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CHARITY & NFP LAW UPDATE

JUNE 2017

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

JUNE 2017

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RECENT PUBLICATIONS AND NEWS RELEASES

CASL Private Right of Action Suspended

By Ryan M. Prendergast

On June 2, 2017, the Governor General in Council issued an Order in Council (the "new Order in Council") amending Order in Council P.C. 2013-1323, the Order fixing the coming into force dates for sections of Canada's Anti-Spam Legislation ("CASL"). The new Order in Council repeals a paragraph in Order in Council P.C. 2013-1323 that sets the date for the coming into force of a private right of action under CASL.

Innovation, Science and Economic Development Canada issued a press release to accompany the repeal, explaining that the government is suspending the implementation of the private right of action "in response to broad-based concerns raised by businesses, charities and the not-for-profit sector." The press release notes that what is needed is "a balanced approach that protects the interests of consumers while eliminating any unintended consequences for organizations that have legitimate reasons for communicating electronically with Canadians." As such, a parliamentary committee will be asked to review the legislation. The *Canada Gazette* further notes that the delay is for the purpose of promoting "legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk."

Despite the fact that the current suspension of the private right of action delays the risk of private claims and class actions, the transition period for requesting express consent ends on July 1, 2017. For more information in this regard, see *Charity & NFP Law Update* May 2017's article "July 1st CASL Deadline Looms." As there are significant penalties under CASL, charities and not-for-profits ("NFPs") must ensure that they have complied and continue to comply with CASL. The Canadian Radio-television and Telecommunication Commission will assess each case but maximum penalties are up to $1 million for individuals and $10 million for businesses.

CRA News

By Theresa L.M. Man

Changes Coming to Charitable Registration Application Process

In late June 2017, the Canada Revenue Agency ("CRA") sent an email to key stakeholders announcing a number of upcoming changes to the charitable registration process. In the email, the CRA announced that

the Charities Directorate would no longer review applications submitted with draft governing documents. Such applications would be considered incomplete and returned to the applicant. The CRA also recommended that trust documents include a clause allowing trustees to amend or alter the purpose(s) of the trust in order to meet the legislative and common law requirements for charitable registration. As well, if an applicant believes that the purposes in its governing documents do not accurately reflect its programs, proposed purposes can be included in the application, along with its current certified governing documents. These changes will come into effect July 1, 2017.

Famine Relief Fund

On May 29, 2017, the Government of Canada launched the Famine Relief Fund (the "Fund"). Eligible donations made to registered charities between March 17 and June 30, 2017 will be matched by equivalent contributions by the Government of Canada to the Fund. The contributions made by the Government of Canada are directed towards the Fund rather than the charities that receive donations from the public. The intention of the Fund is to engage Canadians in responding to the humanitarian crises in Nigeria, Somalia, South Sudan and Yemen where millions are at risk of starvation. Because the humanitarian crises have regional implications, the Fund also matches donations for relief activities in Cameroon, Chad, Niger, Ethiopia, Kenya, and Uganda. The Fund will be used to support experienced Canadian and international humanitarian organizations using established Global Affairs Canada channels and procedures.

To be eligible to be matched by the Government of Canada, donations must be: made by individuals; monetary in nature (*i.e.*, not in-kind donations); not exceeding $100,000 per individual; made to a registered charity that raises money for the above-noted humanitarian crises; specifically earmarked in response to the crises; and made between March 17 and June 30, 2017. Charities receiving eligible donations will need to complete the Famine Relief Fund Declaration Form and return it to Global Affairs Canada by July 7, 2017, in order to have the eligible donations matched by the Government of Canada and contributed towards the Fund. It is up to the registered charities to certify that the donations declared are eligible. The Famine Relief Fund is separate from the funds raised by charities and is administered by the Government of Canada. This means that charities do not receive a matching dollar from the Government of Canada for each dollar that they report.

Legislation Update

By Terrance S. Carter

Budget Implementation Act, 2017

On March 22, 2017, federal Finance Minister Bill Morneau tabled the second budget of the Liberal majority Federal Government ("Budget 2017"), proposing a number of changes for the charitable and NFP sector. The budget was discussed in greater detail in our *Charity & NFP Law Bulletin* No. 399. Legislation to implement certain portions of Budget 2017 was introduced on April 11, 2017 by means of Bill C-44, *Budget Implementation Act, 2017, No. 1* ("Bill C-44"), which received royal assent on June 22, 2017.

