

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

JANUARY 2015

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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](#)

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RECENT PUBLICATIONS AND NEWS RELEASES

Minister of National Revenue Responds to Inquiry About Political Activities

By Linsey E.C. Rains

On January 26, 2015, Imagine Canada distributed a copy of a [Sessional Paper](#) it obtained of a reply by the Minister of National Revenue, the Honorable Kerry-Lynne D. Findlay, P.C. Q.C. (“Minister”), to the Honorable Hedy Fry, Member of Parliament (“Honourable Member”), requesting statistics on CRA’s political activities audits of registered charities since 2004. Presumably, this inquiry was related to the recent media reaction surrounding the federal Budget 2012’s creation of a political activities audit program for charities.

The questions raised by the Honorable Member requested details with regard to the number of:

- Reminder Letters issued by CRA;
- formal complaints received concerning political activities;
- political activities audits commenced; and
- concluded political activities audits (including length of audit, total expenditures on the audit program since it was launched, and total expenditures on each completed audit).

In response, the Minister provided the following statistics:

- Since 2012, CRA has sent between 12 and 13 Reminder Letters per year.
- The number of formal complaints concerning political activities ranged in the 20s from 2008-2009 until 2010-2011, with a significant increase to 139 complaints in 2011-2012, and 159 in 2012-2013. The number of complaints from 2013-2014 and 2014-2015 went down to 52 and 79 respectively.
- As of October 21, 2014, 40 of the planned 60 audits in Budget 2012 were underway and 13 audits had been completed.
- Of the 13 audits completed, the time required to complete the audit ranged from 149 days to 1487 days, with an average of 512 days.

The Minister was not able to indicate how much each political activity audit costs, as CRA does not track its auditing expenses separately, but rather collectively as the “political-activity audit program.”

CRA News

By Jennifer M. Leddy

Updated Pamphlet on Gifts and Income Tax

On November 24, 2014, CRA released an updated version of its pamphlet [“P113 - Gifts and Income Tax”](#). The pamphlet highlights new developments in 2014, including those with respect to donations of certified cultural property, donations of ecologically sensitive land, gifts in the year of death, and the first-time donor’s super credit. In addition to these new developments, the pamphlet provides helpful information for donors on what gifts can be claimed as a tax credit, gifts in kind, and capital gains and losses.

CRA Revokes Ecotecture: Centre for Ecological Art and Architecture’s Charitable Registration

CRA has revoked the registration of Ecotecture: Centre for Ecological Art and Architecture (“Ecotecture”), effective December 13, 2014. CRA’s decision was based on its audit that found Ecotecture operated for the non-charitable purpose of furthering a gifting tax shelter, Vintage Iconic Archives. According to CRA’s news release, the audit revealed that, from 2009, Ecotecture “issued donation receipts nearing \$200 million for supposed gifts of vintage photographs.” CRA concluded that this property was overvalued and, therefore, that the value of the corresponding tax receipts was too high. The audit also showed that Ecotecture failed to comply with the *Income Tax Act* in other ways, including: being unable to show that it carried out any charitable activities; providing undue benefits to a member; gifting to a non-qualified donee; failing to promote the objects for which it was registered; not maintaining adequate books and records; not filing an accurate T3010; failing to meet its disbursement quota; and allowing its corporate status to lapse.

CRA Releases 2015 Corporate Business Plan

CRA recently released its [Summary of the Corporate Business Plan, 2014–2015 to 2016–2017](#) (the “Business Plan”). In its Business Plan, CRA describes how it will deliver its services with security and integrity, while aiming to reduce red tape. Specifically, the Business Plan outlines CRA’s performance indicators and targets in a number of areas. For service to registered charities and applicants for charitable status, the Business Plan indicates that CRA has set the following targets that it aims to meet by March 2015: respond to 80 percent of telephone enquires in the agent queue within 2 minutes, respond to 80 percent of simple applications for charitable status within two months, and respond to 80 percent of other applications for charitable status within six months. The Business Plan also indicates

that CRA has set targets of auditing 100 percent of charities that are known to be participating in gifting tax shelters and ensuring that 80 percent of charities file an annual information return on time.

Corporate Update

By Theresa L.M. Man

Canada Not-for-Profit Corporations Act

At its Client Outreach Session in Ottawa on January 27, 2015, Corporations Canada provided an update on the status of the continuance from Part II of the [Canada Corporations Act](#) (“CCA”) to the new [Canada Not-for-profit Corporations Act](#) (“CNCA”). To date, a total of 11,400 corporations (out of approximately 17,000 corporations) have continued under the CNCA, of which 8,800 were continued in 2014. It is also interesting to note that there were approximately 2,000 corporations incorporated under the CNCA in 2014.

Part II CCA corporations that fail to continue under the CNCA by the October 17, 2014, deadline may be dissolved. However, dissolution is not automatic. See [Charity Law Bulletin No. 336](#), *CNCA Continuance Process - An Update*, by Theresa L.M. Man, for an overview of the dissolution process and how to revive such dissolved corporations.

As reported in our [November/December 2014 Charity Law Update](#), 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, in which only 9 corporations were listed for the November Monthly Transactions. In December 2014, more than 4800 (by our rough count) were listed, and another 3400 (by our rough count) were listed as of January 27, 2015.

Corporations Canada is now focusing on corporations that are not up-to-date in filing their corporate summaries and therefore are assumed to be inactive. It is anticipated that notices to these corporations will be sent by the end of March 2015. After that, Corporations Canada will start sending notices to corporations that are up-to-date with their annual filings but still have not continued. Corporations Canada anticipates that all notices will be sent by fall 2015. Once all Part II CCA corporations have either continued or dissolved, Part II will be repealed.

