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CHARITY & NFP LAW UPDATE

SEPTEMBER 2017

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

SEPTEMBER 2017

SECTIONS

HIGHLIGHTS

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and **Tony Manconi**, Director General, Charities Directorate, Canada Revenue Agency

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RECENT PUBLICATIONS AND NEWS RELEASES

CRA News

By Esther Shainblum

CRA to Update Business Numbers to Provide e-Services Starting in November 2018

On September 22, 2017, following an e-mail sent to certain stakeholders on July 21, 2017, the Charities Directorate of the Canada Revenue Agency ("CRA") announced that, once the Charities IT Modernization Project (CHAMP) is implemented, registered charities will be able to use their business numbers, through the CRA's "My Business Account" portal, to file their information returns online, as well as to update and manage their account information, check file status and received and manage their communications with the CRA. The announcement further states that, over the next few months and until October 2018, charities' internal divisions sharing the business numbers of their head bodies will be assigned unique business numbers so they can access these online services. This process does not require any action from impacted charities, as their internal divisions will continue to operate under the governing documents currently on file with the CRA. More information is expected to be available on the Charities Directorate website soon.

CRA Releases New Guidance on Head Bodies and Internal Divisions

On September 22, 2017, the CRA published a new guidance, CG-028, "Head bodies and their internal divisions" (the "Guidance"), which outlines the CRA's requirements for the charitable registration of head bodies and their internal divisions. For the purpose of the Guidance, a head body is a registered charity that has authority over its internal divisions, is resident in Canada, and was either created or established in Canada. The Guidance states that a head body's governing documents must permit it to exert authority over its internal divisions by taking actions, such as appointing and controlling their boards, approving their budgets and creating them or closing them down. Although "internal division" is not defined under the *Income Tax Act* ("ITA"), the Guidance considers internal divisions to be branches, parishes, sections or other divisions of a registered charity that operate as extensions of and under the authority of the head body, further its charitable purposes, are not separately incorporated but rather operate under the head body's governing documents and receive donations on their own behalf. Internal divisions have their own charitable numbers and are registered separately with the CRA from the head body but are subordinate to it. To register an internal division, the internal division must submit to the CRA a letter of good standing from the head body outlining the internal division's relationship with the head bod, together with the

governing document that created or established the head body. The Guidance also provides information concerning requirements of head bodies and internal divisions after registration, as well as a helpful chart outlining the differences between registered charities, head bodies and internal divisions, and sample scenarios to understand whether or not an organization is an internal division.

Changes to CRA's CG-014 CED Guidance

On September 22, 2017, the Charities Directorate of the CRA announced recent changes to the CG-014 "Community Economic Development Activities and Charitable Registration" ("CED Guidance") to include exceptions to charitable activities aimed at improving socio-economic conditions in areas affected by a disaster. According to the new Appendix A, a disaster is "a hazard that overwhelms a community's ability to cope and may cause serious harm to people's safety, health, welfare, property, or the environment" and it can be a natural phenomenon or the result of human action. Accordingly, the area is presumed to be in need for two years after the date of the disaster, but the charity may continue to work in the area provided it shows continuing need. The new CED Guidance describes the ability of charities to support local small businesses and it provides a list of requirements for charities to show that the benefit the businesses receive is only incidental to the work of the charity.

New Webpage Outlining B.C. *Societies Act* Transition Process

On September 7, 2017, the CRA updated its website to include a new webpage outlining the transition process for societies to the British Columbia *Societies Act*, which came into force on November 28, 2016, as reported in our February 2016 *Charity & NFP Law Update*. The webpage states that B.C. societies must complete their transition to the new rules to become compliant with the *Societies Act* by November 28, 2018, failing which they will be dissolved. To complete the transition, societies must complete an online-only Transition Application and re-file their current constitution and by-laws with the Corporate Registry in electronic format.

