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CHARITY LAW UPDATE

NOVEMBER/DECEMBER 2014

EDITOR: TERRANCE S. CARTER

Updating Charities and Not-For-Profit Organizations on recent legal developments and risk management considerations.

NOVEMBER/DECEMBER 2014

SECTIONS

HIGHLIGHTS

Ottawa Region *Charity & Not-for-Profit Law* Seminar

Hosted by Carters Professional Corporation at Centurion Center in Nepean, Ontario.
Thursday February 12, 2015.
Details and online registration available at http://www.carters.ca/index.php?page_id=116

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RECENT PUBLICATIONS AND NEWS RELEASES

Federal Court of Appeal Rules on Advancement of Religion

By Jennifer M. Leddy

On November 17, 2014 the Federal Court of Appeal ("FCA"), in *Humanics Institute v The Minister of National Revenue*, 2014 FCA 265, upheld the decision by the Minister of National Revenue not to register the Appellant, the Humanics Institute, as a charity. The FCA found that the Appellant's purposes were broad and vague and the activities in support of its purposes did not advance religion or education in the charitable sense.

The Appellant argued the Minister's requirement that religion must include faith in and worship of a supreme being was too narrow a view of religion. This argument was rejected by the court because the concept of "Oneness of Reality" that was being advanced by the Appellant was too broad and vague. The argument also failed because the Appellant could not point to a "particular and comprehensive system of faith and worship" or body of teachings, an element of the definition of religion set out in the Supreme Court of Canada decision in *Syndicat Northcrest v Amselem*, 2004 SCC 47. It is noteworthy that the FCA used a definition of religion from a freedom of religion case in deciding the qualifications for charitable registration.

Relying on its own decision in *Fuaran Foundation v Canada*, 2004 FCA 181 ("*Fuaran*"), the FCA also found the Appellant's proposed activities were not charitable. It held that building and maintaining a sculpture park is not a targeted attempt to promote religion, as required in *Fuaran*, in which the FCA held that it was insufficient to "simply make available a place where religious thought may be pursued." However, some would argue that the decision in *Fuaran* misapplied the test of advancing education to the test of advancing religion.

While the appellant argued that it would promote religion by initiating workshops, seminars, and other educational programs, the FCA held that "merely expressing aspirations does not entitle an applicant to charitable status." The Appellant also failed in its Charter claim that refusal of charitable registration infringes its freedom of religion, because the Appellant could not establish that the Minister's decision objectively, as distinct from subjectively, interfered with its freedom of religion. It also failed in its claim that the Minister breached its equality rights under section 15 of the Charter because section 15 applies only to individuals and a not-for-profit corporation, such as the Appellant, is not an individual.

The full decision is available online at: http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/99312/index.do

CRA News

By Linsey E.C. Rains

Excise and GST/HST News on Sponsorships

In the most recent Excise and GST/HST News – No. 93, CRA included a section on sponsorships and public sector bodies. It describes how the GST/HST affects public sector bodies that receive sponsorships from businesses in exchange for property or services. Depending on the benefit to the sponsor, such sponsorships may be subject to GST/HST. The article discusses the conditions under section 135 of the *Excise Tax Act* where a supply made in exchange for sponsorship funds is not subject to GST/HST. To read the full article, see: http://www.cra-arc.gc.ca/E/pub/gr/news93/news93-e.html

National Philanthropy Day

On November 14, 2014, the Minister of National Revenue, the Honourable Kerry-Lynne D. Findlay, P.C., Q.C., M.P., issued a news release to celebrate National Philanthropy Day on November 15, 2014. The news release emphasized "the important role charities play in communities across the country" and encouraged taxpayers to consider donating. The Minister focused on the First-Time Donor's Super Credit, revealing that over 95,000 individual taxpayers have used the First-Time Donor's Super Credit to claim in excess of 20 million dollars in charitable donations since July of this year. The news release also included a reminder that donors should consult the Charities Listings on CRA's website to verify if an organization is eligible to issue official receipts for donations. The full text of the news release is online here: http://news.gc.ca/web/article-en.do?nid=904799.

Running Tax Clinics in your Community Organization

On November 5, 2014, CRA issued a Tax Tip about its Community Volunteer Income Tax Program ("CVITP"). Under the CVITP, community organizations register with CRA and recruit volunteers, who provide tax assistance directly to community members. As part of the program, these organizations receive support from CRA coordinators, as well as free training, reference material, and tax preparation software. CVITP has existed for more than 40 years. In 2013, more than half a million income tax returns for Canadians with modest incomes and simple tax situations were filed through CVITP. Organizations interested in learning more can visit http://www.cra-arc.gc.ca/volunteer/ or call 1-800-959-8281. This Tax Tip is available at: http://www.cra-arc.gc.ca/nwsrm/txtps/2014/tt141105-eng.html.

Alert on Gifting Tax Shelters

On November 20, 2014, CRA issued a Tax Alert that warns taxpayers about the consequences of participating in gifting tax shelter schemes. The alert confirms CRA will continue to hold back on processing tax returns for the 2014 tax year, as it did in 2012 and 2013, where taxpayers have claimed a donation tax credit under a tax shelter arrangement. Returns will only be processed after the tax shelter has been audited unless a taxpayer removes the claim from the return. The alert also cautions taxpayers audits can take as long as two years to complete and that all gifting tax shelters will be audited. As no tax shelter has so far complied with Canadian tax law, CRA reminds taxpayers that since 2013 they must pay 50% of taxes potentially owed even if they choose to object to the notice of assessment. The Tax Alert can be found at: http://www.cra-arc.gc.ca/nwsrm/lrts/2014/l141120-eng.html?utm_source=mediaroom&utm_medium=eml

Corporate Update

By Theresa L.M. Man

Canada Not-for-Profit Corporations Act

As of November 22, 2014, 10,478 (out of approximately 17,000) corporations have continued from Part II of the *Canada Corporations Act* ("CCA") to the new *Canada Not-for-profit Corporations Act* ("CNCA"). Failure to continue under the CNCA by the deadline may result in those corporations being dissolved. However, dissolution is not automatic. See *Charity Law Bulletin* No. 336 (http://www.carters.ca/pub/bulletin/charity/2014/chylb336.pdf) for an overview of the dissolution process and how to revive such dissolved corporations.

