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# CHARITY & NFP LAW UPDATE

## FEBRUARY 2019

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

# FEBRUARY 2019

## SECTIONS



## HIGHLIGHTS



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# RECENT PUBLICATIONS AND NEWS RELEASES

## Legal Issues in Social Media for Charities and Not-for-Profits

By Terrance S. Carter

As new advancements and applications continue to develop with regard to the use of social media by charities and not-for-profits ("NFPs"), there are corresponding challenges in the law that should be considered, such as privacy law, intellectual property law, tort law, contract law, and charity law, amongst others. This *Bulletin* discusses a number of these legal issues and suggests that, at a minimum, charities and NFPs should have a robust social media policy in place and should coordinate such policy with other operational policies of the charity or NFP in order to manage the legal risks associated with their use of social media.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 441.

## CRA News

By Jennifer M. Leddy

### CRA is Revising Form T3010 and Form T2050

The Canada Revenue Agency ("CRA") has recently announced that it will revise Form T3010 *Registered Charity Information Return* and Form T2050 *Application to Register a Charity Under the Income Tax Act*, with additional instructions to be made available online soon, due to the new public policy dialogue and development activities ("PPDDA") rules introduced in the *Income Tax Act* (Canada) ("ITA") in December 2018 that make the reporting of spending on political activities "no longer relevant".

### Update to Info Sheet for Charities Completing their GST/HST Return

On February 12, 2019, the CRA updated its GST/HST Info Sheet GI-066 *How a Charity Completes Its GST/HST Return* (the "Info Sheet"). The Info Sheet includes a number of updates, including changes to reflect the repeal of section 252.1 of the *Excise Tax Act*, which provided a GST/HST rebate for the accommodation portion of eligible tour packages and the net tax calculation. For additional information, see GST/HST rebate for tour packages as well as Guide RC4082, GST/HST Information for Charities, discussed in the April 2018 Charity & NFP Law Update.

### P113 – Gifts and Income Tax 2018

On February 19, 2019, the CRA updated its P113 Gifts and Income Tax 2018 (the "Pamphlet") to reflect changes to the ITA with regard to universities outside Canada no longer being required to be prescribed in Schedule VIII of the *Income Tax Regulations*, as per the 2018 Federal Budget. The Pamphlet assists individuals who donate money or property to registered charities or other qualified donees, such as universities outside Canada, and is updated every year. The changes affecting universities outside Canada were discussed in greater detail in the March 2018 *Charity & NFP Law Update*.

## Legislation Update

By Terrance S. Carter

### Federal Budget to be Tabled on March 2019

In a news release published by the Department of Finance on February 20, 2019, Finance Minister Bill Morneau announced that the Federal Budget of 2019 ("Budget 2019") will be tabled on March 19, 2019. Federal budgets in previous years have usually contained proposals for legislative and policy amendments that have impacted charities and not-for-profits, and Budget 2019 will likely be no different. Of particular interest to charities and not-for-profits are possible legislative and policy changes arising out of the 2018 Fall Economic Statement ("Economic Statement"). In this regard, the Economic Statement proposed new initiatives to support non-profit journalism and news organizations (which were previously proposed in the 2018 Federal Budget), establishing a permanent Advisory Committee on the Charitable Sector, as well as a Social Finance Fund to benefit charitable, non-profit and other social purpose organizations. See *Charity & NFP Law Bulletin* No. 435 for more details.

### Royal Assent Received for Alberta Bill 23, *An Act to Renew Local Democracy in Alberta*

On December 11, 2018, Royal Assent was given for Alberta's Bill 23, *An Act to Renew Local Democracy in Alberta* ("Bill 23"), which updates the legislation in Alberta that governs local elections, the *Local Authorities Election Act*. As explained by the Alberta government, Bill 23 introduces new rules that "will limit campaign contributions, ban corporate and union donations and improve transparency and accountability."

Of relevance to charities are the provisions setting out the circumstances under which a candidate, defined as an individual "who has been nominated to run for election in a local jurisdiction as a councillor or school board trustee," may direct such contributions or other funds to a registered charity. For example,

Bill 23 requires a candidate to direct the local jurisdiction to donate any campaign surplus amounts to a registered charity if the candidate does not file nomination papers before the next general election. Further, unauthorized contributions may be donated to a registered charity as one of several options provided under Bill 23 in certain circumstances, such as when unauthorized contributions are made by an unidentifiable contributor or if there are unauthorized contributions that were made during the transitional period between Bill 23's first reading and the day it received Royal Assent. Additionally, advertising account funds of registered third parties in certain situations may be donated to a charity with respect to contributions made to the campaign. Bill 23 also expressly prohibits charities from being listed in a register of third parties who engage in election or political advertising and from making any election advertising contributions.