In accordance with Budget 2017, Bill C-44 repeals the additional corporate donation deductions on medicine for international aid by repealing paragraph 110.1(1)(a.1) and subsections 110.1(8) and (9) of the *Income Tax Act* ("ITA"), as well as amending subsection 149.1(15) of the ITA. The repeal applies to gifts made after March 22, 2017.

Bill C-44 also made a number of amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. These amendments are discussed in the Anti-terrorism Update, below.

Protecting Patients Act, 2017

On May 30, 2017, Ontario Bill 87, *Protecting Patients Act, 2017* (the "Act") received Royal Assent. The Act makes amendments to a variety of healthcare-related acts. This includes the *Regulated Health Professions Act, 1991*, the *Public Hospitals Act*, the *Health Insurance Act*, the *Ontario Drug Benefits Act*, and the *Immunization of School Pupils Act*, among others. Of particular interest are enhanced protections around sexual abuse under the *Regulated Health Professions Act, 1991*, including an expansion of access to professional college-funded therapy and counselling to alleged victims of sexual assault committed by college members. Previously the funds were only available to victims who had proven the assault. *The Health Insurance Act* is amended to permit ambulance services, medical laboratories and other health facilities to be paid on a basis other than fee for service, and the *Ontario Drug Benefits Act* is amended to expand the role of nurse practitioners in prescribing certain products and drugs. The Bill will also repeal the *Elderly Persons Centres Act* and replace it with the *Seniors Active Living Centres Act, 2017* on a day to be named by proclamation of the Lieutenant Governor. Charities and NFPs involved in the healthcare sector should ensure that they become familiar with the changes that have been made to these and other acts.

Corporate Update

By Theresa L.M. Man

On June 21, 2017, *Bill C-25, An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act, and the Competition Act* ("Bill C-25"), passed the House of Commons and received first reading in the Senate. Bill C-25, tabled on September 28, 2016, was reviewed and amended by the Standing Committee on Industry, Science and Technology before it received third reading in the House of Commons. As indicated in "Technical Amendments to the Canada Not-for-profit Corporations Act" in our October 2016 *Charity & NFP Law Update*, the Bill proposes technical amendments to the *Canada Not-for-profit Corporations Act* ("CNCA"), including the addition of a definition of "incapable" which would no longer require court declaration, and the addition of section 277.1 of the CNCA requiring the Director to publish a notice of any decision made by the Director in respect of applications made under various sections of the CNCA. Corporations incorporated under the CNCA should monitor the status of Bill C-25 when Parliament returns from its recess in the fall.

Special Committee Proposed by Senator for Review of Charitable Sector

By Jennifer M. Leddy

On June 1, 2017, Senator Terry Mercer made a motion before the Senate for the creation of a Special Committee on the Charitable Sector (the "Committee") to study not only charities but also NFPs, as well as the impact of federal and provincial laws on them. Senator Mercer cited Statistics Canada's *General Social Survey: Giving, volunteering and participating, 2013*, which indicated that participation in volunteer work had decreased between 2010 and 2013. Senator Mercer identified several questions for the Committee including:

- How do we modernize the NFP and charitable sectors in Canada?
- Why do we need volunteers and donations?
- What motivates someone to volunteer or donate?
- How does socio-economic status, geography, gender, or culture affect volunteering or donating?
- What can we do to encourage more volunteering and donating?
- What are the barriers to volunteering and donating?
- How are current tax credits working?

- How is the *Income Tax Act* supporting charities, NFPs and volunteers?
- How efficient and effective are the policies and laws governing the philanthropic sector?
- How are charities regulated and are there barriers to their success, either provincially or federally, or both?
- How do government departments interact with charities?

Senator Mercer proposes that the Committee speak with groups representing the sector, volunteers, government officials, charities and NFPs and present a report at around the one-year mark following the framework for the Committee being put in place. Senator Mercer's motion is particularly timely, given the recent report of the Consultation Panel on the Political Activities of Charities, covered in our *Charity & NFP Law Bulletin* No. 403. The motion was again debated on June 21, 2017 without resolution. Hopefully, if successful, this motion will enhance understanding of the sector and what is working and not working in the current regulatory framework.