Legislation Update

By Terrance S. Carter

Bill 154, Cutting Unnecessary Red Tape, 2017

Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154"), received first reading in the Legislative Assembly of Ontario on September 14, 2017. Bill 154 introduces changes to the *Ontario Not-for-Profit Corporations Act* ("ONCA") substantially similar to those contained in Bill 85, *Companies Statute Law Amendment Act, 2014*, along with additional proposed amendments. *Charity Law Bulletin* No. 315

covered Bill 85 soon after it was first introduced on June 5, 2013, before it died on the order paper upon the dissolution of the Provincial Parliament on May 2, 2014. Bill 154 proposes to amend, repeal and enact a number of other acts which will impact charities and not-for-profits in Ontario, namely: amendments to the *Corporations Act* intended to enable the future proclamation of the ONCA, discussed in *Charity & NFP Law Bulletin* No. 406, below, as well as amendments to the *Charities Accounting Act* permitting "social investments", discussed in separate *Charity & NFP Law Bulletin* No. 407, below. A description of the amendments to the ONCA being proposed by Bill 154 will be discussed in an upcoming *Charity & NFP Law Bulletin*.

Bill 149, Ministry of Mental Health and Addictions Act, 2017

On September 14, 2017, Bill 149, *an Act to establish the Ministry of Mental Health and Addictions*, received second reading in the Legislative Assembly of Ontario and was referred to the Standing Committee on Finance and Economic Affairs. Bill 149 proposes to establish a new Ministry of Mental Health and Addictions ("Ministry"), provide for the Minister of Mental Health and Addictions ("Minister") to preside over the Ministry and assign the duties and functions of the Minister, including: improving access to mental health and addiction support services, being responsible for and leading the development of the mental health and addictions system, developing a wait times strategy, and working in partnership with organizations, communities and stakeholder to respond to public health emergencies, such as the "emergency of opioid addiction and overdose fatalities".

Proposed Amendments to Regulation 79/10 under Long-Term Care Homes Act, 2007

The Ontario Ministry of Health and Long-Term Care ("MHLTC") is proposing amendments to Regulation 79/10 of the *Long-Term Care Homes Act, 2007* ("LTCHA"). Between September 11, 2017 and October 26, 2017, the MHLTC is accepting comments from the public regarding the proposed amendments, which, if approved, would come into force on January 1, 2018. The amendments would allow the Director under the LTCHA (the "Director") to designate "reunification priority access beds" that would help to reunite spouses and partners who have been separated. Long-term care homes would be required to keep separate waiting lists for the designated beds and to admit qualified applicants in order of priority as set out in the draft Regulations. The draft Regulations also require the Minister or the Director to disclose personal information to a health regulatory college and the Ontario College of Social Workers and Social Service Workers where required for the administration or enforcement of various statutes including the *Regulated Health Professions Act, 1991* and the *Social Work and Social Service Work Act, 1998*.

Proposed Breach of Security Safeguards Regulations under PIPEDA

A draft Breach of Security Safeguards Regulations ("Draft Regulations") under the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") was published in the *Canada Gazette*, Part I on September 2, 2017. The Draft Regulations will be open for comments for a period of 30 days from its publication, until October 2, 2017. Among other proposed changes, the Draft Regulations support Division 1.1 of PIPEDA, which, when it comes into force, will establish mandatory reporting of data breaches that pose a "real risk of significant harm" to the Office of the Privacy Commissioner of Canada ("OPC") as well as mandatory notification of individuals affected by such data breaches. For more information, see *Proposed Breach of Security Safeguards Regulations under PIPEDA* below.

Bill 154 – Proposed Amendments to OCA

By Theresa L.M. Man

After having waited three years since the demise of Bill 85 in May 2014 proposing amendments to the ONCA, it is great news that the Ontario government is again moving forward with the corporate reform for the not-for-profit sector. In this regard, Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154"), was introduced on September 14, 2017, proposing changes to the Ontario *Corporations Act* ("OCA") and the ONCA, as well as other legislation. The Backgrounder to Bill 154 indicates that the proposed amendments would "enable the future proclamation" of the ONCA and the proposed amendments to the OCA would "enable Ontario not-for-profit corporations to benefit from some of the ONCA features prior to its proclamation, such as allowing notice of members' meetings to be sent electronically and members' meetings to be held electronically." As well, these proposed amendments would "increase flexibility, encourage participation in meetings, provide clarity and reduce burdens and costs for not-for-profit corporations." This Bulletin highlights key proposed amendments to the OCA, but a detailed review of the proposed changes is outside the scope of this Bulletin. It should be noted that this Bulletin does not review proposed amendments to other statutes contained in Bill 154.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 406.

