

Healthcare Philanthropy: Check-Up 2018

Friday, June 8th, 2018

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Carters/Fasken Healthcare Philanthropy: Check-Up 2018 Half-Day Seminar, June 8, 2018

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Carters Professional Corporation / Fasken Healthcare Philanthropy: Check-Up 2018

Half-Day Seminar, June 8, 2018

Agenda

7:45 am - 8:25 am **Registration & Breakfast** 8:25 am - 8:30 am **Opening Remarks** M. Elena Hoffstein / Terrance S. Carter 8:30 am - 9:15 am **Due Diligence In Gift Documentation** Theresa L.M. Man – Partner, Carters Professional Corporation 9:15 am - 10:00 am Tips from a Former Justice Tax Litigator on CRA Audits Jenny Mboutsiadis, Partner, Fasken 10:00 am - 10:20 am **Refreshment & Networking Break** 10:20 am - 11:10 am Legal Issues In Fundraising On Social Media Terrance S. Carter, Managing Partner, Carters Professional Corporation 11:10 am - 11:40 am The Health Sector Payment Transparency Act, 2017: Implications for Healthcare Institutions and their Foundations Laurie M. Turner, Associate, Fasken 11:40 am Questions 11:50 am **Closing Remarks** M. Elena Hoffstein / Terrance S. Carter

FACTS

Who's Who Legal (2018)

recognizes Fasken as the Global Mining Law Firm of the Year, for the fourth straight year. The firm is a ten-time winner of this award

Chambers Global (2018)

recognizes 54 of our lawyers in 19 practice areas

IFLR 1000 Financial and Corporate (2018) ranks 30 of our lawyers in 11 practice areas

Chambers Canada (2017) recognizes Fasken as the Banking

recognizes Fasken as the Banking Law Firm of the Year

Chambers Global (2017) ranks 59 of our lawyers in 37 practice areas

Who's Who Legal recognizes Fasken as the 2017 Global Mining Law Firm of the Year

The Legal 500 Canada (2017)

ranks Fasken as a top tier firm in three categories: (1) Dispute Resolution - British Columbia, (2) Energy - Mining and (3) Labour and Employment, and recognizes 63 of the firm's lawyers, 17 of which are named as Leading Lawyers

The Best Lawyers in Canada (2017) names 134 of our lawyers in 44 areas of practice

The 2017 Canadian Legal Lexpert Directory recognizes 161 of our lawyers in 54 areas of practice and industry

Chambers UK (2017) names two Fasken lawyers in one practice area

The Legal 500 UK (2016/2017) ranks Fasken as a top tier Canadian firm in London and ranks three of our lawyers in three practice areas

The Best Lawyers in South Africa (2017) ranks 13 Fasken lawyers in 11 practice areas

AT A GLANCE

For any organization, making decisions effectively and efficiently is vital to thrive in an increasingly competitive business environment. Fasken's more than 700 lawyers, in ten offices across four continents, are always ready to navigate legal challenges and capitalize on business opportunities for you. As a leading international business law and litigation firm, we offer experience and expertise across a wide range of industries and practice areas to suit the needs of organizations worldwide. Clients rely on us for practical, innovative and cost-effective legal services. We solve the most complex business challenges, providing exceptional value and putting clients at the centre of all we do.

Our Clients

We advise corporate clients, government agencies, regulatory authorities, non-profit bodies and individual clients. As our client, you benefit from our:

- Commitment to quality Our legal practice is rooted in the relationships we build with clients. That means a comprehensive and sustained focus on the highest level of service throughout our entire firm to meet and anticipate your evolving needs. Quite simply, we start building relationships by listening to you, our client. We gauge our success from clients like you who continue to entrust us with their most pressing matters.
- Cogent advice Known for our ability to think strategically and deliver practical solutions, we have extensive experience acting for clients on domestic and international issues. Our lawyers are often asked to comment on legal issues affecting business and are quoted regularly in the media.
- International reach To meet your needs worldwide, we have teams of lawyers and professionals working in our offices across Canada, Europe, Africa and Asia.

Our Expertise

We have top-ranked lawyers in a wide range of industries and practice areas:

Practice Areas

- Indigenous Law
- Africa
- Antitrust/Competition & Marketing
- Asia Pacific
- Banking & Finance
- Capital Markets
- Corporate/Commercial
- Corporate Governance
- Corporate Social Responsibility Law
- Environmental
- Estate Planning
- Government Relations & Ethics
- Information Technology Law
- Insolvency & Restructuring
- Intellectual Property
- International Trade & Customs Law
- Investment Products & Wealth Management
- Labour, Employment & Human Rights
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Privacy & Information Protection

- Real Estate
- Start-Up & Entrepreneurial Services
- lax

Industries

- Aviation
- Charities and Not-For-Profit
- Communications
- Construction
- Co-ops & Credit Unions
- Energy
- Financial Institutions
- Forestry
- Health
- Infrastructure & Public-Private Partnerships
- Insurance
- Life Sciences
- Mining
- Real Estate
- Transportation

Selected Experience

We have advised clients in a wide-range of industries on complex matters including:

The **Special Committee of Magna International Inc.** in the development and defence of Magna's novel and ultimately successful collapse of its dual-class share structure.

CGI Group Inc. on its US\$1.07 billion cross-border acquisition of Stanley, Inc.

Uranium One Inc. on its proposed \$1.5 billion transaction with ARMZ, a Moscow-based uranium mining company.

Infrastructure Québec on the \$470 million Centre Hospitalier de l'Université de Montréal project, the first health public-private partnership (P3) to close in Québec.

Independent directors of Grant Forest Products in the \$400 million sale of mills in Canada and the US to Georgia-Pacific, as part of Grant's reorganization.

Addax Petroleum Corporation on its \$8.2 billion acquisition by The Sinopec Group, the largest overseas acquisition ever by a Chinese state-owned company.

MDS Inc. on the sale of its instrument division to Danaher Corporation for US\$650 million.

Gold Reserve Inc. before the Ontario Superior Court of Justice in successfully restraining Rusoro Mining Ltd. from proceeding with a hostile takeover bid for the company because of alleged conflicts of interest and confidentiality violations

EnStream LP, a mobile commerce joint venture company owned by Canada's three leading wireless operators, on multiple aspects of the development, structuring and launch of Zoompass, a breakthrough mobile money transfer and payment service.

Various parties in relation to the high-profile cross-border insolvencies of Nortel, AbitibiBowater and Quebecor World.

Kerry (Canada) Inc. in a dispute with former employees over the use of surplus in the employee pension plan by plan administrators, culminating in a landmark decision by the Supreme Court of Canada in favour of Kerry, with wide implications for employers, pension plan administrators and employees of Canadian companies.

Export Development Canada which, along with a syndicate of lenders, extended a term credit facility of up to \$700 million to Air Canada.

ING Canada with respect to its transformation from a Canadian subsidiary of ING Group into an independent Canadian-listed and widely-held company, including advice on regulatory matters and its rebranding as Intact Insurance.

The Royal Bank of Scotland on Canadian bank and securities regulatory and antitrust matters in connection with the UK government becoming a 58% majority stakeholder in the bank.

A consortium led by **The Royal Bank of Scotland** on Canadian aspects of its successful competitive bid for Dutch bank ABN AMRO, the largest financial services merger in history.

The **underwriters led by TD Securities** on more than \$10 billion in equity and debt offerings for TD Bank Financial Group in 2008 and 2009.

Key parties, including the issuer trusts and Desjardins Group, in the landmark Canadian \$32 billion Asset-Backed Commercial Paper restructuring.

A syndicate of European banks and a core group of North American banks on the refinancing by Bombardier of US\$6.24 billion letter of credit facilities.

The **Special Committee of Alcan Inc.** in Alcan's \$38.1 billion acquisition by Rio Tinto, to form the world's leader in aluminum.

The **lenders** for \$460 million in financing in support of an agreement between the Government of Alberta and BBPP Alberta Schools to design-build-finance-maintain 18 state-of-the-art schools in Alberta, the largest ever Canadian schools P3 transaction.

Issuers (including Inmet Mining, IAMGOLD First Quantum Minerals, Gold Wheaton Gold and First Uranium) and underwriters on more than \$2.5 billion in mining equity financings in 2009.

Tyco Safety Products in a dispute with one of its competitors before The Federal Court of Canada resulting in a landmark patent decision and a clear victory for Tyco.

The **lenders** for the construction bank financing and long term bond financing for the \$759 million Niagara Health System Alternative Financing and Procurement project, Infrastructure Ontario's first full design-build-finance-maintain hospital project.

The Bank of Nova Scotia in litigation before the Supreme Court of Canada resulting in the SCC issuing a precedent-setting decision in favour of the bank concerning the recovery of the proceeds of fraud.

FACTS

Chambers Canada (2018) ranks our firm nationwide in Charities and recognizes one of our lawyers in this practice area

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

Three of our lawyers are recognized in the Canadian Legal Lexpert Directory (2015) for their Charities/Not-for-Profit work

Lexpert has presented the Zenith Award to multiple members of our group

CHARITIES AND NOT-FOR-PROFIT

Charities and not-for-profit organizations enrich the lives of people and communities every day. But managing charitable organizations is a heavy responsibility. Directors, officers and employees of charitable organizations face increased regulations and growing scrutiny of both their operations and governance. Fasken's Charities and Not-for-Profit Group can help you navigate the complex laws and regulations governing the creation, organization, and ongoing administration of charities and not-for-profit entities.

Our Clients

Our team has a long history of helping not-for-profit organizations and charities build the right legal foundation for success. We have extensive expertise in all areas of charity and not-for-profit law both nationally and internationally. We advise a large number of hospitals, healthcare service agencies, professional governing bodies and associations, community service agencies, charitable organizations and community foundations as well as private family foundations and non-profit corporations including RCAAAs and clubs.

Our expertise in fundraising, donations and legacy planning is further enhanced by our team's:

- **Regulatory expertise** We can help you navigate the increasingly complex regulatory environment, including the complex new disbursement quota rules and new privacy legislation that apply to charities and not-for-profits.
- In-depth tax knowledge Based on in-depth understanding of Canadian and provincial tax legislation, we can help resolve any tax issues that may arise, such as obtaining charitable status, helping charities and donors maximize the tax efficiency of their charitable gifts and helping to develop investment strategies for donated gifts.
- Expertise in planned giving Most Canadians contribute to charities throughout their lifetime, but few continue this support through a gift in their will or estate plan. This is a missed opportunity. Our practitioners take the time to understand your values and vision to ensure your legacy planning is fulfilled in a tax efficient manner.
- International legal expertise We have experience helping charities to carry out their activities abroad in accordance with applicable regulatory rules.

Our Expertise

- Establishing and advising hospital foundations and other parallel foundations
- · Advising on amalgamation of hospitals and other charities
- Advising on foreign operations of operating charities
- Fundraising issues and charitable gaming
- · Advising charities on CRA audits
- Advising international charities
- Advising on donor advised funds
- Advising donors on effective charitable gifting
- Intellectual property
- · Labour and employment law
- HS1
- General legal matters including real estate
- Risk management
- Advocacy
- Defence and administration of charitable bequests
- Directors and Trustees duties and liabilities
- Incorporation organization and regulation of charity

FACTS

Who's Who Legal: Canada (2017) recognizes three of our lawyers in Private Client, and names one as a Most Highly Regarded Individual in the area

The Canadian Legal Lexpert Directory (2017) recommends six partners as leading practitioners in the area of Estate & Personal Tax Planning

Chambers High Net Worth (2017) ranks our firm at Band 1 in the area of Private Wealth Law and ranks three of our lawyers, including two as top tier (Band 1)

The Best Lawyers in Canada (2018) lists six of our lawyers for their Trusts & Estates expertise

Who's Who Legal: Canada (2016) recognizes four of our lawyers in the area of Private Client

Who's Who Legal: Private Client (2016) recognizes four of our lawyers

ESTATE PLANNING

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

Our Clients

- International families
- Entrepreneurs
- Non-profit organizations
- Private foundations
- Global trust corporations

The plans we develop with you may include:

- Wills
- Domestic contracts
- Succession plan for your business
- Charitable giving strategy to fulfill your social capital legacy
- Powers of attorney
- Trusts

Notre expertise

Our experience includes the following:

- Advising on the use of trusts and powers of attorney to protect clients' assets and ensure safeguarding of those assets and care of clients in the event of long term illness or incapacity
- Using tax-planned trusts and wills to accomplish one's primary personal and financial objectives while minimizing tax consequences
- Advising on trust variations and migrations
- Planning to effectively reduce probate taxes within the framework of the will or estate plan
- Developing and facilitating succession plans to transfer family business between generations
- Cross-border will and trust planning for clients who are US citizens or dual residents of Canada and the United States or Canadians who own US situs property
- Assisting new immigrants to Canada to establish trusts to take advantage of the five-year Canadian tax holiday
- Advising individuals in planning for emigration from Canada
- Advising on the appropriate use of insurance
- Advising on and implementing sophisticated estate freezing and income splitting schemes
- Assisting clients with marriage contracts and family law planning
- Planning to deal with the succession of recreational properties (within and outside Canada) for both Canadian residents and non-residents and minimizing taxes with respect to such succession
- Assisting with the administration of the estate or trust
- Advising executors and trustees
- Acting as their agents in the day-to-day administration of the estate
- Attending to fiduciary accounting
- · Gathering information on the assets and liabilities of an estate
- Applying for grants of probate or letters of administration
- Making all necessary filings with the Canada Revenue Agency
- Distributing assets to beneficiaries
- Assisting executors and trustees with estate and trust administration, and executors' and trustees' accounts

The Fasken Advantage

Fasken Martineau is one of the world's leading international business law and litigation firms with more than 700 lawyers with offices in Canada, the United Kingdom and South Africa.

The multi-jurisdictional property interests of our clients often require the development of a co-ordinated plan to leverage differing legal and tax regimes. Through our international offices and the reputation of individual members of our group, we have access to experts in other jurisdictions to address your needs in an integrated manner.

Members of our group belong to professional bodies such as the Estate Planning Council (EPC), Family Firm Institute (FFI), the Society of Trust and Estate Practitioners (STEP), Canadian Association of Family Enterprises (CAFE), Academy of Trusts and Estates (ACTEC), the International Academy of Trusts and Estates Lawyers, the Canadian Association of Gift Planners (CAGP) and the Association of Fundraising Professionals (AFP).

When your estate planning requires additional expertise, we are able to partner with the firm's specialists in taxation, insurance and business law and can also assist in resolving estate-related disputes through litigation or mediation.

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Private Client Services

Your family.

Your business.

Your wealth.

You.

FASKEN

As a high-net-worth individual, family-owned or privately managed business, you face dynamic and unique challenges.

Our approach

We believe it's important to bring a multi-disciplinary, collaborative approach to complex personal, estate, family and business issues to customize strategies that meet the needs of the private client. This includes understanding your personal goals, multijurisdictional tax considerations, estate and business succession goals, liquidity events and philanthropic intentions.

We provide comprehensive, integrated legal solutions and access to a network of top advisory relationships to provide you with high-end personalized advice.

Our comprehensive Private Client offering includes:

- Estate and Succession Planning
- Tax planning
- Philanthropy
- Estate and Trust Administration
- Estate, Trust & Shareholder Disputes
- Family Business Succession
- Corporate governance
- Liquidity event planning and execution
- Corporate Finance
- Private M&A

Our clients

Our private clients include successful individuals, families and their enterprises across generations, industries and cultures.

We understand the need to consider differing requirements in the context of your unique situation in order to service all of your needs.

Private Client Services group ranked as Band 1 for Private Wealth Disputes – Canada

- Chambers High Net Worth 2017

Our lawyers ranked in the areas of Banking & Finance: Financial Services Regulation (Canada), Tax (Canada), and Corporate/M&A (Canada)

- Chambers Canada 2018

Our lawyers recognized for their expertise in Charities/ Not-For-Profit, Corporate Tax, Litigation – Corporate Tax, Estate Planning & Personal Tax Planning, and Investment Funds & Asset Management (Tax Aspects)

- Canadian Legal Lexpert Directory 2017

Our lawyers ranked in the area of Trusts and Estates

- The Best Lawyers 2018

Continuing success requires collaboration with your stakeholders and advisors. We can help.

For over a century, generations of families have turned to Fasken for legal advice to protect what matters most. Whether you're passing down the family business to the next generation or looking for new capital, we can help.



Transfer your wealth in an orderly way by developing income splitting strategies, customizing your retirement and succession plan and putting in place other tax efficient plans for multi-jurisdictional property or family interests.

Preserve your assets

♥ Planning Create a lasting legacy

As you introduce the next generation into your business or wish to capitalize on an exit strategy, we can help to transition your wealth for generations to come.

Take control of your corporate wheelhouse

Learn how to effectively navigate the complex corporate governance landscape by implementing best practices, structures and governance tools to ensure your business stays on track.

Your Business Realize value in your business

From proactive preparation for liquidity events to the most sophisticated and structurally complex transactions, learn how our relationship capital can drive your transactions to completion.



Leave your mark by defining your charitable giving goals, designing a lasting financial legacy or engaging in mentoring and philanthropy.

Contact us to discuss how we can help you realize your goals.

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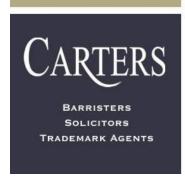
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CARTERS FIRM PROFILE

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

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

WITH INTERNATIONAL RELATIONSHIPS

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

PROVIDING 'PROACTIVE ADVICE'® TO CLIENTS

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

WITH SOLICITORS TO HELP YOU AVOID LEGAL LIABILITY

The focus of the solicitors at Carters is in serving charities and not-for-profit organizations through an effective legal risk management approach to the practice of law, and providing legal services in the areas of charity and not-for-profit law, including charitable registrations, fundraising, taxation, and the development of national and international structures, as well as corporate law, contracts, real estate and leasing, franchising law, intellectual property and technology, i.e. trade-marks and copyrights, labour, employment, human rights, estates and trusts, tax audits, opinions and appeals, and the evolving area of privacy law and anti-spam. Four of the lawyers at Carters have been recognized by both *Lexpert*, and three have been recognized by *Best Lawyers in Canada*, as leaders in their fields in Canada.



