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CHARITY & NFP LAW UPDATE

JULY/AUGUST 2015

EDITOR: TERRANCE S. CARTER ASSISTANT EDITOR: NANCY E. CLARIDGE

Updating Charities and Not-For-Profits on recent legal developments and risk management considerations

JULY/AUGUST 2015

SECTIONS

HIGHLIGHTS

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RECENT PUBLICATIONS AND NEWS RELEASES

CRA News

By Jennifer M. Leddy

Advisory on Partisan Political Activities

In light of the current election campaign, on August 21, 2015, Canadian Revenue Agency ("CRA") published an Advisory on Partisan Political Activities (The "Advisory") its Educational resources page for Charities. As in previous advisories, this one includes examples of partisan political activities. A new example included in the Advisory is "criticizing or praising the performance of a candidate or political party." The Advisory is also an important reminder to charities that they should take particular care in ensuring that their websites or social media platforms do not contain partisan political statements, or links to statements of third parties who support particular candidates. However, restrictions on partisan political activities do not apply to directors, volunteers, or employees of charities where they help in a political campaign or make comments in the public or on social media in their personal capacity and not as a representative of the charity. While this Advisory is particularly apt during an election campaign, partisan political activities are always prohibited irrespective of whether there is an election.

CRA Publishes Two New Webpages on Charities and Audits

On July 14, 2015, CRA published a webpage entitled Charities and Political Activities (Budget 2012). This webpage is included under CRA's main listing of Educational Resources for Charities. It discusses the resources allocated to CRA in the 2012 Budget to increase its oversight of political activities by charities. This includes increased "investments in education and outreach for all charities to help them follow the rules on political activities," and 60 audits focusing on political activities. The webpage notes that "the process for identifying which charities will be audited for any reason is exclusively handled by the CRA alone."

CRA also published on July 14, 2015 a webpage entitled The Audit Process for Charities. This webpage is included as a resource under CRA's page on Compliance and Audits. It provides information on how a charity is selected for audit, and how CRA audits charities both by field audits and office audits. It also highlights what steps CRA might take after it completes an audit (including education letters, compliance agreements, sanctions, and, in the most serious cases, revocation of registration). This webpage is also

useful in that it provides some statistics about the outcome of audits since 2012 and explains what audit information is available to the public.

The content of these two webpages is similar to the relevant sections on audits and political activities included in CRA's Charities Program Update – 2015.

CRA Publishes New Webpage on Budget 2015

On June 30, 2015, Canada Revenue Agency ("CRA") published a webpage on the 2015 Budget – Supporting the Charitable and Non-Profit Sector. It includes a Message from the Director General of the Charities Directorate and two sets of Questions and Answers on "Donations involving private corporation shares and real estate" and "Investments by registered charities in limited partnerships."

CRA Revokes Charitable Registration of Canadian Friends of Pearl Children

Canada Revenue Agency ("CRA") revoked the charitable registration of Canadian Friends of Pearl Children, effective July 18, 2015. CRA's decision was based on its audit that found the Canadian Friends of Pearl Children operated for the non-charitable purpose of furthering a tax shelter, the Mission Life Financial Inc. Canadian Relief Program. According to CRA's News Release, the audit revealed that during the period of June 1, 2008 to December 31, 2012, Canadian Friends of Pearl Children issued donation receipts of over $167 million for supposed gifts of cash and pharmaceuticals (including over $4 million in cash and over $163 million for gifts of pharmaceuticals). CRA reported that of the $4 million in cash received, over $3.19 million was paid to the promoters of the tax shelter. CRA concluded that Canadian Friends of Pearl Children over-reported the value of this property and, therefore, the value of the corresponding tax receipts was too high. The audit also concluded that Canadian Friends of Pearl Children could not demonstrate that it had ever received the pharmaceuticals or that the property was used for any charitable activities.

Director General's 2015 CBA Charity Law Symposium Speech Now Posted

Canada Revenue Agency ("CRA") has posted on its website the speech of Cathy Hawara, the Director General of the CRA Charities Directorate, delivered at the 2015 CBA Charity Law Symposium held on May 29, 2015. Ms. Hawara's speech focuses on the wider theme of "working together". In particular, she provided an update on political activities and discussed the Directorate's approaches related to compliance, outreach, business intelligence and client outreach.

Draft Legislative Proposals Affecting Charities and RCAAAs

By: Theresa L.M. Man, *Charity Law Bulletin No. 370*

On July 31, 2015, the Department of Finance released draft legislative proposals ("Proposals") to amend the *Income Tax Act* ("ITA") for consultation to implement certain tax measures from the April 21, 2015 Federal Budget ("Budget 2015") affecting charities and registered Canadian amateur athletic associations ("RCAAAs"). Among other changes, the Proposals would provide an exemption from capital gains tax for certain dispositions involving private corporation shares or real estate where cash proceeds are donated to a qualified donee within 30 days. The Proposals would also allow registered charities and RCAAAs to acquire or hold interests in limited partnerships. Interested parties may provide comments to the Proposals by September 30, 2015.

The Proposals follow the enactment of Bill C-59, *Economic Action Plan 2015 Act No. 1* which implemented some of the measures concerning the charitable and not-for-profit sector introduced in Budget 2015. Bill C-59 received Royal Assent on June 23, 2015. In particular, Bill C-59 amends subsection 149.1(26) and the definition of "qualified donee" in subparagraph 149.1(1)(a)(v) to clarify that both foreign charitable organizations and foundations are eligible for registration as qualified donees under the ITA. See "Federal Budget 2015: Impact on Charities" in *Charity Law Bulletin* No. 363, for further discussion of proposed amendments of Budget 2015.

See our *Charity & NFP Law Bulletin No. 370* for the balance of the discussion of the released draft legislative proposals.

Legislation Update

By Terrance S. Carter

New Brunswick's New *Trustees Act* Receives Royal Assent

On June 5, 2015, New Brunswick's *Trustees Act* (the *Trustees Act* (2015)) received Royal Assent; its provisions will come into force on a day to be fixed by proclamation. When this occurs, the *Trustees Act* (2015) will replace New Brunswick's current *Trustees Act*, most of the text of which dates back to 1903. A recent edition of Law Reform Notes from the New Brunswick Office of the Attorney General describes the *Trustees Act* (2015) as being substantially modeled on the Uniform Law Conference of Canada's *Uniform Trustee Act* (2012).

In conjunction with the *Trustees Act* (2015), *An Act Respecting the Trustees Act* also received Royal Assent on June 5, 2015. This statute primarily amends other New Brunswick legislation which references the investment powers of trustees to correspond with the changes found in the *Trustees Act* (2015).