Bill 154 to Permit Social Investments in Ontario

By Terrance S. Carter

On September 14, 2017, Ontario's Bill 154 was introduced as an omnibus bill in the Legislature. Among the numerous proposals introduced in Bill 154, many of which impact charities and not-for-profits (see

Charity & NFP Law Bulletin No. 406 on corporate changes to the *Corporations Act*), the proposed changes to the *Charities Accounting Act* ("CAA") permitting "social investments" by charities justify special attention. The CAA applies to all charities in Ontario and provides in section 10.1 that sections 27 to 31 of the *Trustee Act*, dealing with investment powers by trustees, apply to trustees and charitable corporations holding property for charitable purposes. Schedule 2 of Bill 154 (a copy of which is attached to this Bulletin as Schedule "A" for ease of reference) proposes to amend the CAA by adding sections 10.2 to 10.4 to permit "social investments" by trustees and charitable corporations holding property for charitable purposes and to exclude the application of the *Trustee Act* (with minor exceptions) with regard to "social investments." This Bulletin provides an overview of the draft legislation in Bill 154 permitting "social investments," and raises a number of questions about the practical impact of the draft legislation on the powers and duties of trustees and charitable corporations in the event that the provisions in Bill 154 on "social investments" come into force.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 407.

Unfunded Cheque Results in Unenforceable Gift

By Jacqueline M. Demczur

In the decision of *Teixeira v Estate of Maria Markgraf*, released January 20, 2017, the Ontario Superior Court of Justice ("Court") considered the validity of a gift of money that the donor did not actually have. The issue of the validity of a gift was raised when the payor, Maria Markgraf ("Markgraf"), made an *inter vivos* gift to the payee, Arlindo Teixeira, her long-time neighbour ("Teixeira"), in the form of a $100,000 cheque, despite having only $81,732 in her account.

The facts of the case were not in dispute: in appreciation for the kindness shown to her by Teixeira, Markgraf wrote a cheque for $100,000 payable to Teixeira and instructed a family member to deliver it. Even though Markgraf had other investments with her bank amounting to a total of greater than $100,000, the account on which the cheque was drawn had only $81,732, which caused the cheque to be returned to Teixeira. By then, Markgraf had passed away, so Teixeira brought an application against the estate to enforce the gift.

In considering the issue at hand, the Court looked at the necessary elements for a valid gift: i) donative intent; ii) acceptance; and iii) sufficient delivery. It found that Markgraf had "voluntarily intended" to make the $100,000 gift and, even though she may have been mistaken as to the funds available in her account, this was sufficient to meet the donative intent element of a valid gift. The second element of

acceptance was also satisfied, as Teixeira had accepted the cheque and attempted to deposit it at his bank. With regard to the third element for a valid gift, the Court acknowledges that, while not a necessary part of a contract, delivery is a basic requisite of gifts. Moreover, the Court states that "there must be an efficient delivery of the gifted property or some accepted substitute. As a rule the gift must be literally given away." As the Court found that this third element had not been satisfied in this case, it thereby rendered the gift invalid.

The Court stated that the delivery by cheque "is neither money nor representation of money, it is only a direction to the drawer's bank" and, thus, the gift is not complete until the cheque has cleared. In this case, because Markgraf's account did not have sufficient funds, the Court found that the delivery of the cheque was not complete. As a result, the gift was consequently not perfected and was unenforceable. Furthermore, the decision confirmed the equitable principle of estoppel was not applicable to the facts of this case.

While this case did not involve a charity, it does serve as a reminder to charities, as well as donors, that all three elements of a gift must be present in order for the gift to be valid. Even where clear donative intent and acceptance of the gift are present, a gift may fail where it cannot be properly delivered to the intended recipient.

Charitable Form Filing Requirements in Québec

By Theresa L.M. Man

As reported in our April 2017 *Charity & NFP Law Update*, the double registration process for charities wishing to operate in Québec was eliminated as of January 1, 2016 as a result of an amendment to Québec's *Taxation Act* brought about by *Regulation to amend the Regulation respecting the Taxation Act*, that was introduced by *Regulation to amend various regulations of a fiscal nature* on April 12, 2017. While the elimination was originally proposed in the 2016 Québec Budget, the budget did not clarify whether charities are still required to file the separate information return.

