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CHARITY & NFP LAW UPDATE

JANUARY 2018

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

JANUARY 2018

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The 2018 Ottawa Region *Charity and Not-for-Profit Law*™ Seminar
Hosted by Carters Professional Corporation in Ottawa, Ontario,
on **Thursday February 15, 2018**
Guest Speakers include **the Honourable Justice David Brown**, Court of Appeal of Ontario
and **Tony Manconi**, Director General of the Charities Directorate of the CRA
Brochure and online registration are available on our website.

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RECENT PUBLICATIONS AND NEWS RELEASES

When Waivers Fail: The Impact of Imprecise Language and Resulting Liability

By Sean S. Carter and Barry W. Kwasniewski

On September 28, 2017, the Ontario Superior Court of Justice released its decision in *Anderson v Confederation College.* The decision involved a summary judgment motion by the defendant, a registered charity and a college of applied arts and technology, seeking an order to dismiss the claim by the plaintiff ("Anderson") on the basis that Anderson had signed an "Informed Consent Form for Physical Activities" (the "Consent Form") that barred his claim. In its decision, the court determined that the liability waiver wording in the Consent Form did not bar Anderson's claim. This *Bulletin* reviews this decision, as well as the importance of properly drafted liability waivers and risk management practices for charities and not-for-profits.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 414.

CRA News

By Ryan M. Prendergast

Updates to T4063, Registering a Charity for Income Tax Purposes

The Canada Revenue Agency ("CRA") updated its T4063, Registering a Charity for Income Tax Purposes on January 12, 2018. While many of the changes are administrative, the CRA has updated its answer to the "Will the Charities Directorate accept draft governing documents" section. While the T4063 had previously stated that the Charities Directorate would review draft governing documents on a one-time basis, it has been amended to state that the Charities Directorate will not review applications submitted with draft governing documents, and that the CRA will treat such applications as incomplete and will return them to the applicant. The amendments also clarify that for an application to be considered complete, certified governing documents must be included with the submission. These changes conform with the CRA's amended policy that it will no longer review applications submitted with draft governing documents as of July 1, 2017, as outlined in our June 2017 *Charity & NFP Law Update*.

Implementation of Proposed Changes to VDP

In our August 2017 *Charity & NFP Law Update*, it was reported that the Ministry of National Revenue announced changes to the CRA's Voluntary Disclosures Program ("VDP") to take effect as of January 1,

2018. These changes, which narrow the eligibility criteria for the VDP, were outlined in two proposals, Draft Information Circular - IC00-1R6 – Voluntary Disclosures Program and Draft GST/HST Memorandum 16.5 – Voluntary Disclosures Program (the "Proposals"). On December 15, 2017, the CRA published an announcement indicating that changes to the VDP would be effective March 1, 2018 rather than January 1, and that to be considered under the current VDP program, the CRA must receive applications on or before February 28, 2018. The announcement includes links to revised versions of the Proposals for IC00-1R6 and Memorandum 16.5. The VDP has application to non-profit organizations ("NPOs"). However, it has only limited application to registered charities in the context of employee source deductions and Harmonized Sales Tax ("HST").

New Video – Who is the True Donor of this Gift?

On December 4, 2017, the CRA published a new video, Who is the True Donor of this Gift?. As charities cannot issue official donation receipts unless they know who is the true donor, the video discusses how to determine the true donor in order to issue the corresponding donation receipt. In this regard, the video discusses various methods to identify individual and corporate donors, and briefly outlines issues that may arise when trying to identify the true donors. For example, the video explains when receiving a cheque from a joint account showing the name of two individuals, the receipt can be in one name or both names regardless of who signed the cheque. Another example provided is that of a corporation collecting funds from its employees and making a donation to a charity; in that case, the charity may not issue a donation receipt to the corporation, but may issue individual donation receipts to each of the employees who donated the funds for the corresponding amount of each employee donation, provided the charity is provided with that information, including each employee's address. Other examples include anonymous donations and cash donations.

Legislation Update

By Terrance S. Carter

Senate Adopts Motion to Appoint Special Committee on Charitable Sector

On January 30, 2018, the Senate of Canada debated and adopted a motion to appoint a Special Committee on the Charitable Sector ("Special Committee") to "examine the impact of federal and provincial laws and policies governing charities, nonprofit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada." The motion, as adopted, states that the Special Committee is to be composed of nine members and has "the power to send for persons, papers and records;

to examine witnesses; and to publish such papers and evidence from day to day as may be ordered by the committee." The Special Committee will be empowered to report from time to time, to submit a final report of its findings on or before December 31, 2018, and may publicize its findings up to 60 days after its final report is tabled.

