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CHARITY & NFP LAW UPDATE

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

MARCH 2018

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RECENT PUBLICATIONS AND NEWS RELEASES

The 2018 Ontario Budget: Impact on Charities and Not-for-Profits

By Ryan M. Prendergast, Adriel N. Clayton & Terrance S. Carter

On March 28, 2018, Ontario's Minister of Finance Charles Sousa tabled the Liberal Ontario Government's 2018 Budget ("2018 Ontario Budget"). The 2018 Ontario Budget includes various provisions that will be of interest to the charitable and not-for-profit sector, including tax measures to enhance support for charitable giving, to ensure the Employer Health Tax remains available to charities and not-for-profits, and to create a tax exemption for certain non-profit child care facilities.

In order to maintain and enhance support for charitable giving in Ontario, the 2018 Ontario Budget proposes to enhance the Ontario Charitable Donations Tax Credit ("OCDTC"), a tax credit that provides relief to taxpayers that make eligible donations. The current OCDTC rate is 5.05% for the first $200 of eligible donations and 11.16% for eligible donations exceeding $200. In this regard, the 2018 Ontario Budget proposes to increase the rate for eligible donations exceeding $200 from 11.16% to 17.5% in order to correspond with proposed changes to provincial personal income tax.

The 2017 Ontario Budget proposed measures to eliminate an exemption available to certain employers for Employer Health Tax ("EHT"), a payroll tax that partially funds the Ontario Health Insurance Plan, and to ensure that the EHT exemption would be available for other, smaller employers. The EHT exemption is currently available to employers that are not eligible for the Small Business Deduction under the *Income Tax Act*. The 2018 Ontario Budget proposes to base the EHT exemption on the Small Business Deduction eligibility criteria. The effect of this would be that the EHT exemption would remain available to charities, not-for-profit organizations, and private trusts, among other small employers.

The 2018 Ontario Budget also recognizes that many child care facilities are located in spaces that are property tax-exempt, such as public schools, places of worship, municipal town halls, and other community centres. In order to maintain the tax-exempt status of these facilities where a portion of their facility is rented to a non-profit child care centre, the 2018 Ontario Budget proposes to amend the *Assessment Act* in order to provide a tax exemption to non-profit child care centres within the meaning of the *Child Care and Early Years Act, 2014* that lease property in these tax-exempt spaces. Proposed amendments to the *Assessment Act* have already been introduced through Bill 31, *Plan for Care and*

Opportunity Act (Budget Measures), 2018 ("Bill 31"), which received first reading on March 28, 2018, the same day that the 2018 Ontario Budget was released.

The proposed provisions of the 2018 Ontario Budget are welcome measures that, if passed, may provide relief to specific charities and not-for-profits, as well as to the sector as a whole. Charities and not-for-profits operating in Ontario should monitor the status of Bill 31, as well as any upcoming budget implementation bills to be introduced in the Ontario Parliament.

CRA News

By Theresa L.M. Man

New Business Numbers No Longer Required for Internal Divisions

In the September 2017 *Charity & NFP Law Update*, it was reported that the Canada Revenue Agency ("CRA") would be assigning unique nine-digit business numbers to charities' internal divisions that were sharing the business numbers of their head bodies in order to access the CRA's online services through the Charities IT Modernization Project. However, on March 1, 2018, the CRA announced through an e-mail sent to certain stakeholders, as well as through an update to its Guidance CG-028, "Head bodies and their internal divisions", that the new initiative announced in September 2017 will no longer be required in order to allow internal divisions to access the CRA's online services. This means that the CRA is reverting back to its long-standing practice of assigning internal divisions with the same business numbers as their head bodies followed by a program identifier "RR", as well as a unique four-digit reference number following RR to help distinguish between different head bodies and internal divisions.

CRA Releases Video on Gift Certificates and Gift Cards

On February 28, 2018, the CRA published a video outlining when and how registered charities can issue official receipts for gift card or gift certificate ("Gift Card") donations. Gift Cards are akin to promises to issue a gift which are fulfilled upon a transfer of property through redemption of the Gift Card. In this regard, if a charity that received a Gift Card directly from an issuer (*i.e.* the individual or business that issues the Gift Card and from whom the Gift Card can be redeemed for services or property), the charity can only issue a donation receipt to the issuer once the charity has used the Gift Card to purchase a product or service, and only for the amount that the charity redeemed from the Gift Card. On the other hand, a charity that received a Gift Card from a Gift Card holder (*i.e.* a third party non-issuer who purchased the Gift Card from an issuer) can issue a donation receipt to the donor for the amount of the Gift Card because

the holder purchased the Gift Card, giving it a monetary value. As such, it is important for charities to know whether the donor of a Gift Card is an issuer or a holder of a Gift Card.

Legislation Update

By Terrance S. Carter

Federal Bill C-74, *Budget Implementation Act, 2018, No. 1*

On March 27, 2018, Bill C-74, *Budget Implementation Act, 2018* ("Bill C-74") was introduced and received first reading at the House of Commons. If passed, Bill C-74 will implement certain measures proposed in the 2018 Federal Budget ("Budget 2018"), some of which will impact the charitable and not-for-profit sector, as discussed in *Charity & NFP Law Bulletin* No. 417. In this regard, Bill C-74 proposes to amend the s. 188(1.3) definition of "eligible donee" under the *Income Tax Act* ("ITA") to include municipalities for purposes of revocation tax, and to amend the s. 149.1(1) definition of "qualified donee" to simplify the qualified donee status of universities outside of Canada. For further information regarding universities outside Canada, see "Ministry of Finance Clarifies Changes Concerning Prescribed Universities" below.

