

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

## MAY 2015

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Carters Professional Corporation and Fasken Martineau invite you to attend the [Healthcare Philanthropy: Check- Up 2015](#) on Thursday, June 11, 2015

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

### **.NGO and .ONG Domain Names Now Available**

By Sepal Bonni

As of May 6, 2015, .ngo and .ong domain names are now available for use by charities, non-governmental organizations (“NGOs”) and not-for-profits in Canada and around the world. These new domain names provide a unique way for charities and not-for-profits to portray and distinguish their work in an increasingly crowded online world. [Public Interest Registry](#) (“PRI”), the entity that administers the .org domain name, launched the .ngo and .ong domain names in response to concerns from the sector about the need for a closed domain that would help donors immediately know if a website was legitimate and, therefore, feel confident in supporting the organization.

PRI launched the .ngo and .ong domain names in conjunction with its new global [OnGood directory](#) of NGOs. Organizations that qualify for and purchase the new domain names will receive both a .ngo (for English users) and .ong (for Romance languages, including French and Spanish) domain name, as well as a customizable online profile on the searchable OnGood directory. This profile allows charities and not-for-profits to showcase their work, collect donations, and link to their other online and social media presence. The database is meant to have a global reach and create a community of like-minded organizations.

Because credibility and donor trust were two significant factors in the push to create the new domain names, PRI has established a validation process that organizations must complete before they can register a .ngo or .ong domain name. Unlike the .org domain name, which can be used by individuals, not-for-profits, or corporations, in order to qualify for a .ngo and .ong domain name, potential registrants must self-certify that they meet seven eligibility criteria. Additionally, the registrant must provide either a registration number, if it is already registered with a NGO or charitable body, such as Canada Revenue Agency, or a supporting letter of reference if no such documentation is available. The seven eligibility criteria require that the organization:

- focuses on acting in the public interest;
- does not recognize profits or retain earnings;
- has limited government influence;
- has staff/members who are independent actors and are not parts of political parties;

- actively and regularly pursues its mission;
- operates in a structured manner; and
- acts with integrity within the bounds of law.

PRI will conduct regular reviews to ensure that organizations with a .ngo or a .ong domain name continue to meet the eligibility criteria.

The new domain names provide an interesting new opportunity for charities and not-for-profits to further establish their online presence and portray themselves to potential donors in a new light. As the new domain names become increasingly recognizable, it is likely that donors will gravitate towards the names. Already, in the first two weeks of availability, over 500 organizations are profiled on the OnGood directory and over 1400 .ngo and .ong domain names have been registered.

## Legislation Update

By Terrance S. Carter

### Economic Action Plan 2015 Act, No. 1

Bill C-59, [Economic Action Plan 2015 Act, No. 1](#) (the “Bill C-59”), is currently in Second Reading in the House of Commons and has been referred to the Standing Committee on Finance for study. The Standing Senate Committee on National Finance has also commended its Pre-Study of Bill C-59. The [Legislative Summary](#) released by Parliament indicates that although “[e]stablished legislative practice would have this bill followed by a second budget implementation bill [...] it is possible that there will be only one bill implementing the April 2015 budget” because of the federal election scheduled for October 2015.

Bill C-59 will implement some of the income tax and related measures proposed in the April 21, 2015 Federal Budget (“Budget 2015”), which contained a number of important measures of benefit to the charitable and not-for-profit sector. In particular, Bill C-59 amends subparagraph 149.1(1)(a)(v) of the definition of “qualified donee” and subsection 149.1(26) of the *Income Tax Act* (“ITA”). Both amendments will change the current ITA references from “foreign organization” to “foreign charity.” The combined result of these amendments will be to clarify that both foreign charitable organizations and foundations are eligible for registration as qualified donees under the ITA, as originally proposed by Budget 2015. Details regarding the other provisions of Budget 2015 affecting charities have yet to be announced.

Division 2 of Part 3 of Bill C-59 enacts the *Prevention of Terrorist Travel Act*, which is discussed in more detail in the article on *New Anti-Terrorism Legislation Introduced*, below.

See [Federal Budget 2015: Impact on Charities](#), *Charity Law Bulletin* No. 363, for further discussion of proposed amendments of Budget 2015.

