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THE OTTAWA REGION *Charity & Not-for-Profit Law Seminar* Thursday, February 15th, 2018

“RECENT DEVELOPMENTS IN THE LAW”

WELCOME

Welcome to the Ottawa Region *Charity & Not-for-Profit Law Seminar*, which is designed to assist charities and not-for-profit organizations in understanding developing trends in the law in order to keep up to date and to reduce unnecessary exposure to legal liability. This seminar is eligible for **5 hours substantive CPD credits** with the **Law Society of Ontario** and **CPA Professional Development** requirements.

The *Charity & Not-for-Profit Law Seminar*, with its related *Church & Charity Law™ Seminar* held annually in Toronto since 1994, is hosted by **Carters Professional Corporation (Carters)**, a law firm experienced in advising charities and not-for-profits, with offices in Ottawa and the Toronto area. The Seminar is presented by a number of expert speakers, including our guest speakers the Honourable Justice David Brown of the Court of Appeal of Ontario, and Tony Manconi, Director General of the Charities Directorate of CRA.

CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and pre-paid handout package in the Foyer of the Centurion Conference Center, and help yourself to the complimentary Continental Breakfast.

If you NEED TO PAY the registration fee or have NOT YET REGISTERED, please proceed to the “Unpaid and New Registrations” table in the Foyer. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a pre-paid handout package from one of our greeters for more information.

CONTINENTAL BREAKFAST & LUNCH BUFFET

A complimentary Continental Breakfast is provided in the morning. A lunch buffet is also included with your registration fee. Both of these meals will be served in the Adriatic Ballroom.

REMINDERS

Please silence all cell phones and electronic devices. We ask that no photos or videos be taken during the seminar as per our Privacy Policy. For re-cycling purposes, please return your name tag (after removing your receipt), along with your Evaluation Form, before you leave.

RESOURCE MATERIALS

Included in this handout package are copies of today's presentation materials. These materials, along with numerous other articles, seminar materials, and newsletters of interest to charities and not-for-profits, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity Law Updates* are available free of charge at our websites of www.charitylaw.ca, www.churchlaw.ca, www.antiterrorismlaw.ca and www.carters.ca. Copies of *Charity & NFP Law Bulletins* and *Church Law Bulletins* are on display at the Carters booth in the Foyer outside of the Auditorium.

Copies of the booklet entitled “**2017 Legal Risk Management Checklist for Ontario-Based Charities**”, as well as the “**2017 Ontario-Based Not-for-Profits**” are available for \$2.00 during breaks, and at no charge on our website at http://carters.ca/index.php?page_id=41.

CHARITY & NFP LAW UPDATE

A limited number of copies of the [January 2018 edition](#) of the *Charity & NFP Law Update* are available at the Carters booth today. To receive the monthly *Charity & NFP Law Update*, e-mail us at info@carters.ca with “mailing list” in the subject line. Alternatively, please add your name and email address to our Sign-Up List at the Carters booth indicating your consent to receive firm newsletters and information about future seminars.

QUESTION PERIOD

Questions are welcomed and will be answered before the lunch break, and again at the end of the day. A question sheet is provided at the back of this handout and should be left at the front podium in the Auditorium or at the Carters booth at any time during the seminar.

ACKNOWLEDGEMENTS

We would like to acknowledge and thank The Honourable Justice David M. Brown and Tony Manconi for their contribution as guest speakers at this year's seminar. All speakers have freely volunteered their time for this event.

We would also like to recognize the sponsors and resource materials provided for the 2018 Ottawa Region *Charity & Not-for-Profit Law Seminar*: BDO Canada LLP, Thomson Reuters Corporation, Lexis Nexis Group, Imagine Canada, Robertson Hall Insurance, and STEP Canada

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THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar
Thursday, February 15th, 2018

AGENDA

7:45 a.m.	Check-In (Continental breakfast buffet provided in Adriatic Ballroom)	
8:30 a.m.	Opening Remarks and National Anthem	
8:40 a.m.	Essential Charity and NFP Law Update	Jennifer M. Leddy
9:10 a.m.	Remuneration of Directors of Charities: What's New?	Ryan M. Prendergast
9:35 a.m.	Critical Privacy Issues Involving Children's Programs	Esther Shainblum
10:05 a.m.	Morning Break (Coffee and tea provided) (30 minutes)	
10:35 a.m.	Recent Changes in Corporate Law Affecting Federal and Ontario Corporations	Theresa L.M. Man
11:05 a.m.	The Impact of Bill 148 on Charities and Not-for-Profits	Barry W. Kwasniewski
11:35 a.m.	Governance Disputes Involving Charities and Not-for-Profits: A View from the Bench	The Honourable Justice David M. Brown
12:20 p.m.	Questions for the Honourable Justice David M. Brown and morning speakers	
12:30 p.m.	Lunch Break (55 minutes)	
1:25 p.m.	Acknowledgements (And a Few After Lunch Jokes)	
1:30 p.m.	Corporate Documents and Procedures to Help Avoid Governance Disputes	Esther S.J. Oh
2:00 p.m.	The Expanding Investment Spectrum for Charities, including Social Investments	Terrance S. Carter
2:30 p.m.	Challenges in Regulating the Charitable Sector: Looking Back and Going Forward	Tony Manconi Director General
3:10 p.m.	Question Period	
3:30 p.m.	Program Ends	

Please see **Speaker Biographies** on the following pages.

Please take a moment to complete the **Evaluation Form** included at the back of this handout to help us make the next Ottawa Region *Charity & Not-for-Profit Law*[™] Seminar even better.

REMINDERS

PLEASE MUTE ALL CELL PHONES AND ELECTRONIC DEVICES.

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SEMINAR HOSTS

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

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

PROTECTION FROM REGULATORY OFFENCES FOR NOT-FOR-PROFITS AND CHARITIES

Charities and not-for-profits are facing significant liability and financial challenges due to increasing enforcement of federal and provincial regulatory legislation dealing with such matters as water, working conditions and environmental issues. Carters is able to provide advice and assistance at all stages from an initial investigation through to a full defence at a trial. For more information, contact Sean S. Carter at (1-877-942-0001 x241).

SEMINAR RESOURCE EXHIBITORS

We are pleased to make resource materials from the following organizations available in the foyer.

- **BDO Canada LLP**, <https://www.bdo.ca/en-ca/home/>
- **Thomson Reuters Corporation**, <http://store.thomsonreuters.ca/home/>
- **Lexis Nexis Group**, <https://store.lexisnexis.ca/en>
- **Imagine Canada**, <http://www.imaginecanada.ca/>
- **Robertson Hall Insurance**, www.robertsonhall.com
- **STEP Canada**, <http://www.step.ca/>

GENERAL DISCLAIMER

Please note the following Disclaimer that applies to all presentations: This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation. © 2018 Carters Professional Corporation

SPEAKER BIOGRAPHIES



The Honourable Justice David M. Brown was appointed to the Court of Appeal of Ontario in December, 2014, after sitting as a judge of the Superior Court of Justice of Ontario in the Toronto Region since September, 2006, including several years on the Toronto Region Commercial List. Immediately prior to his appointment to the Court of Appeal, Justice Brown was serving as the President of the Ontario Superior Court Judges' Association. Before his appointment to the Bench, he was a partner with Stikeman Elliott LLP (Toronto) in its Litigation and Energy Groups. He served as an Adjunct Professor of Law at Osgoode Hall Law School teaching Energy Law from 2004 until 2006, and a Sessional Lecturer at Queen's University Law School from 1990 to 2002 teaching Trial Advocacy. Justice Brown writes on a number of legal topics, including civil procedure reform and Newfoundland legal history.



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* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (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.



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



Jennifer Leddy, B.A., LL.B. – Ms. Leddy joined Carters' Ottawa office in 2009, becoming a partner in 2014, to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed "Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose."



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



Tony Manconi, B.A. – Tony Manconi was appointed as Director General of the Charities Directorate with the Canada Revenue Agency (CRA) on July 25, 2016. He is responsible for the overall management of the federal regulation of registered charities under the *Income Tax Act*. Mr. Manconi began his career in the Public Service in 1988 at the Secretary of State. Prior to joining the Charities Directorate, Mr. Manconi served as the Director General of the Collections Directorate of the CRA. Mr. Manconi holds a Bachelor's degree from Carleton University with a combined major in Law and Economics.



Esther S.J. Oh, B.A., LL.B. – A partner with Carters, Ms. Oh practices in charity and not-for-profit law, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh has written numerous articles on charity and not-for-profit legal issues, including incorporation and risk management for www.charitylaw.ca and the *Charity & NFP Law Bulletin*. Ms. Oh is a regular speaker at the annual *Church & Charity Law*™ Seminar, and has been an invited speaker to the Canadian Bar Association, Imagine Canada and various other organizations.



Ryan M. Prendergast, B.A., LL.B. - Mr. Prendergast joined Carters in 2010, becoming a partner in 2018, with a practice focus of providing corporate and tax advice to charities and non-profit organizations. Ryan is a regular speaker and author on the topic of directors' and officers' liability and on the topic of anti-spam compliance for registered charities and not-for-profit corporations, and has co-authored papers for the Law Society of Ontario. In addition, Ryan has contributed to *The Lawyers Weekly*, *Hilborn:ECS*, Ontario Bar Association *Charity & Not-for-Profit Law Section Newsletter*, *Charity & NFP Law Bulletins* and publications on www.charitylaw.ca.



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

UPCOMING CARTERS' SEMINARS OF INTEREST

Carters Webinars: 2018 Spring Series – Stay tuned, details to follow at www.carters.ca.

SAVE THE DATE 2018 AND 2019

The 25th Annual *Church & Charity Law*™ Seminar will be held on **Thursday November 8, 2018**. More details will be available soon at www.carters.ca.

The **Ottawa Region Charity & Not-for-Profit Law Seminar** will be held on **Thursday February 13, 2019**, tentatively. More details will be available soon at www.carters.ca.

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Mississauga Meeting Location

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The 2018 Ottawa Region Charity & Not-for-Profit Law Seminar

Ottawa – February 15, 2018

LIST OF POWERPOINTS

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- ◆ **Essential Charity & NFP Law Update**
Jennifer M. Leddy, B.A., LL.B.
- ◆ **Remuneration of Directors of Charities: What's New?**
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Critical Privacy Issues Involving Children's Programs**
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **Recent Changes in Corporate Law Affecting Federal and Ontario Corporations**
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **The Impact of Bill 148 on Charities and Not-for-Profits**
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **Governance Disputes Involving Charities and Not-For-Profits: A View From the Bench**
The Honourable Justice David M. Brown, Court of Appeal of Ontario
- ◆ **Corporate Documents and Procedures to Help Avoid Governance Disputes**
Esther S.J. Oh, B.A., LL.B.
- ◆ **The Expanding Investment Spectrum For Charities, Including Social Investments**
Terrance S. Carter, B.A. LL.B., TEP, Trade-mark Agent
- ◆ **Challenges in Regulating the Charitable Sector: Looking Back and Going Forward**
Tony Manconi, B.A., Director General of the Charities Directorate of Canada Revenue Agency

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The 2018 Ottawa Region Charity & Not-for-Profit Law Seminar Ottawa – February 15, 2018

ESSENTIAL CHARITY & NFP LAW UPDATE

By Jennifer M. Leddy, B.A., LL.B.

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**The 2018 Ottawa Region
Charity & Not-for-Profit Law Seminar**

February 15, 2018

Essential Charity and NFP Law Update
(Current as of February 10, 2017)

By Jennifer M. Leddy, B.A., LL.B.
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OVERVIEW (in Chronological Order)

- 2017 Federal Budget Highlights
- Recent CRA Publications
- Recent Tax Decisions, Rulings and Interpretations Involving Charities
- Federal Legislation Update
- Provincial Legislation Update
- Other Case Law of Interest

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2017 FEDERAL BUDGET HIGHLIGHTS

- Budget 2017 proposed a number of measures to protect Ecogifts, now in *Budget Implementation Act, 2017, No. 2*, which received Royal Assent on December 14, 2017, including:
 - New ministerial approval in certain situations
 - Private foundations no longer eligible to receive Ecogifts
- Repeal of Additional Corporate Donation Deductions on Medicine for International Aid
- The First-Time Donor Super Credit was allowed to expire in 2017 due to low take-up

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RECENT CRA PUBLICATIONS AND PROGRAMS

- The CRA's Cause-related Marketing Webpage
 - In February 2017, the CRA introduced a new webpage to explain the CRA's interpretation of cause-related marketing
 - The CRA defines cause-related marketing as 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 or services on the basis that part of the revenues will be donated to the registered charity

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- New Privacy Disclosure in T2050 Application to Register a Charity Under the ITA
 - The privacy disclosure, added on February 21, 2017, indicates that personal information is being collected under the authority of the ITA to validate the identity and contact information of directors, officers and authorized representatives of the applicant, and for the indirect collection of additional personal information from other internal and external sources, which may be used by the CRA to assess the risk of registration
 - The CRA is also permitted to make the T2050 public if the registration is approved

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- Sweeping changes recommended in Report on political activities
 - On May 4, 2017, CRA published the *Report of the Consultation Panel on the Political Activities of Charities*, prepared after the consultation with the charitable sector, and recommended:
 - Define "political activities" to mean "public policy dialogue and development" and to permit charities to engage in public dialogue
 - Changes to CRA compliance and appeals, audits, communication and collaboration
 - Removal of legislative reference to non-partisan political activities and "political activities"
 - A modern legislative framework that focuses on charitable purposes rather than activities
 - Not clear when CRA will respond to the Consultation Panel's recommendations

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- Online services to come November 2018 (July 21, 2017)
 - Filing T3010 annual returns online
 - Update and manage account information
 - Apply for registration (T2050) and check file status
 - Corresponding with the CRA
- Changes to CRA's Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) (August 9, 2017)
 - Permits support for small businesses in disaster areas under certain circumstances for 2 years after the date of the disaster
- Changes to the Voluntary Disclosure Program
 - On June 9, 2017, proposed changes were announced for the CRA Voluntary Disclosures Program ("VDP")

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- On December 15, 2017, the CRA introduced revised proposals and announced that the changes would be effective March 1, 2018
- The VDP is intended to allow taxpayers to come forward and correct previous omissions in their dealings with the CRA to avoid penalties and prosecutions
- The VDP only applies to registered charities in very limited context of employee source deductions and HST, so the specifics of the proposed changes will be of limited interest to registered charities
- However, the CRA provides a type of informal voluntary disclosure process for charities that have been involved in matters of non-compliance and want to bring themselves back into compliance

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- This process is set out on the CRA webpage entitled, "Bringing Charities Back into Compliance"
- It is a discretionary process
- It is important to conduct a due diligence review identifying all issues of non-compliance before commencing a disclosure process with the CRA
- CRA Announces New Charities Education Program
 - On November 6, 2017, the CRA announced the launch of a new Charities Education Program ("CEP") to provide early support and guidance to registered charities "that will help them comply with their obligations, and to answer any questions they may have regarding their activities, the maintenance of their books and records, and the filing of their annual information return"

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- Under the CEP, a Charity Education Officer ("Officer") from the CRA will conduct an in-person visit with a charity, which will consist of information sharing along with a review of the charity's books and records
- The visit will conclude with the Officer providing a Summary of Findings and Recommendations
- The CRA has stated that 500 visits are expected to be conducted annually and that all charities are eligible to be selected for a CEP visit for a number of reasons, including the fact that a charity is newly registered, on account of certain information from its T3010 return, or because of common areas of non-compliance, such as receipting and reporting issues

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- In this regard, the CRA states that "a CEP visit does not preclude the possibility that the charity could be audited in the future"
- Updates to T4063, Registering a Charity for Income Tax Purposes
 - On January 12, 2018, the CRA updated its T4063, which previously stated that the Charities Directorate would review draft governing documents on a one-time basis
 - The updated T4063 states that the Charities Directorate will not review applications submitted with draft governing documents, and will treat such applications as incomplete
 - The amended T4063 also clarifies that for an application to be considered complete, certified governing documents must be included

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RECENT TAX DECISIONS, RULINGS, AND INTERPRETATIONS INVOLVING CHARITIES

- Income Tax Treatment for Monies Paid to Support Refugees
 - On March 3, 2017, the CRA released technical interpretation 2016-0651661E5 - Payments to Syrian refugees by a church
 - A church inquired about the income tax treatment of payments made by the church to support a Syrian refugee family and asked whether the money received by the family was to be included as income in the family's tax returns

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- In response, the CRA noted that par. 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
- The CRA further noted that income included under par. 56(1)(u) will be offset by a matching deduction under par. 110(1)(f) of the ITA
- As a result, there will be no income tax implications, other than potentially affecting certain income-tested benefits

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- The CRA Issues a Technical Interpretation of Charities Returning Gifts
 - On May 17, 2017, the CRA released technical interpretation 2016-0630351 providing 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?"
 - The CRA concluded that the answer to these questions is case-specific and the obligation to return a gift is a matter for the court to determine
 - However, it warned that the return of a gift might be treated for ITA purposes as a charity giving a gift to a non-qualified donee which could result in revocation

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FEDERAL LEGISLATION UPDATE

- CASL Private Right of Action Implementation Suspended
 - On June 2, 2017, the government suspended the implementation of the private right of action "in response to broad-based concerns raised by businesses, charities and the not-for-profit sector"
 - Delay to promote "legal certainty for numerous stakeholders claiming to experience difficulties in interpreting several provisions of the Act while being exposed to litigation risk"
 - On July 1, 2017, the 3-year transition period in CASL ended. Best advice is to obtain express consent

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- On December 13, 2017, the Standing Committee on Industry, Science and Technology presented its report "Canada's Anti-Spam Legislation: Clarifications are in Order"
- The report includes a number of recommendations, but of note to charities and not-for-profits, recommendation 8 states:
 - The Committee recommends that the Government of Canada clarify the application of the Act and its regulations to charities and non-profit organizations to ensure that the legislation is clear and understandable to these organizations and do not create unintended costs of compliance