Ontario Bill 193, *Rowan's Law (Concussion Safety), 2018* and Rowans Law Consultations

On March 7, 2018, Bill 193, *Rowan's Law (Concussion Safety), 2018*, received Royal Assent. With the exception of the provision establishing Rowan's Law Day on the last Wednesday in September each year, which came into force on Royal Assent, this legislation, including the corresponding amendments to the *Education Act*, will come into force on a date to be set by proclamation. *Rowan's Law (Concussion Safety), 2018* follows recommendations set out in the September 2017 report of the Rowan's Law Advisory Committee that was discussed in the June 2016 *Charity & NFP Law Update*, as well the September 2017 *Charity & NFP Law Update*. The Ministry of Tourism, Culture and Sport has started a consultation process for the development of regulations, policies and guidelines that will govern amateur competitive sport organizations and school boards. The consultation process, which will be open until May 7, 2018, also provides a consultation paper for discussion purposes.

Ontario Bill 3, *Pay Transparency Act, 2018*

On March 20, 2018, the Ontario government introduced Bill 3, *Pay Transparency Act, 2018* ("Bill 3") in the Legislature, where it has since been debated twice at second reading on March 26 and 28, 2018. Bill 3 replaces Bill 203, *Pay Transparency Act, 2018* introduced on March 6, 2018 and which died on the order

paper upon the prorogation of the Legislature on March 15, 2018. If passed, Bill 3 will establish a number of provisions regarding compensation-related information of employees and prospective employees. For example, Bill 3 would prohibit employers from seeking compensation history about a job applicant, and will require employers to include compensation information in publicly advertised job postings, along with a number of other related provisions. Prescribed employers would also be required to prepare "pay transparency reports" including information about the employer, their workforce composition, and differences in compensation in their workforce regarding gender and other prescribed characteristics. It is expected that these reporting requirements would first apply to the Ontario Public Service, and then employers with over 500 employees, to be followed then by employers with over 250 employees. If passed, Bill 3 would be scheduled to be in force as of January 1, 2019.

Ontario Bill 14, *Personal Information Protection Act, 2018*

On March 21, 2018, Ontario Bill 14, *Personal Information Protection Act, 2018* ("Bill 14"), a private member's bill, was introduced in the Legislature. Bill 14 passed second reading on March 22, 2018 and was referred to the Standing Committee on Justice Policy the same day. If passed, Bill 14 will apply to every organization, including unincorporated associations and not-for-profit organizations, but not to personal information subject to the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), to Ontario's *Freedom of Information and Protection of Privacy Act*, or to other similar provincial Acts. Bill 14 governs the collection, use and disclosure of personal information and, if passed, could potentially be deemed substantially similar to Part 1 of the PIPEDA. Pursuant to subsection 26(2) of PIPEDA, the Governor in Council may order that organizations and activities subject to provincial legislation that it deems substantially similar to be exempt from PIPEDA with respect to the collection, use or disclosure of personal information occurring in that province.

Amendments to Regulations under the Ontario *Charities Accounting Act*

As of April 1, 2018, new amendments to Ontario Regulation 4/01 under the *Charities Accounting Act* ("CAA") will authorize charitable corporations to pay directors and related persons for goods, services, or facilities under certain limited circumstances. For more information, see "Regulations Concerning Directors' Remuneration Coming into Force" below.

Proposed changes to Regulation 166/11 under *Retirement Homes Act*

On March 9, 2018, the Ministry of Seniors Affairs opened a consultation process looking for submissions from the public on Proposal 18-OSS001, related to the disclosure of cannabis-related offences by

retirement home licence applicants, as well as by staff and volunteers in retirement homes, in anticipation of changes to the federal *Controlled Drugs and Substances Act*. Submissions are due March 30, 2018. As per the Consultation Report published in January 2017, it is worth noting that only a small number of retirement homes are not-for-profit, as opposed to long-term care homes licensed or approved under the *Long-Term Care Homes Act, 2007.*

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

On February 28, 2018, the Ministry of Health and Long-Term Care introduced Proposal 18-HLTC018, which contains a number of technical amendments dealing with penalties, fees and information required from licensees, as well as the disclosure of cannabis-related offences by staff and volunteers in anticipation of changes to the federal *Controlled Drugs and Substances Act.* Input from the public was due March 29, 2018.

Proposed Regulation on exemptions to *Ticket Sales Act, 2017*

On March 1, 2018, the Ministry of the Attorney General introduced Proposal 18-MAG001 on exemptions to the *Ticket Sales Act, 2017*, which is set to come into force on July 1, 2018. The *Ticket Sales Act, 2017* already includes an exemption for registered charities, but this proposed regulation would generally exempt small venues, such as schools, including colleges and universities, churches or other places of worship, and buildings that are owned or operated by municipalities, school boards or community organizations. Comments were due March 21, 2018.

