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CHARITY LAW UPDATE

JUNE 2015

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

JUNE 2015

SECTIONS

HIGHLIGHTS

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RECENT PUBLICATIONS AND NEWS RELEASES

House of Commons Finance Committee Tables Report on Terrorist Financing

By Terrance S. Carter, Nancy E. Claridge, and Sean S. Carter, *Anti-terrorism and Charity Law Alert* No. 40, June 25, 2015

The House of Commons Standing Committee on Finance (the "Committee") released its report entitled *Terrorist Financing in Canada and Abroad: Needed Federal Actions* (the "Report") on June 18, 2015. The Report contains 15 recommendations that are designed to increase the effectiveness of Canada's anti–money laundering and anti–terrorist financing regime, as well as contribute to global efforts to combat terrorist financing. In its discussion of the issues, the Committee noted the low level of terrorist financing that has been detected in Canada compared to other countries, but the Committee was careful to note that limited detection and prosecution of terrorist financing in Canada does not mean that there is a low risk of terrorist financing in Canada or that Canadian entities are not being used to raise or transfer terrorism-related funds abroad. As such, the Committee indicated that more could be done to detect terrorist financing and increase investigative capacity, which could lead to more prosecutions with these expanded capabilities. The following *Anti-terrorism and Charity Law Alert* discusses the consultation process the Committee conducted in preparation for the Report, for which Carters Professional Corporation was invited to take part, and includes a discussion of which recommendations affecting charities and not-for-profits were adopted by the Committee and those recommendations made by Carters that have yet to be adopted by the Committee.

CRA News

By Theresa L.M. Man

Request for Proposals for the Social Finance Accelerator Initiative

The Employment and Social Development Canada announced on June 8, 2015, that it has issued a Request for Proposals ("RFP") to award up to three contracts to establish a social finance accelerator to tackle persistent social problems in each of three regions: the Western provinces, Ontario, and Quebec and the Atlantic provinces. The Social Finance Accelerator Initiative was originally announced as part of the 2015 Federal Budget. Although this initiative is not directly related to Canada Revenue Agency ("CRA"), it will affect how CRA works with charities. The announcement indicates that successful bidders will work with organizations, such as charities and not-for-profit organizations to deliver enhanced assistance to more people in need, by addressing issues including unemployment, poverty and

homelessness. Proposals may also address social isolation of seniors, and services targeting vulnerable youth to support their transition from education to work. The RFP will be open until July 17, 2015, and the awarded contracts are expected to be announced in August 2015, with the work starting by January 2016.

CRA Updated Income Tax Folio Chapter on Related Persons and Dealing at Arm's Length

On June 9, 2015, CRA released an updated version of Chapter 1 of Income Tax Folio 5: Transfer of income, property or rights to third parties. Chapter 1 can be referenced as S1-F5-C1: Related persons and dealing at arm's length. When it was first published on May 2, 2014, this Chapter replaced and cancelled Interpretation Bulletin IT-419R2, Meaning of Arm's Length. The Chapter discusses the criteria used to determine whether or not persons deal with each other at arm's length for the purposes of the *Income Tax Act*. This document will continue to have an impact on the operation of charities, since the arm's length concept affects issues such as designation of charities and inter-charity transfers.

CRA Removes Guide on Keeping Records

As of May 12, 2015, CRA's Guide RC4409, Keeping Records is no longer being made available. Currently, CRA provides limited information on keeping records on its website at: http://www.cra-arc.gc.ca/records/. It is unclear whether a new Guide will be released to replace RC4409.

Prime Minister Announces $10 Million for CRA to Detect and Suppress Terrorist Financing

Prime Minister Stephen Harper announced on June 4, 2015, that CRA will invest approximately $10 million over five years to build on current efforts to detect and suppress terrorist financing activities in the charitable sector. This funding is made under Economic Action Plan 2015 for CRA to "better crack down on the financing of terrorist groups through registered charities in Canada." This announcement was made alongside other provisions also mentioned in the 2015 Federal Budget ("Budget 2015") , including $136.81 million being added to the budget of CSIS over five years, with $40.97 million per year being provided on an ongoing basis afterwards, to address the issue of terrorism.

Legislation Update

By Terrance S. Carter

Economic Action Plan 2015, No. 1

On June 24, 2015, Bill C-59, *Economic Action Plan 2015 Act, No. 1* ("Economic Action Plan") received Royal Assent. The Economic Action Plan implements some of the income tax and related measures

proposed in Budget 2015 on April 21, 2015, which contained a number of important measures of benefit to the charitable and not-for-profit sector.

For more discussion of the impact of Bill C-59 and Budget 2015 on charities and not-for-profits, see Federal Budget 2015: Impact on Charities, *Charity Law Bulletin* No. 363.