In its Law Reform Notes, the New Brunswick Office of the Attorney General has said that new legislation will not attempt complete codification of trust law, and in some cases actually changes the common law. For instance, application of the *cy-près* doctrine is expanded. Other amendments affecting charities include the establishment of "purpose trusts", which refers to non-charitable trusts with no beneficiaries but a social purpose, as well as a new exemption from eligibility for some charitable trust property. The *Trustees Act* (2015) will also affect trustee powers and decision-making. For example, a majority-based decision-making rule will replace the unanimity requirement.

Québec Introduces Bill 56 (*Lobbying Transparency Act*)

On June 12, 2015, Bill 56, the *Lobbying Transparency Act* (the Act) was introduced in the government of Quebec's National Assembly. If Bill 56 is enacted, it will replace Quebec's current *Lobbying Transparency and Ethics Act* and, in doing so, will likely increase the number of organizations, including charities and not-for-profits, which will be required to register their staff as lobbyists. Among the major revisions the Act proposes is revising the types of "lobbyists" subject to the Act to include all non-profit organizations. Under the existing *Lobbying Transparency and Ethics Act*, "lobbyists" all share the requirement that the person have lobbying as a "significant part" of his or her job or function, but under the proposed Act, the word "significant" is removed from these definitions. This means that under the proposed legislation, any director, officer, or employee performing any amount of lobbying, whether significant or not, will necessitate registration under the Act.

The definition of lobbying activities, as found in Division IV of the Act is also expanded to include any oral or written communication with a public office holder in an attempt to influence a decision regarding "a directive, guidelines or an implementation measure such as a guide, fact sheet or interpretation bulletin; and a policy direction, resolution, ministerial order, order or order in council." The Act makes specific exceptions to these and the existing provisions, including "oral or written communications made for a non-profit organization to reach an agreement to have certain operating or mission support expenditures covered or to obtain a grant or subsidy to cover such expenditures, or made by a volunteer of a non-profit organization or group not constituted as a legal person."

Given the various expanded provisions above, it is safe to assume that despite there being exceptions to the rule, more charities and not-for-profits operating within Quebec could expect to be caught within the net of this legislation. These organizations can also expect to be perceived as lobbying more often, and should therefore take note of how their potentially increased participation in political activities may affect other aspects of their operations, specifically charities that have a limited ability to participate in political activities under the *Income Tax Act*.

Senate Committee's Interim Report on "Countering The Terrorist Threat"

By Terrance S. Carter, Nancy E. Claridge and Sean S. Carter, *Anti-terrorism and Charity Law Alert No. 41*

Responding to a mandate to study and report on security threats facing Canada, the Conservative majority of the Standing Senate Committee on National Security and Defence (the "Committee") released its interim report, *Countering the Terrorist Threat in Canada* (the "Report") on July 8, 2015. The Report, which comes on the heels of the passage of Bill C-51, Canada's latest anti-terror legislation, examines terrorist recruitment, operations, financing, prosecutions and other aspects of the security threats Canadians face as a result of the radicalization, extremist agitation and terrorist threats and violence in Canada and around the world and resulted in twenty-five recommendations (the "Recommendations"). While it is unlikely that the Recommendations will be acted upon in the near future, in part due to the Report's interim nature, the dissent of one third of the Committee's members and the election call, it remains important to assess the Recommendations and their impact on charities carrying out programs in conflict zones and donors to such organizations.

This *Anti-terrorism and Charity Law Alert No. 41* discusses the Recommendations from the Report that specifically relate to charities and highlights some of the ways that the rushed nature of the Recommendations have resulted in the Report's failure to provide a thorough, balanced response to the very complicated issue of security threats facing Canada.

Supreme Court Dismisses Appeal in *Guindon v Canada*

By Linsey E.C. Rains

The Supreme Court of Canada ("SCC") dismissed the appeal in *Guindon v Canada* ("*Guindon*") on July 31, 2015. The SCC held that third party penalties imposed in accordance with section 163.2 of the *Income*

Tax Act ("ITA") do not attract protection under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The Appellant, a lawyer without expertise in tax law, was penalized under subsection 163.2(4) of the ITA for providing a legal opinion on the tax consequences of a leveraged donation program and signing 135 charitable receipts totalling $3,972,775 in her capacity as president of a registered charity. Subsection 163.2(4) applies to a "person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person […] that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of" the ITA. Canada Revenue Agency ("CRA") assessed a penalty of $564,747 against the Appellant, who appealed the notice of assessment to the Tax Court of Canada ("TCC").

Despite the Appellant's failure to give proper notice of a constitutional question, the TCC ruled section 163.2 created an offence triggering protections under section 11 of the *Charter*. The Crown appealed the TCC decision to the Federal Court of Appeal ("FCA"), which overturned the TCC's decision. The FCA held the TCC did not have jurisdiction to consider the *Charter* argument, but reviewed the TCC's analysis and concluded section 163.2 proceedings are "not criminal by their nature, nor do they impose true penal consequences." For further detail on these decisions, see *Charity Law Bulletin* No. 291, June 2013 *Charity Law Update*, and March 2014 *Charity Law Update*.

Although the Appellant gave proper notice of the constitutional question at the SCC, the Court dismissed the appeal, agreeing with the FCA that the assessment of a section 163.2 penalty "is not the equivalent of being 'charged with a [criminal] offence.'" Four of the seven justices concurred that the appellant's failures to give proper notice of the constitutional question at the TCC and FCA did not prevent the Court from exercising its discretion "to address the merits of the constitutional issue." The majority further noted that "those against whom penalties are assessed are not left without recourse or protection […because t]hey have a full right of appeal to the Tax Court of Canada and, as the respondent pointed out in her factum, have access to other administrative remedies." The remaining justices concurred with the majority on the outcome, but dissented on the majority's exercise of its discretion to address the constitutional issue.

Accordingly, persons involved with charities should be sure to exercise caution and take steps to ensure that they do not make, participate in, assent to, or acquiesce to the making of false statements to, by, or on behalf of others for any charities related purpose under the ITA, such as donation receipts, the Form T3010, *Registered Charity Information Return*, T4 slips, and the Form T2050, *Application to Register a Charity Under the Income Tax Act*.

