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CHARITY & NFP LAW UPDATE

AUGUST 2019

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

AUGUST 2019

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RECENT PUBLICATIONS AND NEWS RELEASES

Lobbying and Elections Legislation in Canada: An Introduction for Charities and Not-for-Profits

By Ryan M. Prendergast and Terrance S. Carter

Recent legislative changes to the *Income Tax Act* (Canada) ("ITA") have opened the door for registered charities and registered Canadian amateur athletic associations ("RCAAAs") to engage in "public policy dialogue and development activities" ("PPDDAs"). These changes, which were introduced through Bill C-86, *Budget Implementation Act, 2018, No. 2* and received Royal Assent on December 13, 2018, removed all reference to "political activities," and now permit charities (and RCAAAs) to engage in PPDDAs to the extent that PPDDAs further their charitable purpose. To this end, charities and RCAAAs may devote 100% of their resources to PPDDAs, which may include lobbying, as opposed to the previous 10% limit on permitted political activities.

With the upcoming Federal election, and recent amendments to the *Canada Elections Act*, which are meant "to increase transparency regarding the participation of third parties in the electoral process," it is important that charities, RCAAAs, as well as other not-for-profits ("NFPs") intending to carry out lobbying activities understand the legislation for which these activities are subject. In this regard, the lobbying activities carried out by charities and RCAAAs are subject to restrictions under the ITA. In addition, charities, RCAAAs, and other NFPs are subject to federal, provincial, and municipal elections and lobbying legislation. This *Bulletin* provides a very brief introduction to the federal and provincial lobbying legislation (collectively, "Lobbying Legislation") and its impact on charities, RCAAAs and NFPs. This *Bulletin* also provides a very brief introduction to the recent legislative changes to the *Canada Elections Act*. As Lobbying Legislation is complicated in nature, it is beyond the scope of this *Bulletin* to discuss lobbying legislation as it applies to municipalities (including municipal by-laws), or to provide an in-depth analysis of Lobbying Legislation. As such, this *Bulletin* does not provide a detailed explanation of the law in this regard and the reader will therefore want to refer to the resources cited herein for further details.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 453.

Corporate Update

By Theresa L.M. Man

Corporations Canada Updates Policies under CNCA

Corporations Canada announced on August 15, 2019 that it updated its Policy on corrections of articles or a certificate – *Canada Not-for-profit Corporations Act*, to streamline and improve the process of requesting corrections of articles or a certificate for corporations under the *Canada Not-for-profit Corporations Act* ("CNCA"). A correction is a request to fix an error in a corporation's articles or a certificate that occurred during the preparation of the articles or issuance of the certificate. This policy explains how a corporation may request a correction be made. These amendments include new, simplified templates for correction requests, with added model statements; removal of the requirement to explain the error and to provide a statutory declaration; allowing a corporation's professional representative to sign the declaration where an error is obvious; and simplified policy language, with examples to further clarify what an "obvious error", "non-obvious error" and "error attributable to Corporations Canada" are. It should be noted that the requirements permitting a correction have not been amended, and that this is merely an update to the policy.

BC Consultation on Proposed *Societies Act* Amendments

Since British Columbia's *Societies Act* came into force on November 28, 2016, the BC government has been monitoring its roll-out to ensure its effectiveness for societies and their members. Based on the feedback received from societies, the legal community, and the public, the BC Ministry of Finance announced a consultation in July 2019, and provided a list of 36 proposed amendments to the Act to address various issues that have arisen. The purpose of these proposed amendments is to ensure the Act remains and becomes even more user-friendly by addressing ambiguities, omissions and inconsistencies within the Act and other legislation; streamlining, updating and refining processes; as well as removing unnecessarily burdensome Corporate Registry filing requirements. In this regard, the proposed amendments include clarifying certain provisions (such as directors' terms of office, what meetings are referred to in specific provisions, what is meant by "register of directors" and "register of members"); providing new due diligence defence for senior managers; prohibiting anyone to act for absentee directors at board meetings; not requiring directors to disclose material interest in a contract or transaction, if the director reasonably had no knowledge of the contract or transaction until director becomes aware of the conflict; expanding reporting obligations concerning remuneration; and excluding bequests made by

affiliated individuals from "public donations" and thereby would not affect a society's ability to be a member-funded society. Of particular note, it has also been proposed that applications for transition from the previous *Society Act* to the current *Societies Act* that were filed late (after the November 28, 2018 deadline) would not be invalid. As well, the Registrar is proposed to have the power to dissolve those societies that failed to file a transition application or for failing to return a record the registrar has requested. While the consultation ended on August 23, 2019, it remains to be seen which amendments the government will proceed with.