Anti-terrorism Act, 2015

Bill C-51, *Anti-terrorism Act, 2015* received Royal Assent on June 18, 2015, after passing Third Reading in the Senate without any significant amendments. Several of the provisions in the Act are now in force, including the creation of a new *Criminal Code* offence that criminalizes the advocacy or promotion of the commission of terrorism offences. The remainder of the provisions in the Act come into force either 30 days after the Act received Royal Assent or on a day to be fixed by order of the Governor in Council. In addition to introducing two new pieces of legislation, the *Security of Canada Information Sharing Act* and the *Secure Air Travel Act*, Bill C-51 increases the powers given to the Canadian Security Intelligence Service "to address threats to the security of Canada," provides law enforcement agencies with enhanced ability to disrupt terrorism offences and terrorist activity, makes it easier for law enforcement agencies to detain suspected terrorists "before they can harm Canadians," creates new terrorism-related offences, and expands the sharing of information between government institutions.

For a discussion of the impact of Bill C-51 on charities and not for profits, see The Impact of Bill C-51 on Charities and Not for Profits, *Anti-Terrorism and Charity Law Bulletin* No. 39.

Digital Privacy Act

On June 18, 2015, Bill S-4, the *Digital Privacy Act*, which amends the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), was mostly proclaimed into force by Royal Assent. The Act creates greater opportunity for organizations to disclose personal information to certain organizations and individuals without the subject's knowledge or consent. The Act also restricts organizations from informing individuals that their personal information was shared with enforcement and security agencies under certain circumstances. Consequences for not complying with the Act include fines for failure to record and report breaches of security safeguards.

For more information on how Bill S-4 amends current legislation, see *Charity Law Bulletin* No. 341, by Terrance S. Carter and Colin J. Thurston.

2015 Pre-Budget Consultations

On May 25, 2015, the federal government issued a news release announcing that the House of Commons Standing Committee on Finance (the "Committee") will hold its 2015 pre-budget consultations from June 5 to August 7, 2015.

The themes for the 2015 pre-budget consultations are:

- Productivity: What federal actions regarding health, education, tools, technology, the federal public service and supports for the involvement of all Canadians would improve Canada's rate of productivity?
- Infrastructure and communities: What federal actions would ensure that Canada's communities have the infrastructure they need to support people and businesses, including in work, leisure and getting goods to market?
- Jobs: What federal actions would support Canadian residents as they secure employment, adapt their skills to meet the evolving needs of employers, and move to locations where jobs exist?
- Taxation: What federal actions in relation to personal and business taxation would result in the desired incentives for work, saving, spending, investment, job creation and other positive outcomes?

Prior to the announcement, the Committee had adopted a motion inviting the Standing Committee on Finance of the next Parliament to consider submissions received during these pre-budget consultations in the event that the upcoming federal election prevents the current Committee from tabling its pre-budget consultation report. The pre-budget consultation report is traditionally compiled by the Committee based on submissions it receives and is considered by the Minister of Finance in the development of the new federal budget. As the federal budget normally impacts charities in some way, any charities with proposals in mind are encouraged to participate in the pre-budget consultation process.

Submissions must be no more than 2,000 words in length. They must be sent in electronic format to finapbc-cpb@parl.gc.ca and received by the Committee no later than August 7, 2015, at 11:59 p.m. EST.

Corporate Update

By Ryan M. Prendergast

Canada Not-for-profit Corporations Act

As reported in the January 2015 *Charity Law Update*, Corporations Canada had provided an update on the number of federal not-for-profit corporations that had continued from Part II of the *Canada Corporations Act* ("CCA") to the *Canada Not-for-profit Corporations Act* ("CNCA"). At that time, of approximately 25,000 federal not-for-profits, including an estimated 17,000 active not-for-profits, originally incorporated under the CCA, 11,400 had continued under the CNCA. As of June 20, 2015, 12,282 federal not-for-profit corporations had completed the continuance process under the CNCA. While this is up somewhat, there would appear to be a significant number of federal not-for-profit corporations that still need to complete the continuance process.

CCA not-for-profit corporations that did not complete the continuance process by October 17, 2014 may be administratively dissolved by Corporations Canada. In this regard, as reported in previous *Charity Law Bulletins*, Corporations Canada has been sending notices of pending dissolution to those corporations that have not yet completed the continuance process. Federal not-for-profit corporations that have not continued within 120 days of the notice will be dissolved by Corporations Canada. Since notices of pending dissolution were being sent out by Corporations Canada as of December, 2014, it has now been more than 120 days for such not-for-profit corporations to have responded to Corporations Canada. As such, approximately 8,009 not-for-profit corporations have been administratively dissolved for failing to continue to date.

If a corporation has been dissolved for failing to continue, it will need to be revived. In this regard, Corporations Canada has a brief summary of the revival process and the steps that are required to be revived. Of course, the prudent approach would be for corporations that have not yet completed the continuance process to do so, regardless of whether a notice of pending dissolution has been received, in order to avoid needing to be revived.

Ontario *Not-for-profit Corporations Act, 2010*

As noted in earlier updates, there is no new information in relation to the coming into force of the Ontario *Not-for-profit Corporations Act, 2010* ("ONCA"), which remains as being no earlier than 2016. The website for the Ministry of Government and Consumer Services continues to note that the ONCA will not come into force until the Legislative Assembly passes a number of technical amendments to the ONCA and other statutes impacted by the ONCA, and the government is able to implement certain

technology updates to support these changes. Since the Legislative Assembly has adjourned until September 14, 2015, no updates in this regard will be anticipated until after summer.