## **Bill C-51, Anti-terrorism Act, 2015**

Since last reported on in our April 2015 [Charity Law Update](#), Bill C-51, [Anti-terrorism Act, 2015](#) has been passed in the House of Commons, moved to Second Reading in the Senate and has been referred to the Standing Senate Committee on National Security and Defence. 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 enhances 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**

As reported in previous *Charity Law Updates*, Bill S-4, the [Digital Privacy Act](#), was passed by the Senate on June 16, 2014, and was subsequently referred to the Standing Committee on Industry, Science and Technology. The Committee reported the Bill without amendment on April 22, 2015, and Bill S-4 is now proceeding to the Report Stage and Second Reading in the House of Commons. Bill S-4 proposes amendments to the [Personal Information Protection and Electronic Documents Act](#) (“PIPEDA”), among which is the provision that under certain circumstances organizations will be allowed to disclose personal information to other organizations or to the individual’s next of kin without the individual’s knowledge or consent.

For more information on how Bill S-4 affects PIPEDA, see *Charity Law Bulletin* No. 341, [Digital Privacy Act Proposes Amendments to PIPEDA](#).

## **BC Workers Compensation Amendment Act, 2015**

On May 14, 2015, Bill 9, the [Workers Compensation Amendment Act, 2015](#) (the “Act”), received Royal Assent in the British Columbia legislature. The Act expands the powers of WorkSafeBC, an independent

agency governed by a Board of Directors but appointed by the government to work alongside workers and employers. The Act expands WorkSafeBC's ability to deal with non-compliance and increases employers' obligations in respect of workplace health and safety, particularly in the area of inspections and investigations, where a new two stage incident investigation process is being implemented. Further new powers granted to WorkSafeBC by the Act include the power to issue a stop work order at workplaces found to have a high risk of serious injury, serious illness or death to a worker, or reoccurring non-compliance with a provision of the Act, and on the spot fines of up to \$1000 for less serious contraventions of the Act.

Charities and not for profits in BC which are subject to the *Workers Compensation Act* should familiarize themselves with the new regulatory requirements and prepare to revise their internal incident investigation policies as necessary, or otherwise face consequences including financial penalties.

## **CRA News**

By Linsey E.C. Rains

### **CRA Updates T4063, Registering a Charity for Income Tax Purposes**

On May 8, 2015, CRA released an updated [T4063, Registering a Charity for Income Tax Purposes](#). This guide is intended to help applicants for charitable registration complete [Form 2050, Application to Register a Charity under the Income Tax Act](#), which was last updated in 2011.

### **CRA Releases Updated GST/HST Guidelines and Information for Charities**

In May 2015, CRA released an updated GST/HST Info Sheet (GI-067) [Basic GST/HST Guidelines for Charities](#) and an additional GST/HST Info Sheet (GI-066) [How a Charity Completes its GST/HST Return](#). These versions replace the previous versions from June 2011. The new Info Sheets reflect the changes regarding GST/HST that have occurred in some provinces since 2011. GI-067 explains when charities must comply with specific GST/HST rules, such as when a charity is required to register for GST/HST purposes, including when a charity qualifies as a small supplier. GI-066 outlines the specific steps a charity must take to complete its GST/HST return. GST10 [Application or Revocation of the Authorization to File Separate GST/HST Returns and Rebate Applications for Branches or Divisions](#) was also updated. This form can be used by public service bodies, charity, and qualifying non-profit organizations who want to file separate GST/HST returns and rebate applications as separate branches or divisions.

### **National Volunteer Week Speech Highlights First-Time Donor's Super Credit**

On May 6, 2015, CRA posted an April 15, 2015 [speech](#) given by the Honourable Kerry-Lynne D. Findlay, the Minister of National Revenue ("Minister"), at an event hosted by the Vancouver Fire Fighters' Charitable Society, a registered charity in honour of National Volunteer Week. The Minister drew attention to three charities-related non-refundable tax credits, the First-Time Donor's Super Credit, the Volunteer Firefighters' Tax Credit and the Search and Rescue Volunteers Tax Credit.

### **CRA Commencing Legal Action Against CBC for Disclosure of Donor Names**

On May 15, 2015, CRA issued a [statement](#) that it has sent final notice to the CBC and will commence legal action to recover confidential taxpayer information that CRA inadvertently sent to CBC on November 24, 2014. CBC [published](#) the information, which, according to the CBC report, contained details about donations of cultural property, including donors' identities and donation values, on November 25, 2014. On the day of publication, CRA released a [statement](#) characterizing the breach as an accidental disclosure and reported it to the Privacy Commissioner of Canada. Both CRA statements indicate CBC was aware the information was protected, but CBC continues to refuse to return it to CRA. Under section 241 of the [Income Tax Act](#), CRA has an obligation to keep taxpayer information, including certain information from registered charities and donors, confidential. As a public broadcaster, it will be interesting to see whether CBC's officials and representatives fall under the jurisdiction of section 241, as it also applies to government entities other than CRA.