Information on the process is available from its [FAQs on transition](#). As noted on Corporations Canada’s website, corporations that have not continued and have not been dissolved can still apply to continue.

Ontario Not-for-Profit Corporations Act

As noted in our November/December 2014 *Charity Law Update*, the update on the [Ontario Not-for-Profit Corporations Act, 2010](#) (“ONCA”) is that there are still 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. It is disappointing that there has been no progress in this regards. Many not-for-profit corporations continue to be left in corporate limbo, having to make the difficult decision whether to update their objects and by-laws as required to further their mission, or to keep waiting for the proclamation of the ONCA. 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.

Federal Legislative and Regulatory Update

Economic Action Plan 2014 Act, No. 2 Receives Royal Assent

By Terrance S. Carter

On December 16, 2014, the [Economic Action Plan 2014 Act, No. 2](#) (“Act No. 2”) received Royal Assent. It is the second piece of legislation to implement measures from the federal Budget tabled in Parliament on February 11, 2014. Federal [Bill C-31, Economic Action Plan 2014 Act, No. 1](#) (“Act No.1”) received Royal Assent on June 19, 2014, implementing other portions of Budget 2014’s proposals affecting charities and not-for-profits. Please see our June 2014 [Charity Law Update](#) for more details on Act No. 1 and its significance to charities, such as eliminating administrative burdens by allowing charities to use “modern technologies” to raise funds. One of the key changes contained in Act No. 2 affecting the charitable sector is the changes allowing greater flexibility in the income tax rules for recognizing charitable donations made by will or on death have now been implemented. These changes were summarized in our [September 2014 Charity Law Update](#). Additionally, Act No. 2 allows charities to computerize their lotteries through an amendment of the *Criminal Code of Canada*, which previously prohibited charities from using computers to process their lottery sales. This allows charities to use e-commerce to issue both lottery tickets and receipts to donors, saving significant potential administrative costs.

Budget 2014’s proposals were discussed in further detail in [Charity Law Bulletin No. 330, Budget 2014: Impact on Charities](#).

Combating Counterfeit Products Act Comes into Force

By Sepal Bonni

On January 1, 2015, certain provisions of the [Combating Counterfeit Products Act](#) relating to Canada's new border enforcement regime came into force. This legislation amends previous legislation including the *Trade-marks Act* and *Copyright Act* to create prohibitions on the importation and exportation of copyrighted works or goods bearing a registered trade-mark. One main impacts of this legislation includes the creation of a Request for Assistance ("RFA") procedure which allows owners of Canadian registered trade-marks or non-registered and registered copyrights to obtain assistance from Canadian Border Services Agency ("CBSA") in detaining suspected counterfeit and infringing copies or goods at the border.

Right holders should take note however that by filing an RFA with the CBSA, the right holder is accepting liability for all costs associated with storage, handling, and destruction of any goods detained as a result of the RFA. It is therefore very important that right holders promptly respond to any notification of detention received from the CBSA, both to limit potential liability for storage and handling costs, and to ensure that any desired action is taken against the importer within the necessary time frame.

In addition to the border enforcement regime, this new legislation also provides for new civil causes of action and criminal offences regarding counterfeit goods and works for commercial purposes.

Charities and not-for-profits should be reminded that this legislation does not discriminate as to who owns the intellectual property, the legislation therefore applies to all copyrights held by charities and not-for-profits. However, it should be noted that this regime is only applicable to registered trade-marks, and as a result, charities and not-for-profits are encouraged to secure their trade-marks in order to have full access to the tools created under this legislation.

New Legislation Strengthens Anti-Terrorism Powers

By Terry S. Carter and Nancy E. Claridge

Determined to strengthen the tools available to police and the Canadian Security Intelligence Service ("CSIS") when it comes to surveillance, detention and arrest, the federal government introduced [Bill C-44](#), the [Protection of Canada from Terrorists Act](#) (the "Bill") in late October 2014, in the shadow of the terrorist attacks on Parliament Hill and in Saint-Jean-sur-Richelieu. The Bill subsequently passed Second Reading and has now entered the Report Stage in the House of Commons, following a Committee Report being

presented by the Standing Committee on Public Safety and National Security. The Bill proposes to implement several revisions to expand the powers of CSIS in response to a series of court decisions, including [R v Hape](#) (2007 SCC 26) and [Canada \(Citizenship and Immigration\) v Harkat](#) (2014 SCC 37) (“*Harkat*”), that restricted several police powers. The Bill will effectively expand the powers of CSIS in terms of surveillance activities both in Canada and abroad with regard to anti-terrorism initiatives.

Among its main components, the Bill amends the [Canadian Security Intelligence Service Act](#) (“CSISA”) in two ways. First, it authorizes CSIS to conduct activities within and outside Canada, whether or not these activities comply with international laws or the laws of any foreign jurisdiction. The Bill does this by granting the Federal Court the power to issue a warrant authorizing activities that allow CSIS to investigate a security threat in a foreign region, regardless of whether or not those activities comply with the laws of that jurisdiction. Second, the Bill adds in a protection of confidentiality for “human sources”, promising confidentiality to individuals in exchange for information given to CSIS. Although the Court in *Harkat* found that the scheme under the *Immigration and Refugee Protection Act* already affords broad protection to human sources by precluding the public disclosure of information that would injure national security or endanger a person, it rejected the concept of a general class privilege and recommended Parliament can enact appropriate protections. The Bill also proposes to amend provisions in the *Strengthening Canadian Citizenship Act*, allowing the government to revoke the citizenship of dual citizens in certain circumstances, including following a conviction of terrorism.