Imagine Canada Releases Paper on Charities as an Economic Sector

By Jennifer M. Leddy

On June 23, 2015, Imagine Canada released a discussion paper entitled *Charities in Canada as an Economic Sector* (the "Paper") by Brian Emmett, Imagine Canada's Chief Economist for Canada's Charitable and Nonprofit Sector, and Geoffrey Emmett, Research Assistant. It was written to "take a balanced look at the Canadian charitable sector from an economic point of view." In doing so, the Paper emphasizes the important role and scope of the charitable sector in Canada's economy, discusses revenue sources for charities, and briefly highlights policy implications stemming from the sector's role in the economy. Overall, the authors stress that while charities are not analogous to for-profit businesses, the impact that they have on the economy is equally strong and is a necessary part of the broader economic picture.

The Paper begins by highlighting the significant role and scope of the Canadian charitable sector. The authors define the charitable sector as part of the service sector and emphasize that its growth "reflects growth in the service sector in general." For example, the charitable sector's contribution to Canada's GDP and employment is growing faster than many "traditional" sectors, such as construction, and the charitable sector employs nearly as many people as the manufacturing sector. This section of the Paper concludes by highlighting the commonalities between charities and small businesses, such as their relatively small size and the "significant risks to success and continuity" that exist for both sectors.

The Paper then discusses revenue sources for charities. It draws a key distinction between the private sector, in which customers determine financial success, and the charitable sector, in which "clients are somewhat passive beneficiaries of funding decisions by governments and donors." The charitable sector relies on government transfers, member and donor funds, and the sale of goods and services. It is interesting to note that the Paper highlights some of the same challenges regarding donations that were also included in this year's edition of Statistic Canada's *Spotlight on Canadians: Results from the General Survey*, such as the fact that donors are aging. For more information on the Statistics Canada report see *Charity Law Bulletin* No. 362.

The final section of the Paper is a relatively brief overview of associated policy implications. These include the fact that policy makers should consider the needs of the charitable sector in the same way

that they currently consider sectors more traditionally thought of as "economic". Also, the authors state that "the full suite of support programs available to small private businesses" should be made available to the charitable sector. They also emphasize that regulatory and income tax barriers to expanding earned income and investment opportunities should be addressed and social finance should be expanded. Finally, the authors argue that the importance of the charitable sector should warrant better data collection and analysis such as that which supports the small business sector.

Overall, this Paper provides an interesting and needed discussion, which situates the charitable sector as a key part of the wider Canadian economy. As the Paper highlights, given the fact that the charitable sector is facing increasing financial challenges, understanding its economic role is an important part of understanding how the sector can respond and move forward with innovative solutions.

Court Upholds Members' Right to Requisition a Meeting

By Ryan M. Prendergast

On May 5, 2015, a decision was released from the Ontario Superior Court of Justice in the matter of *Saskatchewan WTF Taekwondo et al v Taekwondo Canada*. The applicants, being the various provincial bodies of Taekwondo Canada making up its membership, sought a court order calling a meeting of members under section 168 of the *Canada Not-for-profit Corporations Act* ("CNCA").

The members had requisitioned a meeting on February 15, 2015, to be called for the reinstatement of suspended members and the removal of several of the board of directors. The directors did not call a meeting on the basis of paragraph 167(3)(c) of the CNCA, which provides that directors need not call a meeting where it, "clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance…" As a result, the members attempted to call a meeting on their own when the directors refused to do so, but required the membership list, which the board did not provide.

The Court was satisfied upon a review of the facts that there was "no basis for characterizing the motives of the members who requisitioned the meeting as being in the nature of a personal grievance." The Court emphasized that use of the word "clearly" in paragraph 166(6)(b) of the CNCA meant that "only requisitions which are clearly personal grievances are to be rejected." In addition, the Court also noted that "the right to call a special meeting is a substantive one and is not lightly to be interfered with." In this regard, the board had also sought an exemption from the Director under the CNCA from the requirement to provide the membership list. However, the Court stated that such requests cannot act as an injunction to prevent calling a meeting or complying with the CNCA. Moreover, the court did not

find the fact that an annual meeting would be forthcoming was a reason for not calling the requisitioned meeting, particularly when the annual meeting was a year away and no notice had been provided.

As the CNCA remains relatively new legislation, it can be assumed that membership rights will continue to be enforced through the courts, and specifically the courts will be asked how the various provisions of the CNCA are to be interpreted in the not-for-profit context. It is important to note that the court looked to case law concerning similar provisions of the *Canada Business Corporations Act*, on which a substantive portion of the CNCA is based. This trend is likely to continue as the CNCA continues to be interpreted through litigation.

Report on Exploring Potential of Social Finance

By Linsey E.C. Rains

Exploring the Potential of Social Finance in Canada, a Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities ("Committee"), was released on June 17, 2015 (the "Report"). The Report is the culmination of the Committee's study of "Social Finance's potential for unlocking new sources of capital to improve social and economic outcomes for Canadians." During the consultations for the study, witnesses before the Committee included representatives from not-for-profits, charities and government departments.