### **Federal Court of Appeal Hears Case on Direction and Control**

By Jennifer M. Leddy

On May 26, 2015, the Federal Court of Appeal heard the appeal in *Public Television Association of Québec v Minister of National Revenue*. The primary issue in this case is whether the Public Television Association of Québec (the "Appellant") retained a sufficient degree of direction and control over its resources when it transferred funds to Vermont Public Television ("VPT"), an American television station that broadcasts in southern Québec, or acted as a conduit for Canadian donations to VPT. The decision in this case has been reserved, but the written arguments (factums) of the parties and the Intervener, Imagine Canada, are publically available by contacting the court.

The Appellant is a not-for-profit corporation formed for the purpose of advancing education through the production, distribution, and promotion of non-commercial, educational television programming. It has been a registered charity since September 21, 1990. On August 23, 2011, the Appellant received a Notice

of Intention to Revoke, following an audit for the fiscal period of June 30, 2005 to June 30, 2006. However, the question of adequate direction and control was not raised until April 4, 2013, in the response to the Appellant's Notice of Objection, which had been filed on November 11, 2011.

In its factum, the Appellant submits that it has produced to Canada Revenue Agency ("CRA") convincing evidence, including agreements, minutes of directors meetings and bank statements to demonstrate that it has direction and control over the funds it raises, choice of programs broadcast by VPT and that it pays a fair price for the programming it purchases through VPT. The Appellant also presents arguments based on the Canada-US Tax Convention that the transfers to VPT should also be treated as gifts to a registered charity. CRA in its responding factum sets out facts to support its position that the Appellant is simply acting as a conduit for receipting purposes for VPT in Canada.

Charity lawyers will be particularly interested in the factum of the Intervener, Imagine Canada. It reflects a carefully crafted argument that CRA's [Guidance CG-002, Canadian Registered Charities Carrying out Activities Outside Canada](#) and its predecessors misinterpret the law on which they are based. Imagine Canada argues that the Federal Court of Appeal decisions upon which CRA relies do not require written agreements between the Canadian charity and foreign intermediary but only that the charity be able to provide a sufficient account of how its resources are used by the intermediary in light of the particular context and operational realities and that the charity have a "reasonable expectation" that the resources be used only for charitable purposes. Imagine Canada concluded that the CRA Guidance "is so narrowly and erroneously drafted that charities should not reasonably be expected [...] to rely on [it]."

Given the arguments presented in the factums, the decision by the Federal Court of Appeal in *Public Television Association* will invariably be an interesting decision to read and one that lawyers and charities that operate outside of Canada will want to carefully study.

## **Federal Court Upholds Solicitor-Client Privilege Principles**

By Ryan M. Prendergast

[Canada \(National Revenue\) v Revcon Oilfield Constructors Incorporated](#), a judgment of the Federal Court released on April 23, 2015, discusses solicitor-client privilege during tax planning. The decision is the result of a summary application made by Canada Revenue Agency ("CRA") through the Minister of National Revenue, after Revcon Oilfield Constructors Incorporated ("Revcon") failed to produce material to the CRA in connection with a reorganization that it undertook in 2011. CRA requested the material

pursuant to section 231.7 of the *Income Tax Act* (ITA), though Revcon asserted solicitor-client privilege over the material and refused to provide it.

The ITA, at s. 231.7, defines “solicitor-client privilege” as “the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person’s lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.”

The materials in dispute fell into four categories:

1. Items that would identify Law Firm X, an undisclosed law firm which was retained by the Respondent’s counsel for the purposes of the restructuring transactions being audited [the Law Firm X claim].
2. Items which include “shorthand tax law language used by Law Firm X that describes the Transactions in a manner that could potentially be prejudicial to the Respondent’s interests” [the Nomenclature claim].
3. Items which include Law Firm X’s opinion respecting the transactions or the work product of Law Firm X’s legal retainer [the Structuring claim].
4. Items which were communications for the purpose of obtaining legal advice or assistance [the Legal Advice claim].