Recent GST/HST Rulings

By Ryan M. Prendergast

On May 31, 2017, the CRA released a GST/HST ruling that addresses, among other issues, a corporation's eligibility for a public service body ("PSB") rebate (CRA document #165757) as well as a correction of a previous GST/HST ruling, which addresses the correct application of GST/HST to a charity's supplies of esthetics services and spa services (CRA document #176139R).

With regard to the first ruling, the CRA stated that, in order to be eligible to claim a PSB rebate, the corporation would need to be a "qualifying non-profit organization, facility operator or external supplier." The corporation in question in the ruling is not a charity. Based on the facts of this specific case, the corporation did not meet the requirements to be considered a qualifying non-profit organization, facility operator or external supplier, and was therefore not eligible for a PSB rebate.

The second ruling dealt with a charity that provides medical foot care services by registered nurses, but also provides esthetic services including pedicures, manicures and waxing, as well as spa services including reflexology, massages and Reiki. The CRA explained that a charity's supply of esthetics services would be a taxable supply, as esthetics services enhance an individuals' physical appearance and are not rendered for medical or reconstructive purposes and are therefore excluded from the general exemption for charities under the *Excise Tax Act*. However, a charity's supply of reflexology, massage,

and Reiki services, which do not enhance or otherwise alter an individual's physical appearance, are tax-exempt supplies as no other exclusions to the general exemption apply.

GST/HST Rulings are written statements that set out the CRA's position on how certain provisions of the *Excise Tax Act* apply to a clearly defined fact situation. While rulings are binding on the CRA, they are only binding with respect to the specific facts disclosed to them and do not have any universal application. Charities and NFPs that are uncertain about the application of the *Excise Tax Act* may wish to seek legal assistance in writing a written request for a ruling.

Ontario Employment Standards Act Changes Proposed

By Barry W. Kwasniewski

On May 23, 2017, the Ontario Government released the much anticipated *Changing Workplaces Review Final Report and Summary* (the "Report"). The Report recommended some 173 changes to Ontario's employment and labour laws, and proposed amendments to Ontario's *Employment Standards Act, 2000* ("ESA") and the *Labour Relations Act, 1995*. In response to the Report, on June 1, 2017, Bill 148, *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148") was quickly introduced and referred for consideration of the Standing Committee on Finance and Economic Affairs. Public consultations on Bill 148 will be held in various Ontario cities this summer. This Bulletin will focus on the proposed changes to the ESA which may have the most significant impact on charities and not-for-profits in Ontario, including changes proposed to provisions on minimum wage, paid vacation, personal and emergency leave, and scheduling.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 405.

Trustees Held to Good Faith Standards

By Jacqueline M. Demczur

Directors and officers of federally incorporated charities and NFPs have both a statutory standard of care and common law fiduciary duty to act in good faith with a view to the best interests of the corporation. This duty at common law is illustrated in *Bhadra v Chatterjee*, where the Ontario Superior Court of Justice (the "Court") considered a dispute between the board of directors (referred to as the "board of trustees") of Toronto Kalibari, a NFP religious organization ("Kalibari"), over the amendment of by-laws upon their transition to the CNCA. This case is not the first instance that a trustee of Kalibari has filed a lawsuit against two of the Respondents. The first instance was in the case of *Pal et al. v Chatterjee et al.*, reported in the March 2013 *Charity Law Update*.

In this case, Bhadra, a trustee of Kalibari (the “Applicant”), brought a motion seeking to stop three other trustees, Chatterjee, Dey and Ghosh (the “Respondents”), from calling a meeting of the board to vote on the proposed new by-laws. The Applicant further sought for the Court to redraft the by-laws or, in the alternative, to be granted leave to commence a derivative action.

At a meeting discussing the process of internal revision of Kalibari’s by-laws, a dispute arose between the Applicant and the Respondents. Subsequently, the board of trustees held a discussion about hiring a lawyer to revise Kalibari’s by-laws for the CNCA transition. Five of nine trustees voted in favour of retaining a lawyer, Mr. Box, to do the work. Two of the Respondents subsequently went by themselves to discuss the retainer with Mr. Box without first consulting with the remaining trustees on the work to be done.

