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Essential Charity Law Update

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OVERVIEW

Update since our June 2014 presentation

- Federal Budget 2015
- Federal Legislative and Regulatory Update
- Ontario Legislative and Regulatory Update
- Corporate Law Update
- Highlights of Recent CRA Publications
- Selected Case Law

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A. FEDERAL BUDGET 2015

- Budget 2015, announced April 21, 2015
- Contains a number of important proposed amendments relating to the charitable and not-for-profit sector, which include
 - Exempt capital gains tax on the donation of proceeds of private shares or real estate
 - Permit registered charities to invest in limited partnerships
 - Expand foreign entities eligible for registration as qualified donees
 - Introduce Social Finance Accelerator Initiative, a program to encourage social finance in Canada



- Budget 2015 did not include
 - The stretch tax credit for charitable giving proposed by Imagine Canada
 - An administrative mechanism to provide an extension of the 36-month period announced in Budget 2014 in which an estate donation can be treated as a gift in a terminal return
 - Follow up to the 2014 Federal Budget announcement that there would be a review of the tax exemption status for non-profit organizations



1. Capital Gains Exemption on Donations of Private Shares and Real Estate

- Proposal to exempt individual and corporate donors from tax on the sale of private shares or real estate to an arm's length party if the proceeds are donated to a registered charity within 30 days of the disposition
- Appears to contemplate sale first, then donate
- Anti-avoidance rules address opportunities for tax avoidance within 5 years of the disposition – such as a non-arm's length person repurchases the property after the sale
- The measures will apply for dispositions occurring after 2016

2. Charities can now Invest in Limited Partnerships

- Registered charities or RCAAs with an interest in a partnership will not be seen as carry on a business if
 - Limited liability of the partnership interest
 - Members deal at arm's length with each general partner of the partnership
 - Only holds less than 20% of the fair market value of the interest of all members
- Intended to enable charities to diversify their investment portfolios to better support their charitable purposes and give them the flexibility to use innovative approaches to address pressing social and economic needs
- New subsection 253.1(2) will apply to investments made after April 20, 2015

3. Additional Budget 2015 Proposals

- All foreign charities (not just “charitable organizations”) that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities related to disaster relief, urgent humanitarian aid, or in the national interest of Canada
 - Bill C-59, *Economic Action Plan 2015 Act, No. 1*, which is currently in Second Reading
- Includes a commitment to “support social entrepreneurs with innovative solutions” through “the implementation of a social finance accelerator initiative to help develop promising social finance proposals”
- Proposes to spend \$150 million towards social housing providers that wish to pre-pay long-term and non-renewable mortgages without penalty

B. FEDERAL LEGISLATIVE AND REGULATORY UPDATE

1. Implementing Legislation for 2014 Budget

- Bill C-31, *Economic Action Plan 2014 Act, No. 1*, which received Royal Assent on June 19, 2014
 - Increases the carry-forward period for gifts of ecologically sensitive land to 10 years (instead of 5)
 - Removes the exemption for gifts of cultural property made as part of a tax shelter gifting arrangement
 - Gives the Minister power to refuse to register a charity or revoke its registration if it is accepts a “gift” from a “foreign state” listed in the *State Immunity Act*
- Bill C-43, *Economic Action Plan 2014 Act, No. 2*, which received Royal Assent on December 16, 2014
 - Creates new rules regarding estate gifts

2. *Anti-Terrorism Act, 2015 (Bill C-51)*

- Bill C-51 was introduced on January 30, 2015 and is currently in Third Reading at the Senate
- Charities operating in conflict areas may be particularly affected by the proposed amendments, which include
 - *Criminal Code* will be amended to create an offense for knowingly advocating or promoting the commission of terrorism offenses in general
 - *Security of Canada Information Sharing Act, 2015* will authorize and facilitate the sharing of information among government agencies (e.g., CRA) in situations where there is “activity that undermines the security” of Canada
 - The *Secure Air Travel Act* will create a “no-fly list” for identifying and responding to persons who engage in an act that threatens transportation security or travel

3. *Canada’s Anti-Spam Legislation (“CASL”)*

- CASL came into force on July 1, 2014
- CASL impacts how charities and non profit organizations communicate with their donors, volunteers and members
- The regulations include a specific exemption from CASL for select messages sent by registered charities for fundraising purposes
- On March 5, 2015, Compu-Finder, a for-profit organization, received the first CASL-related Notice of Violation and a \$1.1 million penalty for non-compliance