The Court rejected the Law Firm X claim and the Nomenclature claim. The judge concluded, in line with well-established principles of solicitor-client privilege, that only documents containing legal advice were privileged. Charities and not-for-profits should be reminded that although CRA cannot view documents subject to legal privilege, legal privilege can be waived if the charity or not-for-profit is not careful when sharing communications, such as sharing legal opinions with third-parties. If an auditor requests a document that a charity or not-for-profit suspects is privileged, the organisation should place the document in a sealed package and retain the package until a judge provides an order about its status.

## **New Anti-Terrorism Legislation Introduced**

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

The Federal government in May 2015 introduced several new pieces of legislation relating to anti-terrorism in Canada. One of the Acts is the [\*Removal of Serious Foreign Criminals Act\*](#), which proposes

to amend several federal Acts in an effort to streamline the removal of foreign nationals who commit serious crimes in Canada, allow for the mandatory transfer of foreign criminals back to their country of origin and render foreign criminals ineligible for a record of suspension. Among its contents is a provision for making all foreign nationals, and some permanent residents sentenced to more than six months for a serious crime in Canada, ineligible for a criminal record suspension, as well as a provision allowing Canada to transfer a criminal without their consent where provided for under the terms of a future treaty. This Act is currently in First Reading in the House of Commons.

Also in May 2015, the *Prevention of Terrorist Travel Act* was introduced alongside amendments to the [Canadian Passport Order](#) (“CPO”). These amendments are part of [Economic Action Plan 2015 Act, No. 1](#), the legislation implementing Budget 2015, and are thus currently in Second Reading at the House of Commons. The amendments to the CPO will grant Federal Court judges the ability to cancel, refuse or revoke passports as a preventative measure to stop an individual from committing a terrorism offence, as defined by the *Criminal Code*, or for the national security of Canada or a foreign country or state. The revocation of a passport could last for up to 10 years. The *Prevention of Terrorist Travel Act* pertains to judicial proceedings involving a CPO decision. Among other provisions, the Act stipulates that during a proceeding, on the Minister’s request, a judge must hear submissions on evidence in the absence of the public and the applicant and their counsel, and the judge must ensure that the applicant is provided with only a summary of the evidence if in the judge’s opinion it would be injurious to national security or endanger the safety of any person if disclosed.

*Economic Action Plan 2015 Act, No. 1* also implements changes to section 55(3) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, as alluded to in Budget 2015. These changes will require that the Financial Transactions and Reports Analysis Centre of Canada, if it has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence, disclose the information to an agency or body that administers the securities legislation of a province.

The legislation described above reflects the Federal government’s increased focus on addressing terrorist activity. These measures are generally reflective of the approach towards terrorist activity as found in legislation such as Bill C-51, as discussed in *Anti-Terrorism and Charity Law Bulletin* No. 39, [The Impact of Bill C-51 on Charities and Not for Profits](#). Also like Bill C-51, the legislation described above may raise concerns for Canadian charities and not for profits, specifically those operating in conflict zones or otherwise becoming the subject of investigation by law enforcement and other agencies. Close attention

to the development of this legislation will be important so that every organization may conduct a close pro-active review of charitable activities and due diligence procedures to ensure limitation of risk for the organization itself, as well as its directors, officers, employees, and members.

## **CRA Comments on Services Performed by Volunteer Firefighters**

By Ryan M. Prendergast

On April 29, 2015, Canada Revenue Agency (“CRA”) released a technical interpretation (CRA # 2014-0559501E5) describing what type of activities are likely to be considered “primary services” or “secondary services”, in relation to the definition of “eligible volunteer firefighting services” in the *Income Tax Act* (“ITA”). This CRA View is only available in French. While it does not address the search and rescue volunteer credit under section 118.07 of the ITA, in 2014, the ITA was amended to allow volunteer firefighters or volunteers who perform search and rescue services and who perform 200 hours of eligible service to claim a tax deduction.

“Eligible volunteer firefighting service” is defined under subsection 118.06(1) of the ITA as:

services provided by an individual in the individual’s capacity as a volunteer firefighter to a fire department that consist primarily of responding to and being on call for firefighting and related emergency calls, attending meetings held by the fire department and participating in required training related to the prevention or suppression of fires, but does not include services provided to a particular fire department if the individual provides firefighting services to the department otherwise than as a volunteer.