AND A LITIGATION DEPARTMENT TO ASSIST YOU WHEN PROBLEMS ARISE

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

CONVENIENCE AND ACCESSIBILITY

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

PUBLICATIONS & RESOURCES

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

EXPERTISE IN CHARITY AND NOT-FOR-PROFIT LAW

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

- Development and maintenance of the websites www.carters.ca, www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca;
- Authoring the *Corporate and Practice Manual for Charities and Not-for-Profit Corporations* (Thomson Reuters), with annual updates;
- Co-editing *Charities Legislation & Commentary*, 2018 Edition (LexisNexis), published annually;
- Contributing to *The Management of Nonprofit and Charitable Organizations in Canada*, 4th Edition (LexisNexis, 2018);
- Co-authoring Branding and Copyright for Charities and Non-profit Organizations (LexisNexis, 2014);
- Co-authoring Branding & Trademarks Handbook for Charitable and Not-For-Profit Organizations (LexisNexis Butterworths, 2006);
- Contributing to the *Primer for Directors of Not-for-Profit Corporations* (Industry Canada, 2002);

CARTERS

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



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

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

Anti-bribery Compliance

Anti-terrorism Policy Statements

Charitable Audits

Charitable Organizations & Foundations

Charitable Incorporation & Registration

Charitable Trusts

Church Discipline Procedures

Church Incorporation

Continuance Under the CNCA

Corporate Record Maintenance

Director and Officer Liability

Dissolution and Wind-Up

Domain Name Management

Ecological Gifts

Employment Issues

Endowment Agreements

Foreign Charities Commencing Operations in Canada

Fundraising and Gift Planning

Gift Acceptance Policies

Human Rights 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

EXPERIENCE WITH CHARITIES AND NOT-FOR-PROFIT ORGANIZATIONS

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

Churches, Dioceses and Related Religious

Organizations

Ecological Charities

Educational Institutions in Canada and

Internationally

Environmental Organizations

Financially Troubled Charities & Their Directors

Government Agencies

Health Care Organizations

Hospitals and Hospital Foundations

International Missionary Organizations

Lawyers Requiring Counsel on Charitable Matters

Museum Foundations

National and International Charitable Organizations

National Arts Organizations

National Medical Research Foundations

National Religious Denominations

Not-for-Profit Housing Corporations

Not-for-Profit Organizations

Parallel Foundations

Religious and Secular Schools

Religious Broadcasting Ministries

Safety Regulatory Organizations

Seminaries and Bible Colleges

Temples, Synagogues and Other Religious

Organizations

Violence Prevention Organizations

Universities and Colleges





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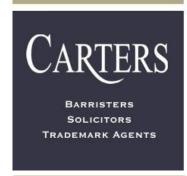
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Carters/Fasken Martineau Healthcare Philanthropy Checkup 2018 Toronto - June 8, 2018

Due Diligence in Gift Documentation

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OVERVIEW

- · Why keep gift documentation
- Types of gift-related documentation
- Gift agreement is the most important type of gift documentation
- Common problems if insufficient gift-related records are maintained
- Best practice due diligence documentation

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A. WHY KEEP GIFT DOCUMENTATION

- Ensures effective gift solicitation and management for each gifting process
 - Declining a gift
 - Negotiating and recording a gift
 - Receipting a gift
 - Managing a gift & complying with gift terms
 - Returning a gift

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- · Ensures legal compliance and risk management
 - Ensures compliance with the law, including case law and the requirements of the *Income Tax Act* (ITA)
 - Helps board of directors fulfill their fiduciary duties under common law to comply with the terms of a gift, failing which the directors could be held personally liable for any loss or damages
 - Ensures compliance with gift terms to avoid breach of trust
 - Demonstrates due diligence as a defence in the event of litigation
 - Avoids allegation of breach of trust
 - Avoids unexpected surprises and costs

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Manages donor relations

- Ensures transparency of process and policy with donors
- Ensures compliance with donor restrictions
- Assures donors of sound management of their gifts
- Avoids misunderstanding with donors
- Manages donor expectations
- Have answers "ready" to respond to donor's enquiries

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Enhances effective operational management

- Promotes credibility of the charity
- Manages expectation of directors, staff and volunteers
- Maintains corporate history
- Discharges directors' and officers' duties
- Complies with donor's restrictions
- Ensures operational efficiency
- Mitigates legal risks
- Assists future planning
- Manages donor and public relations
- Prepares for legal challenges, e.g., CRA audits, law suits, insurance claims

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Complies with ITA requirements

- Some gift-related documents may also be part of books and records required to be kept by charities under the ITA
- Therefore must be held in the manner for the applicable statutory retention periods
- Complies with incorporating legislation requirements
 - Some gift-related documents may also be required to be kept under the incorporating legislation
 - Detailed requirements in each statute are different
- Complies with other requirements
 - There may be other specific records keeping requirements that an organization has to maintain e.g., funders, certification bodies, umbrella organizations

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B. TYPES OF GIFT-RELATED DOCUMENTATION

1. Documents that Set Out Terms of Gifts

- Terms of gifts (limitations, conditions, terms of reference, directions or other restrictions imposed by the donors) may be set out expressly or be understood by implication
- Expressed gift terms is the best because it clearly documents donors' intent and may be contained in different documents, for example:
 - Gift agreements or deed of gift
 - Wills terms testamentary gifts, fulfillment of pledges
 - Donor communications (e.g., emails, letters, phone calls, meeting notes)

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- Implied gift terms reflect the terms as understood by the parties, not expressly written out, and may be contained in different documents, for example:
 - Fundraising materials (e.g., brochures, posters, pamphlets, newsletters, solicitation letters, etc.)
 - Fundraising materials of third party organizations
 - Website of the charity
 - Social media messaging
- Gift terms may also be set out in different types of contracts that may not be "gift agreements", for example: sponsorship agreements, product supply agreements, funding agreements, side letters or agreements

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2. Documents for Due Diligence of Proposed Gifts

- Before a gift is accepted, due diligence is required to ensure if the charity is willing to accept the gift
- For example: title searches of a gift of real property, reputation of the donor, whether purpose of gift is inconsistent with those of the charity, title documents of donation of shares, charity's gift acceptance policy and other gift-related policies

3. Documents to Support Valid Gift at Common Law

- Need documents to evidence valid gift at common law, i.e., voluntary transfer of property without consideration
- For example: documents to show a "property" is donated, donor has the capacity to donate, donation is voluntary, charity accepts the gift, board resolution establishing a board initiated restricted fund

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4. Documents for Appropriate Receipting

- In order for a gift to be receipted, the charity needs to support the receipt with proper documentation
- For example: appraisal of in-kind gifts, amount of advantage, valuation of donation of shares

5. Documents for Management of Gifts

- Need documents to show the charity complies with the terms of the gifts and effectively manages them
- For example: donors communications, gift reports, acknowledgement letters, appreciation letters, tracking of gift terms, tracking of amount of capital, encroachment of capital, disbursement of income, investment of gifts

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6. Documents on Donor Information

- Donor information constitutes personal information that must be respected and protected by the charity
- Donor information can include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, financial information, name of business, place of employment, preferred donation restrictions and even health information
- Lots of documents may contain donor information, e.g., letters, receipts, computer data

7. Documents to Support Decline or Return of a Gift

- Need documents to show why and how a particular gift is declined or returned
- For example: letters to potential donor, board resolution

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C. GIFT AGREEMENT IS THE MOST IMPORTANT TYPE OF GIFT DOCUMENTATION

1. Basic Considerations

- Starting Point: A gift agreement is not a legal requirement in order to make a gift
- To establish a gift at common law simply involves the voluntary transfer of property without consideration
- However, a well-drafted gift agreement generally provides the best documentary evidence to avoid confusion at a later time concerning whether there was a gift and what the terms of the gift were

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2. Difference Between Gift Agreement and Pledge Agreement

- The terms "Gift Agreement" and "Pledge Agreement" are often used interchangeably, particularly when a gift agreement for a current gift includes a pledge to make a future contribution
- Gift agreement documents a gift having been made by a donor to a charity and is legally enforceable on the charity when the gift involves restrictions
- Pledge agreement records a commitment by a donor to make a gift at a future time

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- Pledge is generally not enforceable at law unless at least one of the following is met
 - There is consideration, even a nominal amount of two dollars
 - Charity can establish that it has acted to its detriment as a result of the pledge (i.e., detrimental reliance)
 - Pledge is within the provisions of "Public Subscription" legislation in Nova Scotia or the Statute of Frauds in P.E.I.
- Important to include testamentary provision in a Will to ensure that any outstanding pledge is fulfilled
- Pledge should not be counted as a gift until the pledge is actually received, or it should only be identified as a "pledge" as opposed to an actual gift received

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D. COMMON PROBLEMS IF INSUFFICIENT GIFT-RELATED RECORDS ARE MAINTAINED

- See webinar presentation "When Is A Gift Not A Gift?
 And What to Do When Gifts Go Bad?" at Healthcare Philanthropy Check-Up on June 23, 2016 at

 http://www.carters.ca/pub/seminar/charity/2016/Handout-When-is-a-
- Gift-Not-a-Gift.pdf
 See presentation "Pitfalls in Drafting Gift Agreements" at

http://www.carters.ca/pub/article/charity/2017/STEP-Pitfalls-in-Drafting-Gift-Agreements-STEP-2017.pdf

STEP Conference on June 12, 2017 at

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- PROBLEM #1: Failure to document valid gift at common law
 - Need documents that there is valid gift at common law, i.e., a voluntary transfer of property without consideration
- PROBLEM #2: Failure to document eligible amount of gift at ITA
 - CRA adopts the traditional common law definition of a gift, however ITA split-receipting rules allow donors to receive an advantage (consideration or benefit) in return for having made a gift
 - Eligible Amount = FMV Advantage

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- PROBLEM #3: Failure to document due diligence before gift is accepted
 - Gift not against public policy or policies of the charity
- PROBLEM #4: Failure to clearly document gift terms, e.g.
 - Gift restrictions, meaning of endowment, disbursement of funds, donor naming rights, investment power
- PROBLEM #5: Failure to properly draft gift agreements, e.g.
 - Drafting language, proper authorization, variation clause; admin fees

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E. BEST PRACTICE DUE DILIGENCE DOCUMENTATION

 The following are due diligence tips in addition to the above section on avoiding common problems

Proper review of existing endowments Taking Inventory

- It is essential that the board of a charity maintain an up-to-date inventory of all endowments and other restricted funds, to be updated on a regular basis
- However, it is often difficult to locate original documentation that established the endowment because documentation may have been lost, was inadequate or is confusing

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- Must go back to original source documents where possible to see what the terms of the endowment and other restrictions were, examples of source documents
 - Endowment agreements
 - Terms of wills
 - Notes in audited financial statements
 - Government contracts for matching funds
 - Board resolutions creating the endowment fund or attempting to change the fund
 - Donor letters or agreements attempting to change the terms of the endowment
 - Family members attempting to change the terms of the endowment
 - Notes to file about the endowment made by previous staff of the charity

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(b) Identify Areas of Deficiencies

- Needs to identify when terms of the endowment have not been complied with by the charity
- Non-compliance can occur in any area, but often tends to be where the charity has followed a total return strategy when there is no authority in the endowment agreement to do so or in a policy incorporated by reference into the gift agreement
- Non-compliance with terms of an endowment agreement can lead to exposure to liability for members of the board of directors, both past and present
- Where there has been evidence of non-compliance, it may be necessary to obtain a relieving court order on a consent basis from the Public Guardian and Trustee in Ontario under s. 13 of the Charities Accounting Act

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(c) Transfer of Endowment Funds

- If an endowment fund(s) is to be transferred to another charity, such as a parallel foundation, the charity must first take inventory of its endowments, and then determine what authority speaks to the issue of transferring the endowment funds
- The transfer of funds from one charity as trustee to another charity as subsequent trustee can be done by deed of appointment under trustee legislation, or by court order
- If recipient charity is not arm's length to the donor charity, then need to consider whether to identify the gift as a "designated gift" under the ITA for purposes of avoiding the 100% disbursement requirement by the recipient charity

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2. Keeping Adequate Records of Gift-Related Documents

ITA requirements

- In general, there are three types of books and records
 governance, financial and operational records
- Many gift-related documents are part of these records
- CRA requires registered charities to keep adequate books and records (including source documents) so that CRA can verify revenue, expenditures, resources spent on activities
- Books and records of registered charities must contain specific information such as (a) information related to any grounds for revocation, (b) duplicate receipts, and (c) Information to support the verification of donation tax credits and deductions

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- "Records" are broadly defined in ITA to include an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form
- Webpage for charities Books and Records
 https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/books-records.html

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Key issues regarding record keeping (a) How to keep records

- · Records must be kept safe and protected from
 - Fire, flood, mold, deterioration
 - Misfiling, loss, mishandling, tampering
- Separate permanent and working files
- Address privacy and confidentially concerns

(b) Electronic records

- · Paper vs. electronic?
- Some corporate legislation (e.g., CNCA) contain rules on keeping electronic records
- ITA contains extensive rules on how charities may keep electronic records

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(c) Where to keep records

 Some corporate legislation (e.g., CNCA) contain rules on where records may be kept

 ITA contains rules that trump the rules in corporate legislations - Registered charities must keep their books and records in Canada at an address in Canada recorded with CRA, but does <u>not</u> permit electronic records to be kept outside Canada even if they can be accessed within Canada

(d) What language must books and records be kept in

- CRA suggests, but does not state, that books and records <u>should</u> be kept in English or French and translated from a third language
- CRA may consider exceptions if translation requirements impose a "significant burden"

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(e) Who keeps records, Who has access

- · Privacy and confidentially concerns?
- If a charity hires a third party to keep or maintain its records, the charity is still responsible

(f) How and when to destroy records

- Develop a plan for destroying old records
- · Adhere to retention schedule
- Issues: privacy and confidentially, permanent destruction, security (no unintended access by 3rd parties)

(g) How long to keep records

- Some legislation (e.g., CNCA) contain rules on how long records must be kept
- ITA has detailed requirements Regulation 5800 and s.
 230 set out the retention periods for keeping records

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Retention Periods for QDs' Books and Records REGISTERED OTHER TYPE OF RECOMMENDED BOOK OR RECORD CHARITY, RCAAA, & QDS RETENTION PERIOD RNASO Governing documents 2 years after revocation or 2 years after corporate 10 years after revocation or corporate dissolution dissolution or 6 years from 5 years after corporate end of tax year ceased to dissolution exist Minutes 2 years after revocation or 2 years after corporate 5 years after corporate corporate dissolution dissolution or 6 years after dissolution or revocation or ceased to exist 10 years after ceased to exist 5 years after corporate General ledger or book of 2 years after revocation or 2 years after corporate final entry corporate dissolution or 6 dissolution or 6 years after dissolution or revocation or years after ceased to exist ceased to exist 10 years after ceased to exist **Duplicate receipts** 2 years after year gift made 2 years after year gift made 5 years after year gift made



Retention Periods for QDs' Books and Records

TYPE OF BOOK OR RECORD	REGISTERED CHARITY (INCLUDING RCAAA & RNASO) & OTHER QDS	RECOMMENDED RETENTION PERIOD
Supporting status under ITA	2 years after corporate dissolution or 6 years after ceased to exist	5 years after corporate dissolution or 10 years after ceased to exist
Verification of donation tax credits and deductions	6 years after end of tax year related or 2 years after revocation or dissolution	10 years after tax year related or 5 years after revocation or dissolution or indefinitely for certain gifts and endowments
Information returns	6 years after end of tax year related or 2 years after revocation or dissolution	10 years after tax year related or 5 years after revocation or dissolution

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- Charities may want to retain certain books and records beyond the required periods for various reasons
 - Demonstrate due diligence in the event the charity or one of its donors is audited
 - Defend a lawsuit or support an insurance claim
 - Preserve organizational memory
 - Establish a paper trail to show directors' decisions were in line with restricted charitable purpose trusts
 - Compliance with donors' intent and gift restrictions
 - Limitation periods that a law suit can be commenced
 - Third party requirements, e.g., umbrella organization
 - Other statutory requirements, e.g., special records retention requirements for "public bodies" under the Ontario Archives and Recordkeeping Act, 2006 (e.g., Ontario ministries, commissions)

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3. Developing Books and Records Policy

- Review requirements on what books and records are required to be kept
- Gather all records and categorize them in a logical manner - What if records were lost?
- Review applicable maintenance and retention requirements for each type of records
- Needs to strike balance retain full and accurate records vs avoid perpetually retaining an everincreasing number of records and comply with applicable legislation
- Develop a written policy, each organization is different, no one-size fits all policy, depends on the needs and circumstances of the organization

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- Circulate draft policy to board, staff, IT, etc. for comments and input, seek legal advice
- · Examples of key areas to be addressed in policy
 - State the purpose of policy
 - Define the scope of the policy records management, retention and destruction
 - Define responsibility roles who is responsible for various areas of compliance
 - Define key principles followed
 - Address records management, retention, destruction
 - Address litigation or investigation hold issues certain circumstances may supersede policies authorizing destruction of records, including the authority granted in the retention schedule
 - Set out records retention schedule

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4. Privacy Issues and Donor Information

- Donor information constitutes personal information that must be respected and protected by the charity
- Who are donors? In addition to those making donations, they can include members, employees, patients, and even customers where a gift is tied to a donation
- Donor information can include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, financial information, name of business, place of employment, preferred donation restrictions and even health information

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- The primary statutory sources of privacy laws are
 - Federal private sector legislation, e.g., Personal Information Protection and Electronic Documents Act
 - Provincial private sector "substantially similar"
 legislation, e.g., Ontario Personal Health Information
 Protection Act and public sector privacy legislation, e.g.,
 Freedom of Information and Protection of Privacy Act
 - Canada's Anti-Spam Legislation
- Other related sources of law that may give rise to obligations when charities deal with donor information, e.g.,
 - Common Law
 - ITA disclosure and books and record obligations
 - National Do-Not-Call List
 - Anti-terrorism and anti-money laundering legislation
 - Sector standards and contractual obligations

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What can go wrong?