The quick pace by which this Bill is being pushed through the House of Commons parallels the way that Bill C-13, the [Protecting Canadians from Online Crime Act](#), received Royal Assent on December 9, 2014. The *Protecting Canadians from Online Crime Act* similarly gave new powers to police authorities and CSIS, but in the context of anti-cyberbullying. The *Protecting Canadians from Online Crime Act* implemented the offence of non-consensual distribution of intimate images, clarified that *Criminal Code of Canada* offences may be committed by any means of telecommunication, and introduced a series of new “lawful access” powers, which refers to intercepting private communications and seizing information where authorized by law. This legislation also granted immunity to telecommunications companies that choose to voluntarily provide personal data to authorities, despite the Supreme Court of Canada’s decision in [R v Spencer](#) (2014 SCC 43), wherein the Court ruled that warrants should generally be required when seeking subscriber information from telecommunications companies.

It is apparent from this legislation that increased police powers are a priority for the federal government. When left unchecked, these powers can have a significant impact on the privacy rights of any person or organization in Canada or beyond.

House of Commons Releases 2015 Pre-Budget Consultations Report

By Terrance S. Carter

On December 10, 2014, the House of Commons Standing Committee on Finance tabled “[Towards Prosperity: Federal Budgetary Priorities for People, Businesses and Communities](#)”, a Committee Report (the “Report”) in response to the Federal pre-budget consultations for 2015. In addition to multiple witnesses, more than 400 groups and individuals made online submissions during the consultation process, including several charities. Of particular relevance to charities were recommendations made by groups like Imagine Canada, who requested the creation of a “stretch tax” credit to provide an enhanced charitable donation tax credit to individuals who donate an amount in a given taxation year that exceeds their donation in the immediately preceding taxation year. Both the NDP and Liberal federal parties also contributed recommendations, including the Liberal recommendation that the federal government examine the feasibility of amending the *Air Travellers Security Charge Act* to exempt Canadian registered charities from the air travellers security charge when the charity is providing a free flight to a low-income Canadian who is travelling to a required medical appointment.

The Report identified six priority themes: balancing the federal budget to ensure fiscal sustainability and economic growth; supporting families and helping vulnerable Canadians by focusing on health, education and training; increasing the competitiveness of Canadian businesses through research, development, innovation and commercialization; ensuring prosperous and secure communities, including through support for infrastructure; improving Canada’s taxation and regulatory regimes; and maximizing the number and types of jobs for Canadians. Relating to charities, the Committee recommended that the federal government continue to provide targeted and results-focused support and funding to health, disease and disability charities, as well as explore measures to prompt higher levels of charitable donations, such as a “stretch tax” credit. Although stakeholders remain hopeful, the federal government is of course under no formal obligation to implement any of these recommendations in its Budget 2015.

New Anti-terrorism Bill to Criminalize Promotion of Terrorism

By Sean S. Carter

In a speech on January 25, 2015, the Canadian government announced it will introduce new anti-terrorism legislation on January 30, 2015, which will imbue authorities with new powers to combat “homegrown extremists,” including criminalizing the “promotion of terrorism.”

The spectre of this type of legislation has been raised before, including references by politicians in 2007 concerning the “glorification” of terrorism, but was never formally introduced by legislation. Similar offences criminalizing “glorification” of “promotion” of terrorism exist in other jurisdictions, including European countries, but whether or not the proposed legislation will withstand scrutiny if challenged with regard to the *Canadian Charter of Rights and Freedoms* will depend largely on the language of the legislation to be introduced on January 30, 2015.

Provincial Legislative and Regulatory Update

Ontario Public Sector and MPP Accountability and Transparency Act Receives Royal Assent

By Terrance S. Carter

Bill 8, the [Public Sector and MPP Accountability and Transparency Act, 2014](#), received Royal Assent on December 11, 2014. Included in this legislation was the enactment of the Ontario [Broader Public Sector Executive Compensation Act, 2014](#) (the “Act”), which complements the [Broader Public Sector Accountability Act, 2010](#). This Act will manage compensation frameworks of executives in the public sector, including an ability to put mandatory restrictions on executive compensation for certain designated organizations in the broader public sector. “Broader public sector organizations” are defined as “designated broader public sector organizations” and “publicly funded organizations,” this includes hospitals, school boards, universities and colleges, Children’s Aid Societies, community care access corporations, and corporations controlled by a designated broader public sector organization and other public sector organizations, which could include charities, that have received more than \$10 million in funding from the provincial government. “Publicly funded organization” is broadly defined to include every authority, board, commission, committee, corporation, council, foundation or organization that received public funds in the previous fiscal year from the Government of Ontario, but excludes certain entities, such as a ministry of the provincial government or a municipality.

If implemented, mandatory restrictions will apply, specifically to those who earn \$100,000 or more per year within the broader public sector. These amendments 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. The [Broader Public Sector Accountability Act, 2010](#) is also amended by Bill 8 to give authority to the Management Board of Cabinet to issue directives requiring certain designated broader public sector organizations to prepare and publish business plans and any other specified business or financial documents of the entity.

Charities impacted by this Act will need to familiarize themselves with the legislation and ensure that they are in compliance. As well, charities in Ontario generally should continue to monitor this legislation to see whether it might broaden to place salary caps on a sector wide basis similar to what had been proposed in the failed federal Bill C-470, *An Act to amend the Income Tax Act (disclosure of compensation – registered charities)* in 2011.