In this CRA View, CRA was asked, in particular, whether activities such as monthly practices, including simulations of interventions, and prevention visits, such as visits to homes to inspect fire alarm systems, fall within the above definition. In response, CRA provided general comments concerning its interpretation of 118.06(1). Although the ITA itself does not refer to “primary” or “secondary” services in relation to the volunteer firefighter tax credit, CRA administers the credit by referring to the services in the above definition, i.e., responding to and being on call for firefighting and related emergency calls as a firefighter; attending meetings held by the fire department; and participating in required training related to the prevention or suppression of fire as “primary services”. Other activities are also eligible for the credit as “secondary services”, such as time spent repairing and maintaining vehicles and equipment used by the fire department. Generally, the number of hours devoted to primary services must exceed the number of hours devoted to secondary services. In this regard, CRA stated that assessing such activities will be a question of fact and that in this specific situation, the monthly practices may be primary services

where they include a portion related to the prevention or extinguishing of fires, but that prevention visits or verification of fire alarms were secondary services as they are not included in the definition at 118.06(1) of the ITA.

This commentary is noteworthy as more provinces introduce similar legislation. For example, Manitoba recently introduced a tax credit for volunteer firefighters as part of its 2015 Budget.

## Re-Capping Employer Liability for Wrongful Acts of Their Employees

By Barry W. Kwasniewski, [Charity Law Bulletin No. 366](#), May 27, 2015

In [KL v 1163957799 Quebec Inc cob as Calypso Water Park Inc and Calypso Theme Waterpark, and Curtis Strudwick](#) (“KL”), the Ontario Superior Court of Justice considered a motion by the corporate defendant (“Calypso”) to strike the plaintiff’s pleadings regarding Calypso’s liability for the alleged sexual assault of KL, the plaintiff, by an employee of Calypso, on the ground that the pleadings disclosed no reasonable cause of action. On April 14, 2015, Justice Smith dismissed Calypso’s motion. In his reasons, Justice Smith provided a thorough review of the Supreme Court of Canada’s decision in [Bazley v Curry](#) (“Bazley”), which established the test for vicarious liability of an employer for the acts of an employee. Although this decision represents only a procedural step on the way to a final decision in KL, it is useful as a reminder to employers, including charities and not-for-profits, concerning how the courts will determine potential employer liability for the acts of its employees. This *Charity Law Bulletin* reviews the comments by the court in KL. This [Charity Law Bulletin](#) reviews the comments by the court in KL.

## BC Societies Act Received Royal Assent

By Theresa L.M. Man

On May 14, 2015, the BC [Societies Act](#) (the “Act”) received Royal Assent. Once in force, the Act will replace the current [Society Act](#), enacted in 1977, which governs approximately 27,000 societies. This modernization of the incorporation and governance framework for non-profit corporations corresponds with recent modernization brought by the federal *Canada Not-for-profit Corporations Act* and the Ontario *Not-for-Profit Corporations Act, 2010*, which the sector is still waiting to be proclaimed.

The Act contains new measures including distinguishing “member funded” societies from societies that are funded by public donations or government, which will influence public disclosure requirements and governance restrictions; imposing duties and rules on senior managers; requiring a “member proposal” be added to the agenda of a members’ meeting if the proposal is signed by 5% or more of the society’s voting

members; and implementing a new online filing system for incorporation, bylaw changes, and other filings at the corporate registry.

Once the Act is proclaimed, a pre-existing society must transition under the Act within two years by filing a constitution, by-laws (consolidated into a single set of bylaws) and a statement of directors and registered office of the society. Notice of enabling regulations and a timetable for implementation of the Act is pending.

## **Recent Submissions to HoC Standing Committee on Finance's Study on Terrorist Financing**

By Terrance S. Carter

As reported in the April 2015 [Charity Law Update](#), at the request of the House of Commons Standing Committee on Finance ("Committee"), Carters Professional Corporation (represented through Terrance S. Carter) appeared on April 30, 2015 to make a [submission](#) to the Committee with regard to its study of the cost, economic impact, frequency and best practices to address the issue of terrorist financing, both here in Canada and abroad. A [supplemental submission](#) was made by Carters to the Committee on May 8, 2015, to bring to the Committee's attention the earlier recommendations made by the Subcommittee of the Standing Committee on Public Safety and National Security ("Subcommittee") in their report in 2007, which recommendations were consistent with those contained in the earlier Carters submission.