- Good intention sharing of personal information with volunteers without appropriate restrictions
- Intentional intrusion by employees
- Cyber attacks
- Information requests by CRA
- Information requests by donor
- Information requests by the press
- Canadian laws concerning the collection and use of donor personal information vary from province to province and are in an ongoing state of flux
- Consider developing privacy and anti-spam policies
- See webinar "Do's and Don'ts of Donor Information" by Terrance Carter and Ryan Prendergast at http://www.carters.ca/pub/webinar/2017/Dos-Donts-of-Donor-Information.pdf

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5. Develop and Implement Gift Acceptance and Other Gift-Related Policies

- A gift acceptance policy can
 - Facilitate gift solicitation and management
 - Ensure legal compliance and risk management
 - Manage donor relations
 - Enhance effective operational management help
 - Evidence due diligence by board and senior management of the charity
- However, a gift acceptance policy that is not implemented is worse than not having a policy at all

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- Topics to be included in a gift acceptance policy
 - Outline duties of directors regarding charitable gifts
 - Outline role of parallel foundation (if applicable)
 - Explain basic receipting rules for reference by staff and volunteers
 - Explain restrictions that may be imposed by donors on gifts
 - Explain endowment and long term funds and donor advised funds
 - Explain policies for various types of gifts
 - Special issues
 - Gift agreements, gift acknowledgement, and other donor related issues
 - When the charity may decline or return a gift
- Use similar approach for other gift-related policies, such as endowment policies, naming policy

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6. Use Checklists

- · Ensures nothing is missed
- Ensures consistent treatment of gifts
- Ensures the checklist is followed and update from time to time

7. Clear Discussion with Donors and Clear Communications with Public

- Offer alternative terms and arrangements
- Stop things early on if there are issues, rather than dealing with aftermath
- Better to decline an inappropriate gift upfront, rather than having to return it
- Do the necessary due diligence so that the charity can issue donation receipt that can withstand scrutiny by CRA

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8. Develop template gift agreements and sample bequest language

- Ensures all gift terms properly documented and complies with all legal requirements
- Ensure consistent treatment of gifts
- Provide template to donors and their advisors
- Update templates from time to time to reflect changes in the law
- Provide sample bequest language to donors & advisors
- Ensures charity is accurately named in Wills
- · Ensures charity can fulfill gift restrictions
- Encourage donors and their advisors to discuss the gifts with the charity in advance of drafting testamentary language

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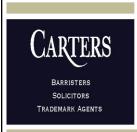
9. What to do with legal opinions?

- Important to protect and not waive solicitor client privilege with regard to legal advice on creating gift documentation or other gifting issues
- Need to ensure legal opinions can be kept protected in the event of litigation over gift documentation or CRA audit
- Keep legal advice confidential, e.g., not provide copies to donors or anyone else

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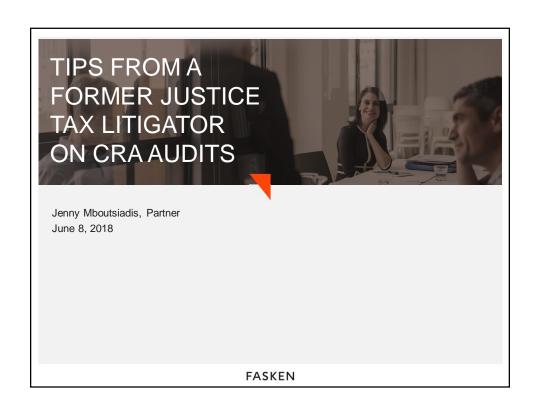
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▼ CRA

- 2016 federal budget directed \$444.4M to CRA
- 2017 federal budget directed another \$523.9M to CRA
- ~2,500 CRA employees are involved in international, large business, and aggressive tax planning audit areas

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▼ CRA

- CRA conducts more than 120,000 audits each year
- Collects \$11 billion in taxes, penalties, and interest
- There are >86,000 registered charities in Canada
- CRA audits ~750 charities a year
 - Random
 - Targeted reviews
 - Follow ups of prior compliance action

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▼ Audit:

- Why invest time and money during an audit?
 - Avoid bad publicity
 - Easy and early opportunity to limit issues

Start of Audit

- · Review carefully Charities Directorate letter advising of audit
- If field audit:
 - · Auditor will propose audit date (can reschedule)
 - · Letter will list documents auditor expects to be available at site
- If desk audit:
 - · Letter will list documents to be sent to auditor for review
 - E.g., financial records and supporting documents, general ledgers, duplicate donation receipts, copies of agreements, governance documents, board & committee minutes

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▼ CRA Access to Docs & Info

CRA has broad powers to obtain docs & info:

- Domestic requirements
 - CRA may request any information or document, including for unnamed persons
- Foreign-based requirements
 - CRA may request information or a document that is available or located outside of Canada

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■ CRA Access to Docs & Info

- Rare to successfully refuse CRA's request
- CRA can ask court to compel charity to produce
- If CRA asks for outrageous amount of documents and information:
 - Be cautious
 - · Determine whether anything is privileged
 - Consider arguing proportionality
 - Try to narrow "first round" of documents

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■ Audit: Tips

- Build rapport with the auditor
- Try to understand and respond directly to auditor's position
- Select a single "Point Person" for the charity
- Answer questions <u>only</u> when you have full answer
- If auditor is going to seek help from HQ, help with facts
- Meet deadlines (all the time)

Audit: Using Legal Counsel

Legal counsel can be useful during an audit:

- · Usually in background
- Importance of advocacy
- · Importance of privilege
- Counterpoint to the single internal "Point Person"
- Provide advice on law
- Benefit from lawyer's experience

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▼ Audit: Tips

If charity and auditor disagree on law and charity is confident of its position:

- Can ask the auditor to seek an internal legal opinion
 - Legal opinion may come from DOJ or CRA Legal Services
 - Charity does not have access to the opinion



Object to a Reassessment

- Charity can object to a reassessment to the CRA's Appeals Division
- · Appeals Division's mandate is:

"To provide a fair and impartial process to resolve disputes, service complaints and requests for relief arising from decisions made under the legislation and programs administered, and services provided by the CRA."

Notice of Objection

- Object by serving a Notice of Objection
 - · State facts, issues, reasons and relief
 - · Attach copy of Notice of Reassessment
- Notice of Objection goes to the Appeals Officer

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■ Basic Content of Notice of Objection

- · State facts, issues, reasons and relief
- Attach copy of Notice of Reassessment

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Tips for Preparing a Notice of Objection

- · Good time to involve legal counsel
- · Ask for auditor's report and working papers
- · Address auditor's position and concerns head on
- Avoid being verbose
- Attach relevant documents with pages numbered

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Appeals Division

- Notice of Objection goes to Appeals Officer
 - Appeals' decisions are independent of audit function
 - Decisions are based on legislation and policy
 - · Auditor not usually contacted
 - Matter referred back to audit if charity provides new & relevant documents

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Tips Regarding Documents

- Implement a document retention policy
- Maintain books and records
- Maintain contemporaneous evidence of facts required to support the tax position

Tips For Protecting Privilege

- Always mark lawyer communications as privileged
 - On first page
 - In email subject line
- Segregate privileged documents
- Keep separate from transaction documents
- Maintain separate folders in Outlook

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Settlement With the CRA

- Many opportunities for settlement
- Settlement is appropriate when there is:
 - · An error in all or part of the assessment
 - Minister changes her interpretation of the provision at issue
 - · A retroactive amendment to the provision at issue
 - · A precedential court decision has been rendered
 - · Charity provides new documents

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■ Rules of Settlement

- Settlement must comply with the law and be supported by the facts
- No compromise settlements
- Settlement of issue with the CRA means charity cannot object or appeal
- Appeal to Tax Court if settlement is not possible

Tips for Achieving Settlement

- CRA almost always open to discussing settlement
- Be realistic and pragmatic about your position
- A settlement offer must be principled, but you can be creative

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Tips for Achieving Settlement

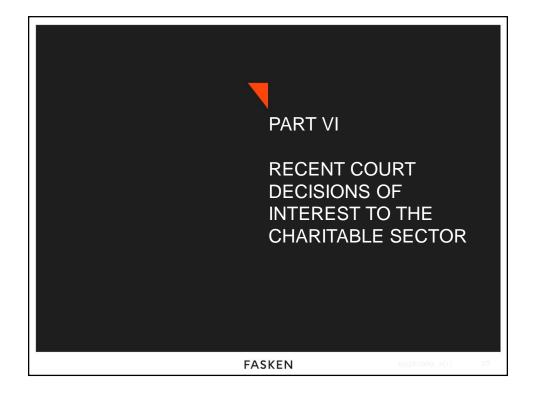
- When working with the Appeals Officer
 - Demonstrate good faith and openness
 - Try to fill in missing documents
 - Make sure Appeals Officer understands your position
 - Can ask Appeals Officer to seek an internal legal opinion
 - Or ask Appeals Officer to seek HQ advice on policy

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Tips for Achieving Settlement

- · Come to settlement meetings prepared
 - Always be polite
 - · Submit offer of settlement ahead of meeting
 - You can settle only some of the issues
 - Do not ignore your case's weaknesses

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▼ Recent Cases

- Ahlul-Bayt Centre, Ottawa v. Canada (National Revenue), 2018 FCA 61
- Humane Society of Canada Foundation v. Minister of National Revenue, 2018 FCA 66

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Carters/Fasken Healthcare Philanthropy Checkup 2018 Toronto - June 8, 2018

Legal Issues in Fundraising on Social Media

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A. INTRODUCTION

- Given the increasing use of social media by charities, this presentation identifies some of the legal risks that can arise with fundraising on social media, as well as the corresponding policies to manage those risks
- The topics that will be covered are:
 - What does fundraising on social media look like?
 - What are the legal issues and risks when fundraising on social media?
 - What can be done to manage the legal risks?



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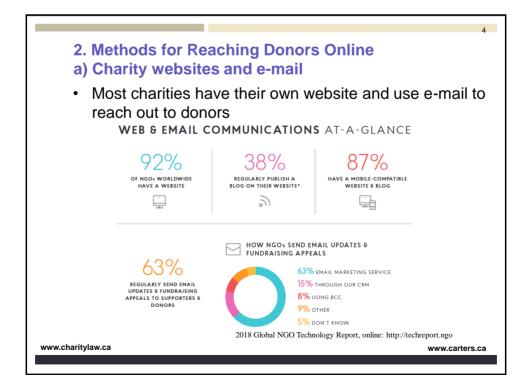
B. WHAT DOES FUNDRAISING ON SOCIAL MEDIA LOOK LIKE?

1. Setting the Stage

- As the Internet is constantly evolving, fundraising on social media is in a continuing state of flux
- Social media builds on and encompasses the full breadth of online communication, and is becoming the key element of different methods for fundraising online
- Charities typically encourage supporters on social media to:
 - visit the charity's own donation website or crowdfunding site to make donations; and
 - share information about the campaign on social media with their friends and families, who would potentially become supporters themselves

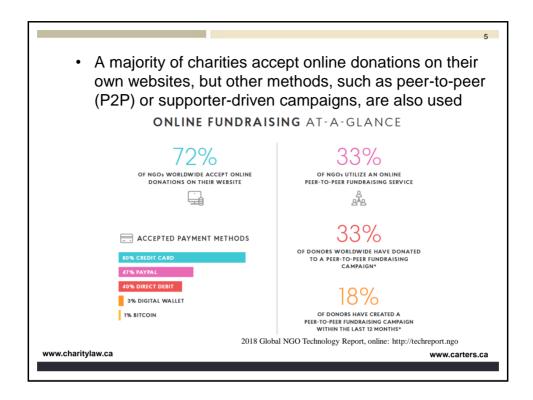
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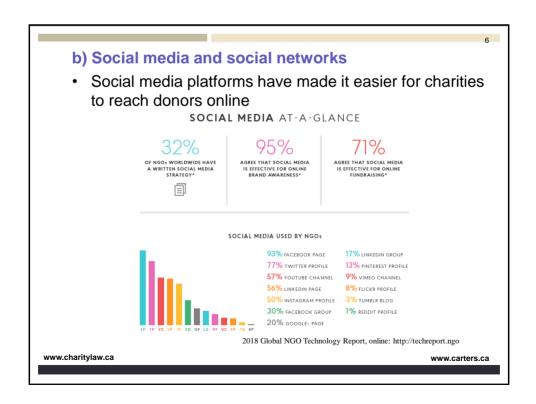
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3. Examples of Fundraising on Social Media a) Crowdfunding

- Crowdfunding involves fundraising by appealing to a "crowd" (broad group or network) of small donors, using the Internet and social media
- Crowdfunding is more commonly used for specific projects with a time-limited campaign strategy
- Crowdfunding generally involves three elements: the campaigner, the crowd, and the platform
- Crowdfunding platforms establish their own terms and the charity's only option is to either accept those terms or not, with no bargaining power
- There are a variety of types of crowdfunding, but charities typically use donation-based or reward-based crowdfunding

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b) Peer-to-Peer (P2P) Fundraising

- P2P fundraising involves empowering supporters of a charity to reach out to the their friends, family and coworkers on social media to endorse a charity or a campaign of a charity as a cause they believe in and to ask their personal network to donate, often including photos and videos of themselves
- The request for support could be for a campaign run by the charity, such as "The Ride to Conquer Cancer", or it can be for the supporter's own campaign, e.g. a Do-It-Yourself (D.I.Y.) campaign
- With a DIY campaign, the supporter takes responsibility for the fundraising event, such as a "walk a-thon" or a "bike a-thon"

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c) Third-party Fundraiser Campaigns

- Similar to a DIY that is done as a P2P platform, thirdparty fundraising campaigns are also undertaken by third-parties as opposed to the charity itself, but has a larger outreach beyond simply friends, relatives and coworkers
- Third-party fundraising events are generally carried out utilizing some type of crowdfunding platform
- Responsibility for the third-party fundraising campaign lies with the third-party as opposed to the charity, and is generally carried out under a third-party fundraising agreement or licence agreement, but not necessarily
- The charity may have little control over the third-party fundraising event

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d) Text to Give

- Because mobile devices are becoming the preferred method of navigating the Internet, some social media crowdfunding campaigns also include "text to give"
 - A social media campaign encourages followers to user their mobile devices to send a paid text message as a donation to the charity, less a service fee to the provider

e) Online Auctions

- These online auctions do not collect small donations from the "crowd", but rely on the "crowd" to bid up the price of their items or events
 - Some examples of these types of platforms are: www.omaze.com and www.charitybuzz.com

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f) Cryptocurrencies and Crypto-philanthropy

- Cryptocurrencies are "virtual currencies" that work as a medium of exchange through cryptographically secured digital records stored on a public, decentralized, distributed digital ledger referred to as a blockchain (said to make the data permanent and tamper-resistant)
- Blockchain technology is also being used to accept donations to charities and trace funds to increase donor confidence
- · Ways in which cryptocurrencies are being used:
 - Accepting donations in cryptocurrency
 - Initial Coin Offerings (ICOs), which involves the charity creating its own cryptocurrency (e.g. Clean Water Coin; Pinkcoin)

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C. WHAT ARE THE LEGAL ISSUES TO CONSIDER WHEN FUNDARAISING ON SOCIAL MEDIA?

1. Data Sharing Issues

- Social media gives a false sense of security about personal information (e.g. a perception that "it is just me and my online friends")
- The reality is that whatever is posted on social media will be shared and become permanent and virtually impossible to erase
- Large data sets are often collected without meaningful consent and later monetized
- IP-protected learning algorithms (artificial intelligence or AI) are able to harvest seemingly innocuous data from social media, sometimes without even the programmers knowing about it, to build profiles of individuals

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- Social media networks' terms of use and privacy policies govern the use and storage of personal information, intellectual property, jurisdiction and more
 - Facebook's terms of use, entitled "Statement of Rights and Responsibilities", state that:

"You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings"

- However, it also includes some revealing "consents":

"You give us permission to use your name, profile picture, content, and information in connection with <u>commercial</u>, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you"

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Similarly, Facebook's Data Policy states:

"we collect different kinds of information from or about you [...] including information about the people and groups you are connected to and how you interact with them [...] location [...] payment information [...] device information [...] information about you and your activities on and off Facebook [that we receive] from third-party partners"

 An excerpt from a privacy policy of a Canadian crowdfunding platform about links to third party websites:

"This website may offer links to other third party websites. You should be aware that <u>operators of linked websites may also collect your personal information</u> (including information generated through the use of cookies) <u>when you link to their websites</u>... [the platform] is not responsible for how such third parties collect, use or disclose your personal information, so it is important to familiarize yourself with their privacy policies before providing them with your personal information"

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- Data sharing invites a number of questions for a charity using social media for fundraising:
 - What are the terms of use that the charity is accepting by using a social media site or an app?
 - Is the charity inappropriately collecting or using aggregate private data from donors, supporters, volunteers or employees?
 - Is the charity fully complying with applicable privacy legislation in encouraging donors, supporters, volunteers, or employees, to share data on social media? (see Privacy Issues below)
 - Could the charity be exposed to liability for unauthorized sharing of data, including possible class action litigation?

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2. Privacy Issues

· Privacy is a key legal issue that arises with any

fundraising campaign, but is particularly relevant in the context of social media

- The rapid pace of the online sharing of information has called into question how social media impacts an individuals' privacy
- The information posted on social media can unintentionally breach applicable privacy law



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a) What is Personal Information?