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- Bill C-59 proposes to amend the *Security of Canada Information Sharing Act* and the *Criminal Code*
 - Clarifying that advocacy, protest, dissent or artistic expression will not generally fall under the definition of activity that undermines the security of Canada
 - Inserting "threaten" into the definition, which would not require proof as to the effect of the activity
 - Mandatory review of the list every 5 years (or 5 years after an entity is added)
 - Replacing the offence of "advocating or promoting commission of terrorism offences" (s.83.221 of the Criminal Code), with the offense of "counselling"
 - Bill C-59 was referred to Committee before Second Reading on November 27, 2017

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- *Corruption of Foreign Public Officials Act* was amended on October 31, 2017
 - Repeals the "facilitation payments" exemption from the offence of bribing a foreign public official
 - Charities could be exposed to possible criminal liability for payments to expedite or secure the performance of certain routine activities
- Amendments to the *Trade-marks Act* expected to come into force in early 2019
 - Will eliminate the requirement to use a trademark in Canada before a registration can be obtained

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- Senate Adopts Motion to Appoint Special Committee on Charitable Sector
 - On January 30, 2018, the Senate of Canada debated and adopted a motion to appoint a Special Committee on the Charitable Sector to "examine the impact of federal and provincial laws and policies governing charities, nonprofit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada"
 - The Special Committee, composed of nine members, will be empowered to send for persons, papers and records, examine witnesses, report from time to time and to submit a final report of its findings on or before December 31, 2018

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PROVINCIAL LEGISLATION UPDATE

- On July 10, 2017 proposed Ontario regulations under the CAA authorizing charitable corporations to pay directors in limited situations (see presentation by Ryan Prendergast)
- On September 20, 2017, Ontario Bill 155, Life Leases Act, 2017 was introduced in the Legislative Assembly of Ontario
 - If passed, Bill 155 will be the first piece of legislation in Ontario dealing with life leases, a form of leasehold interest that many senior housing charities and not-for-profits have adopted in recent years

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- Recent amendments made to the *Corporations Act* ("OCA") and the *Not-for-Profit Corporations Act, 2010* ("ONCA")
 - Good news that Ontario government has proceeded with corporate reform for NFP sector
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, received Royal Assent on November 14, 2017, introduces significant changes to the OCA and ONCA (see presentation by Theresa Man)
- New amendments to the CAA in Bill 154 on November 14, 2017 now permit charities to make "social investments" (see presentation by Terrance Carter)
- *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148") received Royal Assent on November 27, 2017
 - Contains major amendments to the *Employment Standards Act, 2000* (see presentation by Barry Kwasniewski)

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- Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017*
 - Received Royal Assent on December 12, 2017, it amends enacts and repeals a number of Acts regulating healthcare in Ontario
 - Amendments to the *Long-Term Care Homes Act, 2007* and new rules to deal with both restraining and confining of residents of a retirement home
- Ontario Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017*, enacts the *Ticket Sales Act, 2017* (yet to be proclaimed), which restricts the sale of tickets to recreational, sporting, cultural or other prescribed events in the secondary market, but provides an exception for registered charities

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- On December 14, 2017, the Minister of Tourism, Culture and Sport introduced Bill 193, *Rowan's Law (Concussion Safety), 2017*
 - If passed, Bill 193 will provide Canada's first framework to govern concussion prevention, detection, management and awareness in amateur competitive sports and schools
- O. Reg. 191/11, *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act, 2005* requires that public and private organizations in Ontario file an accessibility report:
 - For designated public sector organizations, such as hospitals and other public bodies, the report is due every 2 years starting December 31, 2013

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- For organizations with at least 20 employees, the report is due every 3 years starting December 31, 2014
- If your organization falls into either of these categories, then your accessibility report was due on December 31, 2017
- Administrative penalties may apply for late filing so best to seek legal advice
- Charities Operating in Quebec are Still Required to Submit an Annual Information Return in Quebec
 - Although registered charities that collect donations from Quebec residents are no longer required to register separately as charities in Quebec, they are still required to file the annual information return TP-985.22-V within 6 months after the charity's year-end

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CASE LAW OF INTEREST

- Trinity Western University ("TWU")
 - On November 1, 2016, the Court of Appeal of BC unanimously upheld the decision of the BC Supreme Court to quash the decision of the Law Society of BC
 - On February 23, 2017, the Supreme Court of Canada granted leave to appeal in *Trinity Western University, et al v Law Society of Upper Canada* and in *Law Society of British Columbia v Trinity Western, et al*.
 - Hearings at the Supreme Court of Canada were held on November 30 and December 1, 2017, but no decision has been released to the date of this presentation

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- *Wall v Jehovah's Witnesses* (Member Discipline)
 - Mr. Wall was disfellowshipped from his congregation for alleged wrongdoing involving "drunkenness"
 - The Alberta Court of Appeal noted that Mr. Wall was not provided with the details of the allegations against him or an explanation of the discipline process, also that Mr. Wall did not receive any written reasons for the decision
 - On April 13, 2017, the Supreme Court of Canada granted leave to appeal, with hearing held on November 2, 2017
 - Case will have significant impact on the extent to which a faith-based organization is able to discipline members without having to adhere to principles of natural justice

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- Court Finds That Parent Charity is Permitted to Change Governance Structure
 - On September 12, 2017, the Ontario Superior Court of Justice released its decision in *Ottawa Humane Society v. Ontario Society for the Prevention of Cruelty to Animals*, 2017 ONSC 5409
 - Annual general meeting passing new by-law changing the governance model from an open-membership to a closed-membership model with voting rights for OSPCA's board
 - Court held that by-law was lawfully passed by voting members and that the OSPCA owed "no legislative or other accountability" to its affiliates
 - The Court further held the board acted in the best interests of the OSPCA and that it was "entitled to deference under the Business Judgment Rule"

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- *Teixeira v Markgraf Estate*, 2017 ONCA 819 (Oct 26, 2017) (Effective date of Gift by Cheque)
 - The trial court had held that a gift by means of a \$100,000 cheque was unenforceable when the cheque could not be cashed due to insufficient funds
 - The Court of Appeal stated that cheques are directions by the drawer to the bank to pay money to a payee and can be revoked by the drawer before the cheque is cashed
 - It also stated that a gift by cheque is not complete until the cheque has been cashed or has cleared, and that the death of a cheque drawer prior to the cheque being cashed would subsequently revoke the bank's authority to pay funds to the payee

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- *ET v Hamilton Wentworth District School Board*, 2017 ONCA 893 (Nov 22, 2017) (Religious Accommodation)
 - The Court of Appeal for Ontario upheld the trial court's judgement that dismissed the request for accommodation on religious grounds submitted by a Greek Orthodox Christian who claimed that his sincerely-held religious beliefs required him to shelter his two primary school-aged children from "false teachings"
 - The Court of Appeal held that there was no evidence of the appellant's or his children's religious freedom being violated, and that exposing children to contrary views alone, without other relevant factors, did not amount to an infringement of religious freedom under the *Charter*

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- The Court of Appeal acknowledged that the appellant had a legitimate fear that his children could be persuaded to abandon their religious beliefs if their teachers were to actively endorse the moral positions of the "false teachings"
- In this regard, the Court stated that "[t]he mores contained in [a school board's program to promote inclusivity] can conflict with parental religious views, particularly if it is premised on the proposition that true acceptance of another person can only be achieved by embracing all of their self-understandings"
- If such a program were to undermine a parent's ability to transmit religious faith, this could justify accommodation on religious grounds

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- *Lichtman v The Queen*, 2017 TCC 252 (Dec 18, 2017)
 - The Tax Court of Canada considered whether three ordained rabbis teaching Judaic studies in a Jewish elementary day school were “ministering to a...congregation” in order to be eligible for the clergy residence deduction under the ITA
 - The court stated that an individual is required to meet a two-fold test for status and function:
 - Status: requires the individual to be a member of the clergy or of a religious order, or a regular minister of a religious denomination
 - Function: whether the individual is performing one of the functions outlined in s. 8(1)(c)(ii) of the ITA, such as “ministering to a diocese, parish or congregation”

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- The court concluded that there was no consensus on the spirituality of Torah education or that learning Torah “is any more of a spiritual or religious act than it is an academic and intellectual pursuit”
- The court found the appellant’s duties were those that “would be typically required of any teacher in a typical school setting”, as opposed to those of a synagogue rabbi
- Reviewing the context and a purposive interpretation approach to the word “congregation” in the ITA, the court found that elementary school students gathered for Jewish religious education and instruction were not a congregation

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- *Chinese Benevolent Association of Edmonton v Chinatown Multilevel Care Foundation*, 2018 ABQB 8 (Jan 5 2018)
 - The plaintiffs sought a declaration that the bylaws adopted by the Chinatown Multilevel Care Foundation in 2009 were invalid and that the governing bylaws were those adopted in 1985
 - The court found that the members of the Foundation were the same as the directors at the time of the 2009 meeting in which the new bylaws were adopted, and that only those individuals were entitled to receive notice of and vote on the 2009 bylaws
 - Objections to the validity of a bylaw must be brought on a timely basis

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- *Milberg v North York Hockey League*, 2018 ONSC 496 (Jan 22, 2018)
 - Mr. Milberg brought an application alleging he was denied procedural fairness when the North York Hockey League (“NYHL”) decided to suspend him from attending any NYHL games for the remainder of the season due to his behaviour at one of his son’s games
 - The Court stated that “Private actors often engage in activities that have a very ‘public dimension’”
 - However, following the jurisprudence in this area (not including *Wall*), the Court held that “public law” decisions that engage judicial authority to review must ultimately emanate from the exercise of statutory power by the government

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The 2018 Ottawa Region Charity & Not-for-Profit Law Seminar Ottawa – February 15, 2018

REMUNERATION OF DIRECTORS OF CHARITIES: WHAT'S NEW?

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Remuneration of Directors of Charities: What's New?

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A. INTRODUCTION

- On July 10, 2017, the Office of the Public Guardian and Trustee of Ontario ("PGT") posted [Proposal Number 17-MAG008](#) (the "Draft Amendments")
- The Draft Amendments propose to amend Ontario Regulation 4/01 under the *Charities Accounting Act* (Ontario) ("CAA") to provide relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them by outlining certain circumstances where charitable corporations would be authorized to pay directors and related persons for goods, services, or facilities

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B. OVERVIEW OF TOPICS

- Who will benefit from the Draft Amendments?
- What is the current common law prohibition on director remuneration and statutory law in Ontario?
 - Fiduciary duties of directors of charitable corporations
 - But what about the corporate law?
 - We're a registered charity; do other rules apply?
- What are the proposed changes?
- Comments on the proposed changes in the Draft Amendments

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C. WHO WILL BENEFIT FROM THE DRAFT AMENDMENTS?

- The Draft Amendments apply to a "corporate trustee", which would be defined as "a corporation deemed by subsection 1(2) of the *Charities Accounting Act* ("CAA") to be a trustee within the meaning of the Act"
 - The CAA deems all corporations incorporated for "a religious, educational, charitable or public purpose" to be trustees within the meaning of the CAA
- Therefore, the Draft Amendments are intended for directors of charitable corporations, e.g., those incorporated under the *Corporations Act* (Ontario) or the future *Not-for-profit Corporations Act* (Ontario)

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- In the view of the PGT, the common law in Ontario and CAA also apply to federally incorporated charitable corporations, e.g., *Canada Not-for-profit Corporations Act* charities
 - Province has proper jurisdiction over charities
 - Likely the same position with incorporated charities in other jurisdictions that operate or are headquartered in Ontario
- This means that the Draft Amendments do not apply to charities operating as unincorporated charities or trusts
 - The common law prohibition may be relaxed with respect to trusts since the settlor in making the trust document can provide for payments for certain services rendered by trustees

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- Also would not impact other exceptions to the common law
 - e.g., Regulations under the *Public Hospitals Act* (Ontario) specifically provide that certain paid staff of a hospital are to sit on its board of directors, such as the administrator of the hospital, and the chief of staff of the hospital
 - Other special act corporations may have similar exceptions in their governing statute

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D. WHAT IS THE CURRENT LAW IN ONTARIO?

1. Fiduciary duties of directors of charities

- The PGT in its guidance "[Duties, Responsibilities, and Powers of Directors and Trustees of Charities](#)" states:

"Generally a charity cannot pay a director to act in the capacity of a director. Also, a director cannot be paid for services provided in any other capacity unless permitted by a court order. In appropriate circumstances, payment for services other than as a director may be allowed by Court Order or by an Order made under section 13 of the Charities Accounting Act where it is in the charity's best interest to do so"

A trustee also cannot be paid for services in any capacity unless approved in advance either by the court or by an order made under section 13 of the Charities Accounting Act. A trustee may also be paid when authorized by the document which creates the trust. The document that creates the trust can also prohibit or restrict payment to trustees. A charity can reimburse a director or trustee for reasonable expenses"

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- This position is based upon a series of cases in Ontario which established at common law that directors of charities are considered to have high fiduciary obligations in respect of charitable property
 - As a result, it is a conflict of interest and a breach of trust for a charity to pay any monies of the charity to any director as remuneration for any services rendered by the director to the charity, directly or indirectly, whether it is in his/her capacity as a director or for other services provided to the charity
 - Applies to those not at arm's-length from the director
- Whether the director is a voting director or non-voting one is irrelevant

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- How are directors of charitable corporations in Ontario able to receive remuneration directly or indirectly now?
 - Option #1: Resign!
 - Option #2: Director remuneration for services in another capacity in Ontario requires prior court approval
 - In Ontario, the PGT is able to exercise the authority of the courts in a limited context by granting consent orders made under section 13 of the CAA
- What if directors receive remuneration from a charitable corporation without a court order?
 - Directors may be personally liable for any payments received and may have to repay the charity

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- Applicants for a section 13 order are reviewed on a case by case basis, but must generally be able to show:
 - Remunerating the directors for their services in another capacity would be in the best interests of the charitable corporation
 - Factors that might be considered include: the directors are providing their services at below market costs; the directors have niche expertise that is not generally available commercially; the charity took steps to obtain quotes from other third-parties and explored other alternatives
 - Also prudent to establish process to minimize any conflict of interest resulting from the payments

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2. What about the corporate law?

- Many corporate statutes that apply to non-profit corporations often permit directors to be remunerated
 - Canada Not-for-profit Corporations Act* (s. 143) and the new *Not-for-Profit Corporations Act, 2010* (Ontario) (s. 47), specifically provide that the board may fix the reasonable remuneration of the directors and allows directors to receive reasonable remuneration for services to the corporation performed in another capacity
 - Existing *Corporations Act* (Ontario) permits directors to pass by-law concerning "the qualification of and the remuneration of" directors (para. 129(1)(f))
 - See also statutory conflict of interest provisions

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- In Ontario, the common law overrides these provisions
- For Ontario corporate statutes, clarification in this regard was included in Bill 154, the *Cutting Unnecessary Red Tape Act, 2017*:
 - "If a provision in this Act or in a regulation made under it that applies to a corporation, the objects of which are exclusively for charitable purposes, conflicts with a law relating to charities, the law relating to charities prevails, regardless of whether it is a provision in another Act or regulation or a rule or principle of common law or equity."
 - New ss.117.1(2) and ss. 5(2) respectively

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3. We're a registered charity; do other rules apply?

- Regardless of whether the Draft Amendments are passed or not, registered charities also need to be aware of compliance with the *Income Tax Act* (Canada)
- See CRA Summary Policy [CSP-D10](#) concerning Directors/Trustees
 - Payments to directors are subject to law of charities in provinces
- However, various penalties or suspensions under the *Income Tax Act* (Canada) could apply

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- Registered charities cannot provide any "undue benefit" to its directors or other related individuals
 - i.e., a gift or "any part of the income, rights, property or resources of the charity" for the personal benefit of any person who is a "proprietor, member, shareholder, trustee, or settlor of the charity", who contributed more than 50 per cent of the capital of the charity or does not deal at arm's length with the charity
 - "undue benefit" excludes "an amount that is reasonable consideration or remuneration for ... services rendered to the charity or association"
- CRA can assess a penalty of 105% of any undue benefit conferred; 110% if assessed again within a 5 year period, or suspension of receiving privileges

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- Failing to meet the definition of a registered charity
 - Subsection 149.1(1) of the *Income Tax Act* (Canada) requires that a "charitable organization" devote all of its resources to "charitable activities carried on by the organization itself"
 - As well, a "charitable foundation" is required to be "operated exclusively for charitable purposes".
 - As a consequence, if a registered charity provides unreasonable compensation or other indirect benefits to directors, CRA may conclude that the charity is not operating for exclusively charitable purposes, i.e., having a "collateral unstated purpose"
 - CRA may revoke the registration of a registered charity that has a collateral unstated purposes

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- Unreasonable compensation or other director or indirect benefit to a director may also be a "private benefit"
 - i.e., any benefit provided to a person or organization that is not a charitable beneficiary, or a benefit to a charitable beneficiary that exceeds the bounds of what CRA considers "charity" to be at common law
 - Generally, a private benefit occurs when a charity's resources promote the interests of individuals involved in private business or of a non-qualified donee, unless the private benefit is incidental, meaning it is necessary, reasonable, and not disproportionate to the resulting public benefit

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E. WHAT ARE THE PROPOSED CHANGES?