BC Civil Resolution Tribunal Has Jurisdiction over Certain Society and Cooperative Disputes

British Columbia societies should be aware of a mechanism that may allow for a quick and efficient resolution to certain disputes between members and directors through the province's Civil Resolution Tribunal. The Civil Resolution Tribunal is an independent, neutral online tribunal that has jurisdiction to make enforceable decisions and function as a fast and affordable alternative to the court action. British Columbia's Bill 22, *Civil Resolution Tribunal Amendment Act, 2018*, which received Royal Assent and came into force on May 17, 2018, introduced Division 6 to Part 10 of the provincial *Civil Resolution Tribunal Act*, giving the tribunal jurisdiction to hear "society claims" respecting British Columbia societies on the following matters: (a) the interpretation or application of the *Societies Act* or a regulation, constitution or bylaw, including a request to inspect, or to receive a copy of, a record of a society; (b) an action or threatened action by the society or its directors in relation to a member; and (c) a decision of the society or its directors in relation to a member.

It can therefore resolve disputes, for example, where a society has not followed the *Societies Act* or its regulations, where a society has not complied with its constitution by-laws, where proper notice was not provided for meetings, where voting was carried out improperly or incorrectly, or where the society has not provided access to records. The tribunal is to be considered to have specialized expertise in respect of claims within its jurisdiction. Claims may be brought by societies, by society members, or by anyone who believes they have a right to view or obtain copies of a society's records or financial statements.

However, there are many issues that are outside the jurisdiction of the tribunal, such as termination of membership in the society; liquidation, dissolution or restoration of a society; corporate reorganizations; certain claims that may be dealt with by the Supreme Court (such as powers of court respecting general

meetings and remedies under Part 8 of the *Societies Act*); or claims to which all parties have agreed that the British Columbia *Arbitration Act* will apply.

Consultation and Proposed Changes to the Tax Treatment of Employee Stock Options

By Terrance S. Carter

On June 17, 2019, the Government of Canada tabled in the House of Commons a Notice of Ways and Means Motion to amend the *Income Tax Act* (the "NWMM") to limit the use of the current employee stock option regime for high-income individuals employed at large, long-established, mature firms. The Government also published a Backgrounder document expanding on the commentary provided in Budget 2019, including a short commentary dealing with charitable donations, and launched a public consultation seeking stakeholder input on various aspects of the proposed changes.

Budget 2019 and the Backgrounder state that the preferential personal income tax treatment provided as a "stock option deduction" was intended for smaller and growing companies, such as start-ups, to attract and retain talented employees with a form of remuneration that is linked to the future success of the company.

The conditions of this "stock option deduction" are described in paragraph 110(1)(d) of the ITA, which effectively results in the employee stock option benefit being taxed at a rate equal to one-half of the normal rate of personal taxation – the same rate as capital gains. The employee may be eligible for an "additional deduction" equal to one-half of the employee stock option benefit if the employee donates to a qualified donee, such as a registered charity, publicly listed shares acquired under an employee stock option agreement within 30 days of the exercise of the option, or the cash proceeds from the sale of such publicly listed shares, pursuant to paragraph 110(1)(d.01) and subsection 110(2.1) of the ITA. As a result, where both the stock option deduction and the additional deduction for a donation to a qualified donee are available, the entire employee stock option benefit is effectively excluded from income.

However, Budget 2019 and the Backgrounder state that the employee stock option deduction claims are disproportionately benefiting a very small number of high-income individuals employed at large, mature companies. As such, the NWMM proposes that, starting on January 1, 2020, the employee stock options granted by certain employers be subject to a $200,000.00 annual vesting limit determined by the fair market value of the underlying securities on the date that stock option is granted. Where the fair market

value of the underlying securities in any given vesting year exceeds the $200,000.00 annual vesting limit, such securities above the annual vesting limit will be deemed to be non-qualified securities in computing the stock option deduction under paragraph 110(1)(d) of the ITA. Since the additional deduction for charitable donations requires that the taxpayer be entitled to the stock option deduction pursuant to the condition in subparagraph 110(1)(d.01)(iv) of the ITA, the direct consequence of the new rules would be to disallow the additional deduction for charitable donations of securities acquired under an employee stock option agreement above the vesting limit of $200,000.00. The Backgrounder explains that any capital gain that has accrued since the shares were acquired under the stock option agreement would continue to be eligible for exemption from capital gains tax, subject to existing rules for donations of publicly listed securities. For those in the sector who wish to comment on the proposed amendments contained in the NWMM, the last day on which to make a submission to Finance is September 16, 2019.

