controversial within the estate planning community and as a result the Department of Finance released legislative proposals on January 15, 2016 for consultation

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**5. Mandate of Minister of Finance (November 13, 2015)**

- The Prime Minister has asked the Minister of Finance to "work with the Minister of National Revenue to allow charities to work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors. This will include clarifying the rules governing "political activity"

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**C. 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

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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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- As of January 1, 2016 "large organizations" are required to meet AODA requirements for *Employment Standards*
- The *Employment Standards* relate to recruitment, accommodating employees with disabilities, accessible formats and communication supports for employees with disabilities, workplace emergency response information, documented individual accommodation plans and more
- With certain exceptions "small organizations" need to comply by January 1, 2017

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**2. Forfeited Property of Dissolved Not-for-Profit Corporations**

- The *Forfeited Corporate Property Act* and the *Escheats Act* will come into force on December 10, 2016
- The Acts make changes in the law with respect to the availability of forfeited corporate property to reviving corporations or creditors
- The combined effect is to reduce the number of corporate properties which will forfeit to the Crown and return forfeited property to productive use more efficiently
- The goal is also to increase corporate accountability for costs associated with forfeited corporate property

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**3. Rowan's Law – Concussion Legislation**

- On December 10, 2015 *Rowan's Law Advisory Committee Act* passed second reading
- Rowan's Law will be of interest to any charity or NPO which have sports activities with young athletes
- Rowan's law focuses on education for parents, athletes and coaches
- The legislation focuses on when an athlete must be removed from participation in the sport if a concussion is suspected and the medical clearance required to return

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**4. Community Benefits Agreements**

- The *Infrastructure for Jobs and Prosperity Act*, which received Royal Assent on June 4, 2015, includes the community benefits principle in its Infrastructure Planning Principles
- Community Benefits Agreements among community organizations, the public and private developers aim to ensure that development benefits the communities in which it is taking place through jobs, green space, allocation of space for charitable or not-for-profit organizations

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**5. Ontario Standardizes Police Checks**

- On December 3, 2015 Royal Assent was granted to the *Police Record Checks Reform Act, 2015*
- The Act implements a new standardized statutory regime governing police checks to screen for employment, volunteering
- Types of police checks: 1) criminal record checks, 2) criminal record and 3) vulnerable sector check
- Non-conviction information can only be disclosed in the context of vulnerable sector checks
- The individual must consent to disclosure of the police record check
- Police record checks are only part of a comprehensive child and vulnerable protection policy

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**D. 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*, which had been in force since 1917
- All CCA corporations had to continue under the CNCA within 3 years, i.e., by October 17, 2014
- Dissolution for not meeting the October 17, 2014, deadline is not automatic
- As of October 3, 2015, 12,554 of approximately 17,000 Part II CCA not-for-profit corporations had continued

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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
- Information about federal corporations, including registered office address and names and addresses of directors is available to the public
- Directors who do not want to have their residential addresses posted on Corporations Canada website can use another address (which is not a P.O. Box) where legal documents can be accepted by the Director or someone on his or her behalf
- Corporations Canada recently posted information about how a corporation can apply to hold an annual meeting later than six months following its year end

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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, but Bill 85 died on the Order Paper in May 2014 because of the election
- 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

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- 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 sometime in 2018
- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- 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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## E. CRA UPDATES

### 1. Budget 2015 - Supporting the Charitable and Non-Profit Sector (July 15, 2015)

- Contains two pages dedicated to questions and answers pertaining to charities from the 2015 Budget as well as a message from the Director General

### 2. Charities and Political Activities (July 14, 2015)

- An educational resource for charities that provides insight on political activities audits and procedures and how they are selected and conducted

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### 3. CRA to Wind down Political Activities Audits (Jan.20,2016)

- The Minister of National Revenue, announced that CRA would be winding down the political activities audit
- The audits are being wound down because it has revealed substantial compliance with the rules
- Of the thirty completed audits only five resulted in revocation and for reasons that were primarily outside their political activities
- The Minister affirmed the independence of CRA with respect to selecting charities to be audited and the outcomes
- CRA will be holding consultations with the charitable sector about the rules relating to political activities

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### 4. General Audit Process for Charities (July 14, 2015)

- This page provides information for charities concerning audits and the audit process for charities
- CRA has reported 781 audits for 2014/2015

### 5. Advisory on partisan political activities (August 21, 2015)

- In anticipation of the recent federal election campaign, CRA published further information in relation to partisan political activities
- Charities should note that among the list of partisan political activities either criticizing or praising the performance of candidate or political party is now included



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### 6. Syrian Conflict

- The deadline for individual charitable donations that will be counted towards the government's matching relief fund has been extended to February 29, 2016
- CRA posts information for charities and donors about assisting Syrian refugees including
  - The need to have charitable purposes that authorize assistance to refugees
  - Information about Sponsorship
  - How to find registered charities who are providing humanitarian relief

### 7. The T3010

- Updated on January 14, 2016 to include the requirement to report investments in limited partnerships

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**F. Selected Case Law**

**1. *Loyola High School v Quebec (Attorney General)***

- On March 19, 2015 both majority and the concurring minority opinions of the Supreme Court provided robust affirmation of freedom of religion, including the communal aspects of religion
- SCC ruled that requiring religious schools to teach their own religion objectively infringes religious freedoms
- The Court commented on secularism in considering how to balance freedom of religion with state values
  - The majority underlined that secularism does not mean excluding religion and, instead includes “respect for religious differences”
- The majority returned the matter to the Minister for reconsideration, while the minority would have ordered the Minister to grant Loyola an exemption