As a result of the elimination of double registration, charities registered under the ITA will no longer need to file a separate application for charitable registration in Québec (TP-985.5-V form). Instead, they are deemed to have also been registered in Québec, subject to the power of the Québec Minister of Revenue to refuse, cancel or revoke a registration or to modify the charitable designation. However, even though charities wishing to operate in Québec are no longer required to obtain charitable registration in that

province, all charities carrying on activities in Québec are still required to file the separate information return (TP-985.22-V form) within six months after year end.

The Leveraged Donation Program that Led to Charity Losing Its Registered Status

By Ryan M. Prendergast

On September 8, 2017, the Tax Court of Canada ("TCC") released its decision in *Cassan v The Queen*, a matter involving a complex investment and donation program offered through EquiGenesis 2009-II Preferred Investment Limited Partnership ("EquiGenesis"), with the participation of a charity, The Giving Tree Foundation of Canada ("TGTFC"). The program consisted of a 20-year leveraged investment with an optional leveraged donation, through TGTFC, to the participants' charities of choice. Leveraging for the program was provided through a 10-year loan with interest accruing on an annual basis. Any time participants failed to make the corresponding annual interest payments, they were deemed to have requested additional funds. The participants were required to transfer their funds, including the loan, to TGTFC, in exchange for a charitable donation receipt for the entire amount and TGTFC was further instructed to invest 98.04% of the donated amounts (the entire value of the loans) in debt notes issued by the same investment manager who, in turn, lent the money to the entity that funded the loans assumed by the participants.

The Minister of National Revenue (the "Minister") described the program as a "self-contained structured finance investment program and gifting tax shelter" and rejected the charitable donation tax credits claimed by the participants in 2009, 2010 and 2011 because the transfers were not gifts as defined under section 118.1 of the ITA. The Minister also submitted that, even if the transfers were considered gifts, the eligible amount of those gifts should be nil, in accordance with subsections 248(31) and (32) of the ITA, as a result of the advantage received by the participants in the program by way of the loans being "limited-recourse debts in respect of the gifts" under subsection 143.2(6.1) of the ITA.

The first argument proposed by the Minister was that the participants did not have "donative intent," one of the three elements required for a valid gift. The Minister claimed that the participants were solely motivated by the investment value of the donation program, in terms of tax credits, rather than an intention to impoverish themselves. Following long-standing jurisprudence on donative intent, however, the TCC found that the tax advantage received by donors is not considered a "benefit" and that the motivation of a tax credit under section 118.1 does not vitiate the intent or disqualify the gift. Furthermore, the TCC found that, while participants received a benefit in exchange for their transfer to TGTFC, through below market

interest rates on their loans, this benefit was not greater than 80% of the fair market value of the property transferred and, therefore, it did not disqualify the gifts, as per subsections 248(30) and (32) of the ITA.

The second argument advanced by the Minister was that the loans were "limited-recourse debt" as per subsection 143.2(6.1), and so the eligible amount of the otherwise valid gifts was nil. The Minister claimed that the loans were related to the gifts by the participants to TGTFC and should be deemed "limited-recourse debt" because: i) there were no *bona fide* arrangements for the repayment of the loans within the 10-year period in paragraph 143.2(7)(a) of the ITA; ii) the loans were only part of a series of arrangements that would extend beyond the 10-year limit set out in subsection 143.2(12) of the ITA; and iii) interest was not paid annually, but rather added to the principal. The TCC agreed with this argument and held that, viewing "the borrowing arrangements as a whole," the arrangements were not *bona fide* for several reasons, including that there were no arrangements to repay the loans within 10 years and that there was sufficient evidence to suggest they were part of a series of transactions extending beyond that time. The effect of the TCC's holding that the loans for the donation program were "limited-recourse debt" resulted in the entire value of the loans and interest being included as an advantage received by the participants, thus, reducing the eligible amount of the gifts to nil.

