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CHARITY & NFP LAW UPDATE

JUNE 2016

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

JUNE 2016

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RECENT PUBLICATIONS AND NEWS RELEASES

The Supreme Court Broadens the Scope of Solicitor-Client Privilege Under the *Income Tax Act*

By Linsey E.C. Rains and Sean S. Carter, *Charity & NFP Law Bulletin* No. 388, June 29, 2016

On June 3, 2016, the Supreme Court of Canada ("SCC") rendered its judgments in the companion appeals Cana*da (Attorney General) v Chambre des notaires du Québec* ("*Chambre des notaires*") and *Canada (National Revenue) v Thompson* ("*Thompson*"). The appeal in *Chambre des notaires* was heard on October 3, 2015 and the appeal in *Thompson* was heard on December 4, 2014. Both appeals focused on the *Income Tax Act*'s ("ITA") "requirement scheme" and the ITA's definition of "solicitor-client privilege." Together these judgments will likely have an impact on how all taxpayers, including registered charities, other qualified donees, and non-profit organizations ("NPOs"), deal with Canada Revenue Agency's ("CRA") officials during audits and throughout the more formal tax dispute process.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 388.

CRA News

By Jennifer M. Leddy

Good News for Charities in CRA's Corporate Business Plan

On March 7, 2016, CRA published its report *Summary of the Corporate Business Plan* 2016-2017 to 2018-2019 (the "Plan"). In her Message at the beginning of the Plan, the Minister of National Revenue reiterates that one of the government's priorities is "modernizing the rules for charities" and reaffirms the government's belief that charities and non-profit organizations make a "valuable contribution to society and to public policy".

Under Section 2 of the Plan on Programs, CRA acknowledges the important role that charities play in "public debate and public policy" and affirms that it will "review and clarify the rules governing a registered charity's involvement in political activities, in collaboration with the charitable sector." CRA also commits to "modernize its information technology systems to reduce the administrative burden on charities" with electronic filing of applications for charitable registration (T2050) and the annual *Registered Charity Information Return* (T3010) being available by November 2017 and November 2018 respectively.

The Plan also sets out certain performance measurements for responding to charities, such as ensuring that 100% of all scheduled audits are completed, providing timely service for charities by answering 80% of all calls in the agent's queue within two minutes and responding to 80% of simple applications for registration within two months and to regular applications within six months.

CRA Introduces Two New Webpages

On June 10, 2016, CRA introduced two new webpages. The first, Charities Listing request form, allows the public to request on-line an electronic version of data that is available to the public on the Charities Listings webpage. The information will be sent to the applicant by email or mail. While this data will be interesting to researchers, it will also be valuable to organizations and their advisors who wish to know how many and the kind of organizations in a particular category or subcategory have been registered as a charity or revoked as a charity for failure to file, following an audit, voluntarily or for other reasons.

The second page, Request for registered charity information, allows the public to make a request on-line for information about a charity that is publically available but not in the Charities Listings e.g. application for charitable registration, governing documents, notification of registration, letters regarding grounds for revocation, and financial statements. Authorized agents of a charity can also request electronically information about the charity's file that is not available to the public. CRA will send the information by email, mail, or fax.

Legislation Update

By Terrance S. Carter

Federal Budget 2016 Implementation Legislation Passed

On June 22 Bill C-15, *Budget Implementation Act 2016, No. 1* (the "Act") received Royal Assent and implemented a number of measures from Budget 2016: *Growing the Middle Class* ("Budget 2016"), which had previously been released on March 22, 2016, as discussed in our *Charity & NFP Law Bulletin* No. 381. Although the Act does not dramatically alter the legal and regulatory landscape for charities and not-for-profits, there are, nonetheless, some significant changes that are important to note.

Part 1 of the Act amends the *Income Tax Act* ("ITA") to include consequential amendments necessary to complement changes included in the 2015 Bill C-2 (*An Act to amend the Income Tax Act*) ("Bill C-2"), if it receives Royal Assent. Bill C-2 proposed to reduce the second personal income tax rate to 20.5% from 22% and introduce a new personal income tax rate of 33% on individual taxable income in excess of

$200,000, effective beginning in the 2016 taxation year. Among other things, the potential C-15 amendment will provide a 33% charitable donation tax credit on donations that are above $200 and made after the 2015 taxation year to a trust which is subject to the 33% rate on all of its taxable income. This charitable donation tax credit would also be available for donations by a graduated rate estate that are made during a taxation year that straddles 2015 and 2016.

It also implements a measure, originally announced in Budget 2015, which permits charities and registered Canadian amateur athletic associations ("RCAAAs") to acquire or hold interests in limited partnerships without "be[ing] considered to carry on any business of the partnership" if certain conditions are met. Specifically, the amendment will only apply if the partnership is a limited partnership, if the charity (or RCAAA), together with all non-arm's length entities, hold 20% or less of the interest of the limited partnership, and if the charity deals at arm's length with each general partner.