Qualified Donee Status Suspended for Inadequate Records of Expenses Outside Canada

By Jennifer M. Leddy

On June 28, 2019, the Tax Court of Canada released its decision in *Promised Land Ministries v R*, upholding the Minister of National Revenue's (the "Minister") decision to suspend the receipting privileges and qualified donee status of Promised Land Ministries ("PLM") for one year. After an office audit for the fiscal years ending December 31, 2011 and 2012, the Minister found that PLM failed to maintain proper books and records, including invoices, receipts, and vouchers, for expenditures made on activities outside of Canada contrary to the ITA. Further, PLM had failed to comply with a compliance agreement ("Agreement") arising out of a previous audit wherein it had agreed to take corrective measures with respect to maintaining proper books and records for its activities outside of Canada.

In Canada, PLM provided church services twice a week and offered spiritual help to individuals during the week. In addition, the Pastor went on mission trips outside of Canada to poor and remote areas to preach to other pastors about spiritual welfare. The costs of the mission trips included coordinators, accommodation, airline tickets, set up costs, lunches for the participants, and bus transportation. The Pastor was the founder, manager, and sole employee of PLM, responsible for making deposits and the custodian of PLM's records.

Contrary to PLM's submission that "it acted in good faith in providing what it believed the Minister was requesting" as a result of the office audit, the court noted that PLM did not appreciate the breadth of the definition of "records" under subsection 248(1) of the ITA, stating "[n]ot only does the definition of record include a "return", it also includes invoice, voucher and "any other thing containing information, whether in writing or in any other form" which would include an expense receipt."

The court also found that the Minister had followed the requirements set out in *Prescient Foundation v MNR* ("Prescient"), discussed in *Charity Law Bulletin* No. 313, which stated:

> the Minister must 'clearly identify the information which the registered charity has failed to keep' and 'explain why this breach justifies the revocation. It is not sufficient to simply state that the charity has failed to keep proper records.' Natural justice requires that a charity be properly and adequately informed of the particulars of the alleged breach so that it may respond to the allegations.

In so finding, the court reasoned that the CRA had "clearly particularized the alleged breach" in its correspondence with PLM on multiple occasions. Despite being given the opportunity to respond over an extended amount of time, PLM had failed to provide the CRA with the invoices, vouchers and a breakdown of expenses made outside of Canada during the Pastor's mission trips.

Although PLM argued that its poor recordkeeping was due to problems with its former accountants, and that obtaining receipts for expenses abroad was difficult as they were "cash economies," the court found these arguments to be "self-serving," particularly as PLM was well aware of the recordkeeping requirements set out in the Agreement. Having been put on notice, and aware that the CRA would follow up on compliance with the Agreement, it was up to PLM to find ways to substantiate its expenses for the mission trips. The Minister suggested a voucher book where details of the expenses could have been recorded and signed by the individual receiving the funds. The court also found that PLM could not blame the accountants for the inadequate recordkeeping because PLM had the ultimate responsibility for maintaining proper books and records. The court concluded that PLM's repeated non-compliance in providing receipts for activities outside of Canada in a timely manner, and being unable to sufficiently account for half of the expenses, justified the suspension and upheld the Minister's decision.

This case serves as a reminder to charities of the importance of complying with the obligations imposed on them, both under the ITA and in compliance agreements with the CRA. Registered charities must comply with their recordkeeping obligations, including maintaining records of expenses of activities

outside of Canada, even in "cash economies" where receipts may be difficult to obtain. As demonstrated in this case, non-compliance can expose charities to the risk of suspension of their qualified donee status and receipting privileges, and even revocation of charitable status.