Ministry of Finance Clarifies Changes Concerning Prescribed Universities

By Ryan M. Prendergast

As commented on in the *Charity & NFP Law Bulletin* No. 417, Budget 2018 proposed to amend the definition of "qualified donee" so that universities outside Canada are no longer required to be listed in Schedule VIII, which had previously been the case prior to the 2011 federal budget implementing a separate registration for "prescribed universities". As a consequence, Budget 2018 proposed repealing section 3503 and Schedule VIII of the *Income Tax Regulations* so that there would be only one list of universities outside Canada that are qualified donees for the CRA to maintain, and for the public to check to determine qualified donee status.

On March 22, 2018, a Notice of Ways and Means Motion to implement Budget 2018 was posted by the Ministry of Finance. In it, the Ministry clarified that those universities named in Schedule VIII at the end

of February 26, 2018 were "deemed to have applied for registration". This clarification was in response to a number of practitioners pointing out that the original drafting of the proposed amendments in Budget 2018 may have inadvertently excluded a number of universities outside Canada that had previously been qualified donees due to the proposed amendments to the *Income Tax Act* and the repealing of Schedule VIII. These amendments have been proposed through Bill C-74. Charities should continue to monitor the status of Bill C-74 for further progress on its implementation.

Corporate Update

By Theresa L.M. Man

Bill C-25 Passed

On March 22, 2018, federal Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profits Corporations Act and the Competition Act* ("Bill C-25") received third reading and was passed "on division", meaning that it was supported by a majority, though not unanimously. A majority of Bill C-25's provisions will come into force upon assent. As reported in the October 2016 *Charity & NFP Law Update*, Bill C-25 introduces technical amendments to the Canada Not-for-profit Corporations Act ("CNCA"), including the addition of a definition for an "incapable" person and a requirement for the Director to publish notices of any decision he or she has made in respect of applications made under various sections of the CNCA. As well, new regulations have also been proposed to correspond with changes to sections 238 and 283(3) of the CNCA.

Bill C-25 also introduces various changes to the *Canada Business Corporations Act* ("CBCA"), including changes to electing directors of public CBCA corporations; facilitating electronic communication; diversity reporting requirements for prescribed corporations which, according to the proposed regulations, would be distributing corporations; and an expanded concept of affiliation under the *Competition Act*.

Newfoundland Court Finds Archdiocese Not Liable for Child Abuse

By Jennifer M. Leddy & Sean S. Carter

On March 16, 2018, the Supreme Court of Newfoundland and Labrador released its decision in *John Doe (G.E.B. #25) v The Roman Catholic Episcopal Corporation of St. John's*, concerning an action launched by four representative plaintiffs (collectively "Plaintiffs") who are former residents of the Mount Cashel Orphanage ("Mount Cashel"). The Plaintiffs claimed that the defendant, The Roman Catholic Episcopal

Corporation of St. John's (the "Archdiocese") was liable for sexual and physical abuse committed against them at Mount Cashel by teachers of The Christian Brothers Institute Inc. ("Christian Brothers") during the late 1940's and 1950's.

The Archdiocese and Mount Cashel were separate corporate entities. However, the Plaintiffs argued that the Archdiocese was liable on the grounds that the Archdiocese had sufficient control over Mount Cashel to make it vicariously liable for the actions of the Christian Brothers; that the Archdiocese was vicariously liable for the failure of Mount Cashel's parish priest (chaplain) to intervene to prevent the abuses based on his knowledge of the abuses; and that the Archdiocese was negligent through its inaction in light of the abuses of which it had knowledge. It was accepted between the parties that there was no employer/employee relationship between the Archdiocese and the Christian Brothers. The Archdiocese did not dispute the physical and sexual abuse of the Plaintiffs, but took the position that the Christian Brothers, several of whom had already been tried, convicted and served time in prison, were responsible for the abuse because they, rather than the Archdiocese, operated Mount Cashel and were responsible for its personnel. It further argued that it had appropriately discharged its responsibility when it became aware of abuse.

After reviewing the evidence, the court found that the Archdiocese and the Christian Brothers were separate organizations with little connection or interaction on a daily basis, that they were not a joint venture, that the Archdiocese was not involved in the management of Mount Cashel, and that its role was limited to advocacy on its behalf and assisting with financial support. It stated that, "[v]icarious liability for the actions of an employee or subordinate requires that there be a close connection between the intended defendant and the enterprise which gave rise to the tortious conduct." Therefore, having found that there was insufficient evidence of control over operational matters or the assumption of responsibility for the day-to-day affairs of the orphanage, the court held that there was no vicarious liability on the part of the Archdiocese. It further stated that the Christian Brothers would have been found vicariously liable but for the fact that it was not part of these proceedings, as it had liquidated its assets through bankruptcy proceedings to satisfy similar sexual abuse proceedings.

The Court also found that the Archdiocese was not vicariously liable for the inaction of the parish priest assigned to Mount Cashel who may have heard about the allegations of abuse in the confessional. It was held that there was insufficient evidence to establish a duty of care between the parish priest and the plaintiffs given that as chaplain he had no role in management. The court assessed the duty of care in the

context of the particular time period of the case, and found that there was also no evidence of breach of the duty of care because the misconduct was unforeseeable. The court stated that "at the time in question, the misconduct with which we are concerned would have been unthinkable. Therefore, any disclosure made to the priest would have been assessed as to its credibility on the basis of what he knew at the time. At that time, in my view, it would not have been foreseeable that these acts could have taken place." The court accordingly found that the parish priest not to have a duty of care in respect of the boys, as he had no fiduciary relationship with them.