FCA Rules That PTAQ Fails to Evidence Direction and Control

By Terrance S. Carter and Linsey E.C. Rains, *Charity Law Bulletin No. 368*

Following a May 26, 2015 hearing in Montréal, the Federal Court of Appeal ("FCA") upheld the Minister of Revenue's ("Minister") revocation of the Public Television Association of Quebec's ("*PTAQ*") registration as a charity under the *Income Tax Act* ("ITA") on July 22, 2015. Imagine Canada intervened on behalf of the sector and challenged the Minister's reliance on its Guidance for carrying out activities outside Canada and the proper test and standard for determining direction and control. For further detail on the hearing, see the May 2015 *Charity Law Update*. Prior to the release of the judgment in *Public Television Association of Quebec v Minister of National Revenue*, many in the sector had high hopes that the FCA would provide some clarity on the nuanced issues raised in the appellant and intervener's factums. Unfortunately, the FCA did not embrace the opportunity to address the issues put to them and as a result, the subsequent judgment is very fact specific and reflects no new developments in the legal tests for direction and control.

The Minister advanced two grounds for revocation, namely that PTAQ:

(1) "ceased to comply with the requirements of the definition of a charitable organization as prescribed in subsection 149.1(1) [of the ITA] since it failed to devote all of its resources to its own charitable activities;" and

(2) made gifts to a non-qualified donee in violation of subparagraph 149.1(2)(c)(ii) of the ITA.

The FCA dealt only with the first ground and found that it was a sufficient ground on its own for the revocation of PTAQ's charitable registration, as PTAQ failed to demonstrate that the Minister's conclusion was unreasonable. Accordingly, the key issue considered by the FCA was whether PTAQ was using an agent to carry out its own charitable activities or acting as a conduit for a non-qualified donee.

See *Charity & NFP Law Bulletin No. 368* for the balance of the discussion of the *PTAQ* case.

Ontario Court Upholds Decision to Deny Accreditation to TWU's Proposed Law School

By Jennifer M. Leddy

On July 2, 2015, the Ontario Superior Court of Justice (Divisional Court) in *Trinity Western University v The Law Society of Upper Canada* (the "Ontario decision") upheld the Law Society of Upper Canada's ("LSUC") decision to deny accreditation to Trinity Western University's ("TWU") proposed law school because of what it found to be institutional discrimination. In reaching this conclusion, 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.

TWU is a private evangelical Christian university. Students at TWU must sign a Community Covenant, based on their faith, which requires them to adhere to certain behavior, including abstaining from "sexual intimacy outside of marriage between a man and a woman." In December 2013, the Federation of Law Societies of Canada accredited the TWU law school. Notwithstanding this approval, in a vote of 28 to 21 LSUC rejected accreditation of TWU's law school.

The Ontario decision adds to the growing body of case law concerning TWU's proposed law school and differs in almost every regard from the earlier reasoning of the Nova Scotia Supreme Court in *Trinity Western University v Nova Scotia Barristers' Society* (see the February 2015 *Charity Law Update* for a discussion of this case). The Ontario and Nova Scotia decisions involve similar facts about TWU's proposed law school, but reach different conclusions due, in part, to different facts about the decision making processes in each province. The most notable difference being that LSUC had a much broader statutory authority and had a greater control over the education qualifications for admission to the Bar than the Nova Scotia Barristers Society (NSBS).

The Ontario decision also took a different approach than the Nova Scotia decision in regards to whether TWU's Community Covenant was discriminatory. Although the Court found that the LSUC's decision interfered with TWU's right to religious freedom under section 2(a) of the *Charter*, it concluded that the LSUC engaged in a proper "proportionate balancing" of the competing Charter values because, while the LSUC did not prevent TWU from opening a law school or expressing its religious beliefs, the TWU Community Covenant did exclude some persons from applying to the law school because of their beliefs. It is noteworthy that in finding that TWU's right to freedom of religion was infringed, the Court used the

robust interpretation of that right found in the recent Supreme Court of Canada case of *Loyola High School v Quebec (Attorney General).*

The Ontario Court distinguished the SCC's 2001 decision in *Trinity Western University v British Columbia College of Teachers*, finding that the 2001 decision involved "different facts, a different statutory regime and a fundamentally different question."

In addition to the Ontario and Nova Scotia decisions, oral arguments began on August 24, 2015, in a third case, this time involving TWU and the Law Society of British Columbia. The NSBS has also filed for leave to appeal in Nova Scotia. All of these cases will be of interest to both faith-based and other organizations because they have implications for religious codes of conducts and how Canadians live together in a pluralistic society. It will be interesting to watch how this line of case law progresses, especially now that there are conflicting decisions, and whether this issue will, inevitably, be heard by the SCC.

Minister of National Revenue Ordered to Issue Taxpayer's Notice of Assessment

By Linsey E.C. Rains

On June 18, 2015, the Federal Court ("FC") granted a taxpayer's application for judicial review and issued an order by way of *mandamus* requiring the Minister of National Revenue ("Minister") to examine the taxpayer's 2012 income tax return and provide a notice of assessment within 30 days of the judgment. The taxpayer's application for *mandamus*, defined by *Black's Law Dictionary* as an order "to compel […] a government officer to perform mandatory or purely ministerial duties correctly," was in response to the Minister's failure to examine and assess his income tax return with "all due dispatch." The Minister's requirement to examine and assess with all due dispatch is set out in subsection 152(1) of the *Income Tax Act* ("ITA") and is not conclusively defined in the case law.

In this case, *McNally v Canada (Minister of National Revenue)* ("*McNally*"), the Minister refused to examine and assess the taxpayer's income tax return because of his investment in a gifting tax shelter that was under audit by Canada Revenue Agency ("CRA"). The Minister's refusal reflects CRA's current position that it will not "assess the [tax shelter] participants' tax returns until after the audit of the gifting tax shelter" has been completed. However, the FC concluded that in this case the delayed examination

and assessment was inconsistent with the "due dispatch" requirement of *ITA* 152(1) and "the resulting delay is capricious and cannot be allowed to stand."

The case is comparable to *Ficek v Canada (Attorney General)* (see the July/August 2013 *Charity Law Law Update*), in which the FC found that a delayed assessment also violated the Minister's requirement to examine and assess "with all due dispatch." Although the FC's decisions in these cases suggest a growing judicial intolerance for CRA's delay in examining and assessing income tax returns of taxpayers who have invested in gifting tax shelters, it is unlikely that the issue will be settled in the near future, as the Minister appealed the FC's decision in *McNally* to the Federal Court of Appeal on August 14, 2015.

FCA Upholds CRA Decision to Revoke Charitable Status

By Ryan M. Prendergast

The decision of the Federal Court of Appeal ("FCA") in *Humane Society of Canada for the Protection of Animals and the Environment v Minister of National Revenue* released on August 18, 2015, emphasizes how charitable status can be jeopardized through improper disbursement of benefits to directors or officers of a registered charity.