## Corporate Update

By Theresa L.M. Man

**Yukon Territory Introduces New *Societies Act***

As a result of the efforts of the Government of Yukon in 2017 and 2018 to modernize legislation in order to better serve the needs of societies and the public, a new *Societies Act* ("New Act") received Royal Assent on November 22, 2018 (Bill 20, *Societies Act*).

The New Act is not currently in force and will come into force on a day or days to be fixed by the Commissioner in Executive Council. Regulations for the New Act have not yet been drafted. However, the Government of Yukon anticipates that the New Act and regulations will be approved and proclaimed in force approximately one year after Royal Assent, *i.e.* late 2019. When the New Act comes into force, it will repeal and replace the Yukon's current *Societies Act* (RSY 2002, c 206).

Following input from a number of stakeholders from September 25 to 29, 2017, concerning their experiences with the *Societies Act* and its Regulations, the Department of Community Services invited the public for input on potential improvements to the *Societies Act* from October 14 to December 14, 2017. The Department then invited the public to provide feedback from May 1 to June 30, 2018 on proposed changes set out in *Policy Elements for New Societies Legislation*, which includes 40 proposed key policy elements. The *Policy Elements for New Societies Legislation* reviews changes in the following areas: the creation and liquidation of societies; directors' matters; the role of the registrar; operational matters;

privacy; liability; finance and employment; and other structures (being social enterprises and non-profit cooperatives).

The New Act is written in plain language and aims to clarify the framework for societies and the processes regarding their creation, governance and operation. An overview of key changes in the New Act are summarized in *Bill #20 Societies Act: Highlights of Proposed New Societies Act*.

**Amendments to Recordkeeping Requirements under Alberta *Societies Act***

On December 11, 2018, sections 26 and 36 of Alberta's *Societies Act* were amended by Bill 31, *Miscellaneous Statutes Amendment Act, 2018*. As a result of these changes, Alberta societies no longer need to state the occupation of each of their directors and officers in their annual returns, and thereby no longer need to provide the Registrar with notice when a director or officer changes occupations. Accordingly, Alberta's REG3185 Society Annual Return has also been updated to reflect this change. As well, Alberta societies will have the flexibility of recording the "street address or postal address" of the members in the members' registers instead of their "residential address."

## Supreme Court Rules on "Reasonable Expectation of Privacy" in Voyeurism Case

By Esther Shainblum

On February 14, 2019, the Supreme Court of Canada ("SCC"), in a case that will be of interest to charities and not-for-profits, released its decision in *R v Jarvis*, overturning two lower court decisions in which a high school teacher, Mr. Jarvis, was twice acquitted of charges of voyeurism under paragraph 162(1)(c) of the *Criminal Code*. The SCC convicted the teacher, who had been secretly recording videos of female students' breasts and cleavage using a camera that was hidden within a pen. Mr. Jarvis was charged under paragraph 162(1)(c), which states:

> Voyeurism
>
> 162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if […]
>
> (c) the observation or recording is done for a sexual purpose.

The key elements of an offence under paragraph 162(1)(c) are: (1) whether the circumstances gave rise to a reasonable expectation of privacy; and (2) whether the observation or recording was done for a sexual purpose. The Ontario Court of Appeal had already determined that Mr. Jarvis had made the videos for a

sexual purpose. Therefore, the only issue before the SCC was whether the students recorded by Mr. Jarvis were in circumstances that gave rise to a reasonable expectation of privacy. The students, who ranged in age from 14 to 18 years old, had all been recorded without their knowledge or consent in common areas of the schools such as hallways, classrooms and computer labs.

In holding that the circumstances did give rise to a reasonable expectation of privacy and convicting Mr. Jarvis of voyeurism, the SCC majority (the "Majority") rejected a narrow, "all or nothing", location-based interpretation of "reasonable expectation of privacy" in which a person only has a reasonable expectation of privacy in a place where she does not expect to be observed by others (such as her own home) and loses all expectations of privacy if she is in a place where she knows she can be observed by others or from which she cannot exclude others. Instead, the Majority adopted a broad interpretation in which a person retains some expectation of privacy even while knowing that she could be viewed or even recorded by others in a public place. The Majority stated that a typical or ordinary understanding of "privacy" recognizes that a person may be in circumstances where she can expect to be the subject of certain types of observation or recording but not others.

