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CHARITY LAW UPDATE

MARCH 2015

EDITOR: TERRANCE S. CARTER

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

MARCH 2015

SECTIONS

Recent Publications and News Releases 2
In the Press 20
Recent Events and Presentations 20
Upcoming Events and Presentations 20
Contributors 21
Acknowledgements, Errata and other Miscellaneous Items 24

HIGHLIGHTS

SCC Delivers Strong Judgment on the Communal Aspect of Freedom of Religion
CRA News
Statistics Canada Releases New Survey on Giving and Volunteering
First CASL Fine Issued
Tax Court Upholds Common Law Definition of "Gift"
Dept. of Finance Evaluates Charitable Donation Tax Credit
CRA Examines Public Bodies Performing a Function of Government
Court Refuses to Expand Jurisdiction to Alter a Charitable Constitution
Corporate Update
Tax Court Comments on Recordkeeping and Receipting
Court of Appeal of Alberta Upholds Court's Bylaw Amendments
Balancing Privacy Legislation and the Common Law
Upcoming Minimum Wage Changes in Ontario
Review of Accessibility for Ontarians with Disabilities Act
Ontario Court Applies "Family Status" Test for Discrimination
$1.5M Fine for Australian Donation Scheme Promoters
CBA Submission to Parliament on Bill C-51

The 2015 National Charity Law Symposium is being hosted by The Canadian Bar Association on May 29, 2015.

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RECENT PUBLICATIONS AND NEWS RELEASES

SCC Delivers Strong Judgment on the Communal Aspect of Freedom of Religion

By Jennifer M. Leddy

On March 19, 2015, the Supreme Court of Canada (the "Court") ruled that requiring religious schools to teach their own religion through an objective lens seriously infringes their religious freedoms. In *Loyola High School v Quebec*, all seven sitting Justices in the majority and minority opinions held that the decision of the Quebec Education Minister ("Minister") that Loyola High School ("Loyola"), a private Catholic school, must teach Catholicism from a neutral perspective interferes with the freedom of religion of Loyola and does not advance the objectives of the Minister's standard Program on Ethics and Religious Culture (the "ERC Program") to promote "recognition of others and the common good."

The ERC Program requires students to study world religions, reflect on ethical questions, and engage in dialogue. Teachers are required to provide instruction in an objective and neutral manner. The Minister can grant an exemption from the ERC Program to private schools if they offer an alternative but equivalent program. Loyola's request for an exemption was refused because its alternative program proposed to teach all elements of the ERC Program from a Catholic perspective. Loyola subsequently revised its position to say that it would teach world religions objectively but teach Catholicism and the ethics of other religions from a Catholic perspective. The Minister maintained its position that no aspect of the ERC Program, including Catholicism, could be taught from a Catholic perspective.

Significantly, both the majority and concurring minority opinions affirmed that religion has communal aspects that are protected by the *Charter*. The majority decided that it was not necessary to determine whether Loyola as a corporation has the right to freedom of religion under the *Charter* because the Loyola community who "seek to offer and wish to receive a Catholic education" are protected by the *Charter*. By contrast, the minority easily concluded that "the communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola."

A central question before the Court was how to balance freedom of religion with the values of the state when regulating religious schools. In this regard, the majority underlined that secularism does not mean excluding religion. On the contrary, secularism includes "respect for religious differences" and that "through this form of neutrality, the state affirms and recognizes the religious freedom of individuals and their communities."

While the majority and minority opinions agreed that the Minister interfered with the freedom of religion of Loyola by requiring it to teach Catholicism from a neutral or non-religious perspective, they disagreed with respect to teaching about the ethics of other religions. The majority held that teaching the ethics of other religions in a neutral way would not interfere with Loyola's freedom of religion because "in a multicultural society, it is not a breach of anyone's freedom of religion to be required to learn (or teach) about the doctrines and ethics of other world religions in a neutral and respectful way."

By contrast, the minority held that to expect Loyola teachers to ensure "that all viewpoints are regarded as equally credible or worthy of belief would require a degree of disconnect from, and suppression of, Loyola's own religious perspective that is incompatible with freedom of religion."

In this case both the majority and minority opinions provide a robust affirmation of freedom of religion which will be reassuring for both individuals and religious organizations.

CRA News

By Esther S.J. Oh

CRA Updates its Information on the Community Volunteer Income Tax Program

Starting in February 2015 and continuing throughout March, CRA has been promoting and updating material on its Community Volunteer Income Tax Program ("CVITP"). Under the CVITP community organizations collaborate with CRA to host tax preparation clinics and arrange for volunteers to prepare income tax and benefit returns for eligible individuals who have a modest income and a simple tax situation. The link includes information on how to become a CVITP volunteer, how to become a participating community organization and a video entitled "Need a Hand?" This video describes the CVITP and its associated tax preparation clinics. These clinics will continue until the end of April. Interested charities and not-for-profits that wish to host tax preparation clinics or send volunteers to assist with the CVITP program may contact CRA at the enclosed information. In addition, charities and not-for-profits serving individuals in need of the above service may direct those individuals to a clinic to obtain assistance with their personal income tax return.