The Court allowed the application, in part, “on the basis that the Respondents did not act in good faith in the manner in which they retained counsel to draft new corporate by-laws and invited corporate counsel to a meeting of the board […] without notice to the applicant”. In this regard, it stated that the “Respondents should have expected that the “minority” trustees would want an opportunity to liaise with the lawyer before the first draft was prepared.”

The Court stated that “the Respondents acted in bad faith and without the authority of the board when they retained Mr. Box and the by-laws drafted by him were drafted on behalf of the Respondents”. As such, the court prohibited the Respondents from holding a meeting to vote on the said by-laws. The Court ordered that all parties be returned to their previous positions, and that Kalibari retain new legal counsel, namely someone other than Mr. Box or two other lawyers that had been hotly debated by the trustees. This case serves as a reminder that, even where there is conflict between members of a board of directors, each director must uphold the statutory standard of care and the duty to always act in good faith with a view to the best interests of the corporation on which they serve, as they may be held personally liable for their actions.

Privacy Implications of Conducting Social Media Background Checks

By Esther Shainblum

In May 2017, the Office of the Information and Privacy Commissioner for British Columbia updated its guidance document on Conducting Social Media Background Checks (the “Guidance”). The Guidance is intended “to help organizations and public bodies navigate social media background checks and privacy laws.” The Guidance emphasizes the fact that using social media to conduct background checks on prospective employees or volunteers or to monitor current ones can place an organization at risk of a

privacy breach. Privacy risks of social media screening include collecting inaccurate, dated or irrelevant information about individuals, collecting too much information about individuals or inadvertently collecting personal information about third parties. The Guidance also cautions against over-reliance on consent, which can be revoked at any time. The Guidance advises organizations planning to use social media for background checks to conduct a privacy impact assessment of the risks associated with doing so and to have comprehensive policies, procedures and controls in place to address these risks.

Although not specifically aimed at charities and NFPs, and although it is drafted in the legislative context of British Columbia, this short document is a useful tool for charities and NFPs using social media background checks, and may provide helpful information, even if the charity or NFP is not located in British Columbia. Charities and NFPs not located in British Columbia can use this tool as a starting point to understanding the risks in using social media background checks, but should consult provincial privacy law and legal counsel in the province or territory in which they operate.

Polish Association of Toronto Limited v. The Polish Alliance of Canada

By Esther S.J. Oh

On November 21, 2016, the Ontario Superior Court of Justice (the "Court") released its judgment in *Polish Association of Toronto Limited v. The Polish Alliance of Canada* ("2016 Case"). The parties to the 2016 Case had also been involved in previous litigation involving similar issues in *The Polish Alliance of Canada v. Polish Association of Toronto Limited* (2014 ONSC 3216) (the "2014 Case") and on appeal (2016 ONCA 445) (the "2014 Appeal"). The Court in the 2016 Case applied the common law principle known as the "clubman's veto" in an unusual corporate context. The clubman's veto was explained by the Court as "a common law rule that provides that members of an unincorporated association must be unanimous to leave the association and to take the property of the association with them."

The 2016 Case dealt with the issue of whether the members of Branch 1-7 ("Branch") were entitled to leave The Polish Alliance of Canada ("National"), a not-for-profit corporation, and take with them the property used by the Branch. The Branch was an unincorporated branch of the National. The Branch's property included a clubhouse on Lakeshore Blvd. in Toronto worth $50 million or more (the "Branch Property"), which was held in trust for the members of the Branch by a separate corporation, the Polish Association of Toronto Limited ("PATL"). Prior to its incorporation in 1973, the National had operated as an unincorporated association from the 1920s. However, it was the members of the Branch that raised

money to purchase and maintain the Branch Property over the years and the PATL was incorporated in 1927 to hold property in trust for the benefit of the unincorporated Branch.

In the 2014 Case, the Branch's efforts to leave the National based on the approvals obtained at a meeting attended by less than one third of the Branch members, with insufficient notice, was unsuccessful. However, the Court in the 2014 Case made determinations on several matters between and among the National, the members of the Branch and the PATL, which were upheld with some amendments in the 2014 Appeal. The Court in the 2014 Case held, among other matters, that the beneficial owners of the Branch Property are the members of the Branch, and that the Branch is an independent organization within the constitutional structure of the National. Regarding the nature of the Branch, the Court in the 2014 Case held that "While not a legal entity, as between the parties, [the Branch] is recognized as distinct, can lend and borrow, manage property interests delegated to it, and exercise the rights of a branch under the [National's] constitution."