· "Personal information" is an important concept defined

in privacy legislation as "any information about an identifiable individual"

- It does not include anonymous or non-personal information (i.e., information that cannot be associated with a specific individual)
- Examples include: name, address, social insurance or health numbers, donations, and photos or videos of identifiable individuals



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 Information that has been de-identified or stripped of identifiable markers and anonymized data that cannot be linked back to individual records are treated as nonpersonal information that are not subject to privacy protection

Risk of re-identification always exists

 Aggregated or group-level information may be personal information depending on the sample size



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b) PIPEDA and "Substantially Similar" Provincial Legislation

- The Personal Information Protection and Electronic Documents Act (PIPEDA) is the main private-sector legislation for protecting privacy in all provinces that have not enacted "substantially similar" legislation
- PIPEDA applies to the collection, use or disclosure of personal information in the course of a "commercial activity" - broadly defined as any transaction, act or conduct of a commercial character, and includes the sale, lease or exchange of donor, membership or other fundraising lists
- Guidance documents from the Office of the Privacy Commissioner of Canada (OPC) as well as provincial Privacy Commissioners should also be considered

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- Alberta, British Columbia, and Quebec have passed legislation substantially similar to PIPEDA
- Ontario, New Brunswick, Manitoba and Newfoundland have passed substantially similar legislation with respect to personal health information (e.g. in Ontario, it is the Personal Health Information Protection Act (PHIPA))
- In Ontario, the public-sector *Freedom of Information* and *Protection of Privacy Act* (FIPPA) governs "institutions" (*e.g.* universities and hospitals) and their use of non-health personal information
 - Applies to sharing of information between hospitals and associated foundations for fundraising
 - Freedom of information for accounts records

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c) Key Principles from Privacy Legislation and Fair Information Principles

- A charity is responsible for personal information in its custody and under its control
- Policies and practices regarding the management of personal information must be implemented
- An individual must be designated to oversee compliance with applicable legislation ("Privacy Officer")
- Contracts which provide for the protection of personal information should be in place with any third party, e.g., data processors, partners, affiliates



- Storage outside of Canada involves additional issues
- Books and records requirement for charities

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- Purposes for using personal information must be identified and documented at or before the time the information is collected
- Purposes must be those that "a reasonable person would consider appropriate in the circumstances" considering the sensitivity of the information
- The collection of personal information should be limited to that which is necessary for the purposes identified
- Personal information must be protected by appropriate safeguards
- When personal information that has been collected is used for a new purpose, the consent of the individual is required before the information can be used for that new purpose

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e) Donor Information

- Donor information constitutes personal information that must be respected and protected by the charity, especially in the context of fundraising on social media
- Who are donors? In addition to those making donations, they can include members, employees, patients, and even customers where a gift is tied to a purchase
- Donor information may include the donor name, mailing address, email address, phone numbers, birthdate, name of family members, photos, videos, financial information, name of business, place of employment, preferred donation restrictions, or health information
- Personal information on a third-party platform may also be the responsibility of the charity, depending on the terms of the applicable service agreements

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Develop a record retention policy that considers the charity's use of social media in collecting, using and disclosing donor information

- Donor information forms part of the books and records that charities must keep, subject to applicable statutory retention periods under the *Income Tax Act* (ITA) (e.g., 6 years from the end of the tax year or 2 years from dissolution) and also in accordance with corporate law
- Charities wishing to exchange donor or membership lists with other organizations, whether connected or not, must first obtain express consent from each donor or member
 - If a donor list is obtained from a third party, ensure no computer program was used for scraping websites or generating a list of electronic addresses (address harvesting) in contravention of PIPEDA

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e) Posting Photos/Videos of Children on Social Media

- Images of identifiable individuals, including children, are personal information
- It is standard practice among schools and other entities to request the consent from the child's parent or guardian
- However, no definitive case law yet on whether a waiver signed by a parent is binding on a minor as a matter of public policy, so best to assume that it does not
- Parental consent is still helpful in providing evidence of due diligence
- If a charity does decide to assume the significant risk of photographing/posting images or videos of minors, it must obtain robust consents, including consent to data being stored, accessed or disclosed outside of Canada

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f) Collecting Personal Information from Children on Social Media

- Charities using social media should limit or avoid the online collection of personal information from children,
- Problem of inadvertent collection of personal information
 e.g. many children use their real names
- Recommendations 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 those online advertisers

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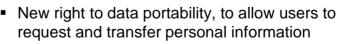
g) General Data Protection Regulation (GDPR)

- New European Union ("EU") General Data Protection Regulation ("GDPR") came into effect May 25, 2018
- GDPR will apply to Canadian charities that collect or process personal data of EU residents to offer goods or services (even at no-charge)
- GDPR requires parental consent to collect, use, disclose ("process") personal information of a child under the age of 16
- Charities 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

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 On February 28, 2018 the House of Commons' Standing Committee on Access to Information, Privacy and Ethics tabled for consideration its report "Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act"

 The Report contains 19 recommendations that would update PIPEDA and align it with GDPR, including the adoption of the following:



- New right to erasure, to allow users especially children - to have their personal information deleted or taken down
- New right to de-indexing, so personal information is not available in online searches

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PIPEDA

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h) Privacy Torts

- 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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i) Breach of Security Safeguards

- As per clause 4.7 of Schedule 1 PIPEDA, "personal information shall be protected by security safeguards appropriate to the sensitivity of the information"
- Amendments to PIPEDA (Division 1.1) and new Regulations, coming into force on November 1, 2018, will provide mandatory procedures for reporting a breach of security safeguards
- A breach of security safeguards is defined as "the loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards [...] or from a failure to establish those safeguards" (PIPEDA s. 2(1))

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3. CASL Issues

 Canada's Anti-Spam Legislation ("CASL") came into force on July 1, 2014



 CASL includes prohibition on the sending of commercial electronic messages ("CEM") unless the sender has express or implied consent and the message contains prescribed information

- A CEM is generally an electronic message that encourages participation in broadly defined "commercial activity"
- Normally, CASL does not apply to social media, but can apply if caught by definition of "electronic address", e.g., Direct Messaging on Twitter, Facebook messenger, LinkedIn messenger, etc.

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- Regulations exclude CEMs that are sent by or on behalf of a registered charity as defined in subsection 248(1) of the ITA and the message has as its <u>primary</u> <u>purpose</u> raising funds for the charity
- Since some electronic messages sent by a charity may be CEMs, it is best to assume CASL will apply, subject to statutory exemptions
- Penalties possible under CASL include monetary penalties of up to \$10,000,000 for corporations and \$1,000,000 for individuals for a violation of the prohibition on sending CEMs or other prohibitions contained within CASL

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4. Intellectual Property Issues

- Register and enforce intellectual property ("IP")
 - The main types of IP that a charity will deal with are trademarks and copyright
 - A charity's trademarks or brand is one of its most important assets - it distinguishes the charity from other organizations
 - With social media, branding reaches a large audience around the world in an instant
 - Failing to register trademarks in all applicable jurisdictions prior to using them online can lead to third parties poaching and registering those marks prior to the owner



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- Hashtags (#YourCharityorCampaign) may need to be protected as registered trademarks
 - Some social media sites, such as Twitter, Facebook and Instagram allow users to tag the content they share with a "hashtag" so it can be grouped together



- Some fundraising campaigns have encouraged supporters to upload photos or share stories on social media using the campaign's hashtag
- Concerns about hashtags include possible hashtag hijacking and/or damage to the brand or reputation of the charity
- Popular hashtags for a charities' name or major campaign can be protected as registered trademarks

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5. Third-Party Fundraising Campaigns

 Several legal issues may arise in a crowdfunding campaign, depending on the circumstances of each case and any agreements with third parties



If the charity allows or encourages supporters to start their own fundraising campaign, is there an appropriate agreement in place to govern that relationship, such as an agency agreement?

- Has the charity reviewed and been satisfied with the applicable crowdfunding platform's terms of service, if a platform is to be utilized?
- Agreements with other third parties, such as sponsors and intermediaries, may give rise to additional issues of relationships

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- Several legal issues arise when third parties, including P2P events, are undertaking fundraising events promoted on social media
- Because the name of the charity is being used in conjunction with the fundraising event by the third party, the charity could be seen as endorsing and/or being responsible for the event as if it was its own
- Some of the legal issues that could come up include
 - Civil liability for injuries at a fundraising event, including the abuse of children
 - Lack of necessary permits to hold an event
 - Misuse of IP as well as failure to exercise control required for appropriate licencing of IP



 Misrepresentation to the public of how much money goes to the charity, i.e. gross or net proceeds

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 Failure to obtain a waiver and/or release from participants for the charity and its board

 Failure to obtain indemnification of the charity and its directors and officers

- Failure of the third party to obtain appropriate insurance coverage that includes the charity and its directors and officers as additional insureds
- Failure to advise the insurer of the charity about the event, possibly resulting in loss of insurance coverage for failure to advise of a material risk
- Lack of appropriate agency appointment for the third party to receive and/or remit funds to the charity
- Failure to monitor and approve the crowdfunding site and/or giving portals with regard to the terms of use
- Lack of ability to audit third-party campaigns

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6. Terms of Use (Contracts of Adhesion)

- · Terms of Use (Contracts of Adhesion) for social media or crowdfunding platforms are "take-it-or-leave-it" contracts
- These terms of use generally cover:
 - Collection, use and storage of personal information, including pictures and videos
 - Use of intellectual property
 - Liability for representations made by the campaigner, and the exclusion of the platform's liability
 - Jurisdiction in case of a dispute
 - Refunds and withdrawal of funds from an account
 - Service fees as a percentage of each donation
 - Assignment of contract by platform to a third party

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Regarding use of IP:

"If you provide material or post content onto the [the platform] website, you are hereby waiving all moral rights you may have in the material you have provided or posted. By providing or posting this material onto [the platform], you hereby grant to [the platform] a nonexclusive, royalty free, perpetual, and irrevocable license which allows [the platform] the right to use, edit, modify, adapt, reproduce, publish, distribute and display such material"

 Similar platforms typically will define "material or content" to include "photos, videos, text, graphics, logos artwork and other audio or visual materials"



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Regarding assignment of the contract to third-parties:

"The Terms, and any rights and licenses granted hereunder, may not be transferred or assigned by any User, but may be assigned by [the platform] without restriction or consent"

· Regarding liability of the campaigner:

"[the platform] merely provides a technology platform to allow Campaign Owners to connect with Contributors. <u>Users</u> who access or use the Services do so at their own volition and <u>are entirely responsible for compliance with applicable law</u>"

"[the platform] makes no representations, warranties or other assertions as to the potential tax deductible status of any Contribution"



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- Charities should review all terms of use carefully with legal counsel before agreeing to those terms
- While online terms of use do not allow for the charity, or any user, to negotiate the terms of service, knowing the limits imposed by these agreements will allow the charity to make better decisions with regard to the most appropriate use of these services
 - The enforceability of online contracts is ultimately to be decided by the courts, including the aspects of the contract determining which courts have jurisdiction and which laws are applicable



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7. Jurisdictional Issues

- Forum selection clauses in social media platforms give rise to important jurisdictional issues
- For example, Facebook's terms of service, state that the laws of the State of California will apply without regard to usual conflict of laws provisions
- In Douez v. Facebook, Inc., 2017 SCC 33, the Supreme Court of Canada was asked to decide whether the forum selection clause contained in Facebook's terms of use prevented a user in British Columbia from bringing a claim against Facebook
 - Since 2011, Facebook members who "liked" a post associated with a business, would have their name and portrait linked to an advertisement on the newsfeeds of that member's friends

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- An action was brought in British Columbia alleging that Facebook used personal information without consent for the purposes of advertising, contrary to s. 3(2) of BC's *Privacy Act*
- The majority of the Supreme Court of Canada held that the forum selection clause was unenforceable
- Also, enforcement of Canadian court decisions in a foreign jurisdiction is not straightforward, and may be subject to further litigation in the home jurisdiction where the online service provider is registered as a corporation (e.g. Google Inc. v Equustek Solutions Inc, 2017 SCC 34, decision by SCC could not be enforced in the US)

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8. CRA Issues

 Relevant considerations by CRA when monitoring charities' online presence:

- Does online content, including social media, indicate programs outside of the stated charitable purposes of the charity?
- Does the website, email or social media provide a link - and therefore by implication have the charity agree and endorse problematic materials?
- Does the website, email or social media content indicate prohibited activities, such as partisan political activities?
- CRA auditors may review social media content for information and data that may support a case for revocation



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CRA issues regarding fundraising:

Does the social media fundraising campaign result in

an undue private benefit that is not necessary, reasonable and proportionate? e.g. a celebrity

 Is the social media fundraising campaign illegal or contrary to public policy, such as criminally fraudulent or that facilitates an abusive tax shelter or terrorism?

- Does the social media campaign, such as crowdfunding, direct gifts to a specific person, family, or other instances of private benevolence?
- Is the social media fundraising campaign deceptive?
- Does the social media fundraising campaign promote an unrelated business?
- Because the terms of use of crowdfunding platforms outside of Canada are not drafted with the ITA or CRA rules in mind, charities should consider:

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- Do the funds received by the charity on a crowdfunding platform constitute a loan, a gift, or a combination?
- Is there an appropriate agency agreement in place to authorize the collection of funds for the charity and/or issue donation receipts?
- When a crowdfunding platform allows a donor to reverse a contribution, is the charity complying with ITA and CRA rules for returning gifts (as well as common law)?
- Is the charity able to comply with restrictions on funds in accordance with common law trust requirements of CRA (and provincial regulators)
 - Is the charity in control of the restricted purpose of a crowdfunding campaign, or has it been delegated to the donor?

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9. Cryptocurrencies and Fundraising

- There are a number of legal issues associated with charities using cryptocurrencies in fundraising
- Receipting issues involving cryptocurrencies:
 - CRA technical interpretation 2013-0514701I7 states that cryptocurrencies are property for purposes of the ITA, but rather than "money" or "currency", they are considered a <u>commodity</u> for tax purposes
 - Donations in cryptocurrencies are, therefore, subject to the rules for gifts-in-kind under CRA's IT-297R2
 Gifts in Kind to Charity and Others and IT-288R2 Gifts of Capital Property to a Charity and Others
 - As such, the fair market value (FMV) of the gift in kind as of the date of the donation must be determined before a tax receipt can be issued to the donor

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- The determination of FMV for cryptocurrency donations could be subject to scrutiny by CRA
- Gifts of cryptocurrency above \$1,000 require an appraisal as generally required for in kind donations
- Other issues, such as the identification of the donor and determining if there is an advantage for purposes of receipting will also need to be considered
- Mining cryptocurrencies by a charity, either directly or through a pooled fund, might not meet the test of an ordinary investment governed by provincial trust legislation (e.g. prudent investor standard in Ontario)
- Initial Coin Offerings (ICOs), which involves the charity creating its own cryptocurrency (e.g. Clean Water Coin; Pinkcoin) will be subject to provincial securities legislation, unless they qualify for an exemption

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Regarding anti-money laundering and anti-terrorist financing issues with cryptocurrencies:

NTI ONEY AUNDERING

Proceeds of Crime (Money Laundering) and Terrorist
 Financing Act provides that Regulations may be enacted "dealing with virtual currencies"

- However, no regulations have been released yet
- Cryptocurrencies also raise issues of cybersecurity:
 - Increased risk of hacking and real world crime (extortion, violence, hostages), due to "privacy" afforded by the blockchain to criminals
 - Since transactions are not reversible, mistakes when completing a transfer incorrectly can be costly
 - There may be directors' and officers' liability for not maintaining appropriate cybersecurity measures

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D. WHAT CAN BE DONE TO MANAGE THE LEGAL RISKS?

- 1. Implementing a Social Media Policy
- Amongst other things, a social media policy may include the following:
 - Rules for the use of IP belonging to the charity
 - Restricted behaviours, such as posting material deemed inappropriate or which could discredit or cause embarrassment to the charity
 - Who is allowed to open a social media account or post "official" social media content on behalf of the charity
 - Use of the charity's name or other trademarks or copyright on social media pages require consent

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- Make reference to other relevant policies such as privacy policy, fundraising, etc.
- Include prohibitions on speaking on behalf of the charity or disparaging the reputation of the charity
- Possibly use of a disclaimer for personal social media posts such as "The views expressed on this website are mine alone and do not necessarily reflect the views of [name of particular charity]"
- Social media content should be reviewed by management on a regular basis
- Be prepared to immediately take down inappropriate content from social media and ban future posts from the persons responsible

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MEDIA

2. Implementing a Privacy Policy

- Charities that are subject to PIPEDA should reflect the 10 principles in the Model Code
- Amongst other things, the public privacy policy should outline the following:



- How personal information will be used, collected, and disclosed, including a document retention policy
- How personal information is safeguarded
- The process for making and handling complaints and requests for personal information
- The process for dealing with, reporting and communicating data breaches
- Identify the Privacy Officer and include contact information

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3. Implementing a CASL Compliance Policy

- Due diligence defence under CASL may help mitigate against liability, or reduce the imposition of a penalty by the Canadian Radio-television and Telecommunications Commission ("CRTC")
- What should a CASL compliant policy include?
 - Establish internal procedures for compliance with CASL, including training and record keeping, specially as it pertains to consent;
 - Establish auditing and monitoring mechanisms for the compliance program(s), including a process for employees to provide feedback to compliance officer;
 - Establish procedures for dealing with third parties

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4. Implementing an Intellectual Property Policy

- Protect IP before posting it online
 - Avoid a costly branding blunder by completing the necessary due diligence ahead of time
 - Conduct trademark clearance searches to ensure marks are not encroaching on others' marks before using them on social media
 - Register all trademarks, copyrights, and domain names to avoid poaching by third parties





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5. Implementing a Policy for Fundraising on Social Media

- Any general fundraising policy should be amended to cover fundraising on social media, including:
 - Cross reference with other policies, such as social media, privacy, intellectual property, CASL
 - Identifying an acceptable presence of the charity on social media, and use of crowdfunding, cryptocurrencies and the different ways in which these may be combined or modified
 - Require supporters participating in a social media campaign to abide by the policies of the charity
- Consider not retaining payment information from donors (e.g. credit cards, banking information), so as to avoid becoming a target of cybercriminals

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 Agreements for third-party fundraisers and P2P campaigns should include, amongst other matters:

 A requirement that third parties protect the personal information of donors in comparable terms as those under the charity's privacy policy

- Require third parties to adopt appropriate risk management policies, such as child protection and/or vulnerable person policies
- The ability of the charity to maintain control over its intellectual property by a limited purpose licence
- Providing adequate insurance for the charity and its directors and officers
- Appropriate waivers and releases, possibly including indemnification of the charity and its directors and officers

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E. CONCLUSION

 Although social media has many benefits for charities, it is important to remember that discretion and common sense should be used when fundraising on social media

- A proactive approach to minimizing potential risks should be taken before a charity embarks on social media fundraising campaigns, including a review of existing insurance policies
- The primary way to manage the risk associated with fundraising on social media is to ensure that the various policies discussed above are implemented and reviewed on a regular basis



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CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS

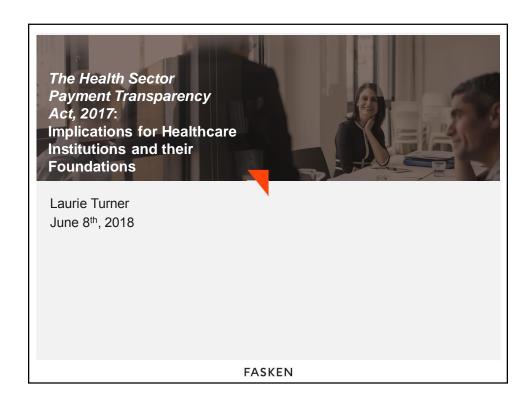
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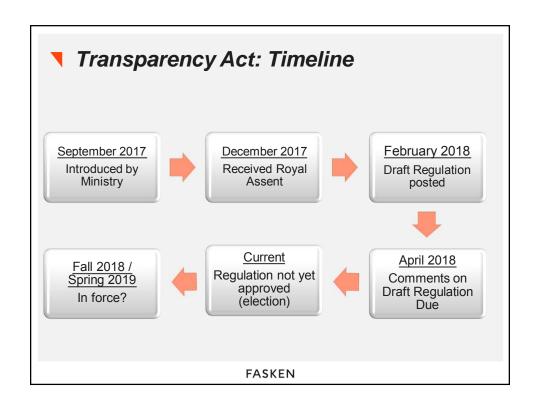
Overview

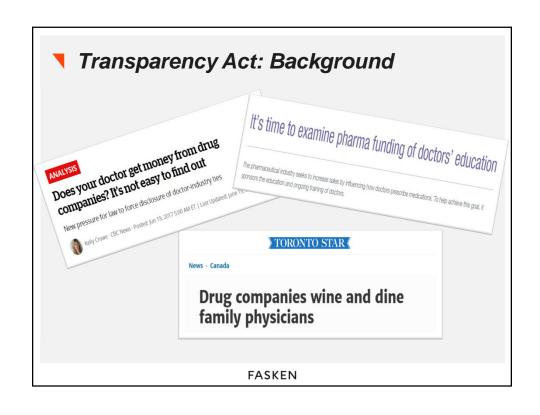
- Introduction to The Health Sector Payment Transparency Act, 2017 (the "Transparency Act")
- Background to the Transparency Act
- Scope of the Transparency Act & Proposed Regulations
- Next Steps
- Round-up & Questions

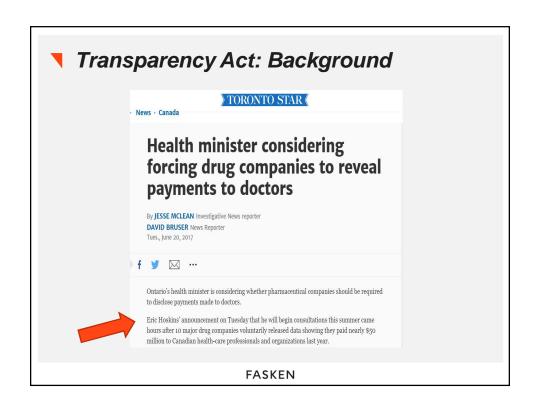


Transparency Act: Introduction

- 1 of 10 pieces of legislation comprising *The Strengthening Quality and Accountability for Patients Act, 2017* (Bill 160)
- According to the Ministry of Health and Long-Term Care (the "Ministry"), Bill 160:
 - ✓ Supports the Ministry's "Patients First: Action Plan for Health Care" (2012)
 - ✓ Will ensure that patients continue to receive quality and accountable health care services







▼ Transparency Act: Background

- Expansion of Ontario's Freedom of Information and Protection of Privacy Act ("FIPPA") to hospitals (2012)
 - Last province to do so (compare to position with Transparency Act)



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Transparency Act: Background

Reach of FIPPA with respect to industry payments...