Now that the October 17, 2014 deadline date for continuance has passed, Corporations Canada has started sending notices of pending dissolution to those corporations that have not continued. In its Monthly Transactions (posted once a month), Corporations Canada will list all corporations for which such a notice has been issued. Corporations Canada started this listing at the end of October, so there are only 9 corporations listed for the November Monthly Transactions with an effective date of October 31, 2014 (see http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06330.html). We understand that the list for November (which will be posted in early December) will be a longer list. Corporations Canada is now focusing on corporations that have not filed anything with it in years. Information on the process is available from its FAQs on transition, which have recently been updated (see

http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04973.html). As noted on Corporations Canada's website, corporations that have not continued and have not been dissolved can still apply to continue.

Many corporations have mistakenly thought that the one-year requirement under the CNCA to file by-laws means that they have one year to adopt a new CNCA compliant by-law. As a result, some corporations have filed their articles in order to meet the October 17, 2014 deadline, but have not adopted a new by-law or amended their current by-law to comply with the rules in the CNCA. In fact, the CNCA requirement simply means that by-laws have to be filed within one year of being adopted and is not intended to give corporations another year to prepare their by-laws. Although it is not necessary to file a CNCA compliant by-law at the time of continuance, corporations should adopt one at the same time as adopting their articles of continuance. It is not appropriate to operate under a CCA by-law once the corporation has continued. Most (if not all) by-laws of CCA corporations do not comply with the rules in the CNCA because they are prepared with the CCA rules in mind. To continue operating under a CCA by-law after continuance may expose the directors and officers to liability (for allowing the corporation to not comply with the legal requirements in the CNCA) and will create a governance nightmare for the corporation. As well, provisions in the articles have to go hand in hand with provisions in the by-law. Those corporations that have continued under the CNCA but have not adopted a new by-law or amended their current by-law to comply with the rules in the CNCA should do so as soon as possible.

Ontario *Not-for-Profit Corporations Act*

The update on the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") is that there are no updates. We provided an update on the status of the ONCA in our October 2014 *Charity Law Update*. Please refer to that for the last update on the progress of the ONCA (see http://www.carters.ca/pub/update/charity/14/oct30.pdf). It is hoped that the government will move forward with tabling a new Bill to amend the ONCA and then proclaim the ONCA as soon as possible.

Alberta *Societies Act* Amended to Permit Continuances

On September 22, 2014, portions of Alberta's Bill 12, *Statutes Amendment Act, 2014*, came into force. Bill 12 received Royal Assent on May 14, 2014, and it comes into force on various dates. The amendments permit not-for-profits incorporated in other jurisdictions to be continued in Alberta. This provision can now be found at section 36.2 of the Alberta *Societies Act*. Also coming into force was section 36.3, which contains provisions for Alberta societies to apply for continuance in other

jurisdictions. The Alberta *Societies Act* is available online at: http://www.qp.alberta.ca/documents/Acts/S14.pdf.

Directors and De-facto Directors Liable for Unpaid Corporate Liabilities

By Ryan M. Prendergast

Directors of corporations, including not-for-profit corporations, may be liable for income tax, employer contributions, interest, and penalties that the corporation may owe to Canada Revenue Agency ("CRA"). Under section 227.1(4) of the *Income Tax Act*, this liability exists while a director is serving as a director as well as for two years after a director resigns from the corporation. Two recent decisions from Justice Campbell of the Tax Court of Canada ("TCC") highlight the importance of properly determining who is a director, and, therefore, the scope of that individual's liability.

In July 2014, the TCC released its decision in *Bekesinski v The Queen*, 2014 TCC 245 ("*Bekesinski*"), in which it considered whether a director had properly resigned within the two-year limitation period. In 2010, CRA assessed the director $477,546.08 for failure to remit source deductions. However, the director contended that he had resigned in 2006, and, therefore, was not liable, as the limitation period had passed. CRA was only informed of the resignation after legal proceedings commenced and believed that the resignation was backdated, inauthentic, and irrelevant. Although Justice Campbell also believed the resignation was backdated, she found for the appellant due to a lack of documentary evidence.

Subsequently, in its October 2014 decision in *McDonald v The Queen,* 2014 TCC 315 ("*McDonald*"), the TCC held that an individual was a *de facto* director based on his role in the corporation. Consequently, based on the decisions in *Wheeliker v the Queen*, 1999 CanLII 9297 and *Hartrell v The Queen*, 2006 TCC 480, the *de facto* director was found liable for company liabilities despite not officially holding the role of director and not presenting himself as a director to any third-parties. Justice Campbell found that, on the facts, the appellant "played an important and active role in the overall corporate operations," including having access to corporate books and records, managing and controlling employees, and attending meetings with trust examiners. Justice Campbell also held "that an individual need not be involved in all facets of...corporate operations to be held to be a *de facto* director."