Director General Responds to Media Allegations Regarding CRA Charity Audits

In a letter to *The Toronto Star* published on March 6, 2015, Cathy Hawara, Director General of CRA's Charities Directorate, responded to a recent *Toronto Star* article entitled "Charity Law Blocks Progress

on Issues Facing Canadians" which alleged that a number of Canadian charities had undergone CRA audits involving political activities in order to silence criticism of various federal government policies.

In her response, Ms. Hawara explained that selection of charity audit files is handled by CRA alone, from a broad cross-section of all four categories of charity (poverty, education, religion, and other purposes beneficial to the community) which can be selected for a range of reasons, including: random selection; referrals from other areas of the CRA; complaints from the public; articles in the media; or a follow-up on a previous CRA audit.

Ms. Hawara wrote that between 800 and 900 registered charities (reflecting approximately 1 percent of the charitable sector), are audited in any given year. Roughly 1.6 percent of the total charities to be audited by CRA for the periods 2012 to 2016, inclusive, will have audits focussed on political activities (which amounts to roughly 15 audits per year focussed on political activities and 0.07 percent of the charitable sector as a whole). In addition, Ms. Hawara noted CRA encourages compliance through education and client service, to assist charities to meet their legal obligations, which resulted in 93 percent of audited charities being able to work with CRA to resolve any identified issues.

Statistics Canada Releases New Survey on Giving and Volunteering

By Terrance S. Carter, *Charity Law Bulletin* No. 362, March 25, 2015

On January 30, 2015, Statistics Canada released its initial analysis of data from the 2013 General Social Survey on Giving, Volunteering, and Participating in its *Spotlight on Canadians: Results from the General Social Survey* (the "Report"). The General Social Survey is conducted every three years. The Report provides an early view of the trends regarding how Canadians support each other, either directly or indirectly, by volunteering, including the number of hours volunteered, or by donating to chartable and non-profit organizations, including donation rates and amounts. The Report provides a picture of volunteering and giving in 2013, as well as comparisons between the 2013 data and information collected in 2010, 2007 and 2004. This *Charity Law Bulletin* provides a brief review of the findings in the Report. This information will be important for charities and non-profit organizations so that they can fully understand recent societal trends shaping their work.

First CASL Fine Issued

By Ryan M. Prendergast

On March 5, 2015, the Canadian Radio-television and Telecommunications Commission ("CRTC") released a news release indicating that it had issued the first Notice of Violation under Canada's Anti-

Spam Legislation ("CASL"), including a penalty of $1.1 million, to Compu-Finder, a for-profit organization. The CRTC's Chief Compliance and Enforcement Officer found that Compu-Finder sent commercial electronic messages "CEMs" without consent and that the unsubscribe mechanism in Compu-Finder's emails did not work properly.

This Notice and its associated penalty illustrates that violations of CASL have the potential to bring about very heavy fines for organizations that send CEMs without consent from the recipient, or where the prescribed requirements, including an unsubscribe mechanism, are not functioning. Although many registered charities will rely on the exemption under CASL for CEMs sent for the primary purpose of raising funds, this recent fine underscores the importance of implementing and following a CASL compliance program for CEMs that are not exempt and for not-for-profits that do not fall within this or any other exemption found in CASL.

The penalty appears to have been specifically related to four alleged violations of CASL between July 2, 2014 and September 16, 2014, although it is also noteworthy that an analysis of complaints made to the Spam Reporting Centre showed that Compu-Finder accounted for 26 percent of all complaints submitted in its sector. It is not clear, therefore, if the penalty was in respect of just four alleged violations of CASL, i.e., four non-compliant CEMs, or in respect of broader activity. If the former, the penalty of $1.1 million provides insight into how the CRTC will determine the appropriate penalty. As discussed in previous *Charity Law Bulletins* and *Charity Law Updates*, charities and not-for-profits should proactively review all electronic messages they send to verify if they are exempt from CASL, as well as ensure that any third-parties that distribute communications on their behalf properly comply with CASL. The recent Notice of Violation and the associated penalty show that CRTC is now actively investigating and pursuing organizations that violate CASL

Tax Court Upholds Common Law Definition of "Gift"

By Linsey E.C. Rains

On February 11, 2015, the Tax Court of Canada ("TCC") granted a Motion brought by the Crown under rule 53(1) of the *Tax Court of Canada Rules* to strike certain paragraphs related to the civil law definition of "gift" from a group of taxpayers' pleadings. In order to have portions of pleadings struck under rule 53(1) "it must be plain and obvious that the pleadings have no chance of success."

The Motion was brought in the context of a TCC case involving a group of taxpayers whose eligibility to claim the charitable donation tax credit for purported donations to a registered charity was in issue.

Although none of the purported gifts were made in Quebec, the taxpayers' pleadings relied, in part, on the *Civil Code of Québec* and the federal *Interpretation Act*. The taxpayers argued that the common law definition of gift was ambiguous, ultimately contending the civil law definition should be adopted instead because the latter definition is clearly defined. The TCC disagreed with the taxpayers and issued an Order striking the relevant paragraphs from the taxpayers' pleadings.