The Report begins by characterizing the phenomenon of social finance or impact investing as "an approach to mobilizing repayable capital in ways that seek to create positive social impacts" and proceeds to examine the Canadian social finance market, regulatory framework, potential ways to measure social impact, different ways to improve knowledge and capacity; and develop the social finance market.

The Report concludes with a total of nine recommendations being made by the Committee. Of those recommendations, four make specific reference to the perceived inadequacies of the current regulatory framework for charities and non-profit organizations ("NPOs"). In particular, the Committee recommends:

- "[T]he federal government consider legislative and policy measures [...] to allow charities greater flexibility to conduct business activities for the purpose of reinvesting profits back into their charitable missions."

- CRA and the Department of Finance ("Finance") "review current regulations with respect to the profit-generating activities of non-profit organizations, and consider options to allow some non-profits with a clear social purpose to generate surplus revenues in some circumstances."
- CRA and Finance "conduct a review of current policies with respect to program-related investments, with a view to improving the communication and/or clarity of these measures, as necessary."
- "Employment and Social Development Canada continue to encourage cross-sector collaboration on social finance by convening regular meetings of stakeholders from the for-profit and the non-profit and charitable sectors, in order to encourage partnership development and to share information and best practices."
- It will be interesting to see if any of the Committee's recommendations have an immediate impact on CRA's current policy positions with regard to the profit-generating activities of NPOs and charities, as the Committee's recommendations seem to focus on policy rather than legislative measures to address social finance issues.

Bank Required to Pay Nominal Damages for Breaching its Privacy Policy

By Sepal Bonni

Charities and not-for-profits often publish privacy policies on their websites as a way to inform the public of their practices regarding the handling of personal information. It is important that charities and not-for-profits properly implement their privacy policies and ensure that all individuals within the organization are familiar with the privacy policy, in order to avoid the exposure to liability, as was the case in *Albayate v Bank of Montreal* ("*Albayate*").

In this case, the Bank of Montreal (the "Bank") changed Ms. Albayate's address without her consent, which resulted in letters being mistakenly sent to her ex-husband, as well as inaccurately reported Ms. Albayate's address to two credit reporting agencies. Although the British Columbia Supreme Court did not accept all of Ms. Albayate's claims, the Court did conclude that the Bank breached Ms. Albayate's privacy rights under British Columbia's *Privacy Act* when it released her information to the credit bureaus, and also breached its privacy policy, which formed part of the contract between Ms. Albayate and the Bank.

Although Ms. Albayate was unable to prove any damages, the Court awarded her nominal compensation in the amount of $2000, which was based on case law before the Court in which compensation had been

awarded for breach of privacy or contract where applicants had not established they suffered a pecuniary loss. It is important to note that the case law also established that such awards can often be much greater, in some cases up to $20,000, despite the ability to prove any damages.

Prior to advancing the current claims, Ms. Albayate had filed two complaints, based on the current facts, with the Office of the Privacy Commissioner of Canada. In each case, the Privacy Commissioner conducted a complaint review. It determined that in the first complaint the Bank had contravened the principles of PIPEDA related to collecting personal information and that the second complaint was well-founded and the issue had been sufficiently resolved.

Although this case relied upon British Columbia's *Privacy Act*, for jurisdictions in Canada which have not adopted a cause of action by statute for breach of privacy, some provincial jurisdictions provide recourse at the common law for a cause of action concerning breach of privacy. For example, in Ontario, the Court of Appeal recently recognized a cause of action identified as "intrusion upon seclusion" (for more information on this newly recognized tort, see *Charity Law Bulletin* No. 277).

Despite the relatively low damage award in this case, charities and not-for-profits should be aware that breaching an individual's privacy can result in various causes of action, complaints to the Office of the Privacy Commissioner of Canada, loss of reputation to the organization, and legal costs. As *Albayate* illustrates, simply enacting a privacy policy without allocating sufficient resources to properly implement the privacy policy will render it meaningless and may expose charities and not-for-profits to the sanctions and penalties available under various laws. Accordingly, charities and not-for-profits should take steps to appropriately implement the terms of their privacy policies at the operational level, and ensure that employees, staff and volunteers know how to recognize potential privacy issues.

Court Declares Membership Resolution Inconsistent with *Corporations Act*

By Ryan M. Prendergast

On April 17, 2015, the Ontario Superior Court of Justice released its decision in the matter of *Vaughan Community Health Centre Corporation v Annibale* ("*Vaughan*"). In contrast to the decision in *Saskatchewan WTF Taekwondo et al v Taekwondo Canada*, discussed earlier in this *Charity Law Update* the Court in *Vaughan* declared that the subject matter of a proposed resolution that the members of a not-for-profit corporation governed by the *Corporations Act* (Ontario) (the "OCA") wanted to pass was inconsistent with the OCA and the corporation's by-laws, and also stated that the resolution was not consistent with the role of corporate members.

In this regard, a portion of the corporate membership of Vaughan Community Health Centre Corporation attempted to requisition a meeting to remove certain directors, and make amendments to the by-laws of the corporation concerning the qualifications and number of directors.