Alberta's PIPA Amended

By Sepal Bonni

As previously reported in our [November 2014 Charity Law Update](#), Alberta's privacy legislation, the *Personal Information Protection Act* ("PIPA"), was found unconstitutional by the Supreme Court of Canada ("SCC") in the decision [Alberta \(Information and Privacy Commissioner\) v United Food and Commercial Workers, Local 401 \(UFCW\)](#) (2013 SCC 62), on the basis that it infringed on a union's freedom of expression during a lawful strike. The SCC granted the Government of Alberta time to make the necessary amendments to PIPA and in response on December 17, 2014 the [Personal Information Protection Amendment Act, 2014](#) (the "Act"), received Royal Assent.

The amendments to PIPA are very limited in their scope to unions and labour disputes. In this regard, in certain circumstances, the amendments allow a trade union to collect, use and disclose personal information without consent. Although the amendments capture the SCC's concern regarding a trade union's right to picket the workplace, the Act fails to address the overarching concern regarding the relationship between freedom of expression and privacy.

Given that these amendments were so narrowly made to address the concerns of the SCC with regard to labour disputes, it is likely that PIPA's constitutionality will be challenged again. In this regard, a comprehensive review of PIPA is scheduled to take place in July 2015.

Charities and not-for-profits in Alberta, as well as across Canada, are encouraged to continue to monitor the developments of PIPA and comply with relevant privacy legislation by meeting the highest standards imposed by any applicable privacy legislation, [PIPEDA](#), at all times.

Court Refuses to Vary the Terms of a Restricted Gift

By Ryan M. Prendergast and Terrance S. Carter

In [Mulgrave School Foundation \(Re\)](#) (2014 BCSC 1900) (“*Mulgrave*”), the British Columbia Supreme Court (“BCSC”) considered a request by a registered charity to vary a restricted gift for a particular purpose. The BCSC declined to vary the restrictions on the donations and, in the process, interpreted the application of section 3(4) of the [Charitable Purposes Preservation Act](#) (the “Act”).

The Mulgrave School Foundation (the “Foundation”) sought an order allowing it to apply two large donations of \$250,000 and \$861,217.50 toward the construction of a new senior school facility for the Mulgrave School. The donors had originally made the donations with two restrictions, i.e., that the funds be used to create an endowment and that the endowment was be used to support scholarships at Mulgrave School. The donors consented to the use of their donations being varied so that they could be used for the construction of the facility. The Foundation’s application, however, was opposed by the Attorney General of British Columbia, on behalf of the Crown, based on its responsibility over charities in British Columbia and its interpretation of section 3(4) of the Act.

The Foundation submitted that the BCSC has inherent jurisdiction over charitable matters and can alter endowment or purpose restrictions regarding how to apply the income of the fund. The Foundation relied on s. 3(4) of the Act, which states:

If a charity holding discrete purpose charitable property is unwilling or unable to continue to keep, administer and use the property to advance the discrete purpose, the court may make whatever orders, including arrangements, it considers appropriate, including transferring the property to a new charity, so that the property is kept, administered and used to

- a) advance the discrete purpose, or
- b) advance another charitable purpose that the court considers is consistent with the discrete purpose.

Section s.3(4) of the Act can be read as a general codification of the court's inherent *cy-prés* jurisdiction to vary property donated for a particular charitable purpose where it is impossible or impracticable for the charity to continue using the property for that purpose.

However, the Foundation provided no evidence that it was either impossible or impracticable for the Foundation to continue using the donated funds for their stated purpose of providing scholarships to Mulgrave School. Counsel for the Foundation urged the Court to interpret section 3(4) widely to apply the Act even where it was not impossible or impractical. After considering the lack of any evidence showing an impossibility or impracticality of carrying out the intended purpose in accordance with the court's *cy-prés* power, the BCSC refused to allow the donations intended to be used for scholarships to be used in the construction of the school.

This decision is important because it confirms that once donors have donated funds to a charitable purpose the donor loses any further interest in those funds once the gift is complete. In this regard, the consent of the donors is not determinative, and does not provide the directors of a charity with authorization if they decide to use funds restricted for a particular purpose for another purpose without court approval, which may not always be available. As a result, charities should be cautious before encouraging donors to make gifts with restrictions attached to them unless appropriate wording is included in the gift agreement giving the charity the power to vary a restriction or encroach on an endowment, where applicable.

Recent False Receipting Cases from the Tax Court of Canada

Theresa L.M. Man

In November 2014, the Tax Court of Canada ("TCC") released seven related judgements dealing with false receipting stemming from a tax donation scheme in Vancouver that involved approximately \$12 million in false charitable donation receipts. The Court disallowed the receipts in all cases. The set of cases includes: [Vekkal v The Queen](#) (2014 TCC 341) ("*Vekkal*"), [Abootaleby-Pour v The Queen](#) (2014 TCC 343), [Bani v The Queen](#) ("*Bani*") (2014 TCC 340), [Izkendar v The Queen](#) (2014 TCC 344), [Rasuli v The Queen](#) (2014 TCC 346), [Nocon v The Queen](#) (2014 TCC 345), and [Komarynsky v The Queen](#) (2014 TCC 342) (collectively referred to as the "Appellants"). Common evidence was presented in all seven cases, with the judge often referring to his full analysis in *Vekkal*.

In each case, the Minister alleged that the Appellants purchased false donation receipts from their accountants. The exact details vary between cases, but the result was the same. In 2009, CRA discovered

that a number of the accountants' clients had made large donations to the same charity, Mehfuz Children Welfare Trust. The donations generally represented an abnormally high portion of their net incomes. During the ensuing criminal investigation, CRA also discovered that receipts seized at the accountants' offices were different from the official receipts issued by the charity. The accountants were charged with fraud for making false statements on income tax returns.