Concerning the Archdiocese's direct negligence for its failure to act in the face of continued abuses of which it had knowledge, the Plaintiffs argued that confessions made to the parish priest amounted to notice to the Archdiocese. The parish priest who took the confession at issue was not the individual who carried out the assaults against the plaintiffs, which differentiated this case for the court. While the court held that under both civil and Canon law, notice of abuse could in some circumstances, including the context of the 'seal of the confessional', constitute a duty to respond with respect to a breach of the duty of care, the court did not consider or comment on any issue of common law privilege with respect to the confessions. The court held that there was insufficient evidence to find that the confessions amounted to notice, which is relevant to whether a duty of care has been breached to constitute negligence. Given the court's findings, it ultimately held that the Archdiocese was not liable for the Christian Brothers' abuse of the Plaintiffs. At press time, there was no formal indication of whether the Plaintiffs would appeal.

This case is significant because the court recognized that the Archdiocese and Mount Chapel were two separate corporate entities that operated as such without blurring their boundaries. Having a common faith is insufficient basis for vicarious liability. Charities and not-for-profits that deal directly with children and other vulnerable people should treat this case as a reminder of the potential for both direct and vicarious liability for abuse, and seek legal counsel to ensure that they have the proper policies and protections in place.

Privacy Regulations Recognize CRA's RAD as Investigative Body

By Terrance S. Carter & Esther Shainblum

Amendments to the Privacy Regulations, SOR/83-508 (the "Privacy Regulations") under the *Privacy Act* and amendments to the Access to Information Regulations, SOR/83-507 under the *Access to Information Act* came into force on March 7, 2018 upon the registration of the Regulations Amending the Privacy

Regulations: SOR/2018-39 and Regulations Amending the Access to Information Regulations: SOR/2018-38 (the "Amending Regulations"). Among the changes introduced, the Amending Regulations amended Schedule II of the Privacy Regulations to designate the Review and Analysis Division, Charities Directorate, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency ("RAD") as an investigative body for the purposes of s. 8(2)(e) of the Privacy Act. This designation means that government institutions will be able to disclose personal information to RAD for law enforcement purposes without having to obtain consent from the affected individuals. RAD will also be entitled to rely on the law enforcement exemption to deny requests for access to personal information made under either the *Privacy Act* or the *Access to Information Act*.

According to the CRA Privacy Impact Assessment (PIA) Summary - Review and Analysis Division, "RAD is responsible for delivering the Agency's mandate under the *Anti-Terrorism Act* to prevent the abuse of registered charities for the financing of terrorism." The CRA's Report on the Charities Program 2015-2016 explains that it does this by reviewing applications for charitable registration, monitoring and auditing registered charities, and providing education on terrorism and terrorist financing-related issues.

It is interesting to note that, although RAD is a division of the CRA's Charities Directorate, the *Amending Regulations* designate only RAD itself as an investigative body rather than the CRA Charities Directorate as a whole. As a result, it would appear that RAD has access to information gathering powers not available to the Charities Directorate itself.

The increased information-gathering powers given to RAD as an investigative body remove a certain expectation of privacy concerning the personal information of identifiable individuals associated with a charity, such as their "directors, trustees, officers or other officials." This is in line with a trend towards decreased privacy that has seen the CRA include a new privacy warning statement in the most recent T3010 Registered Charity Information Return, which states that the CRA collects personal information, including that of "directors trustees, officers and/or like officials" from the T3010 under the authority of the *Income Tax Act* and uses this information as a basis for the indirect collection of additional personal information from other internal and external sources to assess the overall risk of registration. Charities and their directors, officers and other officials should be aware of RAD's increased personal information-gathering power and ability to rely on the law enforcement exemption to deny requests for access to personal information under its control.

CRA Releases Interpretation on Gifts of Securities Made by Executors

By Jacqueline M. Demczur

On March 7, 2018, the CRA released Interpretation 2017-0698191E5, "Gift of securities by executors of a will" that addresses the income tax implications of three hypothetical scenarios involving gifts made by executors of the estate of a deceased individual. More specifically, the facts presented to the CRA described a will in which there was no designation of the amounts to be given to charities, although the three co-executors were given flexibility to make donations in their discretion. It was also indicated that the deceased's assets included a mutual fund investment account with a $4 million total fair market value with an inherent capital gain of $1 million. In response, the CRA addressed the resulting tax implications of this situation by way of three different scenarios.

The first scenario addressed whether a charitable donation of $500,000 cash from a graduated rate estate's ("GRE") sale of mutual fund units could be used to offset personal taxes owed on the deceased's final return. In this regard, the CRA stated that, subject to subsection 118.1(13) of the *Income Tax Act*, a gift made by an estate is deemed to be made by the estate, as opposed to by the deceased, under subsections 118.1(4.1) and (5). It further stated that the cash would constitute property substituted for the property that the estate acquired on and as a consequence of the death of the deceased for the purposes of paragraph 118.1(5.1)(b), concerning gifts by GREs. Therefore, the donation credit could be claimed on the deceased's final return pursuant to clause 118.1(1)(c)(i)(C) on the definition of "total charitable gifts."

