

Healthcare Philanthropy: Check-Up 2017

THURSDAY, JUNE 1, 2017



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Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2017
Half-Day Seminar, June 1, 2017

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Tab 1



Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2017
Half-Day Seminar, June 1, 2017

Agenda

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|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| 7:45 am – 8:25 am | Registration & Breakfast |
| 8:25 am – 8:30 am | Opening Remarks
<i>Terrance S. Carter / M. Elena Hoffstein</i> |
| 8:30 am – 9:15 am | Essential Charity Law Update
<i>Jacqueline M. Demczur, Partner, Carters Professional Corporation</i> |
| 9:15 am – 10:00 am | Practical Problems with Gift Planning
<i>M. Elena Hoffstein, Partner, Fasken Martineau</i> |
| 10:00 am – 10:20 am | Refreshment & Networking Break |
| 10:20 am – 11:05 am | Critical Issues Concerning Investment by Charities
<i>Terrance S. Carter, Managing Partner, Carters Professional Corporation</i> |
| 11:05 am – 11:50 pm | When Charities Go To Court: Is Your Charity Ready? Tips And Traps
<i>Jonathan F. Lancaster, Partner, Fasken Martineau</i> |
| 11:50 pm – 12:00 pm | Questions and Closing remarks
<i>Terrance S. Carter / M. Elena Hoffstein</i> |

Tab 2

Trusts, Wills, Estates and Charities

Members of the Trusts, Wills, Estate and Charities group practising in the **Charities and Not-For-Profit** sector provide legal services related to the effective creation, organization and ongoing governance and administration of charities and not-for-profit entities. We advise donors with respect to effective charitable giving as well as the establishment, maintenance and operation charities and not-for-profit entities.

Our **Estate Planning** services includes wills, domestic contracts, business succession planning, planned giving, powers of attorney and trusts. We can assist you with your responsibilities in the administration of an estate, a trust or if you are acting as a power of attorney. When your estate planning requires additional expertise, we are able to partner with other experts to ensure all your options are explored.

Our **Personal Tax Planning** practitioners offer a broad range of services to assist clients in developing effective strategies for minimizing taxes including probate taxes, within the framework of the will or estate plan. We can provide both cross border and international tax planning.

If you have a trust, will or estate related or a related dispute, we act as a fiduciary or as a beneficiary members of our **Estate Litigation** group can represent your interests in the pursuit of an effective solution.

Charities and Not-For-Profit

Every day people's lives are enriched by the work of charitable and not-for profit organizations. The role these organizations play in our society is growing. That growth has been accompanied by a growth in the regulation of these organizations and a greater scrutiny of their governance, including the actions of their directors and officers. The laws around fundraising, donations and legacy planning are complex. If you are involved in the management and operation of one of these organizations, our team of skilled lawyers can help you in understanding and complying with the law as it applies to the management and operation of your organization.

At Fasken Martineau, we work extensively with the charitable sector, providing legal services related to the effective creation, organization and ongoing governance and administration of charities and not-for-profit entities. We assist with the efficient maintenance of the legal affairs of the organization, including advising on administrative and governance matters, compliance and regulatory issues, taxation matters, directors' duties and obligations and members' rights.

Research has indicated that while most Canadians contribute to charities throughout their lifetime, very few continue this support through a gift in their will or estate plan; this is a missed opportunity. Consideration should be given to the tax advantages of testamentary charitable gifts as part of the estate planning process. The two most common types of planned gifts are bequests in wills and gifts of life insurance. Other types of donations include: pledges; payroll deductions; gifts in kind; charitable remainder trusts; charitable gift annuities; gifts of appreciated securities and bonds; in memoria and special occasion gifts. If your estate plan involves leaving a social capital legacy, we can assist you in effectively implementing this legacy.

We count among our clients a large number of hospitals, healthcare service agencies, professional governing bodies and associations, community service agencies, not-for-profit organizations and community foundations as well as private family foundations.

If you are in need of advice concerning the establishment of such an organization or the making of a charitable gift, our practitioners will take the time to understand your values and vision to ensure your legacy planning is fulfilled in a tax efficient manner.

Members of our group belong to professional bodies such as the Society of Trust and Estate Practitioners (STEP), Academy of Trusts and Estates (ACTEC), the Canadian Association of Gift Planners (CAGP) and the Association of Fundraising Professionals (AFP).

Estate Litigation

Members of our practice group have specialized expertise to assist in resolving contentious matters relating to wills, trusts and the administration of estates. We are able to provide effective guidance and, where appropriate, skilled counsel abilities to negotiate, mediate, arbitrate or litigate the matter. Our expertise is recognized by other members of the legal community and we often assist other lawyers in litigation matters concerning wills, estates and trusts and their administration.

Estate and Trust Litigation

We act for executors/administrators/trustees, heirs and beneficiaries, including charitable beneficiaries and persons who feel they have been wrongfully excluded from a share of an estate. We both prosecute and defend claims and seek court direction as best serves the needs of our clients.

We have extensive experience in matters concerning the validity of a will or trust where concerns arise about the maker's mental capacity, undue influence or knowledge or approval of the document. We also act on behalf of family members and dependants of a deceased who seek to vary a will under legislation that allows for the court to give a greater share of the estate to them than they have been given under the will. We act on matters where property has been transferred through joint tenancy or outright transfer during a person's lifetime that may not have been intended as a true gift and where a resulting trust arises. We act on matters where an unjust enrichment or compensation claim for benefits is made for benefits one person has provided to another.

We assist family members where a power of attorney appointment or a court appointment of a legal representative for an incapable adult is required to assist with the person's financial and legal affairs or personal care decisions. We also advise families where there are vulnerable elderly members who require financial protection and act to recover assets for persons who have suffered a loss because of financial abuse or improvident transfers of assets. Where a person is in a position of trust or serves as a fiduciary to another, we bring proceedings to recovery losses resulting from the breach of trust or breach of fiduciary duty.

Estate Administration

We advise estate trustees/executors/administrators as to their responsibilities and obligations in the administration of estates and trusts. This may include court applications to determine the appropriate heirs and beneficiaries of an estate and their respective entitlements (both where there is a will and where

a person dies leaving no will), to have persons appointed to administer estates and trusts and to replace executors and trustees appointed under a will with others. We also defend claims by creditors or claimants against an estate or bring claims by the estate for recovery of assets.

We can provide advice and seek court direction where there are questions regarding the proper interpretation of the document, where an amendment to the trust terms is required or where there are issues about how the administration of a trust or the estate is to be undertaken. We give advice on matters relating to the proper preparation of estate/trust accounts, the process of obtaining court approval of the estate/trust accounts, the appropriate remuneration for the trustee/executor/administrator and their ultimate discharge.

Regardless of the specific estate, will or trust issue, our strength is that we will apply our expertise to bring the most effective solution to achieve the goals of our clients.

Estate Planning

An effective estate plan requires a thorough understanding of your values and objectives for your wealth. Once we have worked with you to clarify what these are, our acknowledged leaders in estate planning can develop a well-designed plan to fulfill those values and objectives. The plan we develop with you may include wills, domestic contracts, a succession plan for your business, a charitable giving strategy to fulfill your social capital legacy, powers of attorney and trusts. We will work independently or with your other advisers to develop an integrated estate plan which meets your values and objectives, while minimizing the impact of income taxes and probate fees.

Our services also include assisting with the administration of the estate or trust including advising executors and trustees and, in many cases, acting as their agents in the day-to-day administration of the estate. We can also attend to fiduciary accounting, gathering information on the assets and liabilities of an estate, applying for grants of probate or letters of administration, making all necessary filings with the Canada Revenue Agency and distributing assets to beneficiaries.

The multi-jurisdictional property interests of our clients often require the development of a co-ordinated plan to leverage differing legal and tax regimes. Through our international offices and the reputation of individual members of our group, we have access to experts in other jurisdictions who can assist in this regard.

Our experience includes the following:

- Assisting clients with marriage contracts and family law planning;
- Advising on the use of trusts and powers of attorney to protect clients' assets and ensure safeguarding of those assets and care of clients in the event of long term illness or incapacity;
- Using tax-planned trusts and wills to accomplish one's primary personal and financial objectives while minimizing tax consequences;
- Advising on trust variations and migrations;
- Planning to effectively reduce probate taxes within the framework of the will or estate plan;
- Developing and facilitating succession plans to transfer family business between generations;

- Cross-border will and trust planning for clients who are U.S. citizens or dual residents of Canada and the United States or Canadians who own U.S. situs property;
- Assisting new immigrants to Canada to establish trusts to take advantage of the five-year Canadian tax holiday;
- Advise individuals in planning for emigration from Canada;
- Advising on the appropriate use of insurance;
- Advising on and implementing sophisticated estate freezing and income splitting schemes;
- Assisting executors and trustees with estate and trust administration, and executors' and trustees' accounts;
- Planning to deal with the succession of recreational properties (within and outside Canada) for both Canadian residents and non-residents and minimizing taxes with respect to such succession.

Members of our group belong to professional bodies such as the Estate Planning Council (EPC), Family Firm Institute (FFI), the Society of Trust and Estate Practitioners (STEP), Canadian Association of Family Enterprises (CAFE), Academy of Trusts and Estates (ACTEC), the International Academy of Trusts and Estates Lawyers, the Canadian Association of Gift Planners (CAGP) and the Association of Fundraising Professionals (AFP). When your estate planning requires additional expertise, we are able to partner with the firm's specialists in taxation, insurance and business law and can also assist in resolving estate-related disputes through litigation or mediation *see **Estate Litigation***).

Personal Tax Planning & Wealth Management

The enhancement, accumulation and preservation of wealth require a combination of acumen and insight. Through an organised and effective tax planning, you will reduce, minimize or defer your Canadian and global income tax burden. Our acknowledged leaders in the personal tax planning group can assist you and your advisers to realise and fulfill your objectives in a manner complying with your behaviours and respecting your values. We can assist you in the elaboration of strategies to minimize or defer the tax payable upon your death or by your estate or heirs, including probate taxes within the framework of your will and estate plan.

In the context of closely held companies, we can assist you in customizing your compensation, elaborating income splitting strategies, developing your retirement plan and putting in place other tax efficient plans. We can assist you in the orderly transfer of your wealth to family members, the planning of your business succession plan and its transfer to family members, employees or other persons.

The multi-jurisdictional property interests of our clients often require the development of a co-ordinated plan to leverage differing legal and tax regimes. Through our international offices and our experience in this field, you benefit from a broad network of professionals both in Canada and abroad who can assist you in all of your planning-related needs.

Our services also include assistance in responding to audit inquiries from tax authorities, negotiating on your behalf, preparing notices of objection and appeals against tax assessments and litigating tax disputes at all judicial levels, including provincial courts, the Tax Court of Canada, the Federal Court of Canada, the Federal Court of Appeal, and the Supreme Court of Canada.

Specific areas of personal tax expertise include the following services, in both domestic and international contexts:

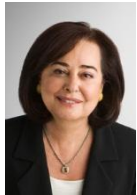
- Developing and facilitating succession plans to transfer family business between generations while promoting business' growth and family harmony;
- Advising and implementing sophisticated estate freeze and income splitting schemes;
- Advising on compensation and retirement plan, including deferred income plans and employment benefits;
- Structuring investments and transactions in a tax effective manner;
- Advising on derivatives, tax shelters investments and any other type of investment products or vehicles;
- Advising on the appropriate use of insurance and insurance based products;
- Advising on the use of trusts to minimize the income tax payable or to achieve non-tax objectives;
- Advising on the use of trusts and powers of attorney to ensure the safeguard's continuity of your assets in the event of long term illness or incapacity;
- Advising client on asset protection strategies in a tax effective manner;
- Litigating tax disputes or claims arising out of family business disputes;
- Assisting clients with marriage contracts and family law planning;
- Advising clients having assets or families in multiple-jurisdictions, such as recreational property;
- Advising on cross-border trust planning for US and Canadian citizens or dual residents;
- Structuring non-resident trusts for Canadians or foreigners;
- Establishing trusts for new immigrants in Canada, in order for them to take advantage of the five year Canadian tax holiday or other opportunities;
- Assisting emigrants to properly order their departure from Canada and take advantage of tax planning opportunities;
- Advising on charitable giving including the use of private charitable foundations (see ***Charities and Not-For-Profit***);
- Advising on estate planning (see ***Estate Planning***).

Assisting clients in these areas requires a thorough knowledge of challenges and obstacles to the ownership and transfer of property. This includes knowledge of tax law, family law, elder law, probate and estate law, wills and wills variation law, trust law, creditors' rights and remedies, corporate law, and the rules of litigation procedures, negotiation and advocacy skills.

Our knowledge enables us to fully understand the problems you are facing and to find the appropriate solutions for your particular situation, whether it is of a mundane or sophisticated nature, and to deliver those services in a highly professional and efficient manner.

Trusts, Wills, Estates and Charities

Toronto



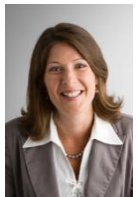
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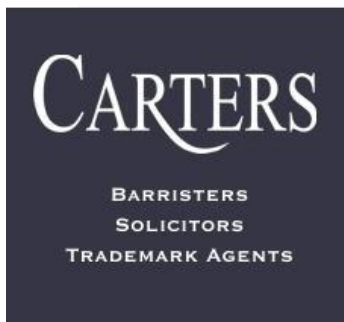
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Tab 3



CARTERS FIRM PROFILE

A FULL SERVICE LAW FIRM WITH A FOCUS ON CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Carters Professional Corporation (Carters) is one of the leading firms in Canada in the area of charity and not-for-profit law and is able to provide a full range of legal services to its charitable and not-for-profit clients, as well as to individuals, corporations and businesses. With offices and meeting locations in Toronto, Ottawa, Mississauga and Orangeville, Ontario, Carters provides assistance to clients across Canada and internationally with regard to all aspects of charity and not-for-profit law. The lawyers and staff at Carters are committed to excellence in providing clients with complete legal solutions for their unique needs.

WITH INTERNATIONAL RELATIONSHIPS

Carters has full access to specialized national and international legal services through its relationship with Fasken Martineau DuMoulin LLP (Fasken Martineau), an international business law firm of approximately 770 lawyers, as well as relationships with firms that specialize in tax exempt organizations in other countries. Terrance S. Carter of Carters also acts as legal counsel to the Charities Practice Group at Fasken Martineau. Through these professional relationships, Carters is able to provide its charitable and not-for-profit clients, as well as other clients, with specialized legal services as necessary.

PROVIDING 'PROACTIVE ADVICE'® TO CLIENTS

Carters strives to provide clients with 'Proactive Advice'® in our integrated approach to legal services. Our lawyers are committed to assisting clients in developing short-term and long-term strategic plans in order to avoid legal problems before they occur in all areas of the law. As part of this commitment, Carters has made numerous resource materials available through its websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.

WITH SOLICITORS TO HELP YOU AVOID LEGAL LIABILITY

The focus of the solicitors at Carters is in serving charities and not-for-profit organizations through an effective legal risk management approach to the practice of law, and providing legal services in the areas of charity and not-for-profit law, including charitable registrations, fundraising, taxation, and the development of national and international structures, as well as corporate law, contracts, real estate and leasing, franchising law, intellectual property and technology, i.e. trade-marks and copyrights, labour, employment, human rights, estates and trusts, tax audits, opinions and appeals, and the evolving area of

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privacy law and anti-spam. Four of the lawyers at Carters have been recognized by both *Lexpert*, and three have been recognized by *Best Lawyers in Canada*, as leaders in their fields in Canada.

AND A LITIGATION DEPARTMENT TO ASSIST YOU WHEN PROBLEMS ARISE

The litigation lawyers at Carters are experienced in representing clients before all levels of the federal and Ontario courts, before various administrative tribunals and in mediation and other alternative dispute resolution proceedings. Carters' litigation practice encompasses all aspects of litigation and dispute resolution, including mediation, human rights litigation, civil litigation, criminal, construction liens, employment, family, corporate commercial, appeals, personal injury, product liability, intellectual property, and real estate disputes, as well as undertaking litigation audits, policy reviews and liability risk management in an effort to limit exposure to liability for clients.

CONVENIENCE AND ACCESSIBILITY

The lawyers and staff at Carters strive to be as accessible to our clients as much as possible. We can be reached by telephone, fax or e-mail, with a complete listing of our staff and lawyers' contact information available at www.carters.ca, as well as through our office phone system. Client meetings can be held by telephone conferences, by appointment at our offices in Toronto, Ottawa, Mississauga, or Orangeville, or at the client's location as required. When necessary, evening and weekend appointments are possible.

PUBLICATIONS & RESOURCES

In accordance with Carters' commitment to keep clients abreast of changes in the law, the firm regularly publishes articles, checklists, newsletters, webinars and seminar materials concerning a number of areas of the law. All of these materials are made available free of charge at our websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca. To subscribe to our mailing list, please go to our websites and click on the button "Get on our Mailing List" to receive our monthly Charity Law Update – Updating Charities and Not-for-Profit Organizations on recent legal developments and risk management considerations.

EXPERTISE IN CHARITY AND NOT-FOR-PROFIT LAW

Carters has developed extensive expertise in charity and not-for-profit law in support of its work with charities through participation in various forums for professional development, including:

- ♦ Development and maintenance of the websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca;
- ♦ Authoring the *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Carswell), with annual updates;
- ♦ Co-editing *Charities Legislation & Commentary*, 2017 Edition (LexisNexis), published annually;
- ♦ Co-authoring *Branding and Copyright for Charities and Non-profit Organizations* (LexisNexis, 2014);
- ♦ Co-authoring *Branding & Trademarks Handbook for Charitable and Not-For-Profit Organizations* (LexisNexis Butterworths, 2006);

- ◆ Contributing to *The Management of Nonprofit and Charitable Organizations in Canada*, 3rd Edition (LexisNexis, 2014);
- ◆ Contributing to the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada, 2002);
- ◆ Contributing articles on charity and not-for-profit legal issues for various periodicals, including The Lawyers Weekly, Law Times, The Philanthropist, Canadian Fundraiser, Canadian Association eZine, Canadian Journal of Law and Technology, U.S. Journal of Tax Exempt Organizations, The International Journal of Not-for-Profit Law, The International Journal of Civil Society Law, Estates and Trust Quarterly and The Bottom Line, and The Canadian Bar Association International Business Law Journal;
- ◆ Publication of newsletters: Charity Law Bulletin, Charity Law Update, Church Law Bulletin, and the Anti-Terrorism and Charity Law Alert, distributed across Canada and internationally by email;
- ◆ Speaking nationally and internationally at seminars and conferences for the Law Society of Upper Canada, the Canadian Bar Association, the Ontario Bar Association, The National Society of Fund Raising Executives, The Canadian Association of Gift Planners, the Society of Trust and Estate Practitioners Canada, the Canadian Society of Association Executives, the Canadian Cancer Society, Institute of Corporate Directors, Pro Bono Law Ontario, The American Bar Association, The Canadian Counsel of Christian Charities, The Christian Legal Fellowship, The Canadian Tax Foundation, Osgoode Hall Law School, Insight Information, the University of Ottawa Faculty of Common Law, Ryerson University's Voluntary Sector Management Program, the University of Waterloo, the Ontario Institute of Chartered Accountants, the University of Manitoba Law School, McMaster University, the University of Iowa, and the New York University School of Law, and the Chartered Professional Accountants (CPA) of Canada;
- ◆ Participating in consultations with Canada Revenue Agency (CRA) and the Public Guardian and Trustee on charitable matters; and as agent of the Attorney General of Canada and outside counsel to the Corporate Law Policy Directorate of Industry Canada to provide legal advice on the reform of the *Canada Corporations Act*;
- ◆ Hosting the annual "Church & Charity Law™ Seminar" in Toronto for 1,000 charity and church leaders, members of religious charities, accountants and lawyers; the annual "Charity & Not-for-Profit Law Seminar" in Ottawa for more than 400 members of the sector, and co-hosting the annual "Healthcare Philanthropy Seminar" with Fasken Martineau;
- ◆ Serving as past members of Canada Revenue Agency's Charities Advisory Committee, the Technical Issues Working Group of CRA's Charities Directorate representing the Canadian Bar Association (CBA), the Uniform Law Conference of Canada's Task Force on Uniform Fundraising Law, the Liability Working Group of the Insurance Bureau of Canada and Voluntary Sector Forum, the Government Relations Committee of the Canadian Association of Gift Planners; the Anti-terrorism Committee and the Air India Inquiry Committee of the CBA, and in consultations with Finance Canada and the Province of Ontario, and the Social Enterprise Panel Consultation for the Ministry of Consumer Services; and
- ◆ Participating as founding members and chairs of the Canadian Bar Association and Ontario Bar Association Charity and Not-for-Profit Law Sections, as well as co-founder of the Canadian Bar Association annual Charity Law Symposium.