The Humane Society of Canada and the Protection of Animals and the Environment (the "Society") was issued a Notice of Intention to Revoke by Canada Revenue Agency ("CRA") on February 17, 2010 ("NIR"), to revoke its charitable status following an audit of its 2006 financial year where it was alleged that over $250,000 was reimbursed to Mr. Michael O'Sullivan, a director, officer, and member of the Society. Of the reimbursed funds, CRA was of the opinion that $69,343.81 was not in relation to charitable expenditures, but were purchases made for consumption of various forms of entertainment and memorabilia, and as such, constituted an undue benefit under the *Income Tax Act* ("ITA"). These amounts related to the cost of personal meals, the purchase of comic books, liquor purchases, groceries, tickets to entertainment and a trip to Disneyland. The Society opted to appeal the NIR to the CRA Appeals Branch, which subsequently confirmed the decision of CRA to revoke the Society's charitable registration on July 22, 2013. The Society then appealed this confirmation to the FCA.

While the FCA dismissed the appeal of the Society, two interesting issues were raised on appeal. The first concerned whether CRA was precluded from revoking the charitable status of the Society for conferring an undue benefit, and was instead obligated to issue a penalty under section 188 of the ITA. The Court

held that the Minister was not precluded from revoking charitable status in lieu of issuing a penalty following section 189(7) which states:

> Without limiting the authority of the Minister to revoke the registration of a registered charity or registered Canadian amateur athletic association, the Minister may also at any time assess a taxpayer in respect of any amount that a taxpayer is liable to pay under this Part.

The second issue concerned whether or not the Appeals Directorate had the authority to vary the basis of revocation of charitable status from that which was set out in a NIR. In the opinion of the Court, the language of the ITA in section 165(3) was clear that it required the Minister "with all due dispatch, to reconsider the NIR and vacate, confirm or vary it." In determining whether the decision of the Appeals Directorate to confirm whether or not revocation of the charitable status of the Society was reasonable, the Court concluded that "it was within a range of justifiable outcomes for the Appeals Directorate to conclude that the provision of personal benefits to Mr. O'Sullivan, of even the lower amount recognized by the Appellant, constituted serious non-compliance with the applicable provisions of the Act [ITA]".

This case is a reminder that charitable organizations need to take special care to ensure that they only reimburse funds that are directly connected to their charitable purposes. Furthermore, charities should ensure that they are maintaining proper books and records in support of their activities to ensure there are no grounds for the Minister to revoke charitable status.

Affiliation Agreement Upheld by BC Supreme Court

By Esther S.J. Oh

In the *Habitat for Humanity Canada v Hearts and Hands for Homes Society* decision released on July 8, 2015, the B.C. Supreme Court upheld a claim in specific performance for a provision within an affiliation agreement, which required that upon disaffiliation from the national umbrella organization, an affiliate must transfer its assets to the umbrella organization. The case involved a dispute between Habitat for Humanity Canada ("HHC"), as the plaintiff, and Habitat for Humanity Prince George (formerly a member of HFC) (now Hearts and Hands for Homes Society) ("HPG"), as the defendant. Both organizations are separately incorporated not-for-profit corporations with charitable registrations with Canada Revenue Agency. The dispute arose due to HPC's non-compliance with the HHC membership requirements outlined in the affiliation agreement between the parties. HPG raised a number of objections to the claim, which for the most part, were groundless and rejected by the court.

HHC, as the national umbrella organization for Habitat Humanity operations in Canada, entered into a separate affiliation agreement with each affiliate organization across Canada. The agreement required, among other things, that each affiliate must establish and maintain a Habitat for Humanity housing program within its service area and operate that program in accordance with the requirements outlined in the HHC affiliation agreement, by-laws, policies and other documents. The affiliation agreements also required that affiliates must remain in "good-standing" by being in compliance with the HHC documents and outlined a disaffiliation process whereby affiliates who were not in "good-standing" could bring themselves back into compliance, failing which they would be disaffiliated from HHC upon resolution of the HHC board of directors. In exchange, affiliates obtained a non-exclusive sublicense to use the intellectual property associated with the "Habitat for Humanity" marks to solicit donations and to carry out the charitable activities to provide affordable housing to individuals in need in Canada. Other benefits and support were also provided to affiliates by HHC under the arrangement.

HPG breached a number of the requirements for affiliates, including failure to adhere to HHC's service standards in carrying out its charitable operations. After providing HPG with the opportunity to bring itself back into compliance in accordance with the procedure outlined in the affiliation agreement over a period of approximately three years, HFC took steps to disaffiliate HPG due to the continued non-compliance.

This case underscores the willingness of the courts to uphold reasonable provisions outlined in an affiliation agreement entered into between charities. As result, charities would be prudent to carry out appropriate due diligence when considering preparing or entering into any form of an affiliation agreements.

Tax Court Dismisses Appeals for Charitable Tax Credits

By Linsey E.C. Rains

The Tax Court of Canada ("TCC") recently released two informal procedure decisions which upheld the Minister of National Revenue's ("Minister") disallowance of charitable donation tax credits claimed by two individual taxpayers. The July 9, 2015 decision in *Duggan v The Queen* ("*Duggan*") dealt with the Minister's denial of cash donations made to two registered charities, Mega Church International and Operation Save Canada's Teenagers, which totalled $20,000 in 2007 and $16,890 in 2008. Similarly, the English translation of *Mapish v The Queen* ("*Mapish*") was released on July 14, 2015 and disallowed the taxpayer's cash donations of $9,600 and $11,600 in 2007 and 2008, respectively, to Revival Times

Ministry International, then a registered charity. *Duggan* was dismissed due to the taxpayer's lack of credibility and *Mapish* was dismissed because the receipts issued did not meet the requirements of the *Income Tax Act* ("ITA") and *Income Tax Regulations* ("Regulations").

In *Duggan*, the TCC's consideration of the taxpayer's credibility focused, in part, on his testimony related to his pattern of giving and the fact that the donations were made in large amounts of cash during a period in which the taxpayer's bank account was in overdraft. Although the TCC found that "taken individually, these considerations might not lead to the same conclusion […] when taken together, the conclusion is inescapable that the appellant's evidence was simply not plausible."