- Draft Amendments would permit a charitable corporation to make payments to:
 - A director of a charitable corporation; and
 - A "person connected" to a director of the charitable corporation
- Who is a "person connected"?
 - Draft Amendments defines the following as "persons connected"
 - A spouse, child, parent, grandparent or sibling of the director
 - employer of the director or of a spouse, child, parent, grandparent or sibling of the director

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- A corporation in certain circumstances, e.g., ownership of more than 5% of shares by the director or spouse, child, parent, grandparent or sibling of the director, ownership of 20% of the voting shares, or where the person acts as a director or officer
- A partnership in which the director or spouse, child, parent, grandparent or sibling of the director is a director, or in which a corporation that is connected to the director is a partner
- A partner in a partnership in which the director or spouse, child, parent, grandparent or sibling of the director is a director, or in which a corporation that is connected to the director is a partner

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- Under the Draft Amendments, directors would continue to be prohibited from receiving direct or indirect payment for services they provide:
 - in their capacity as directors or employees of the charitable corporation;
 - for fundraising services; and
 - for selling goods or services for fundraising, or in connection to the purchase or sale of real property.
- Therefore, it is still not permissible for a director to receive remuneration in his or her capacity as a board member, or as an employee of the charitable corporation

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- Before payments can be made to a corporate director or a “person connected”, the charitable corporation would first need to meet a number of conditions set out in the Draft Amendments
 - The payment must be made with a view to the charity's best interests
 - The payment must be in an amount that is reasonable for the goods, services or facilities provided
 - The payment must not result in the amount of the debts and liabilities of the charity exceeding the value of the charity or render the corporation insolvent

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- Before the board may authorize the payment:
 - Every director must agree in writing to the maximum amount that can be paid for the goods, services or facilities
 - Every director, other than the director receiving the payment, must agree in writing that they are satisfied that the conditions set out in the regulation have been met
 - The board must consider any guidance issued by the Public Guardian and Trustee
- There must be at least four directors on the board, not including the conflicted director, i.e., 5
- The director who receives the payment, or “person connected”, do not attend the meeting to authorize the payment or vote

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- The number of directors receiving remuneration, or who are connected to persons receiving remuneration, cannot be greater than 20% of the total number of directors in any fiscal year
- The payment to the director must be reported at the annual general meeting and must be noted on the charity's financial statements
- In addition, payments made to a not-for-profit corporation or a corporation wholly owned by the charity, would be exempt from the regulation if no director of charitable corporation or “person connected” receives a benefit
 - e.g., payments to a wholly owned subsidiary if no benefit was received by the charity's directors or persons connected to them

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F. COMMENTS ON THE PROPOSED CHANGES IN THE DRAFT AMENDMENTS

- The Draft Amendments were open to public comment until August 29, 2017
 - e.g., Ontario Bar Association letter of [August 29, 2017](#)



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- Issues
 - As pointed out by the OBA, employees are excluded from the Draft Amendments
 - Does not address situations where historical structure of religious organization requires pastors or senior clergy members to have a leadership role on the board of directors of their religious organization
 - Independent churches often subject to doctrinal requirements mandating minister or pastor sit on the board
 - Section 13 orders would still be required in these circumstances

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- Transparency
 - Section 13 orders are required to be filed in the Superior Court and are publicly accessible
 - The requirement that payments to directors be disclosed in the financial statements is challenging because:
 - A corporation without members has no obligation to make its financial statements publicly available (unless it is a soliciting corporation under the *Canada Not-for-profit Corporations Act*)
 - Little compliance in the sector with financial review requirements of corporate statutes

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- Requirement that payments be reasonable
 - How does a board evidence that it has satisfied itself that payments are reasonable?
 - Do multiple quotes need to be obtained?
 - What about situations where expertise is in a small field and therefore FMV is hard to ascertain?
- No limitation on length of contract or transaction
 - Typically, a section 13 order is not a blanket approval, and is limited as to a particular contract or transaction


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G. CONCLUSION

- The Draft Amendments, if enacted into law, will ease the process for incorporated charities that want to rely upon their board members who can provide services in another capacity without the need for a consent order
- Process to obtain a section 13 consent order under the CAA can be time intensive and generally requires the assistance of legal counsel; Draft amendments are welcome exception

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**The 2018 Ottawa Region
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**CRITICAL PRIVACY ISSUES
INVOLVING CHILDREN'S
PROGRAMS**

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**Critical Privacy Issues Involving Children's
Programs**

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INTRODUCTION

- Privacy is already a significant risk exposure for charities, churches and other Not-for-Profits ("NFPs") - heightened when dealing with children
- Charities and NFPs must comply with Canada's privacy laws when dealing with children's personal information and must protect children's personal information that is in their care and control
- Number of ways providers of children's programs/services may engage children's privacy rights
- This presentation not exhaustive - organizations should consider privacy implications of other activities
- Note: For the purposes of this presentation, "child" or "minor" means a person under the age of 18 years

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A. WHAT IS PRIVACY?

- Privacy has been defined as "the right of the individual to control the collection, use and disclosure of information about the individual"
- Privacy includes having the right to:
 - determine what information about you is collected
 - determine how it is used
 - choose the conditions and extent to which your information is shared
 - access collected information to review its security and accuracy

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B. THE PRIVACY LAW CONTEXT IN CANADA

- Privacy legislation in Canada generally seen as quasi-constitutional - recently reaffirmed by Supreme Court of Canada in *Douez v. Facebook*
- Patchwork of laws that apply to privacy at both the federal and provincial levels Canada - no single source
- The main privacy laws of interest for charities or NFPs are:
 - Federal private-sector legislation (PIPEDA) - applies to organizations that collect, use or disclose personal information in the course of "commercial activities"

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- "Substantially similar" provincial legislation, e.g., PHIPA (health), Alberta or BC PIPA
- Ontario public-sector privacy legislation (FIPPA - provincial) (MFIPPA - municipal)
- Privacy torts and privacy class actions
- Whether a charity or NFP is subject to PIPEDA depends on whether it engages in "commercial activity"

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- PIPEDA defines commercial activity broadly and would include commercial activity carried out by non-commercial organizations
- The Office of the Privacy Commissioner of Canada (OPC) has indicated that whether or not an organization operates on a not-for-profit basis is not conclusive in determining whether or not PIPEDA applies
- Even if a charity or NFP is not subject to PIPEDA or other specific privacy legislation, violations of privacy can now give rise to damage awards, tort claims and class action litigation in the courts

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- Canadian courts showing an increasing willingness to protect privacy interests
- *Jones v. Tsige* 2013 - Ontario Court of Appeal recognized a new common law tort of "intrusion upon seclusion"
- *Doe 464533 v. N.D.* - January 2016 Ontario courts recognized another new tort - "public disclosure of private facts" - still good law
- Privacy-related class action litigation is also on the rise in Canada - e.g. 2017 Winnipeg Royal Ballet class action brought by former students for intimate photos taken by instructor and posted online

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B. THE PRIVACY LAW CONTEXT IN CANADA (cont.)

- Privacy law is evolving area - most prudent for a charity or NFP to treat all personal information that it collects, uses or discloses in the course of its activities as if it were subject to PIPEDA
- Also - charities and NFPs operating in other provinces may be subject to their privacy laws - e.g. BC PIPA applies to NFPs and charities, AB PIPA applies to religious societies, federally incorporated NFPs, others
- "Questions about data privacy and security have heightened expectations for the charitable sector to develop rigorous standards for how they organize, store and provide access to data" - Mowat Centre 2018

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C. PERSONAL INFORMATION

- Key concept in privacy law - "personal information"
- "Any information about an identifiable individual"
- Examples of personal information:
 - Name, address
 - Health card number
 - Financial information
 - Anything that pertains to a person's health care
 - The identity of a person's health care provider
 - Images of identifiable individuals
 - Video surveillance - whether or not recorded

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D. FAIR INFORMATION PRINCIPLES

- Basis of Canadian privacy law and include:
 - Must identify the purposes for which personal information is collected at or before collection
 - Must obtain consent for the collection, use, or disclosure of personal information
 - Must limit the collection of personal information to what is necessary for the purposes identified
 - Must collect personal information by fair and lawful means
 - Must give individuals access to the information about them

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E. PRIVACY RIGHTS OF CHILDREN

- Canada is a signatory to the UN Convention on the Rights of the Child - recognizes child's right to privacy and to the protection of the law against interference with his or her privacy
- Supreme Court of Canada - recognized the inherent vulnerability of children and the need to protect young people's privacy rights based on age, not the sensitivity of the particular child (*A.B. v. Bragg Communications Inc.*)

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E. PRIVACY RIGHTS OF CHILDREN (cont.)

- Working Group of Privacy Commissioners and Child and Youth Advocates - frames children's privacy as a quasi-constitutional and human right that outweighs other considerations
- The OPC -
 - the personal information of children is particularly sensitive, especially the younger they are
 - must bear this in mind when collecting, using or disclosing their personal information

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E. PRIVACY RIGHTS OF CHILDREN (cont.)

- OPC Report on Consent - From 13 to 18 must adapt consent processes to child's level of maturity
- Does not mean that consents given by such children will necessarily be effective
- Courts may hesitate to enforce a consent signed by a child between 13 and 18
- No clarity in case law yet whether consents signed by parents together with or on behalf of child are binding

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F. CONSENT TO COLLECTION, USE, DISCLOSURE

- Key concept in privacy law is **consent** to collection, use or disclosure of personal information
- Organizations face a problem with obtaining valid consent from children - "it can be challenging (or even not possible) to obtain meaningful consent from youth, and in particular younger children" - OPC
- OPC Report on Consent (September 2017) - OPC now takes the position that no valid consent can be obtained from a child under 13 years old

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G. HEALTH NUMBERS

- Some schools, daycares, camps and other organizations that are not health information custodians often collect children's health numbers for emergency purposes
- Under PHIPA such organizations are not permitted to require that children's health numbers be provided to them
- Charities and NFPs must make it clear that provision of health cards or health numbers is voluntary
- Retention and secure storage requirements - will be discussed later

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS

- Images of identifiable individuals are personal information
- Charities, including churches, and NFPs often use pictures of children to promote their programs or to share with parents and other stakeholders - often posted online
- Charities and NFPs must obtain consent to the collection, use and disclosure of personal information - including photographs of identifiable individuals
- Subject to the following discussion

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Standard practice among schools, religious organizations and other entities to request the consent from the child's parent or guardian
- Not clear that a court will enforce a consent or waiver signed by a parent on behalf of a child - no definitive case law yet on whether a waiver signed by a parent is binding on a minor
- A court may not enforce the waiver/consent or may only enforce some portions of it
- *Dewitt v. Strang* - recent NB case may lead to a definitive ruling on enforceability of parental waivers

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Risk of misuse - common for innocuous photos to be taken from websites and photo-shopped or posted with inappropriate content or comments
- National Post article April 18, 2017 - "Do you know where your child's image is?" - morphing innocent Facebook photos into sexualized imagery
- In February 2016 the French national police warned parents to stop posting photos of their children on Facebook as that could violate their privacy and expose them to sexual predators

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H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

- Sexualized images of a child becomes a permanent, indestructible record - ongoing violation
- Ethical considerations that come into play as photographing and posting images of young persons could expose them to potential misuse of their image
- If an organization does decide to assume the risk of photographing/posting images of minors, it should obtain robust consents, including consent to images or video footage of the child being stored, accessed or disclosed outside of Canada

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I. COLLECTING PERSONAL INFORMATION FROM CHILDREN

- Collection, use and disclosure of personal information is predicated on obtaining valid consent
- Problem of obtaining meaningful consent from children, especially younger children
- OPC recommends that providers of child-centric services avoid collecting personal information
- If collection of personal information is necessary, OPC recommends limiting it to the minimal information that will satisfy the purpose (e.g. what country are you in, rather than what city)

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I. COLLECTING PERSONAL INFORMATION FROM CHILDREN (cont.)

- Ability to provide meaningful consent for collection and use will depend on child's age and development
- May not be possible to explain services and risks to younger children so they can fully understand. If so, must communicate to child the need to involve a parent/guardian
- OPC - no valid consent from a child under 13
- Interesting contrast with the test of capacity to consent to a treatment in health care (Ontario), under PHIPA (Ontario) and under CYFA (Ontario), which are not age-dependent

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE

- Charities and NFPs with websites should limit or avoid the online collection of personal information from children
- Problem of inadvertent collection of personal information - OPC, e.g. many children use their real names as username
- OPC and Working Group - concerns about online advertisements aimed at children and aligned with their specific interests - interest-based advertising (cookies) and disguised marketing
- United States - the *Children's Online Privacy Protection Act* ("COPPA") requires websites to obtain "verifiable" parental consent before collecting information from a child under 13
- No such law in Canada, and complaints that COPPA has been ineffective

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE (cont.)

- Charities and NFPs with websites are expected to have effective procedures to protect personal information - especially to protect the personal information of children
- Examples from the OPC include:
 - Limit/avoid collection from children
 - Obtain consent from parents of children under 13
 - Make sure default privacy settings are appropriate for the age of users
 - Verify that users are not using their real names as user names
 - Have contractual protections in place with online advertisers to prevent the tracking of users and monitor

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J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE (cont.)

- New European Union ("EU") General Data Protection Regulation ("GDPR") coming into effect May 25, 2018 has a number of provisions relating to children, including requirement for parental consent to collect, use, disclose ("process") personal information of a child under the age of 16
- Organizations will be required to make "reasonable efforts" to verify that consent has been given
- GDPR will also require privacy notices and other information directed at children to be in plain language and easy to understand
- GDPR will apply to Canadian organizations that collect or process personal data of EU residents to offer goods or services (even at no-charge)

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K. COLLECTING PERSONAL INFORMATION FROM THIRD PARTIES

- OPC Case #2012-007 - summer camp director collected a child's personal information from a camp she had previously attended without the parent's consent to decide if she would be a suitable camper
- The previous camp confirmed that personal information about the child was exchanged during a phone call
- Camp documents did not mention that camper personal information could be collected from other parties
- The OPC found that the complaint was well-founded - the camp had breached the child's privacy by collecting personal information without the child's/parent's knowledge or consent

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L. DISCLOSING PERSONAL INFORMATION TO THIRD PARTIES

- In OPC Case # 2012-008 the disclosing camp was found to have breached the child's privacy by disclosing her personal information without her/her parent's knowledge and consent
- When disclosing information about a child to a third party, a charity or NFP must have the individual's knowledge and consent to do so

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M. SURVEILLANCE

- Children are subject to increasing levels of surveillance - security cameras, nanny cams, video baby monitors, webcams in daycares
- Other technologies coming - e.g. fingerprint scanners, radio frequency tagging, Mattel's smart device "Aristotle" and toys connected to the internet
- Charities and NFPs must have consent for the collection, use and disclosure - this is personal information

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M. SURVEILLANCE (cont.)

- OPC Case #2011-008 - daycare used webcam for security purposes and so parents could check on their children online
- Parent complained that the daycare was recording and storing the videos (personal information) without consent and without adequate safeguards
- OPC - internet viewable real-time video surveillance of children is highly sensitive personal information and strong security measures were required - daycare did not have

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M. SURVEILLANCE (cont.)

- Daycare had to enhance its technological and contractual safeguards - e.g. regular deactivation of outdated passwords, encryption of the video data and auditing of logs for unusual activity
- In general, video surveillance should be limited in scope as much as possible to minimize interference with individual privacy
- OPC guidelines for video surveillance include:
 - Turn on cameras for limited periods, not always on
 - Minimize risk of capturing images of passersby

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M. SURVEILLANCE (cont.)

- Do not use in/aim cameras at areas where people have a heightened expectation of privacy e.g. washrooms, locker rooms, windows
- Post notice about the use of cameras visible before entering camera range
- If possible, do not record continuously, only record when problematic activity is occurring
- Store recorded images securely
- Keep recordings only as long as necessary to fulfill the purpose and securely destroy

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N. CHILD, YOUTH AND FAMILY SERVICES ACT, 2017

- Child, Youth and Family Services Act, 2017 (CYFSA) - not yet in force
- Part X - based on PHIPA/fair information principles
- Child and youth service providers governed by CYFSA may only collect, use or disclose personal information (a) if they have the individual's consent and it is necessary for a lawful purpose or (b) the collection, use or disclosure without the individual's consent is permitted or required by the Act
- Consent must be knowledgeable - individual must know the purpose and know that they can give, withhold, or withdraw consent

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N. CHILD, YOUTH AND FAMILY SERVICES ACT, 2017 (cont.)

- Individuals are presumed to be capable - able to understand information relevant to deciding whether to consent and the reasonably foreseeable consequences of giving, withholding or withdrawing consent
- Decision of a child younger than 16 who is capable prevails over decision by a substitute decision-maker
- On December 4, 2017 The Ministry of Children and Youth Services released draft regulations under CYFSA which, when in force, will create a number of privacy obligations to be satisfied by entities that meet the definition of "service provider" under CYFSA, including charities and not-for-profits
- Child and youth service providers will need to develop processes that are compliant with Part X of CYFSA and the regulations

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O. HELP/COUNSELLING/ADVICE LINES FOR CHILDREN

- A number of privacy matters that charities and NFPs should consider when engaging in this activity
 - trace phone calls?
 - record phone numbers?
 - record calls?
 - parental consent?
 - handling of recorded personal information?
- Should be addressed in an appropriate privacy policy
- Positive obligation to report if reasonable grounds to suspect that a child is or may be in need of protection

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Q. PREVENTING PRIVACY BREACHES

- Charities and NFPs are required to protect children's personal information against loss or theft, unauthorized access, disclosure, copying, use, or modification
- Fair information principles - onus is on organizations to use safeguards that are appropriate to the sensitivity of the personal information
- Consider amount and sensitivity of information in determining what safeguards are appropriate, e.g. health information
- Must use appropriate safeguards:
 - technical (passwords, encryption, auditing)
 - administrative (training, security clearances, "need-to-know" access)
 - physical (secure areas, ID, locked cabinets)

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Q. PREVENTING PRIVACY BREACHES (cont.)