While TGTFC contributed millions of dollars to dozens of other charities in Canada over several years, it had its charitable status revoked in May 2015 for supporting the EquiGenesis gifting tax shelter discussed in this case. Charities and other qualified donees should be careful with their participation in leveraged donation programs that may cause their donors to be audited by the CRA and may eventually lead to the revocation of their registered status.

Proposed Breach of Security Safeguards Regulations under PIPEDA

By Esther Shainblum

Draft Breach of Security Safeguards Regulation ("Draft Regulations") under PIPEDA were published in the *Canada Gazette*, Part I on September 2, 2017 and are open for public consultation for a period of 30 days thereafter. The Draft Regulations are being proposed pursuant to Division 1.1 of PIPEDA, which, when it comes into force, will require any data breaches that pose a "real risk of significant harm" to be reported by organizations to the OPC, and will further require organizations to notify the individuals who are affected by such data breaches. As, in some situations, charities and not-for-profits could be subject to PIPEDA, they should be aware of these new requirements.

The Draft Regulations set out the minimum content for the mandatory reports to the OPC as well as for the notifications to affected individuals. The latter includes a requirement that the notice contain information about the organization's internal complaints process and advice about the individual's right to make a complaint to the OPC. The Draft Regulations set out the means by which direct notification may be given to affected individuals (by mail, in person, by telephone or by email if the person has already consented to receiving information from the organization in that manner) and permits indirect notification in limited circumstances by way of advertising or conspicuous posting on the organization's website. The Draft Regulations also require organizations to retain records of every data breach for a period of 24 months, regardless of their materiality.

The mandatory notification requirements set out in Division 1.1 and in these regulations are largely in keeping with existing mandatory breach reporting in other jurisdictions in Canada as well as in the European Union and will be familiar to health information custodians subject to Ontario's *Personal Health Information Protection Act*.

All organizations subject to PIPEDA will be impacted by the new mandatory reporting regime. PIPEDA applies to every organization, including charities and not-for-profits, in respect of the personal information that it collects, uses or discloses in the course of commercial activities. Whether an organization can be said to collect, use or disclose personal information in the course of a commercial activity will vary depending on the facts of each case and charities and not-for-profits should not assume that they are exempt from PIPEDA.

The Draft Regulations are expected to come into effect at the same time as the statutory requirements pertaining to data breach reporting under Division 1.1.

The release of the Draft Regulation is timely in light of the recent Equifax privacy breach, discussed in *Equifax Breach Demonstrates What Not to Do*, below, and in light of the Wal-Mart Canada Corp. privacy breach reported in our June 2017 *Charity & NFP Law Update*.

Employer's Right to Require an Independent Medical Examination

By Barry W. Kwasniewski

On August 25, 2017, the Ontario Court of Appeal denied the leave to appeal application brought by Marcello Bottiglia (the "Applicant"), who sought leave from that court to appeal the Ontario Superior Court of Justice (Divisional Court) (the "Court") decision in *Bottiglia v Ottawa Catholic School Board*

released on May 19, 2017. A previous decision of the Human Rights Tribunal of Ontario (the "HRTO") dated September 4, 2015, and a subsequent request for reconsideration at the HRTO, had dismissed the Applicant's application for discrimination on the basis of disability, for being required to undergo an independent medical examination ("IME") at the request of his employer, the Ottawa Catholic School Board (the "OCSB"). The Court's May 19, 2017 decision denied the application for judicial review and, for the most part, confirmed the findings of the HRTO. This decisions of both the HRTO and the Court clarify when it is appropriate for an employer to require an employee to attend an IME, and when an employee can refuse to participate. The decision is relevant to charities and not-for-profits, as employers, with respect to this challenging issue of accommodating employees who may be suffering from illness or disability.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 408.