The second scenario considered the same facts as the first scenario with the exception that the donation is in-kind rather than cash. In this regard, the CRA stated that where subsection 118.1(5) applies to a gift, the gift is not considered to be made until the gifted property is transferred. While the capital gain on mutual fund units would be calculated at the time of death, subparagraph 38(a.1)(ii) provides for a nil taxable capital gain where the property disposed of is a unit of a mutual fund corporation or trust and the gift is subject to subsection 118.1(5.1) and is made by a GRE to a qualified donee.

The third scenario was also a donation in-kind as in the second scenario. However, the question was whether the capital gain from an increase in the fair market value of the mutual fund units between the time of deemed disposition immediately before death and the time of the units' transfer to a qualified donee would also be eligible for a nil taxable capital gains. The CRA answered that the difference between these two values will result in a gain or a loss to the estate, as applicable. However, where the gift is given to a qualified donee and the taxable capital gain of that gift is nil pursuant to paragraph 38(a.1), as

discussed above, any subsequent increase in value from the date of death to the date of disposition by the GRE will also be nil pursuant to subparagraph 38(a.1)(i).

Regulations Concerning Directors' Remuneration Coming into Force

By Ryan M. Prendergast

As reported in the August 2017 *Charity & NFP Law Update*, Proposal Number 17-MAG008 (the "Amendments") containing draft amendments to Ontario Regulation 4/01 under the *Charities Accounting Act* ("CAA") were posted by the Office of the Public Guardian and Trustee of Ontario ("PGT") on July 10, 2017. The Amendments outlined certain circumstances where charitable corporations would be authorized to pay directors and related persons for goods, services, or facilities, which would provide relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them. After a period of consultation, the Amendments will come into force on April 1, 2018 as new s. 2.1 of Ontario Regulation 4/01 with no changes from the original draft posted earlier last summer.

As of April 1, 2018, charitable corporations will no longer need to obtain a s. 13 consent order under the CAA, or from open court, to remunerate directors where the circumstances outlined in s. 2.1 of the Ontario Regulation 4/01 apply, subject to the charitable corporation meeting a number of conditions.

The Amendments ease the process for incorporated charities in Ontario that want to rely upon their board members who can provide services in another capacity without the need for a s. 13 consent order or authorization from a court. As the process to obtain such orders can be time intensive, and generally requires the assistance of legal counsel, the upcoming amendments are a welcome change. New section 2.1 of Ontario Regulation 4/01 makes reference to the fact that the board must consider "any guidance respecting payments made under this section." Charities should monitor the PGT's publications for such guidance to be available in the immediate future once the Amendments come into force.

Court Affirms Student Groups Did Not Violate Natural Justice

By Esther S.J. Oh

On February 26, 2018, three judgments were released by the Ontario Superior Court in *Arriola v. Ryerson Students' Union*, *Naggar v. The Student Association at Durham College and UOIT*, and *Zettel v. University of Toronto Mississauga Students' Union*. The three applications were argued together and the judgements were released simultaneously.

The background facts for the three cases were very similar. The applicants in each case were students at a publicly funded university who were members of their university's student union or association ("Student Unions"). Each of the Student Unions were not-for-profit corporations that were separately incorporated and independent from the respective university. In each of the three cases, the applicants applied to have their student group officially recognized by their Student Union, which would have resulted in the group receiving funding from the respective university, as well as other minor benefits. In each of the three cases, the applicants applied for judicial review of the decisions of their respective Student Unions to deny their application to obtain status as official student groups and also sought orders quashing the decisions of the Student Unions.

In the *Arriola v. Ryerson Students' Union* case, the applicants sued Ryerson Students' Union for refusing official student group status to their student group known as "the Men's Issues Awareness Society", which had the purpose of bringing social awareness to issues that disproportionately affect men and boys, such as higher rates of suicide, homelessness, workplace injuries and failure in school. In the *Naggar v. The Student Association at Durham College and UOIT* and *Zettel v. University of Toronto Mississauga Students' Union* cases, the respective Student Unions denied official student group status to pro-life student groups.

The court noted that the applicable laws and the legal analysis to be applied were identical in all three cases. The court affirmed that the "private law of groups" applied and further confirmed that a court has limited jurisdiction to review the conduct and decisions of an organization, including enforcement of contracts and limited jurisdiction to carry out judicial review over the decisions of an organization. The court affirmed it is not the role of the courts to review the merits of an organization's conduct or decision but instead courts are to review whether the procedure followed by an organization in arriving at its decision was done in accordance with the organization's own rules, in accordance with natural justice and without bad faith. The court noted that courts may decline to exercise their judicial review jurisdiction when the internal dispute resolution mechanisms of an organization have not been exhausted.

In each of the cases, the applicants sought declarations on a number of grounds, including an allegation that the Student Union's decision was *ultra vires* because the Student Unions exceeded its jurisdiction and its decision was contrary to its own policies and rules; the decision was made contrary to the principles of natural justice and done in bad faith; and that the decision was unreasonable and contrary to the *Canadian Charter of Rights and Freedoms* by failing to respect the students' freedom of association and freedom of

expression. Orders were also sought prohibiting the Student Unions from limiting access to services on account of a student's beliefs and directing the Student Unions to recognize each applicant as a student group.