- Only retain personal information as long as necessary to fulfill the purposes for which it was collected
- Securely dispose of personal information so that reconstruction is not reasonably possible
- Ontario Information and Privacy Commissioner - most common causes of privacy breaches:
 - Insecure disposal of records (paper and electronic)
 - Lost/stolen portable devices (laptops, USB)
 - Unauthorized access (snooping, hacking)
- Failure to appropriately safeguard children's personal information or to destroy it securely can place a church, charity or NFP at risk of a privacy breach

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R. RETENTION AND INSURANCE

- Organizations should develop and implement procedures and policies with respect for the retention of personal information that include minimum and maximum retention periods
- Key principle - Personal information shall be retained only for as long as needed to fulfill the purposes for which it was collected
- OPC - Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous

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R. RETENTION AND INSURANCE

- Some insurers may require charities and NFPs to retain personal information indefinitely in order to qualify for Abuse Liability Coverage - Seems inconsistent with the principles of retention
- OPC Report of Findings #2014-019 - "lessons learned" suggests that it may be possible to retain for longer if the individual consents to a longer retention period
- Complicated issue - need legal advice


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R. RISK EXPOSURE FOR CHARITIES AND NOT-FOR-PROFITS

- Failure to comply with the requirements of privacy law regarding the personal information of children can place a charity or NFP at risk of privacy law suits, complaints to the relevant Privacy Commissioner, financial costs and reputational loss or damage
- Charities and NFPs should have robust privacy policies and procedures in place to mitigate these risks

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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**RECENT CHANGES IN
CORPORATE LAW AFFECTING
FEDERAL AND ONTARIO
CORPORATIONS**

By Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.

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**Recent Changes in Corporate Law Affecting
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OVERVIEW

- New development and interesting rules/processes under federal CCA and CNCA
- Status of ONCA & Bill 154
- OCA amendments pursuant to Bill 154
- ONCA amendments pursuant to Bill 154
- OCA corporations going federal?

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A. FEDERAL – CCA AND CNCA

1. Canada Corporations Act is REPEALED !!

- *Canada Corporations Act* ("CCA") since 1917
 - Part II governs non-share capital corporations
 - Part III governs non-share capital federal statutory corporations
- *Canada Not-for-profit Corporations Act* ("CNCA") enacted to replace Part II and Part III of CCA
- CNCA was enacted on June 23, 2009, in force on October 17, 2011
- Federal statutory corporations automatically governed under Part 19 of CNCA when CNCA came into force
- All Part II CCA corporations were required to continue under the CNCA within 3 years, i.e., by October 17, 2014
- Corporations that failed to continue under the CNCA were to be dissolved

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- There were approximately 17,000 Part II CCA corporations in 2011
- By Dec 31, 2017, all Part II CCA corporations were either transitioned to CNCA or dissolved
- Regulations under the CCA was repealed on Dec 30, 2017
- Remaining provisions in the CCA were repealed on Dec 31, 2017

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2. Revival of Dissolved Part II CCA Corporations

- Part II CCA corporations dissolved for failure to transition to the CNCA can apply to be revived and transitioned into the CNCA in one step
- Use *Form 4032: Articles of Revival (transition)*
- See Corporations Canada's *Revival (transition)* guide - <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06603.html>
- The revival (transition) process involves the following
 - Preparing articles of revival (transition) and new by-laws that complies with the CNCA - and having them approved by members
 - Submitting them to Corporations Canada, which would issue a Certificate of Revival
 - For registered charities, submitting CNCA documents to Canada Revenue Agency for approval

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3. Interesting Rules/Processes Under CNCA

- Restated Articles - to consolidate changes to previous articles into one consolidated version (useful when multiple changes have been made in previous years)
- Certificate of Compliance - to show that a corporation exists under the CNCA, has filed the required annual returns with Corporations Canada, and has paid all required fees
- Certificate of Existence - to show that a corporation exists as of a specified date

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- CNCA corporations may seek approval from Corporations Canada for exemption from specific CNCA requirements (<https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs06651.html>)
 1. Deeming a corporation non-soliciting
 2. Restricting access to corporate records
 3. Authorization to extend the time for calling an annual meeting
 4. Authorization relating to method of giving notice of annual meetings
 5. Authorization relating to absentee voting methods
 6. Exemption from financial disclosure requirements
 7. Deeming the gross annual revenues of a soliciting corporation
 8. Exemption from electronic document requirements
 9. Exemption from trust indenture requirements

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B. STATUS OF ONCA & BILL 154 AMENDS OCA AND ONCA

- Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") may finally be proclaimed in early 2020!!
- Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953 - Part III of OCA governs non-share capital corporations
- New ONCA will apply to Part III OCA corporations
- Key timeline of ONCA
 - October 25, 2010 - ONCA received Royal Assent
 - 2013 - Original anticipated proclamation date, later delayed to January 2014
 - June 5, 2013 - Bill 85 introduced, proposing changes to ONCA, with ONCA to be proclaimed 6 months after enactment of Bill 85
 - May 2, 2014 - Ontario Legislature dissolved, Bill 85 died on the Order Paper

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- September 2015 - Ministry announced that the ONCA would come into force after two things have happened
 - Legislature has passed technical amendments to the ONCA and related legislation
 - Technology at the Ministry is upgraded to support these changes and improve service delivery and the Ministry would provide the sector with at least 24 months' notice before proclamation
- Technical amendments
 - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, was introduced on September 14, 2017, and received Royal Assent on November 14, 2017
 - Bill 154 introduced changes to the OCA, ONCA and Ontario *Business Corporations Act*

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- Technology - Following the Royal Assent of Bill 154, Ministry's website indicates that it is upgrading technology to support the changes implemented by Bill 154 and to improve service delivery
- 24 month's notice - Ministry's website also states that it is working to bring ONCA into force as early as possible, with a target of early 2020 - thus giving NFP corporations at least 24 months' notice before the ONCA comes into force
- See Ministry's website <https://www.ontario.ca/page/rules-not-profit-and-charitable-corporations#section-1>
- Further details will be provided by the Ministry of Government and Consumer Services closer to when the ONCA comes into force.

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- Once ONCA is proclaimed
 - Part III OCA corporations will have 3 years to transition to the ONCA to make the necessary changes to their governing documents
 - ONCA applies automatically to Part III OCA corporations upon proclamation, except where overridden by existing corporate documents
 - Optional transition process
 - Review LP, SLPs, by-laws
 - Prepare articles of amendment and new by-law
 - Membership approval, filing, issue certificate of amendment
 - Registered charities - file copies with Canada Revenue Agency
 - Share capital social clubs under the OCA will have 5 years to continue under the ONCA, the Ontario *Business Corporations Act* or the *Co-operative Corporations Act*

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C. OCA AMENDMENTS (Bill 154)

- Bill 154 (Schedule 7) amends certain provisions in the OCA to allow Part III OCA corporations to enjoy some of the modernized rules in the ONCA and provide more flexibility to their operation
- Bill 154 received Royal Assent on November 14, 2017
- Some key changes to the OCA became effective on Nov 14, 2017, and Jan 13, 2018 - These changes are reviewed in this presentation
- Bill 154 also contains other changes to the OCA that will become effective at a later time
- See *Charity & NFP Law Bulletin* No. 406 and No. 412
 - <http://www.carters.ca/pub/bulletin/charity/2017/chylb406.pdf>
 - <http://www.carters.ca/pub/bulletin/charity/2017/chylb412.pdf>

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Summary of key OCA changes (effective Nov 14, 2017 and Jan 13, 2018)

- Audit exemption
 - Members may waive audit by 80% majority vote if annual revenue is less than \$100,000 (or an amount prescribed by the regulations)
 - Previous rules - unanimous membership approval if annual income is less than \$100,000
- Membership issues
 - Notice of members' meetings may be given by electronic means
 - Previous OCA rules - must give notice by mail
 - Members' meetings can be held electronically
 - Previous OCA rules - members' meetings cannot be held electronically (must attend in person or by proxy)
 - The court may make an order appointing the required number of directors if a corporation has no directors and no members

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- Board issues
 - A director may be removed by a simple majority vote of the members, unless corporate documents in place before Nov. 14, 2017, provide otherwise
 - Previous OCA rules - 2/3 majority vote to remove a director
 - New rule does not apply to *ex officio* directors
 - By-laws may provide that non-members may be elected to the board
 - Previous OCA rules - only corporate members may be elected to the board
 - Objective standard of care for directors and officers
 - Previous rules - OCA is silent, directors and officers are subject to common law subjective standard of care
 - The court may make an order appointing the required number of directors if a corporation has no directors and no members

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- General issues of interest
 - Special legislation and charity law will prevail over the OCA in the event of a conflict
 - Contracts entered into before incorporation of a corporation can be adopted by the new corporation, and the person who entered into such contracts would not be liable
 - Corporations will have full capacity, rights, powers and privileges of a natural person
 - OCA corporations may change jurisdictions to outside Canada (export continuance)

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D. ONCA AMENDMENTS (BILL 154)

- Bill 154 (Schedule 8) proposes amendments to the ONCA
- Bill 154 includes substantially similar amendments to the ONCA as those previously in Bill 85, with a few new amendments
- Coming into force date of the ONCA is unknown and these ONCA amendments will take effect on various dates
- See *Charity & NFP Law Bulletin* No. 409
<http://www.carters.ca/pub/bulletin/charity/2017/chylb409.pdf>

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Summary of key ONCA changes

- Consent to be a director must be in writing, and consents for first directors upon incorporation must be in "approved form"
- Threshold to be considered a public benefit corporation would be prescribed by regulation (as opposed to \$10,000 in the ONCA)
- When annual financial statements are to be circulated to members would be prescribed by regulation (as opposed to 21 days before AGM in the ONCA)
- ONCA will not apply to corporations sole "except as is prescribed"
 - Exempting the application of the ONCA to corporations sole had never come up in prior consultations
 - ONCA already has a mechanism dealing with special act corporations

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- Proxy votes will become optional (no longer mandatory right of members to vote by proxy) and articles and by-laws may restrict proxyholders to members only
- Implementation of all membership class votes will be delayed for at least 3 years after proclamation of ONCA
 - ONCA originally provides that members in different classes (voting and non-voting) will have class vote right upon proclamation
 - Bill 85 only delayed class votes of non-voting members
- Transition process from OCA to ONCA is better clarified, including certain provisions in by-laws or special resolutions will continue to be valid indefinitely until articles of amendment are endorsed (e.g., by-law provisions regarding number of directors or membership classes)

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- Distribution of net assets on winding up or dissolution of public benefit corporations is clarified
 - Net assets of a public benefit corporation must be distributed (i) to a Canadian corporation that is a registered charity with similar purposes to the dissolving corporation (instead of "charitable corporations with similar purposes") or (ii) to the government

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E. OCA CORPORATIONS GOING FEDERAL?

- With the delay of the proclamation of the ONCA, some OCA Part II corporations wonder if they should move its jurisdiction to the CNCA
- It is a fundamental change, not a minor matter, which needs careful consideration whether this is suitable for the corporation in question
- There could be many factors at play when determining whether it would be desirable for an OCA corporation to move into the CNCA - these factors should be carefully reviewed and evaluated
- The convenience of not wanting to wait for the proclamation of the ONCA may not necessarily be a sufficient driving force in and of itself to justify moving into the CNCA

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- Two steps are required
 - Export out of OCA - Need to obtain approval from the Ontario government by filing *An Application for Authorization to Transfer to Another Jurisdiction* (Form 13) after having been adopted by a special resolution of the directors and members. Also need approval from the Ontario Public Guardian and Trustee if the corporation is a charity
 - Import into CNCA - Need to adopt Articles of Continuance (Form 4011) and a new by-law that meets the requirements of the CNCA. The articles, notice of registered office address and first board of directors, NUANS name search report and the filing fee must be filed with Corporations Canada. A certificate of continuance under the CNCA will be issued. The by-law will also need to be filed within one year

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- If the corporation is a registered charity, the continuance documents must also be filed with Canada Revenue Agency for approval
- Other extra-provincially may also be required
- See *Charity & NFP Law Bulletin* No. 379
<http://www.carters.ca/pub/bulletin/charity/2016/chylb379.pdf>

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- The following are some key factors why it may be beneficial to continue under the CNCA
 - Having national scope of operations - These corporations are often originally incorporated under the OCA in the early stage of their establishment, and then have their programs expand over the years to other provinces or nationwide over the years
 - Holding membership meetings in different provinces from time to time - A corporation that has members in different provinces may want to hold members' meetings in different provinces from time to time (rather than just in Ontario if it was to remain under the OCA)
 - Having the right to use corporate name in all provinces
 - The right of a federal corporation to use its corporate name in all provinces is entrenched under the Constitution of Canada

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- Facilitating amalgamation and other corporate re-organization - For example, in order to "amalgamate" an OCA corporation with a CNCA corporation, need to move the OCA corporation into CNCA first, before amalgamating the two CNCA corporations (because it is not permitted to amalgamate an OCA corporation and a CNCA corporation)
- Being subject to less oversight of the Ontario Public Guardian and Trustee - Charities in Ontario that are CNCA corporations are subject to less oversight by PGT than OCA charitable corporations
- Facilitating operational issues - There could be many operational issues that may drive the need for an OCA corporation to be continued under the CNCA

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- The following are some factors why it may be more beneficial to remain under the OCA (and continue to wait for the proclamation of the ONCA)
 - Enjoying attractive features of the ONCA not found in the CNCA -There are some key differences that tend to make the ONCA be perceived as “friendlier” and more sensitive to the charitable and non-profit sector than the CNCA, for example
 - Can have ex officio directors
 - Not required to file by-laws with the Ontario government
 - Not required to file financial statements with the Ontario government
 - Lower threshold for audit exemption under the ONCA than the CNCA

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- Considering applicable operational issues - There could be operational issues that may prevent an OCA corporation from continuing under the CNCA, such as organizations involved in a network or umbrella structure
- Complying with legislative prohibitions - Some organizations are required to be incorporated provincially in Ontario, for example, public hospitals in Ontario are required to be incorporated under Ontario law
- Getting approval for continuance - The OCA corporation will have to assess whether it is possible to obtain the necessary approval from its members to effect such a major corporate change

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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**THE IMPACT OF BILL 148 ON
CHARITIES AND NOT-FOR-
PROFITS**

By Barry W. Kwasniewski, B.B.A., LL.B.

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A. OVERVIEW

- *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148")
 - Background of *Employment Standards Act, 2000* ("ESA")
 - Background of Bill 148
 - Minimum Wage
 - Equal Pay for Equal Work
 - Paid Vacation Time
 - Job Protected Leaves of Absence
 - Scheduling Provisions
 - Independent Contractors



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B. Fair Workplaces, Better Jobs Act, 2017 ("Bill 148")

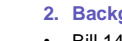
1. Background of *Employment Standards Act, 2000* ("ESA")

- Minimum standards applicable to the employer-employee relationship in Ontario
- It applies to for profits and the vast majority of charities, and not-for-profits in Ontario ("Organizations")
- Deals with a variety of matters such as minimum wages, vacation time, hours of work, termination and severance, liability of directors, etc.
- To access the latest version of the ESA, see:
<https://www.ontario.ca/laws/statute/00e41?search=employment+standard>



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2. Background of Bill 148

- Bill 148 came about as a result of the Changing Workplaces Review Final Report released by the Ontario Minister of Labour on May 23, 2017
 - To access the full report:
<https://www.labour.gov.on.ca/english/about/workplace/>
- Special Advisors retained by the Ontario government made a total of 173 recommendations for amendments to the ESA and the *Labour Relations Act, 1995* ("LRA")
- Bill 148 was passed on November 22, 2017, with several provisions having come into force since then
 - To access Bill 148, see:
http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4963&detailPage=bills_detail_the_bill

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3. Minimum Wage

- Bill 148 increased the general minimum wage to \$14/hr on January 1, 2018, and will increase it to \$15/hr on January 1, 2019, subject to further annual inflation adjustments starting on October 1 2019


General Minimum Wage/hr (prior to January 1, 2018)



Province/Territory	General Minimum Wage/hr (prior to January 1, 2018)
Alberta	\$13.60
British Columbia	\$11.35
Manitoba	\$11.15
New Brunswick	\$11.00
Newfoundland and Labrador	\$11.00
Northwest Territories	\$12.50
Nova Scotia	\$10.85
Nunavut	\$13.00
Ontario	\$11.60
Prince Edward Island	\$11.25
Quebec	\$11.25
Saskatchewan	\$10.96
Yukon	\$11.32

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3. Minimum Wage (cont...)

- Bill 148 increased the student minimum wage from \$10.90/hr to \$13.15/hr on January 1, 2018, and will increase it to \$14.10/hr on January 1, 2019 to employees who are students under 18 years of age, if the weekly hours of work do not exceed 28 hours or if the student is employed during a school holiday
- Overtime Costs will increase, as overtime pay to eligible employees will be based on 1.5 times the increased minimum wage rate
- There may also be upward pressure from other employees currently earning above minimum wage




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4. Equal Pay for Equal Work

- Currently, s.42(1) ESA prohibits different pay rates on the basis of the employee's sex if the employees:
 - (1) perform the same kind of work in the same establishment
 - (2) use substantially the same (but not necessarily identical) skill and effort and take on the same responsibilities, and
 - (3) work under similar conditions
- However, s. 42(2) ESA provides that different pay rates are permitted based on: (1) a seniority or merit system, (2) a system that measures earnings by quantity or quality of production; or (3) any other factor other than sex




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4. Equal Pay for Equal Work (cont...)

- Starting on April 1, 2018, Bill 148 will prohibit differential pay on the basis of "employment status"
- Bill 148 provides that "no employer shall pay an employee at a rate of pay less than the rate paid to another employee [...] because of a difference in employment status"
- "Difference in employment status" means
 - (a) a difference in the number of hours regularly worked by the employees; or
 - (b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or casual status



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4. Equal Pay for Equal Work (cont...)