Both cases reveal lessons for directors of not-for-profits and for individuals who may be considered directors at law. Generally, the only defence, apart from having resigned in accordance with subsection 227.1(4) of the *Income Tax Act*, is demonstrating due diligence. Interestingly, due diligence was not

argued in either case. Practicing due diligence while leaving a board by carefully documenting a resignation, can help a director avoid future liabilities. Additionally, anyone who is not officially a director within a not-for-profit corporation, including an executive director or other senior management position, should be careful to ensure that the scope of their roles does not inadvertently make them a *de facto* director, as it can result in unforeseen and costly liabilities.

The decision in *Bekesinski* can be found at: http://canlii.ca/t/g8gdc, and the decision in *McDonald* can be found at: http://canlii.ca/t/gf517.

Supreme Court Creates New Duty of Contractual Honesty

By Sean S. Carter

On November 13, 2014, in its decision in *Bhasin v Hyrnew*, 2014 SCC 71 ("*Bhasin*"), the Supreme Court of Canada ("SCC") created a new common law duty that all parties to a contract must perform their obligations honestly and with good faith regarding the legitimate interests of the other parties. By doing so, the SCC clarified previous unsettled common law as to what degree Canadian courts required good faith in the performance of contracts. Charities and not-for-profits should take note of this important development in contract law, which will impact how they must act in contracts with employees, suppliers, and other third-parties.

The facts in *Bhasin* involved a contractual dispute between Canadian American Financial Corp. ("Can-Am"), an Alberta financial company, and Mr. Bhasin, an enrolment director for Can-Am, whose position had him act like a small-business owner. Mr. Bhasin alleged that Can-Am acted dishonestly, misled him, and withheld information during the process of terminating a renewable contract. Mr. Bhasin further alleged that this dishonesty resulted in a greater loss to his related business than would have resulted if the termination had occurred without dishonesty.

In his analysis, Justice Cromwell articulated three broad principles:

1. That a general organizing principle of good faith underlies and permeates contract law;
2. That the particular implications for each case are determined by how the doctrine has developed and how it affects particular situations and relationships; and
3. That it is appropriate to recognize a common law duty of honest performance that applies to all contracts as a manifestation of the general organizing principle of good faith.

In particular, Justice Cromwell discussed how commercial parties expect honesty from their contracting partners. Consequently, by enunciating these principles, the SCC is recognizing how a common law duty of contractual honesty is simply a logical development of both the current law as well as current commercial practice.

Additionally, it is important to note the SCC held that a duty of honesty should not be an implied term of a contract. Instead it is a general duty of contract law, regardless of the parties' intentions, similar to other doctrines limiting the freedom to contract, such as the doctrine of unconscionability. While most contractual parties are already presumed to intend honesty in contracts, the decision in *Bhasin* will require parties to more thoughtfully consider how they communicate with other parties in a contract. Charities and not-for-profits should, therefore, proactively review their current contracts to ensure that they reflect this new development in contracts law.

The decision can be found at: http://canlii.ca/t/gf84s.

CRA Owes Duty of Care to Taxpayers

By Ryan M. Prendergast

On April 30, 2014, the British Columbia Supreme Court (BCSC) released its decision in *Leroux v. Canada Revenue Agency*, 2014 BCSC 720 ("*Leroux*"). This decision is significant as it found CRA auditors owed a duty of care to Mr. Leroux, a taxpayer assessed with over $600,000 in taxes, interest and penalties, and that auditors had breached this duty of care in the manner in which they imposed penalties. *Leroux* signals a noteworthy shift from past case law, which did not recognize that CRA auditors owed taxpayers a duty of care. A duty of care refers to a legal obligation to avoid activities that could be reasonably foreseen to harm others. While Mr. Leroux's action was ultimately dismissed because the BCSC found no causative link between the harm he suffered and CRA's conduct, expanding CRA's legal duties to include a duty of care to individuals means that corporations, including registered charities and non-profit organizations, may also potentially qualify under this duty. This could result in a significant new protection for registered charities and non-profit organizations in their interactions with CRA, as well as create a cause of action for organizations that believe they have been unfairly treated or harmed by CRA negligence.

Mr. Leroux claimed that he lost his home and business after a long process of being threatened, deceived, and blackmailed by a CRA auditor who reviewed his GST and income tax returns. Mr. Leroux filed a claim for negligence against CRA as well as a claim for misfeasance in public office. CRA

admitted that it was reasonably foreseeable that a lack of due care on their part could lead to harm of individuals taxpayers. However, CRA argued that there was not sufficient proximity between the parties. The court disagreed, citing that it was evident to everyone involved at the time the assessment was levied that there were devastating consequences to Mr. Leroux. As a result, the CRA auditors in question could not escape an obligation to be mindful of the plaintiff's legitimate interest in how CRA conducted its affairs, or escape the duty to take reasonable care and avoid harming Mr. Leroux. The court further explained that "CRA must live up to their responsibilities to the Minster and the Canadian public, nearly all of whom are taxpayers, by applying a little common sense when the result is so obviously devastating to the taxpayer."

Registered charities and non-profit organizations should follow the pending appeal of the decision to the British Columbia Court of Appeal, as courts across Canada may give this case significant weight in determining whether CRA employees are negligent. This is especially valuable in relation to registered charities and non-profit organizations, whose tax-exempt status depends on a close and properly functioning relationship with CRA, and who have had little recourse against CRA where they may have been harmed by incidents of negligence.