Bill C-63, *Budget Implementation Act No. 2*, Receives Royal Assent

On December 14, 2017, Bill C-63, *Budget Implementation Act No. 2* ("Bill C-63") received Royal Assent. Bill C-63 contains amendments to the *Income Tax Act* ("ITA"), dealing with ecological gifts as proposed in the 2017 Federal Budget, and applies in respect of gifts made after March 21, 2017. Bill C-63 also contains amendments to the *Excise Tax Act* ("ETA") regarding the calculation of net tax for charities. Bill C-63 was discussed in the October 2017 *Charity & NFP Law Update*. The 2017 Federal Budget was discussed in *Charity & NFP Law Bulletin* No. 399.

Bill C-305, *An Act to amend the Criminal Code (mischief)*, Receives Royal Assent

On December 12, 2017, Bill C-305, *An Act to amend the Criminal Code (mischief)*, amending the *Criminal Code* provisions dealing with the offence of mischief relating to religious property, received Royal Assent and was brought into force immediately. The amendment modifies the offence by extending the definition of "mischief relating to property" to encompass not only religious property, but also educational institutions, community centres and senior residences, amongst others, used by an "identifiable group". Also, in coordination with Bill C-16 which received Royal Assent on June 19, 2017, as reviewed in the August 2017 *Charity & NFP Law Update*, the amendment also introduces "gender identity or expression" with regard to bias, prejudice or hate motivating the offence.

Ontario Bill 155, *Life Leases Act, 2017*

On September 20, 2017, Bill 155, *Life Leases Act, 2017* ("Bill 155"), was introduced in the Legislative Assembly of Ontario and since October 5, 2017 has been with the Standing Committee on Social Policy. If passed, Bill 155 will be the first piece of legislation in Ontario dealing with life leases, a form of leasehold interest that many senior housing charities and not-for-profits have adopted in recent years.

Ontario Bill 193, *Rowan's Law (Concussion Safety), 2017*

On December 14, 2017, the Minister of Tourism, Culture and Sport introduced Bill 193, *Rowan's Law (Concussion Safety), 2017* ("Bill 193") to the Legislative Assembly of Ontario. Bill 193 follows the recommendations set out in the report of the Rowan's Law Advisory Committee released in September 2017, which was discussed most recently in the September 2017 *Charity & NFP Law Update*. If passed,

Bill 193 will provide Canada's first framework to govern concussion prevention, detection, management and awareness in amateur competitive sport and schools, requiring that sports organizations, defined "as persons or entities that carry out, for profit or otherwise, a prescribed activity in connection with an amateur competitive sport and that satisfy such other criteria as may be prescribed", comply with a number of requirements. In addition to proclaiming "Rowan's Law Day" to be held every year on the last Wednesday of September, Bill 193 will also amend the *Education Act* by adding a new section authorizing the Minister of Education to establish and require school boards, as well as private schools, to comply with new policies and guidelines.

Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017* Receives Royal Assent

Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017,* affecting a number of Acts regulating healthcare in Ontario received Royal Assent on December 12, 2017, with the majority of the provisions coming into force on proclamation. For further information, see the October 2017 *Charity & NFP Law Update*.

Amendments to Ontario's *Occupational Health and Safety Act* now in force

On December 14, 2017, Bill 177, *Stronger, Fairer Ontario Act (Budget Measures), 2017* received Royal Assent. This brought amendments to Ontario's *Occupational Health and Safety Act* into force on proclamation, introducing important changes affecting employers in the province, including charities and not-for-profits. For more information, see *Amendments to Ontario Workplace Safety Legislation in Force*, below.

Ontario Regulation 79/10 under *Long-Term Care Homes Act* now in force

Amendments to Ontario Regulation 79/10 under the *Long-Term Care Homes Act* are now in force since January 1, 2018. Further to the proposal, previously discussed in the September 2017 *Charity & NFP Law Update*, the amendments deal with reunification priority access beds (sections 206.1-206.2) and the disclosure of personal information (section 304.1).

Amendments to CYFSA and New Regulations Proposed under the *Child, Youth and Family Services Act, 2017*

On December 4, 2017, the Ministry of Children and Youth Services released a set of draft regulations under *Child, Youth and Family Services Act, 2017* ("CYFSA") concerning personal information. Part X of CYFSA establishes a new consent-based regime for the collection, use and disclosure of clients'

personal information by child, youth and family service providers and will have application to charities and not-for-profits that qualify as "service providers" under the CYFSA when it comes into force. For more information, see *Child, Youth and Family Services Act, 2017 Draft Privacy Regulations* posted below.