- Hospitals
- Hospital Foundations
- Physicians
- Health professional associations, etc.



Transparency Act: Scope

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What is the Stated Purpose of the Transparency Act?

- To require reporting of information about financial relationships that exist within the health care system
- To enable the collection, analysis and publication of that information to:
 - ✓ Strengthen transparency to sustain and enhance patient trust in health care providers and the health care system
 - Provide patients with access to information that may assist them with making health care decisions
 - Provide the Minister of Health and others with information for health system research, planning, policy analysis, etc.
 - $\checkmark\,$ Provide for the collection, use and disclosure of personal information for the above purposes

▼ Who is Subject to the Reporting Requirement?

- Applies broadly to persons and organizations that sell or promote medical products (including drugs and medical devices)
 - Manufacturers (and persons who perform manufacturing services on behalf of manufacturers) that sell medical products
 - Wholesalers, distributors, importers, and brokers that promote or facilitate the sale of medical products
 - > Marketing firms or promoters of medical products
 - Persons who organize continuing education events for members of a health profession on behalf of a manufacturer that sells medical products

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▼ When is the Reporting Requirement Triggered?

- When one of the aforementioned persons or organizations provides a transfer of value, directly or indirectly, to a <u>prescribed</u> recipient
- Draft regulation includes a lengthy list of recipients



Proposed Recipients

• Including (but not limited to):

A foundation or other health charity	Researchers or non-profit health research institute / organization
Hospitals	Long-term care homes
Health professionals	Pharmacy operators
Universities, colleges	Group purchasing or share services organizations
Associations that advocate for the interests of health care professionals or organizations	Individuals who are board members, directors, officers, appointees, employees or agents of any of the foregoing

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▼ What Types of Transfers of Value Must be Reported?

- "Transfer of value" is broadly defined in the Act to include payments, benefits, gifts, advantages, and perquisites
- Draft regulations list the prescribed benefits that must be reported

Benefits to be Reported (Proposed)

- · Including (but not limited to):
 - Grants and donations
 C
 m
- Charitable contributions made in the name of a recipient*
 - In-kind items or services Honoraria
 - Event sponsorships
- Value add-ins provided in connection with a procurement
- Rebates and discounts
- Compensation for services
- Exceptions: transactions with dollar value less than \$10; products provided to patients free of charge; educational materials to be used for the benefit of patients

*Within the meaning of the Transparency Act

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■ What Types of Information Must be Reported?

- Proposed Regulation requires the following information to be reported:
 - ✓ The names of the parties to the transaction
 - √ The parties' business addresses
 - ✓ The date of the transfer of value
 - √ The dollar value of the transfer of value (or the approximate dollar value in the case of a non-monetary transfer of value)
 - ✓ Any intermediaries that are parties to the transaction

Note: Optional contextual statement limited to 250 characters to further describe reason for transfer

Other Details of Proposed Regulation

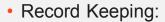
- Payors will be required to provide written notice to recipients of the information it intends to report no later than March 31st (in respect of the previous reporting year) and provide for at least 45 days for review
- Recipient will be afforded a right to request correction (to be accompanied by substantiating materials); if parties do not agree, then request can be made for information to be marked as "disputed"
- The Minister is required to comply with the notice provisions of FIPPA in respect of personal information indirectly collected in reports under the Transparency Act

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How Will the Act be Enforced?

- The Minister is empowered to appoint inspectors who may, without a warrant, enter premises to examine and make copies of records relating to transfers of value that are subject to the reporting requirement
- Inspectors may question any person and audit the accounts of the parties to a transfer of value, intermediaries, and their respective affiliates
- Parties subject to inspection must cooperate and provide reasonable assistance to an inspector

▼ Next Steps…



- Draft Regulation requires records created or received in respect of the transfer of value to be retained by both payors <u>and recipients</u> for at least 7 years from the date of the transaction
- Records to be drawn on where dispute regarding transfers of value (corrections records must also be retained as above)

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■ Next Steps…

- Review, revise and/or develop policies pertaining to transfers of value
- Revisit relationships and contracts (including standard form) with "suppliers"
- Provide education and forum for discussions regarding new legislation (board, staff, stakeholders)

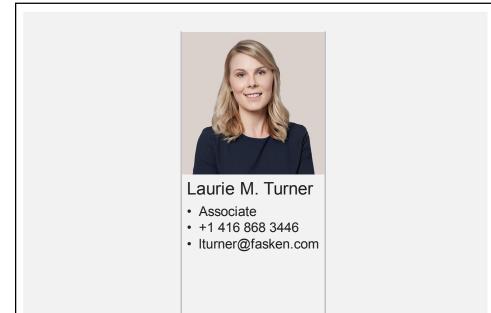


Next Steps...

- Cost planning for compliance?
- Pre-emptive reporting?
- Additional reporting?







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BULLETIN

Changes to Support Social Investing by Charities

READING TIME
4 MINUTE READ



Charities and Not-For-Profit Bulletin

NOVEMBER 23, 2017

On November 14, 2017, the Ontario government gave Royal Assent to Bill 154, the *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154").

Among other changes (see our previous bulletins: Ontario's Not-for-Profit Sector Will Soon See Changes to the Corporations Act and Not-For-Profit Corporations Act and Update: Changes Affecting Ontario's Not-for-Profit Sector Come into Effect 127), Bill 154 amends the Charities Accounting Act to give Ontario charities more latitude to make social investments. The term 'social investment' refers to an investment that is made to directly further the purposes of the charity and to achieve a financial return. Many in the charities sector are familiar with the concept, which is sometimes also referred to as social impact investing or mission-related investing.

Background

As a general rule, directors or trustees of charities in Ontario must invest in accordance with the prudent investment standard—that is, a director or trustee must exercise the "care, skill, diligence and judgment that a prudent investor would exercise in making investments". The *Trustee Act* requires that investment portfolios be appropriately diversified and that various criteria be considered before making investments.

Even before the recent amendments, the general consensus has been that most charities could make investments with a dual purpose of financial return and furthering a charity's purpose(s). However, there was some residual uncertainty about how the prudent investor standard should be applied to social investments. As such, the clarifications in Bill 154 are welcome.

New Social Investment Standards

The new sections in the Charities Accounting Act provide that directors and trustees of charities can generally make social investments, unless limited or excluded from doing so by the charity's governing documents. Where the funds in question are subject to a limitation on capital being expended (i.e. endowment funds), the director or trustee must "[expect] that making the social investment will not contravene the limitation or the terms of trust allow for such an investment".

As noted above, a social investment combines the aims of financial return and furthering one or more of the charity's charitable purpose(s). A social investment will be considered to achieve a financial return "if the outcome in respect of the trust property is better for the trust in financial terms than expending all the property." This means that, at least as far as the provincial rules are concerned, a social investment does not need to be made with the expectation of a market-rate return. At the same time, registered charities will need to continue to be mindful of the Canada Revenue Agency's restrictions on non-fair market value transactions with non-qualified donees (see below).

When an investment is a "social investment", most of the usual prudent investor standards and criteria in the Trustee Act will not apply. Instead, directors or trustees who make social investments will be subject to the following duties under the Charities Accounting Act (which cannot be restricted or excluded):

before making the investment, they must be satisfied that the social investment is in the best interests of the charity;

before making the investment, they must seek advice if needed; and

after making the investment, they must review the investment from time to time and seek advice in relation to such reviews as required.

The new sections provide that a director or trustee will not be liable for a loss arising from a social investment if, in doing so, the director or trustee acted honestly and in good faith in accordance with applicable requirements of the *Charities Accounting Act* and the governing documents of the charity. The sections also confirm that it is not a breach of trust for a director or trustee to rely on advice obtained in accordance with the above-mentioned requirements.

It is important to note that the changes do not affect the requirements under the *Income Tax Act* (Canada) that registered charities only use their resources:

to make gifts or grants to qualified donees (including other registered charities); or

for their own charitable activities.

The position of the Canada Revenue Agency (the "CRA") is generally that registered charities cannot make investments on below-market terms in non-qualified donees (e.g. a below-market rate loan), because such arrangements can effectively confer a 'gift' or other undue private benefit to the person or entity that is receiving the investment. It is somewhat unclear how the Ontario and federal regimes will work together, and further guidance from the Ontario Public Guardian and Trustee (and CRA) would be helpful in this regard. For now, it seems that registered charities will still likely need to ensure that terms are 'market' unless the social investment is made with a qualified donee or is structured as a "program-related investment" consistent with CRA's requirements.[1]

The control of the Canada Revenue Agency (the "CRA") is generally that registered charities cannot make investments on below-market terms in non-qualified donee or 'gift' or other undue private benefit to the person or entity that is receiving the investment. It is somewhat unclear how the Ontario and federal regimes will work together, and further guidance from the Ontario Public Guardian and Trustee (and CRA) would be helpful in this regard. For now, it seems that registered charities will still likely need to ensure that terms are 'market' unless the social investment is made with a qualified donee or is structured as a "program-related investment" consistent with CRA's requirements.

Implications

The amendments introduced by Bill 154 are part of a broader trend to support more innovative methods of advancing charitable and other social good aims, including through social enterprise and social finance. The *Charities Accounting Act* amendments are very similar to changes made in 2016 through the *Charities (Protection and Social Investment) Act 2016* to permit social investments by UK charity trustees.

Prior to Bill 154, it was generally accepted that social investing could, in many cases, be carried out while still meeting the usual investment standards of the *Trustee Act*. Still, it is a welcome development to see this perspective confirmed (and potentially expanded) in statute. With a somewhat clearer legal framework, Ontario charities may be more inclined to consider including social investments in their investment portfolios in the future.

[1] Z See: Guidance CG-014 Community economic development activities and charitable registration.

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BULLETIN

Update: Changes Affecting Ontario's Not-For-Profit Sector Come into Effect

READING TIME

1 MINUTE READ

Overview

Charities and Not-For-Profit Bulletin

Bill 154 passed third reading on November 1, 2017 and received Royal Assent on November 14, 2017.

We previously reported on Bill 154's proposed amendments to the *Corporations Act* and *Not-for-Profit Corporations Act*. The Bill passed with no substantive change from the version of the Bill that was first introduced. See our previous bulletin detailing the changes \(\mathbb{Z} \).

The changes to the Corporations Act (Ontario) highlighted in our previous bulletin will be effective as follows:

Effective from November 14, 2017	Effective January 13, 2018 (60 days from date of Royal Assent)
Members meetings can be held by tele- or video-conference Directors need not be members if so provided in the by-laws Directors can be removed by majority rather than two-thirds vote Clarification that charities laws and other laws that govern a not-for-profit will prevail if there is a conflict between the Corporations Act (Ontario) and that other law Corporations permitted to adopt pre-incorporation contracts entered into on behalf of the corporation	Amendments setting out duties and standard of care of directors and officers Amendments that clarify that not-forprofit corporations have the capacity, rights, powers and privileges of a natural person Option to opt out of audit requirements for small corporations in certain circumstances

Related Solutions

Industries

Health

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BULLETIN

Ontario's Not-For-Profit Sector Will Soon See Changes to the Corporations Act and Not-For-Profit Corporations Act

READING TIME
6 MINUTE READ

Overview

Charities and Not-For-Profit Bulletin

OCTOBER 4, 2017

On September 14, 2017, the Ontario government introduced Bill 154, the *Cutting Unnecessary Red Tape Act* ("Bill 154"). Bill 154 includes a number of changes to modernize the governance rules for Ontario-incorporated charities and not-for-profits (referred to in this Bulletin as "not-for-profits").

The Not-for-Profit Corporations Act (the "ONCA") (which is not yet in force) will be amended to address some outstanding technical and other issues in preparation for ONCA's eventual proclamation. Bill 154 will also modernize some of the more outdated requirements of the Ontario Corporations Act (the "OCA")—which currently governs Ontario not-for-profits—in the meantime.

The full text of Bill 154 can be found here ...

▼ Modernization of Existing Law

The OCA currently governs most Ontario not-for-profit corporations. The ONCA will, once in force, replace the OCA and modernize the regulatory framework for Ontario not-for-profits. However, although the ONCA received final Royal Assent in October 2010, its proclamation has been delayed several times.

Bill 154 is proposing some modernizations to the OCA in the meantime:

Members meetings can be held by tele- or video-conference - A meeting of members would be permitted to be held by telephonic or electronic means, unless the by-laws of a corporation provide otherwise.

Directors need not be members - Bill 154 would permit not-for-profits to provide, in their by-laws, that a person may be a director even if he or she is not a shareholder or member.

Removal of directors by majority vote - Currently the OCA requires a two-thirds vote for the members to remove a director (other than an ex officio director) from office—this would be amended to a majority vote.

Duties and standard of care - The amendments would set out the duties and standard of care of the directors and officers, which is to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These are existing duties under common law, but the changes would make them explicit in the OCA. A director or officer cannot be relieved of these duties (including the duty to act in accordance with the OCA) by a contract, by-law or other similar document.

Relationship with other Acts and charities law - Bill 154 would explicitly clarify that charities laws and other laws that govern a not-for-profit will prevail if there is a conflict between the OCA and that other law.

Corporate capacity - The amendments would clearly provide that not-for-profit corporations have the capacity, rights, powers and privileges of a natural person and a corporation's acts are valid even if the corporation has acted contrary to the letters patent (or other incorporating document), by-laws or the OCA.

Option to opt out of audit requirements for small corporations - The proposed amendments would permit the members of corporations with annual revenues not exceeding \$100,000 (or other prescribed amount) to forego an audit by an extraordinary resolution (approved by at least 80% of votes cast at a meeting of members, or consented to in writing by all members entitled to vote on the resolution).

Pre-incorporation contracts - Bill 154 would allow corporations to adopt pre-incorporation contracts entered into on behalf of the corporation.

Proposed Amendments to the ONCA

In the fall of 2015, the Ministry committed to providing the sector with at least 24 months' notice before it proclaims the ONCA in force. The Ministry is upgrading its technology to support better access to online filing, etc. and has indicated it wants to have those upgrades in place before proclamation. This means that even once the amendments are passed, it will be some time before the ONCA is effective.

Bill 154 aims to address concerns raised about the ONCA.[1] &

Bill 154's key amendments to the ONCA are set out below:

Delayed implementation of voting rights for non-voting members and class vote rights - The ONCA will extend certain voting rights to non-voting members and will also require class votes on certain corporate changes. As it was passed in 2010, the ONCA would have made these rights effective immediately when the ONCA came into force. Bill 154 would provide instead that these rights not be proclaimed in force until at least three years from the proclamation date of rest of the ONCA. The delay would give time to not-for-profits who have not already done so to evaluate and update their governance structures as needed.

Corporations are allowed to limit use of proxies - Bill 154 proposes to restrict the right to vote by proxies by providing that: (i) this method of voting will only be available if the articles or by-laws permit proxies and (ii) the articles or by-laws may require that a proxyholder be a member. It would also remove the requirement for a form of proxy to be circulated with notice of members' meetings.

Director consents must be in writing - Bill 154 would clarify that directors' consents to serve on the board must be in writing. The ONCA was unclear as to whether consents had to be in writing or could be given in another form. Bill 154 would also give the Government the power to require corporations to file consents with the Ministry in the future.

Regulatory flexibility - Under Bill 154, the Minister would have the power to prescribe a different time period for circulating the approved financial statements to the members in regulation—currently this time period is 21 days. Similarly, Bill 154 would provide that the ONCA's current \$10,000 threshold relating to the definition of a non-charitable public benefit corporation can be changed by regulation. The Government will have expanded powers to do other things through regulation or to set other requirements (e.g. to set required content of forms, requirements for the execution and methods of filing of documents, etc.).

Clarity on transition process - Bill 154 would clarify the process for existing OCA not-for-profits to transition to the ONCA. The proposed updates would provide that existing letters patent, by-laws and special resolutions that were valid before the ONCA came into force, will continue to be valid for three years following proclamation. After that date, conflicting provisions will be deemed to be amended to the extent necessary to conform with all requirements of the ONCA. We had assumed this was the case, and a similar clarification had been previously put forward. Bill 154 would also require that provisions currently set out in by-laws or a special resolution—but which the ONCA requires to be in the articles—be so added before the end of the transition period. If this is not done, those provisions will be invalid—with an exception to this general rule for certain types of provisions (e.g. number of directors, member voting rights).

Class vote to approve continuance for share-capital corporations with social objects - Bill 154 would amend the OCA to provide that share-capital corporations incorporated under that Act that have wholly or partly social objects (referred to as a "social company") will have 5 years to continue under the ONCA (as a non-share capital corporation), the Co-operative Corporations Act (as a co-operative) or the Business Corporations Act (the "OBCA") (as a share-capital corporation). If a social company has more than one class of shareholders, Bill 154 would add a requirement that the special resolution to authorize continuance be approved by each class of shareholders by a separate vote.

There are other updates across various corporate statutes, for example, to better account for electronic documentation and filing and to contemplate electronic signatures.