Part 2 of the Act also enacts two significant charity-related Goods and Services Tax/Harmonized Sales Tax ("GST/HST") measures that were mentioned in Budget 2016. In the first instance, the Act amends the *Excise Tax Act* ("ETA") to clarify that GST/HST will now apply to the supply of purely cosmetic procedures by charities. While charities are generally exempt from GST/HST on supplies, this would exclude from that exemption any "supply of a service rendered to an individual for the purpose of enhancing or otherwise altering the individual's physical appearance and not for medical or reconstructive purposes or a supply of a right entitling a person to such service". This measure applies to all such supplies made after March 22, 2016.

The second measure involves the addition of section 164 to the ETA and will apply to both charities and public institutions. Specifically, it will function by ensuring that when a charity supplies property or services in exchange for a donation, only the value of the property or services supplied is subject to GST/HST. Specifically,

> …if a charity or a public institution makes a taxable supply of property or service to another person, if the value of the property or service is included in determining the amount of the advantage in respect of a gift by the other person to the charity or public institution under subsection 248(32) of the *Income Tax Act* and if a receipt referred to in subsection 110.1(2) or 118.1(2) of that Act may be issued, or could be issued if the other person were an individual, in respect of part of the consideration for the supply, then the value of the consideration for the supply is deemed to be equal to the fair market value of the property or service at the time the supply is made.

This measure will also apply to supplies made after March 22, 2016, though transitional relief may be available in some cases.

Bill C-11 Amending the Copyright Act Receives Royal Assent

On June 22, 2016, Bill C-11, *An Act to amend the Copyright Act (access to copyrighted works or other subject-matter for persons with perceptual disabilities)* ("Bill C-11") received Royal Assent. The amendments made by Bill C-11 implemented the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*. Under the amended *Copyright Act* a person with a print disability is defined as:

"[A] disability that prevents or inhibits a person from reading a literary, musical, artistic or dramatic work in its original format and includes such a disability resulting from

(a) severe or total impairment of sight or the inability to focus or move one's eyes;

(b) the inability to hold or manipulate a book; or

(c) an impairment relating to comprehension."

The new amendments provide clarity regarding the exemption for making copies of works for persons with perceptual or print disabilities, including non-profits, who act for the benefit of such persons. New section 32.01 clarifies what a not-for-profit is allowed to reproduce. For example a not-for-profit is allowed to reproduce or fix a performer's performance of a "literary, musical, artistic or dramatic work" in a format specifically for a person with a perceptual disability. One limitation to this exemption includes non-application of the exemption if the work or subject matter is already available in a format designed for persons with a print disability either commercially or through a not-for-profit.

As with the previous version of the *Copyright Act*, not-for-profits that utilize this exemption will still need to pay royalties to the original author of the work, in accordance with the regulations, when they undertake making copies for persons with perceptual disabilities. Not-for-profits relying on the exemption will also be required to submit reports to an authority in accordance with the regulations on its activities.

Update on Bill C-6, An Act to Amend the Citizenship Act

As of June 17, 2016, Bill C-6, *An Act to Amend the Citizenship Act* ("Bill C-6") had passed its first reading in the Senate. As reported in our March 2016 *Charity & NFP Law Update*, Bill C-6 was introduced on February 25, 2016 by the Liberal government, along with a backgrounder, An Overview of Proposed

Changes to the *Citizenship Act* (the "Backgrounder"). If passed, Bill C-6 will be of interest to charities and not-for-profits that work with refugees, as it will substantially amend the *Citizenship Act*.

The Backgrounder states that the proposed amendments provide greater flexibility for applicants trying to meet citizenship requirements and would repeal certain provisions that came into effect as part of Bill C-24, which permitted revocation from dual citizens that had engaged in certain acts against national interest, such as terrorism.

Bill C-6 also contains additional changes that are intended to enhance program integrity, including:

- Conditional sentences. Individuals serving conditional sentences will no longer be able to count that time toward the physical presence requirement
- Maintaining requirements for citizenship until Oath-taking. All applicants must continue to meet requirements of citizenship, regardless of when their application was received.
- Ability to seize documents. Citizenship officers will have improved ability to carry out investigations and prevent further use of fraudulent or suspected fraudulent documents.

Parliament Kills Tax Support Bill for Charities

On June 8, 2016, Bill C-239, *An Act to Amend the Income Tax Act (Charitable Gifts)* ("Bill C-239"), also known as *The Fairness in Charitable Gifts Act*, was defeated in Parliament by a vote of 209 to 103. As discussed in our April 2016 *Charity & NFP Law Update* and our March 2016 *Charity & NFP Law Update*, Bill C-239 was introduced by Conservative Member of Parliament, Ted Falk, as a private member's bill on February 25, 2016.

On paper, Bill C-239 proposed amendments to the *Income Tax Act* that would have increased the amount that individual taxpayers would have been able to claim for donations made to charities in the course of a given taxation year. Specifically, it would have increased the maximum tax credit available for charitable donations to match the current tax credit available for political donations. The defeat of Bill C-239 did not come as a surprise to many within the charitable sector.

Amendments to Ontario's Personal Health Information Law include Increased Penalties

Ontario's *Health Information Protection Act*, 2016 ("HIPA"), received Royal Assent on May 18, 2016, which amends the *Personal Health Information Protection Act* ("PHIPA"). PHIPA generally applies to the use, collection and disclosure of personal health information by "health information custodians" (such as doctors or hospitals) and agents working on behalf of health information custodians (such as a

foundations fundraising on behalf of a health information custodian). The amendments provide for more comprehensive protection of health information in Ontario, including greater accountability and transparency in the health system about privacy breaches and critical incidents.