In *Vekkal*, the Court emphasized that while the accountants instigated the donation scheme, the Appellants "should not be spared." He also stated that "Parliament has made it clear that taxpayer conduct of this sort is not acceptable. Fiscal disobedience is a societal concern."

This series of cases is important because it underscores that individual taxpayers cannot be protected behind a screen of bad financial advice. It further shows that taxpayers cannot use excuses such as bad advice, misguided trust, momentary lapses of judgment, or not reviewing their returns to avoid responsibility. Individuals must take responsibility for their own actions and roles within the tax system.

SCC Debates Cell Phone Privacy Rights in *R v Fearon*

By Sepal Bonni

The Supreme Court of Canada ("SCC") released its decision on December 11, 2014, in [*R v Fearon*](#) (2014 SCC 77) ("*Fearon*"), where a 4:3 majority of the court held that a warrantless cell phone search made by police during an arrest is legal if it is subject to strict limitations. However, in a strongly worded dissent, the minority maintained that such limitations cannot substitute for effective privacy. Because of the split nature of the decision, *Fearon* has been interpreted as a setback for privacy rights in Canada by some privacy experts, and a continuation of the SCC's trend to support privacy rights by others.

In this regard, it is important to note that although *Fearon* is a criminal case, it will likely be applied in employment and other non-criminal contexts, including in the context of charities and not-for-profits, as most of the SCC's decisions on privacy rights were made in a criminal context and have since influenced privacy rights in other areas of Canadian jurisprudence. This pattern has been clear in the use of [*R v Cole*](#) (2012 SCC 53), [*R v Vu*](#) (2013 SCC 60), and [*R v Spencer*](#) (2014 SCC 43). In all of these cases, the SCC expanded privacy expectations in relation to computers and online activities.

In *Fearon*, the majority commented that a cell phone search may constitute a significant intrusion of privacy but that "not every search is inevitably a significant intrusion." Consequently, the majority concluded that some cell phone searches were permissible so long as the current law was modified to

provide some privacy protections. These modifications have resulted in a new four-part test that requires:

1. A lawful arrest;
2. A search that is incidental to the arrest with a valid law enforcement purpose;
3. A search is that tailored or limited to current purpose; and
4. That the police take detailed notes on what they have examined and how the phone was searched.

The dissent explicitly rejected the majority's four-part test, and characterized it as impractical and potentially inviting of "increased after-the-fact litigation." The dissent opined that law enforcement individuals were required to obtain a warrant before searching a cell phone to ensure that individuals' privacy interests are appropriately protected.

Although there is some language in *Fearon* that stresses the importance of privacy rights, many privacy experts believe that this decision is a setback for privacy law in Canada. It remains to be seen how the courts will apply this decision in non-criminal contexts.

Court of Appeal Discusses Board and Management Compensation

By Ryan M. Prendergast

The Ontario Court of Appeal released its decision on July 10, 2014, in [*Unique Broadband Systems, Inc. \(Re\)*](#), in which Unique Broadband Systems ("UBS") successfully appealed an order for it to pay an enhanced severance payment equivalent to 300% of a director's income. The court also upheld the decision not to award the director any additional compensation or indemnify him for legal fees, since the director had not acted honestly or in the best interests of the corporation.

UBS was a for-profit corporation and the Court reviewed a series of compensation arrangements concerning a director and the CEO of the corporation. Although UBS was a for-profit business, the conclusion reached by the Court that the compensation arrangements performed by the board were in breach of the board's fiduciary duty would generally have application to directors of charities and not-for-profits. The Court stated that the fiduciary duty of a board of directors requires the board to act in good faith and in the best interest of the corporation, including a duty to avoid conflicts of interest, and to refrain from abuse of the position for personal gain. A particular issue which the court identified was

the fact that the board did not seek any third-party reassurance that the compensation arrangements enacted by the board was reasonable.

This decision is particularly relevant to boards of charities and not-for profits as it sets a precedent that would reasonably apply to both compensation and indemnification of directors and management, since their fiduciary obligations are analogous to those of for-profit corporations. Although directors of charities in Ontario may not often consider this issue, since they are prohibited at common law from receiving any direct or indirect benefit, executive personnel employed by charities and directors of not-for-profits need to take note of this decision that their compensation schemes must be reasonable under the circumstances. Given recent federal and provincial legislative initiatives concerning executive compensation in the not-for-profit sector, it will also be important for directors and officers in the not-for-profit sector to monitor case developments in the for-profit realm in this regard.

Company Directors Receive Jail Sentences

By Barry W. Kwasniewski

The Ontario Ministry of Labour released a [Court Bulletin](#) on January 13, 2015, announcing that two directors of New Mex Canada Inc. had each been sentenced to 25 days in jail after pleading guilty to safety violations that led to the death of a warehouse worker. Additionally, New Mex Canada Inc. was fined \$250,000 in the incident.

The sentencing in this case stems from the death of a worker who fell from a combination forklift/operator-up platform called an order picker while moving merchandise on January 18, 2013. The platform did not have a guardrail and the worker was not using any fall protection or safety shoes. In an ensuing investigation, the Ministry of Labour found multiple violations of Ontario [Occupational Health and Safety Act](#) (the “Act”) and of [Ontario Regulation 851](#), which covers industrial workplaces.

The two directors were both charged with failing as directors to take reasonable care that the corporation complied with the Act and Regulation 851. They will serve their jail time on weekends and have both been ordered to take a health and safety course within the next 60 days.