Equifax Breach Demonstrates What Not to Do

By Esther Shainblum

A massive data hacking at Equifax Inc., the credit rating and monitoring company, compromised the personal information of about 143 million Americans and at least 100,000 Canadians. It is a recent and vivid illustration of the risks that privacy breaches can pose not only to individuals but to the organizations that are targeted. According to the Equifax Canada website, the personal information of Canadians accessed by the hackers includes names, addresses, social insurance numbers and some credit card numbers, placing these individuals at risk of identity theft. The hackers exploited a flaw in Equifax's computer system – a flaw that Equifax knew about but had not fixed – to gain access to consumers' personal information between May and July 2017. Although Equifax Inc. learned about the breach on July 29, 2017, it did not make it public until September 7, 2017. A number of senior executives at Equifax including, most recently, the CEO, have stepped down as a result of the breach. The company has been strongly criticized for its poor security and for its mishandling of the breach and is facing a number of investigations, including one in Canada by the OPC and class action suits, while its shares have decreased in value. Charities and not-for-profits can also be targeted by cyber attackers. The Ponemon Institute's 2017 Cost of Data Breach Study shows that nearly half of all data breaches in Canada are caused by malicious or criminal attacks and that these breaches can be costly to organizations.

Charities and not-for-profits should ensure that they have robust safeguards, as well as effective crisis/privacy breach protocols in place so that they do not sustain similar reputational and operational damage.

Human Rights Tribunal Upholds Discrimination Decision Against Landlord

By Jennifer M. Leddy

On August 8, 2017, the Human Rights Tribunal of Ontario ("HRTO") denied a request for reconsideration of its previous decision in *Madkour v Alabi*. In the previous decision (the "Original Hearing"), the HRTO considered a claim brought by residential tenants Madkour and Ismail (the "Tenants") against their landlord, Alabi (the "Landlord") for discrimination on the grounds of their creed. Subsection 2(1) of the Ontario *Human Rights Code* (the "Code") provides that every person has a right to equal treatment with respect to accommodation (*i.e.* housing) free from discrimination, including discrimination based on creed. Subsection 2(2) provides that every person who occupies accommodation has a right to freedom from harassment by the landlord, including harassment based on their creed.

In the Original Hearing, the Tenants, who identify as Arab Muslims, had commenced an application against the Landlord, claiming that he had failed to accommodate their religious practices when showing their apartment to prospective tenants and that he harassed them and created a poisoned housing environment. The HRTO ultimately found that the Landlord had discriminated against the Tenants by (1) refusing to provide notice other than the 24 hours' notice required by the *Residential Tenancies Act*, which violated their reasonable requirement for additional notice due to Muslim practices relating to prayer and modest attire for women; and (2) refusing to remove his shoes when entering the apartment, and in particular their prayer space. It further found that the Landlord's actions amounted to harassment under the Code through a combination of a vexatious comment, making loud pounding noises outside the Tenants' door after the comment, and his refusal to remove his shoes when entering the prayer space. The Landlord was ultimately ordered to pay the Tenants $6,000 each for the violations.

In the present case, the Landlord sought reconsideration, alleging new evidence, conflict with tribunal practice, and an error in admitting a post from the Landlord's Facebook page into evidence without justifying its relevance. The HRTO rejected all of the Landlord's allegations. Of particular interest is that it affirmed that the Facebook post, which contained a "joke" about a devout Arab Muslim, was relevant to discerning the respondent's views on religiously-based accommodation requests by Muslims.

This decision serves as a reminder for charities and not-for profits that provide housing of the importance of adhering not only provincial tenancy laws but also to applicable human rights codes. Moreover, charities and not-for-profits which use social media should be mindful that social media posts can be admitted as evidence in a court of law and can be, as was the case in *Madkour v Alabi*, indicative of discrimination or harassment.

Rowan's Law Advisory Committee Recommends Action on Concussions

By Sean S. Carter

As reported in our June 2016 *Charity & NFP Law Update*, Canada's first concussion protocol legislation for young athletes was passed in Ontario when Bill 149, *Rowan's Law Advisory Committee Act* ("Rowan's Law") received royal assent on June 9, 2016. In September 2017, the Rowan's Law Advisory Committee (the "Committee"), which was established to provide recommendations based on the jury's findings and recommendations from the inquest into the death of Rowan Stringer, released the Report of the Rowan's Law Advisory Committee (the "Report") concerning concussion prevention and treatment which it was required to submit to the Minister of Tourism, Culture and Sport.

In developing the Report, the Committee reviewed Canadian and foreign concussion legislation and policy frameworks, monitored federal initiatives and maintained linkages with the Federal-Provincial/Territorial (F-P/T) work on concussions. In this regard, the Report states that there is no common approach in Canada for addressing concussions, and outlines steps that various provinces and the federal government have taken both in legislation and through policy concerning concussion management.