Charitable Status Revoked for Inadequate Recordkeeping and Conferring Private Benefits

By Theresa L.M. Man

On June 24, 2019, the Federal Court of Appeal released its decision in *Many Mansions Spiritual Center, Inc. v MNR*, upholding the Minister of National Revenue's (the "Minister") decision to revoke the charitable status of Many Mansions Spiritual Centre, Inc. ("Many Mansions"). The Minister's decision was based on Many Mansions' failure to comply with various requirements in the ITA, including failing to maintain adequate books and records; conferring a private benefit to its pastor; and engaging in activities inconsistent with its charitable object of "advanc[ing] and teach[ing] the religious tenets, doctrines, observances and culture associated with the Christian faith."

Many Mansions relied on the Supreme Court of Canada decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall* (reviewed in *Church Law Bulletin* No. 54) arguing that matters of religious doctrine had no place in government. However, the court pointed out that this decision stands for the principle that court intervention is warranted "where it is necessary to resolve an underlying legal dispute." Further, the court held that the question of operating within its registered object is a relevant factor to a charity's continued enjoyment of its charitable privileges, and found that the Minister neither exhibited bias, nor acted unreasonably by inquiring into this matter.

With regard to inadequate recordkeeping, the court agreed that Many Mansions failed to maintain adequate books and records, which is a "foundational" obligation from which flows significant privileges. As such, the court noted the decision in *Humane Society of Canada for the Protection of Animals and the Environment v MNR*, which held that the Minister "must be able to monitor the continuing entitlement of the charitable organization to those privileges." The court held that it was open to the Minister in this case to conclude that Many Mansions' non-compliance was serious and justified revocation, even in light of Many Mansions' status as a new charity and its subsequent improvement efforts.

The court also held that it was reasonable for the Minister to revoke Many Mansions' charitable status because it conferred private benefits to its pastor by providing him with an office and allowing the use of

meeting rooms for his private business. The court did not agree with the submission by Many Mansions that the use of the office and meeting rooms was permissible because it was ancillary or incidental to the fulfilment of Many Mansions' charitable purposes. Instead, the court held that while paragraph 149.1(6)(a) of the ITA permits charitable organizations to "carry on a related business without contravening the requirement to devote all its resources to charitable activities, the pastor's private business does not come within this exception." The court also noted that the Canada Revenue Agency ("CRA") had warned Many Mansions when it applied for registration that using charitable funds for personal benefit was grounds for revocation.

Finally, the court did not find that this sanction of revocation was too severe, and the Minister was well within its authority to revoke. It therefore upheld the Minister's decision to revoke Many Mansions' charitable status.

This case serves as a reminder to registered charities of the importance of complying with their obligations imposed on them under the ITA. In particular, charities are reminded to ensure that their resources are devoted to charitable activities, no undue private benefits are conferred, and adequate books and records are maintained. The court specifically noted that newly registered charities are not exempt from compliance, in spite of subsequent improvement efforts upon an audit by the CRA. As well, it is also important for charities to pay special attention to the warning issued by the CRA upon charitable registration and failure to heed the warning could become a negative factor in future court reviews.

Alberta Court Considers Rights of a Corporation to Dispute Dissolution of a Related Society

By Esther S.J. Oh

In a decision released on August 9, 2019, the Court of Queen's Bench of Alberta considered whether a separate legal entity could have standing to enforce the bylaws of another Alberta society. In *Metis Nation of Alberta Association Local Council #63 v Alberta (Corporate Registry)* ("*Metis Nation of Alberta*"), the court considered whether or not a cross-application filed by the Metis Nation of Alberta Association ("MNAA") ("Cross-Application") to dismiss an originating application filed by the Metis Nation of Alberta Association Local Council #63 ("Local 63") and three individual applicants who were the directors of Local 63 ("Individual Applicants") ("Originating Application") would be allowed or

dismissed. While the Alberta Registrar of Corporations ("Registrar") was a named respondent, it took no position.

The Originating Application, which sought declaratory relief regarding dissolution of the Local 63 under the Alberta *Societies Act*, was adjourned so that the Cross-Application could be heard first. The court in the *Metis Nation of Alberta* case dismissed the Cross-Application and directed the parties to arrive at a litigation plan to proceed without the Originating Application in order to clarify the issues under dispute. The court's reasoning, together with a brief summary of some of the key background facts are outlined below.

Local 63 was incorporated on July 5, 2002 under the Alberta *Societies Act*. The governance structure of Local 63 is set out in the Local 63 by-laws filed on July 5, 2002 ("By-law"). There were a number of references to the MNAA in the Local 63 By-law, as noted below.