The following changes contained in HIPA will be of significance to charities and not-for-profits that handle personal health information, or act as agents of health information custodians:

- A revised definition of "use" with respect to personal health information which states "to *view*, handle, or otherwise deal with the information".
- Mandatory privacy breach reporting to the Information and Privacy Commissioner and, to relevant regulatory colleges, in certain circumstances;
- Eliminates the requirement under PHIPA that prosecutions must be commenced within six months of the occurrence of the alleged offence, which allows for a broader range of liability;
- Doubling the maximum fines for privacy offences from $50,000 to $100,000 for individuals and from $250,000 to $500,000 for organizations.

The amendments will come into force on a date set by the government.

Saskatchewan Budget 2016-2017

On June 1, 2016, the government of Saskatchewan released Keep Saskatchewan Strong: Provincial Budget 2016-17 (the "Budget"). Of interest to charities and not-for-profits is that the Budget proposes an elimination of the Active Families Benefit ("AFB") – a refundable income tax credit that is currently available to assist qualifying families in providing cultural, recreational and sporting activities to their children.

Introduced in 2009, the AFB has been available in the amount of $150 per child in each taxation year to families with a combined income of less than $60,000 per taxation year. The Budget states that this proposed elimination is a result of better support being available to these families through community level programs. The Budget also references the similar federal tax credit: The Children's Fitness and Arts Tax Credit, which was eliminated by the Federal Budget.

House of Commons Standing Committee on Finance Announces Pre-Budget Consultations

On June 3, 2016, the House of Commons Standing Committee on Finance (the "Committee") made a news release that it was launching its pre-budget consultation process and invited Canadian to participate

by providing suggestions. Suggestions, as well as a report by the Committee on the consultation process, will be considered by the Minister of Finance in preparation of the 2017 Federal Budget.

Anyone who is interested in providing a written submission should be informed that the Committee has set a hard deadline of August 5, 2016. Submissions should include an executive summary and will not be considered if they exceed 2,000 words. Submissions may be sent to finapbc-cpb@parl.gc.ca.

In September, this process will be followed by invitations for selected groups or individuals to provide testimony during pre-budget hearings. Upon approval by the House of Commons, the Committee will issue another press release with further details.

Corporate Update

By Theresa L.M. Man

Amendment to Canada Not-for-profit Corporations Regulations

On May 13, 2016, Regulation SOR/2016-98 was registered to amend certain Department of Industry Regulations. Among the changes, section 73 and 83 of the *Canada Not-for-profit Corporations Regulations* SOR/2011-223 were amended by replacing the Canadian Institute of Chartered Accountants (CICA) Handbook references with the Chartered Professional Accountants Canada (CPA) Handbook. In this regard, the CPA is the new association of professional accountants in Canada that replaces the Canadian Institute of Chartered Accountants. As a result, the names of the handbooks have changed, but the accounting rules remain the same.

Nova Scotia now permits Community Interest Companies

On June 15, 2016, the Nova Scotia legislature passed the Community Interest Company Regulations, which bring into effect the *Community Interest Companies Act* (the "Act"). At the same time, an order was made by Governor in Council on June 14, 2016, declaring the proclamation of the Act as of June 15, 2016. In a Service Nova Scotia news release on June 15, 2016, it indicated that Department of Business is working with stakeholders to develop a social enterprise strategy.

The Act received Royal Assent on December 6, 2012. The Act permits companies incorporated under the *Companies Act* to be designated as Community Interest Companies ("CICs") if they pursue profits while advancing social causes that are traditionally associated with not-for-profit organizations, such as promotion of health or social and environmental concerns. CICs are required to declare their "community purpose," provide a community interest plan and report on their plan annually. A "community purpose"

means "a purpose beneficial to (i) society at large, or (ii) a segment of society that is broader than the group of persons who are related to the community interest company. The Act also clarified that the following are examples of a community purpose: "providing health, social, environmental, cultural, educational or other services, but does not include a political purpose" or a purpose prescribed under the Act. CICs are restricted in the amount of dividends they may declare, how assets are distributed on dissolution and are required to make financial statements public.

However, the *Income Tax Act* was not amended to provide special tax relief or tax status for CICs. As such, CICs must comply with the rules for non-for-profits or pay tax as a for-profit entity under the *Income Tax Act*.

Tax Court Cases of Interest to Charities

By Ryan M. Prendergast

No Tax Credit Without Proper Receipts

On May 25, 2016, the Tax Court of Canada released a decision in the case of *Shahbazi v. The Queen*. While this case was by way of informal procedure and has no precedential value, it adds to a substantial body of case law regarding proper receipting of charitable donations. The case involved an appeal of two notices of assessment issued by the Minister of National Revenue (the "Minister"), which disallowed charitable tax credits that were claimed by the taxpayer for donations of gifts in-kind consisting of household goods forfeited from rental units owned by the taxpayer.