Stating that the determination of whether there is a reasonable expectation of privacy is a contextual one that must be made in the totality of the circumstances, the Majority provided a non-exhaustive list of nine factors to consider in determining whether circumstances give rise to a reasonable expectation of privacy. The location the person was in when the impugned conduct took place is only one of the factors to be considered. Other factors include whether the person was observed or recorded; whether there was consent; any applicable rules, regulations or policies in place; the nature of the relationship between the parties; the purpose for which the recording or observation was made; and the attributes of the person who was recorded or observed.

In this case, the Majority found, among other factors, that Mr. Jarvis had not only "observed" but had made recordings, which could be manipulated, shared and viewed at length in a manner that would be unimaginable if he had been standing next to a student staring at her breasts; that the recordings were of identifiable individuals, who were also vulnerable minors and young persons; that Mr. Jarvis had targeted certain students; that the recordings focused on intimate parts of the students' bodies; that he had used hidden technology that allowed for recording at close range without the students being aware of it; that there was a trust relationship between Mr. Jarvis and the students that he had abused; that there was a school board policy in place that prohibited such recordings; and that Mr. Jarvis had a sexual purpose for

making these videos. Accordingly, the Majority held that the Crown had established beyond a reasonable doubt that Mr. Jarvis recorded persons who were in circumstances that gave rise to a reasonable expectation of privacy within the meaning of subsection 162(1) of the Criminal Code.

The fact that some of the students were minors and all of them were young persons also supported the finding of reasonable expectation of privacy and strengthened the argument that they could reasonably expect not to be recorded in the manner they were, primarily due to children's inherent vulnerability and inability to protect their own privacy interests.

Additionally, in its analysis, the Majority recognized the threat to privacy caused by new and evolving technologies, noting that even where a recording is not made, technology may allow a person to see or hear more acutely. Importantly, the Majority stated that evolving technologies do not necessarily mean that our expectations of privacy will shrink correspondingly.

This decision will expand the range of settings and contexts in which individuals will arguably have a reasonable expectation of privacy. Charities and not-for-profits must be vigilant about protecting the privacy of their clients and other stakeholders, especially minors and young persons. Charities and not-for-profits must also be aware of the implications of and risks posed by evolving, developing and increasingly ubiquitous technology. For these reasons, charities and not-for-profits should carefully screen and supervise their employees and volunteers, and ensure that their privacy policies and protocols are regularly updated and reviewed.

## Ontario Court Orders Access to Members' Email Addresses

By Ryan M. Prendergast

On December 14, 2018, the Ontario Superior Court of Justice published the transcribed written endorsement in *Hemming v JAZZ.FM 91 Inc.*, involving a dispute between an incorporated registered charity ("JazzFM91") and a group of dissident members who requested that JazzFM91 provide them with a membership list in accordance with the statutory provisions of the *Corporations Act* (Ontario), including email addresses. At the time of writing, the dissident member group was successful in replacing the previous board of JazzFM91 with their own slate at a special meeting earlier in February 2019.

Although most of JazzFM91's over 2,000 members are primarily contacted and sent meeting notices by JazzFM91 via email, JazzFM91 refused to release the email addresses of its members, adopting a narrow

reading of the *Corporations Act* (Ontario) and arguing that it had an obligation to protect its members' privacy. However, the court disagreed with JazzFM91 and stated that:

> Among the purposes advanced by allowing members/shareholders to access the list of members is to allow shareholders/members the means to requisition a shareholder meeting. The Respondent [JazzFM91] has decided to withhold electronic address information. That narrow view of its obligations to provide addresses was clearly adopted to frustrate the applicants and not – as suggested – out of concern to maintain privacy.

As such, the court ordered JazzFM91 to provide the "postal and electronic addresses (email) as it possesses when responding to the applicant or any other member's request."

The court was also concerned with the message that an order on costs in this application would send to other not-for-profits. In this regard, the court ordered JazzFM91 to pay $20,000.00 in costs, stating that the best way to deal with a dissident group is at members' meetings and not misusing the corporation's money by "tossing roadblocks in the way of democracy."

A week later, officers of JazzFM91 appeared before the Divisional Court requesting a stay of the order of December 14, 2018. Even though JazzFM91 did not bring a proper motion on notice, the Divisional Court found that there was no risk of serious harm to JazzFM91 and no risk of irreparable harm to members' privacy resulting from the order to provide the email addresses. In this regard, the Divisional Court held that: "[m]embers of a not-for-profit corporation allow the corporation and dissidents to contact them as an incident of membership. The corporation already uses email to do so. Levelling the playing field for dissidents enhances member democracy. It is not harm."