4. Social Enterprise Update (Federal and Provincial)

- On June 10, 2014, Industry Canada published the results of its public consultation on the *Canada Business Corporations Act* (“CBCA”)
 - This recommended further consultations about whether existing CBCA provisions are sufficient to enable federal socially responsible enterprises
- In early 2014, a consultation group met to consider possible structures for Ontario social enterprise legislation
 - In May 2014, the group produced a report entitled “Dual Purpose Corporate Structure Legislation,” which the Ministry of Government and Consumer Services released on January 29, 2015

- Report recommends that social enterprise legislation
 - Should protect the social mission and attract investment
 - Should provide clarity for owners and directors, and lower the overall cost of establishing and operating a dual purpose corporation
 - Must balance the interests needed to encourage multiple bottom line businesses
- The Ministry sought public input until May 4, 2015, to explore whether the framework social enterprise legislation should be pursued and how the government should support enterprises with social purposes and private interests

5. Credit Card Fees Reduced for Charities

- On November 4, 2014, the federal government announced a voluntary agreement with MasterCard and Visa to reduce interchange fees to an average of 1.5% of the transaction value
 - The agreement came into effect April 1, 2015, and will continue for five years
- Bill S-202, currently in the Senate, proposes even further regulation, such as eliminating credit card acceptance fees being charged to charities
- Reduced interchange fees will benefit charities by increasing donations received and lowering administrative costs, therefore allowing donations to have a greater impact on charitable causes



B. ONTARIO LEGISLATIVE AND REGULATORY UPDATE

1. *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”), New Requirements

- The AODA and its associated *Standards* (regulations) are meant to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures, and premises by January 1, 2025
- Compliance dates for the requirements of each standard are staggered by the type and size of organization
 - Requirements of all standards, except the new Built Environment Standard have begun to be phased in
 - Built Environment Standard will be phased in starting January 1, 2015

- As of January 1, 2015, the following is required
 - “Large organizations” (more than 50 employees) must ensure that all employees and volunteers are trained on the requirements of the *Integrated Accessibility Standards* and the *Human Rights Code*
 - “Large organizations” must ensure that any feedback processes (i.e., surveys) are accessible to persons with disabilities through either accessible formats or communication supports
 - “Small organizations” (less than 50 employees) must develop, implement, and maintain policies that govern how they achieve or will achieve accessibility
 - “Large organizations” had to do so by 2014

- As of January 1, 2015, the *Design of Public Spaces Standards (Accessibility Standards for the Built Environment)* will be phased in
 - It is meant to remove barriers in public spaces as well as in new buildings and buildings undergoing major renovations
 - The *Standard* includes areas such as accessible parking; outdoor sidewalks and stairs; service counters; and playgrounds and recreation areas
 - Ontario’s *Building Code* has been amended to reflect the *Built Environment Standard*
 - “Large organizations” must be compliant as of January 1 2017
 - “Small organizations” will have limited obligations, such as accessible parking by January 1, 2018

2. Ontario Human Rights Commission (“OHRC”) New Policies and Guidelines

- In 2014, the OHRC released new or updated policies on preventing discrimination based on
 - Pregnancy and breastfeeding (October 2014)
 - Mental health disabilities and addictions (June 2014)
 - Gender identity and gender expression (April 2014)
- The Ontario *Human Rights Code* (the “Code”) authorizes the OHRC to prepare, approve and publish human rights policies, to set standards in how to interpret the Code
 - The Human Rights Tribunal must consider such policies if a party requests so
- On November 25, 2014, the OHRC also issued statement on how to prevent and deal with sexual harassment in the workplace

3. Public Sector and MPP Accountability and Transparency Act, 2014 (Bill 8)

- Received Royal Assent on December 11, 2014, but not yet proclaimed in force
- The Act authorizes the Ontario government to establish compensation frameworks for certain executives in the broader public sector, including hospitals, school boards, universities, and other Crown corporations
- The mandatory restrictions will apply to those who earn more than \$100,000 per year
- Bill 8 raises the possibility of even broader legislation regarding salary caps on other sectors, such as for high-earning employees at other NPOs and charities

C. CORPORATE LAW UPDATE

1. *Canada Not-for-profit Corporations Act* (“CNCA”)

- Enacted on June 23, 2009 and proclaimed in force on October 17, 2011
- Replaced Part II of *Canada Corporations Act*, which had been in force since 1917
- All CCA corporations had to continue under the CNCA within 3 years, i.e., by October 17, 2014
- As of June 6, 2015, 12,248 of approximately 17,000 Part II CCA not-for-profit corporations had continued
- Dissolution for not meeting the October 17, 2014, deadline is not automatic