The taxpayer claimed the tax credits for the 2006 and 2007 taxation years in the amounts of $20,000 and $15,000; amounts for which receipts were issued by registered charities. However, the receipt for the first donation did not indicate whether the donation was property or cash, and the second receipt indicated that the donation was received during January to December of 2007 but did not indicate the particular date upon which the donation was made.

The Court, following the Federal Court of Appeal decision in *The Queen v Castro*, dismissed the appeal since the receipts for the donations did not comply with the prescribed information necessary for the tax credits to be claimed under subsection 118.1(2) of the *Income Tax Act* ("ITA") and subsection 3501(1) of the Income Tax Regulations. Since the receipts did not contain descriptions of the goods, the date on which they were donated, or whether the donations were property or cash, the Court ruled that they failed to comply with the necessary requirements and dismissed the appeal.

Misrepresentation

On June 1, 2016, the Tax Court of Canada released a decision in the case of *Omoruan v. The Queen* which was also brought by way of informal procedure. Of particular interest in this case was the matter of misrepresentation that lead the Minister to rely on subsection 152(4) of the ITA to assess the taxpayer beyond the normal reassessment period for the 2003 tax year.

In cases of misrepresentation, credibility of the taxpayer plays a central role in the analysis, and in this case the taxpayer claimed tax credits for a number of charitable donations made in the form of cash and in-kind gifts for the tax years of 2003 to 2006 which totalled $9,533, $15,700, $12,360, and $8,033 respectively. At trial, the taxpayer could not supply bank statements and she could not provide details on the in-kind gifts donated by her and her husband. In short, the Court did not believe the credibility of the taxpayer and her husband for the following reasons:

- Their defensive and evasive attitude in answering question on cross-examination;
- The discrepancy between the years in question and the years before and after vis-à-vis the amounts of the donations;
- The suggestion that Ms. Omoruan donated 100 pairs of used shoes in two years;
- The significant amount of the alleged donations compared to her income;
- The lack of an independent appraisal for the alleged goods donated;
- The lack of bank records (from which was drawn a negative inference that any such records would have helped the Omoruans);
- The different story Ms. Omoruan raised at trial compared to in the previous letter regarding why she left Redemption Power International Ministry;
- The inability to recall a pastor's name;
- The inability to describe the toys donated;
- The large donation by Ms. Omoruan to a church of which she was not a member, when she testified that on one hand she did not attend the church regularly and on the other hand donations were made in smaller amounts throughout the year.

In light of the foregoing, the Court held that there was a misrepresentation, since the taxpayer "claimed donations for amounts she did not donate" and " she knew or certainly ought to have known that $9,500

in 2003 was far in excess of any cash donation actually made, if at all." As a result, the Court ruled that the Minister was entitled to rely on subsection 152(4) and dismissed the appeal.

Clarity Still Needed on Impact of OECD Common Reporting Standards on the Sector

By Linsey E.C. Rains and Terrance S. Carter

As mentioned in our May 2016 *Charity & NFP Update*, the draft legislative proposals to amend the *Income Tax Act* ("ITA") and Income Tax Regulations ("Regulations") to implement the Organisation for Economic Co-operation and Development's ("OECD") common reporting standards ("CRS") were released on April 15, 2016 for consultation until July 15, 2016. Although the legislative proposals are extensive and contain a number of interconnected definitions, the potential impact on charities and non-profit organizations ("NPOs") will depend on whether an entity is caught by the broad definition of "financial institution," as currently drafted. An entity that is characterized as a "financial institution" will be required to report certain information about its non-resident account holders, as also defined in the draft provisions, to the CRA and CRA would then report that information to its counterpart in the non-resident's jurisdiction and vice versa.

The definition of "financial institution" in proposed subsection 270(1) is four-pronged, but a charity or NPO would likely only be caught by the sub-definition of "investment entity", also defined in subsection 270(1). Essentially, an investment entity is defined as an entity "that primarily carries on as a business one or more of the following activities or operations…trading in money market instruments…individual and collective portfolio management, or otherwise investing, administering or managing financial assets or money on behalf of other persons." Proposed subsection 270(3) further clarifies that an entity will be "considered to be primarily carrying on as a business…if the entity's gross income attributable to the relevant activities equals or exceeds 50% of the entity's gross income" during a specified period. As well, the definition of "financial asset" in subsection 270(1) includes "a partnership interest," which has the potential to raise some interesting questions considering that the recent passing of Bill C-15 has greenlit the participation of certain charitable entities in holding interests in limited partnerships. In this regard, sophisticated foundations, charitable trusts, and other large organizations that manage and generate more than 50% of their own income from investment activities may be caught by the financial institution definition and should consult their legal and accounting advisors to help determine whether they will have reporting obligations once CRS is fully implemented.

At this consultative stage of the implementation process it is not clear how CRA plans to administer these new provisions once implemented. On May 16, 2015, Canada Revenue Agency ("CRA") published some questions and answers on its website to "give more information and tax administration perspectives about the" CRS and promised to "continue to inform the public of tax changes through its website, forms and publications, phone enquiries services and other communication channels." The OECD itself also released "CRS-related Frequently Asked Questions" this month on its website, but neither the CRA nor OECD releases provide clear guidance on how charities and NPOs will be affected.