At this time, Bill 154 has passed First Reading so it is possible that further amendments will be made as the Bill progresses. We will keep you apprised as the Bill progresses.

[1] The government previously introduced a bill in 2013 that aimed to fix these issues, but the bill (Bill 85) died when the election was called in 2014. The changes introduced under Bill 154 are similar to those previously proposed in Bill 85.

▼ Related Solutions

Industries

Health

Health Care Charities and Not-For-Profits

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BULLETIN

Ontario Court Upholds Requirement that Physicians Provide an Effective Referral, and Comments on the Legal Status of CPSO Policies

READING TIME
7 MINUTE READ

Overview

Health Bulletin

MARCH 13, 2018

On January 31, 2018, the Divisional Court of Ontario (the "Court") released its decision in *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2018 ONSC 579*

. The applicants, individual physicians and three national associations of physicians aligned on religious grounds, challenged the constitutionality of policies of the College of Physicians and Surgeons of Ontario ("CPSO") that require physicians who object on moral or religious grounds to providing certain medical services to make an effective referral to a non-objecting health care practitioner. The Court dismissed the application, concluding that the infringement of religious freedom was demonstrably justified. In doing so, the Court commented on the legal force of CPSO policies. An application for leave to appeal was filed in the Ontario Court of Appeal on February 20, 2018. We will provide updates as this matter progresses.

The CPSO Policies

The Court considered two CPSO policies:

- 1. Policy Statement #2-15 🗹 (the "Human Rights Policy"); and
- 2. Policy Statement #4-16 & (the "MAID Policy").

(collectively, the "Policies")

The Human Rights Policy requires that physicians who are unwilling to offer care for reasons of conscience or religion provide an effective referral. It also requires physicians to provide care in an emergency even if that care conflicts with their conscience or religious beliefs. The applicants argued that the Human Rights Policy requires them to provide patients with access to services such as abortion, contraception, fertility treatments, prenatal screening and transgender treatments, contrary to their objections on religious grounds.

The MAID Policy was adopted by the CPSO following the decision in Carter v. Canada, 2015 SCC 5 and the subsequent amendments to federal law under Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying). For an in-depth overview of Bill C-14, read our earlier bulletin (An In-Depth Overview of Bill C-14 Medical Assistance in Dying and Dying and Dying are physician declines to provide medical assistance in dying for reasons of conscience or religion, the physician must provide an effective referral.

The Court did not address in detail the emergency provisions of the Human Rights Policy, finding that there was no factual foundation to establish an infringement of the rights of religious physicians, and that the emergency provisions directly engage a patient's right to life under section 7 of the *Charter*. The bulk of the Court's analysis concerned the requirement for effective referral in the Policies.

The Legal Force of the Policies

Before turning to the constitutional issue, the Court assessed the legal effect of CPSO policies. The Court determined that the Policies establish the CPSO's expectations of physician behaviour and are intended to have normative force. The Court went on to distinguish the Policies from regulations and from a "code, standard or guideline relating to the standards of practice of the profession" adopted by the CPSO and enforceable pursuant to section 95(1.1) of the Health Professions Procedural Code, being Schedule 2 to the *Regulated Health Professions Act*, 1991. Non-compliance with the Policies is not a specific act of professional misconduct. While the Policies may be used as evidence of professional standards and the expectations of medical professionalism, a physician would be able to argue that, on the facts of a particular case, failure to uphold the Policies did not constitute professional misconduct.

The CPSO acknowledged, and the Court agreed, that the *Charter* applies to the Policies because the Policies are within the CPSO's statutory mandate and therefore governmental in nature. The Court went on to observe that the CPSO not only has authority, but also has an obligation, to provide its members with guidance regarding the manner of compliance with *Charter* values in the practice of medicine, including the furtherance of equitable access to health care services.

▼ The Standard of Review

The Court determined that it was assessing a particular "law" for compliance with the Charter, rather than an administrative decision, and therefore it should apply a standard of correctness in reviewing the Policies. Under review was whether the Policies unduly infringe the Charter rights and freedoms of the applicants, rather than the constitutionality of the decision of CPSO to adopt the Policies. While the Policies do not establish legally binding rules, the Court found that the more important consideration was that the Policies are expected to be persuasive in disciplinary hearings and therefore engage a constitutional question of law that is of general importance: the appropriate balance between the right of religious freedom or equality rights of a medical professional and the right of patients to equitable access to health care services.

The Constitutional Issues

■ The Policies Infringe the Right to Freedom of Religion But Not Equality

The Court determined that the Policies infringe the religious freedom of the individual applicants under section 2(a) of the *Charter*. The Court rejected the CPSO's argument that the burden imposed on the applicants was "trivial or insubstantial" because of the absence of a specific penalty for non-compliance with the Policies. The Court held that the "moral suasion" associated with the Policies would be important enough in discipline to engage *Charter* protection.

The Court rejected the applicants' submission that the Polices infringe their right to equality under section 15 of the *Charter*. Even if the effective referral requirements create a distinction between objecting physicians and all other physicians, the Policies are an attempt to take into account the circumstances of the objecting physicians rather than to discriminate against them. Their claim "does not arise from any demeaning stereotype but from a neutral and rationally defensible policy choice".

The Infringement is Justified

The Court held that the limit on religious freedom imposed on objecting religious physicians as a result of the effective referral requirements is justified by the goal of ensuring access to health care. It therefore concluded that the infringement of the applicants' freedom of religion was justified under section 1 of the Charter.

The Policies Have an Objective of Sufficient Importance

After concluding that the Policies were prescribed by law, the Court found that the objective of the Policies is of sufficient importance to warrant overriding rights of religious freedom. The Court observed that while there is no right to a particular medical service under the provincial health system, there is a right to equitable access to such services as the government chooses to make available. The Court observed that physicians are "gatekeepers" of health care services and have an obligation not to abandon their patients or put their interests ahead of the interests of their patients. The Court determined that based on the evidence there was a real risk of depriving people of equitable access to health care, particularly for vulnerable members of society, in the absence of the effective referral requirements.

The Means Chosen are Reasonable and Demonstrably Justified

The Court also concluded that the effective referral provisions are rationally connected to the objective of the Policies. The Policies guide physicians on how to uphold their professional and ethical obligations and it is reasonable to conclude that they facilitate patient access to care.

The Court reviewed alternative models considered by the CPSO and found that the effective referral requirement minimally impairs religious freedom. While other regulators in Canada have developed policies that are arguably less restrictive of physicians' religious and conscientious freedom, the CPSO should not be deprived of its statutorily-mandated authority to make its own reasonable and informed decisions regarding complex policy issues.

Finally, the Court assessed the proportionality of the objective of the Policies and the effects on the applicants. The Court found that effective referral will make a positive difference in ensuring access to health care. The applicants argued that objecting physicians will be required to choose between violating their beliefs and risking professional discipline. They further argued that certain objecting physicians will be forced to leave the particular field of medicine in which the physicians currently practise. On this issue, the Court held that while the *Charter* confers a right to equitable access to medical services, the applicants do not have a right, at common law or under the constitution, to the practice of medicine. A medical licence is granted by statute and subject to regulation by the CPSO with a view to protecting the public interest. The Court found that access, particularly equitable access, was a goal that should not be lightly compromised. While objecting physicians will experience an impact on their professional lives, they are not deprived of continuing to carry on the practice of medicine in Ontario in accordance with their beliefs.

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BULLETIN

Draft Regulations Issued under Ontario's Health Sector Payment Transparency Act, 2017

READING TIME

3 MINUTE READ

Overview

Health and Life Sciences Bulletin

MARCH 8, 2018

We previously reported on Ontario's Health Sector Payment Transparency Act, 2017 (the "Act"), which will require reporting of "transfers of value" from the pharmaceutical and medical device industries to prescribed "recipients" (whether directly or through an intermediary). Transfers of value are broadly defined in the Act to include payments, benefits, gifts, advantages, and perquisites or any other prescribed benefit. Although the legislation was passed on December 12, 2017, it is not yet in force, pending issuance of regulations defining, among other things, the meaning of the term "recipient".

Last week, Ontario published for consultation, draft regulations which contain an exhaustive list of persons and entities that constitute recipients. The list includes the following:

Physicians, nurses, dentists (and other Healthcare professionals that are members of colleges) and their professional corporations

Hospital operators

Long-term care home operators

Various not-for-profit entities that operate clinics or provide health services (e.g. nurse-practitioner clinics)

Independent health facilities

Pharmacy operators

Owners/operators of laboratories and specimen collection centres

Healthcare professional associations

Advocacy groups relating to particular diseases

Group purchasing organizations

Universities

Individuals who are board members, directors, officers, appointees, employees or agents of any of the foregoing

We note that some of the recipients (e.g. healthcare professional associations and advocacy groups) need not be Ontario-based, which presumably means that transfers of value made to these recipients will have to be allocated between Ontario and other jurisdictions.

The draft regulations provide a list of prescribed benefits that will have to be reported, including: cash, in-kind items or services, compensation for services, honoraria, grants and donations, event sponsorships, membership fees, rebates and discounts, value-adds provided in connection with a procurement, supplies and equipment, leases for supplies and equipment lasting more than 90 days, entertainment, food and beverages, travel and accommodation, gifts, royalties and inventory listing or stocking fees. Only transactions with a dollar value of less than \$10 need not be reported. There are otherwise very limited exceptions to the reporting requirement (e.g. payment of salary/benefits under a contract of service, products to be provided to

patients free of charge, educational materials to be used for the benefit of patients (e.g. anatomical models)). A notable exception is payments made by drug manufacturers in accordance with ordinary commercial terms as permitted under the Ontario Drug Benefit Act in relation to interchangeable drug products.

Under the Act, the information that must be reported consists of: (i) the names of the parties to the transaction (whether a party is a business or an individual); (ii) the parties' business addresses; (iii) the date of the transfer of value; (iv) the dollar value of the transfer of value (or the approximate dollar value in the case of a non-monetary transfer of value); and (v) a description of the transfer of value, including the reasons for the transfer of value. The draft regulations require reporting of additional information in relation to classification of the transfers of value (e.g. fees for service as speaker, fees for professional services and consulting, research (including clinical trials), food and beverage, gift and entertainment, grants, education, operational support, etc). According to the draft regulations, reports will need to be filed annually.

The broad categories of recipients that trigger the reporting requirement, the expansive definition of transfers of value, as well as the detailed reporting requirements imposed by the draft regulations represent a significant burden for the pharmaceutical and medical device industries.

The government is seeking feedback on the draft regulations by April 6, 2018.

Related Solutions

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CECTIONS

CHARITY & NFP LAW UPDATE

MAY 2018

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RYAN M. PRENDERGAST AND ADRIEL N. CLAYTON

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

MAY 2018

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Healthcare Philanthropy Seminar

Friday, June 8, 2018

Co-hosted by Carters and Fasken in Toronto. Click here for registration details

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RECENT PUBLICATIONS AND NEWS RELEASES

OPGT Releases Guidance on Payments to Directors

By Ryan M. Prendergast

Amendments to Ontario Regulation 4/01 (the "Regulation") to the *Charities Accounting Act* (the "CAA") came into force on April 1, 2018, providing relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them. As a result, in the circumstances outlined in s. 2.1 of the Regulation, charitable corporations are now permitted to make certain authorized payments to directors and related persons without first obtaining a s. 13 consent order under the CAA to permit such payments.

Included in the amendments to the Regulation is a requirement under s. 2.1(6)(c) for charitable corporations to consider any guidance respecting payments when approving such payments to directors or connected persons. In this regard, the Office of the Public Guardian and Trustee published a guidance, "Payments to Directors & Connected Persons" (the "Guidance"), in late May 2018. The Guidance is set out as 19 sections that elaborate upon s. 2.1 of the Regulation in a "frequently asked questions" format, with most sections answering a specific question and clarifying certain sections of the Regulation. This Charity & NFP Law Bulletin discusses and summarizes the Guidance, and provides a summary of what charitable corporations are required to do in order to comply with the Regulation and the Guidance.

For the balance of this *Bulletin*, please see *Charity & NFP Law Bulletin* No. 421.

Supreme Court of Canada Releases Decision in the Wall Case

By Terrance S. Carter & Adriel N. Clayton

On May 31, 2018, the Supreme Court of Canada ("SCC") released its long-awaited decision in <u>Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall</u> ("Wall"), which was heard on November 2, 2017 and concerns the courts' jurisdiction to review the decision of the Highwood Congregation of Jehovah's Witnesses ("Congregation") to expel Mr. Wall from its membership. The Wall decision overturns the Alberta Court of Appeal's September 8, 2016 decision, which was discussed in <u>Church Law Bulletin No. 48</u>. In that decision, the Alberta Court of Appeal had held that courts have jurisdiction to review decisions made by religious organizations regarding the discipline or expulsion of members where it is done in a manner that does not reflect principles of natural justice.



In overturning the Alberta Court of Appeal's decision, the SCC held that the court's jurisdiction to review decisions of religious groups and other voluntary associations on the basis of procedural fairness is limited because (i) judicial review is restricted to public decision makers where there is an exercise of state authority and where that exercise is of a sufficiently public character, (ii) where no underlying legal right is present, there is no independent right to procedural fairness, and (iii) where judicial review is available, courts should only consider issues that are justiciable. On this basis, the SCC quashed Mr. Wall's originating application for judicial review, stating that "courts should not decide matters of religious dogma" and quoting the SCC in *Syndicat Northcrest v Amselem* that "[s]ecular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."

Further commentary and analysis of this important SCC decision will follow in a future *Church Law Bulletin*.

CRA News

By Jacqueline M. Demczur

Automated Calls from CRA for T3010 Information Returns due June 30, 2018

On May 29, 2018, the Canada Revenue Agency ("CRA") <u>informed</u> followers of its Twitter account that it is making automated courtesy calls to remind registered charities whose fiscal year-end was December 31, 2017 to file their completed T3010 information return by June 30, 2018. A complete return is due within six months after the end of the charity's fiscal year. It is possible that, as with last year's automated calls from the CRA, charities that have already filed their information return may still receive a call. The CRA's <u>website</u> provides information on the documents that must be included with a charity's T3010 information return.

In this regard, it is also important to note that the board of directors of a charity is ultimately responsible for the accuracy of the information provided to the CRA in the T30a10. Accordingly, the board should review and formally approve the T3010, as well as indicate who within the charity has the authority to sign the T3010 on its behalf, with such decisions to be properly recorded in the board minutes. Failure to file a complete information return or filing an inaccurate one can result in a suspension of receipting privileges until the required information is provided to the CRA. Even if an incomplete or inaccurate T3010 information return does not result in sanctions by the CRA, the ability of the public to view a T3010



with errors may result in damage to the reputation of a charity with its donors, volunteers and supporters, as well as the general public, including enquiries by the media. To avoid problems in this regard, it may be prudent where a charity is able to do so to ask its legal and accounting professionals to review the T3010 information return for accuracy and, where necessary, advise on technical aspects of the T3010.

Legislation Update

By Terrance S. Carter

Ontario Bill 31, Plan for Care and Opportunity Act (Budget Measures), 2018

On May 8, 2018, Ontario Bill 31, Plan for Care and Opportunity Act (Budget Measures), 2018 ("Bill 31") received Royal Assent. As discussed in the March 2018 Charity & NFP Law Update, Bill 31 implements amendments to the Assessment Act introduced in the 2018 Ontario Budget to extend the property taxexempt status available to public schools, places of worship, municipal town halls, and other community centres, to non-profit child care centres located in the same property tax-exempt land.

Child, Youth and Family Services Act, 2017 Proclaimed

On April 30, 2018, sections 1-280, 294, and 333-349 of Ontario's *Child, Youth and Family Services Act*, 2017 ("CYFSA") and four of its supporting regulations came into force by proclamation. Similarly, January 1, 2020 was named by proclamation as the day on which sections 281-293 and 295-332 of the CYFSA, as well as additional regulations, will come into force. As discussed in the <u>August 2017 Charity & NFP Law Update</u>, as well as the <u>January 2017 Charity & NFP Law Update</u>, the CYFSA replaces the *Child and Family Services Act*, which has been repealed.

Ontario Bill 3, Pay Transparency Act, 2018 Receives Royal Assent

On May 7, 2018, Ontario Bill 3, Pay Transparency Act, 2018 ("Bill 3") received Royal Assent and, in accordance with subsection 22(1), it will come into force on January 1, 2019. As reported in the March 2018 Charity and NFP Law Update, Bill 3 establishes a number of provisions regarding compensation-related information for employees and prospective employees, such as requiring all publicly advertised job postings to include a salary rate or range, prohibiting employers from asking a job candidate about their past compensation, prohibiting reprisals against employees who discuss or disclose compensation, and establishing a framework to require employers with 100 or more employees to track and report compensation gaps based on gender and other diversity characteristics, as prescribed.



Smoke-Free Ontario Act, 2017 and Regulations coming into force July 1, 2018

The new <u>Smoke-Free Ontario Act</u>, 2017 and accompanying regulation <u>O Reg 268/18</u> will come into force in Ontario on July 1, 2018, repealing the previous <u>Smoke-Free Ontario Act</u> and regulation. A number of provisions of the new <u>Smoke-Free Ontario Act</u>, 2017 adapt the previous legislation to include medical cannabis, such as the exemption available to long-term care homes, retirement homes, and others. Of particular interest to charities and not-for-profits is a provision in the new regulation prescribing an expanded perimeter outside schools, as well as including community recreational facilities as places or areas where smoking, use, or consumption of tobacco, medical cannabis or other prescribed products is prohibited. Community recreational facilities are defined in the regulation as enclosed public places owned or operated by a corporation incorporated under Part III of the *Corporations Act* ("OCA") or under the *Canada Not-for-profit Corporations Act* ("CNCA") or a predecessor of that Act, an organization that is a registered charity under the *Income Tax Act* (Canada) ("ITA"), or the Province or a municipality (or an agent thereof), where the place is primarily used for the purposes of providing athletic or recreational programs or services to the local community, and the place is open to the public whether or a not a fee is charged for entry.

New O. Reg. 232/18 Inclusionary Zoning under Planning Act

On April 12, 2018, a number of provisions on the *Promoting Affordable Housing Act*, 2016 were proclaimed in force, including new subsection 16(4) of the *Planning Act*, which requires the official plan of municipalities prescribed under the *Planning Act* to contain policies that authorize inclusionary zoning with regard to affordable housing. Although the *Planning Act* and its Regulations do not define "inclusionary zoning," the Ontario Ministry of Municipal Affairs describes it as "a land-use planning tool that a municipality may use to require affordable housing units (IZ units) to be included in residential developments of 10 units or more." New regulation O Reg 232/18 also came into force on the same day and it provides an exemption from inclusionary zoning by-laws to, among others, developments proposed by or, under certain conditions, in partnership with "non-profit housing providers". The regulation defines non-profit housing providers to include, generally, corporations without share capital under the OCA or the Ontario *Not-for-Profit Corporations Act*, 2010 whose primary object is to provide housing, as well as registered charities and non-profit organizations within the meaning of paragraph 149(1)(1) of the ITA whose land is owned by the organization and to be used at least partially as affordable housing.