This case should serve as a reminder to all employers, including charities and not-for-profits, about the importance of health and safety awareness, as well as a particular reminder to directors about the extent of their potential liabilities.

For more information about mandatory health and safety awareness training under the Ontario Act see [Charity Law Bulletin No. 340](#), *New Ontario Mandatory Health and Safety Awareness Training*, by Barry W. Kwasniewski.

Application of GST/HST to Children's Camps

By Linsey E.C. Rains

CRA explained its position on the applicability of GST/HST to children's camps operated by public sector bodies ("PSBs") in its December 2014 GST/HST Info Sheet [GI-037 Children's Camps Operated by Public Sector Bodies](#) (the "Info Sheet"). CRA describes GST/HST Info Sheets as "plain language, technical publications designed to provide clear and concise explanations of specific issues relating to the GST/HST." Accordingly, the Info Sheet clarifies whether certain overnight camps, day camps, and camps for underprivileged individuals or individuals who have a disability that are run by PSBs are exempt from GST/HST.

The Info sheet relies on the *Excise Tax Act* definitions of PSBs and public service bodies. The former means a government or public service body and the latter means charities, non-profit organizations, municipalities, universities, public colleges, school authorities, and hospital authorities. For the purposes of the Info Sheet, "camp" is defined as a "single supply of services that involves supervision or instruction in recreational or athletic activities."

According to the Info Sheet, CRA's general rule is that camps involving overnight supervision will be considered taxable supplies regardless of the age of attendees even if other supplies of instruction are delivered, e.g. religious or computer training. Alternatively, if a camp operated by a PSB does not involve overnight supervision, the supply of this camp will be exempt if it is primarily, i.e. more than 50%, for children 14 years old and under. For camps intended to primarily benefit, i.e. more than 50%, individuals who are underprivileged or have a disability, the supply will be exempt regardless of the individual participant's age or whether the camp is a day or overnight camp. Where the PSB is a GST/HST registrant, or is required to register, and its camp constitutes a taxable supply, it will be required to collect GST/HST on the camp fees it charges.

Tax Treatment of Charitable Gift Cards

By Jacqueline M. Demczur

On November 3, 2014, CRA responded with a Technical Interpretation (2014-0537191E5 E) to a letter asking whether the value of gift cards given to an individual by a charity should be included in the individual's income for tax purposes. The Technical Interpretation also further considered whether it is appropriate for the gifting organization to issue a form T5007, Statement of Benefits, for said gift cards. In this Technical Interpretation, CRA indicates that a gift card can be considered a form of social assistance payment or gift. For a social assistance payment to be included in income under paragraph 56(1)(u) of the [Income Tax Act](#) ("ITA"), it must be made on the basis of a financial evaluation based on a means, needs, or income test. The amounts included in income under paragraph 56(1)(u) are then matched by an offsetting deduction under paragraph 110(1)(f) of the ITA, so the amount is not taxable to the individual. When an organization concludes that it has provided social assistance to an individual, section 233 of the [Income Tax Regulations](#) requires the organization that provided the social assistance to report the payment on a form T5007, Statement of Benefits, unless the payment is specifically excluded from this reporting requirement.

If an organization, including a charity, provides a gift card on a random basis to individuals without regard to a means, needs, or income test, or not as a series of payments, it could be viewed as gift, and would not be taxed under the ITA. Although gifts of this nature are generally not included in computing income of the recipient for tax purposes, they would also not qualify as a charitable gift or donation on the gifting organization's own tax return.

OHRC Updates Policy on Pregnancy and Breastfeeding

By Barry W. Kwasniewski

The Ontario Human Rights Commission ("OHRC") released on October 29, 2014, an updated [Policy on discrimination related to pregnancy and breastfeeding](#) (the "Policy"). This updated Policy emphasizes women's rights under the Ontario [Human Rights Code](#) (the "Code"), and underscores that because "child-bearing benefits society as a whole," women should not be disadvantaged in the workplace because they are or have been pregnant. The Policy outlines how discrimination related to pregnancy and breastfeeding intersects with other forms of discrimination, and provides examples of how discrimination, based on pregnancy and breastfeeding, may occur in the workplace. The Policy also discusses an employer's duty to accommodate and touches on how protections provided under the Code relate to other pregnancy-related employment legislation. It is important for employers, including

charities and not-for-profits, to understand the scope of potential discrimination related to pregnancy and breastfeeding and to take proactive steps to ensure that their practices and policies create a work environment which meets Code standards. This [Charity Law Bulletin No. 356](#) discusses the details of the updated OHRC policy.

OHRC Issues Statement on Workplace Sexual Harassment

By Sean S. Carter

On November 25, 2014, in response to what continues to be a live issue of debate and topic of interest provincially and across Canada, the Ontario Human Rights Commission (“OHRC”) issued [Sexual Harassment and the Ontario Human Rights Code](#), a statement of guidance with regard to sexual harassment in the workplace and the Ontario Human Rights Code (“Harassment Guidance”). The Harassment Guidance builds upon the 2013 OHRC Policy on Preventing Sexual and Gender-Based Harassment by reminding employers of the different forms of sexual harassment, how to prevent it, how deal with it once it has occurred, and providing an outline of best practices for addressing sexual harassment in the workplace. The Harassment Guidance does not carry the force of legislation, but requires careful note as a clear statement of interpretation that the Human Rights Tribunal of Ontario (“HRTO”) may look to for persuasive guidance during hearing and when making decisions.