Quebec Bill 146 Implementing Fiscal Measures Affecting Charities

On December 2, 2017, Quebec Bill 146, *An Act to give effect mainly to fiscal measures announced in the Budget Speech delivered on 28 March 2017* ("Bill 146"), received Royal Assent and came into force. The explanatory notes state that Bill 146 makes amendments to the Quebec *Taxation Act* and the *Act respecting the Québec sales tax* "similar to those made to the *Income Tax Act* and the *Excise Tax Act* by federal bills assented to in 2014, 2015 and 2016." Amendments affecting charities include new section 7.18.2 of the *Taxation Act* permitting registered charities and registered amateur athletic associations to hold an interest as a member in a partnership without being considered to be carrying on a business. This corresponds with similar amendments that were made to the ITA in 2016 after being announced in the April 2015 federal budget and which were discussed in *Charity Law Bulletin* No. 363.

Saskatchewan Bill 55, *The Provincial Health Authority Act*

On December 4, 2017, Bill 53, *The Provincial Health Authority Act* ("Bill 53") was proclaimed and came into force, with the exception of certain provisions. Bill 53 repealed *The Regional Health Services Act* with consequential amendments to a number of other acts. Because Bill 53 consolidates the operations of 12 former Regional Health Authorities into the Saskatchewan Health Authority, section 3-4(8) of Bill 53 states that any foundation "established with respect to a former regional health authority may, subject to any restrictions placed on the funds by donors, continue to use its funds as the foundation considers appropriate (a) to benefit any facility located in the health region associated with the former regional health authority; (b) to provide health services in the health region associated with the former regional health authority; or (c) for other charitable purposes for which the foundation was established."

Corporate Update

By Theresa L.M. Man

***Canada Corporations Act* Provisions and *Regulations* Repealed**

On December 30, 2017, regulations under the *Canada Corporations Act* ("CCA") (*Canada Corporations Regulations*) were repealed. This was followed by the repeal of the remaining provisions of the CCA on

December 31, 2017. All federal not-for-profit corporations incorporated under Part II of the CCA have now either transitioned to the *Canada Not-for-profit Corporations Act* ("CNCA") or have been dissolved. The repeal of the CCA was effected by *Order Fixing December 31, 2017 as the Day on which Certain Provisions of the Act Come into Force* dated December 15, 2017, which was published in the *Canada Gazette* on January 10, 2018. As well, the *Canada Corporations Regulations* were repealed as a result of the publication of *Regulations Repealing the Canada Corporations Regulations* in the *Canada Gazette*. Part II CCA corporations dissolved for failure to transition to the CNCA can apply to be revived and transitioned into the CNCA in one step through Form 4032*: Articles of Revival (transition)*. For more information see Corporations Canada's *Revival (transition) guide*.

Ontario Government Targets Early 2020 for ONCA Proclamation

Following the Royal Assent of Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154") on November 14, 2017 the Government of Ontario stated on its webpage that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery. It has stated that it is working to bring the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") into force as early as possible, with a target of early 2020. This gives not-for-profit corporations at least 24 months' notice before the ONCA comes into force. Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force. Following proclamation, Ontario not-for-profit corporations will have three years to transition to the ONCA to make the necessary changes to their governing documents.

Additional Changes to OCA in Force on January 13, 2018

A number of changes to the Ontario *Corporations Act* ("OCA") became effective on January 13, 2018, by way of Bill 154. Other changes to the OCA already became effective on November 14, 2017. These changes were introduced to allow Ontario Part III OCA not-for-profit corporations to enjoy some of the modernized rules contained in the ONCA before it is proclaimed, and to provide more flexibility to their operations. These changes are discussed in greater detail in *Charity & NFP Law Bulletin* No. 412.

Corporate Documents Available for Purchase from Corporations Canada

On December 12, 2017, Corporations Canada announced that uncertified copies of corporate documents filed under the *Canada Business Corporations Act* or the CNCA are now available for purchase from their Online Filing Centre. Uncertified corporate documents can be ordered by email, mail or fax, and cost $1.00 per page. Orders are processed within one business day.

Jewish Day School Teachers Held Ineligible for Clergy Residence Deduction

By Jacqueline M. Demczur

In a decision released December 18, 2017, the Tax Court of Canada in *Lichtman v The Queen* considered whether three ordained rabbis ("Appellants") teaching Judaic studies in a Jewish elementary day school were "ministering to a…congregation" in order to be eligible for the clergy residence deduction (the "Deduction") under s. 8(1)(c)(ii)(B) of the ITA. This Deduction allows qualifying individuals to deduct from their personal income a specified amount in relation to their housing, whether rented or owned, when filing their personal income tax return.