After a review of the facts, the Court determined that the members are not entitled to unilaterally make amendments to the by-laws of a not-for-profit corporation under the OCA. In this regard, the OCA provides that the ability to pass by-laws, subject to confirmation or rejection by the members, rests solely with the directors, which was mirrored in the by-laws of the corporation. In addition, with respect to the changes concerning directors, the OCA requires a special resolution to increase or decrease the number of directors, which by definition first requires a resolution to be passed by the directors, then confirmed by the members. In addition, while the OCA provides for the ability for the membership to remove directors if the by-laws so provide, in this case, the by-laws required that reasons for removal be given and that the directors be allowed to respond. Since that did not occur in this instance, the Court found that such removal would not comply with the by-laws.

While this case does not provide any new interpretations of significance concerning the OCA, the detailed review of both the OCA and by-laws by the court in relation to the resolution that the members wished to pass indicates that a not-for-profit corporation will not always be provided any latitude with respect to compliance with its governing documents. As such, it is important to confirm that corporate decisions taken by a not-for-profit corporation, whether under the OCA or other not-for-profit legislation, will not be off-side either the statutory provisions or the by-laws.

Ambiguous Termination Provision Deemed Unenforceable

By Barry W. Kwasniewski, *Charity Law Bulletin* No. 367, June 24, 2015

In *Miller v A.B.M. Canada Inc* ("*Miller*"), the Ontario Superior Court of Justice Divisional Court affirmed an earlier decision from the lower court, in the process providing key insight into how the courts will interpret termination provisions in written employment contracts. On March 19, 2015, Associate Chief Justice Marrocco upheld the trial judge's reasoning and dismissed the appeal by the former employer, A.B.M. Canada Inc. In the reasons for judgment, the Divisional Court affirmed the original conclusion that the termination clause in question was null and void because it provided lesser benefits than those provided for in the Ontario *Employment Standards Act, 2000* ("ESA"), despite the fact that the clause adequately considered the minimum notice period. The decision in *Miller* therefore underscores the importance of including all forms of remuneration in a termination clause, including

benefits. If employers fail to do so they run the risk of having the termination clause declared unenforceable.

The decision also emphasizes that any ambiguity in contract clauses will likely be interpreted in favour of the employee. As such, the case stands as a warning to all employers, including charities and not-for-profits, about the importance of ensuring that termination clauses in employment contracts do not undercut the ESA minimum provisions. If such clauses do not reflect ESA minimum requirements, common law notice periods will apply. This *Charity Law Bulletin* summarizes the comments from both court decisions in *Miller*.

BC Court Assesses Fiduciary Duty to a Board

By Esther S.J. Oh

In *Kamloops-Cariboo Regional Immigrants Society v Herman*, the plaintiffs, including Kamloops-Cariboo Regional Immigrants Society (the "Society") and one of the Society's directors, alleged that Wanda Herman, the former executive director of the Society, had committed a number of torts against them. The Society is a not-for-profit society incorporated under the British Columbia *Society Act* with charitable status and a mandate to assist immigrants and visible minorities integrate into Canadian society. Prior to the case being brought to court, several employees of the Society, including Ms. Herman, had a tumultuous relationship with the Society's Board, resulting in some employees taking medical leave for stress, as well as accusations of mistreatment and harassment from Board members that in a few cases resulted in human rights complaints.

The plaintiffs brought the action against Ms. Herman on a number of grounds, including allegations of (1) breach of confidentiality, (2) breach of fiduciary duties, and (3) conspiracy to injure the Society. The plaintiffs alleged that Ms. Herman breached her duty of confidentiality to the Society by sharing information concerning internal efforts to resolve the Society's employment disputes to the press and with the human rights tribunal ("HRT"). The plaintiffs alleged that Ms. Herman breached her fiduciary duties when she established a committee that had the intention of replacing the Board, and filing complaints with the HRT, among other things. The Board's allegations involving Ms. Herman's conspiracy to injure the Society included Ms. Herman's attempt to arrange a meeting of members to replace the Board, as well as filing complaints with the HRT against the Society and its board.

In dismissing all of the causes of action, the court found that Ms. Herman did owe a fiduciary duty to the Society, as an officer of the Society, and that she had acted in compliance with her duty to the Society.

The court stated that the Plaintiffs had not demonstrated that the complaints to the HRT were unfounded and that Ms. Herman's actions were not done in malice. Instead, the court found that Ms. Herman's actions were taken based on her perception that the Board's actions were putting the Society at risk. With respect to the allegations of breaches of confidentiality, the court found there was no evidence Ms. Herman directly made statements to the press concerning the Society (the comments were attributed to other Committee members); and the information concerning employment disputes were not subject to confidentiality since that information was obtained through other employees who contacted Ms. Herman while Ms. Herman was on sick leave (i.e., not during Ms. Herman's term as executive director).

The court further found that the tort of conspiracy to injure the Society should fail because Ms. Herman's actions were lawful, and she did not act in a way that would imply intent to injure the Society. Instead, the court found Ms. Herman had genuine concerns with the function and role of the Board, as did many other Society members, and that Ms. Herman's actions were taken to remediate what the judge described as the Society's "chronic dysfunction."