The Harassment Guidance offers a broad overview of the problem, first clarifying that sexual harassment can happen to all people regardless of economic class, workplace position, ethnic group, and so on. It also clarifies that sexual harassment can include anything from invading personal space, sexual jokes, making sexual propositions, each of which can escalate into more serious forms of inappropriate sexual behaviour including sexual assault. Sexual harassment may lead down several disciplinary paths; these include internal employer disciplinary measures, a complaint with the HRTO, or in some cases, a criminal offence.

The Harassment Guidance underscores that Ontario employers have a proactive legal duty to prevent and respond to sexual harassment. The Harassment Guidance identifies three recommendations for employers to adopt to prevent cases of sexual harassment and reduce their own liability. The first recommendation is having a comprehensive anti-sexual harassment policy in place. The second recommendation involves ensuring that all employees have access to the policy and are made aware of their rights and responsibilities with regard to harassment. Lastly, the Harassment Guidance reinforces that people in positions of responsibility need a heightened knowledge and perceptiveness with regard to

rights and responsibilities pertaining to sexual harassment, particularly with respect to employees and volunteers. Organizations need to take proactive steps not only to create a safe working environment but because complaints at the HRTO can expose organizations to orders including requiring a reform of internal policies and monetary damages, all without cost exposure to the complainant if their claim is unsuccessful.

Potential sexual harassment claims are an issue in all workplaces including the government, private business, as well as charities and not-for-profits. All organizations in Ontario should therefore be conscious of the seriousness of sexual harassment in the workplace follow the recommendations made in this statement. All types of organizations should take careful note of this reminder that proactive due diligence policies regarding sexual harassment are now essentially required and need to be reviewed periodically with updates in law.

How-To Brief on “How to Incorporate a Not-For-Profit Corporation”

By Theresa L.M. Man

The procedure for incorporating a membership based not-for-profit corporation is much more complex than incorporating a for-profit share capital corporation. Other than deciding on the corporate name, what it is going to do and where, there are many more issues that need to be addressed throughout the process, including who would be the members, what would the board composition look like, will it be seeking charitable status, what influence would the founder have over the governance of the corporation, etc. This article outlines the key steps involved when incorporating federally under the *Canada Not-for-profit Corporations Act* and provincially under the *Ontario Corporations Act*, including issues that need to be addressed both before and after incorporation. The article also provides a list of useful resources and relevant statutes/rules for reference purposes. It is available from [The Law Society of Upper Canada](#).

EU Launches Appeal Against Ruling Striking Hamas off Terrorist List

By Nancy E. Claridge

The European Union (“EU”) has launched an appeal of the December 17, 2014 [ruling](#) of the General Court of the EU, its second-highest tribunal, which ordered Hamas to be removed from the EU’s terror list on procedural grounds. The ruling found that the reason for including Hamas – a group which is similarly listed by Canada, the United States and Israel – on this list was based on factual imputations

derived from the media and the internet, rather than on acts examined by competent authorities. The court made a similar ruling in late 2014 concerning Sri Lanka's Liberation Tigers of Tamil Eelam group. In rendering this decision, the court indicated that the decision did "not imply any substantive assessment of the question of the classification of Hamas as a terrorist group."

The EU intends to challenge the decision on two grounds: first, that it needed to regularly provide new information that a listed group was carrying out terrorist acts; and, second, that the use of the internet was not a valid source of information. The EU will also consider future action to avoid similar annulments.

Since December 27, 2001, the Council of the European Union has adopted a [common position](#) and implemented a [regulation](#) to combat terrorism. This has included freezing the funds of people and entities included on a terror list updated by Council decisions. These regulations were largely in response to the attacks on the United States on September 11, 2001. Hamas' military wing has been on this list since its first decision on the same date, and its political wing since 2003, though it has consistently contested its inclusion on the list. The Canadian government lauded the EU's appeal, as the organization is still listed as a terrorist entity under the *Criminal Code of Canada* ([article 83.05](#)). As a result of the launch of the appeal, Hamas will remain on the EU's terrorism list and its assets will remain frozen pending a judgment by the Court of Justice.

Interpretation Statement on the Provision of Housing by Charities in Australia

By Esther S.J. Oh

The Australian Charities and Not-for-profits Commission ("ACNC") has published a Commissioner's [Interpretation Statement](#) on the Provision of housing by charities. Commissioner's Interpretation Statements provide guidance to ACNC staff, charities, and the public on how the ACNC understands the law that applies to charities, although the Interpretation Statements are not equivalent to a binding ruling.

This Interpretation Statement addresses the following issues in reference to charities and housing:

- What charitable purposes may be fulfilled through the provision of housing?
- To whom can charitable housing be provided?
- What kinds of housing can be provided as charitable?
- How does commercial activity fit with the provision of charitable housing?

- What kind of interaction can occur between Government and charitable housing providers?

This interpretation clarifies that since the implementation of the *Charities Act* in 2013 (the “Act”), the provision of charitable housing in Australia could come within one or more of the charitable purposes set out in section 12 of the Act. These include the purpose of advancing health (s.12(1)(a)) and the purpose of advancing social or public welfare (s.12(1)(c)). The purpose of advancing public or social welfare is defined in section 15 of the Act to include relieving the poverty, distress or disadvantage of individuals or families, caring for and supporting the aged, individuals with disability, children and young people.

The Interpretation Statement further clarifies that poverty does not mean destitution; several factors may be relevant in determining whether someone is in poverty. In the context of housing, relieving poverty is the “provision of housing assistance to those who cannot afford, from their own resources, such accommodation as would give them a modest standard of living in the Australian community” (para 2.6). “Housing” is also clarified as a term that can refer to many forms, including accommodation provided through hostels, crisis accommodation, shared accommodation, units or houses, and it may be temporary or permanent.