In order to qualify for the Deduction, the court stated that an individual is required to meet a two-fold test for status and function set out under s. 8(1)(c) of the ITA. The status test requires the individual to be a member of the clergy or of a religious order, or a regular minister of a religious denomination (a "Clergy Member"). In this regard, the Appellants met the first part of the test as members of clergy. The function test asks whether the individual is performing one of the functions outlined in s. 8(1)(c)(ii) of the ITA. In this regard, as s. 8(1)(c)(ii)(B) allows for the Deduction where a Clergy Member is "ministering to a diocese, parish or congregation," the issue was whether the Appellants' activities and functions could be considered "ministering" and whether the students could be considered a "congregation."

In its consideration of whether the Appellants were "ministering", the court held that "a rabbi teaching Torah to Orthodox Jewish children [would need to represent] a specialized ministry within the context of Orthodox Judaism," and that the students would have to constitute a congregation for the purposes of s. 8(1)(c). Through its review of expert evidence, the court concluded that there was no consensus on the spirituality of Torah education or that learning Torah "is any more of a spiritual or religious act than it is an academic and intellectual pursuit". Further, while it noted that rabbis may engage in a variety of specializations, including education, it held that in contrast to a music minister at a Pentecostal church, which was found to be a specialized ministry in *Austin v The Queen*, the Appellants' activities did not amount to a specialized ministry within the context of Orthodox Jewish ministry. Of note, the Appellants' employment contracts and work duties, which stipulated that they were employed as teachers of Judaic studies at the day school, were contrasted with the activities and duties of a synagogue rabbi, and the Appellants' duties were found to be those that "would be typically required of any teacher in a typical school setting."

Concerning whether the students constituted a "congregation", the court reviewed the ordinary meaning of "congregation" and found that, in the context of Orthodox Jewish rabbis, the term was used in relation to synagogues. In its review of legislation and case law, it held that the term had to be read contextually in reference to a "diocese, parish or congregation", as outlined in s. 8(1)(c)(ii) of the ITA. It held that these three words "share the common element of regularized religious worship in an organized institutional setting," and that elementary school students gathered for Jewish religious education and instruction were not a congregation in this regard. The court also took a purposive approach to the ITA provision, concluding that the purpose, history and general scheme of the ITA further supports the conclusion that the students, in this case, were not a congregation, and that teachers of religious studies could not be considered to be ministering to the students. Based on its findings, the court dismissed the appeal, holding that the Appellants were not eligible for the Deduction.

While the s. 8(1)(c) two-fold status and function test is not new, this case is a good example of the court's application of the test to determine an individual's eligibility for the Deduction. In this regard, individuals applying for the Deduction under s. 8(1)(c)(ii)(B) should be aware that they may need to satisfy the CRA and, if applicable, satisfy the court that they are Clergy Members, that their activities constitute ministry and that those to whom they minister can be considered a congregation.

GST/HST Ruling on Qualifying NPOs and the Public Service Body Rebate

By Theresa L.M. Man

On January 4, 2018, the CRA released a GST/HST ruling (CRA document #176875) concerning qualifying non-profit organizations ("Qualifying NPOs") and the public service body rebate ("PSB Rebate") under the ETA. In the ruling, the CRA was asked to clarify whether an organization was a Qualifying NPO and if so, whether it was entitled to claim the PSB Rebate and at what percentage. The organization in question was a corporation without share capital that was resident in Ontario and was not a government, a specified crown agent under s. 123(1) of the ETA, or a selected public service body. It received its funding through government appropriations which is not consideration for a supply.

In the ruling, the CRA stated that in order to be a Qualifying NPO under s. 259(2) of the ETA, the organization must be a "non-profit organization" as defined under s. 123(1). In this regard, it is a question of fact whether an organization meets the definition for a non-profit organization at any particular time. As well, whether the organization is operating for a purpose other than profit must be determined on an

ongoing basis. Further, to be a Qualifying NPO, the organization must receive at least 40% of its funding through government funding, which is determined in accordance with s. 3 of the *Public Service Body Rebate (GST/HST) Regulations*.

With respect to the PSB Rebate, the CRA stated that an organization that meets the requirements to be a Qualifying NPO on the last day of their claim period or of their fiscal year that includes that claim period is entitled to the PSB Rebate under s. 259(3), subject to exclusions that do not apply in this case for reasons not mentioned. In this regard, a Qualifying NPO that is not a selected public service body (as defined under s. 259(1) of the ETA) is entitled to claim PSB Rebates on the non-creditable tax charged in respect of properties or services (other than prescribed properties or services) for the claim period which is 50% of the goods and services tax (or the federal part of the Ontario harmonized sales tax). The calculation is clarified in GST/HST Memorandum 13.5, Non-creditable Tax Charged. In addition, a Qualifying NPO resident only in Ontario is also entitled to PSB Rebates of 82% of the provincial non-creditable HST charged in respect of property or a service (other than a prescribed property or service) for the claim period regardless of in which province the HST was paid or payable. More information is available on the PSB Rebate in Info Sheet GI-184, Public Service Bodies' Rebate for Qualifying Non-profit Organizations Resident Only in Ontario.