It is also interesting to note that the implementation of CRS has garnered significantly more attention in the United Kingdom ("UK") than in Canada. In fact, the UK's HM Revenue & Customs has recently released guidance on how CRS will impact charities in the UK. It remains to be seen whether the UK perspective on CRS will change following the recent referendum in support of leaving the European Union ("EU"), given that its implementation was the result of a directive from the EU. In any event, regardless of what happens internationally, the sector looks forward to seeing how CRA will administer the proposed amendments.

Director General of the Charities Directorate Promoted

By Terrance S. Carter

At the 2016 National Charity Law Symposium held on May 27, 2016, it was announced that Cathy Hawara has been promoted from her position as Director General of the CRA Charities Directorate to Deputy Assistant Commissioner of the CRA Legislative Policy and Regulatory Affairs Branch effective June 6, 2016. Fortunately for the charitable sector, Ms. Hawara will continue to have oversight of the Charities Directorate in her new position.

After six and a half years, Ms. Hawara has been one of the longest serving Director Generals of the Charities Directorate. Throughout her tenure at the Charities Directorate, Ms. Hawara has encouraged greater engagement with the sector on issues related to the federal regulation of registered charities under the *Income Tax Act*. In addition, Ms. Hawara has led the Charities Directorate during a time of unprecedented change to the regulatory regime, including the introduction of new rules for qualifed donees, the ineligible individual provisions, the political activities audit program, and innovations related to the Charities Directorate's delivery of guidance products, webinars, and other client service improvements. Ms. Hawara will be missed by the charitable sector and will no doubt be a hard act to follow.

CRTC Signs MOU with International Agencies to Fight Spam

By Ryan M. Prendergast

On June 14, 2016, the Canadian Radio-television and Telecommunications Commission ("CRTC") released an announcement that it had signed a Memorandum of Understanding ("MOU") with 10 international enforcement agencies. The purpose of the MOU is to foster and facilitate cooperation between the 11 signatory agencies, with a view to fighting "unlawful spam and unsolicited telecommunications".

The participating agencies were all part of the London Action Plan, which was a 2004 initiative involving 27 countries to address spam proliferation and related problems, such as electronic fraud and the spread of viruses. The agencies specifically involved with the MOU are the following:

- The Office of the Privacy Commissioner of Canada
- The United States' Federal Trade Commission and Federal Communications Commission
- The Australian Communications and Media Authority
- The Netherlands' Authority for Consumers & Markets
- The United Kingdom's Information Commissioner's Office and National Trading Standards Intelligence Team
- The Korea Internet & Security Agency
- The New Zealand Department of Internal Affairs
- The South Africa National Consumer Commission

Charities and not-for-profits that communicate with their donors or members through email, social media, or by telephone, should be aware of the move toward increased information sharing between agencies concerning the enforcement of anti-spam legislation, domestically and internationally. The current MOU reflects this trend and follows closely on the heels of the signing of a previous bilateral agreement between the CRTC and the US Federal Trade Commission on March 24, 2016, regarding anti-spam enforcement, as discussed in our April 2016 *Charity & NFP Law Update*.

SCC Denies Leave to Appeal in Discriminatory Will Case

By Jacqueline M. Demczur

On June 9, 2016, the Supreme Court of Canada denied leave to appeal in the case of *Spence v BMO Trust Company* ("Spence Case"). As a result, the Ontario Court of Appeal decision of *Spence v BMO Trust Company*, that was reported on in our March 2016 Update remains the law in Ontario. The Spence Case arose out of a dispute between Eric Spence's estate and Verolin Spence, Eric's daughter ("Verolin"), when Verolin was excluded from Eric's Will. The claim made by Verolin was that her exclusion from the Will was made on a discriminatory basis, specifically because she had a child whose father was white and that Eric disapproved of her decision in this regard. In particular, Verolin claimed, on the basis of extrinsic evidence, that Eric's intention in excluding her from his Will was based on a "clearly stated racist principle," and offended public policy. However, according to the Court of Appeal, the Will did not express such an intention.

The Ontario Court of Appeal stated that "[a] testator's freedom to distribute her property as she chooses is a deeply entrenched common law principle" and that "[a]bsent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects the testator's right to unconditionally dispose of her property and choose her beneficiaries as she wishes, even on discriminatory grounds." In coming to this decision, the Court of Appeal sent a clear signal that it will continue to uphold testamentary freedom in private will cases concluding that to apply public policy doctrine to void unconditional bequests would be to effect a "material and unwarranted expansion of the public policy doctrine."

Court Limits Temporary Lay-off Rights

By Barry Kwasniewski, *Charity & NFP Law Bulletin* No. 387, June 23, 2016

On March 18, 2016, the Ontario Superior Court of Justice released its decision on a motion for summary judgment in the case of *Chea v CIMA Canada Inc*. The case involved a dispute between Leang Chea (the "Plaintiff") and CIMA Canada Inc. (the "Defendant"). The dispute arose when the Plaintiff, who had been a draftsman for twenty-two years with the Defendant, was laid off. Of particular interest in this case was the treatment of the temporary lay-off and the relevant provisions of the Ontario *Employment Standards Act, 2000* ("ESA") by the Court. This Bulletin discusses the Court's analysis of the temporary lay-off in dispute and the impact that this decision may have on organizations that attempt to utilize the temporary lay-off provisions of the ESA, including charities and not-for-profits.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 387.