CRA Comments on Retention of Books and Records

By Linsey E.C. Rains

In a recently issued technical interpretation (#2014-0548841E5), Canada Revenue Agency ("CRA") commented on the required retention periods for books and records of corporations and unincorporated entities under the *Income Tax Act* ("ITA") and the *Income Tax Regulations* (the "Regulations"). In particular, a taxpayer had sought clarity on the "interaction between the general requirements with respect to the retention of books and records outlined under subsection 230(4) of the Act and the specific requirements in section 5800 of the Regulations." The analysis of CRA's Income Tax Rulings Directorate appears to introduce a novel distinction between records it identifies as permanent and those it identifies as non-permanent. Although the technical interpretation is silent on the books and records of incorporated and unincorporated qualified donees and non-profit organizations, presumably the distinction would also apply to these entities where the ITA and Regulations parallel.

Paragraph 230(4)(a) of the ITA stipulates that certain books and records along with "every account and voucher necessary to verify the information contained therein" must be retained for a prescribed period. Subsection 5800(1) of the Regulations sets out the prescribed periods "[f]or the purposes of paragraph 230(4)(*a*) of the Act." More specifically, paragraph 5800(1)(a) of the Regulations sets out the prescribed period for certain books and records relating to corporations such as a general ledger or other books of

final entry and certain meeting minutes. Paragraph 5800(1)(c) establishes the prescribed period for similar records held by unincorporated businesses. The technical interpretation refers to these paragraph 5800(1)(a) and (c) records as "permanent records," which must be kept from the time of incorporation until two years after corporate dissolution or six years after the end of an unincorporated business' taxation year when it ceases to operate.

Paragraph 230(4)(b) of the ITA establishes that "all other records and books of account referred to in this section, together with every account and voucher necessary to verify the information contained therein" must be retained for six years from the end of the tax year to which they relate. The technical interpretation refers to both paragraph 230(4)(b) records and the additional corporate records prescribed in paragraph 5800(1)(b) of the Regulations as "non-permanent" records.

Interestingly, this distinction between permanent and non-permanent records does not appear to have been previously made in other CRA guides and publications related to records. However, because the text of the taxpayer's enquiry was not included in the technical interpretation, it is unclear whether the distinction was generated by CRA or the taxpayer.

Tax Implications Related to Third Party Fundraising

By Jacqueline M. Demczur

Canada Revenue Agency ("CRA") recently released a CRA View (#2014-0517481E5) that comments on issues related to third-party fundraising. This View was released in response to an inquiry regarding the tax implications to an organizer (i.e., the fundraiser) of a fundraising event, where the organizer as a non-profit organisation intended to give the proceeds of the event to a registered charity.

In response, CRA stated that, generally, fundraising is considered a profit activity, but CRA may allow a non-profit organization, as defined under paragraph 149(1)(l) of the *Income Tax Act* ("ITA"), to carry out some fundraising activity without jeopardizing its tax exempt status if the scope of the fundraising activities does not escalate to the point where it could be considered a purpose of the organization. However, if the scope of the fundraising does reach this point, then the organization will no longer qualify for tax-exempt status under section 149(1)(l) of the ITA. Consequently, CRA went on to state that "organizations that are established and operated for the sole purpose of raising funds are not considered non-profit organizations even if all the profit from a fundraising activity is donated to a registered charity." In this particular circumstance, CRA could not determine whether the scope of

fundraising activities in relation to other activities was so great as to be considered an organizational purpose.

CRA then went on to review the issue of whether fundraisers are carrying on a business or if amounts that they receive can be considered gifts, an issue that CRA indicated was always a question of fact. In this regard, CRA further indicated that when fundraising generates income from a business, this income should generally be included in calculating income under section 9 of the ITA. In such circumstances, where the fundraised amounts were donated to a registered charity, a donation receipt may be available to the fundraiser, allowing it to reduce either taxable income or taxes payable.

However, CRA is of the opinion that, in many cases, the amounts raised would be considered gifts from the outset and would, therefore, not treated as taxable income. This is because CRA would view the fundraisers as acting as agents for the persons from whom the funds were collected and, therefore, responsible for transferring the property collected from the persons over to the registered charities in question. CRA concluded that "generally, it is the CRA's view that where fundraisers collect funds from the general public and pay the amounts to a registered charity the fundraisers would not be entitled to a donation receipt."

It is also noteworthy that, in its response, CRA referenced the fact that in the Federal Budget 2014, the Minister of Finance announced that there would be a public consultation on the income tax framework for non-profit organizations and that "we encourage all interested persons to participate in the consultation process." To date, it does not appear that the Department of Finance has officially launched this consultation process. Non-profit organizations should keep an eye out for developments in this regard.

Ontario Court Defines "the Poor"

By Theresa L.M. Man

In *St. Catharines Seniors Apartments Phase Three Inc. v Municipal Property Assessment Corporation et al*, a recent endorsement in the Ontario Superior Court released on June 17, 2015, the court addresses an application by a housing charity for exemption from municipal taxation. Specifically, the housing provider sought exemption under paragraph 12(iii) of section 3(1) of the Ontario *Assessment Act* (the "Act"), which exempts from taxation lands owned by "any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported in part by public funds."