In the Reasons for Order ("Reasons") in *French v The Queen*, the TCC found the lack of a codified definition of gift in the common law system did not mean the extensive common law jurisprudence on the subject of gifts was unclear. Rather, the court held the jurisprudence "has very clearly established" that "a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor" (see, for example, *Maréchaux v R*). Alternatively, even if the Appellant had been successful in establishing that the term was ambiguous, the court found no authority for the principle that in instances of confusion with the common law, one turns to the civil law. Accordingly, the court concluded that the argument raised by the taxpayers was "hopeless."

At this point it is unclear whether the Reasons cited by the court will have any wider impact on how gifts are defined in future legal proceedings across Canada, but paragraph 28 of the Reasons indicates the TCC has another group of appeals in process that have raised similar issues.

Dept. of Finance Evaluates Charitable Donation Tax Credit

By Terrance S. Carter

On March 5, 2015, the Department of Finance released the 2014 edition of *Tax Expenditures and Evaluations*, which this year includes an *Evaluation of the Charitable Donation Tax Credit* (the "Evaluation"). This Evaluation was developed in response to the federal government's commitment in June 2013 to increase its efforts to monitor charitable giving trends and provide greater public awareness, transparency, and accountability in this area. The Evaluation emphasizes the importance of the charitable donation tax credit (the "donation tax credit") because of the significant amount of money that Canadians claim each year. For example, in 2012, Canadians claimed $8.6 billion worth of donation tax credits.

The Evaluation focuses on how effectively the donation tax credit is able to encourage individuals to donate more often, weighed against the cost of providing the credit. It also reviews trends in charitable giving in Canada from 1995-2012. While the Evaluation does not draw any definitive conclusions about the effectiveness of the donation tax credit, it does provide interesting commentary about the extent and

nature of charitable giving in Canada and the factors that need to be considered in assessing such a credit.

The Evaluation begins by providing a general background to the donation tax credit, including outlining the after-tax price of charitable donations. Taking into account provincial variations, in 2015, this ranges from a high of 87 cents per dollar in Newfoundland and Labrador to a low of 76 cents in Quebec. The Evaluation then indicates that the cost of federal incentives for charitable donations in Canada was $2.5 billion in 2014. It is interesting to note that just 21.5 percent of tax filers claimed the donation tax credit in 2012. This is significantly lower than the 82 percent of Canadians that Statistics Canada estimated to have made a financial donation to a charity or non-profit organization in 2013. This variation is due to a number of factors, including: non-profit organizations cannot issue charitable donation tax receipts; tax receipts are not commonly requested for certain donations, such as those made during door-to-door campaigns or at certain fundraising events; and some donors may not claim the donation tax credit because of their individual tax considerations.

The bulk of the Evaluation considers the effectiveness of the donation tax credit. In this regard, the Evaluation explains that to be price effective, “the value to society of charitable activities that are funded by the additional donations generated by the credit should be greater than the cost to society of providing the credit.” Further, the donation tax credit should cost less than other options that could achieve the same outcome, such as direct government funding of charities. In this regard, the Evaluation considers that the donation tax credit functions differently than other methods, such as direct government funding, since the donation tax credit encourages individual preferences as opposed to government funding priorities.

The Evaluation does not arrive at a firm conclusion regarding the price effectiveness of the tax credit. It does state that international studies show that tax incentives similar to the Canadian donation tax credit “are likely effective in encouraging individuals to donate more,” but it also states that the current Canadian studies in this area are insufficient to draw definitive conclusions. Given the lack of conclusions, the Evaluation is more useful for its overview and analysis of charitable giving trends than for its stated purpose, to evaluate the effectiveness of the donation tax credit.

CRA Examines Public Bodies Performing a Function of Government

By Ryan M. Prendergast

In a recent CRA View (CRA #2014-0533151I7) dated December 10, 2014, CRA was asked whether a particular park qualifies as a "municipal or public body performing a function of government in Canada" for purposes of paragraph 149(1)(c) and the definition of a "qualified donee" under subsection 149.1(1) of the *Income Tax Act* ("ITA").

The CRA View reviewed that the two criteria necessary to qualify under this exemption are that the entity be a "public body" and that it perform a "function of government". Though the ITA does not provide a definition, CRA described that a "public body" is typically a body that acquires both its existence and its authority from a statute enacted by a legislature, and whose functions and transactions are for the benefit of, and affect the whole community of, persons to which its authority extends. Generally, a public body has a governance purpose and is accountable to those governed, regulated or represented by it. CRA further described that the term "function of government" means an activity or group of activities undertaken to meet a governance role or purpose within a geographic area.