The case is available online at http://canlii.ca/t/g6px8

Credit Card Interchange Fees Reduced for Charities

By Terrance S. Carter

On November 4, 2014, the federal government announced a voluntary agreement with MasterCard and Visa to reduce interchange fees to an average of 1.50% of the transaction value. An interchange fee refers to a charge paid by merchants when they process payments by credit card. For charities accepting funds by credit card, the reduction is promised to be even greater. This significant development is in response to continuous work from the charitable sector, specifically Imagine Canada. This initiative reflects the greater work being done with regard to credit card companies and the charitable sector, including the introduction of Bill S-202 in the Senate, which proposes even further regulation and reduced fees. For more information on Bill S-202, see "Bill S-202 Could Eliminate Credit Card Acceptance Fees for Charities" by Ryan M. Prendergast in the October 2013 *Charity Law Update* (http://www.carters.ca/pub/update/charity/13/oct13.pdf).

The voluntary agreement takes effect April 1, 2015 and will continue for five years. In the case of MasterCard, a new merchant category for charities will allow for an almost 40% reduction in

interchange fees. This means interchange fees will fall between 1.0% and 1.5%, as compared to current rates of 1.59% to 2.65%. Visa, rather than creating a completely new merchant category, will include charities in its "emerging segments" category, which means charities' interchange fees will vary between .98% and 1.95%, depending on the Visa card used.

These developments will significantly benefit charities by increasing donations received and lowering administrative costs. The latter is especially important for charities because, unlike traditional merchants and their customers, the administrative costs of charitable donation are not passed to donors. These costs are often hidden and result in a lack of transparency regarding credit cards and donations. These costs go unnoticed, in part, because tax credits given to donors are based on the total donation, even though the charity loses out on a portion of credit card donations because of administrative costs, like interchange fees. Reduced interchange fees will therefore result in donors and people who purchase goods or services from registered charities having a greater impact on charitable causes. The charitable sector will no doubt be encouraged by this progress and feel optimistic about further work with credit card companies, such as addressing other previously identified issues, like the elimination of surcharges for "card not present" transactions.

A press release from the Department of Finance regarding the reduction of fees can be found online at: http://www.fin.gc.ca/n14/14-157-eng.asp

Competition Act Application Broadens Under TREB Decision

By Nancy E. Claridge

Trade associations will need to keep a close eye on proceedings set to take place before the Competition Tribunal (the "Tribunal") in May of 2015, when it will be reconsidering an application by the Commissioner of Competition that could have significant impact on the activities of trade associations in Canada as they relate to the *Competition Act*. In that application, the Commissioner is alleging that a decision by the Toronto Real Estate Board ("TREB") to establish and enforce rules for members' access to and use of the multiple listing service ("MLS") was an abuse of its dominant position in the market for residential real estate brokerage services, contrary to section 79 of the *Competition Act*.

The reconsideration is a result of the February 2014 decision by the Federal Court of Appeal ("FCA") in *Commissioner of Competition v The Toronto Real Estate Board*, 2014 FCA 29, which reversed the decision of the Tribunal that the Commissioner failed to establish the required elements of section 79 of the *Competition Act*, namely that TREB was engaged in the practice of "anti-competitive acts".

Section 79 of the *Competition Act* states in part,

> 79. (1) Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice."

Although it is obviously premature to draw any conclusions over this matter until the application has been heard on its merits, the Federal Court of Appeal's decision does suggest that trade associations who do not compete directly in the same market as their members can be the subject of abuse of dominance claims by the Commissioner where their acts are alleged to be exclusionary, predatory or disciplinary in relation to a competitor in the affected market. This suggests that some caution is warranted, especially in light of the fact that significant monetary penalties are associated with this type of case.

The full text of *Commissioner of Competition v The Toronto Real Estate Board* is available online at: http://canlii.ca/t/g2xq0.

The *Competition Act* is available online at: http://laws-lois.justice.gc.ca/eng/acts/C-34/FullText.html.

Upcoming Supreme Court appeal of *Guindon v The Queen*

By Terrance S. Carter

On December 5, 2014, the Supreme Court of Canada ("SCC") will hear *Guindon v The Queen* (SCC docket #35519). The SCC granted leave to appeal the Federal Court of Appeal's judgment on March 2, 2014.

The case was first heard by the Tax Court of Canada ("TCC") on October 12, 2012. Originally, Canada Revenue Agency ("CRA") had conducted an investigation and assessed a penalty of $564,747 against Guindon, a lawyer, under section 163.2 of the *Income Tax Act* for providing a legal opinion on a charitable donation scheme and issuing 134 charitable donation receipts containing false statements. The TCC held that section 163.2 created "an offence", and, as a result, Guindon had rights as set out in

section 11 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The TCC overturned the penalty on the basis that CRA had not respected Guindon's section 11 rights in the investigation and assessment process.

The Crown appealed the TCC decision and in June 2013, the Federal Court of Appeal ("FCA") overturned the TCC's decision. The FCA held that Guindon should have served notice of a constitutional question and, since she did not, the TCC did not have jurisdiction to consider section 11 of the Charter. The FCA also reviewed the TCC's assessment of the criminal nature of the penalty under section 163.2 and concluded that section 163.2 was not criminal in nature.

Both parties' factums and a summary of the case are available on the SCC's website at: http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35519.

For further details about the TCC's decision, see the *Charity Law Bulletin* No. 291 online at: http://www.carters.ca/pub/bulletin/charity/2012/chylb291.pdf, and for information about the FCA's decision, see the June 2013 *Charity Law Update* available online at: http://www.carters.ca/pub/update/charity/13/jun13.pdf.