In November 2018, Local 63 held a membership meeting to approve a special resolution to dissolve Local 63 ("Special Resolution"). Six of the nine members of Local 63 attended the membership meeting and they voted unanimously to dissolve Local 63. One of the Local 63 directors then wrote to the MNAA advising of Local 63's Special Resolution to dissolve. Local 63 filed articles of dissolution with the Registrar, but the MNAA later wrote to the Registrar disputing the validity of the Special Resolution on the basis it was contrary to the By-law. The Registrar took the position that due to the conflicting information, Local 63 would be suspended until a court order has clarified who is authorized to file the articles to dissolve Local 63, and also confirmed that Local 63 had met all necessary requirements to dissolve.

In April 2019, the Individual Applicants filed the Original Application seeking a declaration that the Individual Applicants are authorized to file the articles of dissolution with the Registrar and that all requirements to dissolve Local 63 have been met. In response, the MNAA filed the Cross-Application in May 2019 seeking an order striking the Originating Application in its entirety, as well as other relief.

In the *Metis Nation of Alberta* case, the applicants argued that the MNAA had no standing to bring the Cross-Application on the basis that the MNAA is a third party and a separate legal entity from Local 63, and therefore lacks legal standing to enforce Local 63's By-law. The applicants relied on *Chinese Benevolent Association of Edmonton v China Town Multilevel Care Foundation* ("*Chinese Benevolent*"), reported in the January 2018 *Charity & NFP Law Update* in which members of the Chinese Benevolent

Association of Edmonton were found to have no standing to bring a court application regarding the validity of a foundation's by-laws, since they were not, and had never been, members of the foundation. However, in finding that the MNAA had standing to bring the Cross-Application, the court distinguished this case from *Chinese Benevolent* on the basis that Local 63's By-laws demonstrated "a clear and close relationship between Local 63 and MNAA." The court cited several articles in the By-law that referenced the MNAA, including a By-law provision which stated one of the objects of Local 63 was to further the objects of the MNAA, a requirement that the By-law was to be consistent with the MNAA by-laws, and that any special resolution approved at a meeting of Local 63 members needed to be ratified by a special resolution of MNAA members.

The court distinguished *Chinese Benevolent*, as there was no evidence that the Chinese Benevolent Association or its directors had any material interest in the foundation, nor any direct stake in the foundation's affairs, which was not the case in the *Metis Nation of Alberta* case. In this regard, the court found the MNAA had standing to bring the Cross-Application since the MNAA does have a material interest in Local 63 and its affairs.

This decision confirms that a separate legal entity can be found to have standing to enforce the by-law of a different corporation in court, where (1) the bylaw of the corporation reflects clear provisions regarding the interests and authority of the entity and (2) where the entity is found to have a material interest and a direct stake in the affairs of the corporation.

Court of Appeal Reduces Termination Notice

By Barry W. Kwasniewski

On June 19, 2019, the Court of Appeal for Ontario (the "Court") released its decision in *Dawe v The Equitable Life Insurance Company of Canada* ("Dawe"), partially overturning the lower court's decision that held that 30 months was an appropriate notice period for termination without cause for an employee with 37 years of service. In this case, the Court reiterated that reasonable common law termination notice periods for long serving employees should not exceed 24 months, in the absence of "exceptional circumstances." The Court further held that the employer must honour the contracted-for bonus entitlements of the employee during the notice period, unless any subsequent changes in the terms of the

employment contract have been brought to the attention of the employee. This *Bulletin* provides a review of the principles outlined by the Court in *Dawe*, which are relevant to charities and NFPs.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 454.

Privacy Law Update

By Esther Shainblum

Federal Government Announces Cybersecurity Voluntary Certification Program

In a news release issued on August 12, 2019, the federal government announced the establishment of CyberSecure Canada, a new voluntary federal certification program that will make cyber security more accessible to small to medium enterprises, including charities and NFPs. To obtain certification, organizations will be required to implement thirteen baseline security controls outlined by the Canadian Centre for Cyber Security, including, among others, developing an incident response plan, using strong user authentication, securing cloud and outsourced IT services, securing portable media and implementing access control and authorization. Organizations will be evaluated on their implementation of the criteria and, if certified, will be given a CyberSecure Canada certification identifier/logo to use on their website to demonstrate compliance. Organizations will have to recertify periodically. CyberSecure Canada is part of a larger National Cyber Security Strategy and supports the "Safety and Security" principle – focused on keeping Canadians safe in the digital world – part of Canada's Digital Charter that was reported on in *Charity & NFP Law Bulletin* No. 449.