Given the definitions above, CRA concluded that the Park in question could be a municipal or public body performing a function of government in Canada for the purposes of paragraph 149(1)(c) of the Act and the definition of a "qualified donee" in subsection 149.1(1) of the Act. CRA clarified that the Park in question appeared to be a public body, as it was constituted by a statute, though more information about its governance was required in order to demonstrate how it is accountable to the public, the province in which it was constituted, and the municipality. In order to qualify as performing a function of government, CRA outlined it is not sufficient to merely state that the park is providing several municipal type services. A review of the park's financial statements would have to show significant expenditure on infrastructure such as roadways, buildings, and sewer systems it claims to be providing, or, in the alternative, show evidence of other actions such as the passing of bylaws, evidence of an agreement with a neighboring municipality to provide fire protection or waste removal services, evidence of organizations subcontracted to provide the municipal type services on behalf of the park, or the name of the municipality that is charged with collecting taxes on behalf of the park and the agreement that governs the relationship.

Though the ambiguities of the definitions of the terms "public body" and "function of government" continue to exist, this interpretation helps to narrow the focus for future individuals and organizations that might struggle with similar issues of qualification under the ITA.

Court Refuses to Expand Jurisdiction to Alter a Charitable Constitution

By Jacqueline M. Demczur

In *Vancouver Opera Foundation (Re)*, the British Columbia Supreme Court ("BCSC") revisited the extent of its inherent jurisdiction over charitable trusts, as well as its ability to remedy irregularities in a society's affairs. This question arose after the Vancouver Opera Foundation ("the Foundation") applied for an order amending certain unalterable provisions in its constitution. On March 12, 2015, the BCSC held that the facts in this case did not justify expanding the court's inherent *cy-pres* jurisdiction. Of note is the fact that, in her decision, Justice Griffin specifically referred to the legislative amendments in the 2014 White Paper, which would allow societies to amend previously unalterable provisions. However, she underscored the fact that "so far the legislature has not decided to amend the law [and] it is not for the Court to make this policy choice."

The Foundation was incorporated in part to hold endowments for the funding and support of activities of the Vancouver Opera Association ("VOA"). The Foundation's constitution establishes three funds: the VOA Real Property Fund, the VOA Endowment Fund, and the VOA Capital Fund, all of which are subject to certain unalterable conditions that the Foundation sought to change because it found that the current provisions were "incompatible with current standards in not-for-profit governance and financial administration" and, consequently, that they restricted the ability of the Foundation to "efficiently and appropriately manage its assets."

In British Columbia, section 22 of the *Society Act* (the "Act") provides that except for a society's name and purpose, a society's constitution must state whether a provision is alterable or unalterable. Additionally, under section 85 of the Act, the court has statutory jurisdiction to remedy irregularities in the conduct of a society's affairs. The Foundation submitted that although there were no such irregularities in its constitution, section 85 should also be read to allow the court jurisdiction to "fill gaps". However, the BCSC held that section 85 only gives the court a "narrow authority" to remedy the specific defects listed in the section. It emphasized that any inherent jurisdiction exercised by a court must remain subject to parliamentary supremacy.

Justice Griffin then turned her mind to the scope of the court's inherent *cy-pres* jurisdiction to supply specific purpose where needed to implement a charitable trust. Justice Griffin referred to the BCSC's recent finding in *Mulgrave School Foundation (Re)* ("Mulgrave"), in which the court held that its inherent *cy-pres* jurisdiction is not meant to change conditions where the terms are simply inconvenient (see the January 2015 *Charity Law Update* for a further discussion of *Mulgrave*). Similarly, Justice Griffin concluded that *cy-pres* jurisdiction is too narrow to apply in this case, particularly because any

requested changes must reflect the intentions of the original donors and founders, and not be made purely for convenience if, otherwise, the charitable purpose remains possible and practical to perform. She noted that the *cy-pres* jurisdiction must be invoked narrowly and only to the extent necessary to address any identified impossibility or impracticality.

As a result, Justice Griffin found that the evidence in this case failed to show that the purpose of the Foundation or its specific trust funds may be impossible or impractical to achieve as currently structured and, as such, the court's *cy-pres* jurisdiction was not appropriate to exercise in this fact situation. That said, in her conclusion, Justice Griffin stated that she did not question the good faith of the Foundation's Board in seeking to make the proposed amendments. She then suggested that the Foundation members could try to convince their legislative representatives to amend the Act. This suggestion, combined with her previous references to the 2014 White Paper, point to some recognition that the current status of the law does not fully reflect the needs of societies in British Columbia and that, if adopted, the proposals in the White Paper could help address these needs more accurately than is done in the current Act.

Corporate Update

By Theresa L.M. Man

Canada Not-for-Profit Corporations Act — To Continue Or Be Dissolved

As reported in our 2015 January and February *Charity Law Updates*, Corporations Canada has started sending notices of pending dissolution to corporations incorporated under Part II of the *Canada Corporations Act* ("CCA") that have failed to continue to the new *Canada Not-for-profit Corporations Act* ("CNCA"). Corporations that do not complete the transition within 120 days of the notice will be assumed to be inactive and will be dissolved by Corporations Canada. 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. For a monthly update of notices sent by Corporations Canada, see http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs01440.html. More information on the continuance process is available from Corporations Canada's FAQs on transition .