How CRA Determines who is a "Municipal Authority"

By Theresa L.M. Man

In a Canada Revenue Agency ("CRA") advance income tax ruling (2012-0473041R3) released on October 22, 2014, CRA was asked to determine whether income allocated to a First Nation from a limited partnership was tax-exempt because the First Nation is a public body performing a function of government. CRA's ruling sets out examples of factors that CRA considers when determining whether a group meets the definition of a "municipal authority" under paragraph 149(1)(c) of the *Income Tax Act* (the "Act"). If a group meets this definition, it can also become a qualified donee that is able to issue donation receipts, if it seeks such registration under the Act.

CRA treats Indian bands as municipalities for purposes of paragraph 149(1)(c) on a case-by-case basis. Some of the factors CRA used in this ruling include that the First Nation:

- Operates its own health center;
- Is responsible for the delivery and administration of employment and training programs;
- Manages all aspects of housing on the reserve;

- Maintains its own local police force and fire protection services;
- Owns, operates, and maintains a police station, a daycare centre, public works facilities, and a community centre;
- Contracts and secures all utility services, garbage collection, and electricity for members on reserve; and
- Is responsible for all water services on reserve.

CRA concluded that on the facts in this case, since the First Nation in question performs the functions of government listed above, it therefore meets the definition of "municipal authority" in section 149(1)(c) of the Act. Consequently, the First Nation was found to be tax exempt under the Act, and it could seek to be registered as a qualified donee.

Gifts-in-Kind and Valuation Evidence

By: Linsey E.C. Rains

In *Ford v The Queen*, 2014 FCA 257 ("*Ford*"), a husband and wife purchased and donated artworks as part of an art donation program. The taxpayers received receipts from the charities for amounts exceeding the original purchase prices of the artworks. The husband claimed the donations on his 1999, 2000, and 2001 tax returns and the wife on her 2000 and 2001 tax returns. The Minister reassessed the husband's 1999 tax return in 2002 and both taxpayers' 2000 and 2001 tax returns in 2003. The reassessments reduced the amount of the charitable gift credit to reflect the amounts actually paid for the artwork and assessed gross negligence penalties. The taxpayers objected to these reassessments and the Minister responded with additional reassessments in 2012. Although the 2012 reassessments vacated the gross negligence penalties and reduced the taxpayers' liability under the *Income Tax Act* ("ITA"), the taxpayers challenged the Minister's right to reassess them in 2012 by appealing these reassessments to the Tax Court of Canada ("TCC"). The TCC dismissed the appeals and the taxpayers appealed to the Federal Court of Canada ("FCA").

The taxpayers raised arguments regarding procedural fairness, statutory interpretation, and delay at the FCA hearing. The taxpayers argued the Minister's delay in reassessing their returns in 2012 meant the Minister failed to reconsider their objections to the earlier reassessments with "all due dispatch" in accordance with subsection 165(3) of the ITA. In particular, the taxpayers argued the Minister's delay "prejudiced their right to obtain evidence to support the amounts that they had claimed as the fair market

value of the donated art when they filed their tax returns." The FCA dismissed the taxpayers' arguments and appeals, in part, because an assessment cannot be vacated solely due to the Minister's delay and also because "valuation issues will always relate to an earlier date than the date of the hearing." As well, the taxpayers knew at the earlier time of reassessment the Minister disagreed with their valuations and had several years to obtain evidence showing the fair market value of the donated artworks was the amount originally claimed on their tax returns.

Charities and donors should take note of this decision and ensure the amounts recorded on receipts for gifts in kind reflect the actual fair market value and can be supported by valuation evidence at the time of donation.

When is a Testamentary Bequest Void for Public Policy?

By Jacqueline M. Demczur

In *McCorkill v Streed*, 2014 NBQB 148, the New Brunswick Court of Queen's Bench (NBQB) considered a request to void a testamentary bequest because it was made to an organization whose purposes are illegal in Canada and because it was contrary to public policy. The bequest was not made for a specific purpose.

The testator died in 2004, never married, and had no children. He was not close to his siblings and left all of his property to the National Alliance ("NA"). The NA is a United States based neo-Nazi group that distributes hate propaganda and promotes a political program similar to that espoused by the Nazis during World War II. In 2013, the testator's sister filed an application to render the NA bequest void.

Justice Grant concluded the NA's publications "can only be described as racist, white supremacist and hate-inspired" and were "disgusting, repugnant, and revolting." Although Justice Grant recognized such publications may be protected under the United States Constitution, they could not be saved under Section 1 of the *Canadian Charter of Rights and Freedoms* ("Charter"), which puts reasonable limits on freedom of speech protected under Section 2(b) of the Charter. He also held that the publications were the kind meant to be targeted under Section 319(2) of the *Criminal Code*, (RSC, 1985, c C-46), which makes public incitement of hatred a criminal offense.

Justice Grant then addressed whether the courts could strike down a will because of the quality of the beneficiary despite there being no specific repugnant condition attached to the bequest. The respondents argued that there was no evidence that the gift contained any connotation of violence. However, Justice

Grant found the NA's purposes were so foundational to the organization that the fact the testator left his entire estate to the NA meant he intended the gift to be used for illegal purposes.

On the question of public policy, Justice Grant quoted Lord Chief Baron in *Egerton v Brownlow*, (1853) 10 Eng Rep 359 (HLC), who stated:

> "When, by a condition, he [the testator] attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void."

Justice Grant's reliance on this quote indicates the NBQB will be proactive when deciding if a bequest will be void. Other Canadian courts are not required to follow this decision, but could choose to do so because it is based on federal laws, i.e. the *Criminal Code* and the Charter.