SPECIFIC LEGAL SERVICES FOR CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

As a law firm experienced in serving charities and not-for-profit organizations, Carters is able to provide specialized legal services in the following areas of charity and not-for-profit law:

Anti-bribery Compliance	Gift Acceptance Policies
Anti-terrorism Policy Statements	Human Rights Litigation
Charitable Audits	Incorporation and Organization
Charitable Organizations & Foundations	Insurance Issues
Charitable Incorporation & Registration	Interim Sanctions
Charitable Trusts	International Trade-Mark Licensing
Church Discipline Procedures	Investment Policies
Church Incorporation	Legal Risk Management Assessments
Continuance Under the CNCA	Litigation and Mediation Counsel
Corporate Record Maintenance	National and International Structures
Director and Officer Liability	Privacy Policies and Audits
Dissolution and Wind-Up	Religious Denominational Structures
Domain Name Management	Sexual Abuse Policies
Ecological Gifts	Special Incorporating Legislation
Employment Issues	Tax Compliance
Endowment Agreements	Tax Opinions and Appeals
Foreign Charities Commencing Operations in Canada	Trade-Mark and Copyright Protection
Fundraising and Gift Planning	Transition Under the ONCA

EXPERIENCE WITH CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

Some of the categories of charities and not-for-profit organizations that Carters has acted for in relation to charity and not-for-profit law include the following:

Churches, Dioceses and Related Religious Organizations
Ecological Charities
Educational Institutions in Canada and Internationally
Environmental Organizations
Financially Troubled Charities & Their Directors
Government Agencies
Health Care Organizations
Hospitals and Hospital Foundations
International Missionary Organizations
Lawyers Requiring Counsel on Charitable Matters
Museum Foundations
National and International Charitable Organizations

National Arts Organizations
National Medical Research Foundations
National Religious Denominations
Not-for-Profit Housing Corporations
Not-for-Profit Organizations
Parallel Foundations
Religious and Secular Schools
Religious Broadcasting Ministries
Safety Regulatory Organizations
Seminaries and Bible Colleges
Temples, Synagogues and Other Religious Organizations
Violence Prevention Organizations
Universities and Colleges

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Ottawa Office

117 Centreponte Drive, Suite 350
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Toronto Meeting Location

Brookfield Place - TD Canada Trust Tower
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Carters Professional Corporation / Société professionnelle Carters

Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce

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CARTERS

BARRISTERS
SOLICITORS
TRADEMARK AGENTS

ProActive Advicetm



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Tab 4

 BARRISTERS SOLICITORS TRADEMARK AGENTS	Carters/Fasken Martineau Healthcare Philanthropy Checkup 2017 Toronto - June 1, 2017
<h2>2017 Essential Charity Law Update</h2> <p>By Jacqueline M. Demczur, B.A., LL.B. jdemczur@carters.ca 1-877-942-0001</p> <p>© 2017 Carters Professional Corporation</p>	
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<h3>OVERVIEW OF SELECTED TOPICS</h3> <ul style="list-style-type: none">• Recent Report on Political Activities• 2017 Federal Budget Highlights• CRA Publications and Website Updates• Recent Tax Decisions, Rulings & Interpretations Involving Charities• Corporate Law Update• Other Federal Legislation• Provincial Legislation Update• Other Case Law of Interest	
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A. Sweeping Changes Recommended in the Report on Political Activities

- On May 4, 2017, Canada Revenue Agency (“CRA”) published on its website the Report of the Consultation Panel on the Political Activities of Charities
- It states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for changes to the current administrative and legislative framework governing “political activities” by charities
- It provides four recommendations:
 1. Revise CRA’s administrative position and policy to enable charities to fully participate in public policy dialogue and development.

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2. Implement changes to CRA’s administration of ITA provisions governing charities in the following areas: compliance and audits, appeals, and communication and collaboration
 3. Amend the Income Tax Act (“ITA”) by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes
 4. Modernize the legislative framework governing the charitable sector
- CRA has committed to providing a formal response to the Consultation Panel’s recommendations by the end of June 2017

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B. 2017 FEDERAL BUDGET HIGHLIGHTS

- On March 22, 2017, federal Finance Minister Bill Morneau tabled the second budget of the Liberal majority Federal Government (“Budget 2017”)
- Subsequent legislation to implement certain portions of Budget 2017 was introduced on April 11, 2017 by Bill C-44, *Budget Implementation Act, 2017, No. 1*, that received second reading and was referred to the Standing Committee of Finance on May 9, 2017
- Budget 2017 contained several measures intended to protect gifts of ecologically sensitive land under the ecological gifts program, and repealed the “additional” deduction available to corporations that donate medicine to eligible registered charities

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- Budget 2017 focused on providing funding commitments to certain parts of the charity and not-for-profit (“NFP”) sector, and proposes amendments to strengthen Canada’s anti-money laundering and anti-terrorist financing regime
- **Ecological Gifts** – Proposed changes to apply to transactions that occur on or after March 22, 2017:
 - Where an Ecogift is transferred between organizations for consideration, the transferee shall be subject to a 50% tax if the transferee changes the use or disposes of the property without the consent of the Minister of ECCC (the “Minister”)
 - The Minister has the ability to determine if proposed changes to the use of lands would degrade conservation protections

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- To extend Ministerial approval requirements, on a gift-by-gift basis, to recipient municipalities, municipal and public bodies performing a function of government
- Private foundations will no longer be eligible to receive Ecogifts in order to prevent potential conflict of interest
- To encourage more Ecogifts in Quebec, certain donations of personal servitudes may qualify as Ecogifts if they meet a number of conditions

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- **Elimination of Specific Tax Credits and Deductions:**
 - Repeal of additional corporate donation deductions on medicine for international aid
 - Expiry of First-Time Donor's Super Credit (2017)
- **Amendments to Anti-terrorism Legislation:**
 - Intend to introduce amendments to "strengthen" the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to: Expand the list of disclosure recipients to include Dept. of National Defence and Canadian Armed Forces; Support more effective intelligence on beneficial owners of legal entities; and Make various technical and other changes

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- **Increased Funding for Charitable and NFP Sector**
- Pledge for spending on infrastructure and programs:
 - **National Housing Strategy** - Invest more than \$11.2 billion over 11 years on variety of programs
 - **Protection for Communities at Risk** - \$5 million over 5 years, as of 2017-2018, for “Communities at Risk: Security Infrastructure Program”
 - **Investments in Research** - \$340 million in support for equipment and various facilities for post-secondary institutions, research hospitals and other NFP institutions
 - **Investments in Youth and Education** - \$38 million over four years beginning in 2018-2019 for Pathways to Education Canada

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C. CRA News and Publications

1. Report on the Charities Program 2015-2016

- Released on December 30, 2016, this Report included:
 - Statistics on the charitable sector, applications for charitable registration, audit outcomes, revocations of charitable registration and the objections process
 - A review of the Directorate’s outreach and engagement activities, such as improving its webpages, expanding its use of social media, and developing and reviewing its guidance products
 - Updates on the Charities Modernization Project to improve online filing for applicants for charitable status & registered charities
 - <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/nnlrprt/2015/rprt-eng.html?=&undefined>

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Audit Outcomes in 2015-2016

No Change	40
Education Letter	444
Compliance Agreement	111
Voluntary Revocation	22
Penalties and Suspensions	4
Notice of intent to Revoke Issued	21
Annulment	59
Other (includes pre-registration/Part V audits)	25
Total	726
Revocations as a result of an audit	20

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2. CRA's New Cause-related Marketing Webpage

- On February 11, 2017, CRA introduced a new webpage to explain Cause-related Marketing - a fundraising activity where a registered charity (or other qualified donee) works with a for-profit entity to promote the sale of the for-profit's items/services on the basis that part of the revenues will be donated to the charity
- To issue an official donation receipt, the charity must be able to calculate the value of any advantage the donor (e.g., for-profit entity) received, which is subtracted from the donation to calculate the eligible amount of the gift
- If the advantage is not more than \$75 or 10% of the gift, the charity does not need to subtract those amounts to issue a receipt. If the advantage is more than 80% of the gift, the charity cannot issue a donation receipt

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3. New Privacy Disclosure in Form T2050

- On February 21, 2017, CRA updated the T2050 (Application to Register a Charity Under the ITA) with a new privacy disclosure indicating that personal information is being collected under the ITA's authority to validate the identity and contact information of directors, officers and authorized representatives
- If charitable status is approved, CRA is permitted to make the form and copies of the registration letter available to the public, except confidential information in Part 5 and 6 of Form T2050
- If registration is denied, the information will not be provided to the public
- Personal information may also be shared with other government departments and agencies

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4. Income Tax Treatment for Monies Paid to Support Refugees

- On March 3, 2017, CRA released technical interpretation 2016-0651661E5 – Payments to Syrian refugees by a church
- A fund was established to provide support to a Syrian family since their arrival in Canada to assist with their living expenses
- CRA noted that paragraph 56(1)(u) of the ITA requires social assistance payments received in the year and made on the basis of means, needs, or income test are to be included in a taxpayer's income
- Such income will be offset by a matching deduction under paragraph 110(1)(f) of the ITA, therefore there will be no income tax implications

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D. RECENT TAX DECISIONS, RULINGS & INTERPRETATIONS INVOLVING CHARITIES

1. CRA Does Not Owe Duty of Care for Disallowed Tax Shelters

- In *Deluca v The Queen* decision (June 2016), the Plaintiff filed a claim against the Crown and two CRA employees for failing to take prompt actions to warn the public about problems they knew of with a tax shelter and the risks involved in dealing with them
- Ontario Superior Court rejected this claim stating that, the ITA does not impose a duty on the Minister to administer the registration and supervision of registered charities in order to protect taxpayers, and that there is no duty to warn taxpayers away from participating in tax shelter schemes that prove unsuccessful

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2. FCA Holds That Prevention of Poverty is Not a Charitable Purpose

- In *Credit Counselling Services of Atlantic Canada Inc. v Minister of National Revenue* (June 2016), FCA found that the “prevention of poverty” was not charitable at law
- The FCA stated, in order to satisfy the requirement that a purpose is for the relief of poverty, the person receiving the assistance must then be in poverty
- Absent “an act of Parliament to add prevention of poverty as a charitable purpose”, it was not possible for the FCA to take such a step on its own
- The Court confirmed that the Notice of Annulment would be assessed by the same review standard as a revocation of charitable status

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E. CORPORATE LAW UPDATE

1. Last Train for CNCA

- On February 13, 2017, Corporations Canada released a notice advising that all federal corporations created under Part II of the *Canada Corporations Act* (“CCA”) must complete their CNCA continuance by July 31, 2017
- Corporations, including registered charities, that do not complete this transition will be dissolved. In the case of registered charities, dissolution could lead to the revocation of their registration
- Once all Part II CCA corporations have continued or been dissolved, Part II of the CCA will be repealed
- Articles of continuance must be prepared and then filed in advance of the deadline in order to get the certificate of continuance issued on time

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2. Technical Amendments to the CNCA

- On September 28, 2016, the Minister of Innovation, Science and Economic Development tabled Bill C-25, *An Act to Amend the Canada Business Corporations Act, the Canada Cooperative Act, the Canada Not-for-profit Corporations Act and the Competition Act*
- Bill C-25 includes minor technical amendments for CNCA corporations including:
 - New definition of person who has become “incapable”;
 - New section requiring the Director to publish a notice of certain decisions by the Director under the CNCA, including when a corporation is deemed non-soliciting, when a corporation is permitted to delay calling of AGMs and when the Director relieves the corporation from certain parts of the CNCA

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3. Update on Ontario *Not-for-Profit Corporations Act*

On September 17, 2015, the Ontario Ministry of Government and Consumer Services announced that ONCA cannot come into force until:

- The Legislative Assembly passes a number of amendments to the legislation and related acts
- Technology is upgraded to support these changes
- The Ontario government will bring the ONCA into force at the “earliest opportunity and will provide the sector with at least 24 months’ notice before proclamation”
- This means that proclamation cannot occur any earlier than late 2019 or 2020
- Organizations that need to update their by-laws and letters patent should move forward under OCA instead of waiting for implementation of the ONCA

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4. Proxy Form for Members’ Meeting Revised by Court:

- In *Jacobs v Ontario Medical Association decision* (August 2016), the Ontario Superior Court reviewed issues related to a members’ meeting to ratify/reject agreement with Ministry of Health and Long Term Care
- Court ordered proxy form be revised because it was unhelpful and unfair, e.g., it contained one restriction to compel a vote for or against 1 of 3 resolutions and recommended vote “for” one resolution with no similar recommendation for other resolutions
- Court held that it was “far fairer” to provide no instructions/no recommendations for three resolutions, or to provide instructions but no recommendations
- Underscores that courts will intervene if a proxy will compromise the fair conduct of a meeting

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Additional Issues Addressed in *Jacobs*

- The Court disagreed with the Applicant members' submission that notice of the members' meeting contravened OMA's by-laws
- The Court refused the request to obtain a membership list including members' phone numbers because the OMA had no obligation to provide said information and appropriate information had already been provided
- The Court refused to appoint a neutral chair to preside over the meeting because a strong case for court intervention had not been made out
- A tentative deal between Ontario doctors and the Province of Ontario may lead to a vote on June 17, 2017 regarding the process by which future contract disputes would be subject to binding arbitration

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5. Court Intervention in By-law Dispute

- In *Bhadra v Chatterjee* (July 2016), a dispute arose between minority and majority factions of the board of trustees of a NFP organization over the amendment of corporate by-laws upon transitioning to the CNCA
- The applicant brought a motion seeking to stop the Respondents from calling a meeting of the board to vote on the proposed new by-laws, and for the Court to redraft the by-laws, or alternatively to be granted leave to commence a derivative action
- The Court allowed the application, in part, "on the basis that the Respondents did not act in good faith in the manner in which they retained counsel to draft new corporate by-laws and invited corporate counsel to a meeting of the board...without notice to the applicant"

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6. Court Resolves Disputes between Struggling “Factions” of a Not-for-Profit Club

- *Colgan v Canada’s National Firearms Association* (“Club”) (July 2016), involved an internal dispute between two factions within a corporation operating under the CNCA
- The issue between the two factions included carrying on an “unsuccessful coup” to replace the president of the Club, revoking membership of certain directors of the Club, thereby removing them from their board seat, passing new by-laws prohibiting membership proxy voting and restricting membership to certain persons
- The Court stated that, “[c]ourts do not intervene in a club’s affairs unless the club is guilty of breaching its rules or the rules of natural justice, or if there is bad faith in decision-making”

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- The Court rejected directing the Club to comply with the laws of Canada and the Club’s by-laws, as they were already required to do so
- The Court held that the appointment of 3 replacement directors by the board was invalid, as the Club’s by-laws required a by-election to be held to fill the vacancies
- The Court held that ss. 126(3) of the CNCA, which provides “[n]o person shall act for an absent director at a meeting of directors”, is not “a ban on proxy votes”, although not clear what this means
- The Court also refused to appoint an investigator, since under s. 242 of the CNCA, there must be evidence of actions that are “oppressive or unfairly prejudicial to or that unfairly disregard the interests of a member or debt obligation holder”

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F. Update on Canada's Anti-Spam Legislation

- On July 1st, 2017, an important provision of Canada's anti-spam legislation ("CASL") will end while another one will come into force
 - 1. The three year transition period of CASL will end; and
 - 2. The private right of action will come into force, which could lead to class action lawsuits.
- As a result of the transition period ending, charities relying on implied consents arising from existing business or non-business relationships created prior to July 1, 2014 have only a brief window to obtain express consent from these individuals

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G. PROVINCIAL LEGISLATION UPDATE

1. Ontario Legislation on Forfeited Property:

- New legislation passed to address situations where corporations, charities and not-for-profits ("NFP") dissolve without properly disposing all their assets
- New legislation to come into force December 10, 2016:
 - *Forfeited Corporate Property Act, 2015* ("FCPA")
 - *Escheats Act, 2015* ("EA")
- The FCPA will give the Minister of Economic Development, Employment and Infrastructure sole jurisdiction over forfeited corporate real property
- The PGT under the EA will retain discretionary authority to take possession, and dispose of, forfeited corporate personal property, and the property of heirless deceased persons
- The new legislation will also change the processes by which claimants can recover forfeited corporate property, including failure to continue under the CNCA

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2. Ontario Corporations Now Required to Keep Records of Land Ownership

- On December 10, 2016, certain provisions of Bill 144, *Budget Measures Act, 2015* came into force, creating new record keeping obligations for Ontario corporations by way of amendments to the *Ontario Business Corporations Act*, the *Ontario Corporations Act*, and the ONCA (when it comes into force)
- Ontario corporations are now required to maintain a register of ownership interests in land in Ontario at its registered office. This includes:
 - The identity of each property in Ontario in which the corporation possesses an “ownership interest”;
 - The date on which the corporation acquired the property and, if applicable, the date on which it disposed of it; and

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- A copy of any deed, transfers or similar documents that contain the municipal address, the registry or land titled division and the property identifier number, the legal description, and the assessment roll number of each property listed on the register, if any
- “Ownership interest” is undefined thereby implying these measures could extend to both legal and beneficial ownership in real property, and possibly interests in property by way of lease or other arrangement
- Corporations incorporated after December 10, 2016, must comply with the new recordkeeping requirements immediately
- For corporations incorporated prior to December 10, 2016, they will have two years to comply with the new requirements

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3. Amendments to Ontario Lobbyists Registration Act

- On July 1, 2016, amendments to the *Ontario Lobbyists Registration Act, 1998* (“OLRA”) took effect
- Under OLRA, lobbying defined as a paid individual communicating with a public office holder in order to influence a decision with regards to legislation, policy, programs, decisions of the Executive Council, or financial benefits from the Crown
- “In-house lobbyist” is redefined in the OLRA to include any organization, including a charity or not-for-profit, which had employees collectively spending 50 hours a year or more on lobbying

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- Where threshold met, then organization must register, with the duty to register being placed upon the senior officer of the organization, not an individual
- A section was added granting the Integrity Commissioner of Ontario investigative powers for matters of suspected non-compliance
- Punishment for committing an offence was increased to a fine of not more than \$25,000 for the first offence and not more than \$100,000 for subsequent offences
- The amended rules provide protection to any person who discloses information to the Registrar or gives evidence in a proceeding or investigation by prohibiting various forms of retaliation (e.g., “whistle blower” protection)

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4. Implications of the *Patients First Act* in Ontario

- The *Patients First Act* (“*Patients First*”) received Royal Assent on December 8, 2016
- Predominantly consisting of amendments to the *Local Health System Integration Act, 2006* (“LHSIA”), *Patients First* expands the role of the Local Health Integration Networks (“LHINs”) as part of the government’s plan for improving the provincial health system to achieve the following:
 - support patient-centred care;
 - promote health system planning and integration; and
 - improve access to high quality health services

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- The role of the LHINs has been broadened to include:
 - primary care, hospices and physiotherapy clinics
 - the operations of the Community Care Access Centres (CCACs) are transferred to LHINs and LHINs take over responsibility for home care
 - LHINs are given increased oversight over “health service providers” and can fund and impose service accountability agreements on them
- Definition of health service provider remains unchanged: A person or entity approved under the *Home Care and Community Services Act, 1994* (HCCSA) to provide services (ss. 2(2)), with only NFP entities able to be approved under HCCSA [s. 2(1)(a), s. 5(1)]

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- However, new LHSIA ss. 2(4) excludes entities from which a LHIN **purchases** “community services” from the definition of health service provider
- Before *Patients First*, LHINs could only **fund** services and only health service providers could receive funding
- This section may mean that suppliers of **purchased** services need not meet the same requirement as **funded** suppliers must meet – e.g., that they do not have to be a NFP
- The exclusion for purchased services may also apply to the providers who currently supply services to CCACs pursuant to the template CCAC service agreements
- *Patients First* repeals the *Community Care Access Corporations Act, 2001* and adds Part V.1 to LHSIA, creating the framework for the transfer of responsibilities from the CCACs to the LHINs

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- LHSIA also give the Ontario Minister of Health and Long Term Care (the “Minister”) the power to order the transfer of all the assets, liabilities and employees of:
 - a CCAC to the LHIN within the same geographic boundaries (ss. 34.2(1)(a)(b) and 34.4(1);
 - the Ontario Association of Community Care Access Centres (“OACCAC”) to a new NFP entity incorporated to provide shared services to the LHINs (sections 39 and 40)
- The LHINs are given various broad oversight powers over health service providers where they consider it to be in the public interest to do so including: (1) power to issue Operational/Policy Directives, s.20.2(1); (2) Power to appoint Investigators, s.21.1(1); and (3) Power to appoint Supervisor, s.21.2

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- A LHIN **may** consider any matter it sees relevant in determining the public interest including:
 - quality of health service provider's management and administration and care and treatment of patients;
 - proper management of the health care system;
 - availability of financial resources for management and delivery of health care services; and
 - accessibility to health services in specific geographic area where health service provider is located;

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5. OHRC Position on Medical Documentation

- On February 1, 2017, the Ontario Human Rights Commission released the "OHRC policy position on medical documentation to be provided when a disability-related accommodation request is made"
- Intended to not only cover employment situations in cases where an employee is seeking reasonable accommodation, but also Code-related accommodation in the areas of housing and services (e.g., education)
- Information which is not within the accommodation providers' right to know includes: "the cause of the disability, diagnosis, symptoms or treatment, unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed"

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H. OTHER CASE LAW OF INTEREST

1. “Armchair Rule” Used by Court to Determine Whether a Gift was an Endowment or Expendable

- In *Paul Sugar Palliative Support Foundation v Creighton Estate* (February 2017), the Supreme Court of British Columbia (“BCSC”) was asked to determine whether a testamentary gift constituted a capital endowment or was expendable
- In its interpretation, the BCSC relied upon the “armchair rule”, being the rule where “the court has to endeavor to place itself in the position of the testator at the time when the last will was made, and give due weight to the circumstances”
- The BCSC found that testator intended to give the gift without limitations, and that the term “capital” was not intended to limited how the gift was to be used, despite the gift’s initial appearance as an endowment based on the Will and the Deed of Gift referenced

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2. Alberta Court of Appeal Affirms Court’s Jurisdiction to Review Unfair Internal Discipline

- On September 8, 2016, the Alberta Court of Appeal (“ABCA”) in *Wall v Judicial Committee for the Highwood Congregation of Jehovah’s Witnesses* affirmed that courts have jurisdiction to review decisions where discipline or expulsion is carried out contrary to natural justice principles
- This case involved the expulsion of Mr. Wall, for “alleged wrongdoing involves drunkenness”
- The ABCA noted that Mr. Wall was not provided with details of the allegations against him, an explanation of the discipline process or any written reasons for the decision for him to be expelled
- On April 13, 2017, the Supreme Court of Canada granted leave to appeal in this case

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3. Social Worker Pleads Guilty to Personal Health Information Violation