While CRA rulings provide an indication of the CRA's position on how portions of the ETA apply to a specific fact situation, charities and not-for-profits should keep in mind that they are only binding with respect to those specific facts disclosed to the CRA.

Child, Youth and Family Services Act, 2017 Draft Privacy Regulations Posted

By Esther Shainblum

As reported in the August 2017 *Charity & NFP Law Update*, Bill 89, *Supporting Children, Youth and Families Act, 2017*, which contains the *Child, Youth and Family Services Act, 2017* ("CYFSA") in Schedule 1, received Royal Assent on June 1, 2017. Part X of CYFSA establishes a new consent-based regime for the collection, use and disclosure of clients' personal information by child, youth and family service providers. Although CYFSA is not expected to come into force until the spring of 2018 at the earliest, on December 4, 2017 the Ministry of Children and Youth Services (the "Ministry") released a set of draft regulations under CYFSA concerning personal information (the "Draft Regulations"), which were open for comment until January 26, 2018.

The Draft Regulations address a number of matters that CYFSA had left to be prescribed by regulation and create a number of new obligations that will have to be satisfied by entities that meet the definition of “service provider” under CYFSA, including charities and not-for-profits. The definition of “service provider” under CYFSA includes the Minister of Children and Youth Services (the “Minister”), holders of adoption or residential licenses under CYFSA and persons or entities that provide a service funded under the Act (“Service Providers”). Some of the requirements set out in the Draft Regulations will require Service Providers to change or improve their day-to-day practices and to gather statistical information concerning their privacy practices and procedures.

Section 8 of the Draft Regulations provides details of what information Service Providers will be required to provide to clients whose privacy has been breached pursuant to section 308(2) of CYFSA, including plain language descriptions of what occurred and the steps taken by the Service Provider to mitigate the breach and prevent future losses. Section 9 of the Draft Regulations sets out the circumstances in which Service Providers must notify the Minister and the Ontario Information and Privacy Commissioner (the “Commissioner”) of a breach pursuant to s. 308(3) of CYFSA. These circumstances include the use or disclosure of personal information without authority, theft of personal information and significant breaches such as those involving highly sensitive personal information or large volumes of personal information.

Section 10 of the Draft Regulations sets out the details of the requirements for the secure retention, transfer and disposal of records of clients’ personal information (pursuant to s. 309(1)(b) of CYFSA). Service Providers must take reasonable steps to protect records containing clients’ personal information from theft, loss, or unauthorized use or disclosure, to ensure that the personal information in a record cannot be reconstructed or retrieved (this requirement would require Service Providers to, for example, permanently wipe or physically destroy hard drives and flash drives and not just erase them or delete files) and to document that a record has been disposed of in a manner that does not actually document any of the personal information it contained. Section 10 also requires Service Providers to put in place and comply with a detailed records retention policy and prohibits Service Providers from transferring a record containing a client’s personal information to a new Service Provider unless the new Service Provider has a records retention policy in place for the type of record being transferred.

Section 11 of the Draft Regulations will now require Service Providers to gather and file annually with the Commissioner specific data such as the number of requests received for access to or correction of

records in the previous year, the number of times it granted or refused such request and within which time frames, and details concerning the number and type of privacy breaches (losses, thefts, unauthorized uses and disclosures and so on) that occurred in that year.

Charities and not-for-profits that are Service Providers under CYFSA should continue to monitor the status of CYFSA as well as the Draft Regulations. In particular, when CYFSA is proclaimed, and if Draft Regulations are enacted, Service Providers will have significant requirements to comply with under the new legislation.

Delaying the Enforcement of Your Copyright May Cost You

By Sepal Bonni

On October 31, 2017, the Federal Court released its decision in *907687 Ontario Inc. (International Institute of Travel) v 1472359 Ontario Ltd (IBT College of Business Travel & Tourism Technology)*. In this case, International Institute of Travel ("IIT"), a private career college, alleged that IBT College of Business Travel & Tourism Technology ("IBT"), another private career college, had improperly used its course material. As a result, on January 15, 2013, IIT commenced a copyright infringement action against IBT.