The charity operates a residential apartment building for low income seniors. The issue before the court was whether the residents of the apartment building could be considered "poor" as contemplated by the Act to relieve poverty, or whether it merely provides affordable housing to seniors.

The court clarified that in determining a charity's purpose, it is the actual operation of the organization rather than its corporate objects that is the determining factor. It was therefore immaterial that the corporate objects of the applicant do not mention "the poor." The court also held that "poor" is a relative term; it does not mean the very poorest or the completely destitute. Instead, only an element of economic deprivation or need is required.

After comparing the low income cut-off statistic numbers for the community where the building is located with the income of the residents, the court was satisfied that the average annual income of $24,140 and a median annual income of $22,042 of the residents would equate with any common sense notion of "poor" as envisioned by the Act. Even if 5 of the 35 units did not meet the definition of "poor", the court was satisfied that the remaining 30 units being rented to the "poor" meant that the primary actual purpose of the charity continued to be to provide affordable housing for poor senior citizens.

This case follows the decisions of previous cases upon which charities in Ontario that provide housing for the "poor" with public funds rely upon exemption from municipal taxes. With the continuing trend of the growth of the senior population in many cities, this tax benefit is especially helpful to those that provide housing to "poor" seniors.

NPO Tax Exempt Status — Affordable Housing Providers

By Ryan M. Prendergast

On May 27, 2015, Canada Revenue Agency ("CRA") released a CRA View (#2014-054279) that addressed the potential tax implications for a non-profit organization, as described in paragraph 149(1)(l) of the *Income Tax Act* ("ITA"), that derives income from the long-term lease of parking spots to a business owned by one of its board members. In this case, the non-profit organization is an affordable housing provider. The comments provided by CRA considered whether the profit earned was incidental and whether it arose from activities that were connected to the organization's non-profit objectives.

CRA stated that both of these considerations were questions of fact. In this context, CRA concluded that income from the long-term rental of parking spots to a third-party by an affordable housing provider

"will generally not be considered to be directly connected to the objective of providing affordable housing." That said, CRA also stated that a review of all circumstances could lead to the conclusion that the housing provider "does not have a profit purpose, notwithstanding the lease." CRA then briefly considered whether the income would be made available for the personal benefit of any member. CRA emphasized that, in general, income cannot be made available, either directly or indirectly, for the personal benefit of any member. However, in this particular circumstance, it could not determine whether the board member in question was also a member of the housing provider.

As an alternative to proceeding under the requirements of paragraph 149(1)(l), this interpretation also highlighting that affordable housing providers can potentially be exempt from tax under a number of less restrictive sections of the ITA including: municipal corporations (paragraph 149(1)(d.5)), limited divided housing companies (paragraph 149(1)(n)), and corporations "constituted exclusively for the purpose of providing low-cost housing accommodation for the aged" (paragraph 149(1)(i)). Many not-for-profits may file their annual corporate returns (T2) with CRA on the basis that they are a non-profit organization under paragraph 149(1)(l), when in fact there may be a tax-exempt category under the ITA that better describes their organization and purpose. Recent CRA Views over the last several years have had the effect of further tightening the types of revenue generating activities non-profit organizations can undertake while being reasonably confident that they are complying with the definition in paragraph 149(1)(l). As such, many not-for-profits that currently file as non-profit organizations under paragraph 149(1)(l) may want to review whether they are better suited as a tax-exempt entity under another paragraph in the ITA.

Director General Appears Before Senate Committee on Terrorist Financing

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

The Standing Senate Committee on National Security and Defence met on June 1, 2015 to consider Budget 2015, as contained in Bill C-59, and to study and report on security threats facing Canada. This meeting included an appearance by Cathy Hawara, Director General of the Charities Directorate of Canada Revenue Agency, and Alastair Bland, Director, Review and Analysis Division of the Charities Directorate. Among the issues discussed with the Senate Committee concerning the Charities Directorate were terrorist recruitment and financing, and terrorist operations and prosecutions. Specific reference was made to CRA's Review and Analysis Division, which, among other roles, audits registered charities based on the potential risk of terrorist financing abuse that is posed to the charitable

sector and Canadian society as a whole in accordance with international standards set by the Financial Action Task Force.

Following the coming into force of Bill C-51, Ms. Hawara clarified that two separate thresholds would need to be met before the information it possesses could legally be shared. The first threshold would be under the *Income Tax Act.* CRA would need reasonable grounds to suspect that the information would be relevant to an investigation of a threat to the security of Canada under the *CSIS Act* or to an investigation of a terrorism offence under the *Criminal Code*. If this was the case, then CRA would have to consider the second threshold, which is laid out in the *Security of Canada Information Sharing Act*, as found in Bill C-51, which will come into force on a day to be fixed by order of the Governor in Council. This Act requires that the information also be relevant to the responsibilities of the organization receiving or requesting the information. Ms. Hawara, however, indicated that even if these thresholds are met, CRA would retain discretion over how it will share information in all circumstances.