- *R v Barnim* (February 2017), was an unreported privacy case that dealt with a violation of the *Personal Health Information Protection Act, 2004* (“PHIPA”)
- Ms. Barnim was completing a co-op placement with a local health care team that held personal health information for 10,000 patients
- She pled guilty to one count of violating s. 72(1) of PHIPA (which provides that “[a] person is guilty of an offence if that person, (a) willfully collects, uses or disclosures personal health information...”)
- The single count refers to a specific day in which Ms. Barnim accessed five individuals’ information without authorization. She was ordered to pay a \$20,000 fine and a \$5,000 victim surcharge

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Testamentary Charitable Giving



M. Elena Hoffstein, Partner



VANCOUVER CALGARY TORONTO OTTAWA MONTRÉAL QUÉBEC CITY LONDON JOHANNESBURG

1

Agenda



1. Administration Issues with Estate Donations
2. Gifts of Private Company Shares on Death
 - RDTOH
 - Life insurance and CDA Account
3. Alter Ego Trusts/Charitable Remainder Trusts
4. Gifts through trusts



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Administration Issues with Estate Donations



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Administration Issues for Estate Donations



Estate Donations

- New rules change the administration of estate due to requirement to transfer property to claim donation

Issues:

- Timing of first distribution to align with Terminal T1
- Interest on payment of tax
- Valuation of in-kind distributions
- Gifts from shared estate residue
- Provincial Tax Credit Mismatch



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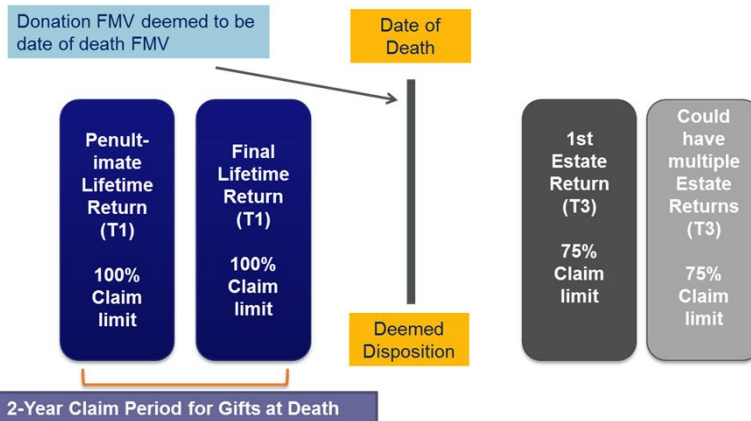
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Estate Donations



- Estate Donation regime shifts taxation from date of death per 118.1(5) to date of receipt by the charity
- Estate donations no longer deemed made by individual immediately before death but by estate at time transfer to charity
- Graduated Rate Estate must transfer donation within **60 months** of death to receive extended claim period
- Deemed disposition at death still applies
- Tax receipt is issued for fair market value (FMV) of amount received
- Property transferred must be property held by deceased at death or property substituted therefor - eliminates borrowing for donation

Gifts by Will, etc. Pre-2016



Graduated Rate Estate



- Graduated rate estate (GRE) is an estate (i.e., is not a trust created under an individual's Will)
- What is a GRE?
 - an estate that arises on and as a consequence of the death of an individual
 - qualifies as a testamentary trust (as defined in the Income Tax Act (Canada))
 - exists for no more than 36 months from the date of the individual's death
 - provides the social insurance number of the deceased individual on the estate's tax return
 - designates the estate/trust as a GRE on its first estate tax return that ends after 2015 (and no other estate/trust designates itself as a GRE of the deceased individual)



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Graduated Rate Estate (cont'd)



- Why is GRE status for an estate important?
 - access to graduated tax rates on income earned and retained in the estate
 - no income tax instalment obligations
 - exemption from alternative minimum tax
 - off calendar year end permitted
 - access to subsection subsection 164(6) and 112(3.2) planning
 - access to new flexible donation credit rules for donations made in will or by the estate (for deaths after 2015)
 - nil capital gains inclusion for donation of publicly-listed shares on death (for deaths after 2015)



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60 Months



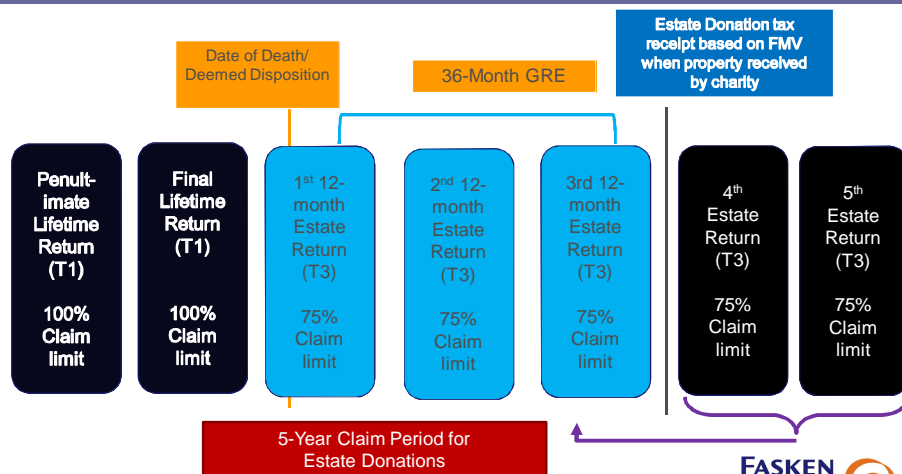
- January 15, 2016 change
- GRE must transfer donation within **60 months (5 years)** of death to receive maximum claim period
- Two treatments:
 1. Donations made within 36-month GRE may be claimed over up to five years: Final two lifetime returns and 36-months of GRE
 2. Donations made in the 24-months after the GRE may be claimed in two final lifetime returns, the estate return in the year of donation and carried back to 36-months of GRE

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Estate Donations *Post-2016 If made by GRE or 24 Months thereafter*



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Timing of First Distribution



- Terminal T1 must be filed within 12 months of death
- Under pre-2016 rules, executor could claim donation on Terminal lifetime T1 return if the gift was in will – donation did not need to be delivered
- New Estate Donation rules requires delivery to the charity for the donation to be claimed
- Executors need to make estate distributions faster to avoid refiling taxes
- Charities may get money faster
- Executors could see increased tax filing costs, complexity and liability for costs
- Can estate deliver donation and claim donation tax credit before estate files its return of income for first taxation year? – CRA says yes



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Interest on Payment of Tax



- Taxes are owed at date of death, but tax credit is not available until payment of gift to charity
- If Terminal T1 is filed without full gift being claimed will there be interest on the tax owed? Yes
- CRA said they will **likely** continue to allow gifts with value that can be determined to be claimed in Terminal T1...
- Again, timing mismatch will lead to additional estate tax filings
- CRA **did confirm** that interest charges would be reversed in subsequent filings
- 2017 Tax Guide will address the mechanics



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Valuation of In-kind Donations



- Assets may fluctuate in value after death of donor
- Deemed disposition of capital property in final T1 based on date-of-death values
- Estate Donation FMV based on tax of transfer – may be greater or less than DOD value
- Donations of public securities and other property exempt from capital gain tax if donation made by GRE or within 24 months thereafter



Gifts from Shared Estate Residue



- A charity may share the residue on an estate with one or more individuals
- Pre-2016, value of gifts from estate revenue was valued at date of death and claimed on two final lifetime returns
- Under post-2016 rules, a share in the residue of an estate may create an “estate donation loop” leading to multiple tax filings
- Tax savings may be shared with individual beneficiaries and lead to additional distributions to charity within 60 months
- Additional donations to charity, but may produce estate delays, costs and multiple tax filings



Provincial Tax Credit Mismatch



- Since 2015/16 , Ontario, Quebec, Yukon and New Brunswick now have higher top marginal tax rate than top donation tax credit rate
- For example, Ontario marginal rate is 53.53%, but donation tax credit rate of 50.41% for income over \$220,000
- With estate donations, tax credit will not eliminate tax in final two lifetime returns
- No longer possible to eliminate all tax at death in these four provinces



Gifts of Private Company Shares on Death



Post-Mortem Gifts of Private Company Shares



Background Facts

- Business owners with charitable intentions
- Shares in one or more businesses represent primary assets of estate



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Post-Mortem Gifts of Private Company Shares (Con't)



John
FMV - 10,000,000



On death deemed
disposition at FMV
- tax on accrued gains

ABC Corp.

- there will also be tax at corporate level when company sells its assets



Real Estate and other Assets
FMV - 10,000,000
ACB - 2,000,000

In his will John directs his trustees to distribute his estate to charity.



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Post-Mortem Gifts of Private Company Shares (Con't)



- There are tax strategies post-death to reduce tax on death at shareholder level but important to note that estate must qualify as a graduated rate estate to take advantage of these strategies in a tax efficient way
- Many other factors to consider when gifts of private company shares or debt are involved
 - charitable foundation acquiring control of a company
 - donation of non-qualifying securities
 - private foundation excess corporate holdings regime
 - private foundation holding non-qualified investments



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Acquisition of Control of Corporation by a Charitable Foundation



- If a charitable foundation (public or private) acquires control of a corporation, the foundation is liable for penalties
- Potential for revocation of registration for a public foundation control if more than 50% of issued shares having voting rights held by:
 - charitable foundation, or
 - charitable foundation together with non-arm's length persons to the foundation
- Charitable foundation deemed not to have acquired control if it did not acquire for consideration more than 5% of issued shares of any class
- Trap: Caution on gifted shares that are exempt from the control test because it did not acquire shares for consideration but shares can be pulled back into the regime if there is a corporate reorganization where shares are exchanged



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Private Company Shares - NQS



- Non-Qualifying Securities
 - where a gift is of non-qualifying securities (“NQS”) (other than an excepted gift), the gift is deemed not to have been made for tax purposes and can only be claimed if and when:
 - i. charity disposes of securities within 60 months, or
 - ii. securities cease to be non-qualifying securities of any person within 60 months
 - non-qualifying securities include shares of a corporation or debt instruments where the donor or estate (or if donor is a trust, a person affiliated with the trust) does not deal at arm’s length with the corporation or the issuer of the securities immediately after the time of the gift



Private Company Shares – NQS Excepted Gift



- Security is an excepted gift only if:
 - security is a share; and
 - donee is not a private foundation; and
 - donor deals at arm’s length with donee; and
 - where donee is a charitable organization or public foundation, donor deals at arm’s length with each director, trustee, etc. of the donee



Private Company Shares – NQS Excepted Gift



- Problem with initial 2016 estate donation rules
- An estate donation is a distribution from a trust, either the GRE or subsequent estate;
- Trust beneficiaries are ***not at arm's length*** from the trustee
- Estate donations of private company shares to any registered charity briefly became a **non-qualifying security (NQS)** donation and could not be claimed until the security is sold by the charity per sub-sections 118.1(13) to (19)



Private Company Shares – NQS Excepted Gift



- Oct 19/16 Ways & Means Motion modified 118.1(19) to exempt estate donation from Paragraph 118.1(19)(c) to provide an exception to the NQS rules for an estate donation effective 2016. Terms:
 - the deceased donor dealt at arm's length with the recipient charity immediately before his or her death, and
 - the graduated rate estate deals at arm's length with the donee determined without regard to paragraph 251(1)(b) of the Act.



Private Company Shares – NQS Tips



- Donor should consider contributing to a public foundation or a charitable organization where the donor deals at arm's length with each director/trustee
- Charity should consider lining up a buyer for the security and at the same time line up the donation



Private Company Shares – NQS Tips



- Regarding Estate Donations: Property transferred must be property held by deceased at death or property substituted
- eliminates borrowing for donation
- NQS rules has a 60-month redemption window
- CRA considers that proceeds received on redemption of shares is « property substituted »
- Proceeds received as a result of dividend payment does not qualify
- Post-mortem plan needs to determine if the property is held by deceased at death or substituted property



Post-Mortem Gifts of Private Company Shares – Can tax at corporate level be eliminated?



- Question: In post-mortem situation can corporation make charitable donation to reduce the tax at corporate level?
- Two Issues:
 1. Shareholder Benefit
 - TI 9306605, July 9, 1993 provides that if obligations to make charitable donation is that of estate, corporate gift to charity is a benefit to estate in its capacity as shareholder of shares formerly owned by John – cites *Perrault v. Her Majesty the Queen* 78 DTC 6272 (FCA)
 2. Does corporate donation constitute a gift?
 - i.e. transfer must be voluntary without expectation of return
 - CRA Position. It was not a gift because it assumed donation to be made by corporation would be made subject to waiver by charity of any right to compel the estate to act in accordance with will
 - See also 2013 – 049014117 (January 2, 2014)



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Gifts of Private Company Shares (RDTOH)



- RDTOH
 - A mechanism built into the income tax system to achieve integration, i.e. to ensure tax payable on investment income is the same whether earned in a corporation or flowed out to shareholders or earned personally by a shareholder
 - Is a notional account that tracks part of a corporation's income from passive investments
- Corporation can claim a refund from CRA equal to one dollar for every three dollars of taxable dividend paid (up to a maximum)



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Gifts of Private Company Shares (RDTOH) (Con't)



- Donor donates private company shares to public charity
- Corporation purchases its own shares back from the charity

Gifts of Private Company Shares (RDTOH) (Con't)



Repurchase of shares by a corporation gives rise to a deemed dividend

Result:

- Donor receives donation tax credit equal to the value of shares donated
- Charity receives money on redemption
- Dividend triggers increase in company's RDTOH which saves corporate tax

Gift of Private Company Shares – Life Insurance



- Donor gifts preferred shares (fmv and acb = \$500,000)
- Shares redeemable and retractable
- Receives charitable receipt for \$500,000
- Gift results in \$250,000 tax savings
- Corporation may pay dividends on shares



Gift of Private Company Shares – Life Insurance



- Donor loans all or part of tax savings back to the Corporation
- Corporation acquires \$500,000 life insurance on Donor
- On death of Donor the Corporation redeems shares using insurance proceeds



Gift of Private Company Shares – Added Benefits



- Insurance proceeds credit capital dividend account
- Possible to pay up to \$500,000 of tax free capital dividends to Donor's heirs
- Taxable dividend to Charity may generate RDTOH recovery



Gift of Private Company Shares - Impact



- \$500,000 gift generated:
 - \$500,000 cash to charity
 - \$500,000 tax-free dividend to shareholders
 - \$250,000 shareholder loan repayment
 - Up to \$167,000 RDTOH recovery
- No impact on value of corporation at death





Alter Ego Trusts/Charitable Remainder Trusts



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Alter Ego Trust/Charitable Remainder Trust



Background Facts

- Donor wishes to make gift to charity
- Wishes to retain life interest in the property during lifetime
- Wishes to obtain immediate Donation Tax Credit



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Alter Ego Trust Tax Considerations



- Transfer of assets to a trust with significant accrued gains triggers disposition for tax purposes (i.e. capital gain realization) except in certain cases including transfer to a spousal or common law partner trust or alter ego/joint partner trust (AET/JPT)



Alter Ego Trust



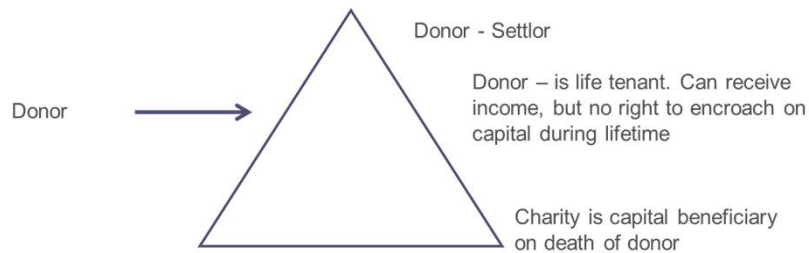
- Canadian Resident Settlor and Trust
- settlor 65+
- settlor entitled to net income
- no person but settlor can receive or otherwise obtain the use of any of the income or capital of the trust before the death of the settlor
- can have beneficiaries after death of settlor
- rollover of assets into trust
- deemed disposition on death of settlor unless elected out of rollover in which case first deemed disposition is 21 years after establishment of trust and every 21 years thereafter



AET Trust as Charitable Remainder Trust



- Charitable remainder trust



Charitable Remainder Trusts



- The charitable donation, for donation tax credit purposes, is the net present value of remainder interest in the trust
- Factors which determine value of charity's remainder interest:
 - age(s) of the life tenant(s)
 - fair market value of property transferred to the CRT mortality/actuarial tables for the life tenant(s)
- Actuarial and valuation reports are needed to assist in determining the value of the capital remainder interest that the charity is receiving

Charitable Remainder Trusts (Cont'd)



- If charitable gift planning is done as part of an alter ego trust or joint partner trust, the property will rollover into trust (i.e., no tax on roll in)
- The charity will issue donation receipt for the fair market value of residual interest at the time property is transferred to the CRT
- The charitable donation tax receipt can be used to shelter tax on the contributor's income for the year the property is transferred or against income of other years where permitted
- Any accrued capital gains with regard to the trust's capital property on death of life tenant will be taxed in the trust



Charitable Remainder Trusts - Traps



- With respect to testamentary charitable remainder trusts, there is uncertainty regarding the application of the 2014 federal budget with respect to the gift by will proposals commencing on January 1, 2016
- The charity agreeing to issue a donation tax receipt in this circumstance where it will be challenging to determine the value of the capital remainder interest of the trust



Charitable Remainder Trusts - Traps



- Establishing the trust too early in the lifetime of the contributor/life tenant likely means that the net present value of the capital residue of the trust will generate a significantly smaller charitable donation for the contributor relative to the value of assets when they are contributed to the trust



Charitable Remainder Trusts - Traps



- Can the donor use the donation tax credit in the year of the transfer and/or in any of the following five taxation years (in the case of a CRT created during the contributor's lifetime)
- If a new property is gifted to trust at a later date, no new gift is considered to be made to the charity – rather the value of the existing remainder interest is merely enhanced. Therefore, no additional charitable donation receipt can be issued





Gifts through Trusts

Gifts through Trusts



Factors required for charitable gift to be made by a trust

- The trustees are empowered to make a gift to charities
- The trustees must be exercising discretion as to whether to make gifts to charities, the charity to benefit, quantum of the gift
- The distribution of property to the charity must be considered as a “gift”, *i.e.*, a voluntary transfer of property without consideration (*Queen v. Friedberg*, 92 DTC 6031 (FCA))
- Recipient charity must not be receiving the distribution of property from the trust in satisfaction of its income or capital interest in the trust
- Consider where trust assets to go if trustees do not exercise their discretion to make gifts to charities

Donations by Testamentary Spousal Trust



- Charitable gift by spousal trust is a gift by the trust, not a gift by the estate
- ITA amended to provide limited concession:
 - Gift must be made within 90 days after the end of the calendar year in which the spouse dies (the filing due date)
 - Donation tax credit can be allocated to the short taxation year of the trust that resulted from the spouse's death, the year the gift is made, or the following 5 years
- Allows for matching of tax liabilities and charitable credits, but very short timeline
- Trustees must have power to make a donation



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 BARRISTERS SOLICITORS TRADEMARK AGENTS	Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2017 Toronto – June 1, 2017
<h2>Critical Issues Concerning Investment by Charities</h2> <p>By Terrance S. Carter, B.A. LL.B., TEP, Trade-mark Agent tcarter@carters.ca 1-877-942-0001 © 2017 Carters Professional Corporation</p>	
CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Toronto Ottawa Orangeville Mississauga www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

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<h3>OVERVIEW</h3> <ul style="list-style-type: none">• Introduction• Purpose of Presentation• Brief Reference to <i>Income Tax Act</i>• Knowing What Investment Power Applies• What Investment Authority Does the <i>Trustee Act</i> Provide For?• When Can a Charity Delegate Investment Decision Making?• What Should an Investment Policy Include?• What Liability Exposure do Trustees Face from Imprudent Investment Decisions?	
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A. PURPOSE OF PRESENTATION

- This presentation is intended to assist charities in understanding the critical issues that need to be considered when investing charitable property
- Unless otherwise provided for, the legal authority for investment of charitable property is determined in accordance with the *Trustee Act* in each province
- For a comparison of applicable provisions from the *Trustee Acts* across Canada, reference can be made to the chart attached as Schedule A to this handout
- The reference to “trustees” in this presentation includes directors, governors, council members, etc. – e.g., whoever is in charge of the charity

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- Below are some links to some resource materials for further information:
 - *Investment Powers of Charities and Not-For-Profits Under Ontario’s Trustee Act*, Terrance S. Carter, Online:
<http://www.carters.ca/pub/bulletin/charity/2010/chylb192.pdf>
 - *Consideration in Drafting Investment Policies in Ontario*, by Terrance S. Carter, Online:
<http://www.carters.ca/pub/bulletin/charity/2010/chylb207.pdf>



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B. BRIEF REFERENCE TO *INCOME TAX ACT*

- It is important to look at the *Income Tax Act* (“ITA”) and CRA Guidance's in order to distinguish between:
 - an investment and a “related business”;
 - an investment and a “program related investment”
- Also, important to consider new limited partnership rules
 - Before 2015, registered charities (but not private foundations) could only invest in limited partnerships if the ITA “related business” test was met
 - However, since April 2015, all registered charities can invest in limited partnerships, provided that:
 - The charity must be a “limited partner” of the partnership (e.g., limited liability);
 - The charity - together with all non-arm’s length entities - holds 20% or less of the fair market value of all interests in the partnership; and
 - The charity deals at arm’s length with each general partner of the partnership

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- There are other factors under the ITA that deal with investments by registered charities that are beyond the scope of this presentation, including:
 - Restrictions on majority control of corporations by foundations
 - Non-qualified investment rules for private foundations
 - Non-qualifying security rules
 - Excess business holding rules for private foundations



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C. KNOWING WHAT INVESTMENT POWER APPLIES

1. Application of the *Trustee Act* to Charities

- ss. 1(2) of the *Charities Accounting Act* provides that charitable corporations are deemed to be trustees of their charitable property within the meaning of that *Act*
- s. 10.1 of the *Charities Accounting Act* confirms that charitable corporations must comply with the investment decision making requirements in s. 27 to 31 of the *Trustee Act*
- However, ss. 27(9) and (10) of the *Trustee Act* provide that the *Act* does not require a trustee to act in a manner inconsistent with the terms of the trust (which terms include the constating documents of a corporation)

- Situations where the *Trustee Act* will not apply
 - The letters patent or articles of continuance of a charity state that the *Trustee Act* does not apply
 - A special purpose trust in a will or gift agreement establishes a different investment power from that contained in the *Trustee Act*
 - A different investment power is set out in special legislation creating the charity



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D. WHAT INVESTMENT AUTHORITY DOES THE *TRUSTEE ACT* PROVIDE FOR?