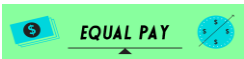
- Bill 148 maintains the exception based on a "seniority or merit system", quantity or quality of production, or any other factor other than sex or employment status
- However, there is no definition of a "seniority system"
- If the employee believes the employer is paying different rates based on sex or employment status, Bill 148 will allow the employee to request a review by the employer
- In response to the employee's request for review, the employer must either (1) adjust the employee's pay accordingly, or (2) provide a written response to the employee setting out the reasons for the disagreement

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4. Equal Pay for Equal Work (cont...)

- Bill 148 also provides protection against reprisal against an employee for exercising these pay review rights
- Bill 148 further provides that no employer may reduce the rate of pay of an employee in order to comply with the equal pay requirement
- Paying part-time and casual employees the same rate as full-time employees may have an even bigger impact on some Organizations than the increases to the minimum wage




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5. Paid Vacation Time

- Formerly under the ESA, an employee was entitled to 2 weeks' vacation time for each vacation entitlement year, with minimum vacation pay of 4% of wages earned in the 12 month vacation entitlement year
- Bill 148 provides for an increase in these entitlements to 3 weeks' vacation time and to 6% vacation pay, if the employee's period of employment is 5 years or more
- The vacation must be taken in increments of 1 week periods, unless the employee requests to take vacation in shorter periods and the employer agrees
- Vacation policies may need to be revised




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6. Job Protected Leaves of Absence

- ESA requires an employer to reinstate employees to their former position (or comparable position) upon return from a "job protected leave of absence"
- The following leaves of absence have been either modified or newly introduced in Bill 148
 - Pregnancy Leave
 - Parental Leave
 - Personal Emergency Leave
 - Crime-related Child Death or Disappearance Leave
 - Family Medical Leave
 - Critically Ill Child Care Leave (replaced by New Critical Illness Leave)
 - New Domestic or Sexual Violence Leave



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6. Job Protected Leaves of Absence (cont...)

- **Pregnancy Leave** in ESA is a leave without pay provided, prior to Bill 148, on the following terms:
 - if the employee is entitled to parental leave, 17 weeks after the pregnancy leave began;
 - if the employee is not entitled to parental leave, on the day that is the later of,
 - 17 weeks after the pregnancy leave began, and
 - 6 weeks after the birth, still-birth or miscarriage
- Under Bill 148, Pregnancy Leave for employees not entitled to parental leave, and where the 17 weeks cap does not apply, is extended from 6 weeks to 12 weeks after birth, miscarriage or still-birth

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6. Job Protected Leaves of Absence (cont...)

- **Parental Leave** was formerly in ESA as follows:
 - Leave without pay for 35 weeks if the employee also took pregnancy leave, and 37 weeks otherwise
 - This leave may begin no later than 52 weeks after the child is born or comes into the custody, care and control of the employee for the first time
- Under Bill 148:
 - This leave is now extended from 35 weeks to 61 weeks (with pregnancy leave) and from 37 weeks to 63 weeks (without pregnancy leave)
 - This leave is now allowed to begin 78 weeks after the child is born or comes into the custody, care and control of employee for the first time

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6. Job Protected Leaves of Absence (cont...)

- **Personal Emergency Leave** formerly provided employees of Organizations with 50 or more employees with an entitlement of up to 10 days leave without pay per calendar year
- Bill 148 amends this leave so that:
 - It applies to all employees, not just those in organizations with 50 or more employees
 - 2 of those 10 days have to be paid at the employee's regular wage rate. This entitlement starts after 1 week of employment
 - The employer may require evidence that is reasonable in the circumstances, but cannot require a medical certificate
- Need to coordinate with existing policies



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6. Job Protected Leaves of Absence (cont...)

- **Crime-related Child Death or Disappearance Leave** formerly provided 104 weeks in case of crime-related death and 52 weeks in case of crime-related disappearance of the employee's child
- Bill 148 separates this leave into two leaves:
 - **Child Death Leave** now provides employees with a leave without pay for up to 104 weeks and it is not limited to crime-related death; and
 - **Crime-related Child Disappearance Leave**, also up to 104 weeks maximum leave without pay entitlement
 - If on leave under these provisions on December 31, 2017, the former periods continue to apply to that employee after January 1, 2018



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6. Job Protected Leaves of Absence (cont...)

- **Family Medical Leave** was formerly up to 8 weeks without pay provided that:
 - It was required to provide care or support to the employee's spouse, a parent, step-parent or foster parent of the employee; a child, step-child or foster child of the employee or the employee's spouse; or any other prescribed as a family member
 - A "qualified health practitioner", as defined in the ESA, issued a certificate stating that the individual had a serious medical condition with a significant risk of death occurring within a period of 26 weeks



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6. Job Protected Leaves of Absence (cont...)

- **Family Medical Leave** under Bill 148 extends this leave to a maximum of 28 weeks without pay provided that:
 - It is required to provide care or support to an expanded list of individuals, including brother, sister, uncle, aunt, nephew, niece, grandparent, or the spouse of any of those individuals
 - A "qualified health practitioner", now re-defined for purposes of this leave to include a registered nurse or an individual with equivalent qualification, issues a certificate stating that the individual has a serious medical condition with significant risk of death occurring within 26 weeks

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6. Job Protected Leaves of Absence (cont...)

- **Critically Ill Child Care Leave** was formerly a leave without pay for the care or support of a critically ill child of the employee and it can be up to 37 weeks as prescribed by a qualified health practitioner
- **New Critical Illness Leave** replaced the above leave in Bill 148 and is available for the care or support of any critically ill family member, including the employee's spouse, brother, sister, uncle, aunt, nephew, niece, grandparent, or the spouse of those individuals, where applicable
 - If the family member is a child, the leave without pay can be up to 37 weeks
 - If the family member is an adult, the leave without pay can be up to 17 weeks

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6. Job Protected Leaves of Absence (cont...)

- **New Domestic or Sexual Violence Leave** is introduced in Bill 148
 - An employee who has been employed by an employer for at least 13 consecutive weeks may take a leave of absence in the event the employee or their child experiences sexual or domestic violence (or is threatened with it)
 - The first 5 days of this leave are to be paid at the same rate payable if the employee had not taken the leave or the rate calculated as prescribed
 - This leave is for 17 weeks in each calendar year, with 10 days that may be taken a day at a time, and 15 weeks that may be taken on a weekly basis provided the employee advises in writing



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6. Job Protected Leaves of Absence (cont...)

- **New Domestic or Sexual Violence Leave (cont...)**
 - The employer has the right to require evidence that is "reasonable in the circumstances" of the need for the leave
 - There may be very little or no warning to the employer before the employee has begun the leave
 - The employer must ensure appropriate mechanisms are in place to protect the confidentiality of records that relate to an employee taking this leave



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6. Job Protected Leaves of Absence (cont...)

- Organizations need to make sure that their employee leave policies are updated to reflect Bill 148 requirements
- Any replacement staff will need to be paid at the same rate as the staff on leave
- Also need to consider how to plan for potentially long absences with little advance warning



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7. Scheduling Provisions

- Currently, ESA Regulations provide that employees who regularly work more than 3 hours a day have an entitlement of at least 3 hours pay for each shift they are scheduled to work ("three-hour rule")
- Bill 148 will change the "three-hour rule" starting on January 1, 2019, to require employers to pay those 3 hours at the employee's regular wage rate (or higher, if applicable), and will extend it to:
 - (1) employees who are on call, and
 - (2) employees whose shifts are cancelled with less than 48 hours notice, except in certain cases beyond the employer's control



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7. Scheduling Provisions (cont...)

- Examples in this regard include: fire, lightning, power failure, storms or similar causes or the work is weather-dependent and there are weather-related reasons




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7. Scheduling Provisions (cont...)

- Bill 148 will also give employees the right to refuse a shift or be on call where the employer's request is made with less than 4 days (96 hours) notice, except where the work is to deal with an emergency, as defined in Bill 148, to remedy or reduce a threat to public safety, to ensure the continued delivery of essential public services, regardless of who delivers those services, or other prescribed reasons
- Due to increased costs, employers will need to consider whether it will continue to be worthwhile to have employees on call




Service on Call

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8. Independent Contractors

- According to the Changing Workplaces Review Final Report, about 12% of Ontario's workforce of 5.25 million workers are "self-employed"
- Many cases where so-called "independent contractors" were in reality employees entitled to ESA benefits, such as minimum wage, vacation pay, overtime pay, leave of absence, etc.
- However, Bill 148 expressly prohibits the treatment of an employee as if the person were not an employee under the ESA
- A worker is deemed to be an employee, unless the employer can prove otherwise ("reverse onus of proof")



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8. Independent Contractors (cont...)

- Some Organizations retain workers as independent contractors to avoid statutory remittance obligations
- In some instances, independent contractor status is imposed on a person who legally should be an employee
- It may be difficult to determine proper legal status




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8. Independent Contractors (cont...)

- The Canada Revenue Agency has a useful guide on the topic of independent contractors on its website: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/rc4110-employee-self-employed/employee-self-employed.html>




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C. CONCLUSION

- As Bill 148 comes into force, it will result in significant challenges for many employers in Ontario, including those in the not-for-profit and charitable sector
- Organizations need to identify strategies and best practices to meet the new compliance obligations
- Need to be prepared and stay ahead of the curve



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**The 2018 Ottawa Region
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Ottawa – February 15, 2018**

**GOVERNANCE DISPUTES
INVOLVING CHARITIES AND NOT-
FOR-PROFITS: A VIEW FROM THE
BENCH**

By The Honourable Justice David M. Brown
Court of Appeal of Ontario

GOVERNANCE DISPUTES INVOLVING CHARITIES AND NOT-FOR-PROFITS: A VIEW FROM THE BENCH

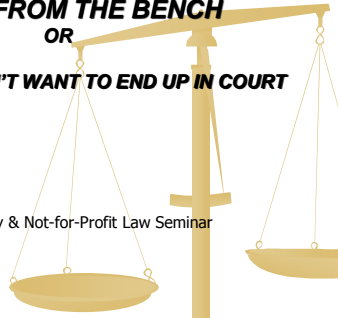
OR

YOU REALLY DON'T WANT TO END UP IN COURT

Justice David Brown
Court of Appeal for Ontario

2018 Ottawa Region Charity & Not-for-Profit Law Seminar
Ottawa, Ontario

February 15, 2018



DISCLAIMER/CAUTION

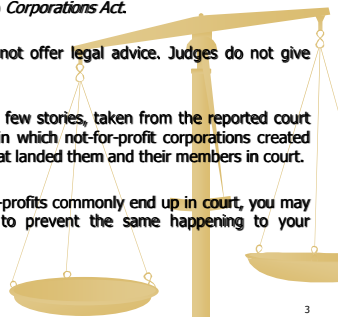
- Our court typically considers cases involving not-for-profit corporations incorporated under the *Corporations Act*, R.S.O. 1990, c. C.38 or by special act.
- The Ontario Legislature has passed legislation to establish a corporate regulatory regime specifically for not-for-profit corporations: *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15. This act has not yet come into force.
- To make matters more complicated, the Ontario government has introduced legislation that would amend the *Corporations Act* to import some of the anticipated provisions in the *Not-for-Profits Act*: see Bill 154 introduced September 14, 2017.



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DISCLAIMER/CAUTION

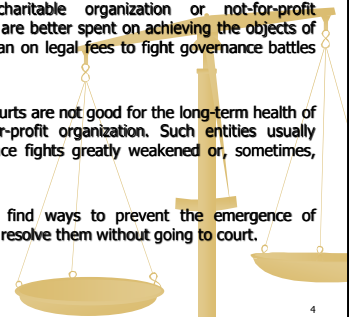
- The discussion in this presentation is based only on the existing provisions of the Ontario *Corporations Act*.
- This presentation does not offer legal advice. Judges do not give legal advice.
- This presentation tells a few stories, taken from the reported court cases, about instances in which not-for-profit corporations created governance problems that landed them and their members in court.
- By knowing why not-for-profits commonly end up in court, you may be able to find ways to prevent the same happening to your organization.



3

MY KEY ASSUMPTIONS

- The funds of a charitable organization or not-for-profit corporation/association are better spent on achieving the objects of those organizations, than on legal fees to fight governance battles in court.
- Governance fights in courts are not good for the long-term health of a charitable or not-for-profit organization. Such entities usually emerge from governance fights greatly weakened or, sometimes, destroyed.
- Effective organizations find ways to prevent the emergence of governance disputes or resolve them without going to court.



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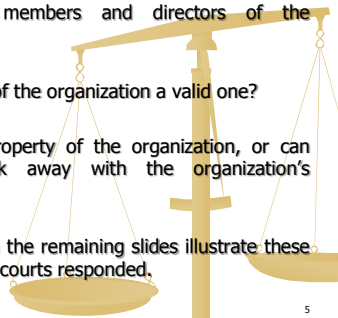
THREE COMMON GOVERNANCE PROBLEMS FOUND IN THE COURT CASES

[1] Who are the members and directors of the organization?

[2] Was that meeting of the organization a valid one?

[3] Who owns the property of the organization, or can some members walk away with the organization's property?

The cases discussed in the remaining slides illustrate these problems and how the courts responded.



5

COMMON PROBLEM NO. 1

WHO IS A MEMBER?

WHO IS A DIRECTOR?



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WHO IS A MEMBER? WHO IS A DIRECTOR?

Corporations Act, Part III: Corporations without Share Capital (selected sections)

120. The letters patent, supplementary letters patent or by-laws of a corporation may provide for more than one class of membership and in that case shall set forth the designation of and the terms and conditions attaching to each class.

123. Unless the letters patent, supplementary letters patent or by-laws of a corporation otherwise provide, there is no limit on the number of members of the corporation.

125. Each member of each class of members of a corporation has one vote, unless the letters patent, supplementary letters patent or by-laws of the corporation provide that each such member has more than one vote or has no vote.

129. (1) The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

- (a) the admission of persons and unincorporated associations as members and as members by virtue of their office and the qualification of and the conditions of memberships;
- (b) the fees and dues of members;
- (c) the issue of membership cards and certificates;
- (d) the suspension and termination of memberships by the corporation and by the member;
- (e) the transfer of memberships.

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WHO IS A MEMBER? WHO IS A DIRECTOR?

Corporations Act, Part III:

129 (1) The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

- ... (f) the qualification of and the remuneration of the directors and the directors by virtue of their office, if any;
- (g) the time for and the manner of election of directors;
- ... (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members' meetings and at meetings of the board of directors...
- (j) the conduct in all other particulars of the affairs of the corporation...

(2) A by-law passed under subsection (1) and a repeal, amendment or re-enactment thereof, unless in the meantime confirmed at a general meeting of the members duly called for that purpose, is effective only until the next annual meeting of the members unless confirmed thereat, and, in default of confirmation thereat, ceases to have effect at and from that time, and in that case no new by-law of the same or like substance has any effect until confirmed at a general meeting of the members.

(3) The members may at the general meeting or the annual meeting mentioned in subsection (2) confirm, reject, amend or otherwise deal with any by-law passed by the directors and submitted to the meeting for confirmation, but no act done or right acquired under any such by-law is prejudicially affected by any such rejection, amendment or other dealing.

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WHO IS A MEMBER? DIRECTOR?

Case study: *Rexdale Singh Sabha Religious Centre*

ROUND 1: *Rexdale Singh Sabha Religious Centre v. Chattha*, 2006 CanLII 2189 (ON SC); reversed: 2006 CanLII 39456 (Ont. C.A.)

What lay behind the court litigation:

- Disagreement over the management of a large capital project (the construction of a funeral home), including the failure to internally share accounting information.
- Unilateral creation of a membership list by an officer, which resulted in most congregants obtaining "membership". However, the process did not comply with the membership requirements of the *Corporations Act*.

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WHO IS A MEMBER? DIRECTOR?

- In the first round, the 2006 Application judge held:

[20] Although the Directors did not call meetings of members and did not properly pass by-laws, I agree with the submission of the Respondents that the congregants warrant protection. I agree with the submission that at least four of the five directors of Rexdale can be taken to have approved the creation of the list of the members. As such the Court can exercise its remedial power to make such order as is just.

- The Court of Appeal disagreed and reversed:

[4] No proper procedure was ever taken to change the members of these corporations in accordance with the Act. There was a total failure to comply with the Act. We cannot agree with the application judge's conclusion that four of the five directors of Rexdale can be taken to have approved the creation of the list of the members.

- The Court of Appeal held the members of the corporation were the original applicants on the incorporation.

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WHO IS A MEMBER? DIRECTOR?

ROUND 2: *Deol v. Grewal*, 2008 CanLII 44699 (ON SC)

- After the 2006 Court of Appeal decision, proper governance conduct prevailed for a time. However, problems emerged at later directors meetings, including:

- The expanded Board turned out to be a divided Board.
- Groups or factions of directors met in the absence of the other directors.
- A resolution removing certain officers was passed in their absence.
- Minutes of meetings were cryptic and omitted material information.
- Proper notice of the time and place of meetings was not given to all directors.
- Notices did not fully describe the business to be considered at a meeting.
- The Board refused to call a members' meeting requested by a proper requisition.

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WHO IS A MEMBER? DIRECTOR?

- The 2008 Application judge stated:

[74] I recognize that the Sikh Centre is a volunteer organization, run by volunteers. I also agree with the comments ... in *Lee v. Lee's Benevolent Assn. of Ontario*, 2004 CarswellOnt 8790 (S.C.J.) at para.12 that non-profit organizations should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the process is fair. In my view, however, the lack of advance notice to the directors of important non-routine business to be transacted at a directors meeting is not fair to the directors.