The case is available online at: http://canlii.ca/t/g8sgm.

Lessons in Protecting Your Brand: The "Ice Bucket Challenge"

By Sepal Bonni and Terrance S. Carter

The "Ice Bucket Challenge" is the viral fundraising sensation of 2014, raising more than $100 million in the US and over $16 million in Canada to date, as reported by The Amyotrophic Lateral Sclerosis (ALS) Association in the US ("ALS US") and ALS Canada. In the US, this equates to a 1000% spike in donations to ALS US.

In August 2014, ALS US recognized (perhaps too late) that there may be some value to the phrases "Ice Bucket Challenge" and "ALS Ice Bucket Challenge" and sought to protect the fundraising brand through trade-mark registrations in that country. However, almost as fast as the Ice Bucket Challenge became a viral sensation, ALS US received public criticism for the its trade-mark filings because the applications would prevent other charities from using the marks. As a result of public concern, ALS US stated its decision to withdraw its applications to register the phrases as trade-marks via Facebook. Notwithstanding the public criticism, the applications may have been denied by the US Patent and Trade-Mark Office in any event, as the phrase had likely already become too generic by that point in time.

Unfortunately, ALS US did not apply for the trade-mark registrations until after the Ice Bucket Challenge had become a global fundraising phenomenon. In this regard, once a fundraising marketing campaign, such as the Ice Bucket Challenge, goes viral and is used increasingly by the public, the trade-mark owner may no longer have control over the mark and may lose its ability to claim ownership of the

mark. If ALS US had applied and registered the mark domestically and abroad prior to the challenge becoming a global phenomenon, it would have been able to effectively prevent the misuse of its fundraising marketing brand by numerous third parties in other countries who have been able to "piggyback" on the success of its campaign. Many of these third parties use ALS as a cover, but have no affiliation with the disease or ALS US in any country.

The lesson to be learned here is that charities should register their unique fundraising brands prior to the launch of a public campaign in order to maintain control over the goodwill associated with their brands and prevent their marks from becoming generic and thereby potentially misused. Early registration is also important to avoid public backlash and criticism that could otherwise result from a later attempt to trade-mark a fundraising marketing brand after it is already in the public domain.

For more information regarding registering fundraising brands, please see:

"Enhancing Your Charity Brand: Why it Matters?" By Sepal Bonni
http://www.carters.ca/pub/seminar/chrchlaw/2014/2014%2011%2019%20Final%20Trademarks.pdf

Branding & Copyright for Charities & Non-Profit Organizations, 2nd Edition By Terrance S. Carter & U. Shen Goh

http://store.lexisnexis.ca/store/ca/catalog/booktemplate/productdetail.jsp;jsessionid=ACCA07FA67052969A2E940ACAC086FB5.psc1706_lnstore_001?pageName=relatedProducts&core=&parent=cacat_02_en&catId=cacat_41_en&prodId=prd-cad-00523

Online Copyright Infringement Regime Coming into Force

By Sepal Bonni

The "notice and notice" regime established under the *Copyright Modernization Act* (the "Act") will come into force on January 2, 2015. This is the final step in implementing the Act. The "notice and notice" regime (sections 41.25, 41.26, and subsection 41.27(3) of the Act) has been described by the Canadian Government as a "made-in-Canada solution" to discourage online copyright infringement. Charities and not-for-profits should be aware of this legislation if they are copyright owners wishing to protect their copyright or if they are inadvertently displaying copyrighted material on their websites.

The new regime will allow copyright owners to send notices of claimed internet-related copyright infringement to anyone who provides: (a) internet access to the electronic location of the infringement; (b) digital memory used for the electronic location; or (c) an information location tool (i.e. a search

engine provider). The notices must be in writing and include details such as: the claimant's name and address; the work to which the alleged infringement relates; the claimant's interest or rights in respect of that work; the electronic location data to which the alleged infringement relates; the infringement that is claimed; the date and time of the alleged infringement; and any other information prescribed by regulation.

The new Act requires Internet intermediaries, including Internet service-providers ("ISPs") and website hosts, who receive notices of alleged copyright infringements to forward the notices to the source of the possible infringement and inform the copyright owner that the notice has been forwarded. ISPs and website hosts must retain records that will allow the identity of the user to be determined for at least six months after the claim is made or for one year if the claimant commences proceedings. The Act provides that failure to abide by the new requirements can result in liability for statutory damages of $5000 to $10,000 (as set out in new subsection 41.26(3)).

Although search engine providers are included in this regime, they are not obligated to forward the notices to the alleged infringer and their liability is limited to injunctive relief. However, once the work has been taken down, if a copyright owner gives notice of an infringement to a search engine provider, search engine providers must remove reproductions (cached copies) of infringing works within 30 days of receiving the notice of claimed infringement, or lose their limitation on injunctive relief.

With the introduction of the "notice and notice" regime, charities and not-for-profits who own copyrights have a new means through which they can enforce proper use of their copyrights. Additionally, charities and not-for-profits whose websites may inadvertently include copyrighted material should take this time to clean up their websites before the regime comes into force.