1. Problems With the Former *Trustee Act*

- The former *Trustee Act* (pre July 1, 1999) listed specific and very limited categories of legal investments:
 - e.g., Debt issued by banks, governments, trust companies
 - e.g., Equities issues by Canadian companies, but subject to a dividend test



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- Investments in mutual funds were not permitted (*Haslam* decision)
- Delegation of investment decision making was also not permitted
- Investment was only permitted in the stated legal list of authorized investments
 - But there was no protection from legal action against trustees
 - Standard of care and prudence was still required

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2. Establishment of Prudent Investor Standard

- Effective July 1, 1999, the prudent investor standard replaced the legal list of authorized investments
 - “A trustee may invest trust property in any form of property in which a prudent investor might invest.” (ss. 27(2) of the *Trustee Act*)
- No longer any restrictions on the type of investments that can be made by trustees



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3. Standard of Care Required

- Standard of care required of a trustee involving the investment of charitable property consists of
 - “the care, skill, diligence and judgment that a prudent investor would exercise in making investments.” (ss. 27(1) of the *Trustee Act*)



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4. Delegated and Other Specific Types of Investments

- Investments in mutual funds is permitted in Ontario (ss. 27(3) of the *Trustee Act*)
 - But there is no definition of mutual funds
- As well, there are no specific references to Exchange Traded Funds (ETFs) in the *Trustee Act*, but ETFs would generally be considered to be a type of mutual fund and would therefore appear to be permitted
- Investing in pooled funds is also specifically permitted
 - But there is no definition of pooled funds
- Investing in segregated funds under insurance contracts is also permitted
- As well, the *Charities Accounting Act* was amended in 2009 to remove the restrictions on charities investing in real estate.
 - However, such investment would still need to comply with the prudent investor standard under the *Trustee Act*, and the “related business” rules of the ITA if applicable



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MANDATORY
COMPLIANCE

5. Mandatory Investment Criteria

- Seven mandatory criteria must be considered in making investment decisions (ss. 27(5) of the *Trustee Act*)
 - General economic conditions
 - The possible effect of inflation or deflation
 - The expected tax consequences of investment decisions or strategies
 - The role that each investment or course of action plays within the overall trust portfolio

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- The expected total return from income and appreciation of capital
- Needs for liquidity, regularity of income and preservation or appreciation of capital
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries
 - Arguably this last criteria would permit a socially responsible investment approach
 - However, to go further and undertake “social investments” or “social impact investments” would likely require an amendment to the *Trustees Act*

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6. Mandatory Diversification Obligations

- A trustee must diversify the investment of trust property to an extent that is appropriate to (ss. 27(6) of the *Trustees Act*)
 - The requirements of the trust; and,
 - General economic investment market conditions



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7. Commingling of Restricted Funds

- At common law, restricted charitable funds cannot be commingled with:
 - other restricted charitable funds; or
 - general charitable funds
- In Ontario, however, regulations were introduced in 2001 as part of the *Charities Accounting Act* that permit comingling of restricted funds with other restricted funds if certain requirements are met



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- Specifically a charity intending to commingle restricted funds with other restricted funds:
 - May only do so if it advances the administration and management of each of the individual restricted funds;
 - Must allocate all gains, losses, income and expenses rateably on a fair and reasonable basis to the individual funds;
 - Must maintain specified detailed records relating to each individual fund; and
 - Must maintain specified detailed records relating to the combined fund

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E. CAN A CHARITY DELEGATE INVESTMENT DECISION MAKING?

1. Understanding the Context of Delegation

- At common law, directors of a charity cannot delegate investment decision making, including investing in mutual funds (*Haslam* decision)
- However, the *Trustee Act* was amended in 2001 as a result of an initiative taken by the Ontario Bar Association in order to authorize the practice of delegation of investment decision making

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- Specifically ss. 27.1(1) of the *Trustee Act* now permits trustees of a charity to delegate investment decision making to the same extent that a prudent investor could in accordance with ordinary investment practice
- This means that the trustees of a charity are now permitted to delegate investment decision making to a qualified investment manager
- However, the mandatory statutory requirements to be able to delegate must be carefully reviewed and complied with, as delegation is only permitted if the statutory requirements are met

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2. Investment Policy Required for Delegation

- Investment decision making cannot be delegated without an investment policy in place that is intended to ensure that the functions will be exercised in the best interest of the charitable purpose (ss.27.1(2) of the *Trustee Act*)
- An investment policy is optional if there is no delegation, but is recommended in any event
- The investment policy must set out a strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor would adopt under comparable circumstances (s. 28 of the *Trustee Act*)



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3. Agency Agreement Requirement (Investment Management Agreement)

- The trustees must have a written agreement (normally referred to as an investment management agreement) in the form of an agency agreement between the trustees and the agent (e.g., an investment manager) (ss. 27.1(3) of the *Trustee Act*)
- The agency agreement must include:
 - The authority to delegate investment decision making
 - A requirement that the agent comply with the investment policy in place from time to time
 - A requirement that the agent report to the trustees at regularly stated intervals



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- In addition to these statutory requirements, an agency agreement should also
 - Include a definition of conflicts of interest for the agent and the trustees (board members)
 - Avoid the obligation to advise the agent of a change of circumstances
 - Be carefully reviewed to eliminate indemnification of the agent (investment manager) by the charity against damages or losses
 - Be reviewed by legal counsel for the charity to ensure compliance with the *Trustee Act*

Requirements



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4. Prudent Selection of an Agent

- The *Trustee Act* imposes a requirement upon the board of a charity to exercise prudence in selecting an agent, in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with the applicable terms (ss. 27.1(5)(a) of the *Trustee Act*)
- The Attorney General may make regulations concerning who is qualified to act as an agent, but no regulations have been made to date (s. 30 of the *Trustee Act*)
- Pending adoption of regulations, it is essential to select agents who have appropriate professional credentials as investment managers



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5. Prudence in Monitoring of Agents Required

- The *Trustee Act* imposes a requirement upon the board of a charity to exercise prudence in monitoring the agent's performance to ensure compliance with the terms of the agency agreement (ss. 27.1(5)(b) of the *Trustee Act*), including:
 - Reviewing the agent's reports
 - Regular review of the agency agreement and how it is being put into effect
 - Regular review of the investment policy and its revision or replacement if necessary
 - Assessing whether the investment policy is complied with



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- Considering whether directions should be provided to the agent or whether the agent's appointment should be revoked
- Providing, when necessary, directions to the agent or revoking the appointment of the agent
- The above mandatory list is not a complete code of what is required for due diligence and may therefore need to be supplemented as necessary
- As a result, the board of a charity needs to be pro-active in monitoring the agent

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6. Prohibition on Sub-delegation by Agents

- In Ontario, an agent (investment manager) may not sub-delegate the investment decision making authority given to the agent by a board of a charity to another person or agent (ss. 27.2(2) of the *Trustee Act*)
- This can create problems when the investment manager wants to invest in third party mutual funds or pooled funds as opposed to the manager's own funds
- This limitation is often not recognised by investment managers
- The Ontario Bar Association is seeking an amendment to the *Trustee Act* to address this problem
- The "work around" involves requiring approval from the charity before the investment manager as agent proceeds with investing in third party mutual funds or pooled funds

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7. Duties of an Agent (Investment Manager)

- An agent (investment manager) has a statutory duty to exercise a trustee's functions relating to the investment property (ss. 27.2(1) of the *Trustee Act*)
 - With the standard of care expected of a person carrying on the business of investing the money of others
 - In accordance with the agency agreement
 - In accordance with the investment policy
- An agent should carefully review their existing agency documentation (e.g., investment management agreements) to ensure that they comply with the mandatory requirements authorizing delegation under the *Trustee Act*



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8. Liability of the Agent (Investment Manager)

- If a charity suffers a loss because of the agent's breach of duty, then legal action can be commenced against the agent (ss. 27.2(3) of the *Trustee Act*) by:
 - The trustees, e.g., the charity through its directors
 - A beneficiary, which would include the charity itself, and those who benefit from the work of charity if the board does not bring action within a reasonable period of time
- As such, members of a charity and/or other individuals who receive a benefit from the charity could themselves initiate proceedings against the agent for breach of the agent's duty if the directors of a charity do not do so
- It is important not to contract out of this statutory right



F. WHAT SHOULD AN INVESTMENT POLICY INCLUDE?

1. Need for a Customised Document for a Charity

- An investment policy should be a document created by the charity to guide the charity and its board of directors, in complying with the high fiduciary duty that applies to the management of charitable property
- Utilizing a *pro forma* investment policy from a financial institution or an investment manager will not reflect all of the legal obligations that apply to investing charitable property
- As a result, the charity should seek legal assistance in reviewing and preparing a customised investment policy



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2. Contents of an Investment Policy

- There is no one-size-fits-all precedent for the form of an investment policy for a charity
- However, the policy could include following:
 - Purpose of the investment policy
 - When the investment policy will apply
 - Explanation of the applicable investment power of the charity
 - Explanation of authorized form of investment as a prudent investor, including mutual funds and pooled funds
 - Explanation of prudent investor standard of care



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- Listing the seven mandatory investment criteria
- Explanation of mandatory diversification requirement
- Provision for specific investment plan for each discrete fund requiring separate investment terms
- Review of statutory requirements for delegation of investment decision making
- Role of the board of directors and investment committees
- Term of reference for an investment committee
- Rules to deal with conflict of interest involving investing
- Requirements for commingling restricted funds when applicable
- Process for amendments of the investment policy



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G. WHAT LIABILITY EXPOSURE DO TRUSTEES FACE FROM IMPRUDENT INVESTMENT DECISIONS?

- Relief from technical breaches of trust under the *Trustee Act* is not available for losses resulting from investment of trust property (ss. 35(1) of the *Trustee Act*)
- However, the *Trustee Act* does provide that a trustee will not be liable for losses from the investment of trust property if the conduct that led to the loss conformed to an investment plan or strategy that a prudent investor would adopt under comparable circumstances (s. 28 of the *Trustees Act*)
- Therefore, it is very important for the board of a charity to adopt an investment policy

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- Failure to comply with mandatory requirements for delegation will preclude liability protection under the *Trustee Act* and will expose trustees to liability for breach of trust for unauthorized delegation of investment decision making
- If a trustee is liable to the charity arising from investment decisions, a court that is assessing damages may take into account the overall performance of the investments (s 29 of the *Trustee Act*) (e.g., no anti-netting rule)



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H. CONCLUSION

- Investing by a charity is very different than investing by any other type of organization
- Investing by a charity carries a high fiduciary duty for the board of directors
- It is therefore important for a charity and its board to carefully consider the special rules that apply to investing charitable property, and implement the correct investment documentation required under the *Trustee Act*

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Schedule of Comparable Provincial Statutes on Investment Power

Province, Applicable Statute, and Effective Date	Ontario <i>Trustee Act</i> Effective 1999	Alberta <i>Trustee Act</i> Effective 2001
Trust Inst. Prevails over Trustee Act?	Yes	Yes
Authorised Investments	“Any form of property”	“Any kind of property”
Specific Allowance for Mutual Funds and Other Delegated Investments	Yes, mutual funds, pooled funds, and segregated funds	Yes, mutual funds, segregated funds, and similar investments set out in the regulations
Standard of Care	The care, skill, diligence and judgment that a prudent investor would exercise	Reasonable skill and prudence
Investment Criteria	Seven mandatory criteria	Nine mandatory criteria
Diversification Required?	Yes	Yes
Delegation Permitted?	Yes	Yes
Prohibition of Sub-delegation?	Yes	Silent
Prudence Required in Selection of Agents?	Yes	Yes
Prudence Required in Monitoring Agents?	Yes	Yes

Schedule of Comparable Provincial Statutes on Investment Power

Province, Applicable Statute, and Effective Date	British Columbia <i>Trustee Act</i> Effective 2002	Manitoba <i>The Trustee Act</i> Effective 1996
Trust Inst. Prevails over Trustee Act?	Yes	Yes
Authorised Investments	“Any form of property or security”	“Any kind of property”
Specific Allowance for Mutual Funds and Other Delegated Investments	Yes, investment funds defined in the <i>Securities Act</i> , includes mutual funds and non- redeemable investment funds	No
Standard of Care	The care, skill, diligence and judgment that a prudent investor would exercise	The judgment and care that a person of prudence, discretion and intelligence would exercise
Investment Criteria	None	None
Diversification Required?	No	No
Delegation Permitted?	Yes	Yes
Prohibition of Sub-delegation?	Silent	Silent
Prudence Required in Selection of Agents?	Yes	No
Prudence Required in Monitoring Agents?	Yes	No

Schedule of Comparable Provincial Statutes on Investment Power

Province, Applicable Statute, and Effective Date	New Brunswick <i>Trustees Act</i> Effective 2016	Newfoundland and Labrador <i>Trustee Act</i> Effective 2000	Nova Scotia <i>Trustee Act</i> Effective 2002
Trust Inst. Prevails over Trustee Act?	Yes	Silent	Yes
Authorised Investments	“Any kind of property or investment”	“Any property”	“Any form of property or security”
Specific Allowance for Mutual Funds and Other Delegated Investments	Yes, mutual funds, the common funds of a trust company or similar pooled funds	No	Yes, mutual funds as defined in the <i>Securities Act</i>
Standard of Care	Exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person	Exercise the care, diligence and skill that a reasonably prudent person would in comparable circumstances	The care, skill, diligence and judgment that a prudent investor would exercise
Investment Criteria	None	Eight mandatory criteria	Eight discretionary criteria
Diversification Required?	No	No	Yes
Delegation Permitted?	Yes	Yes	Yes
Prohibition of Sub-delegation?	Includes specific authority for sub-delegation	Silent	Silent
Prudence Required in Selection of Agents?	No	No	Yes
Prudence Required in Monitoring Agents?	No	No	Yes

Schedule of Comparable Provincial Statutes on Investment Power

Province, Applicable Statute, and Effective Date	Prince Edward Island <i>Trustee Act</i> Effective 1997	Québec <i>Civil Code of Québec</i> , Title Seven Current Version Effective 2016	Saskatchewan <i>The Trustee Act</i> , 2009 Effective 2009
Trust Inst. Prevails over Trustee Act?	Yes	Yes	Yes
Authorised Investments	“Any form of property or security”	“Any form of investment” though there is a list of investments which are presumed sound	“Any form of property”
Specific Allowance for Mutual Funds and Other Delegated Investments	Yes, mutual funds or similar investments	Yes, securities of investment funds or of a private trust included in the list of presumed sound investments	Yes, mutual funds as defined in <i>The Securities Act, 1988</i> or a similar investment
Standard of Care	The care, skill, diligence and judgment that a prudent investor would exercise	Act with prudence and diligence Act honestly and faithfully in the best interest of the beneficiary or of the object pursued	The care, skill, diligence And judgment that a reasonable and prudent investor would exercise
Investment Criteria	Eight discretionary criteria	General mandatory criteria in the code	Eight mandatory criteria
Diversification Required?	Yes	Yes	Yes
Delegation Permitted?	Yes	Some delegation permitted	Yes
Prohibition of Sub-delegation?	Silent	Silent	Includes specific authority for sub-delegation
Prudence Required in Selection of Agents?	Yes	Administrator must retain general control	No
Prudence Required in Monitoring Agents?	Yes	Administrator must retain general control	Yes

When Charities Go to Court: Is Your Charity Ready? *Tips and Traps*



Jonathan F. Lancaster, Partner
Sean S. Carter, Partner

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OVERVIEW



1. IDENTIFY THE CLAIM
2. REPORTING OBLIGATIONS
3. IMPLEMENT INTERNAL CONTROLS
4. ACCESS AND INSPECTION RIGHTS
5. DETERMINING AND MANAGING LIABILITY
6. PLAN TO PREVENT FUTURE CLAIMS
7. CONCLUSION

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1. IDENTIFY THE CLAIM



- When an allegation or knowledge of a claim involving a charity or not-for-profit arises, a series of steps need to be undertaken to identify the claim and to determine what obligations (including reporting) may arise
- These steps aim to assist in reducing the liability of the organization without prejudicing the potential litigation or prejudicing the interests of involved parties

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- Initial intake of claim
 - Identify facts, parties, witnesses, timeline, and what evidence is available (consider signed statements/acknowledgements and legal advice)
 - Identify and preserve documents
- Traps
 - These steps should be already anticipated by processes in place in the organization such as document preservation policies, emailing policies and document storage policies so that records, electronic and otherwise, of the organization are properly retrievable and searchable
 - Spoliation: intentional destruction of evidence during actual or contemplated litigation can lead to the inference that the evidence would have been unhelpful to the spoliator and may lead to adverse findings on credibility

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2. REPORTING OBLIGATIONS



- Once a claim becomes known, consider legal advice and reporting obligations, including to insurers – depending on the issue this could involve reporting on general liability policies and/or D&O policies
- To this end, make a careful review of any/all applicable insurance policies (including historical), with particular note of policy coverage years, terms, and notice requirements
- Review (with legal counsel) the insurer's response and position on coverage issues and consider whether additional steps (including litigation) will be necessary to resolve any dispute on insurance policy coverage interpretation or other issues

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2. REPORTING OBLIGATIONS



- Organizations need to balance reporting and required disclosure with the confidentiality interests of all parties

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- Traps

- Ensure that, if a claim is identified or asserted, communications are properly identified as “Prepared in Contemplation of Litigation”
- Any settlement communication should be marked “Without prejudice”
- Insurance: understand “claims made policies” versus “occurrence policies” – discuss with broker perceived needs

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3. IMPLEMENT INTERNAL CONTROLS



- An organization should consider how to protect against incidents (both in immediate situation and long term) and reduce liability for the organization moving forward
- Document retention policies – See Appendix “A”

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- Suspend/limit an individual's access via organization's programs or resources to the complainant and other family, potential witnesses, etc.
- Internally inform employees and volunteers to refrain from discussing evidence relating to allegations and to keep information strictly confidential

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- Organize and preserve any relevant employment or other documents (screening, work history) relating to the claim to prepare for potential litigation
- If deemed appropriate, the organization may release a public statement, but should remain conscious of privacy concerns of the various parties involved
 - Be cautious of publically identifying the claim in order to protect against possible defamation claims

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- Preserve potential evidence: seize and/or deactivate any organizational property, and if necessary, access to, e.g. cell phones, laptops, and email accounts
- Traps
 - It is too late to implement controls after the fact
 - Claims can often be avoided by spotting issues and addressing them before real liability ensues
 - Ensure that personal emails are separated from organizational emails

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4. ACCESS AND INSPECTION RIGHTS



- Access, Generally
 - Directors generally have a right to access (and to take free copies of) all corporate records that are required to be kept under both the *Canada Not-For-Profit Corporations Act* (“CNCA”) and the proposed Ontario *Not-For-Profit Corporations Act, 2010*, S.O. 2010. c.15 (“ONCA”)
 - Members’ rights of access are more limited
 - Members do not have a right of access to the minutes of directors’ meetings under either Act*

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- **Members' Access Rights**

- Under the **CNCA**:

- Members have right to examine, during regular office hours, and to take copies for a fee:
 - **Articles and by-laws (including amendments)***
 - Copy of any **Unanimous Member Agreement**, if applicable
 - **Minutes of meetings and resolutions of the members and any committees of members**
 - Register of **directors, officers** and members
 - Register of **debt obligations** (used to be just a register of mortgages)
 - **Extracts of minutes of directors' meetings and/or other documentation specifically relating to a declaration of conflict**

* The CNCA provides that each member is entitled to one free copy of these documents

Bolded text means the access right is new or changed from the *Canada Corporations Act* ("CCA")

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- **CNCA** (cont.):

- Members have access to the register of members and/or to a list of members, only if they submit a statutory declaration stating the information will only be used for a permitted purpose, which are:
 - an effort to influence the voting of members;
 - requisitioning a meeting of members; or
 - any other matter relating to the affairs of the corporation.
 - Under the CCA any person who submits a statutory declaration, not just members, can obtain access to the list of members

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- Under the **ONCA**:
 - Members have right to examine, during regular office hours, and to take copies for a fee:
 - Articles and by-laws (including amendments)*
 - Minutes of meetings and resolutions of the members **and any committees of members**
 - Register of directors
 - Register of officers
 - **Consents of directors to act as directors**

* The ONCA provides that each member is entitled to one free copy of these documents

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Bolded text means the access right is new or changed from the current *Corporations Act*, R.S.O. 1990, c. C. 38

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- **ONCA** (cont.):
 - Members also have right to examine the members' register and take extracts for a fee if they complete a statutory declaration
 - A Member may further require the corporation to provide a current list of members, including names and addresses and such other information as is required by the by-laws as soon as is practicable (subject to having completed a statutory declaration)
 - Like the CCA, the OCA allowed any person to complete a declaration and obtain a copy of the list of members; now this is more restricted

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- Access to Financial Records

- Under the CNCA and ONCA, members have the right to receive the following at every annual meeting:
 - Approved annual financial statements of the corporation
 - Report of the Accountant, if any; and
 - Any other information on the financial state of the corporation that is required by the by-laws or articles

The above are collectively referred to in this presentation as the “**Annual Financial Statements**”

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- Under the ONCA and CNCA, members can also obtain free copies of the following on request:
 - Annual Financial Statements of the corporation
 - Financial statements of each of the corporation’s subsidiaries and of each body corporate the accounts of which are consolidated in the financial statements of the corporation

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- What's Changed?