While there were some differences in the background facts of the three cases, based on the court's review of the facts in each individual case, all three applications were dismissed. Firstly, the court held that public law does not apply, since the Student Unions are all private student organizations on a university campus (as opposed to a federal, provincial or municipal government actor). In *Arriola v. Ryerson Students' Union*, the court confirmed that it has the jurisdiction to review the activities of the Student Union since the applicants had exhausted all of the internal remedies at the Student Union. The court also found in each case that the Student Unions did not violate their own rules and regulations in exercising their discretion to refuse to grant student group status to the applicants.

The court found that the principles of natural justice were not violated in the three cases. In that regard, the court stated, as follows:

> The content of the principles of natural justice are flexible and depend on the particular circumstances of the association, but the minimum requirements are: (a) adequate notice of what is to be determined and the consequences; (b) an opportunity to make representations; and (c) an unbiased tribunal. The scope of the requirements of natural justice depend on the subject-matter that is being dealt with, the particular legislative or administrative context, the circumstances of the case, the nature of the inquiry, and the rules under which the tribunal is acting, and the ultimate question is whether the procedures adopted were fair in all the circumstances.

The court found there had been no interference with the applicant's freedom of association or freedom of expression because the applicants were free to gather and express their views on campus, even without being officially recognized by the Student Union. In that regard, the court stated that the funding given to recognized student groups is a discretionary privilege, as opposed to being an entitlement. The court also found no evidence of bad faith by the Student Groups after reviewing the facts of each case.

This case affirms previous case law which reflects the reluctance of the courts to become involved in the internal affairs of a charity or not-for-profit organization where steps taken by an organization vis-à-vis its members, reflects the requirements of natural justice. This case also affirms that the requirements of natural justice that apply to a given situation may be flexible depending on the background facts involved.

Court Reviews Common Employer Doctrine

By Barry W. Kwasniewski

On February 5, 2018, the Ontario Superior Court of Justice released a decision on a motion in *Currie v Gledhill et al*. An action for wrongful dismissal brought by Laurie Currie (the "Plaintiff") named two co-defendants, Gledhill Avenue Child Care Centre ("Gledhill") and the City of Toronto (the "City"). The Plaintiff's motion sought leave of the court to amend her statement of claim in relation to the City being a "common employer". However, while Gledhill admitted it was the Plaintiff's former employer, the City denied having had an employment relationship with the Plaintiff. The City accordingly brought its own motion asking the court to dismiss the action against the City as it was not a "common employer." This Bulletin will review this decision, focusing on the common employer doctrine. The decision is relevant for charities and not-for-profits which may receive significant funding from outside sources if those funding sources seek to have operational control or decision-making authority.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 418.

Prepare Now for Upcoming Changes to Trademark Law

By Sepal Bonni

As previously reported, most recently in the October 2017 *Charity & NFP Law Update*, on June 19, 2014 major amendments to Canada's *Trademarks Act* were passed into law. These amendments introduce significant changes to Canada's trademark law, some of which are summarized in *Charity Law Bulletin* No. 360. When these amendments were passed into law, the Canadian Intellectual Property Office stated that the amendments would come into force on a date to be determined after the *Trademarks Regulations* have been revised, and relevant IT systems have been updated. In this regard, the implementation of these amendments was moved forward with the publication of the latest version of the *Trademarks Regulations* in the Official Gazette, which set February 1, 2019 as the anticipated coming into force date of the amendments. These changes to Canadian trademark law will introduce the most substantive changes to trademark law in Canada since 1950 and intend to bring Canada's trademark law in line with various other countries around the world.

Perhaps the amendments that will have the most significant impact on charities and not-for-profits is the elimination of the pre-requisite to use a trademark in Canada prior to obtaining a registration certificate, and the increase in government application filing fees. As previously reported, this will effectively open the door for trademark squatters and pirates to register trademarks and extort value for them from the

unregistered trademark owners. In fact, a few applicants have already begun taking advantage of the pending implementation of the amendments by filing hundreds of applications that cover very long lists of goods and services. The advantages of registration prior to the implementation of the amendments is that the government fees remain modest and the impending ability for those applications to eventually register without use. These trademark applications include well-known brands and common names and as a result, many in the sector are speculating that these applicants are abusing the Register given the upcoming amendments to the law and will likely be extorting value from unregistered trademark owners for these trademark registrations.

While the *Trademarks Regulations* will help to implement practices that will combat these abusive applications, the cost of recovering a trademark registration far outweighs the cost of securing registration. As a result, while the expected implementation date is still almost a year away, charities and not-for-profits are encouraged to carefully review trademark portfolios and be proactive in filing unregistered trademarks in advance of the implementation date to reduce the risk that third parties misappropriate their rights.

House of Commons Standing Committee Report on PIPEDA

By Esther Shainblum

On February 28, 2018 the House of Commons' Standing Committee on Access to Information, Privacy and Ethics (the "Committee") tabled for consideration its report "Towards Privacy by Design: Review of the *Personal Information Protection and Electronic Documents Act*" (the "Report"). The Report contains 19 recommendations that would update the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and align it with the European Union's General Data Protection Regulation ("GDPR"), which is coming into force in May, 2018.