While the obligation to disclose email addresses or other personal information of members may depend on the statute applicable to the not-for-profit corporation or information collected, these decisions are a reminder of the statutory obligation to provide membership lists, and the willingness of the court to read the statute in favor of the members' rights in a dispute. The tension between corporate disclosures obligations and privacy obligations was earlier reviewed in the decision of *Rodgers v Calvert*, discussed in *Charity Law Bulletin* No. 70. However, increasingly, it is apparent that information collected from members during the membership process will need to be weighed carefully given the disclosure obligations of the not-for-profit corporation under corporate statutes.

## Tax Court of Canada Finds Inflated Gift in Kind Values in Two Donation Programs

By Jacqueline M. Demczur

In two recent decisions, the Tax Court of Canada considered claims from taxpayers who had participated in donation programs that involved inflated fair market values ("FMV") for gifts in kind to charities. In *Morrison v The Queen*, released on November 23, 2018, the court considered a reassessment appeal by Mr. Morrison, a taxpayer who had participated in pharmaceutical donation programs (the "Pharma Programs"). Although the facts are complex, the Pharma Programs generally involved alleged pharmaceutical gifts in kind to a registered charity, with charitable receipts being issued to the donors which became the subject of a reassessment. In this regard, the court found that the values on the charitable receipts had greatly exceeded the FMV of the gifts in kind.

Mr. Morrison argued that he was unfamiliar with how the Pharma Programs worked and with "what went on behind the curtain." He argued that, since he had no such knowledge, he should not be required to prove he was entitled to the donation credit he had claimed and, instead, that the burden should be on the CRA since it had made assumptions about how the Pharma Programs worked. However, the court held that Mr. Morrison had consciously chosen to participate in the Pharma Programs without much knowledge of how they worked, and that "by participating in the [Pharma] Programs without further inquiry, the Appellants accepted the risk that the facts behind the curtain were not what they expected them to be." While the court found that Mr. Morrison had not made a gift in kind, it allowed him to claim a charitable donation tax credit for a $15,350 cash gift he had made to one of the subject charities.

In *Kaul v The Queen*, released on January 18, 2019, the court considered the FMV of artwork that was purchased and donated through an art donation program that was marketed as a tax savings investment vehicle (the "Art Program"). Through the Art Program, individuals bought sets of 11 prints produced for $20 – $40 each at an inflated price of $3,500 – $3,900, and immediately donated 10 of the prints to a charity. Appraisals were arranged through the Art Program, with the prints being appraised at least three times higher than the donors' acquisition price. Charitable receipts given to the donors reflected the inflated appraised amount.

Considering the FMV of the donations, the court reviewed the evidence and found that the FMV of the prints at the time of donation had not increased from the purchase price paid by the donors. It agreed with its previous decision in *Klotz v The Queen*, quoting it and stating that it was "devoid of common sense and out of touch with ordinary commercial reality" for the FMV of the prints to increase threefold during

the short span between the donors' purchases and subsequent donations. It therefore dismissed the appellants' claims and ordered one appellant's matter be sent back for reassessment.

These two cases are neither the first instances of individuals attempting to inflate the FMV of gifts in kind in order to receive a higher tax credit, nor are they likely to be the last. Nonetheless, these cases illustrate the importance of conducting proper valuations for gifts in kind to accurately reflect the FMV in charitable donation receipts, and illustrate that the CRA continues to keep a close eye out for donation receipts with inflated values.

## Charitable Status Revoked Due to Inadequate Books and Records

By Ryan M. Prendergast

On January 30, 2019, the Federal Court of Appeal released its decision in *Ark Angel Foundation v Canada (National Revenue)*, in which the Court dismissed an appeal, with costs, regarding a notice of intention to revoke (the "Revocation Proposal") the charitable registration of the Ark Angel Foundation (the "Foundation"). Two issues were raised in the appeal: 1) whether the Minister had erred in issuing the Revocation Proposal, and 2) whether the administrative process behind issuing the Revocation Proposal had breached the rules of natural justice and procedural fairness.

Of particular note, the Foundation's operations were managed by Mr. Michael O'Sullivan, a director of the Foundation who was also a director of the three other charities – Ark Angel Fund, Humane Society of Canada Foundation, and Humane Society of Canada for the Protection of Animals and the Environment. All three of these charities had also been audited, and Humane Society of Canada for the Protection of Animals and the Environment's charitable status was revoked for improper disbursement of benefits to Mr. O'Sullivan as a director and officer, as reported in the July/August 2015 *Charity & NFP Law Update*.