- Generally, improved access to information for members (consistent with enhanced member rights under both CNCA and ONCA)
- ONCA gives members a right of access to consents of directors
- CNCA gives members a right to inspect extracts of minutes of directors' meetings and/or other documentation specifically relating to a declaration of conflict
- Access to list of members is restricted

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5. DETERMINING AND MANAGING LIABILITY



- The organization

- The organization can be:
 - Vicariously liable for the actions of its employees or volunteers, and/or
 - Liable for failing to take appropriate steps to prevent a claim

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- The board of directors
 - The tortious liability of board members of charities and not-for-profits is almost identical to the liability of directors and officers of business corporations

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- Management
 - Employees in management have the duty to implement the rules as well as act appropriately in response to an allegation

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- In *Blackwater v. Plint*, 2005 SCC 58, the Supreme Court rejected the existence of the doctrine of charitable immunity
- Charitable or non-profit status will not exempt organizations from being held liable for the conduct of its employees
- Organizations should look to insurance policies for potential coverage and board members may be able to rely on corporate indemnification, if applicable

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6. PLAN TO PREVENT FUTURE CLAIMS



- Comprehensive policies ensure an organization of the following:
 - Due diligence
 - As a response to an allegation of negligence, proactive due diligence procedures can be raised as a defence
 - Creates an environment of heightened awareness, which may in turn lead to quicker more efficient and effective organizational response and effective deterrence
 - Increased awareness/education
 - Serves to identify problems before they occur
 - Promotes reporting and pro-active conduct

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— Structured procedure

- Provides for a standardized procedure to respond to complaints and ensure that appropriate measures are taken to reduce or eliminate risks
- Ensures a uniform response to complaints and allows for mechanisms to deal with the complaints, including the right to terminate employees

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- Can be used as a defence in response to claims brought by alleged victims, employees, and volunteers
- Policies help to promote public confidence in the organization's effective and efficient use of assets and management of liabilities and risks

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7. CONCLUSION



- Each potential allegation will present its own particular challenges, but if the organization has an existing claims policy, it can help to both prevent and react to claims against an organization
- Given the nature of charitable and not-for-profit work and the vulnerable communities serviced, claims can be and must be expected

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Appendix A



Corporate Records

The recordkeeping requirements under the Ontario *Corporations Act* (OCA) are similar to those that under the proposed Ontario *Not-for-Profit Corporations Act* (ONCA), though the latter's obligations will be somewhat more extensive.

We recommend keeping the following corporate records **permanently** [because there are no prescribed retention periods under the OCA and/or ONCA and because the Income Tax Act also requires that registered charities keep many of these records until at least 2 years after their registration is revoked in any case]:

- Constatting Documents (i.e. articles, by-laws, letters patent, supplementary letters patent, certificate of incorporation, etc.)
- Minutes of meetings of directors (and written directors' resolutions)
- Minutes of meetings of members (and written members' resolutions)
- Minutes of committee meetings (and written resolutions), including of the Executive Committee, other Board committees, member committees (note: currently under the OCA, only minutes of Executive Committees are required to be kept; the requirement to keep other committee minutes will be new under the ONCA)
- Register of directors
- Register of members
- Register of officers (new requirement under ONCA)
- Books of account and accounting records with respect to all financial and other transactions of the corporation (note: only until the new ONCA comes into force, see "accounting records", below)
- Consents of directors to act as directors (new requirement under ONCA)
- Copy of financial statements for subsidiaries and any entity whose accounts are consolidated with the Foundation (new requirement under the ONCA)

In the case of other types of corporate documents, the retention period or requirement to keep a particular record may vary. For example:

- Under the ONCA, accounting records must be kept which are "adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis" (this is a revised requirement under ONCA and these documents must be retained for **6 years**, unless longer retention is required by another Act or taxing authority such as CRA)
- Materials from board meetings, members' meetings and committee meetings (e.g. agenda, etc.) — these types of documents may be kept, but there is no requirement to do so. Important documents or presentations that are referenced in the minutes (but not adequately described) should be appended to the minutes

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Appendix A



Tax Records

The *Income Tax Act* also imposes a variety of recordkeeping and retention requirements. Generally, the *Income Tax Act* requires that registered charities keep books and records that will:

- permit the taxes payable or the taxes or other amounts to be collected, withheld, or deducted by a person to be determined;
- substantiate registration as a registered charity under the ITA (including records that show the activities of the organization, including any business or commercial activities); and
- permit the verification of all donations received for which a deduction or tax credit is available.

The general rule is that records should be kept for **at least 6 years** after the end of the last taxation year to which the books or records relate. This would include financial statements, T3010 Information Returns and supporting source documents for those returns / documents.

The *Income Tax Act* imposes other specific retention periods for certain types of documents (see for more details: [Keeping Records and Books and Records Retention/Destruction \(C-78-1085\)](#)). For example, duplicate receipts for donations (other than 10 year gifts) must be kept for **at least 2 years** from the end of the calendar year that they relate to (though note: if practical it may be preferable to keep these documents longer (e.g. for 6 years) as a source document for other accounting records or in case a donor needs a replacement receipt).

The following documents should be kept **indefinitely** (or for two years after the date on which the registration of the charity is revoked): (1) all records relating to a 10 year gift; (2) minutes of member and executive meetings and all governing documents and by-laws. In addition, corporations should **permanently** keep: (1) general ledger or books with final entry containing summaries of year-to-year transactions and special contracts or agreements necessary to understand the general ledger should be kept permanently and (2) directors' meeting minutes.

Other recordkeeping requirements or retention periods may apply depending on the type of document. For example, records relating to withheld income tax (e.g. on employee salaries, wages) must be retained for **at least 6 years** from the end of the taxation year to which the records relate. The *Canada Pension Plan and Employment Insurance Act* require employers to keep certain records and supporting documents for **at least 6 years** from the end of the year that they relate.

If the charity is ever subject to litigation or CRA audit or investigation or is appealing an assessment, all relevant records should generally be retained until the matter is fully resolved.

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Tab 5

The Board's Role in Creating an Ethical Culture - Part 1: Ethical Frameworks and Audits

Health Law Bulletin

In an era of increasing scrutiny on healthcare organizations, the board has a critical role in creating and maintaining an ethical organizational culture.

This is the first in a two-part bulletin series looking at the board's role in creating and maintaining a strong 'ethical architecture' within their organization. In this bulletin, we explore two options for boards who wish to go beyond the usual policy groundwork of conflict of interest policies, codes of conduct, etc.—ethical frameworks and ethical audits.

In our next bulletin we will provide more general guidance on how to develop an effective, resilient ethical architecture, and tips for policy development.

Ethical Frameworks

Many in the health sector have adopted ethical frameworks to guide clinical decision-making in ethical grey areas. We recommend adopting a similar framework for board and management decisions.

An ethical framework can be particularly valuable when organizations are confronted with big or challenging decisions. This could include making a major new investment, launching a new service or ancillary revenue venture or ceasing to provide an existing clinical program, etc. This ethical review should take place in the context of and with the support of other due diligence (e.g. financial due diligence to confirm the fiscal soundness of the proposed action, and legal due diligence to confirm the legality and risk profile of the proposed action).

It is helpful to articulate the framework in a written policy, including:

- **A statement of principle.** This statement should be guided by and consistent with the purposes and, where applicable, charitable objects of the healthcare organization.
- **An ethical review process.** The framework should outline a review process that can be adapted for many different circumstances. The process could include the following steps (and potentially others):
 1. Identification of the stakeholders involved in or affected by the decision (including, potentially, funders, patients, families, donors, community partners, etc.)

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2. Consider:

- Is this decision or direction legal? Is it ethical?
 - In considering the latter, what are the interests of the organization? Does the proposed action align with the objects of the organization? How will it further the objects and strategic goals of the organization?
 - What are the interests of the stakeholders who would or could be impacted by the proposed action?
 - Have we sufficiently weighed the risks of action and inaction (to the organization, to its stakeholders) and considered how best to mitigate those risks? Are we acting strategically? Are we taking appropriate risks to support the mission of the organization? (as opposed to simply avoiding risk altogether?)
 - Is there alignment of interests between the stakeholders and the organization? If not, identify potential gaps.
 - Are ethical risks and/or gaps between the interests of stakeholders and the organization sufficiently addressed by the organization's current 'ethical architecture' (i.e. its existing ethics policies and procedures)? If not, can changes be made to address the concern?
- **Procedures for follow-up.** The framework should require implementation review and follow-up. For example, if a new program is launched, a one-year review of the implementation of the program should include a component to evaluate the success and failures of the program against the expectations of the ethical review.

Ethical Audits

The board may also consider implementing an internal ethics audit function.

The function of an internal auditor is to conduct "deep dive" audits on a limited number of programs or services per year. In the private sector, such audits tend to be focused on identifying and rooting out fraud and other questionable conduct. In the healthcare context, we suggest taking a more holistic view. In addition to evaluating the financial health of the program or service (and testing internal fraud detection processes, etc.), the auditor can also be tasked with considering how the activities of the program fit with the objects and current strategic goals of the organization and other matters.

The programs or services selected should be determined in conjunction with the Audit Committee, preferably through a combination of random selection and risk-based selection. The internal auditor should be tasked with reporting directly to the Audit Committee at least semi-annually. His or her reports should include updates on the organization's progress with respect to prior audit recommendations that were adopted by Board.

The internal auditor should be empowered with broad authority:

- to examine all files, records, books, data, papers, and any other materials whatsoever related to the organization's activities,
- to take copies of any material referred to above, and
- to interview staff (at all levels) and ask for and receive information on any matter relating to the activities of the organization.

The auditor should be expected and empowered to ask tough questions and to probe for honest views. The auditor should have a corresponding obligation to hold all such

information in appropriate confidence, disclosing it only to the Audit Committee (and, in some cases, only on an anonymized basis).

In addition to their risk management function, such audits can offer the board a uniquely deep understanding of program and service delivery in the organization. Audits should spot areas of potential concern or risk—but can also be used as an opportunity to identify pockets of innovation or best practice that might otherwise go unnoticed at the board level. Such discoveries can, where appropriate, be scaled up within the organization.

The next bulletin in this two-part series will offer additional guidance on how to develop an effective, resilient ethical architecture, including tips for developing meaningful policies.

A similar version of this bulletin series was published in the February 2017 issue of *Boards*, the official publication of the Ontario Hospital Association's Governance Centre of Excellence

The Board's Role in Creating an Ethical Organizational Culture - Part 2: Tips for Effective Ethics Policies and Programs

Health Law Bulletin

In an era of increasing scrutiny on healthcare organizations, the board has a critical role in creating and maintaining an ethical organizational culture.

This is the second in a two-part bulletin series looking at the board's role in creating and maintaining a strong 'ethical architecture' within their organization. Our first bulletin on ethical frameworks, and ethical audits can be found here: [The Board's Role in Creating an Ethical Culture - Part 1: Ethical Frameworks and Audits](#).

In this bulletin we provide guidance and tips on how to develop an effective, resilient 'ethical architecture'.

Building Effective Ethical Architecture

The appropriate mix of policies, procedures and programs will vary by organization. Ethical audits, for example, might not be necessary or financially feasible for all organizations. However, strong ethical cultures tend to be supported by an architecture that exhibits common features:

- **Focus on positive outcomes sought.** This is easier than it sounds. But a 'compliance mind set' that focusses on legal rules and punishments for breach of those rules will not generally inspire strong ethical leadership. An over-focus on rules and penalties can also become a barrier to organizational innovation—encouraging risk avoidance rather than thoughtful risk-taking

As Lynn Smith Paine writes, *"Even in the best cases, legal compliance is unlikely to unleash much moral imagination or commitment. The law does not generally seek to inspire human excellence or distinction [...] managers who define ethics as legal compliance are implicitly endorsing a code of moral mediocrity for their organizations."* [1].

- **Customized.** It is tempting to use off-the-shelf policies, etc. but there is significant value in customizing them. Individuals are much more likely to read, understand and put into action the words on a page if they speak to their experience. In addition to providing specific and relevant examples from the day-to-day operations of the organization, provide guidance to navigate the grey areas, including by:

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1. articulating the values that should guide ethical decisions in difficult cases; and/or
2. providing employees avenues and options to seek guidance from their superiors.

- **Consistent and appropriate consequences.** In setting consequences, make sure that the expectations are realistic. The severity of the consequence should match the seriousness of breach. Consequences should not discourage first-time offenders from admitting mistakes in order to learn from them.
- **Ongoing engagement to reinforce expectations.** It is easy to underestimate the importance of ongoing training and dialogue about ethical issues to reinforce existing policies, procedures and frameworks. Ethics should be reiterated through ongoing board and professional development training and should likely be an explicit part of the hiring process and performance review of employees (from CEO on down). Managers should be explicitly accountable for their role in setting the ethical tone for employees they manage. Regular, meaningful review of such policies and procedures (including soliciting confidential employee feedback on what is working and what is not) is a critical maintenance function.

This is the second in a two-part bulletin series. Our first bulletin on ethical frameworks and ethical audits can be found here: [The Board's Role in Creating an Ethical Culture - Part 1: Ethical Frameworks and Audits](#).

A similar version of this bulletin series was published in the February 2017 issue of *Boards*, the official publication of the Ontario Hospital Association's Governance Centre of Excellence

[i] Lynn Sharpe Paine, "Managing for Organizational Integrity" Harvard Business Review March-April 1994

Focus on Health Care in Ontario's New Budget

Health Law Bulletin

On Thursday, April 27, 2017 the Ontario government revealed its new budget. It is the first balanced budget in a decade and health care funding is a major focus. If the budget is approved, there will be an additional \$11.5 billion utilized towards health care initiatives over the next three years, which is \$7 billion higher than previously planned. Funding will go towards a new pharmacare program, reducing hospital overcrowding, producing shorter wait times, dementia initiatives, as well as implementing new mental health and addiction services, amongst other projects. These funding initiatives are discussed below.

Pharmacare Program

Beginning on January 1, 2018, a new provincial pharmacare program will cover prescription medication for individuals under the age of 25 ("**youth**"), regardless of family income or private insurance. The program will cost \$465 million per fiscal year.

Upon approval, the new system will give youth access to the 4,400 different drugs that are currently covered under the Ontario Drug Benefit Program for families on social assistance and eligible elderly people. However, parents will not be required to pay the deductibles and co-pay costs that those groups pay.

The program will provide access to common prescriptions (such as antibiotics and asthma inhalers), as well as treatments for cancer and rare diseases. While hospital-based cancer medication is already free under OHIP, the program will cover oral cancer medication and at-home oncology care.

Youth will be able to access medication by merely showing a health card. Ontario will be the first province in Canada to implement a program of this breadth.

Overcrowding of Hospitals

There is a significant overcrowding issue in Ontario hospitals, with occupancy rates reaching over 100% across the province. Over the next 10 years, the Ontario government will spend an additional \$9 billion towards constructing new hospitals and renovating existing ones.

As an additional tool to alleviate overcrowding in hospitals, there will be a \$100 million boost towards home care, in the hopes to encourage those who are able to be cared for at home to take this alternative. Of that amount, \$80 million will be utilized to provide nurses for at home patients, resulting in 350,000 hours of additional nursing care.

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The remaining \$20 million will be geared towards respite for unpaid caregivers. The funding will cover approximately 600,000 hours of respite services. Furthermore, the Ontario government announced an emphasis on education and training programs to be offered to unpaid caregivers.

Additionally, the Ontario government announced its plan to implement a program for "alternative-level-of-care" patients. These patients are healthy enough to leave the hospital, but not yet well enough to live independently and do not have other arrangements in place. The "alternative-level-of-care" group is said to make up 15% of the patients in Ontario hospitals. The province will provide these patients with vouchers that will cover the cost of recovering in a private retirement home until they are able to move back home or to a government funded long-term care home. The program will be tested this year and the government will utilize the results to inform future policies in this regard.

Shorter Wait Times

Over the next three years, \$1.3 billion will be targeted towards reducing wait times for patients who require access to medical procedures. Large portions of that amount will be allotted towards the following:

- reduce wait times and improve access to MRIs;
- increase the number of knee and hip replacements;
- increase the number of cataract surgeries;
- increase stroke and chemotherapy services;
- increase availability of cardiac services, complex spine operations and organ/tissue transplants; and
- expand online access to medical services.

Additionally, there will be a focus on inter-professional health care models, which will facilitate greater efficiency when accessing medical services and treatments.

Dementia Initiatives

It is estimated that approximately 175,000 people in Ontario are living with dementia. The government is proposing to spend \$100 million on dementia initiatives over a three-year period. Programs covered by this investment include: increasing access to adult programs for those suffering from dementia, raising public awareness of the signs, symptoms and risk factors of the disease, and improving the coordination of care between caregivers and specialists.

Mental Health Services

While details on this initiative have not yet been made public, a portion of the budget allotted towards health care will concentrate on mental health and addiction initiatives, including psychotherapy, youth services and supportive housing.

Other Initiatives

Since the April 27th announcement, the government continues to announce new health care programs that will be funded by the Ontario budget.

Ontario's Bill 87 Proposes Significant Changes to Regulated Health Professions and Laboratory Laws

Health Law Bulletin

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In December 2016 the government of Ontario introduced [Bill 87](#).

The stated purpose of the Bill is to protect the interests of patients. It contains significant amendments to the *Regulated Health Professions Act, 1991* (the "RHPA") including changes aimed at strengthening sexual abuse and transparency regimes under the

RHPA. If enacted, the Bill will also amend the following other Acts: the *Laboratory and Specimen Collection Centre Licensing Act*, the *Ontario Drug Benefit Act*, and the *Seniors Active Living Centres Act, 2016*, and the *Immunization of School Pupils Act*.

The Bill received first reading on December 8, 2016. We expect it will be a priority when the Legislature resumes sitting in February 2017.

The Regulated Health Professions Act, 1991 and Health Professions Procedural Code

The Bill proposes significant amendments to the RHPA and Health Professions Procedural Code (the "Code").

Sexual Abuse Amendments

The Bill introduces amendments to strengthen the regime for handling of alleged sexual abuse by professionals who are members of a health regulatory College in Ontario. The amendments respond to various recommendations made by the Ministry's Task Force in its report entitled "To Zero: Independent Report of the Minister's Task Force on the Prevention of Sexual Abuse of Patients and the *Regulated Health Professions Act, 1991*", which was delivered to the Minister in December 2015.

The proposed amendments would:

- Expand the definition of "patient" for the purposes of sexual abuse to include an individual who was a member's patient within the last year or a longer prescribed period and also to provide regulation-making power to specify other individuals to be considered patients for the purposes of the section.
- Prohibit Discipline Committee panels from directing the Registrar to impose gender-based terms, conditions or limitations on a member's certificate of registration. This is aimed at prohibiting the practice of allowing a member to continue to provide services

to patients of a specific gender after an allegation or finding of sexual abuse.

- Expand the grounds for mandatory revocation of a certificate of registration of a member who has sexually abused a patient to include sexual abuse involving "touching of the patient's genitals, anus, breasts or buttocks" and other conduct that may be provided for in regulations made by the Minister.
- Require mandatory suspension of a member in sexual abuse cases other than those requiring mandatory revocation.
- Expand the Colleges' sexual abuse program in order to make funding available for patient therapy and counselling when a complaint of sexual abuse is alleged (but not yet proven). The Minister is given the power to require additional funding for other purposes by regulation.
- Increase the penalties for failing to report sexual abuse.

Other Amendments

(i) Expanded ICRC Suspension Powers

The proposed amendments would give the Inquiries, Complaints and Reports Committee (the "ICRC") and its panels the power to suspend a member from practising after receiving a complaint or report if it is of the opinion that the conduct of the member or the member's physical or mental state exposes or is likely to expose the member's patients to harm or injury, instead of only when a matter is referred for discipline or incapacity proceedings. Other than in extraordinary circumstances that require urgent intervention, the member will need to be provided notice and given an opportunity to make written submissions before such an order is made.

(ii) Expanded Transparency and Public Posting Requirements

The Bill proposes to expand the matters that Colleges are required to set out in their public registers to include:

- a notation of every caution that a member has received from a panel of the ICRC and of any continuing education or remedial programs that the member is required to undergo by a panel of the ICRC;
- the date of referral and status of every matter referred by the ICRC to the Discipline Committee;
- a copy of the notice of specified allegations for every matter that has been referred by the ICRC to the Discipline Committee that has not been finally resolved;
- a notation and synopsis of a member's acknowledgements or undertakings in relation to professional misconduct and incompetence;
- the names of former members of the College, and where a former member is deceased, their date of death, if known to the Registrar;
- where the College has an inspection program established under clause 95 (1) (h) or (h.1) (relating to premises and materials used in connection with the practice of the profession), the outcomes of inspections conducted by the College; and
- additional information where the Minister makes a regulation prescribing same (under new regulation-making powers, the Minister will be permitted to specify such additional information by regulation).

The Bill proposes to expand the term "result," as it is used in the context of the register's publication requirements, to include the result of failure to make a finding.

The Bill will require that information be posted to the register "within a reasonable amount of time" from having received it. The Registrar will also be required to correct incorrect or inaccurate information contained in the register. The member must

demonstrate, to the satisfaction of the Registrar, that the information is incomplete or inaccurate and must provide the necessary information to enable the Registrar to make the correction.

Finally, Colleges will be required to post information about upcoming meetings of the Council on their websites, including the dates of those meetings and matters to be discussed at those meetings. The public can be excluded from Council meetings, but the posting on the website will need to note the reason for the exclusion.

(iii) Other Changes

Other proposed amendments include those to:

- Increase self-reporting obligations to require members to report to the Registrar: (a) if there has been a finding of professional misconduct or incompetence against them by a professional body outside Ontario that they belong to; (b) if they are charged with an offence (and must also provide information about any bail conditions).
- Give powers to the Minister to require the Council to include in its reports to the Minister personal information and personal health information about any member of the College to the extent necessary in order to allow the Minister to determine (i) if the College is fulfilling its duties and carrying out its objects or (ii) if the Minister should exercise certain of the Minister's powers. This power will be limited to only information that is required for such purposes, and no more than is necessary.
- Expand section 36.1 (which allows the Minister to require a College to collect information from members) to permit such collection for the purposes of health human resources research.
- Expand the powers of the Minister to make regulations governing the composition of College committees and panels, as well as governing the qualification, disqualification, selection, appointment, terms of office and removal of disqualified members of committees. Colleges also have the power to regulate these matters through their by-laws; however, these by-law making powers will be subject to regulations made by the Minister.