Once a corporation is dissolved because it has not continued by the October 17, 2014, deadline, it will need to be revived and continued in one step. Corporations Canada is in the process of working on other information to explain this process and it will soon be releasing a communications in this regard. See *Charity Law Bulletin* No. 336 for an overview of the dissolution process and how to revive such dissolved corporations.

For those corporations that have received the notice from Corporations Canada, the 120 days will start running and they should continue as soon as possible if they do not want to be dissolved. Corporations that have not continued but have not received the notice should also move forward with the continuance as soon as possible to avoid the pressure of having to continue once they receive the notice.

Ontario *Not-for-Profit Corporations Act — To Move or Not to Move*

As noted since 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*. It is again 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.

There has been a suggestion in the sector that the easy and quick solution for Ontario corporations that are not interested in waiting any longer is to move to the federal CNCA. While this route might under certain circumstances be suitable for some corporations, this is certainly not the "reason" why a corporation would want to move its jurisdiction from Ontario to the CNCA. There needs to be substantive reasons why the federal jurisdiction is more suitable before making the move. For example, corporations that operate programs that are national in scope (rather than just Ontario) or have activities that are governed by federal jurisdiction might be good candidates to consider moving under the CNCA. For others, there might be features in the CNCA that could be sufficiently attractive to warrant the move, for example the right of the board to appoint additional directors is not a default right under the CNCA.

On the flip side, one must remember that there are a number of features of the ONCA that are "friendlier" than those in the CNCA that might justify the wait, such as *ex officio* directors are permitted under the ONCA, there is no requirement under the ONCA to file financials with the Ontario

government, the revenue cut-off level for public benefit corporations (compared with soliciting corporations under the CNCA) to waive audit or to opt for review engagement is lower, etc. However, there are also those corporations that cannot go to the CNCA no matter how unwilling they are to wait for the new ONCA. For example, public hospitals in Ontario are required to be incorporated either under the Ontario jurisdiction or by special legislation. Moving the corporation jurisdiction is not a minor decision, it can only be made after having carefully considered all applicable factors and implications. A more detailed look of these issues will be reviewed in an upcoming Bulletin.

Tax Court Comments on Recordkeeping and Receipting

By Linsey E.C. Rains

A January 9, 2015 informal decision of the Tax Court of Canada ("TCC") highlights the importance of proper recordkeeping and receipting with regard to the requirements of subsection 118.1(2) of the *Income Tax Act* ("ITA") and Regulation 3501 of the *Income Tax Regulations* ("Regulations"). Subsection 118.1(2) sets out the requirements for an individual taxpayer to prove a gift was made and Regulation 3501 outlines what information must be contained in the receipt.

In *Arthur v The Queen* ("*Arthur*"), the taxpayer appealed the Minister's reassessments which disallowed the charitable donation claims for the 2006, 2007, and 2008 tax years. The purported donations were made to three different organizations, two of which subsequently had their charitable registrations revoked. The third organization was not a registered charity. Justice Lamarre dismissed the claims for cash donations made in 2007 and 2008 because the taxpayer did not have receipts in accordance with subsection 118.1(2) of the ITA for the purported donations made in these years. Although the taxpayer had a receipt for the 2006 donation, purportedly describing a cash donation and a gift in kind, the TCC found the receipt did not contain all of the prescribed information required under Regulation 3501. As well, the taxpayer's testimony with regard to the purported donations was unconvincing, as she could not remember the brand of computers donated, did not have appraisals made, and could not substantiate the cash donation.

Additional factors cited by the TCC in support of the dismissal of the taxpayer's claims included:

- the taxpayer failing to meet the burden of providing support to verify cash transactions having been made;
- the money was given to the taxpayer's accountant and she did not verify if it was passed on to the charity;

- no bank statements or other documentation in support of the cash donation was provided;
- the Minister presented evidence to show the total 2006 donation represented a substantial amount of the taxpayer's income, i.e., 16 percent of her net income, yet was unsupported by adequate records; and
- the recipient charity did not have any books and records to support the taxpayer's purported cash donation.

This decision illustrates the importance of proper receipting by registered charities and the taxpayer's burden of being able to verify cash donations and substantiate gifts in kind. Further, the decision underscores the fact that a claim will not be allowed without proper receipts and supporting documentation.

Court of Appeal of Alberta Upholds Court's Bylaw Amendments

By Ryan M. Prendergast and Terrance S. Carter

An appeal of the decision in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta* was heard in the Court of Appeal of Alberta on March 11, 2015. The appeal came as a result of a Court of Queen's Bench of Alberta decision in which Siri Guru Nanak Sikh Gurdwara (the "Society") was found guilty of oppressive conduct against two of its members. As a remedy, the trial court ordered the restructuring of the Society's process for approving applications for membership and amended its governing bylaws. The Society appealed in part on grounds that the trial court had no jurisdiction to restructure the Society's election process and otherwise amend the Society's bylaws as a remedy to finding it had engaged in acts of oppression, which stemmed from the trial court's inappropriate application of the test for oppression and an inappropriate use of remedies for oppression.