After the 2014 Appeal affirming the decision in the 2014 Case was released, the Branch held a membership meeting at which the Branch members unanimously agreed to leave the National and take the Branch Property with them, giving rise to the 2016 Case. The National argued that the clubman's veto did not apply to the National and its branches because the National was incorporated under the *Corporations Act* (Ontario) in 1973. The National also argued that there was no mechanism for the Branch to leave, since the National's constitution was silent on the issue of how a branch could leave the National.

In finding against the National, the Court stated in the 2016 Case: "Given the unanimity of the branch members, the court is quite satisfied that they should be able to manage the legal title to their properties as well as the equitable title that they already own. […]At common law, the clubman's veto allows a branch to disaffiliate and to take their property. […I]f the members are unanimous, then they can go and take their equity with them. Branch 1-7, as an identifiable, distinct, unincorporated entity within the [National] firmament, has duly engaged the clubman's veto and obtained a unanimous vote with no vetoing vote cast."

The Court also noted that the board of directors for the National had signed promissory notes documenting borrowing of money from the Branch, and the Branch had even sued the National on one such note. In commenting on the National's incorporation in 1973, the Court noted that, "There was no indication that any individual member ever applied to join the corporation or knew that a change in corporate structure had occurred."

Given the uniqueness of the background facts involved in the above decisions, it is unclear whether a court would apply the clubman's veto in future cases involving a not-for-profit corporation where there are different facts involved. However, the decision in this case does raise the spectre that an internal division or branch of a corporation in an analogous fact situation might become so independent, distinct and separately identified that it might be entitled to leave the not-for-profit corporation and take its branch assets with them if the decision was approved unanimously by the branch members. As such, charitable and not-for-profit corporations with branches or divisions may want to take steps as necessary to ensure that the governing board of the corporation exercises a sufficient degree of control over its branches and divisions, both in practice and within the corporation's governing documents.

Facebook Forum Selection Clause Unenforceable

By Barry W. Kwasniewski

On June 23, 2017, the Supreme Court of Canada (the "SCC") reinstated the decision of a chambers judge of the Supreme Court of British Columbia, declining to enforce a forum selection clause and certifying a class action lawsuit against Facebook, Inc. ("Facebook") for alleged violations of British Columbia's *Privacy Act* (the "Act"). *Douez v Facebook, Inc* (the "Case"), is based on Facebook's use of the names and pictures of its users in advertising companies and products to other users. The appellant-plaintiff, Deborah Douez, sought to bring a class action against Facebook for alleged breaches of the Act.

The SCC's decision did not deal with the merits of the case, but rather addressed procedural matters. Facebook brought a preliminary motion to stay the proceeding on the basis of a forum selection clause in its terms and conditions of use. The forum selection clause was intended to make California the forum for all lawsuits against Facebook. The chambers judge declined to enforce the forum selection clause and certified the class action.

The British Columbia Court of Appeal reversed the decision concerning the stay, ruling that the forum selection clause was enforceable and, in the result, finding the certification point moot. The SCC was divided in a 4-3 decision, with Chief Justice McLachlin, and Justices Moldaver and Côté dissenting. The majority applied what is known as the *Pompey* test, from the decision *Z.I. Pompey Industrie v. ECU-Line N.V.*, to determine if the forum selection clause was enforceable. Where there is a contract between parties, the *Pompey* test asks whether the party disputing a forum selection clause has strong cause to show that it would be unreasonable to require adherence to the clause. Three of the majority SCC Justices determined that in this case the forum selection clause was not enforceable, as Douez showed strong cause not to

enforce the forum selection clause. In particular, these majority Justices held that privacy claims relating to the purported statutory rights of British Columbia residents should be determined in the courts of that province by the application of the laws of that Province. The fourth majority SCC Justice determined that it would be unconscionable to enforce the contractual clause due to the disparity in the bargaining powers of the parties. The effect of the decision is that the litigation will continue in the Supreme Court of British Columbia as a class action proceeding.