Ontario Court Rules that CRA Does Not Owe Duty of Care for Disallowed Tax Shelters

By Sean S. Carter and Linsey E.C. Rains

On June 20, 2016, the Ontario Superior Court of Justice allowed the Crown's motion to strike the Plaintiff's statement of claim for failing to disclose a reasonable cause of action in the case of *Deluca v The Queen*. The Plaintiff participated in a charitable tax shelter, which involved the Plaintiff taking a loan from a barter organization for which he received "TradeBux" and then making donations to Liberty Wellness Initiate Foundation ("LWIF"), a registered charity at the time. The Plaintiff received "very substantial tax refunds" for donations he made under the scheme in 2007, 2008, and 2009. In 2010, LWIF's charitable registration was revoked. While the decision does not specify a time frame, at some point the Plaintiff was issued notices of reassessment for his 2007 and 2008 taxation years. Although the Plaintiff is disputing these reassessments in the Tax Court of Canada, he also brought a claim against the Crown and two individual CRA employees, asserting that they "failed to take prompt actions to warn the public" about problems it was aware of with the tax shelter "and the risks in dealing with them until April 2010." This, the Plaintiff alleged, constituted negligence on the part of the CRA and was "a breach of a public and private law duty of care" that resulted in the denial of the Plaintiff's charitable donations and the resulting credits for their respective tax years.

One of the issues central to the decision was whether CRA owed a duty of care to the Plaintiff, since CRA was aware of problems with the tax shelter and LWIF failed to take steps to warn the public. In its analysis, the Court rejected the claim that there was a duty of care for a number of reasons. First, the Court held that the "loss of value of a tax deduction stemming from a questioned (and questionable) in-kind donation" was not a "foreseeable consequence of failing to police the registration of charitable organizations." Second, the Court held that there was no statutory duty under the *Income Tax Act* ("ITA") "from which the necessary degree of proximity might be inferred" and would be required to establish the duty of care. In commenting on this point the Court clearly stated that the purpose of issuing charitable registrations or tax shelter identification number is "to protect the tax base administered by CRA" and that the "ITA cannot be construed to impose a duty on the Minister or his or her officials to administer the registration and supervision of registered charities in order to protect taxpayers from the risk of dealing with them." As a result, the Court found that the relationship between the Plaintiff and CRA "lacks the elements of foreseeability of harm and proximity necessary to sustain a claimed duty of care" and the Court therefore struck the Plaintiff's claim for this, and a number of other reasons including public policy. As the Court summarized "There is no duty to warn taxpayers away from participating in tax shelter schemes that prove

unsuccessful". It is not yet known if the Plaintiff plans to appeal, but this decision will likely have a strong persuasive effect in similar types of actions.

Affiliation Agreement Upheld by BC Court of Appeal

By Theresa L.M. Man

On May 20, 2016, the B.C. Court of Appeal upheld a claim for specific performance by Habitat for Humanity Canada ("Habitat") pursuant to an affiliation agreement in an appeal of the decision of the B.C. Supreme Court by Hearts and Hands for Homes Society ("HHHS").

The case involved a dispute between Habitat as a national umbrella organization and HHHS as one of Habitat's affiliate members. As a Habitat affiliate, HHHS is also required to enter into an affiliation agreement with Habitat. The agreement gives affiliates a non-exclusive sublicense to use the intellectual property associated with the "Habitat for Humanity" marks, to solicit donations, and to carry out the charitable activities to provide affordable housing to individuals in need in Canada.

The dispute arose as a result of HHHS's non-compliance with the requirements under the affiliation agreement, which led to Habitat invoking the disaffiliation process set out in Habitat's disaffiliation policies. Upon completion of all six stages of the disaffiliation process, Habitat determined that HHHS did not bring itself into compliance with the affiliation requirements, disaffiliated HHHS, and proceeded to enforce the provision of the affiliation agreement to require the net assets of HHHS be transferred to Habitat.

We reported in our JulyAugust 2015 *Charity & NFP Law Update* regarding the decision of the lower court released on July 8, 2015. On appeal, the BCCA dismissed all grounds of the appeal and upheld the specific performance as granted by the trial judge, declaring that the net assets of HHHS are assets of Habitat.

Many umbrella organizations utilize a similar structure whereby affiliates or chapters are required to comply with certain requirements or standards, non-compliance with which would lead to disaffiliation. For these organizations, a few lessons can be learned from this case in structuring such a relationship:

First, this case shows the willingness of the courts to uphold reasonable provisions set out in an affiliation agreement entered into between charities.

Second, it is important for parties to comply with the process set out in their policies and agreements. Both courts in this case agreed that their role was not to conduct a judicial review of the reasonableness of

Habitat's decision to disaffiliate HHHS, but to determine whether Habitat complied with the process in its own disaffiliation policy.

Third, when structuring the mechanism for the disaffiliation process, it is important to consider the purpose of such a process and the fairness of the process. It is interesting to note that the Court of Appeal "agree[d] with the judge's comments … that the disaffiliation policy is designed to benefit affiliates experiencing difficulty as it offers a defined path to remain in or return to good standing. The aim is to keep the affiliate in the Habitat family. The policy should be interpreted with this goal in mind."