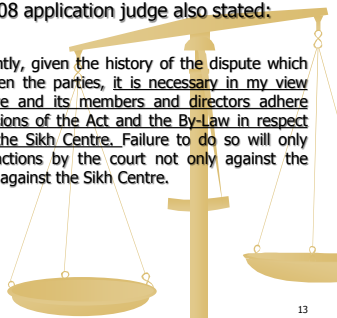
- It is questionable whether the proposition about relaxed compliance with governance requirements is consistent with the Court of Appeal's 2006 decision (see Slide 10). See also the reservations about the proposition expressed by the Divisional Court in the *Lee* case, 2005 CanLII 1072.

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WHO IS A MEMBER? DIRECTOR?

- In any event, the 2008 application judge also stated:

[119] More importantly, given the history of the dispute which has occurred between the parties, it is necessary in my view that the Sikh Centre and its members and directors adhere strictly to the provisions of the Act and the By-Law in respect of the governance of the Sikh Centre. Failure to do so will only result in strong sanctions by the court not only against the participants but also against the Sikh Centre.

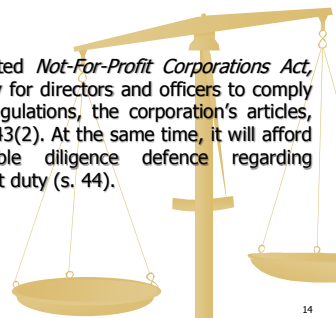


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WHO IS A MEMBER? DIRECTOR?

NOTE:

- The yet-to-be-enacted *Not-For-Profit Corporations Act, 2010* creates a duty for directors and officers to comply with the Act, its regulations, the corporation's articles, and its by-laws (s. 43(2)). At the same time, it will afford them a reasonable diligence defence regarding compliance with that duty (s. 44).

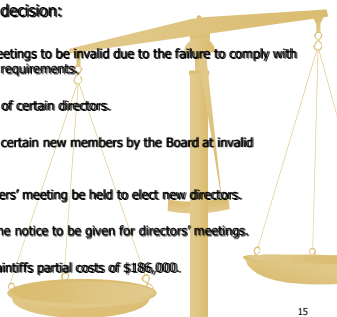


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WHO IS A MEMBER? DIRECTOR?

- 2008 Application judge's decision:

- Found certain directors' meetings to be invalid due to the failure to comply with by-law notice and quorum requirements.
- Set aside the appointment of certain directors.
- Set aside the admission of certain new members by the Board at invalid meetings.
- Ordered that a new members' meeting be held to elect new directors.
- Stipulated the content of the notice to be given for directors' meetings.
- Awarded the successful plaintiffs partial costs of \$185,000.

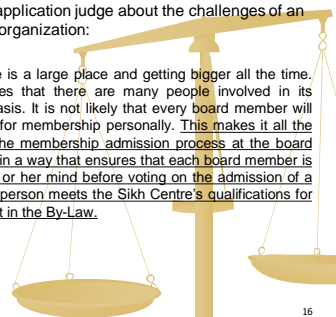


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WHO IS A MEMBER? DIRECTOR?

- Comments of the 2008 application judge about the challenges of an expanding not-for-profit organization:

[100] The Sikh Centre is a large place and getting bigger all the time. The evidence indicates that there are many people involved in its activities on a daily basis. It is not likely that every board member will know every applicant for membership personally. This makes it all the more important that the membership admission process at the board be done properly and in a way that ensures that each board member is clearly satisfied in his or her mind before voting on the admission of a new member that the person meets the Sikh Centre's qualifications for membership as set out in the By-Law.

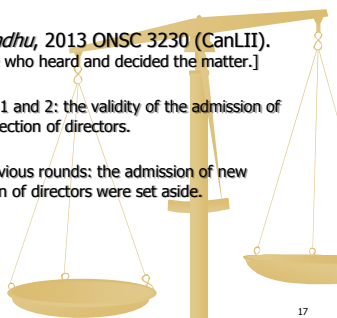


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WHO IS A MEMBER? DIRECTOR?

ROUND 3: *Singh v. Sandhu*, 2013 ONSC 3230 (CanLII).
[I was the application judge who heard and decided the matter.]

- Similar issues to Rounds 1 and 2: the validity of the admission of new members and the election of directors.
- Similar results to the previous rounds: the admission of new members and the election of directors were set aside.

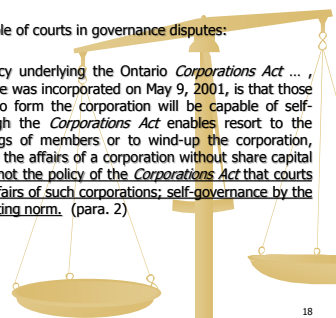


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WHO IS A MEMBER? DIRECTOR?

- Three "take-aways" from the 2013 decision in *Singh v. Sandhu*.
- Take-away No. 1:** The role of courts in governance disputes:

The fundamental policy underlying the Ontario *Corporations Act* ... , under which the Centre was incorporated on May 9, 2001, is that those who come together to form the corporation will be capable of self-governance. Although the *Corporations Act* enables resort to the courts to call meetings of members or to wind-up the corporation, judicial intervention in the affairs of a corporation without share capital should be rare. It is not the policy of the *Corporations Act* that courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. (para. 2)



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WHO IS A MEMBER? DIRECTOR?

- **Take-away No. 2:** The danger of trying to “balance” boards of directors with members drawn from different factions:

I wish to pause to comment on one aspect of this narrative, in particular the objective of the agreement between the contending parties to “balance” the representation of each faction on the Centre’s executive. Balanced representation may have some practical place where both “sides” can work together. More often than not it is a recipe for disaster, simply setting the stage for a governance deadlock. More importantly, by trying to balance factional representation, a board completely ignores the fundamental duty of each and every director – to act in the best interests of the corporation, not the best interests of a faction... (para. 11)

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WHO IS A MEMBER? DIRECTOR?

- **Take-away No. 3:** Taking a governance dispute to court can risk attracting highly intrusive intervention by a court in the affairs of the corporation. In the *Singh* case, the litigants came to court asking for the approval of different groups as members and directors. However, the corporation ended up being subject to the following orders:

- [1] The appointment of a monitor over some of the corporation’s affairs;
- [2] The preparation of audited financial statements by a fixed date;
- [3] Mandatory corporate governance training for all directors;
- [4] The preparation of a by-law amendment for consideration by members at a special meeting. (paras. 122-124)

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COMMON PROBLEM NO. 2

WAS THAT MEETING VALID?

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WAS THAT MEETING VALID?

- There are three sources for the rules that govern calling and holding a meeting of directors or members:

- The corporation’s articles and by-laws;
- Statutes, such as *The Corporations Act*;
- The common law.

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WAS THAT MEETING VALID?

Source No. 1: The articles and by-laws:

The Corporations Act, s. 129 (1): The directors of a corporation may pass by-laws not contrary to this Act or to the letters patent or supplementary letters patent to regulate,

...

- (i) the time and place and the notice to be given for the holding of meetings of the members and of the board of directors, the quorum at meetings of members, the requirement as to proxies, and the procedure in all things at members’ meetings and at meetings of the board of directors...

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WAS THAT MEETING VALID?

Source No. 2: Statute

The Corporations Act, s. 93(1) Subject to subsection (2) and in the absence of other provisions in that behalf in the by-laws of the company,

- (a) notice of the time and place for holding a meeting of the shareholders shall, unless all the shareholders entitled to notice of the meeting have waived in writing the notice, be given by sending it to each shareholder entitled to notice of the meeting by prepaid mail ten days or more before the date of the meeting to the shareholder’s last address as shown on the books of the company;

...

- (c) all questions proposed for the consideration of the shareholders at a meeting of shareholders shall be determined by the majority of the votes cast and the chair presiding at the meeting has a second or casting vote in case of an equality of votes.

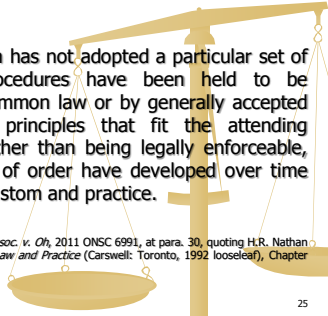
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WAS THAT MEETING VALID?

Source No. 3: The common law (i.e. judge-made law):

Where a corporation has not adopted a particular set of rules, meeting procedures have been held to be governed by the common law or by generally accepted parliamentary law principles that fit the attending circumstances. Rather than being legally enforceable, parliamentary rules of order have developed over time and are based on custom and practice.

[from *Ontario Korean Businessmen's Assoc. v. Oh*, 2011 ONSC 6991, at para. 30, quoting H.R. Nathan and R.E. Voore, *Corporate Meetings: Law and Practice* (Carswell: Toronto, 1992 looseleaf), Chapter 19, §3(b), p. 3(b).]



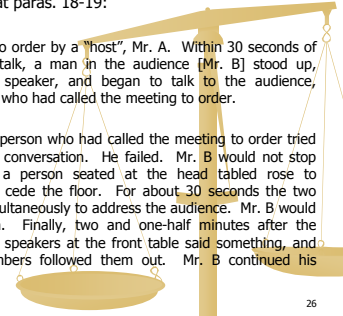
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WAS THAT MEETING VALID?

An example of an annual general meeting of members that went badly off the rails : *Ontario Korean Businessmen's Assoc. v. Oh*, 2011 ONSC 6991 (hereafter "*OKBA*"), at paras. 18-19:

The meeting was called to order by a "host", Mr. A. Within 30 seconds of the speaker starting to talk, a man in the audience [Mr. B] stood up, turned his back to the speaker, and began to talk to the audience, speaking over the person who had called the meeting to order.

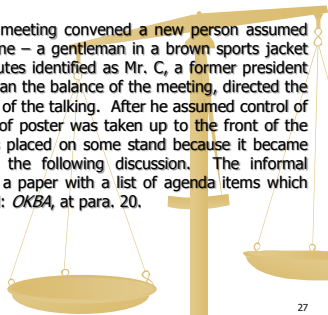
About a minute later the person who had called the meeting to order tried to resume control of the conversation. He failed. Mr. B would not stop talking. At that point a person seated at the head table rose to speak. Mr. B would not cede the floor. For about 30 seconds the two individuals attempted simultaneously to address the audience. Mr. B would not stop his interruption. Finally, two and one-half minutes after the meeting had started, the speakers at the front table said something, and left. A number of members followed them out. Mr. B continued his monologue.



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WAS THAT MEETING VALID?

Four minutes after the meeting convened a new person assumed control of the microphone – a gentleman in a brown sports jacket whom the informal minutes identified as Mr. C, a former president of the Association. He ran the balance of the meeting, directed the discussion and did most of the talking. After he assumed control of the meeting some sort of poster was taken up to the front of the room. I assume it was placed on some stand because it became the focus of much of the following discussion. The informal minutes described it as a paper with a list of agenda items which was attached to the wall: *OKBA*, at para. 20.



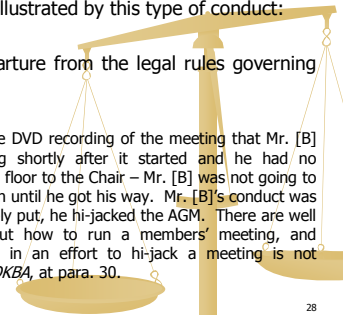
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WAS THAT MEETING VALID?

Three legal problems illustrated by this type of conduct:

[1] The unlawful departure from the legal rules governing meetings:

It is apparent from the DVD recording of the meeting that Mr. [B] disrupted the meeting shortly after it started and he had no intention of ceding the floor to the Chair – Mr. [B] was not going to stop talking or sit down until he got his way. Mr. [B]'s conduct was highly improper. Simply put, he hi-jacked the AGM. There are well established rules about how to run a members' meeting, and interrupting the chair in an effort to hi-jack a meeting is not permissible conduct: *OKBA*, at para. 30.

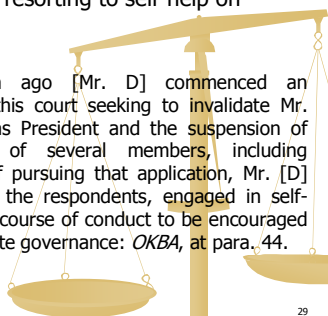


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WAS THAT MEETING VALID?

[2] Courts frown on resorting to self-help on governance issues:

About one month ago [Mr. D] commenced an application before this court seeking to invalidate Mr. [E's] confirmation as President and the suspension of the memberships of several members, including himself. Instead of pursuing that application, Mr. [D] and his associates, the respondents, engaged in self-help. That is not a course of conduct to be encouraged on issues of corporate governance: *OKBA*, at para. 44.

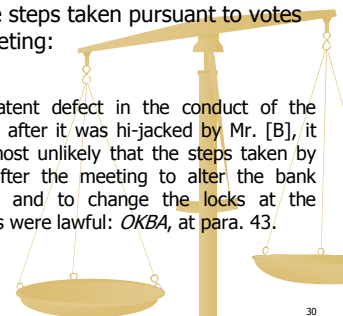


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WAS THAT MEETING VALID?

[3] Invalidating the steps taken pursuant to votes at the unlawful meeting:

In view of the patent defect in the conduct of the November 15 AGM after it was hi-jacked by Mr. [B], it follows that it is most unlikely that the steps taken by the respondents after the meeting to alter the bank signing authorities and to change the locks at the Association's offices were lawful: *OKBA*, at para. 43.



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WAS THAT MEETING VALID?

What were the results of the unlawful “hi-jacking” of the AGM in the *OKBA* case? The court:

- [1] Directed a special meeting of members be held within 60 days to conduct elections of directors and officers;
- [2] Directed the parties select a corporate lawyer or former judge to supervise all aspects of the election process;

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WAS THAT MEETING VALID?

[3] Appointed a monitor of the affairs of the OKBA until the elections were held:

In the meantime, management of the day-to-day operations of the Association should be placed in the hands of an independent third party. Both factions have failed to comply with provisions of the *Corporations Act*, the By-laws and Election Rules. Both factions accuse the other of misconduct in the affairs of the Association. Neither faction should be left in control of the management of the Association – that would only inflame the dispute. The temperature must be brought down on this dispute, the management of the Association monitored by a third party on a temporary basis so the members are not prejudiced by this factional dispute, and steps then taken to hold proper elections: *OKBA*, at para. 49.

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COMMON PROBLEM NO. 3

CAN DEPARTING MEMBERS TAKE AN ORGANIZATION'S PROPERTY WITH THEM?

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MEMBERS DEPARTING WITH PROPERTY

- A complicated issue, the determination of which depends upon the specifics of the legal relationship between the umbrella organization and the small unit/branch/parish.
- An example of a not-for-profit incorporated umbrella organization and an unincorporated branch that held valuable real estate through a corporation and trustees where branch members ultimately successfully withdrew and took the branch's property with them:

Polish Alliance Association of Toronto Limited v. The Polish Alliance of Canada: 2014 ONSC 3216, reversed in part 2016 ONCA 445; 2017 ONCA 574, affirming 2016 ONSC 7230.

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MEMBERS DEPARTING WITH PROPERTY

- A case with a different result. The membership of a Windsor parish voted to leave the Anglican Diocese of Huron. The courts held that when the parish members left the Diocese, they also left the parish's property behind. The analysis by the courts focused on the interpretation of the Diocese' by-laws, or canons, and trust law:

Incorporated Synod of the Diocese of Huron v. Delicata, 2013 ONCA 540

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BIG PICTURE “TAKE-AWAYS” FROM THESE STORIES

- [1] Set clear and lawful governance rules about who is a member, who is a director, and how meetings are to be called and conducted.
- [2] Follow carefully and fairly the rules you set.
- [3] Act in the best interests of the organization as a whole, not in the interests of a faction.
- [4] Recognize that a court fight can weaken an organization's long-term ability to pursue its objects and inevitably will result in very significant legal fees.
- [5] Also recognize that by going to court, an organization may lose the ability to govern its own affairs. A court may place temporary control of the organization in the hands of an outside third party, such as a monitor, who reports to the court, not to the organization's members.

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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**CORPORATE DOCUMENTS AND
PROCEDURES TO HELP AVOID
GOVERNANCE DISPUTES**

By Esther S.J. Oh, B.A., LL.B.

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**THE OTTAWA REGION
CHARITY & NOT-FOR-PROFIT
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Corporate Documents and Procedures to Help Avoid Governance Disputes

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A. INTRODUCTORY COMMENTS

- Charities and other Not-for-Profits ("NFPs") play an important role in Canadian society, including:
 - Art Organizations
 - Faith Communities
 - Professional Associations
 - Health Service Providers, Animal Shelters and many others



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- Charities and other NFPs are collectively referred to as "Organizations" in this presentation
- Differences of opinion can lead to disagreements
- Disputes within charities and other NFPs that escalate into legal action can divert valuable resources away from an Organization's programs:
 - Time spent by employees and volunteer board members to address the situation
 - Resources spent on legal, accounting or other professional services that may be needed
- While it is not possible to avoid disagreements from occurring, clear corporate documents can help to avoid disputes regarding the interpretation of those documents

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B. DIFFERENT TYPES OF LEGAL STATUS

- Different types of Organizations
 - Federal incorporation under *Canada Not-for-Profit Corporations Act* ("CNCA")
 - Provincial incorporation under Ontario *Corporations Act* ("OCA") which will be replaced by the Ontario *Not-for-Profit Corporations Act* ("ONCA") or other provincial statute
 - Incorporation under special legislation or other statutes
- Different legal requirements apply to an Organization depending on the governing statute
- Unincorporated associations and charities established by trust are not covered in this presentation

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C. TYPES OF GOVERNANCE DISPUTES THAT CAN OCCUR


- Disagreements at a charity or other NFP can occur at different levels:
 - Director vs. Director
 - Member vs. Board of Directors
 - Member vs. Member
 - Third party (i.e. someone outside of the Organization such as a donor) vs. Board of Directors
- Disputes can also occur between Organizations, e.g. affiliate Organization vs. parent Organization
- This presentation focuses on disputes between members and directors as they can commonly lead to litigation

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D. STEPS TO AVOID DISAGREEMENTS INVOLVING CORPORATE AND GOVERNANCE MATTERS

- When preparing for a board or membership meeting, it is important to follow correct procedures in accordance with the Organization's by-laws and policies, as well as the applicable corporate statute
 - This can help to insulate decisions made at the meeting from legal challenge



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1. Importance of Following Correct Procedures at Board and Membership Meetings

- Where someone wishes to challenge a particular decision made at a board or membership meeting, the decision can be indirectly challenged on technical or procedural grounds
- For example, in order to challenge a decision made at a membership meeting, opposing counsel could allege that proper notice of the meeting was not given and therefore decisions made at the meeting are invalid



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- In the context of a legal dispute, opposing legal counsel will review the corporate documents of an Organization, including the letters patent or articles as applicable, the by-law and policies, with the following questions in mind:
 - Do the documents reflect applicable legal requirements?
 - Were the documents properly adopted?
 - Were the procedures outlined in the documents followed?