- Before dissolving a corporation, Corporations Canada must first send a notice of pending dissolution after which the corporation will have 120 days to continue
- Corporations Canada initially focussed on corporations that had not filed their corporate summaries and were presumed inactive
 - Since March 2015, it has been sending notices to corporations that are up-to-date with their annual filings but have not yet continued
 - Corporations Canada anticipates that all notices will be sent by Fall 2015
- Part II of The *Canada Corporations Act* will be repealed after all corporations have transitioned or been dissolved
- If you have not yet continued, act now!

2. Ontario *Not-for-Profit Corporations Act* (“ONCA”)



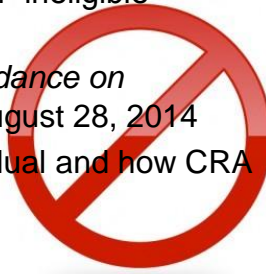
- The *Ontario Corporations Act* (“OCA”) has not been substantially amended since 1953
- The new ONCA received Royal Assent on October 25, 2010 and will apply to OCA Part III corporations

- Bill 85 was introduced on June 5, 2013, and contained key amendments to the ONCA, Bill 85 died on the Order Paper in May 2014 because of the election
- Waiting for a new Bill to be proposed
- ONCA applies automatically upon proclamation
- ONCA currently provides for an optional transition process within 3 years of proclamation
- The Ontario Ministry of Government and Consumer Services indicates that the ONCA is not expected to come into force before 2016
- On September 25, 2014, Premier Wynne indicated support for the ONCA in her “Mandate Letter”

D. HIGHLIGHTS OF RECENT CRA PUBLICATIONS

1. *Guidance on Ineligible Individuals*

- Since January 1, 2012, CRA has had the discretion to refuse or revoke the registration of charities or to suspend their receipting privileges if a director, trustee, or like official or any individual who otherwise controls or manages the charity is an “ineligible individual”
- CRA subsequently released the *Guidance on Ineligible Individuals* (CG-024) on August 28, 2014
- It explains who is an ineligible individual and how CRA will use the discretion



- In general terms, an ineligible individual is one who
 - Convicted of a “relevant criminal offense” and no pardon was received
 - Convicted of a “relevant offense” (financial dishonesty or operation of the organization) in the last 5 years
 - Was a director, officer or like official of a charity that engaged in a “serious breach” of *the Income Tax Act* and had its registration revoked in the past 5 years
 - Controlled or managed, directly or indirectly, a charity that engaged in a “serious breach” of *the Income Tax Act* and had its registration revoked in the past 5 years
 - Was a promoter of a tax shelter, and participating in that tax shelter caused the revocation of an organization’s registered status

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- CRA is not required to take action but has the authority to use discretionary sanctions to enforce the ineligible individual provisions
- Charities are not required to search or proactively determine whether an ineligible individual is involved in the charity
- If CRA has concerns, it will state these concerns in writing and the organization will be given an opportunity to respond before CRA makes a decision
- After the CRA has made its decision, the organization will be able to object
- Questions CRA will ask
 - What made the person an ineligible individual?
 - What roles and responsibilities does the ineligible individual have in the organization?
 - How has the organization lessened whatever risk the ineligible individual may pose?

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- Onus is on the charity to explain and address CRA's concerns by providing CRA with adequate documentary evidence
- Charities should practice due diligence, risk assessment, fraud prevention, and financial controls that protect their beneficiaries
- CRA has revoked the registration of two charities, (Jesus of Bethlehem Worship Centre on July 12, 2014, and Friends and Skills Connection Centre on September 13, 2014) in part because a director was previously a director of a charity when it was engaged in conduct that constituted a serious breach of the Act
- Helpful Guidance, but there remain questions about how it will be applied

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2. CRA Charities Program Update

- On April 9, 2015, the Charities Directorate released its *Charities Program Update*, which updates charities and the charitable sector on the Charities Directorate's recent programs and activities
- This Update is noteworthy because of the details that it provides on the political activity audit program
- As of March 31, 2015, of the 60 charities selected for a political activity audit, 21 political audits had been completed, 28 were underway and 11 had yet to begin
 - Of the completed audits, 6 charities received education letters, 8 received compliance agreements, 5 received notices of intention to revoke, one chose to voluntarily revoke and one was annulled