Although the Federal Court held that IIT had not met its burden of proving that IBT had infringed its copyright, the court held that the infringement action was time-barred as it was not commenced within the three year limitation period provided for in the *Copyright Act.* In this regard, s. 43.1(1) of the *Copyright Act* provides that a copyright infringement action must be commenced within three years. However, there are subtle important nuances to when this three year period begins. If the copyright owner knew or could reasonably have been expected to know of the infringement, then the three year limitation period begins from the time at which the copyright owner knew or was reasonably expected to have known of the infringement. On the other hand, in situations where the copyright owner did not know and could not be reasonably expected to know, then the three year limitation period begins at the time when the copyright owner first knew or could have been reasonably expected to know of the infringement.

In this case, the court held that although IIT did not have actual knowledge of the alleged infringement until 2011, a demand letter sent by IIT's legal counsel to IBT in 2002 established that the infringement was discoverable with reasonable diligence in 2002, and as a result, the action was statute-barred.

Charities and not-for-profits should beware that where a limitations defence in a copyright infringement action is raised, the copyright owner is required to prove that the three year limitation period has not lapsed. Charities and not-for-profits must therefore take reasonable steps to determine if copyright is being infringed and be vigilant in policing unlawful use of their copyright to ensure a copyright infringement action is not time-barred. Further, a demand or cease and desist letter sent can be deemed by courts as evidence that an infringement was known by the copyright owner and would therefore mark the beginning of the three year period, unless there is evidence that the copyright owner had earlier knowledge of the infringement. As such, charities and not-for-profits that know of or even suspect copyright infringement should act immediately to enforce their rights before the limitation period expires.

House Committee Releases Report on CASL

By Ryan M. Prendergast

On December 13, 2017, the Standing Committee on Industry, Science and Technology (the "Committee") presented its report "Canada's Anti-Spam Legislation: Clarifications are in Order" (the "Report"). The Committee conducted a statutory review of Canada's anti-spam legislation ("CASL") between September 26, 2017 and December 12, 2017, the results of which are set out in the Report.

Of note to charities and not-for-profits, recommendation 8 in the Report states that:

> The Committee recommends that the Government of Canada clarify the application of the Act and its regulations to charities and non-profit organizations to ensure that the legislation is clear and understandable to these organizations and do no create unintended costs of compliance.

The Committee heard various witnesses from the not-for-profit sector, including Imagine Canada, which was summarized in the November/December 2017 *Charity & NFP Law Update*. The recommendation in the Report does not go as far as some witnesses proposed to the Committee in exempting registered charities from the requirements of CASL, or creating broader exceptions for other not-for-profits. However, it is hoped that the government will review CASL and its general application to the not-for-profit sector.

The Report also includes recommendations with general application which would also be of interest to charities and not-for-profits that might be involved in sending commercial electronic message ("CEMs"). These include a recommendation that the government clarify the definition of CEM, "electronic address"

as well as the provisions pertaining to "implied consent" and "express consent" under CASL. The Report demonstrates that several years after CASL coming into force, its application is far from clear. The Committee's conclusion recognizes this fact by stating, "While improving guidance and education should be a priority moving forward, it can only achieve so much. The Act [CASL] and its regulations require clarifications to reduce the cost of compliance and better focus enforcement."

Amendments to Ontario Workplace Safety Legislation in Force

By Barry W. Kwasniewski

On December 14, 2017, Ontario's omnibus Bill 177, *Stronger, Fairer Ontario Act (Budget Measures), 2017* ("Bill 177") received Royal Assent, implementing certain measures outlined in Ontario's 2017 Budget, as well as enacting and amending other Ontario statutes. Among these amendments are changes to Ontario's *Occupational Health and Safety Act* ("OHSA") contained under Schedule 30 of Bill 177. These amendments are intended to enhance protections for workers, including those employed by charities and not-for-profits in Ontario.

These amendments include changes to the OHSA's sentencing regime by increasing maximum fine limits from $25,000 for individuals and $500,000 for corporations to $100,000 and $1,500,000 respectively. Individuals convicted of an offence under the OHSA may also be subject to up to 12 months imprisonment. Where the OHSA previously required charges to be laid within one year of an incident, the time limit to allow for prosecution has been changed from one year from the date of the offence to one year from the date an inspector becomes aware of an alleged offence, allowing for charges to be laid more than a year after the occurrence of an incident. Additionally, as a result of Bill 177, employers that do not own their workplace are now required to notify an inspector appointed as a Director under the OHSA where a committee or health and safety representative has identified potential structural inadequacies of a building, structure, or any other part of a workplace, as a source of danger or hazard to workers.

Charities and not-for-profits need to continue to be aware of their health and safety obligations to workers under the OHSA, particularly given the large increase to the maximum fines that are now in force.