Several of the recommendations in the Report deal with consent under PIPEDA. The Report recommends that consent remain the core model for PIPEDA's privacy regime but that the consent model be enhanced and clarified by additional means (Recommendation 1). In response to concerns about organizations using personal information for secondary purposes such as marketing, the Report recommends that an opt-in system of consent – in which users explicitly choose to disclose their personal information – be implemented as the default for any use of personal information for secondary purposes and, potentially, for all purposes (Recommendation 2). Affirming that the right to revoke consent is a key element in

maintaining a consent-based privacy model, the Report recommends that the government study the issue of revocation of consent and its legal and practical implications, particularly in relation to social media, where personal information may have been copied and shared with others (Recommendation 4). The Report examines the challenges of the consent-based model when dealing with minors, particularly in light of the GDPR and the United States *Children's Online Privacy Protection Act*, both of which mandate parental consent for collecting personal information from children below a prescribed age. The Report recommends that the government consider implementing specific rules of consent for minors and for the collection, use and disclosure of their personal information, which would limit the ability of organizations to collect, use and disclose the personal information of minors (Recommendation 9).

The Report also makes a number of recommendations that address new rights inspired by the GDPR. The Report recommends that PIPEDA be amended to provide for a right to data portability which would allow users to request and easily transfer their personal information from one provider to another (Recommendation 10). The Report recommends that the government consider including in PIPEDA a framework for a right to erasure in which online information could be deleted, including, at a minimum, the right for minors to have their information taken down (Recommendation 11). The Report also recommends that the government consider including a framework for a right to de-indexing, which would not delete the information but would ensure that it no longer appears in online searches, and that this right would be expressly recognized in the case of personal information posted online while a person was a minor (Recommendation 12). This was similarly recommended in the Office of the Privacy Commissioner of Canada's Draft Position on Online Reputation, discussed in *Charity & NFP Law Bulletin* No. 416.

The Report also recommends that PIPEDA be amended to make "privacy by design" a central principle. Privacy by design, which has been entrenched in the GDPR, means that privacy considerations are taken into account at all stages of a service or system and that measures to protect personal information are implemented proactively and preventively (Recommendation 14).

A number of recommendations would grant new enforcement and audit powers to the Privacy Commissioner of Canada (Recommendations 15 and 16). The Report also recommends a collaborative approach with the European Union and with the Canadian provinces and territories to maintain Canada's adequacy status under the GDPR (Recommendations 17 and 19) and that the government consider what changes must be made to PIPEDA to maintain its adequacy status under the GDPR (Recommendation

18). Adequacy status is required in order to ensure that data can continue to flow from the European Union to Canada.

As privacy continues to be a growing concern for legislators and the global community, charities and not-for-profits should continue to monitor these developments. Should the recommendations of the Report find their way into PIPEDA or any other Canadian legislation, these may potentially affect interactions with donors, volunteers, beneficiaries of charitable programs, and contractual counterparties, including employees and service providers.

Anti-Terrorism/Money Laundering Update

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

FATF Publishes Financing of Recruitment for Terrorist Purposes

The Financial Action Task Force ("FATF") published "Financing of Recruitment for Terrorist Purposes" (the "FATF Report") in January 2018. To provide an understanding of the role of anti-terrorist financing measures in disrupting terrorist recruitment activity, the FATF Report discusses the role of funding in the process of terrorist recruitment ("Recruitment Financing"). In this regard, the FATF Report identifies common Recruitment Financing techniques and their associated costs, specifically identifying donations and the misuse of "non-profit organizations" ("NPOs") as one of the main sources of Recruitment Financing.

Recruitment techniques can be either active, involving direct personal contact between the recruiter and recruitment target, or passive, involving more indirect means. Passive recruitment methods include using password-protected websites and restricted access Internet chat groups to appeal for material support, collect donations, and to exchange sensitive information, such as bank account information or the true purpose of purportedly charitable donations.

Specifically concerning the misuse of NPOs, the FATF Report states that NPO-funded programs and facilities can be abused for Recruitment Financing and misused to provide justification for moving funds to terrorist organizations, though not all NPOs are at risk of abuse. In this regard, the FATF Report provides various case studies showing where both legitimate and illegitimate NPOs and NPO facilities, including NPOs' social media, have been misused by terrorist organizations to recruit and train individuals, function as a meeting place for terrorist entities, and publish materials in support of terrorism.

Charities and not-for-profits in Canada should become familiar with the various methods of Recruitment Financing that impact the not-for-profit sector in order to best protect themselves from the risk of abuse. The FATF Report, and the case studies in particular, are a helpful tool illustrating how charities and not-for-profits can become subject to abuse by terrorist organization for Recruitment Financing purposes.

FATF International Stakeholder Dialogue on Financial Services for NPOs

On February 15, 2018, the Dutch Ministry of Finance, the World Bank and the Human Security Collective held an International Stakeholder Dialogue on Ensuring Financial Services for Non-Profit Organizations the ("Stakeholder Dialogue") to discuss what public- and private-sector stakeholders, including banks, humanitarian organizations, government policymakers and regulators, as well as international organizations, can do to ensure legitimate NPOs are not negatively affected by "de-risking" by banks and financial institutions, and that access to financial services can be safeguarded for them. In this regard, a background paper ("Background Paper") was prepared for the Stakeholder Dialogue to discuss the de-risking of NPOs and identify ways in which access to financial services can be continued.