Also appearing before the Committee on April 30, 2015 was Samuel Schwisberg, in-house legal counsel for the Canadian Red Cross, who was appearing on behalf of the Canadian Bar Association Charities and Not-for-Profit Law Section ("CBA"). Mr. Schwisberg made a superb [submission](#), stating that charities can be an important asset in countering terrorism given their outreach to communities both within Canada and outside Canada.

In his comments before the Committee, Mr. Schwisberg provided an accurate reflection of the current impossible situation faced by charities wanting to comply with Canada's complex anti-terrorism legislation in conflict areas by explaining that:

Even for a larger organization, the way the law is constructed now... Picture me at a board of directors. They ask me, "Are we compliant with all the laws of Canada?" Can I state that with any great confidence, given the way the law is stated? It is quite possible that some would-be terrorist, three years down the road, after getting treatment at an emergency response unit, a MASH we've set up there, goes and commits an act of terrorism.

If you look at the pure writing of the law, the literal meaning of the law, we could be held liable for that. There is a lot of reliance on prosecutorial discretion, which we don't feel is consistent with the rule of law. In our submission, there needs to be more clarity in the law so that charities have a clear understanding of what they can and cannot do.

This very clear depiction of the conundrum faced by charities wanting to work in the international arena, particularly those charities providing assistance in conflict areas, reflect why change in legislation and enhanced guidance from CRA, as explained in the recommendations made by CBA, the Subcommittee and Carters, is so important for the government to consider at this point in time.

## **Maintaining “Control and Discretion” in the United States**

By Jacqueline M. Demczur

On March 13, 2015, the Internal Revenue Service (“IRS”) released [LTR 201511033](#) (“the Letter”), which is a final adverse determination by the IRS revoking the tax-exempt status of an “American Friends of” organization, because it did not exercise full control and discretion over how funds donated to it were used by its related foreign organization. In the Letter, the IRS described why it concluded that the actions of the “American Friends of” organization in question (identifying details such as the name of the organization have been redacted from the Letter) resulted in the organization being a mere conduit for the foreign organization in question.

In the United States, organizations referred to as “American Friends of” organizations are used to raise tax-deductible funds to support the tax-exempt purposes of foreign organizations, which must correspond to the purposes described in section 170 and subsection 501(c)(3) of the [Internal Revenue Code](#) (the “Code”), which set out the requirements for tax-exempt status as well as the tax deductions for charitable gifts. Specifically, “American Friends of” organizations must comply with the requirements in [IRS Revenue Ruling 63-252](#), which contains five examples of tax-deductibility involving foreign organizations and concludes that if “contributions [are] subject to control by the domestic organization” or “the foreign organization is merely an administrative arm of the domestic organization,” the contributions are tax deductible. This ruling therefore underscores the importance of an “American Friends of” organization retaining control and discretion over all payments, disbursements, and grants made by it.

In the Letter, the IRS highlighted a number of ways in which the organization in question failed to demonstrate sufficient control and discretion. These include making payments to personnel, including the

director, of the foreign organization without being able to provide sufficient documentation regarding the identity of the recipients or the exempt purpose of the payment. Additionally, the IRS maintained that the “American Friends of” organization could not provide records to show that:

- the making of grants was within the exclusive power of the board of directors;
- the board of directors reviewed all requests for funds;
- the board of directors required that the grantees could provide periodic accounting; and
- the board of directors could, at its discretion, refuse to make grants.

Due to these findings, the IRS determined that the organization no longer qualified for tax-exempt status under the Code.

Although the legislative schemes regarding charitable contributions to foreign organizations are different in Canada and the United States, this Letter illustrates interesting parallels between the “control and discretion” analysis in the United States and the “direction and control” analysis in Canada. It is also noteworthy that some lawyers in the United States, including Victoria B. Bjorklund and Morey O. Ward, in their recent continuing legal education presentation at Georgetown Law, have called for the IRS to use this Letter as an opportunity to create an updated precedential guidance on this important topic. Additionally, among other recommended best practices, they also suggested that “American Friends of” organizations should review, in advance, all requests for funds, analyze such requests and approve only those which are satisfactory and reflective of their own purposes, as opposed to providing blanket support of a general nature to a foreign organization. When combined with the fact that, in Canada, the Federal Court of Appeal recently heard the appeal in *Public Television Association of Québec v Minister of National Revenue* (see the separate article above on this case in this *Charity Law Update*), which considers Canadian law on this topic, it is clear that the question of contributions to foreign organizations is becoming a topic of greater importance for charities on both sides of the border.