The Committee also reviewed the coroner's jury recommendations and developed 21 recommended action items ("Action Items") to ensure implementation of all of the jury's recommendations. These Action Items are divided into five themes, discussing (1) surveillance of concussions and concussion policy; (2) prevention of concussions; (3) detection and identifying concussions; (4) Management of concussion data and assessment of responses to concussions; and (5) raising awareness to bring about a culture change towards concussion in amateur sports. Of particular note, the Report proposes one overarching recommended Action Items for Ontario to develop legislation that would cross all five themes, with the other Action Items acting as enablers of the law.

While the Report itself does not immediately change the state of the legislation, charities and not-for-profits that provide services for children and sports programs may be interested in the recommended Action Items, and should monitor any legislative developments to implement the Action Items in order to

maintain compliance with current and developing concussion policy and legislation. Charities and not-for-profits, particularly with the development of more onerous legislative provisions and developing case law, should be seeking professional advice to manage the considerable risk which is now inherent in being involved (even in a tangential way) with children or vulnerable people more broadly.

Court in England Holds Members of Charities as Fiduciaries

By Esther S.J. Oh

In the recent decision of *The Children's Investment Fund Foundation v. A.G. et al.*, the English High Court of Justice (the "Court") considered a request by a registered charity with substantial assets, The Children's Investment Fund Foundation ("CIFF"), for direction concerning proposed payment of a US$360 million grant (the "Grant") to another English registered charity. CIFF is a company limited by guarantee without a share capital governed by the *Companies Act 2006* (UK) in England. While the Court's decision in the CIFF case involves consideration of legislation and case law in England and Wales, given the shared common law jurisprudence, charities in Canada may find the English Court's novel comments regarding the fiduciary duties of members of charities to be of interest.

Given the complexity of the background facts, it is beyond the scope of this article to provide a complete summary of the CIFF case. However, in general terms, CIFF was co-founded by two spouses, who were both trustees and members of CIFF. There was one additional individual who served as a member of CIFF ("Third Member"); CIFF also had a few other trustees. As a result of the breakdown of the marriage between the founders, it was agreed that the wife would resign as member and trustee of CIFF. It was also agreed that the Grant would be paid by CIFF to a new charity established by the wife.

One of the issues considered by the Court was whether the payment of the Grant was a "payment for loss of office to a director" for purposes of sections 215 and 217 of the *Companies Act, 2006* (UK), which would require that the Grant be sanctioned by a resolution of the members of CIFF before being paid. The Court found that the payment of the Grant did constitute payment for loss of office of a director within the meaning of section 215 since the payment was made in connection with the wife's retirement from office as a trustee. While the wife and husband had earlier agreed in writing not to vote on the Grant proposal, the question remained whether the Third Member could use his discretion to vote for or against the Grant.

The Court stated that since the payment of the Grant was approved by the Charity Commission (which governs registered charities in England and Wales) and was also approved by the Court as being expressly

in the best interests of CIFF, the Third Member did not have the discretion to vote against the Grant. Instead, the Court stated that the Third Member was "bound by the fiduciary duties" owed to CIFF and subject to the court's inherent jurisdiction over the administration of charities. The Court also affirmed its agreement with the Charity Commission's publication which stated that the "… 'members have an obligation to use their rights and exercise their vote in the best interests of the charity for which they are a member'."

In providing reasons to support the Court's statements indicating that members had a fiduciary duty to act in the best interests of CIFF, the Court stated, "[i]n my judgment, a member of a company limited by guarantee without a share capital with exclusively charitable objects is bound in to the regime now contained in the *Charities Act 2011* (UK), the whole thrust of which is to ensure that the assets of the company are used for its exclusively charitable objects and for no other purpose. There are numerous provisions designed to prevent the trustees and members benefitting personally from the assets of the charity. Even on a winding up, the assets must go to other charitable purposes." As it was not necessary to decide the nature and extent of the members' fiduciary duties in the context of the CIFF case, the Court did not provide further comments in that regard.