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**2. *Trinity Western University v Law Society of Upper Canada***

- On July 2, 2015, the Ontario Superior Court of Justice (Divisional Court) upheld the Law Society of Upper Canada’s (“LSUC”) decision to deny accreditation to Trinity Western University’s (“TWU”) proposed law school
- The Court found that this was reasonable because of institutional discrimination
- The Court relied on the fact that the LSUC’s statutory authority was not only concerned about academic competence, but also included a broad mandate to advance the cause of justice, maintain the rule of law, and act in the public interest

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- This case was distinguished from TWU v NSBS by the Ontario court on the grounds of the enabling legislation to the LSUC
  - The Court held that since it was formed, the LSUC has had broader statutory authority and greater control over educational qualifications for admission to the Bar than the NSBS
- On December 12, 2015 the B.C. Supreme Court quashed a decision of the Law Society of B.C. to reject TWU as an approved faculty of law because the Benchers fettered their discretion by agreeing to be bound by a referendum of its members without considering the Charter rights of equality and freedom of religion.
- All three decisions have been appealed.


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**3. *Habitat for Humanity Canada v Hearts and Hands for Homes Society (Affiliation Agreements)***

- On July 18, 2015 the B.C. Supreme Court upheld a claim in specific performance for a provision within an affiliation agreement requiring that upon disaffiliation from the national umbrella organization, an affiliate must transfer its assets to the umbrella organization
- The Court held that the affiliate organization breached a number of requirements for affiliates including failure to adhere to service standards of the umbrella organization in carrying out its operations
- After the umbrella organization provided an opportunity to bring the affiliate back into compliance with the agreement over a period of three years, the umbrella organization took steps to disaffiliate due to continued non-compliance

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**4. *Public Television Association of Quebec v Minister of National Revenue (“PTAQ”) (Direction and Control)***

- On July 22, 2015 the Federal Court of Appeal upheld the Minister’s decision to revoke PTAQ’s charitable status
- PTAQ had entered into agreements for broadcasting and fundraising with a charitable US broadcaster
- PTAQ was audited by CRA who found that PTAQ failed to devote all of its resources to charitable activities who then issued a Notice of Intent to Revoke
- PTAQ objected to CRA and Appealed to CRA’s appeals branch who upheld the Minister’s decision

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- PTAQ appealed the Minister’s decision to the FCA
- There the Court found, after reviewing the documentary evidence on record, that PTAQ failed to demonstrate that they maintained direction and control
- The Federal Court of Appeal decision on PTAQ demonstrates that while intermediary agreements are given weight in deciding direction and control, courts will not hesitate to look past these agreements where they are not implemented according to the provisions set out in the agreement
- It is important that charities not only draft agreements that reflect the Act, but also that they can demonstrate that they are implemented in accordance with their terms on an ongoing basis

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**5. *Guindon v Canada (Third-Party Penalties)***

- On July 31, 2015, The Supreme Court of Canada dismissed the appeal
- The Court held that third party penalties imposed according to section 163.2 of the ITA do not attract protection under the *Canadian Charter of Rights and Freedoms*
- The Appellant was a lawyer without expertise in tax law who provided a legal opinion on the tax consequences of a leveraged donation program and signed 135 charitable receipts totalling \$3,972,775, in her capacity as president of a registered charity
- CRA had assessed a third party penalty against the Appellant in the amount of \$564,747 against Appellant, who appealed to TCC

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**6. *Humane Society v MNR (Undue Benefit)***

- The Humane Society was issued a Notice of Intention to Revoke by CRA following a CRA audit of the 2006 fiscal year, for an alleged reimbursement of \$250,000 to the Humane Society's director
- Of the reimbursed funds CRA was of the opinion that \$69,343.18 was not in relation to charitable expenditures
- On August 18, 2015, the FCA held that revocation of the charitable status of the Humane Society was reasonable because "it was within a range of justifiable outcomes for the Appeals Directorate to conclude that the personal benefits...constituted serious non-compliance with the applicable provisions of the Act"

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**7. *Bope v. The Queen (Donations and Donation Receipts)***

- Appellant claimed tax credits for cash donations of \$3,800 made in year 2009 despite an income of roughly \$40,000 for that year
- Tax credits were disallowed by MNR: on May 12, 2015, disallowance was upheld by TCC because:
  - The donation receipt did not meet requirements in ITA Regulation 3501(1)
  - Appellant provided no objective evidence to rebut MNR assumption no donation was made
    - i.e. there were no cheques, no ATM withdrawal slips, or any other records

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**8. *Michela v. St Thomas of Villanova Catholic School***

- On November 23, 2015, the Ontario Court of Appeal ruled that where an employer is in difficult economic circumstances, those circumstances "do not justify a reduction of the notice period to which an employer is otherwise entitled"
- The motion judge in the lower court had reduced the notice award to the plaintiff employees citing the employer's financial difficulty as a reason for the reduction in notice
- The Court of Appeal overturned the motion judge's decision to reduce the notice period, and awarded the teachers damages in the amount of 12 months' notice


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**9. *Saskatchewan WTF Taekwondo et al. v Taekwondo Canada 2015 ONSC 2937***

- On May 5, 2015 the Ontario Superior Court of Justice ruled that the right to call a special meeting under the *Canada Not-for-Profit Corporations Act* is a substantive one and is not lightly to be interfered with
- The mere fact of an AGM coming within a year is not a basis to deny the requisition for a meeting

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