## **Court of Final Appeal Deems Hong Kong Family Foundation a Trustee**

By Theresa L.M. Man

On May 18, 2015, the Court of Final Appeal in Hong Kong, in [Final Appeal No. 9 of 2014](#), made the final judgement concerning the will and ensuing legacy of Nina Wang, who, before her death in 2007, was Asia’s richest woman. The value of the assets involved in the estate is approximately US \$4.2 billion. The Court considered whether the Wang family-led Chinachem Charitable Foundation Ltd. (the “Foundation”)

was a beneficiary under Ms. Wang's will and could use the properties bequeathed to it as an absolute gift, or whether the Foundation was a trustee and must use the properties in accordance with the directions in the will. The Court held that the Foundation was a trustee, in the process limiting its ability to freely use the funds. The appeal was delayed by five years due to protracted contentious probate proceedings arising out of the allegation that Ms. Wang's 2002 will was superseded by another will made in 2006 in favour of her personal *feng shui* consultant, Tony Chan.

The facts are interesting. In 2002, Ms. Wang executed a "homemade" will with the help of her sister but no lawyer. In Clause 1 of her will, Ms. Wang set out that "All of my properties shall be bequeathed to [the Foundation]." Clause 2 states as follows: "[1] I wish to entrust [the Foundation] to the supervision of a managing organization jointly formed by the Secretary General of the United Nations; the Premier of the PRC Government as well as the Chief Executive of the Hong Kong Special Administrative Region. [2] Under its supervision, [i] not only must [the Foundation] continue all the projects which it has undertaken since its establishment to enable their developments continuously, but [ii] it must also continue to achieve the purpose of setting up a fund and a Chinese prize of worldwide significance similar to that of the Nobel Prize."

In order to interpret the role of the supervisory body referred to in Clause 2(1) of the will, the Court considered whether the language was imperative and sufficiently clear in depicting Ms. Wang's intentions. It also attempted to read the will in context and as a whole. After referring to a line of relevant case law, including UK and Canada cases, the Court concluded that the "most appropriate legal terms [to apply to the will] are those that most naturally and simply give effect to Nina's intentions." It therefore held that Clause 2(1) was only precatory and that the "correct interpretation of Clause 2(2) is that it imposes a trust for charitable purposes."

After determining that the Foundation was a trustee, the Court concluded that establishing a "managing organization," as referred to in Clause 2(1), was within the inherent jurisdiction of the courts' scheme-making power over the administration of charitable trusts because "there is a strong public interest in this important benefaction having a clear and sounder legal basis than the language of Nina's home-made will." The Court recommended that a scheme allowing for the administration of the charitable trust in Ms. Wang's will be prepared and submitted to the High Court for approval.

This case illustrates the importance in drafting a clear will, particularly when the will involves a large donation, in order to ensure that the wishes of the testator are met. Although this case is in a different

jurisdiction, it is interesting to see how the legal principles involving special purpose charitable trusts in the context of an estate gift to a charity are interpreted based on cases in the Commonwealth.

## **Joint Comments on Draft Financial Action Task Force**

By Nancy E. Claridge and Sean S. Carter

The Financial Action Task Force (“FATF”) Best Practices Paper (“BPP”) on Combating the Abuse of Non-Profit Organisations (Recommendation 8) was first written in 2002, in the wake of the September 11 terrorist attacks. The purpose of the BPP is to set out specific examples of good practice which may, among other benefits, assist countries and non-profit organisations (“NPOs”) in their implementation and adherence of Recommendation 8, as well as assist financial institutions in the proper implementation of the risk-based approach when providing financial services to NPOs, and guide donors who are providing funding to NPOs.

Since its inception, a limited update of the best practices paper was conducted in 2013, followed by a report on Risk of Terrorist Abuse in Non-Profit Organisations in June 2014, which, along with additional input and examples of best practice from governments and the private sector, led to further revisions. On April 28, 2015, 70 NPOs from 28 countries submitted joint comments on the current draft.

These joint comments from NPOs emphasize that the BPP’s primary purpose should be to “provide guidance for governments” and support outcomes that do not over-regulate NPOs. The comments advise that the BPP should be cognizant that the overall risk of terrorist abuse of the NPO sector is actually very low, both in numbers and geography. By implementing these recommendations, the BPP will be more persuasive among stakeholders, and allow them to take appropriate risks without fear of drastic enforcement measures.