NPOs operating in high-risk countries with exposure to threats of terrorist financing and money laundering are particularly vulnerable to de-risking, whereby banks and financial institutions terminate or restrict business relationships to avoid, rather than manage, risks. When de-risking, banks and financial institutions may refuse to on-board clients or to perform financial transactions, including international wire transfers, which can lead to NPOs' operations being undermined. This can ultimately create challenges for NPOs attempting to access the funds needed to conduct their activities and provide critical humanitarian assistance abroad.

The Background Paper identifies various drivers of de-risking, including concerns for reputational and liability risk, profitability, business strategy, the cost of implementing anti-terrorist financing, anti-money laundering and sanctions and other regulatory requirements, as well as exposure to penalties by supervisory and law enforcement authorities. Interestingly, it also identifies "outdated perceptions of risk associated with NPOs" as a factor, referencing the 2016 revisions to FATF's Recommendation 8 that no longer identify NPOs as "particularly vulnerable" to terrorist abuse, as outlined in *Anti-Terrorism and Charity Law Alert* No. 46.

With regard to potential solutions to de-risking challenges, the Background Paper states that there is no single clear-cut solution that will resolve the issue and therefore encourages stakeholders to work together to investigate de-risking as a "series of issues that need to be investigated in multi-stakeholder settings".

In this regard, the Background Paper provides general categories of actions for stakeholders to explore, including raising awareness and promoting greater understanding of the issues surrounding de-risking of NPOs, encouraging governments to provide regulatory guidance on the implementation of the risk-based and proportional framework, exploring incentives for financial institutions to keep NPO accounts and engage with NPOs, creating safe payment channels, improving humanitarian licensing and exemptions, exploring technological solutions to facilitate NPO transfers, conducting new research to examine de-risking in other jurisdictions, and providing capacity assistance to stakeholders, and countries in particular, to explain regulatory requirements and compliance obligations.

IN THE PRESS

Charity & NFP Law Update – February 2018 (Carters Professional Corporation) was featured on *Taxnet Pro*™ and is available online to those who have OnePass subscription privileges.

Federal Budget 2018: Impact on Charities and Not-for-Profits (Charity & NFP Law Bulletin 417), written by Theresa L.M. Man, Esther S.J. Oh, Ryan M. Prendergast and Terrance S. Carter, was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

South Australian Employers' Chamber of Commerce & Industry Inc. v. Commissioner of State Taxation: Everything You Always Wanted to Know about Charity Law, but were Scared to Ask, co-authored by Theresa L.M. Man and Barry W. Kwasniewski, along with Joel Nitikman, Dentons Canada LLP, was featured on Taxnet Pro™ under Tax Disputes & Resolution Centre Newsletters for March 2018. OnePass subscription services are needed to access this document.

Chapter 5: The Legal Context of Nonprofit Management co-authored by Terrance S. Carter, along with Karen J. Cooper, Drache Aptowitzer LLP, in ***Management of Nonprofit and Charitable Organizations in Canada, 4th Edition***, edited by Keith Seel (LexisNexis 2018).

RECENT EVENTS AND PRESENTATIONS

The Expanding Investment Spectrum for Charities, Including Social Investments was presented by Terrance S. Carter on Wednesday, March 28, 2018. This is the first session of six in the **Spring 2018 Carters Charity & NFP Webinar Series** and is available "on demand" by clicking **here**.

UPCOMING EVENTS AND PRESENTATIONS

CAGP 25th National Conference on Strategic Philanthropy, will be held in Winnipeg, Manitoba, on April 11 and 12, 2018. The following topics will be presented:

- Due Diligence In Gift Documentation by Theresa L.M. Man and Terrance S. Carter on April 11, 2018
- Legal Issues In Fundraising On Social Media by Terrance S. Carter on April 12, 2018

Spring 2018 Carters Charity & NFP Webinar Series will be hosted by Carters Professional Corporation on Wednesdays starting March 28, 2018. Click **here** to register for each webinar individually. Topics to be covered are as follows:

- **The Impact of Bill 148 on Charities and Not-for-Profits** will be presented by Barry W. Kwasniewski, B.B.A., LL.B. on Friday, April 6th - 1:00 - 2:00 pm ET
- **Recent Changes in Corporate Law Affecting Federal and Ontario Corporations** will be presented by Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. on Wednesday, April 25th - 1:00 - 2:00 pm ET
- **Critical Privacy Issues Involving Children's Programs** will be presented by Esther Shainblum, B.A., LL.B., LL.M. CRM on Wednesday, May 9th - 1:00 - 2:00 pm ET
- **Remuneration of Directors of Charities: What's New?** will be presented by Ryan M. Prendergast, B.A., LL.B. on Wednesday, May 30th - 1:00 - 2:00 pm ET
- **Drafting Bylaws: Pitfalls to Avoid** will be presented by Esther S.J. Oh, B.A., LL.B. on Wednesday, June 13th - 1:00 - 2:00 pm ET

CBA Charity Law Symposium will be held on May 11, 2018 in Toronto, Ontario. Ryan Prendergast will be presenting on the topic of "Tax Issues on the Wind-up of Charities: Budget 2018 Expansion of Eligible Donees and Beyond."

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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