F. SELECTED CASE LAW

Cases related to health issues

1. *Carter v Canada (AG)* (Physician-Assisted Suicide)

- On February 6, 2015, the Supreme Court of Canada unanimously held that physicians may help a competent patient die if the patient
 - Clearly consents to the termination of life, and
 - Has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in his or her circumstances
- This ruling distinguished the SCC's 1993 decision in *Rodriguez*, which upheld the *Criminal Code* provisions against assisted suicide
- For more details see today's presentation

2. *Hopkins v Kay* (Personal Health Information)

- On February 18, 2015, the Ontario Court of Appeal ruled that the *Personal Health Information Protection Act* does not preclude a claim of invasion of privacy for the unauthorized access to personal health information
- The plaintiffs brought a class action for the tort of intrusion upon seclusion, claiming that patients' personal information was accessed without knowledge or consent
- The hospital tried to dismiss the claim, arguing that the Act provides an exhaustive code for enforcing privacy rights and as such, precludes any tort claims
- The decision will permit plaintiffs to seek claims in common law for privacy breaches in the health care sector, regardless of whether or not the Commissioner has taken any regulatory action

Cases related to corporate issues

3. *Bekesinski v The Queen* (Director Liability)

- Under section 227.1(4) of the ITA, directors of corporations, including NPOs, may be liable for income tax, employer contributions, interest, and penalties that the corporation owes to CRA
 - This liability exists while a director is serving as well as for two years after a director resigns
- On July 28, 2014, the Tax Court released its decision - both CRA and the Court agree that there was insufficient evidence that the director in question had resigned within the requisite two year period to avoid liability
- It is important that directors practice due diligence while leaving a board by carefully documenting a resignation to avoid potential future liabilities

4. *McDonald v The Queen (De Facto Directors)*

- On September 29, 2014, the Tax Court held that an individual was a *de facto* director and could be liable for company liabilities despite not officially being a director and not presenting himself as a director to third-parties
- The Court held that the potential director “played an important and active role in the overall corporate operations,” including managing and controlling employees, having access to corporate books and records, and attending meetings with trust examiners
- Anyone who is not officially a director, including executive directors and other senior management, should ensure that the scope of their roles does not make them a *de facto* director

Cases related to gift issues

5. *Mulgrave School Foundation (Restricted Charitable Trusts)*

- On October 9, 2014, the British Columbia Supreme Court considered when it could vary a restricted charitable purpose trust
- The Court refused to vary the trust despite the fact that the donor agreed to the change in use
- This case means that once donors have donated donor restricted charitable funds, the donor has no further control or ability to vary the terms of the gift and the court may also not be able to do so
- Charities should be cautious before encouraging donors to make gifts with restrictions unless appropriate wording is included in the gift agreement giving the charity power

6. *Vancouver Opera Foundation (Re) (Cy-Près Jurisdiction)*

- On March 12, 2015, the BCSC revisited the extent of its inherent (*cy-près*) jurisdiction over charitable trusts and its ability to remedy irregularities in a society's affairs
- Vancouver Opera Foundation applied for an order to amend certain unalterable provisions in its constitution
- After referring to the earlier *Mulgrave* decision, the Court concluded that *cy-près* jurisdiction is too narrow to apply in this case, particularly because any requested changes must reflect the intentions of the original donors and founders, and not be made purely for convenience
- For a Court to use its *cy-près* jurisdiction, the charitable purpose must be impossible and impractical to perform

7. *Norman Estate v Watch Tower Bible and Tract Society of Canada (Conditional Gifts)*

- Illustrates the confusion and the consequences that can occur when charities use poorly worded gift documents
- The donors made regular monetary gifts to the Society including a cheque marked as a demand loan
- The donor and charity then entered into a confusing "Conditional Donation Agreement"
- After the donors' deaths, their Estate sued for the funds
- The Court found the gift was *inter vivos*, so it took effect during the donors' lifetime and the Society could keep it
- To avoid unnecessary litigation, the donor and the charity should both obtain legal advice before making or accepting a significant donation

8. Series of Fraudulent Receipting Cases

- Seven Tax Court decisions on fraudulent receipting were released in November 2014
- These cases illustrate that the Tax Court is intolerant of any issues related to false receipting because it considers individuals responsible for their own tax returns
- These informal procedure cases were heard by the same judge and relate to the same donation scheme
- The judge stated that “fiscal disobedience is a societal concern” and that individuals cannot be protected by bad financial advice, misguided trust, or momentary lapses of judgment

9. *Scheuer v Canada* (Duty of Care)