Law Commission of England and Wales Provides Recommendations for Charity Law Reform

By Adriel N. Clayton

On September 14, 2017, the Law Commission of England and Wales ("Law Commission"), an independent body enacted by statute to review and to recommend reforms to English law similar to Canada's now defunct Law Commission of Canada, published its report, *Technical Issues in Charity Law* (the "Report"). The Report stems from a larger project by the Law Commission to consider issues surrounding English charity law and follows the Law Commission's report on social investment, as reported in our October 2014 *Charity Law Update*. The Report outlines technical issues that charities may face with English law, provides recommendations for reforms that would "maximize the efficient use of charitable funds whilst ensuring proper safeguards for the public," and includes a draft bill of the recommendations.

In total, the Report provides 43 recommendations ("Recommendations") for charity law reform in England and Wales. The Recommendations can be generally categorized as those aimed at: (1) facilitating efficient amendments to governing documents and changing the charitable purposes of various forms of charities; (2) expanding and simplifying the application of the doctrine of *cy-près* where funds raised from

specific-purpose fundraising appeals and campaigns (*e.g.* building a church hall) either fall short of or surpass the required target; (3) reducing the burden on charities acquiring, disposing of, and mortgaging land; (4) relaxing restrictions on spending permanent endowments; (5) in limited circumstances, remunerating trustees for the supply of goods and providing equitable allowances to trustees who have carried out work for the charity (similar to Ontario's recent draft amendments to Regulation 4/01 under the *Charities Accounting Act*, as reported in our August 2017 *Charity & NFP Law Update*); (6) permitting charities to make small *ex gratia* payments without prior authorization; (7) facilitating and removing barriers to charities wishing to change their organizational structures (*e.g.* incorporations, mergers, insolvency); (8) enhancing powers of the Charity Commission of England and Wales to require charities to change their name and to ratify a charity trustee's appointment or election; and (9) creating more efficient "charity proceedings" as defined under section 115 of the *Charities Act 2011* (UK).

The Recommendations in the Report aim to create a more efficient legal system and reduce the burden on charities by reducing time and money spent on administration that could be better allocated to charitable causes. Although the Recommendations focus on amendments to legislation in England and Wales, and therefore have little immediate effect on charities in Canada, given the similarities between English and Canadian policy and practice, the Recommendations will be of interest and, at 484 pages, may be a comprehensive resource for those in the sector with an interest in policy and legislative reform.

Carters is Pleased to Welcome Michelle E. Baik as a New Associate

Carters is pleased to welcome Michelle E. Baik to Carters. Michelle joins Carters' Litigation Practice Group having been called to the Ontario Bar in 2015. She has broad experience in civil litigation and her practice areas include general civil, commercial and not-for-profit related litigation, administrative law, insurance defence litigation, loss transfer claims, priority disputes, and personal injury litigation.

IN THE PRESS

Charity & NFP Law Update – August 2017 (Carters Professional Corporation) was featured on *TaxNet Pro*™ and is available online to those who have OnePass subscription privileges. Future postings of the *Charity & NFP Law Update* will be featured in upcoming posts.

Canada Revenue Agency Offers Voluntary Disclosure for Non-Compliant Charities written by Terrance S. Carter was published in The Lawyer's Daily on September 12, 2017.

RECENT EVENTS AND PRESENTATIONS

Charity Law Update was presented by Terrance S. Carter at the 2017 Christian Legal Fellowship (CLF) National Conference on September 22, 2017 in Mississauga, Ontario.

UPCOMING EVENTS AND PRESENTATIONS

Association of Treasurers of Religious Institutes (ATRI) Conference will be held on September 30, 2017. Terrance S. Carter will present on the topic of "Legal Issues in Social Media and Related Policies".

BDO Canada LLP – Waterloo Office will host a conference in Kitchener, Ontario on October 4, 2017. Terrance S. Carter will present on the topic of "Duties and Liabilities of Directors and Officers of Charities and NFPs".

BDO Canada LLP – London Office will host a conference in London, Ontario on October 11, 2017. Terrance S. Carter will present on the topic of "Duties and Liabilities of Directors and Officers of Charities and NFPs".

The Estates & Trusts Summit hosted by the Law Society of Upper Canada will be held on October 17, 2017 in Toronto, Ontario. Terrance S. Carter will present on the topic of "Annual Charity Law Update".

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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