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2. Issues Within Corporate Documents That Organizations May Proactively Consider

- For purposes of this presentation, "corporate documents" refers to the letters patent or articles, as applicable, by-laws and policies of an Organization
- Corporate documents that are clearly drafted (i.e. self-explanatory), up-to-date and consistent with legal requirements can help to avoid disputes regarding those corporate documents
- The following slides provide a list of issues to guide Organizations as they review their corporate documents (although the list is not an exhaustive one)

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- Do the purposes encompass the current activities of the Organization? (or has "mission drift" occurred since incorporation)



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- Is the Organization operating in accordance with its current general operating by-law?
 - Sometimes an unincorporated association will operate in accordance with its constitution, then incorporate several years later
 - A new general operating by-law is required upon incorporation; the constitution used by the unincorporated association should not be used by the incorporated successor as different legal requirements apply
- Does the Organization's by-law reflect legal requirements under the applicable corporate statute?
 - i.e. federal corporations are governed by the CNCA and Ontario corporations are governed by the OCA, (pending the coming into force of the ONCA)

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- Are membership qualifications accurately described in the Organization's by-law?
 - By-law should stipulate that members must agree in writing to the purposes and the governing documents of the Organization
 - This can help to filter out individuals who are diametrically opposed to the purposes of the Organization from flooding the Organization's membership and electing new board members in an effort to change the direction of the Organization



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- All applications for membership should be subject to approval by the board of directors
- Some Organizations have one-year terms for members and require annual membership fees to be paid
 - In that case, the by-law should clearly indicate when membership term begins and ends each year
 - The by-law should clearly indicate the deadline by which annual membership fees must be paid in order to preserve voting rights at a membership meeting
 - Lack of clarity on the above issues can result in confusion and disagreements regarding which members are entitled to vote at a membership meeting

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- Do the corporate documents for the Organization reflect consistency with each other?
- Are there inconsistencies between the letters patent and/or articles, by-laws and policies?
 - e.g. Do the by-laws contain purposes that are different from the purposes in the letters patent or articles of the Organization
 - In the event of inconsistency the purposes in the letters patent or articles will prevail
 - e.g. Are conflict of interest ("COI") provisions within a board policy consistent with the COI provision in the by-law
 - In the event of inconsistency the COI provisions in the by-law will prevail

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- Are the procedures outlined in the by-law or policies clear and are they consistently followed?
 - If not, this can expose the Organization to criticism for not following its own procedures



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- Does the by-law contain a discipline procedure?
 - If yes, the discipline procedure should reflect principles of natural justice, which includes the following (which is not a comprehensive list):
 - Written summary of allegations should be provided to the individual under discipline
 - Explanation of the discipline process should be provided to the individual under discipline
 - Opportunity to respond to the allegations made against him or her
 - Sufficient notice should be provided to the individual in advance of any hearing
 - Written reasons for the Organization's decision on the discipline should be provided

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- Where a member is removed from membership using a procedure that does not reflect natural justice, the removal can be legally challenged
- Given the complexity of this area of law and the potential liability risks involved to an Organization and its board, it is recommended that legal counsel be consulted prior to commencing any disciplinary action
- Additional comments on this topic will be provided later in the presentation when reviewing case law



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3. Consider Establishing Closed Membership

- Enhanced rights are given to members under the CNCA and the ONCA
 - Both the CNCA and the ONCA are conceptually structured on a business corporate model which gives enhanced rights to members
 - i.e. member rights are similar in many respects to rights of shareholders
- Please see Theresa Man's presentation for an update on the status of the ONCA

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a) Brief Summary Of Members' Remedies Under CNCA and ONCA

- The following slides provide a few examples of the enhanced rights given to members under the CNCA and the ONCA
- CNCA
 - Right to seek an oppression remedy against the corporation where an act or omission of the corporation is oppressive, unfairly prejudicial or unfairly disregards the interests of a member
 - Right to seek a court order to commence a derivative action on behalf of the corporation
 - Restraining orders against the corporation, directors or officers

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ONCA

- Compliance Order - where a corporation, or its directors and officers, fails to comply with the duties set out in the ONCA and regulations, the articles or by-laws
- Rectification Order - if the name of a person has been wrongfully entered, retained, deleted or omitted from the registers or records of a corporation, that person may apply to a Court for an order rectifying the registers or records



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- Derivative Action - gives members the right to bring an action in the name of the corporation (except religious corporations) to enforce one of its rights
- In light of enhanced rights given to members under CNCA and ONCA (yet to be proclaimed in force), Organizations may wish to consider establishing a closed membership corporation i.e. whereby the directors and members are the same
- Non-members can be described using a different term:
 - "friends of"
 - "supporters"
 - "adherents" or
 - other terms



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4. Transparency and Collaboration with Membership When Making Important Decisions

- For open membership corporations, appropriate communication and consultation can be done with members prior to making a significant change
 - e.g. changes to corporate documents. While the following slides refer to the example of amendments to corporate documents, the suggestions can also be used for other decisions
- A collaborative process with members to invite questions and feedback prior to implementing a decision can help to avoid potential confusion which can lead to disputes
 - Also demonstrates transparency and can help to increase trust and support from the members

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- The following slides reflect suggestions that may be useful for an Organization, subject to its particular circumstances
- Each Organization and each situation is different and therefore legal counsel should be consulted where guidance is required

a) Option of Holding a Town Hall Meeting

- Where changes to the letters patent/ articles or by-law will be made the board can prepare draft documents, which can then be presented to the membership for feedback and questions
- In order to reflect legal requirements, legal assistance should be sought in the drafting process given the complexity of the CNCA and ONCA

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- A Town Hall meeting or information session can be scheduled in order to explain the board's rationale for the changes being made and also to answer questions from the members
- No membership vote would be taken at the Town Hall meeting
- The draft corporate documents should be provided to members at least a few weeks in advance of the Town Hall meeting
- Members could be requested to submit their questions by a certain date, in advance of the Town Hall meeting



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- After the Town Hall meeting the board can determine which changes will be included in the revised corporate documents in accordance with membership feedback
- Tracked copies of the revised corporate documents can then be provided to the members in advance of the membership meeting where the vote will be taken
- This process can help the board to gauge the support of the members and proactively identify potential areas of concerns from the membership in advance of the vote being taken at a membership meeting



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b) Establish a Committee of Members and Directors

- Where an Organization wishes to encourage direct membership involvement in the drafting process, the board could establish a committee composed of members and directors who would work together in preparing the new corporate documents
- The drafts prepared by the committee would first be presented to the board for approval, prior to distribution to the members
 - A Town Hall meeting could then be called as described in the previous slides
- In order to provide for an orderly process, it is important for the board to provide leadership in establishing appropriate parameters to guide the Town Hall meeting and committee at all stages

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c) Informal Consultations with Members

- In some situations it may not be practical for an Organization to hold a Town Hall meeting or establish a committee composed of directors and members
- In that case, the board can carry out informal consultations with members to determine whether required membership approvals can realistically be achieved at the meeting when the vote is taken
 - If not, as a practical measure a membership meeting should not be called until the board is confident that the necessary approvals can be obtained
 - Legal counsel can be sought to ensure applicable legal requirements are met while drafting of the corporate documents and in obtaining membership approvals

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E. BRIEF REVIEW OF APPLICABLE CASE LAW

- The following cases illustrate the importance of having complete corporate records and following correct procedures in the event of a legal dispute
- *Colgan v. Canada's National Firearms Association*, 2016 ABQB 412 (CanLII)
- Decision of the Court of Queen's Bench in Alberta involving disputes between two factions on the board of directors of a corporation governed by the CNCA
- In reviewing whether the Court should intervene in the Club's affairs, the Court stated:
 - "[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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- "Courts have no interest in the day-to-day activities of voluntary associations" and "[t]hat certainly includes internal politics and inter-factional sniping."

Lesson to be learned:

- The above statements from the Court confirmed previous case law reflecting reluctance of the Courts to intervene in disagreements of a charity or NFP, unless:
 - The Organization did not follow its own procedures as outlined in its own general operating by-law and policies, or
 - The Organization did not adhere to principles of natural justice, where disciplinary proceedings were carried out

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Rexdale Singh Sabha Religious Centre v. Chatta 2006, CanLII 39456 (Ont. CA)

- Ontario Court of Appeal decision involving review of various areas of non-compliance with the requirements of the Ontario *Corporations Act*
 - The centre had never adopted a by-law after its incorporation in 1993
 - As a result the Court found the only directors and members were the incorporators

Lesson to be learned:

- This case underscores the importance of adopting a by-law after incorporation and of complying with the governing corporate statute



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Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah, 2011 ONSC 4696 (CanLII)

- No new members were ever admitted to a federal corporation yet certain individuals (other than the incorporators) called a meeting and purported to elect a new board
- Since the election and composition of the board was governed by *Canada Corporations Act* and the general operating by-laws of the corporation only the first incorporators were valid directors

Lesson to be learned:

- In the context of a dispute, historical omissions in corporate records can result in vulnerabilities to the authority of the board
 - This case was decided under the CCA but has been referred to in subsequent cases, on different issues involving CNCA corporations

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Bhadra v. Chatterjee, 2016 ONSC 4845 (CanLII)

- Decision of the Ontario Superior Court involving a dispute between majority and minority factions on the board of directors
- Court found the majority faction did not act in good faith in process followed to retain lawyer to draft new CNCA by-law and invite lawyer to attend a board meeting (without notice to minority faction or their lawyer)
- Court held the by-law drafted by lawyer for majority faction should not be presented to board or members for approval. Instead, a new bylaw was to be prepared with assistance of a new independent lawyer.

Lesson to be learned:

- Each director must uphold the statutory standard of care and the duty to always act in good faith with a view to the best interests of the corporation, even where there is conflict between directors

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Ahmed v Hossain, 2017 ONSC 5660 (CanLII):

- Recent decision in Ontario where a religious organization had two boards, a "Board of Trustees" and a "Board of Directors" that were both elected to govern different aspects of the organization.
- The Board of Trustees purported to dissolve the Board of Directors and to usurp their right to act as the Board of Directors. The trustees also barred one applicant to the court case from entering the mosque indefinitely and barred both applicants from running for office at the mosque over 10 years.

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- Court held that neither the Board of Trustees nor the members had the right under the mosque's by-law or the *Corporations Act* (Ontario), to dissolve the Board of Directors or to oust the two applicants.
 - As such, the purported dissolution of the previous Board of Directors and the suspensions of rights of the two applicants were declared to be unlawful and of no force or effect.
 - The Court noted that since proper notice of the membership meetings was not given, even if the by-law did provide authority to carry out the above actions, those decisions would be invalid due to insufficient notice.

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Lesson to be learned:

- Again, while Courts are reluctant to intervene in the internal affairs of Organizations, where an Organization does not comply with its by-law or the applicable corporate statute or where a board acts contrary to natural justice, the Courts may intervene
- Having one governing board can help to avoid confusion on allocation of responsibilities that could otherwise arise where there is a double-board structure.

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Wall v. Judicial Committee for the Congregation of Jehovah's Witness, 2016 ABCA 255 (CanLII)

- Alberta Court of Appeal decision involving a situation where a religious organization disciplined one of its members
- Supreme Court of Canada granted leave to appeal, with hearing held on November 2, 2017
- Reference can be made to Jennifer Leddy's presentation entitled "Essential Charity and NFP Law Update" for further information

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***Singh v. Sandhu*, 2013 ONSC 3230, 2013 CarswellOnt 7398, 16 B.L.R. (5th) 194, 229 A.C.W.S. (3d) 22**

Justice Brown said the following in the above case:

"It is not the policy of the Corporations Act that Courts should baby-sit the affairs of such corporations; self-governance by the members is the operating norm. If members, such as those of the [Centre], are incapable of governing the corporation, they should take a hard look in their collective mirrors and do one of three things: (i) reform their ways, which the current members seem incapable of doing; (ii) step aside and let new members who are unencumbered with the baggage of past factionalism take over the running of the corporation; or, (iii) wind-up the corporation, with the different factions parting company and setting up their own temples."


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In commenting on Justice Brown's statement in the *Singh v. Sandhu* case, the Office of the Ontario Public Guardian and Trustee said the following in its PowerPoint entitled "Why Do Directors Get Into Trouble?" <http://www.carters.ca/pub/seminar/chrchlaw/2016/PGT.pdf>

"There was no winner in this litigation. However, there was a loser - the Centre, because it's directors were not prepared to put the corporation's best interests before their own factional purposes"



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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
Ottawa – February 15, 2018**

**THE EXPANDING INVESTMENT
SPECTRUM FOR CHARITIES,
INCLUDING SOCIAL
INVESTMENTS**

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent

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**The 2018 Ottawa Region
Charity & Not-for-Profit Law
Seminar
February 15, 2018**

**The Expanding Investment Spectrum for Charities,
Including Social Investments**

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A. INTRODUCTION

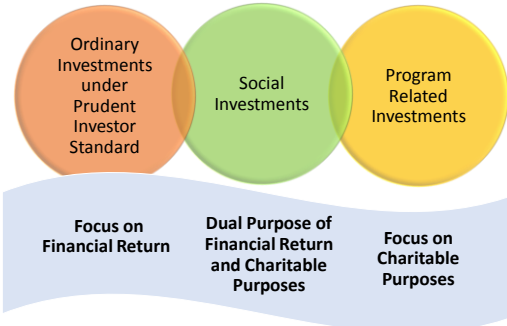
- The presentation provides an overview of the spectrum of options available when investing charitable funds in Ontario
- The options reviewed in the presentation include:
 - Prudent Investor Standard under the *Trustee Act*
 - Program Related Investments (PRIs) under the CRA's Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) ("CED Guidance"), and
 - Social Investments under recent amendments to the *Charities Accounting Act* ("CAA")
- See recent paper on this topic at http://www.carters.ca/pub/seminar/charity/2018/oba/OBA_Paper_Investment_Spectrum.pdf

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The Investment Spectrum for Charities



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- The reference to "trustees" in the presentation includes directors, governors, council members, and members of the board of trustees, etc. - i.e., whoever exercises direction and control over the affairs of the charity as its directing mind
- What is not covered by the presentation includes:
 - related business rules under the *Income Tax Act* ("ITA") and its comparison to ordinary investments,
 - non-qualified investment rules - private foundations,
 - excess business holding rules - private foundations,
 - restrictions on majority control of corporations by foundations, and
 - the ability of registered charities to invest in limited partnerships

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B. PRUDENT INVESTOR STANDARD UNDER THE TRUSTEE ACT

- Involves a focus on financial return
- Highly prescribed rules under the *Trustee Act*

1. Application of the *Trustee Act* to Charities

- s. 1(2) of the CAA provides that charitable corporations are deemed to be trustees of their charitable property within the meaning of that *Act*
- s. 10.1 of the CAA confirms that charitable corporations must comply with the investment decision making requirements set out in ss. 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 include the constating documents of a corporation)

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2. Standard of Care Required

- The former *Trustee Act* (pre July 1, 1999) listed specific and very limited categories of legal investments in accordance with the "prudent man" standard
- The prudent investor standard replaced the legal list of authorized investments
 - "[i]n investing trust property, a trustee must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments." (s. 27(1) of the *Trustee Act*)

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3. Authorized Investments

- "A trustee may invest trust property in any form of property in which a prudent investor might invest" (s. 27(2) of the *Trustee Act*)
- Investments in mutual funds, pooled funds, segregated funds and common trust funds under insurance contracts are permitted, but no further definitions are provided (ss. 27(3) and (4) of the *Trustee Act*)
- Also, while there are no specific references to Exchange Traded Funds (ETFs) in ss. 27(3) of the *Trustee Act*, ETFs would generally be considered to be a type of pooled funds and therefore should be considered to be an authorized investment



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- As well, Legislation introduced in 2009 to repeal the *Charitable Gifts Act* and to amend the CAA removed previous restrictions on charities investing in real estate or holding more than a 10% "interest in a business"
- However, such investment still need to comply with the prudent investor standard under the *Trustee Act* and, if applicable, the related business rules under the ITA
- As well, if the investment in a corporation, partnership or business trust constitutes a "substantial interest" (e.g. the charity owning or controlling, either directly or indirectly, more than 20% of the applicable voting rights or equity interest), the CAA provides that the Public Guardian and Trustee may require financial statements and other records from the charity and is able to seek court intervention if necessary

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- In addition, as of April 2015, all registered charities under s. 253.1(2) of the ITA can invest in limited partnerships and not be considered to be carrying on a business, provided that:
 - The charity must be a "limited partner" of the partnership (e.g., limited liability) as opposed to a general partner;
 - 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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4. Mandatory Investment Criteria