Laboratories and Specimen Collection Centres

Extensive changes are also proposed to the *Laboratory and Specimen Collection Centre Licensing Act* ("LSCCLA"). The LSCCLA governs the establishment, operation and maintenance of laboratories and specimen collection centres under a licence issued under the Act. Both laboratories and specimen collection centres will be provided for in a new proposed definition for "laboratory facility," aimed at making the Act simpler and easier to read. The current LSCCLA makes it a condition of a licence for a laboratory that the laboratory meet the requirements of a quality management program. The Bill proposes that this condition be extended to licences for a specimen collection centre. The Bill extends the terms for provisional and non-provisional licences, subject to the discretion of the Director of Laboratory and Specimen Collection Centre Licensing. The Bill also gives the Director the power to suspend a licence for laboratory facility on an emergency basis. The Bill further provides for significantly enhanced investigation powers; broader regulation-making authority; and broader offence provisions for directors, officers, employees and agents of a corporation.

Two other consequential changes are proposed to the *Health Insurance Act* and *Public Hospitals Act*:

- The *Health Insurance Act* will be amended to permit the Minister to enter into

arrangements with health facilities (which include laboratories) insured services on a basis other than fee for service, for example through bundled payments. Currently the ability for the Minister to do so is limited to physicians and practitioners.

- The *Public Hospitals Act* will be amended to allow the Minister to designate public hospitals to provide community laboratory services. The definition of "community laboratory services" means the services of a licenced laboratory or specimen collection centre that are provided by a public hospital that has been so designated to persons who are neither in-patients nor out-patients of the hospital (in other words, to the general community).

The Ontario Drug Benefit Act

The Bill proposes to add a new definition to the *Ontario Drug Benefit Act* for a "registered nurse in the extended class." The Bill proposes to make amendments to the Act to provide for prescriptions by registered nurses in the extended class, as well as by physicians. A new regulation-making power is introduced, which would allow a regulation to incorporate other documents, as amended, by reference after the regulation is made.

The Seniors Active Living Centres Act, 2016

The Bill proposes to repeal and replace the *Elderly Persons Centres Act* with a new Act. Under the new Act, an operator will be able to apply for approval to receive funding from the Minister Responsible for Seniors Affairs to establish, maintain or operate a seniors active living program. The director appointed by the Minister would be required to approve a program on being satisfied that its purpose is to promote active and healthy living, social engagement and learning for persons who are primarily seniors by providing them with activities and services.

It will be a pre-condition, however, that the local municipality where the program is located (or other relevant entity, if not located in a municipality) agrees to make a matching contribution to the operator of the program — otherwise the program will not receive the provincial funding.

There are broad regulation-making powers under the Act.

The Immunization of School Pupils Act

The Bill proposes that the *Immunization of School Pupils Act* be amended such that parents who want to exempt a pupil from completing a prescribed program of immunization must first complete an immunization education session before filing the required statement of conscience or religious belief. The Bill proposes to expand the categories of persons who may provide statements regarding the administration of immunizing agents to "prescribed persons". Further, it is proposed that those who administer immunizing agents be required to provide information not only to the pupil's parent, but also to the local medical office of health.

We plan to keep readers apprised of developments as the Bill advances through the Legislature.

Tab 6

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

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Healthcare Philanthropy Check-Up 2017
Spring 2017 Carters Charity & NFP Webinar Series
24th Annual Church and Charity Law Seminar – Save the Date

Healthcare Philanthropy Seminar

Co-hosted by Carters and Fasken Martineau in Toronto on Thursday, June 1 2017.

Click here for [Details and online registration](#).

Spring 2017 Carters Charity & NFP Webinar Series

Hosted by Carters Professional Corporation on Thursdays from April 20 to June 22, 2017

Click here for [online registration](#) and for [On Demand/Replay](#).

24th Annual Church & Charity Law™ Seminar

SAVE THE DATE - Thursday November 9, 2017

Hosted by Carters Professional Corporation in Greater Toronto, Ontario.

Guest speakers include **Justice David Brown**, Ontario Court of Appeal
and **Tony Manconi**, Director General, Charities Directorate, Canada Revenue Agency

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RECENT PUBLICATIONS AND NEWS RELEASES

Sweeping Changes Recommended in Report on Political Activities

By [Terrance S. Carter](#), [Jennifer M. Leddy](#) and [Ryan M. Prendergast](#)

On May 4, 2017, the Canada Revenue Agency (“CRA”) published on its website the excellent and very readable [Report of the Consultation Panel on the Political Activities of Charities](#) (the “Report”), prepared after the CRA’s consultation with the charitable sector that was launched in September 2016 and concluded in December 2016 (the “Consultation”). In conjunction with the release of the Report, the Minister of National Revenue announced on the same day the Liberal government’s suspension of all remaining CRA audits of charities for political activities originally initiated through the 2012 Federal Budget. The suspension is to remain in place pending the implementation of the Report’s recommendation.

The Report, states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for changes to the current administrative and legislative framework governing “political activities” by charities. In doing so, the Report provides four recommendations, including the immediate suspension of the political activity audits that was acted upon by the Minister of National Revenue. The CRA has committed to providing a formal response to the Consultation Panel’s recommendations by the end of June 2017.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 403](#).

Corporate Update

By [Theresa L.M. Man](#)

Corporations Canada Increases Online Services

On May 17, 2017, Corporations Canada announced that it is providing a new service to allow not-for-profit corporations incorporated under the *Canada Not-for-profit Corporations Act* to submit requests online to amend their articles of incorporation. The service is provided through its [Online Filing Centre](#) for a fee of \$200. The service standard for the amendment is “Same day/Next Day Service”. The Online Filing Centre already allows federal not-for-profit corporations to incorporate, file annual returns, and file by-laws online, among other services.

BC Releases Guide for Transitioning Societies

With the new British Columbia *Societies Act* having come into effect on November 28, 2016, all pre-existing societies in B.C. must transition to the new Act by November 28, 2018 under Part 16 of the new Act. This is done by filing online with the registrar a transition application consisting of a constitution, by-laws (consolidating all by-laws into a single set of by-laws) and a statement of directors and registered office of the society. The British Columbia Corporate Registry's [website](#) contains many helpful resource tools to help societies to transition to the new Act. In particular, [Preparing for B.C.'s New Societies Act: A Guide to the Transition Process](#) and [Filing Guide: How to file a Transition Application in Societies Online](#) are most helpful.

CRA Issues a Technical Interpretation of Charities Returning Gifts

By [Ryan M. Prendergast](#)

On May 17, 2017, CRA released document 2016-0630351, which is composed of a letter dated March 31, 2017. In the view, CRA provided its response to the questions “1) Can a registered charity return a gift of a life insurance policy to a donor?” and “2) If so, what are the tax consequences to the registered charity and to the donor?” In 1981, the donor gifted a life insurance policy to a foundation which supports a college. The gift was intended to form a scholarship for a specific program. That program, though it existed at the time of the gift, no longer exists. The donor therefore believed that a condition of the gift was not fulfilled, and requested that the gift be returned. The foundation would be willing to do so if CRA could assure the donor there would be no “negative impact on its registered status”.

The technical interpretation first refers the donor to [Guidance CG-016 Qualified donees – Consequences of returning donated property](#), and notes that in most cases a charity cannot return a gift. It then says that there are some cases in which a charity may be obligated to return gifts due to trust law, but that those are ultimately a decision for the court, rather than CRA, to make as those scenarios do not fall under the *Income Tax Act* (“ITA”). As to the tax consequences, the letter points to the rules under the ITA which apply in situations where there was no gift at law or there was a gift at law that needed to be returned, and the charity had given the donor a charitable donation receipt. In such a case, the donor cannot retain the tax benefit of such a receipt.

For the potential impact on a qualified donee, the letter refers to Guidance CG-016 and to the [Returning a gift to a donor webpage](#). It recommends that “before returning gifted property, qualified donees should determine if other provincial or federal legislation might affect their ability to legally return donated

property.” It further warns that “a registered charity that returns gifted property could be regarded as making a gift to a non-qualified donee or providing an undue benefit, which are contraventions of the Act and could result in sanctions that include revocation of registered status.” The letter ends by saying that the determination of whether the gift can be legally returned is beyond the scope of the technical interpretation. The view is an important reminder that when donors and charities are discussing the potential return of charitable property, the common law and provincial jurisdiction should also be considered in addition to any potential income tax consequences.

Income Tax Treatment for Monies Paid to Support Refugees

By [Jacqueline M. Demczur](#)

On March 3, 2017, CRA released technical interpretation 2016-0651661E5 – Payments to Syrian refugees by a church. This technical interpretation was in response to a letter received by CRA from a church inquiring about the income tax treatment of payments made by the church to support a Syrian refugee family (the “family”). Specifically, the church asked whether the said money received by the family was to be included as income in the family’s tax returns, and whether there are any special rules for refugees for income tax purposes.

In terms of background, the inquiring church is a private sponsor that has established a fund to support a particular Syrian refugee family, and has provided support to the family since they arrived in Canada. The monies provided by the church were to assist the family with their living expenses. The family also has received money through the Resettlement Assistance Program provided by the government.

In response to the questions asked, CRA noted that paragraph 56(1)(u) of the ITA requires social assistance payments received in the year and made on the basis of a means, needs, or income test are to be included in a taxpayer's income, unless they are included in the taxpayer's spouse's or common-law partner's income. CRA further noted that income included under paragraph 56(1)(u) will be offset by a matching deduction under paragraph 110(1)(f) of the ITA. As such, there will be no income tax implications, other than potentially affecting certain income-tested benefits. Accordingly, CRA indicated that “if the payments made by the church are assistance made on the basis of “means, needs or income test,” then they are likely social assistance payments for purposes of paragraph 56(1)(u)” of the ITA.

“Social assistance” is not defined under the ITA, but, with reference to paragraph 56(1)(u), CRA indicated that it is generally understood to mean “aid provided by a government or government agency, although it

can be provided by other organizations (such as a church), on the basis of need.” With respect to the means, needs, or income test, CRA advised that it considers them to be financial tests and describes them as follows: “1. [a]n “income” test, which is a test based solely on the income of the applicant, 2. [a] “means” test, which is similar to an income test, but also takes into account the assets of the applicant, [and] 3. [a] “needs” test, which takes into account the income, assets and financial needs of the applicant.”

In its response, CRA also noted that subsection 233(1) of the *Income Tax Regulations* requires organizations providing social assistance to report such assistance on Form T5007- Statement of Benefits, unless expressly exempted.

This technical interpretation is helpful to those organizations providing assistance to refugees in Canada, as well as all organizations, including not-for-profits and charities that provide assistance based on a means, needs or income test.

Further information on the provision of social assistance, the resulting reporting requirements and form T5007 can be found on the CRA website by clicking [here](#), as well as in CRA’s pamphlet [T4055 Newcomers to Canada](#).

Administrative Penalty Assessed for False Statements on Donation Receipts

By [Esther S.J. Oh](#)

On April 25, 2017, the Tax Court of Canada (the “Court”) released its decision in [Ploughman v The Queen](#) (the “Ploughman Decision”), an appeal by Glenn Ploughman (“Ploughman”), from CRA’s assessment under section 163.2 of the ITA, often referred to as the third-party penalty provision.

The Court found that Ploughman participated in the making of, or assented to or acquiesced in the making of, false statements by 135 participants in a charitable donation program. The background facts of this case are complex and it is beyond the scope of this article to describe in detail. However, in general terms, the Court found Ploughman was a creator or promoter of a charitable donation program (“Donation Program”) that was based on the creation of a timeshare property and the donation of vacation ownership weeks to registered charities by participants in the Donation Program. However, timeshare units were never created and therefore vacation ownership weeks were never actually donated by any participants. Each of the 135 official receipts issued to participants in the Donation Program, which stated that each donor had made an in-kind donation of a specified number of “Biennial Weeks Vacation Ownership at Arawak Inn & Beach Resort”, contained a false statement.

Based on the evidence, the Court found that when Ploughman sent a letter to the participants in the Donation Program recommending that they submit their charitable receipts to CRA, he knew or would reasonably be expected to have known but for circumstances amounting to culpable conduct, that each of the official receipts contained a false statement. Further the Court found that Ploughman's indifference concerning the non-existence of the timeshare units, the failure to implement other transactional steps on which the Donation Program was based, and his indifference as to whether his recommendation in that letter was well founded, showed an indifference concerning whether the ITA was complied with and thus constituted culpable conduct.

Subsection 163.2(6) of the ITA provides a safe harbour for an advisor who relies, in good faith, on information provided by or on behalf of a person who makes a false statement. However, the Court found that Ploughman's reliance on the legal opinion letter of Ms. Guindon (the lawyer who had provided the legal opinion concerning the Donation Program as described below) did not satisfy the statutory criteria of subsection 163.2(6) of the ITA. The Court noted that subsection 163.2(6) of the ITA applies only where the advisor is acting on behalf of the person who makes the false statement, but the Donation Program involved a number of participants who were clients of other canvassers, such that Ploughman may not have been acting on behalf of those participants. In addition, the Court found Ploughman was not acting in good faith.

The Donation Program was previously at the centre of the case involving [*Guindon v R*](#), as discussed in the [*August 2015 Charity & NFP Law Update*](#). In that case, Guindon, a lawyer without expertise in tax law, provided a legal opinion on the tax consequences of a leveraged donation program and signed 135 charitable receipts totalling \$3,972,775 in her capacity as the president of a registered charity. Guindon was found liable under s. 163.2(4) of the ITA for knowingly assisting another taxpayer with making false statements or omissions in a tax return.

July 1st CASL Deadline Looms

By [Ryan M. Prendergast](#)

On July 1, 2017, an important provision of Canada's anti-spam legislation, ("CASL") will end while another one will come into force.

- 1) The transition period in section 66 of CASL will end; and
- 2) The private right of action will come into force.

Of particular interest to charities and not-for-profits is the ending of the transition period under section 66 of CASL.

When CASL came into force on July 1, 2014, section 66 of CASL provided a three-year transition period for implied consent for organizations to have been able to send commercial electronic messages arising out of existing business or non-business relationships. Implied consent under CASL, *e.g.*, donations to registered charities or membership in non-profit organizations, is generally tied to a statutory time limit of two years or less. However, during the transition period, implied consent arising from existing business or non-business relationships created prior to July 1, 2014 were effective until the end of the three-year period. The intention of the transition period was to permit organizations to which CASL applies to obtain express consent from these individuals. As of July 1, 2017, this transition period will end. As a result, charities and not-for-profits relying on implied consents arising from existing business or non-business relationships created prior to July 1, 2014 have only a brief window to obtain express consent from these individuals prior to July 1, 2017. Of course, implied consent obtained after July 1, 2014 will still be valid, though such implied consent will be subject to the normal time limitations under CASL and were not impacted by the transition period.

In addition, the ability for an individual to bring a claim against an organization that is non-compliant with CASL, or its directors and officers, under a private right of action will also come into force on July 1, 2017. Many practitioners recently have written on the private right of action and the potential for class action law suits. Whether this is an area of concern for charities and not-for-profits remains to be seen. However, it is an important reminder that charities and not-for-profits impacted by CASL should ensure they can demonstrate due diligence in the event of potential claims.

Electronic Liability Release Held Enforceable

By [Barry W. Kwasniewski](#)

On January 12, 2017, the Court of Queen's Bench for Saskatchewan released its summary judgment decision in [Quilichini v Wilson's Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd.](#) (the "decision"). The decision focuses on the enforceability of an electronic liability waiver. Aaron Quilichini ("Quilichini"), the plaintiff, claimed damages for negligence causing bodily injuries and/or breach of contractual obligations against Wilson's Greenhouse & Garden Centre Ltd. and Velocity Raceway Ltd.

(“Velocity”) (collectively the “defendants”). The injuries were suffered during a go-kart race which took place in a venue operated by Velocity. Quilichini claimed that the throttle on the go-kart he was operating did not work, which caused him to crash into a cement barrier at full speed. The defendants sought a summary judgment dismissing the claim of Quilichini on the basis that he executed an electronic liability waiver. The judge determined that the executed electronic liability waiver was as binding as a signed hard copy. As many organizations, including charities and not-for-profits, are using electronic forms of liability waivers instead of traditional hard copy forms, the decision upholding the enforceability of the electronic format waiver is an example of the law adapting with use of technology.

For the balance of this Bulletin, please see [*Charity & NFP Law Bulletin No. 404*](#).

Ontario Medical Assistance in Dying Legislation Receives Royal Assent

By [Esther Shainblum](#)

On May 10, 2017, Ontario [Bill-84, *Medical Assistance in Dying Statute Amendment Act, 2017*](#) (the “MAID Act”) received royal assent and came into force. On May 9, 2017, the Ministry of Health and Long-Term Care (the “Ministry”) issued a [news release](#) explaining the legislation. The legislation makes changes to various pieces of provincial legislation in order to align provincial law with the federal legislation that came into force in June 2016 through [amendments to the *Criminal Code \(Canada\)*](#), and to address areas that fall under provincial jurisdiction. The MAID Act amendments include:

- Ensuring that benefits, such as insurance payments and workplace safety and insurance benefits, are not denied only because a person received medical assistance in dying
- Protecting physicians and nurse practitioners, those who assist them, and care provider institutions from civil liability when lawfully providing medical assistance in dying, except in cases of negligence
- Preventing identifiable information about individuals and facilities that provide medical assistance in dying from being disclosed under access to information requests
- Ensuring that there is effective ongoing reporting and monitoring by the Chief Coroner of Ontario for cases of medical assistance in dying.

The MAID Act also requires the Ministry to establish a care coordination service to assist patients and caregivers to access additional information and services for medical assistance in dying and other end-of-life options.

Court Awards Damages in Internet Photo Copyright Infringement

By [Sepal Bonni](#)

On April 4, 2017, the Ontario Superior Court of Justice (“Court”) rendered a decision in a copyright case, [*Trader Corp. v CarGurus Inc*](#) that will be of interest to charities and not-for-profits. Trader Corporation (“Trader”) and CarGurus, Inc. (“CarGurus”) are competitors in the marketplace and both operate “digital marketplaces”, which include listings of vehicles on their respective websites that are available for sale from vehicle dealers. Trader operates the popular auto trading website, Autotrader.ca and related websites and mobile applications, including a service for dealers called “Capture Service”, which involves Trader’s photographers going to the dealerships and taking photos of the vehicles to include in the listings of cars that are for sale. CarGurus is new to the Canadian market, but is one of the largest digital marketplaces in the United States. When CarGurus came to Canada they used the same methods for sourcing information as they had in the US, including using computer software to crawl the internet and extract or “scrape” data relating to vehicle listings from other dealers’ websites and posting it on their website. This resulted in CarGurus displaying 196,740 photos that Trader alleged infringed its copyright in the photos taken and owned by Trader for its Capture Service.

Trader sought \$98,370,000 in statutory damages for the copyright infringement of the 196,740 photos. That is \$500 per photo, which is the statutory minimum under the *Copyright Act*. The Court determined that Trader owned the copyright in 152,532 of those photos. Even with the Court-reduced number of 152,532 photos, damages under the statutory minimum would amount to \$76,266,000. The Court exercised its discretion to award fewer damages on the basis of section 38.1(3) of the *Copyright Act*, which allows the Court to award a lower amount if “[t]here is more than one work or subject matter in a single medium” and “the awarding of even the minimum amount referred to in that paragraph or that subsection would result in a total award that, in the Court’s opinion, is grossly out of proportion to the infringement.” In this case, the Court determined that this section applied and awarded statutory damages of \$2.00 per photo, for a total of \$305,064 in damages.

This case is a good reminder for charities and not-for-profits that using photos from the internet can have serious consequences. As a result, charities and not-for-profits should be careful not to reproduce photos

extracted from the internet on their websites without obtaining the requisite consent. It is best to first consult with legal counsel.

Supreme Court of Canada Refused Leave to Appeal in Crossing Guard Case

By [Barry W. Kwasniewski](#)

On May 4, 2017, the Supreme Court of Canada [refused leave to appeal](#) in the case of *Saumur v Antoniuk* (“*Saumur*”). The City of Hamilton (the “City”), which was one of the defendants, sought leave to appeal from a November 2016 Ontario Court of Appeal [decision](#) affirming the decision of the Ontario Superior Court of Justice. In the Court of Appeal decision, the Court addressed the subject of alleged contributory negligence by a minor (Dean Saumur) who was hit by a car when crossing an intersection with the crossing guard absent. At trial, negligence was apportioned equally as between the City and Luba Antoniuk, who was the driver of the vehicle which struck Dean, with no contributory negligence being found as against Dean. In the Court of Appeal, the City argued that Dean was contributorily negligent in that he failed to look both ways before crossing the intersection. The Court of Appeal disagreed and dismissed the appeal, affirming the [trial court decision](#). With leave to appeal to the Supreme Court refused, the *Saumur* decision by the Court of Appeal remains an important reminder for charities and not-for-profits that deal with children, that negligent acts or omissions resulting in injury to children could result in substantial liability, and that courts may be reluctant to reduce such liability even in cases where the child arguably contributed to his or her own harm. For an in depth discussion of *Saumur* see [Charity & NFP Law Bulletin No. 395](#).

Court Resolves Disputes between Struggling “Factions” of a Non-Profit Club

By [Theresa L.M. Man](#)

The July 20, 2016 decision of the Court of Queen’s Bench of Alberta (“Court”) in [Colgan v Canada’s National Firearms Association](#) is an interesting case illustrating how corporate disputes involving a corporation under the *Canada Not-For-Profit Corporations Act* (“CNCA”) were dealt with by the Court.