- On January 20, 2015, CRA was unsuccessful in moving to strike an action at the Federal Court regarding a claim by a group of Canadian taxpayers that CRA was negligent in failing to adequately warn them about the consequences of participating in a tax shelter donation program
- This decision means that Canadian taxpayers may establish a limited duty of care against CRA in such situations
- The case has been allowed to proceed, although is not clear whether the taxpayers will ultimately succeed in establishing that CRA owes them a private law duty of care

Cases related to political activities of charities

10. *Re Greenpeace of New Zealand Incorporated*

- On August 6, 2014 the Supreme Court of New Zealand became only the second Commonwealth jurisdiction to hold that a political purpose can be a charitable purpose
 - The Court held that “political and charitable purposes are not mutually exclusive in all cases”
 - Follows the 2010 Australian decision in *Aid/Watch*
- The Court held that finding a public benefit “depends on the wider context” – and referred the case back to the body of first instance
- After the decision, the Charities Service in New Zealand issued a Guidance emphasizing how difficult it will be for a charity to establish a standalone political purpose as charitable in New Zealand

11. *The Human Dignity Trust v Charity Commission of England and Wales*

- On July 9, 2014, the Tribunal held that promoting and protecting human rights through strategic litigation is not a political purpose or activity
 - Upholding a citizen’s constitutional rights does not seek to change the law but rather seeks to enforce and uphold superior rights and as such is not political
 - Strategic litigation to enforce human rights will be seen as charitable where it involves a benefit to the individual as well as the community at large from interpreting such rights
- CRA’s stance is similar insofar as upholding human rights to further charitable purposes is seen as “undoubtedly beneficial to the public”

Cases related to advancement of religion and freedom of religion

12. *Humanics Institute v The MNR*

- On November 17, 2014, the Federal Court of Appeal (“FCA”) rejected the Humanics Institute’s application for charitable status because its proposed purposes did not constitute advancement of religion in the court’s opinion
- Leave to appeal was denied on April 23, 2015
- In its decision, the FCA
 - Found that the purposes were broad and vague
 - Relied on *Amselem*, a SCC constitutional case, which requires organizations to point to a “particular and comprehensive system of faith and worship”
 - Restated its approach from *Fuaran*, that to “simply make available a place where religious thought may be pursued” is insufficient

13. *Loyola High School v Quebec (Attorney General)*

- Both the majority and the concurring minority opinions provided a robust affirmation of freedom of religion, including the communal aspects of religion
- SCC ruled that requiring religious schools to teach their own religion objectively infringes religious freedoms
- The Court commented on secularism in considering how to balance freedom of religion with state values
 - The majority underlined that secularism does not mean excluding religion and, instead includes “respect for religious differences”
- The majority returned the matter to the Minister for reconsideration, while the minority would have ordered the Minister to grant Loyola an exemption

14. *Trinity Western University (“TWU”) v Nova Scotia Barrister’s Society*

- On January 28, 2015, the Nova Scotia Supreme Court held that the Nova Scotia Barrister’s Society did not
 - Have jurisdiction to deny accreditation of TWU’s law school and, consequently, deny TWU graduates of the ability to article in Nova Scotia
 - Reasonably consider the constitutional freedoms of TWU and its graduates
- The Court concluded that “the refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion”

Other cases

15. *Canada (AG) v Johnstone (Childcare Obligations)*

- On May 2, 2014, the Federal Court of Appeal confirmed that “childcare obligations” are included within the protected human rights ground of “family status”
- Employers must accommodate employees with childcare obligations or potentially face action under applicable human rights legislation
- Legal childcare obligations arise when
 - A child is under the individual’s care and supervision
 - The childcare obligation engages the individual’s legal responsibility for the child and the individual has made reasonable efforts to meet the obligations
 - The impugned workplace rule interferes in a manner that is more than trivial or insubstantial
- On January 19, 2015, the Ontario Superior Court of Justice applied *Johnstone* in *Partridge v Botony Dental*

16. *Tsimidis v Certified General Accountants of Ontario (Discipline Procedures)*

- On July 16, 2014, the ONSC found that CGA Ontario breached its duties of natural justice and procedural fairness and made an unreasonable decision in expelling an applicant from its membership
- Neither the written policies nor the procedure followed for disciplining the applicant were adequate given the standard of procedural fairness he was warranted
- This decision highlights the importance of organizations being informed of applicable procedural rights, creating disciplinary policies which give respect to these rights, and enforcing those policies appropriately

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