## **Australia 2015 Budget Impacts Charities**

By Esther S.J. Oh

On May 12, 2015, the Australian Government tabled that country’s Budget 2015. Several proposed measures will affect the operation of public benevolent institutions and health promotion charities in Australia (“Eligible Organizations”), including proposed amendments to the fringe benefits tax (“FBT”), a tax payable by employers who provide fringe benefits to their employees. While certain fringe benefits, such as meals and entertainment, were uncapped in previous legislation, under the proposed amendments employees will be able to access a cap of up to a grossed-up amount of \$5000 worth of fringe benefits,

separate from the general FBT amount. As employers, Eligible Organizations were previously subject to uncapped exemptions under the FBT in this regard, and were able to provide fringe benefits to employees tax-free. This assisted in attracting quality employees these types of organizations without paying high private-sector salaries. It is not yet clear how far-reaching these proposed amendments will be and whether they will affect all charities and not-for-profits currently eligible for FBT exemptions.

Another item of interest for charities and non-profits is the Australian government's commitment to continue funding for the National School Chaplaincy Program for the next four academic years ending in the year academic year 2017 -2018. This program will assist approximately 2900 schools in Australia engage the services of a school chaplain to provide pastoral care to students in schools. While Canada does not have similar programs to those Australian initiatives outlined above, charities in Canada may find it of interest to be aware of developments occurring in the charitable sector in other commonwealth jurisdictions.

## **IN THE PRESS**

**[Federal Budget 2015: Impact on Charities](#)** by Ryan M. Prendergast, Linsey E.C. Rains and Terrance S. Carter, *Gift Planning in Canada*, Vol 20, Number 4, April 30, 2015.

**[Federal Government to Match Donations to Nepal Earthquake Relief Fund](#)** by Terrance S. Carter and Ryan M. Prendergast, *Hilborn Charity eNews*, May 4, 2015.

**[Federal Budget Offers Good News for Charities](#)**, by Ryan M. Prendergast, Linsey E.C. Rains, and Terrance S. Carter, *Law Times*, May 4, 2015

**[Office of the Privacy Commissioner Comments on Requirements for Opt-in Consent](#)** by Sepal Bonni and Terrance S. Carter, *Hilborn Charity eNews*, May 12, 2015.

**[CBA National Charities and Not-for-Profit Law Section Newsletter](#)** – an interview with Terrance S. Carter regarding “How Bill C-51 will Affect Charities Doing International Relief Work”, May 2015

## **RECENT EVENTS AND PRESENTATIONS**

**[The University of Montreal Faculty of Law](#)** hosted a conference entitled “The Law of Charity” on Friday May 8, 2015 including a panel discussion on “Charities and Political Activity” with Terrance S. Carter as a presenter.

**[Canadian Council for International Co-operation \(CCIC\)](#)** hosted a seminar on Wednesday, May 13, 2015 entitled “The Three Hot Legal Issues for Charities Operating Abroad,” presented by Terrance S. Carter.

**Imagine Canada Sector Source** hosted a webinar entitled “[Update on Ineligibility Requirements: CRA’s Policy on Ineligible Individuals](#)” on Thursday, May 21, 2015, presented by Ryan M. Prendergast.

## **UPCOMING EVENTS AND PRESENTATIONS**

[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.”

[BDO LLP](#) is hosting an evening seminar “Managing the Risk” on Wednesday June 3, 2015, with a session entitled “Basic Legal Risk Management for Charities and Non-Profits” to be presented by Terrance S. Carter.

[Healthcare Philanthropy: Check-Up 2015](#), is being co-presented by Carters and Fasken Martineau for the 11<sup>th</sup> anniversary on Thursday, June 11, 2015. Two topics to be presented are as follows:

- “Essential Charity Law Update” presented by Theresa L.M. Man
- “Preparing for and Surviving a Charity CRA Audit” presented by Terrance S. Carter

[Imagine Canada Sector Source](#) will host a webinar entitled “Volunteer Agreements: Managing Volunteer Relations and Reducing Risk Plus Employment Law Update” on Thursday, June 18, 2015, presented by Barry W. Kwasniewski.

[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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**Barry W. Kwasniewski** - Mr. Kwasniewski joined Carters' Ottawa office in October, becoming a partner in 2015, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal opinions and advice pertaining to insurance coverage matters to charities, not-for-profits and law firms.



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