The Interpretation Statement also examines the relationship between commercial activities and housing, clarifying that charitable housing providers may fund charitable housing through a variety of means. This includes commercial operations carried out in furtherance of the charitable purpose and where the income generated is directed to that charitable purpose.

Although this Interpretation Statement is intended to provide clarity to charities operating in Australia, it may also be of interest to charities operating housing programs in Canada for comparison purposes.

For more information on charitable housing in Canada, see [Charity Law Bulletin No. 332, CRA Guidance on Charities that Provide Housing](#), by Theresa L.M. Man.

Report on Recommendations for IRS Oversight of Charitable Organizations

By Terrance S. Carter

On December 17, 2015, the United States Government Accountability Office (“GAO”) released a report entitled “[Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations](#)” (the “Report”), which focuses on tax-exempt organizations and their oversight by the Internal Revenue Service (“IRS”). The

Report was commissioned partly in response to declining resources held by the IRS, leading to fears over a decreasing number of charities examined about whether their tax exempt status is justified, and thus potential abuse. In 2013, the percentage of charities examined fell to 0.71%. The Report addresses these concerns by describing the charitable organization sector, how the IRS conducts its oversight activities and subsequently evaluates them, and lastly, how the IRS collaborates with state charity regulators and U.S. Attorneys to identify and prosecute organizations suspected of engaging in criminal activity, including fraud.

The main recommendations of the Report are threefold. First, it is recommended that the IRS develop compliance goals and additional performance measures that it can use to assess the effect of enforcement activities on compliance. Emphasis is placed on developing quantitative and results-oriented goals and measures. Second, it is recommended by GAO that the IRS clearly communicate with state charity regulators on how they are allowed to use IRS information related to examinations of charitable organizations. Lastly, GAO recommends that Congress consider expanding the mandate for 501(c)(3) organizations to electronically file their tax returns to cover a greater share of filed returns (something that the Canadian government announced would be done in Canada in its 2014 Budget).

The information gathered for this Report will also aid the IRS in generally setting results-oriented goals for assessing its compliance measures and increasing compliance in the future. Given regulatory similarities between CRA and the IRS, CRA may want to study the experiences of the IRS, especially in implementing measures to ensure compliance, appropriate methods of assessing compliance, and how intergovernmental relationships can work.

Legal Risk Management Checklist for Ontario-Based Non-Profit Organizations

By Terrance S. Carter and Jacqueline M. Demczur

The popular [Legal Risk Management Checklist for Ontario-Based Non-Profit Organizations](#), available free of charge through our websites, has been updated as of December 2014.

IN THE PRESS

[How to Incorporate a Not-for-Profit Corporation](#), by Theresa L.M. Man, *Law Society of Upper Canada*, updated May 2014

[Canada Revenue Agency News](#), by Linsey E.C. Rains, *AFP eWire Canada*, Vol.14, Num.49c – *Canada*, December 10, 2014

[CRA Releases Guidance on Ineligible Individuals](#), by Terrance S. Carter and Ryan M. Prendergast, *e-Forum (Trillium Communications Committee)*, published December 2014

[Credit Card Interchange Fees Reduced for Charities](#), by Terrance S. Carter
Hilborn Charity eNews, December 17, 2014

[Lessons in Protecting your Brand: The “Ice Bucket Challenge” Phenomenon](#), by Terrance S. Carter and Sepal Bonni, *Hilborn Charity eNews*, January 20, 2015

RECENT EVENTS AND PRESENTATIONS

The 21st Annual Church & Charity Law™ Seminar was held at Portico Community Church in Mississauga, Ontario, on Thursday, November 13, 2014.

Presentation handouts are available on our [website](#)

Please note that this RRS feed works best in Internet Explorer.

Imagine Canada Sector Source hosted a webinar entitled “[Legal Issues in Managing Endowment Funds](#)”, on November 25, 2014, presented by Terrance S. Carter.

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”.

[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:

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

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

[Imagine Canada Sector Source Webinar](#) will be hosted on Thursday, February 26, 2015. Terrance S. Carter will be presenting on the topic “Preparing for and Surviving a CRA Audit”.

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

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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 2013), and 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.



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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.



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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



Anna M. Du Vent – Ms. Du Vent graduated from the University of Ottawa in 2015. Prior to attending law school, Anna completed a Master of Arts in International Development Studies. While in law school, Anna volunteered with the national and local levels of the Canadian Association of Refuge Lawyers. She was also a Research Assistant for the Legal Writing Academy, where she worked with first-year law students to develop their legal writing and research skills. Prior to law school, Anna worked in youth programming and community service organizations in Canada, the Philippines, the Marshall Islands, Peru, and Jamaica.



Jennifer Leddy – Ms. Leddy joined Carters’ Ottawa office in 2009, becoming a partner in 2015, 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 (CCCCB). 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.”



Barry W. Kwasniewski - Mr. Kwasniewski joined Carters’ Ottawa office in October, becoming a partner in 2015, 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.



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*. She is vice chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA. In addition to being a frequent speaker, Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Canadian Fundraiser eNews* and *Charity Law Bulletin*. She is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell in 2013.



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 M. 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 concerning incorporation, ongoing corporate compliance, registration of charities, audits and internal appeals with CRA, as well as the amalgamation and merger of charities. Ryan is a regular speaker and author on the topic of directors’ and officers’ liability for not-for-profit corporations, and has co-authored papers for Law Society of Upper Canada. In addition, Ryan has contributed to several *Charity Law Bulletins* and other publications on www.charitylaw.ca, and is a regular presenter at the annual *Church & Charity Law Seminar*.



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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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