Ontario Workplace Laws Bill Receives Royal Assent

By Barry W. Kwasniewski in *Charity Law Bulletin* No. 355, November 26 2014

On November 20, 2014, Bill 18, the *Stronger Workplaces for a Stronger Economy Act, 2014* ("Bill 18"), received Royal Assent. Bill 18 is an omnibus bill, which amends five different labour and employment-related statutes in Ontario, including the Employment Standards Act, 2000 ("ESA"). The main substantive change is that the Ontario minimum wage will be tied to the Consumer Price Index ("CPI") starting in October 2015. Also relevant for charities and not-for-profits is that the definition of "worker" under the Occupational Health and Safety Act ("OHSA") has been broadened to include unpaid co-op students and interns. Additionally, the definition of "worker" under the OHSA may now be broad

enough to encompass volunteers. The amendments will come into force at different times, some immediate and others up to two years from Royal Assent. As Royal Assent has occurred, employers, including charities and not-for-profits, should assess the changes and take steps to address the effect of these changes to their workplaces and relationships with their employees. This *Charity Law Bulletin* reviews Bill 18 changes which are most relevant to charities and not-for-profits.

Read More: [PDF] http://www.carters.ca/pub/bulletin/charity/2014/chylb355.pdf

Proposed Salary Cap on Broader Public Sector Employees in Ontario

By Terrance S. Carter and Ryan M. Prendergast

On November 17, 2014, Ontario Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014* ("Bill 8"), was referred to the Standing Committee on General Government pursuant to an Order of the House after Second Reading. Bill 8 was reintroduced in July, 2014 after it died earlier in the year due to the 2014 provincial election. Of note, Bill 8 proposes to enact the *Broader Public Sector Executive Compensation Act, 2014*, in addition to amending various other Ontario statutes, which will permit the Lieutenant Governor in Council to establish compensation frameworks for certain executives in the broader public sector, including hospitals, school boards, universities and other Crown corporations.

If passed, Bill 8 proposes to manage compensation frameworks of executives in the public sector, which will include putting mandatory restrictions on compensation. These mandatory restrictions will apply specifically to those who earn $100,000 or more per year within the broader public sector.

Comparisons can be made between Bill 8 and the federal private member's Bill C-470, *An Act to Amend the Income Tax Act (revocation of registration)*, which died as a result of the previous federal election. Similar to Bill 8, Bill C-470 sought to impose a salary cap for any executive or employee of registered charities and to impose mandatory disclosure of compensation for its five highest-paid executives or employees. Similar to Bill C-470, Bill 8 proposes sanctions for overpayment of employees by requiring the designated employer to pay a penalty to the Crown, which may be as much as the amount of the overpayment. Bill C-470 was criticized for reflecting an inadequate understanding of both regulation and compensation in the charitable sector. Although Bill 8 is not as broad in scope as Bill C-470, similar criticisms may be raised.

While Bill 8 amends several other Ontario statutes, the proposed amendments that relate to salary caps in the *Broader Public Sector Executive Compensation Act, 2014* are receiving the most attention, as they

not only create a significant change in legislation relating to the broader public sector, but also raise the spectre of even broader legislation regarding salary caps on other sectors, such as registered charities and non-profit organizations more generally. As such, possible enactment of the legislation will need to be carefully monitored by the charitable and non–profit sector in Ontario.

The current version of the Bill is available online at:

http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b008.pdf

Alberta's Privacy Legislation Amendment Deadline Extended

By Sepal Bonni

As reported in the October 2014 *Charity Law Update* (http://www.carters.ca/pub/update/charity/14/oct30.pdf), Alberta's privacy legislation, the *Personal Information Protection Act* (PIPA), was set to lapse on November 15, 2014. PIPA was found unconstitutional by the Supreme Court of Canada (SCC) in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401 (UFCW)*, 2013 SCC 62. However, on October 30, 2014 the SCC granted the Government of Alberta a six month extension of time to make the necessary amendments to the legislation before the Act is declared invalid. PIPA will now remain in force until May 2015. In response to the extension of time, Alberta's Information and Privacy Commissioner released a letter welcoming the decision to grant the time extension and requesting the government act as quickly as possible to address this situation, stressing that the legislation's lapse will result in the loss of significant and unique privacy rights for Alberta's citizens and businesses.

The potential lapse of PIPA could also have a significant indirect impact on provincial privacy legislation enacted in British Columbia, Québec and Manitoba, as well as the federal *Personal Information and Protection of Electronic Documents Act* (PIPEDA), because they all have a similar legislative framework to PIPA. Charities and not-for-profits in Alberta and across Canada are encouraged to continue complying with relevant privacy legislation by meeting the highest standards imposed by any applicable privacy legislation, including PIPEDA, at all times.

The current *Personal Information Protection Act* is online at:
http://www.qp.alberta.ca/1266.cfm?page=P06P5.cfm&leg_type=Acts&isbncln=9780779762507.

Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401 (UFCW), 2013 SCC 62 is online at: http://canlii.ca/t/g1vf6.

Report on Counter-Terrorism Laws and Humanitarian Organizations

By Sean S. Carter and Terrance S. Carter in *Anti-Terrorism and Charity Law Bulletin* No. 38, November 26 2014

In November 2014, the Humanitarian Practice Network at the Overseas Development Institute, with the Counter-terrorism and Humanitarian Engagement Project at the Harvard Law School, published a report entitled "Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know" (the "Report"). The Report examines the tension that has developed over the past two decades between anti-terrorism laws and humanitarian action around the world. Over these years, governmental and inter-governmental bodies have adopted progressively tougher counter-terrorism laws and policies. At the same time, the need for humanitarian aid in countries with significant terrorism threats has increased. Unfortunately, although the Report indicates that these initiatives often have overlapping interests, a strain has emerged between the laws and policies that regulate these interests, which has resulted in challenges for governments as well as humanitarian organizations. This *Bulletin* provides an overview of the Report, which outlines the issues humanitarian organizations experience in navigating counter-terrorism laws in high-risk environments as well as appropriate steps such organizations can take to mitigate against these issues.