Siri Guru Nanak Sikh Gurdwara is a religious society incorporated under the *Religious Societies Land Act* ("RSLA") in Alberta. Sakattar Singh Sandhu and Baldev Singh Hundle are long-standing members of the Society. They had brought an application to the trial court to dissolve and liquidate the Society for various reasons including that the Society had wrongfully refused membership applications by qualified persons and failed to hold elections for the Executive Committee. The trial court held that winding up of the Society would be too drastic a remedy, and instead, ordered amendments to the bylaws of the Society, including that a new membership list be prepared with new criteria for adding to the list, and a new process for election of the Executive Committee.

One of the main issues on appeal was whether the court had jurisdiction to restructure the Society's bylaws as a remedy for oppression. The appeal court found that the trial court did have the statutory authority to restructure the Society's election process and otherwise amend its bylaws upon finding that it had engaged in acts of oppression of its members, arising from the combined operation of provisions of s. 25 of the RSLA and s. 215 and ss. 243(3)(c) of the *Business Corporations Act*, which provide that a judge may make an order to rectify the matters complained of, including an order amending a society's bylaws, upon a finding of oppression. The appeal court further found that the trial court had properly applied the test for oppression.

The appeal court dismissed the appeal and upheld the trial court's decision. Although this decision is limited to legislation specific to Alberta, it is nonetheless significant due to analogous provisions regarding oppression and powers of the court in the *Canada Not-for-profit Corporations Act* (ss. 253(1), (3)(c)), as well as in the yet to be proclaimed Ontario *Not-for-Profit Corporations Act, 2010* (s. 119(2)). As such, it may be that the decision will be relied upon in other jurisdictions in Canada when interpreting the oppression or other remedial powers under the *Canada Not-for-profit Corporations Act* and similar statutes which have not yet been interpreted by the courts in the not-for-profit context.

Balancing Privacy Legislation and the Common Law

By Sepal Bonni

On February 18, 2015, the Ontario Court of Appeal in *Hopkins v Kay* ruled that Ontario's statutory enforcement scheme in the *Personal Health Information Protection Act* ("PHIPA") does not preclude a claim for the common law tort of inclusion upon seclusion, i.e., invasion of privacy, for the unauthorized access to personal health information. Charities and not-for-profits should consider this decision a caution regarding how personal information is handled. The unauthorized access, use, collection or disclosure of personal information may expose a charity or not-for-profit to significant liability under privacy legislation and at common law.

In this landmark decision, the plaintiffs brought a class action for the tort of intrusion upon seclusion, claiming that patients' personal information was accessed without knowledge or consent. The hospital defendant brought a motion to dismiss the claim arguing that the statutory scheme provided in PHIPA provides an exhaustive code for enforcing privacy rights and as such, any tort claims are precluded by PHIPA. The motion judge dismissed the defendant's motion and the defendant appealed.

Despite the fact that, in accordance with PHIPA, the Commissioner had previously conducted an investigation and concluded that the defendant had responded reasonably to the unauthorized access, the Ontario Court of Appeal held that this did not preclude individuals from pursuing common law claims for breach of privacy. The Court held that PHIPA was not an exhaustive code in relation to personal health information and private plaintiffs could commence an action in common law for the tort of intrusion upon seclusion.

The Court's decision has significant and broad-ranging implications. In Ontario, it permits plaintiffs to seek claims in common law for privacy breaches in the health care sector, regardless of whether or not the Commissioner has taken any regulatory action. More broadly, the decision may potentially extend to other provinces and industries and may lay the groundwork for more privacy class actions in Canada. In this regard, charities and not-for-profits should take warning and be proactive in protecting any personal information in their possession as well as review their information handling practices to ensure that unauthorized access, use or disclosure of personal information does not occur.

Upcoming Minimum Wage Changes in Ontario

By Barry W. Kwasniewski

On March 19, 2015, the Ontario Ministry of Labour released the upcoming 2015 minimum wage rates. As reported on in *Charity Law Bulletin No. 355*, in November 2014, the *Stronger Workplaces for a Stronger Economy Act, 2014* amended the *Employment Standards Act, 2000* to tie the minimum wage in Ontario to the Consumer Price Index ("CPI") as of October 2015. These annual changes must be released by April 1 of each year.

As of October 1, 2015 the new general minimum wage in Ontario will be $11.25 per hour, the student minimum wage will be $10.55 per hour and the minimum wage for liquor servers will be $9.80 per hour. These new rates reflect a lower increase than the last rate increase on June 1, 2014. However, employers and employees should now benefit from more predictability in how the minimum wage is determined.

Additionally, on March 12, 2015, the British Columbia government announced that its provincial minimum wage will go up on September 15, 2015 to $10.45 and that it will also now adjust the minimum wage annually to reflect the provincial inflation rate. However, unlike in Ontario, in British Columbia, if the inflation rate is negative, the minimum wage can go down.