The dispute arose between two factions of the Club fighting for control of Canada’s National Firearms Association (“Club”) – the “Colgan Faction”, who are five first-time directors and the “Clare Bloc”, who are a group of re-elected long serving directors. The fight between the two factions included carrying on an “unsuccessful coup” to replace the president of the Club, revoking membership of directors of the Club,

thereby removing them from their board seat, passing new by-laws prohibiting membership proxy voting and restricting membership to certain persons.

In reviewing whether the Court should intervene in the Club's internal affairs, the Court stated that, "[c]ourts do not intervene in a club's affairs unless the club is guilty of breaching its rules or the rules of natural justice, or if there is bad faith in decision-making." Consistent with the case of *Street v BC School Sports* (2005 BCSC 958), the Court held that the "Courts have no interest in the day-to-day activities of voluntary associations" and "[t]hat certainly includes internal politics and inter-factional sniping." However, the Court rejected the request of the Colgan Faction to direct the Club to comply with the laws of Canada and the Club's own by-laws because the Club is already required to comply with them. As such, if the Club chooses not to do so and the grievance meets the threshold for intervention, then the Court will intervene.

The Court held that three board seats were validly vacated when the board revoked the membership of three directors of the Colgan Faction, who were thereby disqualified to be directors because the bylaw states that a director resigns "if he or she ceases to be a member." The Court was satisfied that subsections 130(1) and (3) and section 132 of the CNCA (which deal with removal of directors by membership vote) were not applicable in this situation. However, the Court held that the appointment of three replacement directors by the board at that same meeting was not valid because the by-laws of the Club required a by-election to be held to fill the vacancies.

The Court rejected the argument that the revocation of membership of the three directors were not valid because a proxy vote was counted, presumably at the board meeting. The Court held that subsection 126(3) of the CNCA (which provides that "No person shall act for an absent director at a meeting of directors") is not "a ban on proxy votes." It is not clear from the judgement whether a director voted by proxy at the board meeting, nor is the basis of the Court's ruling, because it is settled law that voting by proxy is an improper delegation of a director's powers and it is not possible for a director to discharge his/her fiduciary duties by appointing a proxyholder to vote in his/her stead.

Although a by-election was required to fill the vacancies on the board, the Court refused the request of the Colgan Faction to appoint an investigator. The Court held that in order to appoint an investigator under section 242 of the CNCA, there must be evidence of actions that are "oppressive or unfairly prejudicial to

or that unfairly disregards the interests of a member or debt obligations holder.” The Court pointed to the decision of the Supreme Court of Canada in *BCE Inc v 6796508 Canada Inc.* (2008 SCC 69), which “interpreted the almost identical language in the *Canada Business Corporation Act* oppression provision, and set out a two-step test to determine if oppression is established: i. determine if the evidence supports the reasonable expectation asserted by the claimant; and ii. determine if the reasonable expectation was violated by conduct falling within the terms ‘oppression’, ‘unfair prejudice’ or ‘unfair disregard’ of a relevant interest?” As such, the Court refused to appoint an investigator because “suspicion and distrust, not evidence [drove] the contention that the Clare Bloc will stoop to using ‘dirty tricks’ to win the next election.”

Lastly, the Court held that two new bylaws that were passed after the Colgan Faction was purged require membership approval before the board can act upon them because subsection 197(1)(e) of the CNCA requires member approval of an amendment if it changes “a condition required for being a member.” These new bylaws removed membership proxy voting, restricted Club membership to only “moral” members, and restricted members to “natural persons” having “legal capacity” and thereby eliminated non-voting memberships that were previously available to corporations and minors.

Jedi Order Denied Charitable Status for Advancement of Religion

By [Terrance S. Carter](#) and [Jennifer M. Leddy](#)

On December 19, 2016, the Charity Commission for England and Wales (the “Commission”) [published its decision](#) to reject an application for charitable registration by The Temple of the Jedi Order (“Jedi Order”). The application was made, in part, on the basis that Jediism is a religion. In its application, the Jedi Order cited its charitable purpose as “to advance the religion of Jediism, for the public benefit worldwide, in accordance with the Jedi Doctrine”. In England and Wales, advancement of religion is described as a charitable purpose in section 3(1)(c) of the [Charities Act, 2011](#) and religion is partially defined in section 3(2) of the Act as including i) a religion which involves belief in more than one god, and ii) a religion which does not involve belief in a god. However, the *Charities Act, 2011* also preserved the common law meaning of religion for the purposes of charity law subject to the partial definition in section 3(2). It is the Commission’s treatment of the common law that is of particular interest to Canadian religious organizations, as there is no corresponding statutory definition of religion in Canada. The decision also sets out the elements of the charitable purpose of promoting moral or ethical improvement.

For the balance of this Bulletin, please see [Church Law Bulletin No. 48](#).

OBA Proposes Changes to Investment Powers in the Trustee Act

By [Terrance S. Carter](#)

On May 1, 2017, the Ontario Bar Association (“OBA”) made a [submission to the Attorney General of Ontario](#) for changes to the *Trustee Act* concerning investment powers by trustees. The OBA has recommended two changes to the *Trustee Act* to better address the ability of trustees to delegate investment decision making to agents (such as delegated investment managers) as provided for under ss. 27.1 and 27.2 of the *Trustee Act*. Because the proposed changes are of a technical nature, the submission’s introduction explains each of the proposed changes in non-technical language as follows:

Our first recommendation is to permit a trustee’s agent (such as a delegated investment manager) to sub-delegate the investment power of trust property. Practically speaking, this will allow for the investment manager of a charity, who works for “Bank A,” to invest in a wider range of products, such as those managed by “Bank B” (such as Bank B’s mutual or pooled funds). This is not currently permitted and therefore unduly restricts investment options for charities that work with delegated investment managers.

The second recommendation requests clarity with respect to the classes of persons or qualifications of persons who are eligible to act as agents relating to the investment of trust property. Our recommendation is that the Attorney General either set out those classes and qualifications, or remove the power to do so that is currently contained in the Act, thereby clarifying the legislative and regulatory framework for the sector.

The implementation of these recommendations would help to clarify when sub-delegation of investment decision making by agents is permitted, as well as clarifying the qualification requirements of agents. The first recommendation would establish an exemption from the prohibition of sub-delegation in s.27.2(2) of the *Trustee Act* to allow an agent (e.g. a delegated investment manager) to invest in mutual funds, pooled funds or segregated funds under variable insurance contracts in accordance with s. 27(3) of the Act. As well, given the current lack of regulations that govern and restrict classes and qualifications of eligible agents as authorised by s. 30 of the *Trustee Act* with regard to the selection of agents in accordance with s. 27.1(5)(a) of the Act, the second recommendation calls for the Attorney General to either adopt relevant regulations concerning the restriction of class and qualification of agents in accordance of s. 30 of the Act, or for s. 30 and its corresponding s. 27.1(5)(a) of the Act to be repealed. Although of a technical nature, the proposed changes by the OBA would help to clarify the role of delegated agents in investment decision making for charities in Ontario.

Anti-Terrorism Law Update

By [Terrance S. Carter](#), [Nancy E. Claridge](#) and [Sean S. Carter](#)

U.S. and Saudi Arabia to Co-Chair New Terrorist Financing Targeting Center

On May 21, 2017, the United States of America (“U.S.”) and Saudi Arabia [announced](#) an intention to establish and co-chair the Terrorist Financing Targeting Center (“TFTC”). The TFTC is intended to increase and formalize cooperation between the U.S., Saudi Arabia, and partners in the Gulf Cooperation Council, as it pertains to countering terrorist financing. The stated goals of the TFTC are to:

1. Identify, track, and share information regarding terrorist financial networks;
2. Coordinate joint disruptive actions, and;
3. Offer support to countries in the region that need assistance building capacity to counter terrorist finance threats.

States involved in the new TFTC include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates and the U.S (the “Participants”). These states put together a Memorandum of Understanding on Countering the Financing of Terrorism (the “MOU”), a non-legally binding document that states the intentions of the participating states. The MOU states that it does not replace or modify “existing bilateral information sharing and operational relationships among the Participants.” The MOU also specifically references “establishing workshops on best practices in line with Financial Action Task Force (“FATF”) standards.” As a matter of background, the [FATF](#) is an inter-governmental body responsible for setting and monitoring international standards for combating money laundering and financing of terrorism and proliferation. Organizations operating in the Persian Gulf region or with a particular interest in countering terrorist financing measures should keep an eye on the developments around the new TFTC.

New Study on the Impact of International Counter-Terrorism on Civil Society Organisations Released

In April 2017, the Brot für die Welt (English translation: Bread for the World) released a [study](#) entitled “The impact of international counterterrorism on civil society organisations: Understanding the role of the Financial Action Task Force.” [Bread for the World](#) is a German civil society organization, acting on behalf of the Protestant Churches in Germany, which is globally active in development and relief projects. The organization observed issues encountered by partner organizations around the world and decided to look into the matter. The report “examines the impact of international counterterrorism frameworks on the work of civil society organisations.” It particularly focuses on the impact of the Financial Action Task Force (the “FATF”). This resource may be useful to organizations operating internationally, to help them gain

an understanding of the impacts of counter-terrorism measures globally. The report covers such topics as: “How the international counterterrorism framework affects the work of INGOs and their partners on the ground”, “The FATF and the worldwide proliferation of restrictive non-profit laws”, “how due diligence and ‘de-risking’ is limiting civil society’s access to financial services”, and the effect of terrorist blacklisting on the sector.

Healthcare Philanthropy Check-Up 2017

The Healthcare Philanthropy Check-Up 2017 will be co-hosted by Carters and Fasken Martineau in Toronto on June 1, 2017. Click here for [registration](#). This seminar will focus on a number of timely topics:

- “Essential Charity Law Update” by Jacqueline M. Demczur
- “Practical Problems with Gift Planning” by M. Elena Hoffstein
- “Critical Issues Concerning Investment by Charities” by Terrance S. Carter
- “When Charities Go To Court: Is Your Charity Ready? Tips and Traps” by Jonathan F. Lancaster

Spring 2017 Carters Charity & NFP Webinar Series

Hosted by Carters Professional Corporation on **Thursdays** that started on April 20, 2017, [online registration](#) and [On Demand/Replay](#) are available for the following topics:

- “Implications of the Patients First Act in Ontario” presented by Esther Shainblum on April 20, 2017
- “Youth Programs: Identifying and Managing the Risks” by Sean S. Carter on April 27, 2017
- “Allocation Issues and CRA: The Importance of Getting it Right” by Theresa L.M. Man on May 4, 2017
- “Legal Check-Up: 10 Tips to Effective Legal Risk Management” by Terrance S. Carter on May 18, 2017
- “Do’s and Don’ts of Donor Information” by Ryan M. Prendergast & Terrance S. Carter on May 25, 2017
- “Copyright Issues for Charities and NFPs in the Digital Era by Sepal Bonni on June 8, 2017
- “The Top Ten Human Resources Mistakes Employers Make (And How to Avoid Them)” by Barry W. Kwasniewski on June 15, 2017

- “Importance of Corporate Documents in Governance Disputes” by Esther S. Oh on June 22, 2017

24th Annual Church and Charity Law Seminar – Save the Date

The upcoming 24th Annual *Church & Charity Law*TM Seminar hosted by Carters in Greater Toronto, Ontario, will be held on **Thursday November 9, 2017**. Guest speakers include Justice David Brown, of the Ontario Court of Appeal who will speak on the topic of “Governance Disputes involving Charities and Not-for-profits: The View from the Bench”, as well as Tony Manconi, Director General, Charities Directorate, Canada Revenue Agency. Details and online registration will be available soon

IN THE PRESS

[Charity & NFP Law Update – April 2017 \(Carters Professional Corporation\)](#) was featured on *TaxNet Pro* and is available online to those who have subscription privileges. Future postings of the *Charity & NFP Law Update* will be featured in upcoming posts.

[Patients First Act Becomes Law in Ontario](#) written by Esther Shainblum was published in *The Lawyer's Daily* on May 4, 2017.

RECENT EVENTS AND PRESENTATIONS

[Implications of the Patients First Act in Ontario](#) was presented by Esther Shainblum on April 20, 2017. Links to the [Webinar Materials](#), [Resource Materials](#) and [On Demand/Replay](#) are available on our website.

[Youth Programs: Identifying and Managing the Risks](#) was presented by Sean S. Carter on April 27, 2017. Links to the [Webinar Materials](#) and [On Demand/Replay](#) are available on our website.

[Allocation Issues and CRA: The Importance of Getting it Right](#) was presented by Theresa L.M. Man on May 4, 2017. Links to the [Webinar Materials](#) and [On Demand/Replay](#) are available on our website.

Practice Tips: Voluntary Disclosure for NPOs and Charities was presented by Terrance S. Carter as part of a panel discussion at the CBA Charity Law Symposium held in Toronto on May 12, 2017.

[Legal Check-Up: 10 Tips to Effective Legal Risk Management](#) was presented by Terrance S. Carter on May 18, 2017. Links to the [Webinar Materials](#) and [On Demand/Replay](#) are available on our website.

[**Do's and Don'ts of Donor Information**](#) was presented by Ryan M. Prendergast & Terrance S. Carter on May 25, 2017. Links to the [**Webinar Materials**](#) and [**On Demand/Replay**](#) are available on our website.

UPCOMING EVENTS AND PRESENTATIONS

[**Spring 2017 Carters Charity & NFP Webinar Series**](#) will be hosted by Carters Professional Corporation on **Thursdays** starting April 20, 2017. [**Online registration**](#) is available for the following topics:

- “Copyright Issues for Charities and NFPs in the Digital Era by Sepal Bonni on June 8, 2017
- “The Top Ten Human Resources Mistakes Employers Make (And How to Avoid Them)” by Barry W. Kwasniewski on June 15, 2017
- “Importance of Corporate Documents in Governance Disputes” by Esther S. Oh on June 22, 2017

[**Healthcare Philanthropy Check-Up 2017**](#) is co-hosted by Carters and Fasken Martineau in Toronto on Thursday, June 1, 2017. This seminar will focus on a number of timely topics:

- “Essential Charity Law Update” by Jacqueline M. Demczur
- “Critical Issues Concerning Investment by Charities” by Terrance S. Carter

[**19th National STEP Conference**](#) will be held on June 12, 2017 in Toronto. Terrance S. Carter and Ruth MacKenzie will co-present on the topic of “Charitable Giving – Pitfalls in Drafting Gift Agreements and Implementing Your Clients’ Philanthropic Goals.”

[**PAVRO \(Professional Association of Volunteer Leaders Ontario\)**](#) will host a seminar by Carters on June 23, 2017. The topics will include:

- “10 Key Tips to Effective Risk Management for Charities and Not-for-Profits” – Terrance S. Carter
- “Volunteer Agreements: Managing Relations and Reducing Risk” – Terrance S. Carter
- “Youth Programs: Identifying and Managing the Risks” – Sean S. Carter

[**CSAE Trillium 2017 Summer Summit Conference**](#) will be held on July 13, 2017 in Alliston, Ontario. Terrance S. Carter will present on the topic of “Social Media and Privacy Pitfalls Involving NPOs and Charities”.

CONTRIBUTORS

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Sepal Bonni, B.Sc., M.Sc., J.D., Trade-mark Agent - Called to the Ontario Bar in 2013, Ms. Bonni practices in the areas of intellectual property, privacy and information technology law. Prior to joining Carters, Ms. Bonni articulated and practiced with a trade-mark firm in Ottawa. Ms. Bonni represents charities and not-for-profits in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations. Ms. Bonni assists clients with privacy matters including the development of policies, counselling clients on cross-border data storage concerns, and providing guidance on compliance issues.



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 Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2017), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, 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 articulated with and been an associate with Fasken Martineau DuMoulin LLP (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 Upper Canada and Ontario Bar Association CLE learning programs.



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*.



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SWEEPING CHANGES RECOMMENDED IN REPORT ON POLITICAL ACTIVITIES

*By Terrance S. Carter, Jennifer M. Leddy & Ryan Prendergast **

A. INTRODUCTION

On May 4, 2017, the Canada Revenue Agency (“CRA”) published on its website the excellent and very readable [Report of the Consultation Panel on the Political Activities of Charities](http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html) (the “Report”),¹ prepared after the CRA’s consultation with the charitable sector that was launched in September 2016 and concluded in December 2016 (the “Consultation”). In conjunction with the release of the Report, the Minister of National Revenue announced on the same day the Liberal government’s suspension of all remaining CRA audits of charities for political activities originally initiated through the 2012 Federal Budget. The suspension is to remain in place pending the implementation of the Report’s recommendation.

The Report, states that the “legislative framework for regulating charities is out-dated and overly restrictive” and calls for changes to the current administrative and legislative framework governing “political activities” by charities. In doing so, the Report provides four recommendations, including the immediate suspension of the political activity audits that was acted upon by the Minister of National Revenue. The CRA has committed to providing a formal response to the Consultation Panel’s

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¹ Canada Revenue Agency, *Report of the Consultation Panel on the Political Activities of Charities*, Government of Canada, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/pnlrprt-eng.html> [the “Report”]. The Report was prepared by a panel appointed by the Minister of National Revenue, consisting of Marlene Deboisbriand (Chair), Shari Austin, Susan Manwaring, Kevin McCort and Peter Robinson.

recommendations by the end of June 2017. This *Charity Law Bulletin* provides a summary and commentary of the Report and its impact on the charitable sector in Canada.

B. THE REPORT AND RECOMMENDATIONS

The Report explains that there has been much confusion concerning the limits of what charities can say, how much they can say, and to whom they can speak when it comes to advocating for public policy change. The confusion stems from the often conflated terms “activities” and “purposes” in the *Income Tax Act (Canada)* (the “ITA”).² While the Report indicates that “political purposes” are prohibited, subsections 149.1 (6.1) and (6.2) of the ITA permit charities to carry out a limited amount of what the Report refers to as “non-partisan political activities” to achieve their charitable purposes. However, many of these key terms remain undefined, and the line between a charity having a political purpose and conducting political activities to achieve its charitable purposes remains unclear.

In particular, the Consultation found a consistent, sector-wide call for legislative change, with many charities stating that administrative changes would be insufficient to address fundamental issues with the current legislative framework over political activities. In response to the Consultation, the Report provided four recommendations to change both the administration of the ITA and the ITA itself with regard to political activities by charities, as well as a broader recommendation to modernize the legislative framework for charities. A brief summary of these recommendations follows.

1. Full Public Policy Dialogue and Development

To eliminate confusion over acceptable activities and how to calculate political activities, the Report recommends that the CRA immediately revise its [Policy Guidance CPS-022, Political Activities](#) (the “Guidance”) to define “political activities” to mean “public policy dialogue and development” and to expressly permit charities to fully engage in them where doing so would further the charity’s charitable purposes, and they are non-partisan and subordinate to the charitable purposes. In this regard, the Report recommends that the Guidance view “public policy dialogue and development” as entailing “providing information, research, opinions, advocacy, mobilizing others, representation, providing forums and convening discussions.” Examples of such activities provided in the Report include: providing information on their charitable objects to sway public opinion, engaging in

² RSC 1985, c 1 (5th Supp).

advocacy and mobilizing the public to support keeping or changing law or policy, and expressing non-partisan views on social media. This recommended change in terminology from “political activities” to “public policy dialogue and development” is insightful and welcome because it removes the misunderstanding that any contact with a politician is “political” and actually reflects the contribution that charities can make not only to programs but also to social and economic policy development because of their experience and expertise.

The Report also recommends that the CRA remove its policy requirement that charities’ materials reflect all sides of an argument, and instead add a requirement that they be fact-based. It further recommends that charities should not be required to quantify or report on the quantification of political activities on the T3010, Registered Charity Information Return, but instead be required to provide only a narrative description of the nature of public policy dialogue and development work that they undertake.

2. Changes to CRA Compliance and Appeals, Audits, Communication and Collaboration

To enhance clarity and consistency, the Report recommends implementing changes to CRA administration of the ITA in the areas of compliance and appeals, audits, communication and collaborative approaches. The recommendations generally focus on greater transparency and communication between the CRA and the charitable sector, consistency in information provided, as well as enhanced avenues through which charities can receive guidance on issues, such as an expanded Charities Liaison Officer role and access to the Taxpayers’ Ombudsman.

Concerning compliance and audits, the Report’s recommendations include ensuring consistency in CRA’s application of the compliance continuum and consulting with the sector when identifying thematic audit topics. Concerning appeals, the Report recommends that appeals should be heard by the Tax Court of Canada rather than by way of judicial review at the Federal Court in order to level the playing field and enhance fairness in a system that is currently perceived to be biased in favour of the CRA. Concerning communication and collaboration, the Report recommends reinstating in-person programs, such as Charities Information Sessions and the Charities Partnership and Outreach Program, as well as the establishment of a high-level standing working group to identify and address issues of concern to charities.

3. Removal of Legislative Reference to Non-partisan Political Activities

The third recommendation in the Report is to “[a]mend the ITA by deleting any reference to non-partisan political activities to explicitly allow charities to fully engage without limitation in non-partisan public policy dialogue and development, provided that it is subordinate to and furthers their charitable purposes“. The Report’s recommendation to delete any reference to “non-partisan political activities” is somewhat unclear, as there is no mention of such term in the ITA. Nonetheless, the recommendation goes on to provide some clarity by proposing to “retire the term “political activities”, which the Report says tends to be understood as partisan. It reasons that doing so would provide clarity and certainty for the charitable sector and the CRA, and would explicitly allow charities to be fully engaged in “non-partisan public policy dialogue and development.” Similarly, the Report recommends retaining the prohibition on “partisan political activities” and political purposes for charities.

4. A Modern Legislative Framework that Focuses on Charitable Purposes

As a more long-term solution, the Report recommends the modernization of the ITA dealing with charities. Specifically, the Report recommends a focus on charitable purposes rather than activities, an inclusive list of charitable purposes reflecting contemporary issues, and the ability to appeal the Tax Court of Canada’s refusal to register, or to revoke, charitable status.