Settlement Agreement in Wal-Mart Privacy Class Action Approved

By Esther Shainblum

On May 30, 2017, the Ontario Superior Court of Justice granted an order approving a settlement agreement (the "Settlement Agreement") in a class action lawsuit (the "Class Action") against Wal-Mart Canada Corp. ("Wal-Mart"). The Class Action was brought after Wal-Mart notified its customers in July 2015 that its photo processing website, which was operated by a third party, had been compromised, potentially placing customers at risk. The Statement of Claim in the Class Action alleged that customers had been required to provide their name, address, telephone number and credit or debit card information ("Personal Information") to Wal-Mart and its co-defendant in order to use the photo finishing website and that this Personal Information had been subject to unauthorized access and stolen. As a result, customers had experienced or were exposed to various harms, including identity theft, harassment and fraudulent credit card transactions.

The plaintiff and the class members in the Class Action sought general and special damages totalling $500 million, together with punitive and aggravated damages in the amount of $50 million on the basis that, among other things, Wal-Mart's privacy policies, handling, storage and lack of security of the Personal Information had exposed them to harm. The plaintiffs also claimed that Wal-Mart had delayed notifying law enforcement and their customers of the breach and the loss of the Personal Information, resulting in additional harm and showing negligence and reckless disregard for the sensitivity and confidentiality of the Personal Information, and that Wal-Mart had breached the terms of an implied contract it had with its customers that it would safeguard their Personal Information and notify them promptly of any compromise or theft.

The Settlement Agreement makes various benefits available to eligible class members, including recovery of valid claims for out of pocket losses, unreimbursed charges and time spent remedying issues traceable to the privacy breach of up to $5000 and $15 per hour for up to five hours per person. The maximum

cumulative total available for the recovery of expenses under the Settlement Agreement is $400,000, following which this obligation will have been discharged. Eligible class members will also be able to apply for free credit monitoring services for a maximum of one year, whether or not they submit a claim for the above-noted expenses, and can apply for a reimbursement for credit monitoring services where such services were already purchased as a result of the breach. The maximum cumulative total available for credit monitoring under the Settlement Agreement is $350,000. Additionally, under the Settlement Agreement, Wal-mart will pay up to a maximum of $250,000 for the costs of administering the recovery of expenses and the credit monitoring services.

All Canadian residents who used Wal-Mart's photo website between June 1, 2014 and July 10, 2015 and who have not opted out are eligible for compensation under the Settlement Agreement.

Even though the actual quantum of damages reflected in the settlement agreement was not large at the end of the day, this privacy Class Action demonstrates the risk faced by organizations that collect, use, store and handle personal information in the course of their activities. Any compromise of that information can lead to claims for damages for privacy breach, identify theft, out of pocket expenses, damage to credit rating and other costs incurred by the persons impacted, and can result in significant reputational damage to the organization itself. In order to mitigate these risks, organizations that deal with personal information should put in place and monitor the implementation of enterprise-wide privacy policies. They should also ensure that their contractual arrangements with third party IT providers and consultants contain robust covenants to protect the organization in the event that the actions of the third party lead or contribute to a data breach. Finally, organizations should obtain cyber risk insurance to help protect against technology risks and exposures.

Considerations in Drafting Restricted Purpose Charitable Trusts

By Terrance S. Carter

When drafting a testamentary or *inter vivos* restricted charitable purpose trust, charities should be aware of legal issues and concerns that may arise. Specifically, charities should take the time to tailor a restricted charitable purpose trust to fit the factual context and needs of the particular donor as necessary. The purpose of the following paper is to provide charities and those working with charities with a basic understanding of charitable purpose trusts that are subject to restrictions in the context of *inter vivos* and testamentary trusts, an understanding of possible areas of problems that may arise, and practical tips to consider when drafting restricted charitable purpose trusts.

To reference the paper, see "Considerations in Drafting Restricted Purpose Charitable Trusts." Though the paper was prepared for the STEP National Conference on June 12, 2017 and is therefore addressed to lawyers and gift planners, the paper will have application to charities in general and as such can be a helpful resource tool in better understanding restricted charitable purpose trusts.

Mowat NFP Lays the Groundwork for Regulatory Reform for Charities

By Adriel N. Clayton

On June 1, 2017, Mowat NFP, the Mowat Centre not-for-profit research hub, published "Turning a Corner: Laying the Groundwork for Charity Regulatory Reform in Canada" (the "Paper"). The Paper is part of Mowat NFP's Enabling Environment series of papers that focus on developing a modern federal policy framework for the NFP sector, and specifically "seeks to help the sector and the architects of the federal regulatory regime…create a more enabling regulatory environment."