Alberta Court Denies Challenge Brought Six Years After Passing of Bylaw

By Esther S.J. Oh

On January 5, 2018, the Court of Queen's Bench of Alberta released its decision in *Chinese Benevolent Association of Edmonton v Chinatown Multilevel Care Foundation*. In this case, the plaintiffs sought a declaration that the general operating by-law adopted by the Chinatown Multilevel Care Foundation (the "Foundation") in June 2009, was invalid and that the governing bylaws were those adopted in 1985 (the "1985 Bylaw"). The plaintiffs also sought a determination concerning who the members of the Foundation were, together with a court order on other corporate matters.

The plaintiffs included Mei Hung and Frank Gee (who were members of the Foundation), as well as the Chinese Benevolent Association (the "Association") and directors of the Association. On the issue of who had valid standing to bring the application, the court found that only Ms. Hung and Mr. Gee had standing given their capacity as members of the Foundation. The court stated "There is no evidence to suggest that the [Association] or its Directors have any material interest in the [Foundation] and therefore any direct stake in the [Foundation]'s affairs such as to justify granting them standing...." The court also stated, "I agree with the Defendants that merely applying for membership in the [Foundation] is not sufficient to grant standing and that the board of directors was entitled to employ Selection Criteria in making membership decisions for the [Foundation] as a private society."

The Foundation was incorporated under the Alberta *Societies Act* and had registered its bylaw in 1985 under that Act. At a meeting held on June 16, 2009, (the "June 2009 Meeting") members of the Foundation passed a special resolution replacing the 1985 Bylaw with a new bylaw (the "2009 Bylaw") which introduced a number of changes, including limitations on the maximum number of members to ten and limitations on the term of office for directors. The special resolution approving the 2009 Bylaw was signed by nine of the Foundation's members who were also directors of the board at the time.

Based on the evidence, including the individuals listed by name on the 2009 Bylaw filed with the Alberta corporate registry, the court found that the members of the Foundation were the same as the directors at the time of the June 2009 Meeting. Accordingly, the court found that only those ten individuals (who were directors and members of the Foundation) were entitled to receive notice of and vote on the 2009 Bylaws.

The court also found that those ten members received adequate notice of the June 2009 Meeting. In that regard, the court stated:

> While notice of the meeting was given by email or telephone, there is no evidence that any of the members/directors in attendance at the meeting objected to the adoption of the 2009 Bylaws or to the sufficiency of the notice given in relation to that meeting until six years later in the case of the Plaintiffs, Mr. Gee and Ms. Hung. The evidence establishes that the board was considering new bylaws, a subcommittee had been appointed to review the bylaws, and at no time was there any indication, certainly not from Mr. Gee and Ms. Hung, that the members/directors did not understand the bylaws or the purpose of the June 2009 Meeting.

As such, given the court's finding that the Foundation had ten members/directors who had received sufficient notice, it found that the threshold 75% required for a special resolution under the Alberta *Societies Act* was met and that the 2009 By-laws were therefore validly implemented. On this basis, the court dismissed the Appellant's claim.

This decision, in addition to confirming that simply applying for membership is not sufficient to grant standing as members in a court proceeding, more importantly clarifies that directors and/or members who wish to raise objections to the validity of a bylaw must do so on a timely basis and ensure that such objections are properly documented.

Minister Prohibited from Dealing in Mutual Funds with Congregation

By Terrance S. Carter

On November 30, 2017, the Ontario Securities Commission ("OSC") released its decision in *Mason (Re)* to impose "restricted client terms and conditions" on a non-paid minister, lay leader, and mutual fund dealer registrant ("Mason"), from acting as a mutual fund dealer with regard to members of his church's congregation or for their direct relatives. In this case, the OSC found that the work performed by Mason at his church, which included performing prayers, delivering messages to the congregation, and visiting the sick and persons in need, constituted an "outside business activity" within the meaning of Part 13.4 of Companion Policy 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. Part 13.4 states that registrants must disclose, among other things, all officer and director positions and any positions of influence, including "paid or unpaid roles with charitable, social or religious organizations where the individual is in a position of power or influence and where the activity places the registered individual in contact with clients or potential clients, including positions where the registrant handles investments or monies of the organization." In accordance with Part 13.4, the OSC imposed on Mason

restricted client terms and conditions ("Restrictions") because the OSC was of the opinion that Mason was in a position of power or potential influence over potential clients.

Mason had argued that he was not a pastor or religious leader, did not hold a position of authority in the church, and that the Restrictions would result in constructive discrimination under section 11 of Ontario's *Human Rights Code* ("Code") by infringing on his creed rights and adversely affecting his ability to fulfill his religious obligations. However, the OSC stated that "[t]he purpose of the [Restrictions] is not to prohibit registrants from volunteering with charitable or religious organizations, but to protect clients or potential clients from potential undue influence from a registrant who is in a position of power or potential influence, whether spiritual or otherwise". In this case the Restrictions were intended to protect vulnerable individuals and so it was reasonable and *bona fide* under section 11(1)(a) of the Code.