It is important for all employers, including charities and not-for-profits operating in these provinces to be aware of these upcoming changes.

Review of Accessibility for Ontarians with Disabilities Act

By Nancy E. Claridge

The Ontario government released the Second Legislative Review (the "Review") of the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") in February 2015. Under section 41 of the AODA, a full review of its effectiveness, including consultations with the public, particularly people with disabilities, is required every three years. This particular review is significant as it was undertaken at approximately halfway through the AODA's implementation period.

As discussed in *Charity Law Bulletin No. 352*, the AODA was introduced in 2005 with the goal to develop, implement, and enforce accessibility standards with respects to goods, services, facilities, accommodation, employment, buildings, structures, and premises on or before January 1, 2025, and to involve persons with disabilities in developing relevant accessibility standards. The associated Accessibility Standards were developed to accomplish these goals and include numerous phased in requirements.

In addition to an overview of the background and context of the AODA, the Review discusses findings from the consultation process and outlines eight key recommendations for the government.

The consultation process involved over 200 individuals and organizations through various in-person and online channels. Key themes that arose included areas such as the significance of accessibility, progress towards the 2025 goal, implementation challenges, and suggestions for improvements. One key point that emerged is that the pace of change has been slower than many hoped. In particular, many people with disabilities underscored that their day-to-day experiences show that the AODA is not on schedule, such as the fact that transportation barriers continue to restrict participation in employment and community life. Additionally, a key implementation challenge that arose in discussions was "fatigue" due to the complexity of the regime and the lack of support for the implementation process. Finally, many organizations were concerned about the lack of financial support for costs associated with complying with the AODA.

Recommendations made in the report included that the government should: renew its leadership role; prepare and implement a transparent enforcement plan; and undertake a comprehensive public awareness campaign.

The author emphasized that following through on the recommendations in the Review should be part of a larger effort to ensure an accessible Ontario by 2025. She underscored that "a necessary shift in our collective mindset" and an associated "cultural shift" will be necessary to overcome the "cumbersome process" that is involved in fully implementing the AODA.

Ontario Court Applies "Family Status" Test for Discrimination

By Barry W. Kwasniewski

On January 19, 2015, in *Partridge v Botony Dental Corporation* ("*Partridge*"), the Ontario Superior Court of Justice found that an employer had discriminated against an employee in relation to childcare arrangements. The Court relied on the Federal Court of Appeal's recently articulated test in *Canada (Attorney General) v Johnstone* ("*Johnstone*") with respect to discrimination on the ground of family status, pursuant to the Ontario *Human Rights Code*, resulting from childcare obligations. *Partridge* is the first time that the *Johnstone* test has been applied in Ontario. It confirms that the principles set out in the federal decision are applicable in Ontario and, therefore, that provincially regulated employers, including most Ontario based charities and not-for-profits, must accommodate employees with legal parental obligations.

As previously written in our September 2014 *Charity Law Update*, *Johnstone* confirms that "family status" includes childcare obligations and clarifies the test for a duty to accommodate childcare obligations on the ground of family status. This test requires that (i) a child is under the individual's care and supervision; (ii) the childcare obligation engages the individual's legal responsibility for the child, as opposed to a personal choice; (iii) the individual has made reasonable efforts to meet the childcare obligations; and (iv) the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the individual's ability to fulfill childcare obligations.

In *Partridge*, the plaintiff returned from her second maternity leave to be told that her duties would change, her hours would be reduced, and she would now be required to work from 10am-6pm, where she had previously worked from 9am-5pm. After a series of ensuing events, the plaintiff was fired and she sought damages arising from wrongful termination, as well as for breach of her human rights.

In her Reasons for Judgment on the discrimination claim, Justice Healey found that the first two factors of the *Johnstone* test were easily met. In regard to the third factor, Justice Healey considered that the plaintiff had attempted to make complex childcare arrangements with family members and neighbours in order to meet the requirement that she be at work until 6pm. However, this arrangement involved

significant extra cost and was not sustainable, as it required the plaintiff to rely on other people's schedules as well as the policies of two daycares. Justice Healey then considered whether the employer could illustrate that the rule to be at the office until 6pm was a *bona fide* occupational requirement. She found that there was no reason why the office could not be opened earlier, that the requirement was reprisal based, and that there was no legitimate work-related purpose behind the rule.

Justice Healey concluded that, similar to the facts in *Johnstone*, "the discrimination arose out of [the employer's] willful and reckless disregard for her legal obligations." She awarded $20,000 in human rights damages, in addition to $42,517.44 representing twelve months' pay in lieu of notice. This case therefore underlines that employers must carefully consider their employees' child care accommodation requests, within the context of the test set out in the *Johnstone* decision. Failure to do so could result in human rights and/or wrongful dismissal claims, and potential substantial monetary liability.