Regulations under Child Care and Early Years Act, 2014 Amended

On March 1, 2018 a number of amendments to Ontario Regulations <u>137/15</u> and <u>138/15</u> under the <u>Child Care and Early Years Act</u>, <u>2014</u> came into force, with several amendments coming into force on July 1, 2018. Following the consultation process of Proposal 17-EDU004 from October 2, 2017, the amendments include the revocation of Schedule 2, dealing with age group ranges and the ratio of employees to children, as well as changes to the emergency contact information for parents, financial records, and extends the obligation not to permit the prohibited practices in section 48 of regulation 137/15, such as corporal punishment of a child, to individuals other than licensees.

Quebec Bill 175, An Act to amend the Taxation Act, the Act respecting the Québec sales tax and other legislative provisions

On May 9, 2018, Bill 175, An Act to amend the Taxation Act, the Act respecting the Québec sales tax and other legislative provisions ("Bill 175") was introduced in the Quebec National Assembly. Bill 175 makes amendments similar to those made to the ITA and the Excise Tax Act (Canada) by federal bills assented to in 2016 and 2017, including changes to the rules relating to donations to charities with regard to the taxable supply of property or a service that is included in determining the amount of an advantage to a donor.

Saskatchewan Bill 128, The Provincial Sales Tax Amendment Act, 2018

On May 30, 2018, Saskatchewan Bill 128, *The Provincial Sales Tax Amendment Act, 2018* ("Bill 128") received Royal Assent. Bill 128 adds a new exemption from Provincial Sales Tax ("PST") for "prepared food and beverages sold by charitable or non-profit organizations at a community concession in the circumstances prescribed in the regulations." The regulations under *The Provincial Sales Tax Act* are currently silent on this matter. This change follows Information Notice IN 2017-21 (the "Information Notice"), issued December 2017 by the Government of Saskatchewan's Ministry of Finance, clarifying how the exemption from PST for charitable and non-profit organizations included sales of food and beverages at a community concession, subject to a number of conditions listed in the Information Notice.



Corporate Update

By Theresa L.M. Man

Bill C-25 Receives Royal Assent

After being tabled on September 28, 2016, federal Bill C-25, *An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profits Corporations Act and the Competition Act* ("Bill C-25") finally received Royal Assent on May 1, 2018. While certain provisions will come into force on a day to be fixed by order of the Governor in Council, the majority of Bill C-25 came into force on Royal Assent. Notwithstanding the breadth of the changes being introduced for *Canada Business Corporations Act* and co-operative corporations, Bill C-25 includes only minor technical amendments for CNCA corporations. These amendments include a definition of a person who has become "incapable" in subsection 2(1) of the CNCA, and the addition of section 277.1 of the CNCA requiring the Director to publish a notice of any decision made by the Director in respect of applications made under various sections of the CNCA (for example when a corporation is deemed non-soliciting under ss. 2(6), is permitted to delay calling of annual meetings under ss. 160(2), or when the Director relieves the corporation from certain parts of the CNCA under s.173).

New Direct Access to Corporations Canada Examiners for Registered Intermediaries

Corporations Canada announced on May 28, 2018, that registered intermediaries would begin to have better access to Corporations Canada's examiners. Organizations that frequently file with Corporations Canada on behalf of multiple corporations and that have an established relationship with Corporations Canada can apply to become registered intermediaries. These are usually law firms and corporate service providers. Once registered, they can have increased efficiency in online corporate filing. Starting June 4, 2018, registered intermediaries will have direct access to examiners by phone, via its Contact Centre, for questions that require the specific expertise of an examiner. General inquiries will continue to be handled by the Contact Centre's information officers.

New Online Guidelines from the Office of the Privacy Commissioner of Canada

By Esther Shainblum

On May 24, 2018, the Office of the Privacy Commissioner of Canada ("OPC") published two new guidance documents designed to help organizations comply with their privacy obligations in an online environment: the "Guidelines for obtaining meaningful consent," and the "Guidance on inappropriate data



practices: Interpretation and application of subsection 5(3)." This *Charity & NFP Law Bulletin* provides an overview of both documents, which the OPC states are intended to improve the consent model under the *Personal Information Protection and Electronic Documents Act*.

For the balance of this Bulletin, please see Charity & NFP Law Bulletin No. 422.

Tax Issues on the Wind-up of Charities: Budget 2018 Expansion of Eligible Donees and Beyond

By Ryan M. Prendergast

A resource paper discussing tax issues on the wind-up of charities was presented at the Canadian Bar Association's 2018 National Charity Law Symposium on May 11, 2018. The paper provides an overview of federal income tax matters that can arise on the winding-up of a charity, and more specifically in relation to the application of the "revocation tax." It discusses the revocation tax under the ITA, a brief discussion of corporate and common law issues related to the revocation tax, ways to reduce the revocation tax, and potential strategies to mitigate the revocation tax using multiple corporate structures.

The balance of the paper can be accessed here.

GDPR Now in Force

By Esther Shainblum

The European Union's <u>Regulation 2016/679</u>, <u>General Data Protection Regulation</u> ("GDPR") came into force on May 25, 2018 and could have a significant impact upon some charities and not-for-profits in Canada.

As discussed in <u>Charity & NFP Law Bulletin No. 419</u> and in the <u>March 2018 Charity & NFP Law Update</u>, the GDPR introduced sweeping changes to the privacy rights of individual "data subjects" with global effects that may extend to organizations operating in Canada.

In the wake of the long lead-up to the May 25, 2018 deadline, a number of Canadian organizations have been updating their privacy policies in order to comply with the GDPR and have been informing their users of the changes to their terms.

Similarly, as discussed in the <u>March 2018 Charity & NFP Law Update</u>, Canadian charities and not-for-profits that may collect or process personal data of European Union residents could be caught by the



GDPR. In light of the significant penalties associated with a breach of the GDPR, such Canadian charities and not-for-profits should take proactive measures to review and update their privacy policies and consent mechanisms in order to ensure that they comply with the GDPR, and should be bringing those changes to the attention of their clients, users and other stakeholders.

Special Senate Committee Update

By Terrance S. Carter

Special Senate Committee Continues Study on Charitable Sector

On May 28 2018, the Special Senate Committee on the Charitable Sector ("Committee") met with witnesses from the Social and Aboriginal Statistics Division of Statistics Canada, as well as individuals and representatives involved with research of the charitable and not-for-profit sector, to discuss charitable giving in Canada. This meeting followed a meeting of the Committee on May 7, 2018, in which the Committee heard from witnesses from the National Economic Accounts Division of Statistics Canada and Imagine Canada on the economic contribution of the charitable and non-profit sector in Canada. Previous meetings were held on April 16, 2018 and April 23, 2018, as reported in the April 2018 Charity & NFP Law Update.

The witnesses from Statistics Canada discussed the size and scope of Canada's charitable and non-profit sector, as well as the financial contribution that Canadians make to the sector through their donations. Various methods used to collect statistics on the sector and measure economic contribution were also discussed, along with statistics on the sector's share of economic activity, employment, average compensation, as well as figures about the profile of the donors, the amounts donated and how these have changed in recent years.

As the Committee's study reveals interesting information about the charitable sector, it would be worthwhile for charities to monitor the progress of the Committee ahead of its report due by the deadline date of December 31, 2018.

CBA Makes Submissions to Special Senate Committee

On May 9, 2018, the Charities and Not-for-Profit Law Section of the Canada Bar Association ("CBA Section") submitted <u>a letter</u> to the Committee offering support and assistance to the Senate Committee. The letter indicates that charities and not-for-profits tend to find the rules that govern that charitable sector arcane and difficult to understand, which has led to charitable resources being unnecessarily tied up with



compliance when they could better be used to advance and promote charitable causes. In this regard, the CBA Section provided various observations and suggestions to the Committee.

The letter states that the proposed review being carried out by the Committee is complex due to the different sets of rules governing charities and those governing non-profit organizations, as well as the different levels of government involved resulting in a "patchwork of rules and regulations between the federal rules and those of the various jurisdictions" which, along with the inconsistent use of terminology, such as "charitable purposes" and "charitable activities", is cause for confusion. In this regard, the CBA Section suggested focusing the Committee's review on modernizing the rules governing charities under the *Income Tax Act* (Canada).

Finally, the letter explains that, while the general focus in the US, UK and Australia is on promoting charities' purposes, Canadian rules "focus on the activities of Canadian charities, such as on direction and control by charities of their own activities." This has resulted in lower effectiveness and inefficiencies, as Canadian charities expend large amounts of time and resources on compliance as opposed to charitable works. The letter concludes by offering further elaboration on these challenges and the CBA Section's proposals on how the rules could be clarified and simplified.

Standing Senate Committee Publishes Report on Social Finance

By Jennifer M. Leddy

On May 10, 2018, the Standing Senate Committee on Social Affairs, Science and Technology ("Standing Committee") published a report entitled <u>The Federal Role in a Social Finance Fund</u> (the "Report"). The Report follows the Standing Committee's study of a social finance fund and discussions with the steering group that co-developed a Social Innovation and Social Finance Strategy with the Government of Canada. While the Report was produced in response to an Order of Reference adopted by the Senate on December 14, 2017 authorizing the Standing Committee to "examine and report on issues relating to social affairs, science and technology generally," it falls in line with the Federal Government's initiative over the last several years to investigate whether and how to support social finance initiatives in Canada.

The Report describes social finance as "an investment made for the purposes of achieving a beneficial and quantifiable impact on society and/or the environment; and an economic return," as well as "mobilizing private capital for public good." While social finance is not a new concept, the Report outlines a more recent phenomenon of social finance being used in the context of social challenges that have been



traditionally dealt with by the public sector. In this regard, the Report indicates a need for a financing "ecosystem" to bridge the divide between the need in the charitable and not-for-profit sectors for funds and the supply by impact investors thereof.

The Report also discusses social finance funds in Canada and abroad, and outlines two types of social finance funds. The first model "helps mature social enterprises and charities to expand their programs and to invest in property and real estate or free up equity from real estate or provide subsidies to affordable housing," and while these are less risky investments, the Report indicates that there are regulatory constraints preventing charities and not-for-profits from investing in them. The second model is the "seed fund model," which blends philanthropic capital and donations under the assumption that the majority will not grow. However, investors may receive up to 70% of their costs back through a combination of charitable donations and tax credits.

With regard to the role of the government in social finance, the Report states that all witnesses agreed that the government was instrumental in creating, growing and maintaining the sustainability of a social finance market in Canada, both through supporting existing social finance ecosystems and through creating new ones. Witnesses also agreed that the risk for private investors could be reduced through guaranteed government loans.

The Report provides six recommendations concerning what the Federal Government can do to stimulate social investment. These recommendations include that the government: create a pan-Canadian social finance fund operating at arm's length from the government; seek opportunities to leverage funds from investors when assessing where to invest in the social finance fund; consider using dormant bank accounts as the basis of capital for the social finance fund; target a portion of its social finance fund contribution to intermediary funds used to help marginalized regions and communities; ensure organizations are capable of participating in the social finance ecosystem by supporting institutional capacity building; and make a multi-year commitment to a social finance fund.

While it remains to be seen how the Federal Government will act upon the recommendations, the Report is an encouraging step forward towards creating a more robust social finance model in Canada.



Employer Not Liable for Sexual Assault

By Barry W. Kwasniewski

On June 2, 2017 (and as reported in the *Ontario Reports* on April 6, 2018) the Court of Appeal for Ontario released its decision in *Ivic v Lakovic* ("*Ivic*"). This significant decision reviews the principles of vicarious liability of employers for wrongful acts of their employees, which were considered in the leading 1999 SCC decision in *Bazley v Curry*. In *Ivic*, the appellant was a customer seeking damages against a taxi company for the alleged sexual assault perpetrated by one of its employee drivers. The court upheld the decision of the motion judge, which dismissed the claim against the taxi company. This case provides a current perspective on the factors that courts will consider when imposing vicarious liability on employers, including charities and not-for-profits, for intentional wrongs committed by their employees.

For the balance of this Bulletin, please see Charity & NFP Law Bulletin No. 423.

514-Billets Enters Into Voluntary Undertaking for CASL Violation

By Ryan M. Prendergast

A Quebec ticket resale company operating as 514-Billets agreed to an undertaking to resolve alleged violation of Canada's Anti-Spam Legislation ("CASL") between July 2014 and January 2016, as announced by the Canadian Radio-television and Telecommunications Commission ("CRTC") on May 1, 2018. The voluntary undertaking stated that 514-Billets had sent commercial electronic messages ("CEMs"), mostly in the form of text messages, without consent of the recipients, without providing information that identified 514-Billets as the sender, and without providing information that would enable recipients to readily contact 514-Billets in contravention of s. 6(1) and (2) of CASL.

The majority of CEMs sent by 514-Billets consisted of requests for consent for recipients to receive future commercial offers. Section 4 of the CRTC *Regulations* requires requests for consent to include certain information, including the sender's name, other contact information, and a statement indicating that the person whose consent is sought can withdraw their consent. Where the number of characters is limited in the communication method, such as in text messages, s. 2(2) of the CRTC *Regulations* also allows for the sender to instead provide a hyperlink to a readily accessible webpage on which the required information is posted.

In recognition of having not met these requirements, 514-Billets undertook to pay \$100,000 in total compensation, consisting of \$75,000 in the form of \$10 rebate coupons offered to 514-Billets customers,



along with an additional \$25,000 to the Receiver General for Canada. Billets-514 further undertook to implement a compliance program and to appoint an officer responsible for organizational compliance.

As demonstrated with the 514-Billets undertaking, CEMs can come in many forms beyond emails and phone calls, including text messages. As a result, charities and not-for-profits that are considering sending CEMs by text message or other form of CEM apart from email should consider that the requirements of CASL will apply equally. As such, while this is another instance of a for-profit corporation entering into an undertaking for alleged non-compliance with CASL, it is a reminder to charities and not-for-profits that are sending CEMs to ensure they are familiar with the requirements of CASL, which has application to electronic messages other than just email.

Public Holiday Pay Review

By Barry W. Kwasniewski

On May 7, 2018, the Ontario government <u>announced</u> that, following feedback from stakeholders and as part of the government's on-going response to the <u>Changing Workplaces Review (CWR)</u>, the Ministry of Labour would review the public holiday system under Part X of <u>Employment Standards Act</u>, 2000 ("ESA"). In this regard, on the same day, the government released Ontario <u>Regulation 375/18</u> under the ESA as an interim measure to reinstate the public holiday pay formula recently amended by the *Fair Workplaces*, *Better Jobs Act*, 2017 ("Bill 148"), discussed in <u>Charity & NFP Law Bulletin No 411</u>. The government also indicated that submissions regarding the public holiday pay review can be sent via email to <u>exemptions.review@ontario.ca</u>.

Before the amendments introduced by Bill 148, section 24(1)(a) of the ESA provided that an employee's public holiday pay was "the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20". Effective January 1, 2018, Bill 148 amended this calculation to "the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period".

Because clause 24(1)(b) of the ESA allows the government to prescribe some other manner of calculation by regulation, Regulation 375/18, which will come into force on July 1, 2018, reinstates the public holiday pay formula in section 24(1)(a) of the ESA before the amendments introduced by Bill 148. In this regard,



public holiday pay during the first half of the year was subject to the new formula, but public holiday pay during the second half of the year should return to the old formula.

Regulation 375/18 is scheduled to be revoked on December 31, 2019 if no other action is taken by the government before that time. Charities and not-for-profits subject to the ESA should continue to monitor these developments, as it is unclear how soon another change may be expected from the public holiday pay review.

Federal Court Upholds Photographer's Copyright and Moral Rights

By Terrance S. Carter

On March 7, 2018, the Federal Court released its decision in the case of <u>Collett v Northland Art Company</u> <u>Canada Inc.</u>, in which the plaintiff Mr. Collett ("Collett"), a professional photographer, claimed that the defendants Northland Art Company Canada Inc. ("NACC") and Bremner Fine Art Incorporated operating as Northland Art Company ("Northland") had infringed the copyright and moral rights in his photographic works.

Collett originally began supplying printed copies of his works to Northland in 2011 for purposes of resale, but upon a deterioration of the relationship between both parties, he ceased to supply prints to Northland in or around November 2013. At that time, Collett advised Northland that it was no longer authorized to distribute, offer for sale, or sell any of his works. Collett alleged that, after advising Northland to cease distributing his works, it nonetheless continued to advertise, make unauthorized reproductions of, and sell prints of his works through various venues, including Northland's website, at trade shows, and on various rewards websites. In certain instances, Collett's signature had been removed from unauthorized prints and replaced with the signature of another photographer, Anthony Randall.

In considering whether Collett's copyright was infringed, the court relied on the definition of copyright under s. 3(1) of the *Copyright Act* as being the "sole right to produce or reproduce the work or any substantial part thereof in any material form whatever," and stated that this also includes the sole right to authorize such acts. In this regard, the court found that Collett's copyright had been infringed where his works had been reproduced without his authorization.

With respect to infringement of Collett's moral rights, the court relied on s. 14.1(1) of the *Copyright Act*, which provides that "[t]he author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the



circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous." Section 28.2 states that an author's right to the integrity of a work is infringed "only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation, (a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution." In this regard, the court found that in instances where the reproductions were attributed to Anthony Randall, Collett's moral rights had been infringed.

As NACC had not been incorporated at the time of the infringement, the court held that it could not be held liable for the infringements. However, Northland's infringements were held to be infringements for commercial purposes, conducted out of bad faith, flagrantly and deliberately. Based on its differing levels of infringement for different works of art, Northland was held liable for the maximum statutory damages of \$20,000 for copyright infringement of one work, \$10,000 for the infringement of a second work, \$7,500 for reproducing a third work on its website homepage, and a further \$7,500 for reproduction of the same work on "Bio Page" of its website. A further \$10,000 in damages was awarded for infringement of Collett's moral rights, along with \$25,000 in punitive damages. Finally, given that both Northland and NACC had been seen by the defendants as "all the same company", a permanent injunction was awarded against both parties.

This case is a reminder to charities and not-for-profits of the serious consequences that can flow from a breach of the copyright and moral rights of an owner, including that of photographers, as well as the corresponding importance of ensuring that a charity or not-for-profit either secures the ownership of copyrights through a properly drafted assignment of copyright and waiver of moral rights, or secures an adequate license of the copyrights in question.