This decision serves as a caution that if a charity or not-for-profit has directors, officers, volunteers or employees who are registered dealers with the OSC, then depending upon the role that each individual has within the organization, their involvement may have to be reported by the individual to the OSC as an "outside business activity" and may potentially result in restrictions being imposed by the OSC on that individual's registration, including where the activities of volunteers and employees within the charity or not-for-profit put them in a position of power or influence, as was the case in this OSC decision.

New Guide Published on Fundraising under Australian Consumer Law

By Jennifer M. Leddy

The Australian Competition & Consumer Commission published *A guide to the Australian Consumer Law* (the "Guide") on December 18, 2017. The Guide outlines general principles and provides examples to assist charities and fundraisers with understanding their obligations under the Australian Consumer Law ("ACL"), which is set out under Schedule 2 of the *Competition and Consumer Act 2010*. The ACL outlines obligations concerning unfair practices, consumer transactions, product safety, and product-related services, and applies to charities, not-for-profits, and fundraisers in Australia in certain circumstances.

In general, the ACL applies only to activities that are in "trade or commerce". The Guide indicates that since fundraising activities may occur in trade or commerce, those who engage in fundraising activities may have obligations under the ACL. It further clarifies that a fundraising activity that is in trade or commerce includes fundraising activities involving supplies of goods or services, fundraising by a for-profit professional fundraiser, and "fundraising in an organized, continuous and repetitive way."

Where a fundraising activity is in trade or commerce, or where goods or service are supplied as part of a fundraising activity, the fundraiser must not engage in misleading or deceptive conduct in relation to either the fundraising activity or the goods and services supplied, regardless of whether there is intention to mislead or deceive. Similarly, unconscionable conduct is prohibited under the ACL. The Guide explains that unconscionable conduct "includes trading practices that are harsh or oppressive and go against good conscience", as conscience is judged by the norms of society. Further, it states that conduct may also be unconscionable "where one party knowingly exploits the special disadvantage of another." The Guide also explains that there are further obligations to comply with where fundraising activities specifically involve the supply, or promotion of the supply of a good or service, and outlines these obligations.

While the Guide applies only to Australian charities, not-for-profits and fundraisers, its general principles and examples with regard to consumer protection may be of interest to those in the Canadian charitable sector and, despite having no legal application in Canada, is helpful in terms of providing guidelines for "best practices."

IN THE PRESS

Charity & NFP Law Update – November 2017 (Carters Professional Corporation) was featured on *Taxnet Pro*™ and is available online to those who have OnePass subscription privileges.

CRA Announces New Charities Education Program written by Jacqueline M. Demczur and Terrance S. Carter was published in AFP e-wire on December 13, 2017.

Canada Revenue Agency Announces New Program to Help Charities Meet Obligations written by Jacqueline M. Demczur and Terrance S. Carter was published in The Lawyers' Daily on December 22, 2017.

Guidance on Economic Sanctions Aims to Help Charities with Due Diligence written by Adriel N. Clayton was published in *The Lawyer's Daily* on January 4, 2018.

RECENT EVENTS AND PRESENTATIONS

Duties and Liabilities of Directors and Officers of Charities and NFPs was presented by Terrance S. Carter at a conference hosted by BDO Canada LLP – Dufferin and Area Office in Orangeville, Ontario on November 30, 2017.

UPCOMING EVENTS AND PRESENTATIONS

OBA Institute 2018 will be held on February 6, 2018 in Toronto. Terrance S. Carter will present on the topic "The Investment Spectrum for Charities, Including Social Investments." Details and online registration are available on the OBA website.

CSAE Winter Summit will be held in Niagara Falls, Ontario on February 8, 2018. Theresa L.M. Man will present on the topic "New and Exciting Changes to Ontario and Federal Corporate Legislation"

The Ottawa Region *Charity and Not-for-Profit Law*™ Seminar hosted by Carters Professional Corporation will be held at the Centurion Conference Center in Ottawa, Ontario, on **Thursday February 15, 2018**. Guest Speakers include the Honourable Justice David Brown, Court of Appeal of Ontario and Tony Manconi, Director General of the Charities Directorate of the CRA. Brochure and online registration are available on our website.

CPA Not-for-Profit Executive Forum 2018 will host an Early Bird Session on February 27, 2018. Terrance S. Carter will present on the topic "Legal Issues in Social Media for Charities and NFPs"

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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