$1.5M Fine for Australian Donation Scheme Promoters

By Esther S.J. Oh

The Australian Federal Court recently ordered that promoters of a tax scheme and the charity they operated must pay $1,500,000 (AUD) to the Australian Taxation Office (ATO). This is the largest penalty ever ordered by an Australian court for breach of tax law provisions. The case involved contravention of Division 290-50(1) of Schedule 1 of the Taxation Administration Act 1953, which was created to deter the promotion of tax evasion schemes. Stephen Arnold and the corporations he operated, including Leaf Capital (a for-profit corporation) and Donors Without Borders (an Australian Charity which purported to provide medical aid to HIV patients in Africa) (DWB), were fined for breaching promoter penalty provisions and "generating deductions to which their clients were not entitled." Tim Dyce, ATO Deputy Commissioner, noted that the purchasers had only paid 7.5 percent of the grossly inflated price of the drugs, yet claimed tax deductions of 100 percent.

Dyce also noted that the Australian scheme was modelled on an arrangement which previously failed in Canada. Arnold, a Canadian citizen, had earlier created a scheme in Canada in the years 2005 to 2007 whereby pharmaceuticals were sold to Canadian taxpayers, who then donated the pharmaceuticals to charities for international aid. Highly inflated donation receipts (totalling $91 million) were issued to the Canadian taxpayers under the scheme. After investigation by CRA, the charitable registration of the charity involved in the scheme was revoked, the charitable donation receipts were disallowed and the provisions of *the Income Tax Act* (Canada) were amended to prohibit such schemes in Canada.

For further information on the Australian case, reference can be made to *FC of T v Arnold & Ors*.

CBA Submission to Parliament on Bill C-51

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

On Wednesday March 25, 2015, the Canadian Bar Association appeared before the Standing Committee on Public Safety and National Security of the House of Commons to present its views on Bill C-51, *Anti-terrorism Act, 2015* ("*Bill C-51*"). Bill C-51 completed Second Reading and was referred to the Standing Committee on February 23, 2015.

The key position put forward by the CBA submission that Bill C-51 does not currently strike the appropriate balance between enhancing state powers to manage risk and safeguarding citizens' privacy rights and personal freedoms. The CBA Submission includes a section dealing with the impact of Bill C-51 on charities and not-for-profits, a number of these comments had been previously outlined in *Anti-Terrorism and Charity Law Bulletin No. 39*.

The CBA Submission raises a number of areas of concerns in this regard, including issues with respect to overly broad wording and potential for abuse of the provision that allows for the targeting of any "activity that undermines the security of Canada". Charities operating in conflict zones, as well as environmental and aboriginal organizations, will be particularly vulnerable to this provision and other similar ones identified by the CBA Submission.

The CBA Submission makes it clear that unnecessarily sacrificing individual liberties and democratic safeguards cannot be justified in order to better implement public safety. Rather, an appropriate balance must be sought, and as such, the CBA Submission recommends that new measures, including extraordinary mechanisms of oversight and after-the-fact review, are necessary. As Bill C-51 moves swiftly through Parliament, the CBA Submission suggests that legislators should carefully take into consideration the concerns and recommendations raised by the CBA before Bill C-51 is adopted into law.

IN THE PRESS

Court Refuses to Vary the Terms of a Restricted Gift by Ryan M. Prendergast, Ontario Bar Association Charity and Not-for-Profit Law, Thursday, March 19, 2015

Separating Fact from Fiction: Political Activities Revisited — Part II by Terrance S. Carter and Linsey E.C. Rains, *Hilborn Charity eNews*, Thursday, March 19, 2015

Separating Fact from Fiction: Political Activities Revisited — Part I by Terrance S. Carter and Linsey E.C. Rains, *Hilborn Charity eNews*, Thursday, March 12, 2015

RECENT EVENTS AND PRESENTATIONS

Imagine Canada Sector Source hosted a webinar entitled "Preparing for and Surviving a CRA Audit" on Thursday, February 26, 2015, presented by Terrance S. Carter.

CMC Governance Special Interest Group hosted a presentation regarding New Legislation for the Governance of Not-for-Profit Corporations on Wednesday, March 4, 2015, presented by Terrance Carter.

Imagine Canada Sector Source hosted a webinar entitled "Tips and Traps of the T3010" on Thursday, March 26, 2015, presented by Jacqueline M. Demczur.

UPCOMING EVENTS AND PRESENTATIONS

AJAG Professional Development for Accountants will host a webinar entitled "Preparing for and Surviving a CRA Audit" on Tuesday, April 7, 2015, presented by Terrance S. Carter.

Imagine Canada Sector Source will host a webinar entitled "Holding Board Meetings: 101" on Thursday, April 16, 2015, presented by Theresa L.M. Man.

Canadian Association of Gift Planners Conference will be held in Halifax, Nova Scotia on April 22 and 23, 2015. The following sessions will be presented:

- Theresa L.M. Man will present "Basic Tax Rules for Charitable Gifts" on Wednesday, April 22, 2015
- Terrance S. Carter will present "Pitfalls in Drafting Gift Agreements" on Thursday, April 23, 2015

2015 National Charity Law Symposium is being hosted by The Canadian Bar Association on Friday, May 29, 2015. Terrance S. Carter will present on the topic "Judicial Renderings to Consider."

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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