Certification is no guarantee of protection from cyber threats. However, charities and NFPs that implement the baseline security controls may reduce cyber threats and may be better prepared and equipped to deal with any breaches that may occur. Further, boards of directors of charities and NFPs should be prepared to manage cyber security risk just as they manage other enterprise risks. Ensuring that their organization obtains certification could demonstrate that the board of directors of a charity or NFP is acting with due diligence to oversee and manage organizational cyber risk.

Ontario Privacy Commissioner Releases 2018 Annual Report

On June 27, 2019, the Information and Privacy Commissioner of Ontario ("IPC") presented the 2018 Annual Report, *Privacy and Accountability for a Digital Ontario* ("Report"), providing an overview of developments in access to information and privacy matters in Ontario during 2018. In terms of privacy,

the Report touches on a broad range of topics. Among others, it cites the increasing number of cyberattacks and reminds organizations of the importance of having appropriate security measures in place as well as a privacy breach protocol. The Report also indicates that the increased use of video surveillance by both government and the private sector has resulted in the collection of more personal information and increased tracking of individuals in their daily lives and has significant privacy implications. In this regard, the IPC recommends balancing privacy and public safety interests by limiting surveillance and the amount of personal information retained. The Report also touches on the European Union's *General Data Protection Regulation* ("GDPR"), which was implemented in May 2018 and which, as outlined in *Charity & NFP Law Bulletin* No. 419, may have implications for Canadian charities and NFPs. While the GDPR is not overseen or enforced by the IPC, it has developed a Privacy Fact Sheet on the GDPR that may be of assistance to charities and NFPs seeking general information about it.

The Report also addresses a broad range of health privacy matters, including new breach reporting requirements and cyberattack concerns, among others. Finally, the Report provides various recommendations going forward, including tests being carried out on the use of artificial intelligence to detect and deter snooping and inappropriate access related to personal health information. The Report also indicates that over 6,000 health-related information privacy breaches came as a result of misdirected faxes, and recommends that Ontario implement a strategy to eliminate dependence on the use of fax machines for the delivery of personal health information.

Canadian Bar Association Submission on Transfers of Information for Processing

As discussed in the June 2019 *Charity & NFP Law Update*, the Office of the Privacy Commissioner of Canada ("OPC") initiated a consultation on data transfers for processing ("Consultation"), reversing its own longstanding position by characterizing the cross-border transfer of personal information for processing as a "disclosure" of personal information within the meaning of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which would require consent, rather than as a "use", which would not. In response to the Consultation, the Canadian Bar Association's Privacy and Access Law and Charities and Not-for-Profit Law Sections made a joint submission ("CBA Submission") addressing the larger issues raised by the Consultation. At a high level, the CBA Submission takes the position that (1) transfers for processing are "uses" rather than "disclosures" under PIPEDA; (2) consent is not required under PIPEDA for such transfers; and (3) most cases do not fit the unique facts of the *Equifax Report of Findings* discussed in the September 2017 *Charity & NFP Law Update*, and a

reinterpretation of PIPEDA should therefore not be required. The CBA Submission concludes that this significant change in the OPC's position would eliminate the existing consistency in the legal regime and introduce uncertainty in the law and states that if this change is to be made, it should occur through the federal Parliamentary process.

Of particular note to charities, the CBA Submission specifically addresses the potential impact of this policy change on organizations such as charities and NFPs that are either subject to or that voluntarily follow PIPEDA or the underlying CSA Model Code, as discussed in *Charity & NFP Law Bulletin* No. 437. The CBA Submission points out that by reversing its well-settled position that a transfer for processing is a "use" of information and not a "disclosure", and by requiring meaningful consent, and possibly even express consent, to such transfers, the OPC would impose additional costs and onerous requirements on a sector needing "to do more with less" and facing a steady decline in charitable giving. The CBA Submission advises that these requirements would consume resources that could otherwise be deployed for charitable or not-for-profit purposes, cause delays and curtail a charity's ability to fulfill its mandate, especially in the international context. Rather, the CBA Submission indicates that the resources that would be devoted to compliance could otherwise be better used by charities in achieving their charitable purposes.