With regard to *Mapish*, the taxpayer's entitlement to claim the credits hinged, in the absence of "any objective evidence to rebut the Minster's assumptions that he did not make the cash donations," on whether the receipts he provided met the requirements of the ITA and Regulations. Paragraph 118.1(2)(a) of the ITA provides that an individual cannot include a charitable gift "unless the making of the gift is evidenced by filing with the Minister a receipt for the gift that contains prescribed information." Section 3501 of the Regulations sets out the prescribed information that the receipt must contain. The TCC found the taxpayer's receipts were inadequate because the charity's name and address were incorrect, the receipt did not indicate where it was issued, and the dates were incomplete.

Although these decisions do not have precedential value, registered charities and donors should take note of how these decisions demonstrate the importance of donor credibility and proper receipting practices, especially when dealing with cash donations.

Long Term Employee Awarded Twenty-Seven Months Notice

By Barry W. Kwasniewski, *Charity & NFP Law Bulletin No.369*

In *Markoulakis v. SNC-Lavalin Inc.* ("*Markoulakis*"), a civil engineer who was terminated on a without cause basis by his employer at age sixty-five, after more than forty years of service, was awarded twenty-seven months compensation in lieu of notice by the Ontario Superior Court of Justice. As this decision demonstrates, and in light of the abolition of mandatory retirement in Ontario and elsewhere, all employers including charities and not-for-profits, face potential challenges and liability risks in terminating older workers. The court held that due to a variety of exceptional circumstances, the plaintiff was justified in receiving a substantial award.

See *Charity & NFP Law Bulletin No.369* for the balance of the discussion of the *Markoulakis* decision.

Testamentary Freedom and Public Policy

By Esther S.J. Oh

Re The Esther G. Castanera Scholarship Fund

On February 23, 2015, the Court of Queen's Bench of Manitoba rendered its decision on *Re Esther G. Castanera Scholarship Fund* ("*Castanera*"). Ms. Castanera bequeathed a significant portion of her estate to establish a scholarship fund at the University of Manitoba to benefit "needy and qualified women graduates of the Steinbach Collegiate Institute" ("Fund"). At the time that the will was drafted (1991) and the date the will became effective (1997), the University had a policy on "Non-acceptance of Discriminatory Scholarships, Bursaries or Fellowships", which stated the University would not administer any new scholarship that discriminates on the basis of certain enumerated grounds, including sex. While the Faculty of Science at the University recommended that that an exception be made on the basis that women are and have been consistently underrepresented in the said academic disciplines, this position was rejected. Instead, in order to reflect consistency with its anti-discrimination policy, the University brought an application to vary the terms of the Fund so that it would extend to "qualified **men and** women graduates from rural Manitoba." [emphasis added] The court declined to vary the gift as requested by the University by stating, "Where a gift can be articulated as promoting a cause or belief with specific reference to a past inequality, there is nothing discriminatory about such a gift." In this regard, the court recognized that although sex and gender are prohibited grounds of discrimination under the Manitoba Human Rights Code, the Code also contains affirmative action exceptions, including situations where there is an objective to improve the conditions of disadvantaged individuals or groups who are similarly identified on the grounds listed in the Code (including women). On this basis the court found that the Fund did not offend or violate the Manitoba Human Rights Code, or public policy.

McCorkill v. Streed

In contrast with the *Castanera* decision, the New Brunswick Court of Appeal recently upheld a lower court's decision to vary a testamentary gift for public policy reasons. In his will, Harry Robert McCorkill had bequeathed a valuable coin and artifact collection, valued at approximately $250,000, to the National Alliance, a US-based white supremacist group. McCorkill's sister had contested the will in 2013 on the grounds that the will violated Canadian public policy. Anti-racist groups also alleged concerns that such a donation to the National Alliance could result in sale of the artifacts, thereby funding a rebirth of the

neo-Nazi group which had otherwise been in decline for over a decade. Upon challenge, the lower court voided the will, stating that the group's "hate propaganda" is illegal and contrary to Canadian public policy. On appeal, it was found that there was no justification to interfere with the trial level decision. Sums of $3,000 each were awarded to McCorkill's estranged sister, the Centre for Israel and Jewish Affairs, and the New Brunswick government.

Nova Scotia *Variation of Trusts Act* Applies to Charitable Trusts

By Bartosz Danko

On July 24, 2015, the Supreme Court of Nova Scotia released its decision in *Bethel Estate (Re)*. The case involved five trusts that were established by will in 1976, for the benefit of five charitable organizations. Each trust provided that $5,000 be given annually to a charity until the fund was exhausted. Even after a variation of the trusts in 2005, which allowed for a higher annual sum to the beneficiaries, the funds exceeded $2 million, and it appeared that they would never be exhausted. The beneficiaries therefore sought an order to vary the trusts again, this time under the Nova Scotia *Variation of Trusts Act* ("VTA"), which was amended in 2013, so that the remaining funds be distributed among the beneficiaries, and the trusts be subsequently wound up.

A central issue was whether the VTA applied to charitable trusts. The trustees argued that the VTA applies to trusts for individuals and not charitable trusts, resulting in there being no legislative basis to vary the trusts. The Court did not accept this argument, stating that there was nothing in the use of the word "trust" in the VTA to indicate that charitable trusts are excluded, and that the trustee's argument was based largely on interpreting the VTA as it was worded before it was amended, which permitted variation by "any person."

The trustees further argued that the beneficiaries do not have a fully vested or contingent interest in the capital of the income of the charitable trusts, but rather vested interests only in the $5,000 per year referenced in the will. The Court did not accept this argument either, finding that since the will contemplated the trusts' eventual exhaustion, the beneficiaries' interests were vested and there were no further contingencies.

The Court also considered the testator's intentions in determining whether granting a variance was appropriate. The Court found that the testator had intended to provide substantial funds to the beneficiary

charities and also anticipated that the funds would be eventually exhausted. Thus, while the distribution was altered in form, the requested variance remained consistent with the wishes of the testator.

Tax Court Disallowed Gift Without Donative Intent

By Theresa L.M. Man

On August 6, 2015, the Tax Court of Canada released its decision in *Glover v The Queen*, disallowing charitable tax credits claimed for a cash payment made without the required donative intent.

In 2003, the Appellant, Mr. Glover, participated in a tax shelter gifting arrangement called Canadian Single Adult Ministry Inc. ("CSAM"), whereby Mr. Glover applied to become a capital beneficiary of a trust which distributed software to beneficiaries to donate to a registered charity. He donated $29,952 and received 64 software licenses for a bulk wholesale price of $468 each, rather than for their retail value of $1,499 for each. The licenses were subsequently donated to CSAM. Mr. Glover then received a charitable tax receipt for $65,984, based on the combined value of the cash donation and the purported value of the software licenses. The issues before the Court were whether Mr. Glover participated in a properly registered tax shelter and whether the cash payment was a valid gift.