The Paper begins with a review of how the Charities Directorate regulates charities in Canada, and outlines regulatory problems for charities. In this regard, the Paper found that Canada's legislative framework constrains charities, such as by restrictions on earned revenue and by preventing collaboration through restrictions on partnerships with non-charities. It also found that the Charities Directorate, in its opinion, favours technical compliance over an approach that "balances the risks of wrongdoing with the benefits of flexibility", and found a general lack of transparency with its decision-making process.

After a brief review of past Canadian reform efforts and lessons from charities regulators abroad, the Paper provides recommendations for reform towards a more responsive regulatory framework. These include agreement between the federal government and NFP sector on the basic elements of a good regulator, focused more on enabling than constraining, to assist with designing a new approach and rules, as well as more practical suggestions, such as easing the path to appeal by "shift[ing] the first appeal court from the Federal Court of Appeal to a lower court", and increasing transparency by publishing some registration letters.

The Paper comes in the wake of the *Report of the Consultation Panel on the Political Activities of Charities*, discussed in our *Charity & NFP Law Bulletin* No. 403, both of which contribute towards discussion between the NFP sector and the federal government and call for legislative and policy reform. Charities and NFPs with an interest in policy and legislative reform will want to watch out for the next paper in Mowat NFP's Enabling Environment series.

Anti-Terrorism Law Update

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

New National Security Bill C-59 Introduced

On June 20, 2017, the Government of Canada introduced Bill C-59, *An Act respecting national security matters* ("Bill C-59"). Bill C-59 is currently in first reading at the House of Commons. Of relevance to charities and not-for-profits ("NFPs") is one of the proposed changes to the *Criminal Code* (the "Code"). Section 143 of Bill C-59 proposes to replace section 83.221 of the Code, the offense of advocating or promoting terrorism offences, with the offense of counselling commission of terrorism offences. The current section 83.221 was introduced through Bill C-51, *Anti-terrorism Act, 2015*, and states:

> **Advocating or promoting commission of terrorism offences**
>
> **83.221 (1)** Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general — other than an offence under this section — while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.
>
> **Definitions**
>
> **(2)** The following definitions apply in this section.
>
> ***communicating*** has the same meaning as in subsection 319(7). (communiquer)
>
> ***statements*** has the same meaning as in subsection 319(7). (déclarations)

The proposed replacement in Bill C-59 would say:

> **Counselling commission of terrorism offence**
>
> **83.221 (1)** Every person who counsels another person to commit a terrorism offence — other than an offence under this section — is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.
>
> **Application**
>
> **(2)** An offence may be committed under subsection (1) whether or not
>
> **(a)** a terrorism offence is committed; and
>
> **(b)** the person counsels the commission of a specific terrorism offence.

This change is intended to clarify the offense, bringing it more in line with the already existing offense of counseling found under section 22 of the Code. In our January 2017 *Charity & NFP Law Update*, we reported on the Canadian Bar Association's ("CBA") response to "Our Security, Our Rights: National Security Green Paper, 2016" issued by the Government of Canada (the "Green Paper"). One of the questions asked in the Green Paper was, "[a]dvocating and promoting the commission of terrorism offences in general is a variation of the existing offence of counselling. Would it be useful to clarify the advocacy offence so that it more clearly resembles counselling?" The CBA response was that s.83.221 should be deleted because the offence is redundant, as the offence of counselling already exists in the Code. Although the Government of Canada chose not to delete the offence, the clarification does make clear that the existing counselling offence and the current advocating or promoting commission of terrorism offences, are intended to be similar.

Impact of Bill C-44 on Proceeds of Crime (Money Laundering) and Terrorist Financing Act

Bill C-44, *Budget Implementation Act, 2017, No. 1*, discussed in the Legislation Update above, makes a number of technical and substantive amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, along with coordinating amendments to related legislation. Of particular interest to charities and NFPs, Bill C-44 expands the list of disclosure recipients, allowing for Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") to disclose designated information that is has reasonable grounds to suspect would be relevant to threats to the security of Canada to the Department of National Defence and the Canadian Armed Forces. Bill C-44 also expands the list of persons and entities to which record keeping, identification verification and reporting of suspicious transactions and registrations apply to include "trust companies incorporated or formed by or under a provincial Act that are not regulated by a provincial Act". Under certain circumstances, Bill C-44 also permits FINTRAC to disclose designated information to institutions or agencies of foreign states (including any political subdivisions or territories thereof) or to international organizations with similar powers and duties as FINTRAC's. While the trust companies provision comes into force on a day to be fixed by the Governor in Council, Bill C-44 is silent concerning the effective date of the other provisions discussed above.