Trademark Applicants Beware of Unexpected Government Fees

By Sepal Bonni

As most recently reported in the June 2019 *Charity & NFP Law Update*, significant amendments to the *Trademarks Act* came into force on June 17, 2019. One of the many changes includes the requirement for applicants filing and registering trademarks with the Canadian Intellectual Property Office ("CIPO") to classify goods and services into one of 45 classes in accordance with the Nice Classification system, which seeks to harmonize the classification of goods and services across member countries and facilitate worldwide trademark searching and filing. Importantly, each class of goods or services included in the application has a separate government filing fee attached to it.

Charities and not-for-profits filing trademark applications with CIPO are cautioned to the position that Canada has taken with regard to the payment of filing fees per class of goods and services. In particular, in various countries around the world, when an applicant files an application with classified goods and

services, an examiner may issue an office action indicating that some of the goods or services have been incorrectly classified and that the application needs to be expanded to include more classes of goods or services. In that case, the applicant then has the choice of paying for each additional class identified by the examiner, or it can simply delete the particular goods or services which do not fit into the pre-existing classes, thereby avoiding paying additional class fees.

In stark contrast, the Government of Canada's Regulatory Impact Analysis Statement states that "[i]f the examiner determines that there are more Nice classes than were identified at the time of filing, the applicant would be required to pay the additional fees." This means that if an examiner identifies additional classes of goods or services, the applicant will be forced to pay a government fee for each additional class identified by the examiner and will not be afforded the opportunity to delete those goods or services from the application.

Given that there are 45 potential classes of goods and services, this may result in a significant increase in application costs. For instance, if an applicant files an application and includes all goods and services in one class and receives an office action indicating that the goods and services actually fall into 30 additional different classes, the applicant would be forced to pay the government fee for the 30 additional classes, which would amount to $3400. This would, of course, come as a shock to applicants.

As a result, it is very important that charities and not-for-profits work closely with their trademark counsel to carefully consider both the number of goods and services included in a trademark application, and also the classification of the goods and services in order to avoid unexpected and potentially very significant costs during the application process.

Federal Government Announces Full Membership of Advisory Committee on Charitable Sector

By Jennifer M. Leddy

Following up on the federal government's commitment in the 2018 Fall Economic Statement to establish an advisory committee to provide advice to the Government of Canada with respect to important issues facing the charitable sector, as discussed in *Charity & NFP Law Bulletin* No. 435, the Honourable Diane Lebouthillier, Minister of National Revenue, announced on August 23, 2019 the full membership of the Advisory Committee on the Charitable Sector ("Committee"). The Committee was formed in response to

recommendations made in the May 2017 Report of the Consultation Panel on the Political Activities of Charities, discussed in *Charity & NFP Law Bulletin* No. 403, and by the Social Innovation and Social Finance Strategy Co-Creation Steering Group, discussed in the September 2018 *Charity & NFP Law Update*.

The Honourable Diane Lebouthillier stated that "[b]y engaging in an ongoing dialogue with experts from the charitable sector, we can shape the regulatory environment so it supports and helps sustain the important work charities do in the world of today."

Ms. Hilary Pearson and Mr. Bruce MacDonald from the charitable sector, and Mr. Geoff Trueman from the CRA, will co-chair the Committee, which is comprised of three senior Government officials (two from the CRA and one from Finance Canada), as well as 14 appointed sector members, including Terrance S. Carter of Carters Professional Corporation. The Committee will meet a minimum of twice per year and consult with the government to "engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do." Working groups will be formed as needed. The Committee will prepare reports for the Minister of National Revenue and the Commissioner of the CRA, summarizing its progress and providing recommendations for the charitable sector.

Anti-Terrorism/Money Laundering Update

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

Regulations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

On July 10, 2019, the Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2019 (the "Regulations") were published in the Canada Gazette. The Regulations introduce a number of changes to the draft regulations proposed in June 2018, which were discussed in the June 2018 *Charity & NFP Law Update*, and includes a number of new additions that will be of interest to charities and not-for-profits. The Regulations require financial entities, as defined therein, to verify the identity of each authorized user and keep records regarding every "prepaid payment product account," such as those tied to prepaid cards programs, and which permit funds or virtual currency that total $1,000.00 or more to be added to the account in a 24-hour period or a balance of funds or virtual currency of $1,000.00 or more to be maintained in the account. However, the Regulations

exclude accounts tied to prepaid payment products, which would include disaster relief prepaid cards, used for purposes of humanitarian aid by registered charities.