The Court decided that the gifting arrangement was not valid, but the primary reason for disposing the appeal was on the basis that the purported donation did not constitute a gift. The meaning of the term "gift" is not defined in the Income Tax Act, but it has been established by common law. To constitute a valid gift, there must be a voluntary transfer of property. The Court found that Mr. Glover did not intend to make a gift. Rather, the Court found that his "intent was to enrich himself by applying to become a capital beneficiary of the trust with the objective of obtaining and using inflated charitable gift receipts in order to profit from inflated tax credits." The Court held that the cash component cannot be separated from the software transaction as they are part of one interconnected arrangement where the cash donation was required in order to apply to the program.

Transparency Reporting Guidelines for Privacy Law Obligations

By Sepal Bonni

In an effort to provide guidance to organizations regarding reporting of personal information disclosures to government authorities, Industry Canada has released privacy Transparency Reporting Guidelines ("Guidelines") to assist organizations in meeting obligations under various privacy legislation. Industry

Canada states that the Guidelines have been prepared "to help private organizations be open with their customers, regarding the management and sharing of their personal information with government, while respecting the work of law enforcement, national security agencies, and regulatory authorities."

The Guidelines include six categories of disclosure for reporting purposes. As such, organizations can report the number of disclosures made to government authorities in each of the outlined categories, e.g., "voluntary disclosures at request of government organization" or "disclosures in emergency". For each of the six categories, "organizations may choose to report any of the following statistics: the number of requests received from government authorities, the number of requests fulfilled, the number of requests rejected or contested; and the number of persons or accounts whose information was disclosed."

The Guidelines also include limitation provisions to "ensure that transparency reporting does not impair or compromise national security or criminal investigations, and the safety and security of Canada and its citizens." Lastly, the Guidelines also include a template which can be followed by organizations.

Charities and not-for-profits should become familiar with these Guidelines as they provide guidance on how to issue public reports on the sharing of personal information with government. In this regard, Canadian privacy laws require organizations to be transparent about their personal information handling practices. While charities and not-for-profits can meet these obligations in a number of different ways, depending on the circumstances, organizations may choose to proactively publish "transparency reports" to account for when personal information is disclosed to government authorities. In that regard, the Guidelines may assist organizations with these transparency reports.

Ontario Superior Court Dismisses Municipality Application for Transfer of Title

By Ryan M. Prendergast

In *Municipality of Strathroy-Caradoc v Gentleman*, the Ontario Superior Court of Justice dismissed an application by the municipality of Strathroy-Caradoc (the "Municipality") for the transfer of property involving a charitable purpose trust. The Court held that title to a property could not be expropriated free and clear of all obligations where that property was subject to a valid charitable purpose trust, and without notice being provided to the Public Guardian and Trustee of Ontario in accordance with the *Charities Accounting Act* (Ontario).

The property in question (the "Property") was transferred in 1923 to three individuals, "in trust as trustees," for the purpose of erecting a building to be used as a "Public Hall." In 1985, because of a land transfer for an adjoining property, the Municipality mistakenly took ownership of the property. Until it was abandoned in 2014 for failing to meet the requirements of the *Fire Protection and Prevention Act, 1997*, the building was used as a community hall by the residents of the Municipality and the Municipality of Southwest Middlesex. Concerned that the building would become a safety hazard, the Municipality concluded that the best way to deal with the building on the Property was to demolish or sell it. However, when the Municipality searched the title for these purposes it discovered that the Property was subject to a charitable purpose trust.

The Court held that a valid charitable purpose trust, like the Property in question, does not fail because of breaches of trust in its administration, and that property given over for an exclusive charitable purpose that can no longer be fulfilled "passes to the Crown in right of the province as the ultimate protector of charity and charities." In the opinion of the Court, the Municipality's application fit within the provisions of the *Charities Accounting Act*, which requires that an application of this nature be served on the Public Guardian and Trustee before a scheme of *cy-près* (a doctrine that enables the Court to alter the terms of a charitable trust as close as possible to the donor's intention) could be made.

The Court did, however, rule that the application would be dismissed without prejudice so that the Municipality could make a further application on notice to the Public Guardian and Trustee for court approval of a proposed *cy-près* distribution of the property.

Alleged CASL Violations Costly to Porter Airlines

By Ryan M. Prendergast

In a News Release dated June 29, 2015, the Canadian Radio-television and Telecommunications Commission ("CRTC") announced that Porter Airlines Inc. ("Porter") had agreed to pay $150,000 as part of a voluntary undertaking for alleged violations of Canada's Anti-Spam Legislation ("CASL"). Although this amount is substantially less than the $1.1 million penalty that the CRTC issued to Compu-Finder, in March 2015, it is noteworthy because it shows that there may be significant financial consequences even in situations where the organization, such as Porter, has a CASL compliance program, cooperates with the CRTC, and takes immediate corrective actions.

Following an investigation, the CRTC alleged that Porter failed to comply with CASL by:

- Sending commercial electronic messages ("CEMs") without an unsubscribe mechanism or with an unsubscribe mechanism that was not clearly or prominently set out,
- Sending CEMs without complete contact information,
- Failing to respond to unsubscribe requests within 10 business days, and
- For certain CEMs being unable to provide proof that it had obtained consent.

The CRTC noted that CASL requires companies to show proof of consent for each electronic access in order to be fully compliant. As part of its undertaking, Porter will also have to improve its existing compliance program, including increased and enhanced training and education for staff and improved policies and procedures.

This announcement is also noteworthy because it illustrates that an existing compliance program for CASL may not prevent monetary consequences where an investigation by the CRTC results in alleged areas of non-compliance with CASL. The timeline of the commercial electronic messages reviewed is also of consequence, as it appears that the CRTC review electronic messages from July, 2014 to April, 2015. In this regard, many organizations are under the mistaken impression that they do not yet have to comply with CASL until a three-year transition period has passed, which is not the case. All organizations, including charities and not-for-profits, should remember that compliance programs for CASL should always include the requirements for documentation related to evidencing consent to send a commercial electronic message where they are relying on consent to do so. As noted in the CRTC news release, reliance announcement, reliance on general business practices with respect to commercial electronic messages will not be sufficient evidence of compliance with CASL.