Building on its mandate, the Report suggests additional legislative changes, including removing the need for charities to maintain “direction and control” of non-qualified donees in certain circumstances. Doing so, the Report states, would enable charities to work with partners “as equals in furtherance of their charitable purposes”. The Report further recommends greater accommodation of social enterprise and social finance models that would benefit the charitable sector.

C. THE WAY FORWARD

The current suspension of the political activity audits comes as a result of the Liberal government’s commitment that it would “[a]llow charities to do their work on behalf of Canadians free from political harassment, and modernize the rules governing the charitable and not-for-profit sectors ... [by] clarifying the rules governing “political activity,” with an understanding that charities make an important

contribution to public debate and public policy.”³

However, notwithstanding the Minister of National Revenue’s announcement of the suspension of ongoing audits of charities for political activities, it remains to be seen how the Federal Government and CRA will respond to the remainder of the Report’s recommendations. In particular, many of the recommendations touch on issues related to the regulation of charities that are not limited to political activities, and would require extensive changes to the ITA concerning the administration of charities, *e.g.*, providing for an inclusive list of charitable purposes or permitting appeals to the Tax Court of Canada as opposed to the Federal Court of Appeal.

Nonetheless, the Report and the announcement by the Minister constitute extremely good news for the charitable sector and a hope for the future given that the political audits mandated by the previous government in 2012 have been seen as having created an unjustified and unnecessary “chill” effect on charities in Canada with regard to public policy and advocacy.

CRA is to be commended for the process that it used in this consultation, being a combination of on-line and in-person consultations in seven major cities and appointing a panel of five sector representatives to review the consultation submissions and provide recommendations to CRA which have now been made public in their report.

There is no doubt much anticipation developing in the charitable sector to see how the CRA will respond to the Report by the end June, 2017. Stay tuned!



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³ Office of the Prime Minister of Canada, *Minister of National Revenue Mandate Letter*, online: Government of Canada <<http://pm.gc.ca/eng/minister-national-revenue-mandate-letter>>.

PATIENTS FIRST ACT BECOMES LAW IN ONTARIO

*By Esther Shainblum**

A. INTRODUCTION

On December 7, 2016, the Ontario government passed the *Patients First Act* (“*Patients First*”),¹ intended to support patient-centred care, promote health system planning and integration, and improve access to high quality health services.

Yet, while the provincial government has promised that *Patients First* will deliver better care and usher in a new era of health transformation in Ontario, it could also pave the way for new involvement into the governance of health service providers by the province’s Local Health Integration Networks (“LHINs”).

B. HISTORY OF THE *PATIENTS FIRST ACT*

Patients First was originally introduced in June 2016 as Bill 210 and was re-introduced in October 2016 as Bill 41. It is officially titled “*An Act to amend various Acts in the interest of patient-centred care*”, but the bulk of the legislation consists of amendments to the *Local Health System Integration Act, 2006* (“LHSIA”)² that affect the management and administration of the health care system in Ontario.

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¹ Bill 41, *Patients First Act, 2016*, 2nd Sess, 41st Parl, Ontario, 2016 (assented to 08 December 2016), online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4215&detailPage=bills_detail_the_bill.

² *Local Health System Integration Act, 2006*, SO 2006, c 4, online: <https://www.ontario.ca/laws/statute/06l04>.

Following up on commitments made by the Ontario government in a discussion paper released on December 17, 2015, entitled “Patients First: A Proposal to Strengthen Patient-Centred Health Care in Ontario”³, the *Patients First Act* greatly expands the role of the LHINs as part of the government’s plan for improvement to the provincial health system.

C. NEW ROLE OF LHINS UNDER THE *PATIENTS FIRST ACT*:

Under *Patients First*, the role of the LHINs in the Ontario health care system has broadened considerably from the rather specific mandate they originally possessed. Prior to *Patients First*, the fourteen Ontario LHINs were primarily concerned with planning, funding and integrating the health system in their catchment areas. As a result of *Patients First*, a whole new range of entities has been brought within the scope of LHIN responsibilities.

The definition of “health service provider” in section 2(2) of LHSIA has been expanded to include a variety of not-for-profit primary care providers, as well as palliative care providers, hospices and physiotherapy clinics, allowing LHINs to fund and have accountability agreements with these entities.

The objects of the LHINs as set out in section 5 of LHSIA have been amended to include, without limitation, bringing planning for physician resources, providing health and related social services and supplies and equipment for the care of persons in home, community and other settings and managing the placement of persons into long-term care homes, within the role of the LHINs.

Section 14.1(1) of LHSIA now requires each LHIN to establish geographic sub-LHIN regions for the purposes of planning, funding and integrating services.

D. TRANSFER OF CCAC RESPONSIBILITIES TO THE LHINS

Probably the most anticipated provisions of *Patients First* are those that deal with the transfer of responsibility for home and community care from the Community Care Access Centres (“CCACs”) to the LHINs. In its December 2015 discussion paper, the provincial government signaled its intention to transfer responsibility for the delivery and management of those services from the CCACs to the LHINs and to

³ Ontario, Ministry of Health and Long-Term Care, “Patients First: A Proposal to Strengthen Patient-Centred Health Care in Ontario”, Discussion Paper (Toronto: MHLTC, 17 December 2015), online http://www.health.gov.on.ca/en/news/bulletin/2015/docs/discussion_paper_20151217.pdf.

eliminate the CCACs.⁴ Ontario's Auditor General had identified that inconsistencies between CCACs were leading to inequities in service levels and quality of care⁵.

Not surprisingly, *Patients First* repeals the *Community Care Access Corporations Act, 2001*.⁶ It also adds a new Part V.1 to LHSIA, which creates the framework for the transfer of responsibilities from the CCACs to the LHINs. New paragraphs 34.2(1)(a) and (b) of LHSIA give the Ontario Minister of Health and Long Term Care (the "Minister") the power to order the transfer of all the assets, liabilities and employees of a CCAC to the LHIN within the same geographic boundaries. If such an order is made, the LHIN essentially steps into the shoes of the CCAC, assuming all of its assets, liabilities, operations and activities⁷ and taking on a new role in home and community care service delivery. The change would be seamless to employees⁸ and to the terms of any charitable gifts or bequests, which would apply to the LHIN as they had to the CCAC.⁹ Subsection 34.4(1) contemplates the automatic transfer of all CCAC employees to the LHINs.

In keeping with the transfer of responsibilities from the CCACs to the LHINs, sections 39 and 40 of LHSIA provide for the transfer of assets, liabilities and employees from the Ontario Association of Community Care Access Centres ("OACCAC") to a new not-for-profit entity incorporated to provide shared services to the LHINs. As with the transfer from CCACs to the LHINs, the new provisions seem to contemplate the transfer of all existing OACCAC functions and employees from the OACCAC to the new entity.

⁴ *Ibid* at 6.

⁵ Office of the Auditor General of Ontario, *Annual Report 2015*, at 77-78, online http://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf

⁶ *Supra* note 1, at s34, repealing the *Community Care Access Corporations Act, 2001*, SO 2001, c 33, online <https://www.ontario.ca/laws/statute/01c33>.

⁷ *Ibid* s 34.3(1).

⁸ *Ibid* ss 34.4(1)-(2).

⁹ *Ibid* ss 34.3(10)-(11).

E. NEW OVERSIGHT POWERS OF LHINS

The most noteworthy provisions of *Patients First* are those giving the LHINs various broad oversight powers over providers to which they provide funding where they consider it to be in the public interest to do so.

Section 20.2 of LHSIA gives LHINs the power to issue operational or policy directives that are binding on health service providers to which they provide funding, where they consider it to be in the public interest to do so. This power does not apply to long term care homes, public hospitals or the University of Ottawa Heart Institute. Further, the LHINs' powers under this section are somewhat circumscribed by subsection 20.2(4), which provides that a LHIN will not unjustifiably require a religious health service provider to provide a service that is contrary to the religion of the organization.

Section 21.1 of LHSIA gives LHINs the power to appoint investigators to investigate and report on the quality of the management, care and treatment or any other matter relating to a health service provider to which they provide funding, other than long term care homes, where they consider it to be in the public interest to do so. These investigators have broad powers to enter premises without a warrant, to require the production of documents, things and persons and to question individuals on matters relevant to the investigation.

Finally and most notably from the health service provider perspective, section 21.2 of LHSIA gives LHINs the power to appoint a person as the supervisor of a health service provider to which they provide funding, other than a public hospital, a private hospital or a long term care home, where they consider it to be in the public interest to do so. The appointment of a health service provider supervisor is valid until it is terminated by the LHIN. The health service provider supervisor may displace the board of directors and the members or shareholders, as the case may be, of the health service provider and exercise all of their powers. A supervisor also has the same rights as the health service provider's board of directors and its chief executive officer in respect of the documents, records and information of the health service provider and its board.

These powers are subject to various notice and privacy requirements but they do not substantively limit the LHINs' ability to interfere in health service provider operations or governance. Further, the requirement that the decision to exercise one of these powers must be "in the public interest" is of little assistance.

Certain LHIN materials indicate that these powers would only be exercised in particular circumstances, such as where a health service provider is acting in contravention of legislation, directives or policies, is experiencing governance and accountability challenges or is persistently underperforming on its accountability agreement indicators and/or obligations.¹⁰

In reality however, under section 35 of LHSIA, a LHIN may consider any matter it regards as relevant in determining whether a decision is in the public interest including, without limitation:

- the quality of the management and administration of the health service provider;
- the proper management of the health care system in general;
- the availability of financial resources for the management of the health care system and for the delivery of health care services;
- the accessibility to health services in the geographic area or sub-region where the health service provider is located; and
- the quality of the care and treatment of patients.

¹⁰ Central West Local Health Integration Network, "LHIN Renewal Questions and Answers for LHIN Use", (Brampton: Central West LHIN, 2016) at 5, online: [http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwic0_i_0PXSAhWD6xOKHZ6mDxOOFGgaMAA&url=http%3A%2F%2Fwww.centralwestlhin.on.ca%2F~%2Fmedia%2Fsites%2Fcw%2FDocuments%2FNews%2520and%2520Events%2FPatients%2520First%2520Discussion%2520Paper%2FRolling%2520LHIN%2520Renewal%2520Q%2520%2520A%2520\(2016-07-29\).pdf%3Ffla%3Den&usg=AFQjCNEuK4RJOsLWmuY1yK3tZNvsyBZZJg&sig2=56Noyd0xwYkpxeCyBTWfUA&bvm=bv.150729734,d.amc](http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwic0_i_0PXSAhWD6xOKHZ6mDxOOFGgaMAA&url=http%3A%2F%2Fwww.centralwestlhin.on.ca%2F~%2Fmedia%2Fsites%2Fcw%2FDocuments%2FNews%2520and%2520Events%2FPatients%2520First%2520Discussion%2520Paper%2FRolling%2520LHIN%2520Renewal%2520Q%2520%2520A%2520(2016-07-29).pdf%3Ffla%3Den&usg=AFQjCNEuK4RJOsLWmuY1yK3tZNvsyBZZJg&sig2=56Noyd0xwYkpxeCyBTWfUA&bvm=bv.150729734,d.amc).

Section 35 could theoretically enable LHINs to take over the governance of health service providers on potentially minimal grounds, as there will be little that does not fall within the scope of this broad and open-ended language.

It should be noted that the legislation contains mirror provisions empowering the Minister to make the same orders in respect of LHINs, including orders to appoint a supervisor, displace the governing body and exercise the powers of the governing body and chief executive officer of the affected LHIN, all where the Minister considers it to be “in the public interest”.

However, the LHINs are creatures of statute and of the provincial government. They are fully funded by the Ministry of Health and Long Term Care and exist solely to further the objects of the provincial government in respect of the administration and management of and planning for the province’s health care system. The provincial government has almost identical powers to intrude into the governance and operation of public hospitals under the *Public Hospitals Act*¹¹, where again the entities in question are fully funded by and operate under the authority of the Ministry of Health and Long Term Care.

For the provincial government to issue binding operational or policy directives, appoint an investigator or displace the governing body of a LHIN or of a public hospital would be more reasonable given the essentially public nature of these bodies and their mandates than it would be for a LHIN to do the same in respect of an independent entity that is essentially private in nature.

Moreover, while most health service providers possess multiple sources of funding, the LHINs’ power to appoint a supervisor over health service providers is not restricted to programs or operations that are funded by the LHINs. As noted by organizations such as the Ontario Community Support Association¹² (“OCSA”) and the Ontario Nonprofit Network¹³ (“ONN”), a LHIN could appoint a supervisor to take control over all assets and funds of an organization, regardless of their provenance. Further, while subsection 21.2(6) provides that the supervisor has the exclusive right to exercise all the powers of the

¹¹ *Public Hospitals Act*, RSO 1990, c P.40, online: <https://www.ontario.ca/laws/statute/90p40>.

¹² Ontario Community Support Association, “Patients First Act: Preliminary Response”, (Toronto: OCSA, 2016) page 3, online: http://www.ocsa.on.ca/uploads/9/8/9/9/9899852/patients_first_act_-_preliminary_response_-_ontario_community_support_association_-_september_2016.pdf.

¹³ Letter from Ontario Nonprofit Network to The Honourable Monte McNaughton, Chair of the Standing Committee on the Legislative Assembly for the Ontario Legislature (14 November 2016), online: http://theonnn.ca/wp-content/uploads/2016/11/FINAL_ONNLetter_Bill-41-Patients-First_2016-11-14.pdf.

governing body of the health services provider, it does not explicitly state that the supervisor is subject to the same obligations and liabilities as the governing body. It is therefore not clear whether a supervisor would be required to abide by any restrictions on use or disposition of charitable funds and assets held by a charitable entity. In a case in which a supervisor is appointed for a charitable health services provider, it would be necessary for the LHIN to specify that the supervisor is subject to those charitable requirements pursuant to subsection 21.2(7) of LHSIA, which permits the LHIN to specify the terms and conditions governing the powers and duties of the supervisor. If the LHIN does not do so, the charity's stakeholders may want to consider seeking legal advice in order to ensure that its charitable assets are protected.

The definition of "health service provider" in subsection 2(2) of LHSIA includes a person or entity approved under the *Home Care and Community Services Act, 1994* (HCCSA) to provide services. Approved agencies under HCCSA can only be not-for-profit entities.¹⁴ LHINs may purchase community services from for-profit providers but these entities are expressly excluded from the definition of "health service provider" by subsection 2(4) of LHSIA.

The risks to the not-for-profit sector – largely community-based organizations serving vulnerable communities and already under pressure from for-profit competitors – are significant. Both OCSA and ONN have raised concerns about the lack of appeal mechanisms, due process and other safeguards in the legislation.

It should be noted that section 20.2 (the power to issue binding directives), section 21.1 (the power to appoint investigators) and section 21.2 (the power to appoint supervisors) are not yet in force and will not come into force until a future date to be named by proclamation of the Lieutenant Governor. It would be useful if the Ministry of Health and Long Term Care were to provide additional guidelines and safeguards to outline what would constitute an appropriate exercise of the LHINs' new supervisory and other powers before these provisions are proclaimed in force.

¹⁴ *Home Care and Community Services Act, 1994*, SO 1994, c 26, ss 2(1), 5(1), online: <https://www.ontario.ca/laws/statute/94l26>.

Finally, not-for-profit health service providers still have some time to prepare for the LHINs' new powers. They should be taking steps to minimize their risks including, without limitation, ensuring that they are not in contravention of any legislation, directives or policies, that their governing bodies are functioning appropriately and in accordance with governance best practices and that they are meeting all obligations set out in their accountability agreements with the LHINs.



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Tab 7

TERRANCE S. CARTER, B.A., LL.B, TEP, TRADE-MARK AGENT



Terrance Carter, as the Managing Partner of Carters, practices in the area of charity and not-for-profit law, and has been recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*. Mr. Carter is also a registered Trade-mark Agent and acts as legal counsel to the Toronto office of the national law firm Fasken Martineau DuMoulin LLP on charitable matters.

Mr. Carter is a co-author of *Corporate and Practic Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation & Commentary*, 2017 Edition (LexisNexis Butterworths), a contributing author to *The Management of Nonprofit and Charitable Organizations in Canada* (2014 LexisNexis Butterworths), co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths) and the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada).

Mr. Carter is a member of the Government Relations Committee of the Canadian Association of Gift Planners (CAGP), the Association of Fundraising Professionals, a past member of the Technical Issues Working Group of Canada Revenue Agency's (CRA) Charities Directorate, a past member of the Imagine Canada Technical Advisory Committee, a past member of CRA's Charity Advisory Committee and the Uniform Law Conference of Canada Task Force on Uniform Fundraising Legislation, a Past Chair of the Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA) and a past Chair of the Charity and Not-for-Profit Law Section of the Ontario Bar Association (OBA), and was the 2002 recipient of the AMS - John Hodgson Award of the OBA for charity and not-for-profit law. He is also a member of the Intellectual Property Institute of Canada, the Association of Fundraising Professionals, and the American Bar Association Tax Exempt Section, and has participated in consultations with the Public Guardian and Trustee of Ontario, the Charities Directorate of CRA, Finance Canada, and was a member of the Anti-terrorism Committee and the Air India Inquiry Committee for the CBA.

Mr. Carter has written numerous articles and been a frequent speaker on legal issues involving charity and not-for-profit law for the Law Society of Upper Canada, the CBA, the OBA, the Association of Fundraising Professionals, the American Bar Association, the CAGP, the Canadian Tax Foundation, The Institute of Chartered Accountants, the CSAE, the New York University School of Law, the University of Ottawa Faculty of Common Law, Ryerson University, McMaster University, the University of Waterloo Master of Tax program, Queensland University of Technology (Brisbane, Australia), University of Manitoba Law School as well as the C.D. Howe Institute.

Mr. Carter is also the editor of, and a contributor to www.charitylaw.ca, www.churchlaw.ca, www.carters.ca, and www.antiterrorismlaw.ca, as well as Chair of the annual *Church & Charity Law*TM Seminar, and a founder and a past co-chair of the CBA National Charity Law Symposium.

PRACTICE AREAS: Charity and Not-for-Profit Law, Fundraising, Gift Planning, National and International Strategic Planning, Charity Tax and Trusts, Intellectual Property and Corporate and Commercial Law.

EDUCATION: B.A. (Joint Honours), and a McGill University Scholar, McGill, 1975
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JACQUELINE M. DEMCZUR, B.A., LL.B.



Mrs. Demczur was called to the Ontario Bar in 1999, joined Carters in 2001 and became a partner in 2007. Her practice is exclusively focused in the areas of charity and not-for-profit law, including incorporation, charitable status applications, corporate restructuring, establishment of churches and religious denominations, international operations, gift planning, legal risk management reviews, charity pre-audit reviews and post-audit submissions to CRA, and advising directors of charities and other not-for-profit corporations. Mrs. Demczur has been recognized as a leading expert in charity and not-for-profit law in Canada by *Lexpert* and *The Best Lawyers in Canada*.

Mrs. Demczur is a member of the Charity & Not-for-Profit Section of the Ontario Bar Association, a contributing author to the *Primer for Directors of Not-for-Profit Corporations* published by Industry Canada, and has written numerous articles on charity and not-for-profit legal issues, including directors' and officers' liability, incorporation and risk management, for *The Lawyers Weekly*, *The Philanthropist*, *Charitable Thoughts*, and www.charitylaw.ca. Mrs. Demczur is also a regular speaker at the annual *Church & Charity Law*TM Seminar and has been an invited speaker to the Canadian Bar Association, Imagine Canada Sector Source, and numerous other organizations. Her volunteer activities have, in the past, included serving as a Board member of Theatre Orangeville, Vice-President and a Board member of the Orangeville Tennis Club, and a Business Advisory Committee Member for Family Transition Place.

PRACTICE AREAS: Charity and Not-for-Profit Law, Wills, Estate Planning and Estate Administration

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Elena Hoffstein is engaged in personal tax and estate planning, family business succession planning, wills and trusts, corporate reorganizations, marriage contracts and charities and not for profit law. Elena also represents clients in both contentious and non-contentious estate litigation matters including will challenges, mental capacity matters, applications for advice and direction of the court and passing of fiduciary accounts.

Elena has been ranked by Lexpert as one of the most frequently recommended Toronto private client and charity law practitioners and as one of the top 500 lawyers in Canada. Martindale-Hubbell has given her a rating of AV. In 2006, she received the Ontario Bar Association Award of Excellence in Trusts and Estates in recognition of her leadership and contribution to estates and trusts law. Elena is also a recipient of Lexpert's prestigious Zenith award for business law and business of law.

Elena articulated with the firm in 1978-79 and returned in 1980 after being called to the Bar and became a partner in 1986. She is director of the Toronto office's Wealth Management and Charities practice group.

Areas of Practice

- Personal Tax Planning & Wealth Management
- Estate Litigation
- Charities and Not-For-Profit
- Estate Planning
- Health
- Tax
- Private Client Services

Education

- LLB, 1978, University of Toronto
- MA, 1970, Columbia University
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Jonathan Lancaster has a litigation practice, with an emphasis on corporate commercial litigation, commercial real estate litigation, lease arbitrations, banking law, product liability litigation, professional negligence and estates litigation.

Jonathan has acted as successful counsel on the leading Ontario cases dealing with mortgagee and tenant rights/priorities (Goodyear); rights of first refusal/options to purchase and equitable defences (Harris); vendors' liens (Silaschi); duties of condominium developers to purchasers (Cam-Valley); restrictive covenants (Martin) and limitation issues (IAS). Jonathan has also acted in a number of large product liability and professional negligence cases dealing with solicitors' and auditors' negligence and also in estates matters.

Jonathan joined the firm as an articling student in 1991 and as an associate in 1993. He became a partner in 1999.

Areas of Practice

- Litigation & Dispute Resolution
- Commercial Litigation
- Real Estate
- Product Liability
- Estate Litigation
- Insurance
- Real Estate Law

Education

- LLB, 1991, University of Western Ontario
- BSc, 1984, Georgia Institute of Technology

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- Ontario, 1993

Languages

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