Fourth, before entering into an affiliation agreement, affiliates should be given an opportunity to provide input or feedback to the terms of the agreement. In this case, the court found that HHHS did not provide any input although an opportunity was given by Habitat.

Fifth, it is helpful for parties to confirm in the affiliation agreement and constating documents their respective purposes and how they align with each other. In this case, the court held that HHHS did not have a "distinct charitable purpose from that of Habitat." Instead, HHHS's charitable purpose was substantially the same as that of Habitat and the affiliation agreement states that the affiliate's purpose is consistent with the purpose of Habitat.

Proposal for Changes to Trademark Fees May Prompt Pre-emptive Registrations

By Sepal Bonni

As reported in *Charity & NFP Law Bulletin* No. 360, on June 19, 2014, amendments to Canada's *Trademarks Act* were passed into law. As a result of these amendments, on June 6, 2016, CIPO released consultation documents which includes the proposed trademark fee changes that will apply when the amendments come into force, and has set a deadline of July 5, 2016 for public comment.

The main proposal with respect to the trademark fee structure is to implement fees per classification of goods and services. Currently, Canada does not require classification of goods and services into specific categories. As such, trademark applicants can include an unlimited number of goods and services in a trademark application without any additional government fees, regardless of how broad the list of goods and services is. When the amendments are implemented, the goods and services will have to be categorized into one of 45 classes and the proposal by CIPO reflects fees per class of goods and services, both at filing and renewal.

The proposed new government fees for online trademark filing are $330 for one class of goods and services, and $100 per additional class. Current fees for filing and registration are $450 combined for application and registration, regardless of the number of classes. To avoid the proposed fees per class, charities and not-for-profits wishing to protect their brands in multiple classes should consider filing trademark applications now with a broad "wish list" of goods and services prior to the amendments being implemented.

Rowan's Law Receives Royal Assent

By Sean S. Carter

On June 9, 2016, Bill 149, *Rowan's Law Advisory Committee Act* ("Rowan's Law") received royal assent in the Ontario legislature. As discussed in our January 2016 *Charity & NFP Law Update*, Rowan's Law was named after 17-year-old Rowan Stringer, who tragically died after sustaining a concussion while playing rugby. This is the first concussion protocol legislation that has been passed for young athletes in Canada. This new law will be of interest to any charities and not-for-profits that run activities for young athletes, such as: sporting events; helping to operate leagues or sporting organizations; or, assist in establishing standards and rules for the carrying out of the sporting activity.

The focus of Rowan's Law is to provide education regarding sports-related concussions to athletes, parents and coaches. The legislation would establish a mandatory protocol that dictates when an athlete must be removed from the applicable sport if a concussion is suspected. Further, it also mandates that medical clearance must be obtained before athletes are permitted to return to his or her chosen sport after sustaining a concussion. An advisory committee will also be established to provide recommendations to the legislature based on findings from the inquest into Rowan Stringer's death. The committee will be composed of members appointed by the Minister of Children and Youth Services, the Minister of Education and the Minister of Health and Long Term Care, and the Minister of Tourism, Culture and Sport.

As mentioned above, it is the first legislation of its kind in Canada and follows Bill 39, *Education Amendment Act (Concussions)*, 2012, which was introduced in 2012 and would have established similar rules for teachers and coaches, but died on the Order Paper in October 2012 when the Legislature was prorogued. Charities and not-for-profits that provide services for children should remain attentive to the Rowan's Law and the recommendations that its advisory committee will make because they may need to adopt new policies to ensure compliance.

Anti-Terrorism & Money-Laundering Update

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

Bill C-22 To Establish the National Security and Intelligence Committee Passes First Reading

On June 16, 2016, Bill C-22, *An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts* ("Bill C-22") passed its First Reading in Parliament. If passed, Bill C-22 would establish the National Security and Intelligence Committee of Parliamentarians (the "Committee") and determine its composition and mandate. It would also establish the Committee's Secretariat, which would assist the Committee in fulfilling its mandate and make consequential amendments to certain Acts.

The Committee would be given the capacity to monitor classified security and intelligence activities and subsequently report findings to the Prime Minister. Bill C-22 states that the mandate of the Committee would be to review:

- the legislative, regulatory, policy, administrative and financial framework for national security and intelligence;
- any activity carried out by a department that relates to national security or intelligence, unless the appropriate Minister determines that the review would be injurious to national security; and
- any matter relating to national security or intelligence that a minister of the Crown refers to the Committee.

Although the Committee would be precluded from reviewing activities if such a review would be deemed "injurious to national security", charities and not-for-profits that have concerns about the far-reaching effects of Bill C-51 and the dearth of oversight for broad state investigative powers may wish to follow the progress of Bill C-22.

Revisions Announced to FATF Recommendation 8

From June 22-24, 2016, the Financial Action Task Force (FATF) held a plenary meeting in Busan, Korea, which, among other things, resulted in revision of FATF Recommendation 8 and its interpretive note to protect non-profit organisations from terrorist financing abuse (the "Revision") which has been incorporated into the FATF's main Recommendation document. The FATF is an inter-governmental body responsible for setting and monitoring international standards for combating money laundering and the

financing of terrorism and Recommendation 8 deals specifically with combating the abuse of non-profit organizations, internationally.