In this case, the court found that the Minister had not erred in issuing the Revocation Proposal, which stemmed from the Minister's conclusion that the Foundation had failed to keep adequate books and records under subsection 230(3) of the ITA and failed to devote all its resources to charitable purposes. In particular, the Minister concluded that the records of consultation fees paid to Mr. O'Sullivan, a director of the Foundation who managed the operations of the charity, "fail[ed] to demonstrate what Mr. Michael Sullivan was consulting upon or how it related to the charitable mandate of the [Foundation]." The court acknowledged that subsection 230(3) did not specify the *types* of books and records required and a mere

technical failure to comply may not justify a revocation of charitable status. However, the court stated that in the case of the Foundation, "the failure was significant":

> […] the Foundation failed to provide any records that demonstrated what consulting services Mr. O'Sullivan provided for the fees he received. Although one of the invoices appears to give some detailed information by listing names of consulting projects, the Foundation failed to provide any support that the named projects were bona fide. Needless to say, a bald reference to consulting projects in an invoice that cannot be corroborated with other evidence does not satisfy the records requirement of the Act.

The court also stated that "if a charity's books and records are insufficient for the CRA to assess whether the charity is in compliance with its obligations under the [ITA], this may be sufficient ground upon which to revoke the charity's charitable status." Further, the Court commented that "[i]n order to avoid the imposition of a sanction, a charity ought to do more than provide non-responsive submissions or simply deny that their records are inadequate."

In finding that it was reasonable for the Minister to conclude that the Foundation had failed to devote all its resources to charitable purposes, the court accepted the Minister's conclusion that the lack of proper documentation regarding the consultation activity of Mr. O'Sullivan meant that the Foundation could not "demonstrate by any means that no personal or undue benefits were conferred to the directors." The Court noted that the Foundation was "non-responsive" in its submissions to the Minister, so it was "not unreasonable" for the Minister to conclude that such fees were incurred for a non-charitable purpose. Further, the court stated that "[t]he problem is that the information that was provided did not address the fundamental concerns that the Minister had." As such, the Foundation failed to demonstrate that the Minister's decision to issue a Revocation Proposal was unreasonable.

The court rejected all of the Foundation's allegations of a breach of natural justice and procedural fairness as "wholly without merit." The court held that: 1) the failure of the appeals officer to read certain documents was not a breach of procedural fairness as there was no evidence indicating that the appeals officer had missed any relevant documents; 2) the CRA only needs to "consider the submissions" presented by the Foundation and the Foundation is not owed a "full opportunity to respond;" 3) the Foundation could not rely on an incomplete tribunal record to vacate the Revocation Proposal because it could have rectified any deficiencies; 4) the Foundation had been informed of the case it had to meet; and 5) the Foundation had "not come close to satisfying this test [of bias]" with respect to the Minister's conduct.

Charities should ensure that their recordkeeping practices are detailed enough to justify any activities or expenses that are made by the charity, as failure to do so may result in direct violation of subsection 230(3), and also in other non-compliance issues, such as the inability to demonstrate that all charity resources are being used for a charitable purpose. Further, charities must be proactive in responding to inquiries by the Minister by providing fulsome responses and information that directly addresses the concerns of the Minister.

## Characteristics of Employee Duties Found not to be Managerial or Supervisory

By Barry W. Kwasniewski

On October 15, 2018, the Ontario Labour Relations Board (the "Board") released its decision in *Merali v Designs G7 Inc*, which dealt with the review of an Order to Pay that required the employer, Designs G7 Inc. G7 Designs, Inc./Worklio to pay overtime and vacation pay to a former employee, Anaar Merali. In upholding the Order to Pay issued by an Employment Standards Officer, and affirming that Ms. Merali was entitled to overtime pay pursuant to the *Employment Standards Act, 2000* (the "ESA"), the Board looked at the characteristics of Ms. Merali's employment to confirm that she had not been employed in a supervisory or managerial capacity. As discussed in this *Bulletin*, this decision is relevant to charities and not-for-profits with respect to the issue of properly classifying their managerial and supervisory Ontario employees, in that an incorrect classification may result in claims pursuant to the ESA alleging unpaid overtime pay.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 442.

## BC Court Releases Decision on Charities "Entrusting" Funds to Community Foundation

By Esther S.J. Oh

On January 17, 2019, the Supreme Court of British Columbia released its decision in *Doukhobor Heritage Retreat Society #1999 v Vancouver Foundation*, which involved a dispute between two Canadian registered charities: Doukhobor Heritage Retreat Society #1999 (the "Society") and the Vancouver Foundation (the "Foundation"), a community foundation and a corporation established by special act, being the *Vancouver Foundation Act* (the "VFA").