Public Safety Canada Updates List of Suspected Terrorist Groups

On June 21, 2019, the list of entities believed to be involved in or associated with terrorism, which is a list maintained by the Governor in Council on the recommendation of the Minister of Public Safety and Emergency Preparedness pursuant to section 83.05 of the Criminal Code, was updated to include five new organizations. The new entities are Al-Ashtar Brigades, Fatemiyoun Division (FD), Harakat al-Sabireen (HaS), operating in the Middle East, as well as, for the first time, two neo-Nazi groups, namely, Blood & Honour (B&H) and Combat 18 (C18), operating in Europe and the US.

Charities involved in activities both outside as well as inside Canada should have adequate due diligence procedures in place to reduce the risk of unknowingly providing any kind of support to any of the entities listed by Public Safety Canada as suspected terrorist groups.

FATF Releases Terrorist Financing Risk Assessment Guidance

On July 5, 2019, the Financial Action Task Force ("FATF"), an inter-governmental body founded to set standards and promote policies to combat money laundering and terrorist financing, released its Terrorist Financing Risk Assessment Guidance (the "Guidance") to assist participants and countries, particularly those with lower capacity to regulate and enforce a counter terrorist financing regime, in assessing terrorist financing risk. The Guidance acknowledges that there is no one-size-fits-all approach for assessing terrorist financing risk, so it provides considerations and examples for different contexts.

Part 4 of the Guidance deals specifically with how to assess the terrorist financing risk associated with non-profit organizations ("NPOs"), as defined by the FATF. In this regard, and relying on Recommendation 8 which was discussed in the *Anti-Terrorism and Charity Law Alert* No. 46 dated September 29, 2016, the Guidance highlights the experience of the UK in its 2017 domestic review of the NPO sector, which included a review of what information each regulatory body/agency collected to help assess levels of transparency and oversight within the UK NPO sector, as well as any self-regulatory measures and the adequacy of relevant outreach and guidance to the sector. The Guidance also makes reference to the Charity Commission of England and Wales' review of 2014/15, which led to the amendment of the *Charities Act 2011* in 2016 in order to expand the automatic disqualification of certain individuals from holding the position of charity trustee, including individuals convicted of terrorism

offences or subject to financial sanctions. Other case studies referred to in the Guidance include Australia, Malaysia, Kosovo and Kyrgyzstan.

Inclusion in Best Lawyers in Canada 2020

Theresa L.M. Man, Jacqueline M. Demczur and Terrance S. Carter of Carters Professional Corporation were once again recognized as leaders in the area of Trusts and Estates Law in the Charity and Not-For-Profit Law subspecialty by *The Best Lawyers in Canada*. Terrance S. Carter has been recognized since 2006, Theresa L.M. Man has been recognized since 2012, and Jacqueline M. Demczur has been recognized since 2014.

IN THE PRESS

Charity & NFP Law Update – June 2019 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Bracing for the Budget Impact written by Terrance S. Carter, Barry W. Kwasniewski and Ryan M. Prendergast, was featured in the Ontario Nonprofit Network (ONN) blog on July 19, 2019.

Critical Privacy Update for Charities and Not-for-Profits written by Esther Shainblum, was featured in The Lawyer's Daily on August 14, 2019.

RECENT EVENTS AND PRESENTATIONS

York Region Community Development Unit and United Way Greater Toronto hosted a workshop entitled **Managing in Challenging Times** on July 5, 2019 in Newmarket, Ontario, at which Ryan M. Prendergast participated in a panel discussion.

Legal Check-Up: Top 10 Tips to Effective Legal Risk Management for NPOs and Charities was presented by Terrance S. Carter at the CSAE Trillium Summer Summit on July 11, 2019, in Windsor, Ontario.

UPCOMING EVENTS AND PRESENTATIONS

Christian Legal Fellowship National Conference is being held from Thursday, September 26 to Sunday, September 29, 2019. Terrance S. Carter will be presenting on the topic of Essential Charity Law Update on September 27, 2019.

ATRI 32nd Annual Conference (Association of Treasurers of Religious Institutes) is being held in Calgary, Alberta. Terrance S. Carter will be presenting on the topic of Legal Challenges and Options for Boards in Transition on September 29, 2019.

The **26th Annual Church & Charity Law Seminar™** will be held on **Thursday, November 7, 2019**, hosted by Carters Professional Corporation in Greater Toronto, Ontario. Details, brochure and registration are available online.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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