Anti-Terrorism Law Update

By Terrance S. Carter, Nancy E. Claridge, and Sean S. Carter

FATF Report on Combatting The Abuse of Non-Profit Organisations

Anti-Terrorism and Charity Law Bulletin No. 42

In June 2015, the Financial Action Task Force ("FATF") published its revised Best Practices Paper on "Combatting the Abuse of Non-Profit Organisations (Recommendation 8)" ("The "Report"). The FATF is an international organization responsible for setting and monitoring international standards for combating money laundering and the financing of terrorism. The Report discusses practical strategies for

implementing FATF Recommendation 8, which specifically deals with combatting the abuse of non-profit organisations ("NPOs") and outlines best practices and examples of successful implementation of anti-terrorism assessment and compliance tools. The guidelines found in the Report are influenced by the risk-based approach of FATF Recommendation 1 and specific examples of best practices from various jurisdictions. The best practices set out in the Report have been produced to reflect comments from governments and the private sector, as well as the findings of the typologies report in the "Risk of Terrorist Abuse in Non-Profit Organisations," published in June 2014, and discussed in the *July/August 2014 Charity Law Update*. Notably, the Report comes at a time when relevant and controversial Canadian anti-terrorism legislation is being implemented, such as the widely discussed Bill C-51, as discussed in the *Anti-Terrorism and Charity Law Bulletin No. 39*.

See *Anti-Terrorism and Charity Law Bulletin No. 42* for the balance of the discussion on the FATF Report.

United Nations Human Rights Committee Comments on Anti-Terrorism Legislation and Human Rights Advocacy

On July 23, 2015, the United Nations Human Rights Committee (the "Committee") published an advance unedited version of its *Concluding observations on the sixth periodic report of Canada* (the "Report"). The Committee is composed of 18 international independent experts, who are charged with monitoring the implementation of the *International Covenant on Civil and Political Rights* ("ICCPR") by state parties. This marks the first time that the Committee has reviewed Canada's compliance since 2006. The Report highlights several matters of concern and recommendations. Two areas of particular relevance to charities and not-for-profits are observation 10, regarding counter-terrorism legislation, and observation 15, regarding limitations on advocacy imposed through section 149.1 of the *Income Tax Act* ("ITA").

In observation 10, the Committee expresses concern about the increased information sharing allowed through Bill C-51, in particular the broad mandate and powers given to the Canadian Security Intelligence Service through amendments to the *Canadian Security Intelligence Act*, as well as the new ability of federal government agencies to broadly share information under the power of the *Security of Canada Information Sharing Act*. In response, the Committee recommended that Canada ensure that anti-terrorism legislation provides for adequate legal safeguards and establish effective oversight mechanisms.

Additionally, in observation 15, the Committee expressed concern about the "ambit of section 149.1 of the *Income Tax Act*," and how this section impacts charities who engage in political activities related to

the promotion of human rights. In particular, the Committee highlighted that the scope of section 149.1 may be in contravention of Articles 19, 21 and 22 of the ICCPR, which state that "everyone shall have the right to hold opinions without interference." The Committee further recommended that Canada "should take all appropriate measures to avoid unnecessary obstacles and restrictions, legally or in practice, against the activities of civil society organizations" and also that Canada "should take measures to ensure that the application of section 149.1 […] does not result in unnecessary restrictions on the activities of non-governmental organisations defending human rights."

It is interesting to note that the Report did not refer to *CG-001, Upholding Human Rights and Charitable Registration* ("CG-001"), in which Canada Revenue Agency ("CRA") provides for situations in which Canadian charities may engage in human rights advocacy. This Guidance states that CRA recognizes that upholding human rights can be a charitable purpose. Consequently, when engaging in such activity, charities should have an understanding of both section 149.1 and CG-001. Canada will have to submit its next periodic report to the Committee by July 24, 2020.

Building Peace in Permanent War

Building Peace in Permanent War: Terrorist Listing and Conflict Transformation, a study released by the Transnational Institute on February 16, 2015 (the "Study"), examines with empirical data concerning how counterterrorism measures, specifically terrorist listing, affect global peacebuilding. The Study includes a focus on how legal and political counterterrorism instruments interact with and affect the work of charities and other humanitarian organizations. The issue is examined on both a local and international scale, drawing from interviews with practitioners and policymakers around the world engaged in peacemaking, namely in the conflict areas of Somalia, Israel/Palestine and Turkey/Kurdistan.

The main conclusion drawn from the Study is that counterterrorism measures, such as terrorist blacklisting, rather than alleviating conflict tend to exacerbate problems by encouraging state repression of unarmed dissidents and fuelling further radicalisation. The Study reports that measures, such as terrorist lists in reality "shrink the space" for peacebuilding by criminalizing many third-party interventionists, such as charities, that are often and easily caught in the net of association with listed terrorist parties. This has resulted in organizations feeling unable to carry out their mandates out of fear, exacerbating the problems found in conflict areas even further.

The authors of this Study advocate for a political change that challenges the underpinning of current counterterrorism measures. Among its recommendations, the Study endorses coordinated support for justice work that addresses the root causes of conflicts, working together in a diverse coalition that may organize politically, and the need for further empirical research, with specific reference made to the various largely unmeasured impacts of counterterrorism measures which complicate the prospect of peacekeeping. The critique set out in this comprehensive Study is both significant and disturbing, and should be read carefully as a counteractive perspective to the plethora of anti-terrorism legislation that has been introduced worldwide over the last 14 years.

Lexpert® Rankings 2015

Several partners of Carters Professional Corporation were recognized as leaders in the areas of charity and not-for-profit law, as well as Trusts and Estates Law in Canada by *The Canadian Legal Lexpert® Directory 2015*. Terrance S. Carter, Managing Partner of the firm, has been recognized as one of the most frequently recommended practitioners in the area of charities and not-for-profits in Canada since 2004. Theresa L.M. Man has been recognized as consistently recommended practitioners in charity & not-for-profit law since 2011, and Jacqueline M. Demczur and Esther S.J. Oh have been recognized as repeatedly recommended practitioners, also since 2011.

Best Lawyers in Canada 2016

Terrance S. Carter, Theresa L.M. Man and Jacqueline M. Demczur of Carters Professional Corporation were again recognized as leaders in the area of Trusts and Estates Law in the Charity and Not-For-Profit Law subspecialty by the 2016 edition of *The Best Lawyers in Canada*. Terrance S. Carter has been recognized since 2006, Theresa L.M. Man has been recognized since 2011, and Jacqueline M. Demczur has been recognized since 2014.

IN THE PRESS

Charity Law Update - June 2015 (Carters Professional Corporation) was featured on TaxNet Pro and is available to those who have login privileges. Future postings of the *Charity Law Update* will be featured in upcoming posts.

RECENT EVENTS AND PRESENTATIONS

Avoiding Board Meeting Nightmares was presented by Theresa L.M. Man and Terrance S. Carter at the CSAE Summer Summit on Thursday, July 9, 2015.