The main issue in the dispute involved $175,000 donated in 2001 by Mr. Markin to the Society for the purpose of generating investment income for specific charitable programs involving the support of the

Whatshan Lake Retreat and related camps and seminars of the Society ("Charitable Program"). The $175,000 gift from Mr. Markin was transferred by the Society to the Foundation by cheque to establish a "permanent open fund" known as the "Allan T. Markin Benevolent Fund" (the "Fund"). The letter enclosing the cheque ("Transfer Letter") stipulated that the capital was to be "held permanently by Vancouver Foundation and invested in accordance with the provisions of the *Vancouver Foundation Act*." The Transfer Letter also required that the income generated was to be disbursed on the Society's Charitable Program. The dispute focused on whether the Fund could be returned to the Society in the context of the provisions of the VFA which governed the Foundation, notwithstanding the requirement that the Fund be "held permanently" by the Foundation as set out in the Transfer Letter.

The economic downturn that occurred several years after the transfer of the Fund to the Foundation resulted in the investment income becoming insufficient to support the Charitable Program the Fund was established to support. As a result, the Society requested the return of the Fund from the Foundation in order to use the funds in another matter that would better support the Charitable Program. The Foundation refused to return the Fund to the Society on the basis that it was unable to do so, given the Society's earlier direction in the Transfer Letter that the Foundation was to hold the Funds "permanently."

The Society argued that the Fund was a non-charitable purpose trust and was therefore voidable under the BC *Perpetuity Act,* which provides that a court may void the disposition of a non-charitable trust if, in the opinion of the court, doing so would be closer to the intention of the creator of the trust. The court disagreed with the Society and found that the Fund met the test to be considered a charitable purpose trust and, as such, the court held that the Fund was not voidable under the BC *Perpetuity Act*.

The Society also argued that the Foundation's governing statute, the VFA, required the Foundation to carry out the directions of donors (in this case the Society) in accordance with subsection 11(1) of the VFA, which states, "For the purpose of giving effect to the objects of the foundation, *the board must carry out the directions of donors if definite directions in writing are given*" (emphasis added). In response, the Foundation counter-argued that the Society was only capable of giving direction provided at the time of the transfer of the Fund, *i.e.* before relinquishing its ownership completely over the Fund to the Foundation.

However, the court held that any subsequent directions provided by the Society, including the instruction to return the Funds, must also be followed by the Foundation under subsection 11(1) of the VFA. The court noted that the Fund was not a gift made to the Foundation, but instead was a transfer that reflected

a situation described in section 17 of the VFA, which provides that a charity may "entrust" funds to the Foundation so that the Foundation may manage and invest the said charity's funds. In addition, the court found that the meaning of the word "permanent" in the Transfer Letter was intended to ensure that the capital would never be encroached upon, but not that the Fund would remain with the Foundation "for all time."

This decision is very fact specific and therefore is limited to its particular facts. However, the case does underscore the importance of reviewing and complying with applicable governing legislation and transfer documentation (in this case, the VFA, the private legislation which governed the Foundation, as well as the Transfer Letter) when a registered charity makes a gift or a transfer of charitable property to another charity such as a community foundation. Registered charities would also be prudent to clearly document the terms intended to apply to any transfers of charitable property in an appropriate agreement, in order to avoid potential misunderstandings and disputes between the parties, as had occurred in this case.

## Failure to Enforce Trademarks can Lead to a Loss of Trademark Rights

By Sepal Bonni

A recent decision from the Federal Court of Appeal, *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd.*, provides charities and not-for-profits with a helpful reminder regarding the consequences of failing to enforce trademark rights in a timely manner. The case is regarding the distinctiveness of a trademark.

While the facts of the case and the issues between the parties were complicated by settlement agreements and a lengthy history of litigation, the message provided by the Federal Court of Appeal in this decision is clear. A trademark owner must maintain distinctiveness of its trademark. If a trademark owner fails to enforce its rights against infringers or allows ongoing infringement of its trademark for a number of years, the trademark owner is essentially passively consenting to the infringement which can have a detrimental impact on the validity of the trademark.

In the case, Sadhu Singh Hamdard Trust (the "Trust") had filed for a trademark application for the trademark AJIT for use in association with newspapers and printed publications based on its use of the mark since 1968. Navsun Holdings Ltd. ("Navsun") opposed the application claiming that the trademark was not distinctive of the Trust because Navsun had use of the trademark in Canada since 1993. Both the Trademark Opposition Board and the Federal Court held that the mark AJIT could not be registered because it was not distinctive of the Trust, that is, the hallmark of a trademark is the message that it sends

to the public that the goods or services have one single source. Given the common use of the mark by multiple owners (*i.e.*, Trust and Navsun), the mark no longer performed the essential trademark function of denoting one single source, and as a result, the trademark was not distinctive and there was no protectable right.

The Federal Court of Appeal upheld these decisions for the same reason, stating further that the fact that the Trust had prior use of the mark in Canada and that Navsun's later use was infringing were of no consequence in cases such as this one where the parties had used the mark concurrently for over ten years, and Navsun had successfully and sufficiently acquired notoriety of the mark in Canada.