Read More: [PDF] http://www.carters.ca/pub/bulletin/charity/2014/atclb38.pdf

United Kingdom Releases Draft Protection of Charities Bill

By Esther S.J. Oh

On October 22, 2014, the draft Protection of Charities Bill (the "Bill") was presented to Parliament by the United Kingdom ("UK") Minister of the Cabinet Office. The Bill proposes to extend the powers of the Charity Commission by making changes and adding provisions to the *Charities Act 2011* (UK), which regulates charities in England and Wales. This draft is the result of multiple reports and consultations with stakeholders with regard to the gaps and weaknesses in the Charity Commission's current powers, it proposes to help the Charity Commission target those who abuse a charity's status for their own private benefit. The measures proposed in the Bill include banning individuals the Charity Commission deems "unfit" from being a trustee of a charity. This includes expanding the prohibition that prevents people with criminal convictions from being a trustee of a charity to include those people with terrorism and money laundering convictions. A further power outlined in the Bill enables the

Charity Commission to disqualify, under certain circumstances, a person from being a charity trustee for 15 years, as well as suspend a charity trustee pending removal for up to two years.

The Bill also grants new powers to the Charity Commission with regard to how it interacts with charities, including granting the power to give an official warning to charities in less serious cases of noncompliance, which can be put on the charity's official record and warrant further action if the problem is not resolved. A more significant and contentious sanction is the proposed amendment that will allow the Charity Commission to shut a charity down once an inquiry into corruption or mismanagement is opened. Specifically, this amendment allows for the Charity Commission to shut a charity down "where there has been misconduct or mismanagement and allowing the charity to continue would risk undermining public trust and confidence in charities". Various legal loopholes regarding trustees in the existing legislation are also addressed by the Bill. One such loophole involved the requirement by the Charity Commission to give prior notice before removing a trustee from a charity, which effectively allowed a trustee to resign in order to avoid removal and disqualification, and later return to the sector in another way.

The Bill is currently being reviewed by the Joint Committee on the draft Protection of Charities Bill and is seeking submissions of written evidence by December 16, 2014, with a report due regarding its decision by the end of February 2015.

The Draft Charity Protection Act is available online at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365710/43820_Cm_8954_web_accessible_Draft_protection_of_charities_bill.pdf

RECENT EVENTS AND PRESENTATIONS

The Canadian Bar Association and Ontario Bar Association hosted a session on "CASL for Charities and Not-for-Profits" on November 11, 2014, presented in part by Ryan M. Prendergast.

The 21st Annual *Church & Charity Law*™ Seminar was held on Thursday, November 14, 2014, at the Portico Community Church in Mississauga, Ontario, with 975 registered attendees. Designed to assist churches and charities in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability, the *Church & Charity Law*™ Seminar has been held annually since 1994. Although the topics are directed at churches and charities, many aspects of the presentations will also be of interest to not-for-profits. All handouts and presentation materials are now available free of charge at: http://www.carters.ca/pub/seminar/chrchlaw/charsem.xml

AFP Congress was held at the Metro Toronto Convention Centre from November 24 to 26, 2014. On November 24, 2014, Terrance S. Carter presented on the topic "What You Need to Know but Were Afraid to Ask about Managing Endowed Funds".

Imagine Canada Sector Source hosted a webinar entitled "Legal Issues in Managing Endowment Funds", on November 25, 2014, presented by Terrance S. Carter. The presentation can be downloaded at: http://sectorsource.ca/managing-organization/charity-tax-tools/charity-tax-tools-webinars

UPCOMING EVENTS AND PRESENTATIONS

Institute of Corporate Directors (ICD) is hosting a session on Thursday, January 29, 2015 at the Mississauga Convention Centre. Theresa L.M. Man will participate in a panel discussion entitled: "The Legal Framework for Board Meetings and Minutes".

OBA Institute, 2015 will be held on Wednesday February 4, 2015, including a program on "Charity Law: What's New and Emerging?". Theresa L.M. Man will be presenting on the topic entitled "Gifting Issues". More information about the program is available at: http://oba.org/Institute/Program-Listing/Wednesday/Charity-and-Not-for-Profit-Law

CSAE Winter Summit is being held on Thursday February 5, 2015, at the Holiday Inn Kitchener-Waterloo Hotel & Conference Centre, Kitchener. Topics to be presented will include the following:

- Anti-Spam Tips After the First Year: What Have You Learned? presented by Ryan M. Prendergast
- Essential Legal Update, presented by Terrance S. Carter and Theresa L.M. Man

Details can be found at:
http://www.csae.com/coursesevents/details/tabid/176/articleid/2066/trillium-chapter-winter-summit.aspx

The Ottawa Region *Charity & Not-for-Profit Law* Seminar will be held on **Thursday February 12, 2015** at the Centurion Center, Nepean, Ontario.

Details and registration available online at: http://www.carters.ca/index.php?page_id=116

CSAE Trillium Chapter is offering a number of *Accessibility for Ontarians with Disabilities Act* (AODA) Workshops in various locations.

Details at: http://www.csae.com/Chapters/Trillium/AODAResourcesWorkshopsandWebinars.aspx.

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Barry W. Kwasniewski - Mr. Kwasniewski joined Carters' Ottawa office in October 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal opinions and advice pertaining to insurance coverage matters to charities, not-for-profits and law firms.

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Esther S.J. Oh – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for www.charitylaw.ca and the *Charity Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law*™ Seminar, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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