UPCOMING EVENTS AND PRESENTATIONS

2015 Christian Legal Fellowship (CLF) National Conference will include a session entitled "Charity Law Update" on September 25, 2015, presented by Terrance S. Carter in Mississauga, Ontario.

ATRI Conference 2015 will include two sessions entitled "Preparing for and Surviving a CRA Audit" on September 26 and 27, 2015, presented by Terrance Carter in Saskatoon, Saskatchewan.

Imagine Canada Sector Source will host a four-part series of webinars on "Legal Issues in Government" over the next four months to be presented by various lawyers at Carters. More details to follow.

22nd Annual Church & Charity Law™ Seminar hosted by Carters Professional Corporation in Greater Toronto, Ontario, on **Thursday November 12, 2015**
Brochure and online registration available on our website

CONTRIBUTORS

Editor: Terrance S. Carter
Assistant Editor: Nancy E. Claridge

Sepal Bonni - Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articled and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance issues.

Terrance S. Carter – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2015). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is Past Chair of the CBA National and OBA Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

Sean S. Carter – Sean Carter is a senior associate and co-chair of Carters' litigation practice group. Sean has broad experience in civil litigation and joined Carters in 2012 after having articled with and been an associate with Fasken Martineau DuMoulin LLP (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Upper Canada and Ontario Bar Association CLE learning programs.

Nancy E. Claridge – Called to the Ontario Bar in 2006, Ms. Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.

Bart Danko – Mr. Danko was called to the Ontario Bar in 2015 following the successful completion of his articles at Carters. He now practices in corporate and commercial law, anti-terrorism law, real estate law, charity and not-for-profit law, and wills and estates. Mr. Danko obtained his Juris Doctor from Osgoode Hall Law School and a Master of Environmental Studies from York University. Prior to this, he graduated with a Bachelor of Sciences (Honors) from the University of Toronto, with High Distinction. In his free time, Mr. Danko volunteers with Peel Regional Police as an Auxiliary Constable.

Jacqueline M. Demczur – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Mrs. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law*™ Seminar.

Barry Kwasniewski – Mr. Kwasniewski joined Carters' Ottawa office in 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.

Jennifer Leddy – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose."

Theresa L.M. Man – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers in Canada*. She is chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA Charities and Not-for-Profit Law Section. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell. She has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS eNews* and *Charity Law Bulletin*.

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.

Ryan Prendergast - Called to the Ontario Bar in 2010, Mr. Prendergast joined Carters with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan is a regular speaker and author on the topic of directors' and officers' liability and on the topic of anti-spam compliance for registered charities and not-for-profit corporations, and has co-authored papers for Law Society of Upper Canada. In addition, Ryan has contributed to *The Lawyers Weekly*, *Hilborn:ECS eNews*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity Law Bulletins* and publications on www.charitylaw.ca.

Linsey E.C. Rains - Called to the Ontario Bar in 2013, Ms. Rains joined Carters Ottawa office to practice charity and not-for-profit law with a focus on federal tax issues after more than a decade of employment with the Canada Revenue Agency (CRA). Having acquired considerable charity law experience as a Charities Officer, Senior Program Analyst, Technical Policy Advisor, and Policy Analyst with the CRA's Charities Directorate, Ms. Rains completed her articles with the Department of Justice's Tax Litigation Section and CRA Legal Services.

Tom Baker - Mr. Baker graduated from Osgoode Hall Law School and commenced his articles at Carters Professional Corporation in 2015. Prior to law school, he completed Bachelor degrees in Classical Studies and Psychology, as well as a Master's degree in Classical literature. He has published several scholarly articles in academic journals and was an associate editor for the *Osgoode Hall Law Journal*. During law school, he completed the mediation intensive program and was an executive member of the Entertainment and Sports Law Association. He also represented Osgoode in trial advocacy competitions at both the provincial and national levels.

Shawn Leclerc - Mr. Leclerc graduated from the University of Ottawa, Faculty of Law, in 2015. While attending his law studies, he gained legal experience through an internship with the Evangelical Fellowship of Canada where he researched various legislation and legal issues. Prior to attending law school he graduated with distinction from the University of Lethbridge with a B.A. in Anthropology. Mr. Leclerc has spent 11 years in automotive sales and finance, as well as over 15 years as a volunteer and board member in various charitable organizations. Mr. Leclerc has participated in overseas mission trips where he was engaged in humanitarian work.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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CARTERS PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE CARTERS

PARTNERS:
Terrance S. Carter B.A., LL.B. tcarter@carters.ca
(Counsel to Fasken Martineau DuMoulin LLP)
Jane Burke-Robertson B.Soc.Sci., LL.B. (1960-2013)
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M. tman@carters.ca
Jacqueline M. Demczur B.A., LL.B. jdemczur@carters.ca
Esther S.J. Oh B.A., LL.B. estheroh@carters.ca
Nancy E. Claridge B.A., M.A., LL.B. nclaridge@carters.ca
Jennifer M. Leddy B.A., LL.B. jleddy@carters.ca
Barry W. Kwasniewski B.B.A., LL.B. bwk@carters.ca
ASSOCIATES:
Sean S. Carter B.A., LL.B. scarter@carters.ca
Ryan M. Prendergast B.A., LL.B. rprendergast@carters.ca
Kristen D. Morris B.A., J.D. kmorris@carters.ca
Linsey E.C. Rains B.A., J.D. lrains@carters.ca
Sepal Bonni B.Sc., M.Sc., J.D. sbonni@carters.ca
Bart Danko B.Sc., M.E.S., J.D. bdanko@carters.ca,
STUDENTS-AT-LAW
Thomas Baker B.A., M.A., J.D tbaker@carters.ca
Shawn Leclerc B.A., J.D sleclerc@carters.ca
COUNSEL:
Bruce W. Long B.A., LL.B. blong@carters.ca

Orangeville Office
211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300

Ottawa Office
117 Centrepointe Drive, Suite 124
Ottawa, Ontario, Canada K2G 5X3
Tel: (613) 235-4774
Fax: (613) 235-9838

Mississauga Meeting Location
2 Robert Speck Parkway, Suite 750
Mississauga, Ontario, Canada, L4Z 1H8
Tel: (416) 675-3766
Fax: (416) 675-3765

Toronto Meeting Location
TD Canada Trust Tower
161 Bay Street, 27th Floor, PO Box 508
Toronto, Ontario, Canada M5J 2S1
Tel: (416) 675-3766
Fax: (416) 675-3765