This case emphasizes the importance of maintaining the distinctiveness of a trademark. As held by the court, charities and not-for-profits should bear in mind that trademark use must occur in Canada in order to establish distinctiveness. A trademark's reputation must therefore be built on the foundation of Canadian use. To ensure the distinctiveness of a trademark is not eroded, charities and not-for-profits must actively monitor and enforce all registered and unregistered trademarks that they own. Where trademarks are not enforced, the trademarks may lose distinctiveness and be unenforceable or invalidated.

## Privacy Issues Affecting Charities

By Esther Shainblum

Recent developments in privacy law, both globally and in Canada, as well as increasing stakeholder expectations and demands for protection of their personal information, should change how Canadian charities understand and manage their obligations around privacy, transparency and accountability. The following paper provides an overview of these recent developments, including recent developments under the EU's *General Data Protection Regulation* and mandatory breach reporting under PIPEDA, as well as discussion on the application of privacy law to charities, privacy litigation, charities and children, data breach and cyber risks, and why charities should comply with PIPEDA.

This paper was prepared for the Ontario Bar Association's Institute 2019: Privacy, Land Development, and Other Key Updates in Charity and Not-For-Profit Law. To reference the full paper, see "Privacy Issues Affecting Charities."

## Ottawa Region Charity & NFP Law Seminar Materials Available

The Ottawa Region Charity & Not-for-Profit Law Seminar, hosted by Carters in Ottawa, on February 15, 2019, was attended by over 400 leaders from the charity and not-for-profit sector. Kenneth Goodman, The Public Guardian & Trustee of Ontario, and Tony Manconi, Director General of the Charities Directorate of CRA, were guest speakers. The Seminar was designed to provide practical information to assist charities and not-for-profits in understanding and complying with recent developments in the law. All handouts and presentation materials are now available at the links below:

- Introduction, Agenda and Speaker Details - Seminar and Speaker Details and Acknowledgements.
- Essential Charity & Not-for-Profit Law Update by Jennifer M. Leddy
- Critical Privacy Update for Charities and NFPs by Esther Shainblum
- Clearing the Haze: Managing Cannabis in the Workplace in Ontario by Barry W. Kwasniewski
- Protecting Your Brand in the Digital Age by Sepal Bonni
- Charities and Politics: Where Have We Been and Where Are We Going by Ryan M. Prendergast
- The Coming of the ONCA (We Hope) and What to Start Thinking About by Theresa L.M. Man
- The Evolution and Empowerment of Charities in Ontario from the Perspective of the PGT by Kenneth Goodman, The Public Guardian & Trustee of Ontario
- Lessons Learned from Claims to the Courtroom by Kenneth Hall and Sean S. Carter
- Tips for Avoiding Common Errors: A Charities Directorate Perspective by Tony Manconi, Director General of the Charities Directorate of CRA
- Legal Challenges in Social Media for Charities and NFPs by Terrance S. Carter

## IN THE PRESS

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

## RECENT EVENTS AND PRESENTATIONS

**Privacy Issues Affecting Charities** was presented by Esther Shainblum at the OBA Institute hosted by the Ontario Bar Association Charity & Not-For-Profit Law Section on Tuesday, February 5, 2019.

**Essential Charity Law and Compliance Update** was presented by Terrance S. Carter at the CPA Canada's 2019 Not-for-Profit Forum hosted by Chartered Professional Accountants Canada on February 6, 2019.

**The Ottawa Region Charity & Not-for-Profit Law™ Seminar** presented by Carters Professional Corporation in Ottawa, Ontario, on Thursday February 14, 2019. Guest Speakers included Kenneth Goodman, The Public Guardian & Trustee of Ontario, and Tony Manconi, Director General of the Charities Directorate of the CRA. Handout materials are available at our website.

**Maintaining NPO Tax Exempt Status: What You Need to Know and Why it Matters** was presented by Theresa L.M. Man and Terrance S. Carter at the CSAE Trillium 2019 Winter Summit on February 15, 2019 in Burlington, Ontario.

## UPCOMING EVENTS AND PRESENTATIONS

**CAGP 26th National Conference on Strategic Philanthropy**, will be held in Montreal, Quebec, on April 10, 2019. The topic "Gift Acceptance Policies – Hot Policies for Hot Gifts" will be presented by Theresa L.M. Man and Terrance S. Carter.