- Seven mandatory criteria must be considered in making investment decisions (s. 27(5) *Trustee Act*) in addition to any others that are relevant in the circumstances
 - 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

MANDATORY COMPLIANCE

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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 may permit socially responsible investments, impact investments, and social investments separate from the requirements provided for under the CAA for social investments as set out later



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5. 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



6. Investment Advice

- Subsection 27(7) of the *Trustee Act* allows a trustee to obtain advice in relation to the investment of trust property
- As well, a trustee will not be liable for losses to the trust where he or she relies upon such advice, provided that a prudent investor would rely upon the advice under comparable circumstances


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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 the comingling of restricted funds with other restricted funds if certain requirements are met




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8. Delegation of Investment Decision Making

a) Power to Delegate

- s. 27.1(1) of the *Trustee Act* 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 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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b) Investment Policy Required for Delegation

- Investment decision making cannot be delegated without a "written plan or strategy" (e.g. an investment policy) in place that is intended to ensure that the functions will be exercised in the best interest of the charitable purpose (s. 27.1(2)(b) 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 (ss. 27.1(2)(a) and s. 28 *Trustee Act*)




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c) Written Agreement Requirement

- The trustees must have a written agreement (e.g. investment management agreement) between the trustees and the agent (e.g., an investment manager) (s. 27.1(3) of the *Trustee Act*)
- The agreement must include:
 - The delegated authority to make investment decisions
 - 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
- The agreement should not include a release or indemnification of the agent




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d) Prudent Selection of Agent

- The *Trustee Act* imposes a requirement upon the board of a charity to exercise prudence in selecting an agent (investment manager), in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with the applicable terms (s. 27.1(4) of the *Trustee Act*)



e) Prudence in Monitoring of Agent Required


- The *Trustee Act* imposes a requirement upon trustees to exercise prudence in monitoring the agent's performance to ensure compliance with the terms of the agreement with the agent (para.27.1(5)(b) *Trustee Act*)

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f) Duties of an Agent

- An agent (investment manager) has a statutory duty to exercise a trustee's functions relating to the investment property (s. 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



g) Prohibition on Sub-delegation by Agent

- 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 (s. 27.2(2) of the *Trustee Act*)

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h) Liability of the Agent

- If a charity suffers a loss because of the agent's breach of duty, then legal action can be commenced against the agent (s. 27.2(3) of the *Trustee Act*) by:
 - The trustees, e.g., the charity through its directors
 - A beneficiary, if the board does not bring action within a reasonable period of time
- It is important to ensure that agents not be allowed to contract out of the statutory requirements



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i) Liability Protection for Trustees

- The *Trustee Act* provides 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 a plan or strategy that a prudent investor would adopt under comparable circumstances (s. 28 of the *Trustees Act*)
- If a trustee is liable to the charity for losses arising from investment decisions, the court assessing damages may take into account the overall performance of the investments (s. 29 of the *Trustee Act*)



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9. Contents of an Investment Policy

- 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 will not reflect all of the legal obligations that apply to investing charitable property
- As a result, the charity should work with their legal counsel in reviewing and preparing a customised investment policy to properly reflect the requirements of the *Trustee Act*



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C. PROGRAM-RELATED INVESTMENTS

1. What are Program-related Investments (PRIs)?

- Involves a focus on charitable purposes
- PRIs are defined by CRA as investments that "directly further" the charitable purposes of the charity
- PRIs may generate a financial return, though they are not made for that reason
- PRIs are not available for advancement of religion
- PRIs usually involve the return of capital within a period of time, but this is not required, and yields of revenue from the investment, if any, can be below market rates
- A charity can make a PRI with a Qualified Donee ("QD")
- A charity can also now make a PRI with a non-QD if there is direction and control and private benefit is incidental

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2. Requirements of Charities Engaging in PRIs

- Charities conducting PRIs must have
 - A policy describing how the charity will make decisions regarding PRIs
 - Documentation explaining how each PRI furthers its charitable purpose
- In the case of PRIs to non-QD, the charity must also maintain direction and control ("own activities" test) and ensure that any private benefit is incidental (e.g., necessary, reasonable and proportionate)
- Exit mechanisms to withdraw from a PRI or convert it to an ordinary investment if it no longer meets the charity's charitable purposes
- Must also meet all applicable trust, corporate and other legal and regulatory requirements
- Maintain books and records to prove compliance



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3. Types of PRIs

- Loans and loan guarantees - to another organization to allow that other organization to pursue the charitable purpose of the investor charity
- Share purchases - in a for-profit company to accomplish the charitable purpose of the investor charity
 - However, foundations face restrictions on acquiring a controlling interest in a company
 - Private foundations are also subject to excess corporate holding rules and prohibition on carrying on any business activity
- Leasing land and buildings - buying a building and leasing it to an organization to accomplish a charitable purpose, e.g., for education purposes



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4. Accounting for PRIs

- Charities must account for their assets contributed to PRIs and loans in their financial statements and annual T3010 information returns
- PRIs are not included in the asset base for the calculation of the 3.5% disbursement quota ("DQ")
- PRIs, though, are not considered by CRA to be a charitable expenditure in meeting the 3.5% DQ, except in limited circumstances, such as loss of capital or lost opportunity costs resulting from a PRI's low return
- However, since PRIs must further a charity's charitable purposes, the assets contributed to the PRI arguably should be seen charitable expenditures in meeting the 3.5% DQ

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D. SOCIAL INVESTMENTS

1. Definition of Social Investments



- Involves achieving a dual purpose of financial return and charitable purposes
- Amendments to the CAA in Bill 154, came into force on November 14, 2017, permit charities to make "social investments" where the trustee applies or uses trust property to:
 - directly further the purposes of the trust, and
 - achieve a "financial return" for the trust (s.10.2(2) CAA)
- "Financial return" is defined as an "outcome in respect of the trust property [that] is better for the trust in financial terms than expending all the property" (s.10.2(3) CAA)

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2. The Power to Make Social Investments

- Subsection 10.3(1) of the CAA establishes the specific power of trustees to use or apply trust property to make a social investment
- Subsection 10.3(4) provides that the terms of the trust may exclude or restrict the power to make social investments
- However, subsection 10.2(5) provides that a social investment is not, for that reason alone, an investment for any other purpose
- This means that an investment power clause referencing the *Trustee Act* in the constating documents of a charitable corporation will not preclude the charity from making social investments



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3. Limitation on Availability of Endowment Funds

- Section 10.3(2) of the CAA states that:
 - "social investment may not be made in relation to trust property that is subject to a limitation on capital being expended for the purposes of the trust, unless the trustee expects that making the social investment will not contravene the limitation or the terms of the trust allow for such an investment" (s.10.3(2) CAA)



4. No Delegation of Power to Make Social Investments

- While charities may make social investments in mutual funds, pooled funds, segregated funds and common trust, charities may not delegate general decision-making power with regard to social investments as section 27.1 of the *Trustee Act* has not been extended to social investments (s. 10.1 of the CAA)

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5. Duties of Trustees in Making Social Investments

- In making social investments, trustees must:
 - ensure that "it is in the interests of the trust" before making a social investment
 - review the investment periodically, after making a social investment; and
 - both before and after making a social investment, determine whether, in the circumstances, advice should be obtained and, if so, obtain and consider the advice (ss.10.4(1)(a) and 10.4(3) CAA)
- Reliance on advice received does not constitute breach of trust (s. 10.4(4) CAA)
- However, there is no guidance concerning who the charity can or should seek advice from
- Therefore, prudent to ensure that if advice is sought, it is in writing and that the board of the charity records having received and considered the advice



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6. Liability Protection for Trustees

- s.10.2(7) of the CAA provides protection from liability for losses to the trust arising from a social investment, but only if in doing so "the trustee acted honestly and in good faith in accordance with the duties, restrictions and limitations that apply under [the CAA] and the terms of the trust"
- This provision was not in the original draft of Bill 154 and was added in third reading



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7. Issues Involving Social Investments

a) Identifying Types of Investments and Potential for Overlap

- It will be important for a charity to determine whether a proposed investment falls into one or more of the three investment regimes available to charities in Ontario
 - An ordinary investment under the *Trustee Act*
 - A social investment under the CAA, and/or
 - A PRI under the CED Guidance
- It is possible for an investment to be in one or all three investment regimes, which may result in unintended consequences
- For instance, if a proposed investment is with a non-QD, then a social investment may also need to meet the requirements of a PRI to avoid penalties or revocation of charitable status under the ITA

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b) Issues for Foundations

- In making a social investment in the form of a share purchase, private foundations will need to be aware that the same issues apply to them when making a PRI or a regular investment (e.g., limits on controlling a corporation for public foundations, excess business holding rules, and no business activities for private foundations)

c) Limitations on Expenditure of Capital

- Charities that hold "endowments" will need to review their historical gift documentation to determine if there are any limitations on the expenditure of capital, including whether capital is to include realised capital gains or not

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- Need to carefully document decisions by the board of trustees concerning possible use of endowment funds in making a social investment, including why they expect that a social investment will not result in an encroachment on capital

d) Issues of Liability Protection for Trustees

- Liability protection for trustees under s. 10.2(7) of the CAA is different and not as practical as provided for under s. 28 of the *Trustee Act*
- Unlike s. 28 of the *Trustee Act*, s. 10.2(7) of the CAA does not provide a methodology of what needs to be done in order to ensure protection from liability (i.e. no reference to a "plan or strategy")

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e) Trustees' Duty Regarding Advice

- If the trustees or board of a charity must consider whether they need to obtain advice, this will likely mean that trustees will generally seek advice in order to be cautious
- However, the amendments to the CAA should not be so complicated that obtaining professional advice becomes the norm as a matter of due diligence



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E. CONCLUSION

- Investments of charitable funds by charities will need to be carefully considered given the complexities that have now arisen because of the introduction of social investments under the CAA
- It is important for charities to understand the spectrum of options that are available and the corresponding requirements when investing charitable funds
- It is advisable that charities develop and implement an appropriate investment policy or policies to reflect the specific type of investment that the charity intends to embark on before investing
- Although not intended, charities will likely need more legal assistance than they have had to in the past in order to navigate their investment options

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The 2018 Ottawa Region Charity & Not-for-Profit Law Seminar

Ottawa – February 15, 2018

CHALLENGES IN REGULATING THE CHARITABLE SECTOR: LOOKING BACK AND GOING FORWARD

By Tony Manconi, B.A.

Director General of the Charities Directorate
of Canada Revenue Agency




Challenges in Regulating the Charitable Sector: Looking Back and Going Forward

by
Tony Manconi, Director General





 Canada Revenue Agency / Agence du revenu du Canada 



The Past

- ✦ The War Charities Act of 1917;
- ✦ 1962: the Department of National Revenue maintained lists of registered charities, but had no formal registration process;
- ✦ 1966: legislated registration process, reporting requirement, and donation receipt requirements;
- ✦ From 'the Charitable Organizations section' with 4 employees to the Charities Directorate with 282 employees.






Today


The Charities Directorate, administers a system to register charities under the *Income Tax Act*. As the regulator of charities, the CRA's responsibilities include:


- ✦ processing applications for registration;
- ✦ offering technical advice on operating a charity;
- ✦ handling audit and compliance activities; and
- ✦ providing general information to the public.



Our goal: to promote compliance through education, quality service and responsible enforcement.

In accomplishing this goal, the charitable sector will be supported in advancing the social well-being of Canadians.







What we've been up to and what to expect going forward


Registering charities

- ✦ Focusing on client service: changes to our letters, [new online tools](#), new processes;
- ✦ Going forward: modernize our approach to screening and reviewing applications for charitable registration and reduce wait time by:
 - ✦ moving towards one service standard regardless of the complexity of the application April 1, 2018; and
 - ✦ working with our provincial and territorial partners to update the information they provide on registration as a charity at the federal level.







Engaging with the sector




- ✦ Strategy to streamline procedures to ensure the most efficient and timely service to clients;
- ✦ New tool for [public document requests](#);
- ✦ New innovative [videos](#) on topics of concern to the charitable sector;
- ✦ Other forms of innovative outreach: video tweets, graphic visual representations ([infographics](#)), website renewal.

Did you know...








Educating the sector

- ✦ Through Q & A (i.e. disaster relief);
- ✦ New guidance:
 - ✦ Relieving conditions attributable to being aged and charitable registration
 - ✦ Prescribed Universities;
- ✦ Going forward, we plan to update the following guidance:
 - ✦ Comprehensive guidance on the first 3 heads of charity
 - ✦ relief of poverty
 - ✦ advancement of education
 - ✦ advancement of religion
 - ✦ Related business update



Political Activities

What we did to clarify the rules on political activities:

- ✦ In-person and online consultations.
 - ✦ We received 19,990 submissions from charities and individuals, and
 - ✦ We met with 167 representatives from the charitable sector.

What we did with the feedback:

- ✦ Feedback was reviewed by the Consultation Panel on Political Activities of Charities

What we did in response to the Panel's Report:

- ✦ Suspension of all remaining audits and objections that were part of the Political Activities Audit Program;
- ✦ Currently reviewing the report and preparing a response.

Canada

Protecting charities from terrorist abuse

- ✦ Focusing on working to combat support for terrorist financing within charities: Participating in the Financial Action Task Force.
- ✦ Working to enhance our public outreach regarding the risk of terrorist abuse in the charitable sector.

Canada

Monitoring charities

- ✦ New business intelligence and analytics team to better target audits to cases of serious non-compliance;
- ✦ Charity Education Program (CEP)
 - ✦ Designed to provide in-person support and information to charities;
 - ✦ Visits will involve: information sharing, books and records review, and summary of findings and recommendations;
 - ✦ CEP ≠ audit;
 - ✦ CEP will allow us to:
 - ✦ double our compliance coverage of the sector
 - ✦ reduce the burden of a full audit on charities where it is not warranted
 - ✦ engage with a larger number of charities.

Canada

International Regulators' conference

- ✦ Ensures we have a pulse on how charities and regulators abroad are functioning – allows us to remain current and responsive.



Canada

Challenges

Constitutional framework

- ✦ The responsibility for managing the operations of charities falls to provinces and territories;
- ✦ Provinces have limited their involvement in regulating charities;
- ✦ The federal government deals with aspects of the regulatory regime for charities through its powers of taxation;
- ✦ CRA has become the *de facto* regulator.

Canada

Challenges cont'd

Continuous environmental changes

- ✦ The charitable sector is evolving and we as a Regulator need to keep pace with the changing environment;
- ✦ Three themes stand out:
 - ✦ Charities have had to evolve and be more innovative in generating income;
 - ✦ Charities have had to be more strategic in how they deliver their programs to meet demands and maximize resources;
 - ✦ There is a need for more clarity to help charities understand and comply with the rules of registration.

Canada

Challenges cont'd

Common Law

- Creates precedents to follow;
- Helps clarify grey areas;
- Decline in case law = need for more administrative positions.

Policy Development

- Broad-reaching impacts on other government departments affect policy development

Canada

The future

A few items on our agenda for the year ahead:

- Strategic planning by developing a 3 year business plan;
- Charities modernization project: e-services;

What is CHAMP?

- Project that will modernize the services we offer to Canadian charities starting in November 2018.
- Through the My Business Account (MyBA) secure online portal, charities will be able to:

- Apply for registration
- File annual returns (T3010)
- Update account information and upload documents
- Correspond with us electronically

Canada

Accessed through My Business Account

Canada

How to Prepare



Sign up now for My Business Account



Visit our Charities and giving page regularly



Subscribe to our electronic mailing list for updates

Canada

T3010 insert



Canada

A few items on our agenda for the year ahead (cont'd):

- Innovation lab on late filing: ongoing initiatives;
- Charities Annual Report;
- Social enterprise and revenue generation: working with ESDC and Finance to develop a strategy; and reviewing and updating policy guidance on these topics;

Canada





BARRISTERS
SOLICITORS
TRADEMARK AGENTS

THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar
Thursday, February 15th, 2018

FEEDBACK FORM

Thank you for participating in today's Seminar. Please help us plan the 2019 Ottawa Region *Charity & Not-for-Profit Law Seminar* by completing this Feedback Form.

1 = disagree 2 = neutral 3 = agree 4 = strongly agree

How Did You Hear About This Seminar?

☐ Mailing ☐ Email ☐ Advertising ☐ Word of Mouth ☐ E-Newsletter "Charity Law Update"

Presentations

	Disagree	Neutral	Agree	Strongly Agree
The presentations were relevant and informative.	1	2	3	4
The number of presentations was appropriate.	1	2	3	4
The speakers explained the legal issues in a manner that was understandable	1	2	3	4
The use of PowerPoint was helpful and instructive.	1	2	3	4
The question and answer periods were helpful and informative.	1	2	3	4

What topic would you like to see discussed next year?

Lunch & Coffee Breaks

The lunch reflected good value	1	2	3	4
The time allotted for coffee break was adequate.	1	2	3	4
The time allotted for lunch break was adequate.	1	2	3	4

What is one way we could improve the lunch or coffee breaks?

General

The facilities were comfortable.	1	2	3	4
The seminar location was convenient.	1	2	3	4
I will recommend this seminar to others.	1	2	3	4
I would like to attend next year.	1	2	3	4

Comments and Suggestions:

We appreciate any other comments or suggestions.

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Charity & Not-for-Profit Law Seminar
Thursday, February 15th, 2018

QUESTION SHEET

Please complete the question sheet, tear along the dotted lines and leave it at the front lectern in the auditorium any time before 2:30 p.m. Questions will be answered during two Question Periods at 12:15 p.m and 3:10 p.m.

-----TEAR HERE-----

SPEAKER:

TOPIC:

QUESTION:

-----TEAR HERE-----

SPEAKER:

TOPIC:

QUESTION:

-----TEAR HERE-----

SPEAKER:

TOPIC:

QUESTION:

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