24th Annual Church and Charity Law Seminar

The upcoming 24th Annual *Church & Charity Law*™ Seminar hosted by Carters in Greater Toronto, Ontario, will be held on **Thursday November 9, 2017**. Guest speakers include the Honourable Justice David Brown, of the Ontario Court of Appeal who will speak on the topic of "Governance Disputes

involving Charities and Not-for-profits: The View from the Bench", as well as Tony Manconi, Director General, Charities Directorate, Canada Revenue Agency. Click here for details and "Early Bird" online registration.

IN THE PRESS

Charity & NFP Law Update – May 2017 **(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.

"Armchair Rule" Used by Court to Determine Whether Gift was an Endowment or Expendable written by Terrance S. Carter was published in CCCA/*Mondaq* on June 2, 2017.

RECENT EVENTS AND PRESENTATIONS

Carters hosted a series of eight webinars in their Spring 2017 Carters Charity & NFP Webinar Series. The series included the following topics and are available by clicking on the individual links:

Implications of the *Patients First Act* in Ontario was presented by Esther Shainblum on April 20, 2017. Click for Webinar Materials, Resource Materials and On Demand/Replay.

Youth Programs: Identifying and Managing the Risks was presented by Sean S. Carter on April 27, 2017. Click for Webinar Materials and On Demand/Replay.

Allocation Issues and CRA: The Importance of Getting it Right was presented by Theresa L.M. Man on May 4, 2017. Click for Webinar Materials and On Demand/Replay.

Legal Check-Up: 10 Tips to Effective Legal Risk Management was presented by Terrance S. Carter on May 18, 2017. Click for Webinar Materials and On Demand/Replay.

Do's and Don'ts of Donor Information was presented by Ryan M. Prendergast & Terrance S. Carter on May 25, 2017. Click for Webinar Materials and On Demand/Replay.

Copyright Issues for Charities and NFPs in the Digital Era was presented by Sepal Bonni on June 8, 2017. Click for Webinar Materials and On Demand/Replay.

The Top Ten Human Resources Mistakes Employers Make (And How to Avoid Them) was presented by Barry W. Kwasniewski on June 15, 2017. Click for Webinar Materials and On Demand/Replay.

Importance of Corporate Documents in Governance Disputes was presented by Esther S. Oh on June 22, 2017. Click for Webinar Materials and On Demand/Replay.

Healthcare Philanthropy Check-Up 2017 was co-hosted by Carters and Fasken Martineau in Toronto on Thursday, June 1, 2017. Click here for seminar handouts, including "Essential Charity Law Update" by Jacqueline M. Demczur and "Critical Issues Concerning Investment by Charities" by Terrance S. Carter.

Charitable Giving – Pitfalls in Drafting Gift Agreements and Implementing Your Clients' Philanthropic Goals was presented by Terrance S. Carter and Ruth MacKenzie at the **19th National STEP Conference** held on June 12, 2017 in Toronto.

PAVRO (Professional Association of Volunteer Leaders Ontario) hosted a seminar by Carters on June 23, 2017. The topics included:

- 10 Key Tips to Effective Risk Management for Charities and Not-for-Profits by Terrance S. Carter
- Volunteer Agreements: Managing Relations and Reducing Risk by Terrance S. Carter
- Youth Programs: Identifying and Managing the Risks by Sean S. Carter

UPCOMING EVENTS AND PRESENTATIONS

CSAE Trillium 2017 Summer Summit Conference will be held on July 13, 2017 in Alliston, Ontario. Terrance S. Carter will present on the topic of "Social Media and Privacy Pitfalls Involving NPOs and Charities".

24th Annual Church and Charity Law Seminar – Early Bird Registration now Available

The upcoming 24th Annual *Church & Charity Law*™ Seminar hosted by Carters in Greater Toronto, Ontario, will be held on **Thursday November 9, 2017**. Click here for details and "Early Bird" online registration.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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