**Spring 2019 Carters Charity & NFP Webinar Series** will be hosted by Carters Professional Corporation on Wednesdays starting April 17, 2019. Click here for online registration for one or more individual sessions. Topics to be covered are as follows:

- **Legal Challenges in Social Media for Charities and NFPs** by Terrance S. Carter on Wednesday April 17, 2019 from 1:00 to 2:00 pm ET
- **Protecting Your Brand in the Digital Age** by Sepal Bonni on Wednesday May 1, 2019 from 1:00 to 2:00 pm ET
- **Critical Privacy Update for Charities and NFPs** by Esther Shainblum on Wednesday May 15, 2019 from 1:00 to 2:00 pm ET

- **Charities and Politics: Where Have We Been and Where Are We Going** by Ryan M. Prendergast on May 22, 2019 from 1:00 to 2:00 pm ET
- **The Coming of the ONCA (We Hope) and What to Start Thinking About** by Theresa L.M. Man on Wednesday June 5, 2019 from 1:00 to 2:00 pm ET
- **Clearing the Haze: Managing Cannabis in the Workplace in Ontario** by Barry W. Kwasniewski on Wednesday June 12, 2019 from 1:00 to 2:00 pm ET

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**Terrance S. Carter**, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis, 2019), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis). He is recognized as a leading expert by *Lexpert*, *The Best Lawyers in Canada* and *Chambers and Partners*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

**Sean S. Carter**, B.A., LL.B. – Sean Carter is a partner with Carters and the head of the litigation practice group at Carters. Sean has broad experience in civil litigation and joined Carters in 2012 after having articled with and been an associate with Fasken (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity & NFP Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Ontario and Ontario Bar Association CLE learning programs.

**Luis R. Chacin**, LL.B., M.B.A., LL.M. - Luis was called to the Ontario Bar in June 2018, after completing his articles with Carters. Prior to joining the firm, Luis worked in the financial services industry in Toronto and Montreal for over nine years, including experience in capital markets. He also worked as legal counsel in Venezuela, advising on various areas of law, including pensions, government sponsored development programs, as well as litigation dealing with public service employees. His areas of practice include Corporate and Commercial Law.

**Nancy E. Claridge**, B.A., M.A., LL.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity & NFP Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.

**Adriel N. Clayton**, B.A. (Hons), J.D. - Called to the Ontario Bar in 2014, Adriel Clayton rejoins the firm to manage Carters' knowledge management and research division, as well as to practice in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.

**Jacqueline M. Demczur**, B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert* and *The Best Lawyers in Canada*. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law Seminar™*.

**Barry W. Kwasniewski**, B.B.A., LL.B. – Mr. Kwasniewski joined Carters' Ottawa office in 2008, becoming a partner in 2014, to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal advice pertaining to insurance coverage matters to charities and not-for-profits.

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**Theresa L.M. Man**, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers in Canada*. In addition to being a frequent speaker, Ms. Man is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Thomson Reuters. She is vice chair of the CBA Charities and Not-for-Profit Law Section. Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS* and *Charity & NFP Law Bulletin*.

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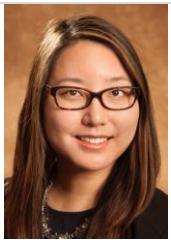
**Ryan M. Prendergast**, B.A., LL.B. - Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan has co-authored papers for the Law Society of Ontario, and has written articles for *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.charitylaw.ca. Ryan has been a regular presenter at the annual *Church & Charity Law Seminar™*, Healthcare Philanthropy: Check-Up, Ontario Bar Association and Imagine Canada Sector Source.

**Esther Shainblum**, B.A., LL.B., LL.M., CRM – Ms. Shainblum practices at Carters Professional Corporation in the areas of charity and not for profit law, privacy law and health law. From 2005 to 2017 Ms. Shainblum was General Counsel and Chief Privacy Officer for Victorian Order of Nurses for Canada, a national, not-for-profit, charitable home and community care organization. Before joining VON Canada, Ms. Shainblum was the Senior Policy Advisor to the Ontario Minister of Health. Earlier in her career, Ms Shainblum practiced health law and corporate/commercial law at McMillan Binch and spent a number of years working in policy development at Queen's Park.



**Christina Shum**, B.M.T., J.D – Ms. Shum graduated from Osgoode Hall Law School in 2018 and is Student-at-Law at Carters. While attending Osgoode, Christina interned at International Justice Mission where she provided research on bonded labour laws, and summered at CGI where she focused on contractual matters in IT law. She also volunteered as a community mediator and was Vice-President of Osgoode's Women's Network and Co-President of the Osgoode Peer Support Centre. Prior to attending law school, Christina obtained her Bachelors of Music Therapy from the University of Windsor and her Associate diploma in piano performance from the Royal Conservatory of Music.

## ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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