Of particular note is the fact that the Revision has amended the Recommendation to remove the identification of the Non-Profit Organization ("NPO") sector as "particularly vulnerable" to terrorist abuse and money laundering concerns. The Revision follows a Consultation and Dialogue Meeting that the FATF held with NPOs on April 18, 2016, in Vienna to encourage "open dialogue with representatives from a variety of NPOs on the FATF's ongoing work to revise its standards on non-profit organizations" (as discussed in our April 2016 *Charity & NFP Law Update*). This meeting followed a November 2015 call for public consultation on the Interpretive Note to Recommendation 8 (the "Interpretive Note") that sought to garner input to refine its terminology and application to the NPO sector.

With regard to the role of NPOs in terrorist financing, the FATF previously released "The FATF Typologies Report on Risk of Terrorist Abuse in Non-Profit Organizations" (the "Typologies Report") in June 2014, which identifies factors that contribute to abuse of NPOs (as discussed in our July/August 2014 *Charity & NFP Law Update*). The Typologies Report was a precursor for the preparation of a recently revised best practices paper published by the FATF in June 2015, "Best Practices Paper on Combatting the Abuse of Non-Profit Organizations (Recommendation 8)" (the "Best Practices Paper") that discusses strategies for implementing the recommendation (as discussed in our July/August 2015 *Charity & NFP Law Update*).

A more extensive analysis of the changes to the more complex Interpretive Note to Recommendation 8 will follow in a future Update.

Lexpert® Rankings 2016

Several partners of Carters Professional Corporation were recognized as leaders in the areas of Charity and Not-for-Profit Law, in Canada by The Canadian Legal Lexpert® Directory 2016. Terrance S. Carter, Managing Partner of the firm, has been recognized as one of the most frequently recommended practitioners in the area of charities and not-for-profits in Canada since 2004. Theresa L.M. Man has been recognized as consistently recommended practitioners in charity & not-for-profit law since 2011, and Jacqueline M. Demczur and Esther S.J. Oh have been recognized as repeatedly recommended practitioners, also since 2011.

IN THE PRESS

Charity & NFP Law Update – May 2016 (Carters Professional Corporation) was featured on *TaxNet Pro* and is available online to those who have subscription privileges. Future postings of the *Charity & NFP Law Update* will be featured in upcoming posts.

RECENT EVENTS AND PRESENTATIONS

Carters hosted its **Spring 2016 Webinar Series** to assist charities and not-for-profits with current and essential legal issues. Available as "On Demand / Replay" webinars, the following complimentary webinars are available at our website:

Going Into Business? The Social Enterprise Spectrum for Charities was presented by Terrance S. Carter on April 21, 2016 from 1:00 – 2:00 pm ET. On Demand / Replay available.

Going Social: Using Social Media to Accomplish Your Mission was presented by Sepal Bonni on May 4, 2016 from 1:00 – 2:00 pm ET. On Demand / Replay available.

Human Rights Challenges in the Workplace was presented by Barry W. Kwasniewski on May 18, 2016 from 1:00 – 2:00 pm ET. On Demand / Replay available.

The ABC's of GST/HST for Charities and NPOs was presented by Linsey E.C. Rains on June 8, 2016 from 1:00 – 2:00 pm ET. On Demand / Replay available.

National Charity Law Symposium was held on Friday, May 27, 2016 at the Toronto Region Board of Trade in Toronto Ontario. Theresa Man participated in a panel discussion and provided a handout entitled "**Accounting for and Allocating Costs: Legal Perspective**."

York Entrepreneurship Development Institute was held on Monday May 30, 2016, at Vaughan City Hall. Theresa L.M. Man joined a roundtable discussion on the topic of "Tax and Legal Implications for Charities and NPOs in Ontario."

Endowment and Foundation Investment Conference for Western Canada was held on June 15, 2016, in Vancouver, B.C. Terrance S. Carter presented on the topic of "Avoiding Pitfalls in Drafting Gift Agreements."

Healthcare Philanthropy: Check-Up 2016, was co-hosted by Carters and Fasken Martineau on Thursday, June 23, 2016. A two part session entitled "When is a Gift Not a Gift?" and "What to Do When Gifts Go Bad" was presented by Theresa L.M. Man and Terrance S. Carter. Click here for the **Complete Handout**, including "Privacy Issues for the Healthcare Sector" by John P. Beardwood and "Testamentary Charitable Gifting" by M. Elena Hoffstein, Partners from Fasken Martineau.

UPCOMING EVENTS AND PRESENTATIONS

11th Annual CSAE Trillium Chapter Summer Summit will be held July 6 to 8, 2016 at Blue Mountain Resort, Ontario. Terrance S. Carter and Theresa L.M. Man will present on the topic "Considerations in Drafting a Books and Records Policy" on Thursday, July 7, 2016 from 4:00-5:30 pm.

SAVE THE DATE - 23rd Annual Church & Charity Law™ Seminar will be hosted by Carters Professional Corporation in Greater Toronto, Ontario, on **Thursday November 10, 2016**. Details and online registration will be available soon.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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