The Senators in the meeting were intent on learning the processes of CRA, as well as the importance of oversight following the coming into force of Bill C-51, emphasizing that it is crucial to have regular oversight of the employees of the Charities Directorate who are assessing whether information can be shared, as well as the regulator as a whole, in order to function in a way that simultaneously addresses terrorism and retains charitable organizations' privacy.

Bill 113 to Update Criminal Record Check Process in Ontario

By Esther S.J. Oh and Sean S. Carter

On June 3, 2015, the Ontario government introduced Bill 113, the *Police Record Checks Reform Act, 2015*. If passed, the Act would implement a new statutory regime in Ontario governing police checks, which generally describe searches of the Canadian Police Information Centre ("CPIC") and other applicable police databases to screen an individual for employment, volunteer or other purposes.

Changes arising from Bill 113 would include the following:

- Standardization of the police checks that can be requested by individuals, as well as standardization of the information authorized for disclosure for each type of police check. The three types of police checks described in Bill 113 are: criminal record checks, criminal record and judicial matters checks, and vulnerable sector checks. At the present time, police checks are not standardized across Ontario and are instead governed by different procedures established by each respective regional police service.

- Restrictions placed on the release of non-conviction records and mental health information. Non-conviction information would only be disclosed in the context of vulnerable sector checks where individuals are applying to work or volunteer with vulnerable individuals as described in Bill 113. An individual would also be able to request reconsideration of the release of non-criminal/non-conviction records as outlined in Bill 113.
- Police record checks will always be sent to the individual for review before any disclosure of the check to an employer or other organization that requested the police check. After receiving the results of the police check on himself/herself an individual may provide written consent allowing the disclosure of the police check results to another person or individual.
- Authorization to third-party background screening companies to conduct certain types of police checks.
- Bill 113 is modeled on the Ontario Association of the Chiefs of Police's *LEARN Guideline for Police Record Checks*, an initiative to standardize the procedures that apply to obtain police checks. The LEARN Guidelines were first introduced in March 2011 and updated in June 2014.

Judicial Renderings — Interesting Cases to Consider

By Terrance S. Carter

The following paper, entitled *Judicial Renderings – Interesting Cases to Consider* was presented at the Canadian Bar Association's National Charity Law Symposium on May 29, 2015. The paper provides an overview and commentary on some of the more important Canadian and international court decisions impacting charities and not-for-profits from the past year. It considers case law in a range of areas including the relationship between political purposes and charitable purposes, advancement and freedom of religion, directors' liability, estate gifts, and charitable receipting issues. It is clear from the depth and breadth of the issues raised in the cases summarized that the judicial renderings over the past twelve months have been particularly fruitful. It is important for those working in the charitable and not-for-profit sectors to be aware of recent case law in the international context as it may very well serve as bellwethers of trends in charity law that may be coming to Canada at some point in the future.

IN THE PRESS

Speakers Corner: Tax Implications of Crowdfunding a Work in Progress by Ryan M. Prendergast and Linsey E.C. Rains, *Law Times*, June 1, 2015.

Charitable Intent: Navigating the Murky Waters of Terrorist Financing an interview with Terrance S. Carter by Doug Beazley for the CBA National Charities and Not-for-Profit Law Section PracticeLink, May 2015

Charity Law Update - May 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

The 2015 National Charity Law Symposium hosted by the Canadian Bar Association was held in Toronto on Friday, May 29, 2015, including the presentation of the first Canadian Bar Association Jane Burke-Robertson Award of Excellence in Charity and Not-for-Profit Law to Arthur Drache, C.M., Q.C.

Judicial Renderings – Interesting Cases to Consider presented by Terrance S. Carter at the 2015 National Charity Law Symposium hosted by the Canadian Bar Association was held in Toronto on Friday, May 29, 2015. Click on the following links for the paper and PDF handout.

Basic Legal Risk Management for Charities and Non-Profits presented by Terrance S. Carter at an evening seminar on "Managing the Risk" hosted by BDO LLP on Wednesday June 3, 2015.

Healthcare Philanthropy: Check-Up 2015, co-presented by Carters and Fasken Martineau on Thursday, June 11, 2015, included the following topics:

- "Essential Charity Law Update" presented by Theresa L.M. Man
- "The New Era for Estate Donation Rules. How They Will Impact on Charities and Donors" presented by M. Elena Hoffstein
- "Preparing for and Surviving a Charity CRA Audit" presented by Terrance S. Carter
- "The Carter Decision and Physician-Assisted Dying: Implications for Healthcare Institutions and their Foundations" presented by Kathryn L. Beck and Rosario Cartagena

Volunteer Agreements: Managing Volunteer Relations and Reducing Risk Plus Employment Law Update, presented by Barry W. Kwasniewski for Imagine Canada Sector Source on Thursday, June 18, 2015.

UPCOMING EVENTS AND PRESENTATIONS

CSAE Summer Summit will include a session entitled "Avoiding Board Meeting Nightmares" on Thursday July 9, 2015, presented by Theresa L.M. Man and Terrance S. Carter.

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