Federal Government Launches Intellectual Property Strategy

By Sepal Bonni

In response to the federal government's commitment through the 2017 Federal Budget to implement reforms to Canada's intellectual property ("IP") system, the Minister of Innovation, Science and Economic Development announced the launch of <u>Canada's Intellectual Property Strategy</u> (the "IP Strategy") on April 26, 2018. The IP Strategy recognizes that IP helps Canadian innovators attain commercial success and maximize the value of their creations by protecting their ideas, and was designed to "help Canadian entrepreneurs better understand and protect intellectual property..., get better access to shared intellectual



property," and provide businesses with the "information and confidence they need to grow their business and take risks." In this regard, the IP Strategy states that small and medium-sized businesses that hold formal IP are significantly more likely to engage in product and other innovation, more likely to export, and more likely to be high-growth. As such, the IP Strategy proposes changes in the key areas of legislation, literacy and advice, and tools which are discussed below.

With respect to legislation, the IP Strategy proposes to amend Canadian IP laws to remove barriers to innovation, and in particular to close loopholes for bad faith use of IP, such as trademark squatting and patent trolling. Further, an independent body would be created to oversee patent and trademark agents in order to maintain professional and ethical standards amongst IP professionals.

With respect to literacy and advice, the IP Strategy proposes various educational resources, including the launch of programs through the Canadian Intellectual Property Office to help improve Canadian literacy in IP, providing support to engage with Indigenous people and decision makers, providing support for research activities and capacity building, as well as training federal employees who deal with IP governance.

With regard to tools, the IP Strategy would provide tools to support and educate Canadian businesses about IP, such as the IP Strategy website. Additionally, a "patent collective" will be created to bring businesses together to share expertise and strategy for the purpose of working towards better outcomes for members with regard to IP.

These new measures proposed in the IP Strategy are expected to better facilitate the protection of IP in Canada and will make IP resources available to the public that will be of interest to charities and not-for-profits. In addition to the legislative reforms, charities and not-for-profits should therefore monitor the IP awareness, educational, and strategic growth tools released through the IP Strategy as a means of ensuring that they are protecting and making the best use of their IP.

US Court Holds Pledge to be Enforceable Contract

By Theresa L.M. Man

In the U.S. case of <u>Appalachian Bible College v Foremost Industries</u>, released on April 17, 2018, the United States District Court for the Middle District of Pennsylvania held that a charitable pledge made by a corporate donor, Foremost Industries ("Foremost"), to a non-profit educational institution, Appalachian Bible College ("College"), was binding upon the donor. Since pledges are generally held by courts in



Canada to be unenforceable as contracts, it is interesting to note that the law was determined to be the opposite in Pennsylvania.

In 2015, Foremost executed a donor commitment ("Gift Agreement") to donate \$4 million to the College through five annual payments of \$800,000 beginning in 2016. The Gift Agreement stated that Foremost's commitment was legally binding and enforceable against Foremost, its successors and assigns. Foremost subsequently executed a unanimous written consent to ratify the Gift Agreement. Not only did Foremost fail to make its annual payments to the College, it indicated to the College that it did not intend to make any future payments. The College therefore brought an action against Foremost, claiming breach of contract and anticipatory breach of contract.

The court considered whether all elements required under Pennsylvania law were present to find a breach of contract. In this regard, it found that the Gift Agreement contained all essential terms of a contract, and that it indicated both parties' intent to be legally bound by the agreement and to legally bind successor entities. It further found a breach of duty imposed by the contract when Foremost failed to pay the pledged amount and indicated it did not intend to uphold its pledge at all. Of particular note, the court also found that the Gift Agreement stated that the College "is relying, and shall continue to rely, to its detriment" on the pledge being satisfied, and that the gift would be used as "an inducement" for other donors to make contributions and gifts to the College. The court therefore held that Foremost had breached the Gift Agreement with respect to the past due payments. With respect to its indication that it did not intend to uphold its pledge, Foremost was also found to be in anticipatory breach of contract for the remainder of the pledge, and was ordered to pay the full pledged amount to the College within 90 days.

This case demonstrates a striking difference between American and Canadian law. In Canada, courts have affirmed that charitable pledges are not enforceable as contractual agreements in the absence of consideration, such as the *Brantford General Hospital Foundation v Marquis Estate* case discussed in *Charity Law Bulletin* No. 49. In that case, the Ontario Superior Court did not accept the charity's position that naming a new hospital unit in honour of the donor was sufficient consideration, and held that the charity failed to establish that it had relied on the pledge to its detriment. In Canada, a pledge would only be enforceable if there is sufficient consideration, which would bring into question the nature of the pledged "gift," which by definition is not accompanied by consideration. As well, a pledge could be held to be enforceable based on the doctrine of estoppel if there is partial performance of the pledge based on a pre-existing legal relationship between the parties which the charity acted to its detriment in reliance on



the pledge. As such, charities operating in Canada should continue to operate under the common law principle that a pledge is not an enforceable contract at law unless there is sufficient consideration or the doctrine of estoppel as explained above applies.

Charity Commission Publishes Report on Insider Fraud Affecting Charities

By Esther S.J. Oh

On April 26, 2018, the Charity Commission for England and Wales ("Charity Commission") published its research report, Focus on Insider Fraud ("Report"), outlining findings from its 2018 study on how insider fraud affects charities. Insider fraud is committed when individuals within the charity, such as trustees (a term commonly used to describe directors in the United Kingdom), employees or volunteers, commit various forms of fraud from within the organization, including financial fraud, making unauthorized payments, inflating expenses, and stealing information. In this regard, the Report aims to better understand the types of insider fraud occurring in charities, as well as factors that make charities vulnerable to insider fraud, and trends in the charitable sector.

In Phase One of its study, the Charity Commission reviewed 20 sample cases where charities had confirmed insider fraud had occurred at their organizations or where charities were deemed to be at an increased risk to insider fraud. In 19 of the 20 cases that were reviewed, the absence of appropriate controls to prevent fraud was determined to be the primary enabling factor in either allowing the fraud to occur or in making the charity more vulnerable to fraud. While a similar study conducted by the Charity Commission in 2016 indicated that most charities in that study had prevention controls that were inconsistently applied, the Report notes the two studies together suggest that trustees should ensure that fraud prevention controls are in place and also applied consistently within the charity's operations.

Phase Two of the study involved 54 responses from charities providing requested information concerning insider fraud. In 43% of the cases, the insider fraud was committed by an employee and the stated prime factor for the insider fraud was "excessive trust or responsibility placed on one individual."

In closing, the Report indicates that it is "vital that charities take appropriate action that is proportionate to their activities, size and financial governance, in order to manage the risk of potential fraud." The Report also encloses an infographic of "10 top tips for fraud prevention," together with other recommendations on how charities can avoid insider fraud occurring at their organization. The Charity Commission's ten top tips are outlined below:

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- Aim to develop a counter fraud culture;
- Implement financial controls that everyone signs up to;
- Conduct an annual review of fraud risk and internal controls:
- Consider having a dedicated fraud officer on the board;
- Encourage staff and volunteers to raise concerns;
- Promote fraud awareness and consider training;
- Conduct pre-employment screening and gets reference checks;
- Guard against excessive trust and complacency;
- Don't be afraid to challenge if you suspect wrongdoing; and
- Report suspected fraud to the Charity Commission and Action Fraud.

Charities and not-for-profits in Canada will find the findings and recommendations of the Charity Commission Report to be a useful resource to help avoid insider fraud occurring within their organizations.

Anti-Terrorism/Money Laundering Update

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

Bill C-59 Amended by Committee

On May 3, 2018, <u>Bill C-59</u>, *National Security Act*, 2017 ("Bill C-59"), which had been referred to the Standing Committee on Public Safety and National Security (the "Committee") before second reading, was reported back to the House of Commons with a number of amendments. Bill C-59, introduced on June 20, 2017, was previously discussed in the <u>June 2017 Charity & NFP Law Update</u>. The amendments made by the Committee include the following:

- The introduction of the new *Avoiding Complicity in Mistreatment by Foreign Entities Act*, regarding "the disclosure of and request for information that would result in a substantial risk of mistreatment of an individual by a foreign entity and the use of information that is likely to have been obtained as the result of mistreatment of an individual by a foreign entity";
- Amendments to the Communications Security Establishment Act requiring that the Communications Security Establishment, which is created by the same Act, carry out its activities



of foreign intelligence, cybersecurity and information assurance in accordance with the *Canadian Charter of Rights and Freedoms*, including considerations such as the reasonable expectation of privacy that a Canadian or a person in Canada may have with respect to information acquired;

- A number of technical amendments to the National Security and Intelligence Review Agency Act and the Canadian Security Intelligence Service Act;
- Several amendment to the *Criminal Code*, including the broadening of the scope of certain provisions regarding the promotion or counselling of terrorist activities, specifically:
 - 83.221(1) Every person who counsels another person to commit a terrorism offence without identifying a specific terrorism offence is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.
 - (2) An offence may be committed under subsection (1) whether or not a terrorism offence is committed by the person who is counselled.

While Bill C-59 has yet to pass second reading in the House of Commons, charities and not-for-profits, especially those operating internationally, should continue to monitor its progress and how Bill C-59, if enacted, may affect their operations. Proactive due diligence policies which address both anti-money laundering and anti-terrorism legislation are critical for non-profits and charities, whether working internationally or domestically.

IN THE PRESS

<u>Charity & NFP Law Update – April 2018 (Carters Professional Corporation)</u> was featured on *Taxnet Pro*TM and is available online to those who have OnePass subscription privileges.

<u>The Expanding Investment Spectrum for Charities in Ontario</u>, written by Terrance S. Carter, was featured in *The Lawyer's Daily* on April 26, 2018.



RECENT EVENTS AND PRESENTATIONS

<u>Critical Privacy Issues Involving Children's Programs</u> was presented by Esther Shainblum on Wednesday, May 9, 2018. This session is available "on demand" by clicking <u>here</u>.

Remuneration of Directors of Charities: What's New? was presented by Ryan M. Prendergast on Wednesday, May 30, 2018. This session is available "on demand" by clicking here.

<u>Tax Issues on the Wind-up of Charities: Budget 2018 Expansion of Eligible Donees and Beyond</u> was presented by Ryan Prendergast at the CBA Charity Law Symposium held on May 11, 2018. Click here for the <u>paper</u> and the presentation <u>handout</u>.

UPCOMING EVENTS AND PRESENTATIONS

Spring 2018 Carters Charity & NFP Webinar Series will be hosted by Carters Professional Corporation on Wednesdays starting March 28, 2018. Click **here** to register for the final webinar:

- <u>Drafting Bylaws: Pitfalls to Avoid</u> will be presented by Esther S.J. Oh, B.A., LL.B. on Wednesday, June 13th 1:00 2:00 pm ET
- Previous sessions in this webinar series are available as On Demand/Replay:
 - The Expanding Investment Spectrum for Charities, Including Social Investments
 presented by Terrance S. Carter On Demand/Replay
 - The Impact of Bill 148 on Charities and Not-for-Profits by Barry W. Kwasniewski -On Demand/Replay
 - Recent Changes in Corporate Law Affecting Federal and Ontario Corporations by Theresa L.M. Man - On Demand/Replay
 - <u>Critical Privacy Issues Involving Children's Programs</u> by Esther Shainblum -<u>On Demand/Replay</u>
 - Remuneration of Directors of Charities: What's New? by Ryan M. Prendergast On Demand/Replay



<u>Healthcare Philanthropy Seminar</u> is co-hosted by Carters Professional Corporation and Fasken and will be held on **Friday**, **June 8**, **2018** in Toronto. Registration details are available by clicking <u>here</u>. The following topics will be covered:

- Due Diligence In Gift Documentation by Theresa L.M. Man, Partner, Carters Professional Corporation
- Tips from a Former Justice Tax Litigator on CRA Audits by Jenny Mboutsiadis, Partner, Fasken
- Legal Issues In Fundraising On Social Media by Terrance S. Carter, Managing Partner, Carters Professional Corporation
- The *Health Sector Payment Transparency Act, 2017*: Implications for Healthcare Institutions and their Foundations by Laurie M. Turner, Associate, Fasken

2018 CSAE Trillium Summer Summit will be held on July 12, 2018 in London, Ontario. "Your Association's Brand and Reputation: Why it Matters?" will be the topic covered by Terrance S. Carter and Sepal Bonni.



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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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CHARITY & NFP LAW BULLETIN NO. 421

MAY 31, 2018

EDITOR: TERRANCE S. CARTER

OPGT RELEASES GUIDANCE ON PAYMENTS TO DIRECTORS

By Ryan M. Prendergast *

A. INTRODUCTION

Amendments to Ontario Regulation 4/01¹ (the "Regulation") to the *Charities Accounting Act*² (the "CAA") came into force on April 1, 2018, providing relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them. As a result, in the circumstances outlined in s. 2.1 of the Regulation, charitable corporations are now permitted to make certain authorized payments to directors and related persons without first obtaining a s. 13 consent order under the CAA to permit such payments.

Included in the amendments to the Regulation is a requirement under s. 2.1(6)(c) for charitable corporations to consider any guidance respecting payments when approving such payments to directors or connected persons. In this regard, the Office of the Public Guardian and Trustee (the "OPGT") published a guidance, "Payments to Directors & Connected Persons" (the "Guidance"), in late May, 2018. The Guidance is set out as 19 sections that elaborate upon s. 2.1 of the Regulation in a "frequently asked questions" format, with most sections answering a specific question and clarifying certain sections of the Regulation. This *Charity & NFP Law Bulletin* discusses and summarizes the Guidance, and

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¹ Approved Acts of Directors and Trustees, Ontario Regulation 4/01.

² RSO 1990, c C.10.

³ Ministry of the Attorney General, *Payments to Directors & Connected Persons*, online: Office of the Public Guardian and Trustee https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/authorization_of_payments.html>.



provides a summary of what charitable corporations are required to do in order to comply with the Regulation and the Guidance.

B. GENERAL OVERVIEW

Although the term "charitable corporation" does not appear in the Regulation, the Guidance makes frequent reference to the term and uses it in place of "corporate trustee," which is used throughout the CAA and Regulation. In this regard, the Guidance defines a charitable corporation as being any non-share capital corporation operating in Ontario, whether it be a registered charity or another organization that has exclusively charitable purposes. As such, the Guidance confirms that trustees of charitable trusts or unincorporated charitable organizations are not permitted to pay trustees under the Regulation which is only applicable to "corporate trustees", *i.e.*, a corporation deemed by s. 1(2) of the CAA to be a trustee. In addition, the Guidance also clarifies that the Regulation has application to charitable corporations "operating" in Ontario, even if they are not incorporated in Ontario.

The Guidance states that the Regulation permits "payments for most goods, services and facilities, provided all the requirements are met." Further, the Guidance explicitly states that the Regulation does not permit directors to be remunerated for services provided in their capacity as a director or employee, or for fundraising or real property transactions. For payments not authorized by the Regulation, a s. 13 court order under the CCA through the OPGT would still be required, if applicable. As an example, the Guidance clarifies that the Regulation is not applicable to a religious leader who, in addition to being an employee, sits on the board of directors of a religious organization that is a charitable corporation, and in such cases a court order would be required. Additionally, the Guidance states that the Regulation does not permit payments that are prohibited by the charitable corporation's governing documents or by any other legislation applicable to the corporation, or any rules of professional conduct applicable to the director. In this regard, charitable corporations wishing to make use of the Regulation will still need to review their governing documents to determine if their by-laws, letters patent, or articles of incorporation otherwise prohibit such payments.

C. CONDITIONS FOR AUTHORIZING PAYMENTS

The Guidance outlines the conditions required under ss. 2.1(5) - (7) for remuneration to be authorized and elaborates upon the requirements. In accordance with s. 2.1(7), the Guidance clarifies that in order for a



charitable corporation's board to authorize payments, it must have at least five directors, four of whom are eligible to vote on the payment to the director or connected person. Directors either receiving a payment or who are otherwise connected to the person receiving the payment, as well as any other person connected to such a director, would not be eligible to vote. In total, no more than 20% of the number of voting directors may receive remuneration.

To authorize remuneration, the board must believe at the time of authorization that the payment would be in the charitable corporation's best interests. In this regard, directors must be able to demonstrate that the arrangement is both beneficial to the charitable corporation and that there is an advantage to the charitable corporation using a director or connected person rather than an unrelated third party. The Guidance provides five factors for the board to consider prior to authorizing a payment including, for example, the experience and qualifications of the director or connected person, and any adverse impacts on the charitable corporation.

Boards must also consider whether the authorized amount is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided. The Guidance provides a list of factors for the board to consider in this regard, such as the market price for similar goods, services or facilities and the quality of them. Where the cost of a service is large and the charitable corporation does not have information on market prices, they may obtain quotes from suppliers. As a general rule, as the payment increases, so does the burden on charitable corporations to demonstrate that they considered the market price.

The Regulation also states that any payments must not result in the charitable corporation's debts and liabilities exceeding the value of its charitable property, and must not render the charitable corporation insolvent. Further, all directors and connected persons must agree in writing to a maximum amount that the charitable corporation can pay for the goods, services or facilities. Where these are provided by a connected person, that connected person must also agree in writing to the maximum amount. The Guidance clarifies that the maximum amount is "the total amount that the charitable corporation has agreed to pay for provision of the goods, services or facilities," although the total amount paid at the end of the contract may be less than the maximum amount. However, the Guidance also allows for the



agreement setting the maximum amount to be amended to authorize a payment above the original amount. To do so, the charitable corporation must again satisfy ss. 2.1(5) - (10) of the Regulation.

D. RECORD KEEPING AND ANCILLARY REQUIREMENTS

If charities and their advisors are to have one take away to remember from the Guidance, it's that the Guidance states that charitable corporations are advised to keep records of everything related to compliance with the Regulation, including a copy of the agreement and approvals, and fully document the decision-making process, including market research, supplier quotes, the fact that the board reviewed the Guidance, and the rationale for the decision. As such, while the Regulation eases the regulatory burden on charitable corporations that wish to make certain payments to directors or persons related to them, charities will need to be careful to maintain records of complying with the Regulation and Guidance. While directors that do not comply with the Regulation may be considered in breach of their fiduciary duties, and may ultimately be liable to re-pay funds, the Guidance states that complaints about alleged improper payments can ordinarily be answered where the charitable corporation is able to show, through good recordkeeping, that it complied with the Regulation.

For greater transparency between directors and members of charitable corporations, the Regulation requires authorized payments that have been made to be disclosed to the charitable corporation's members at its annual members meeting and in its financial statements. While the Regulation is silent on the type of information to be disclosed and the manner of disclosure, the Guidance states that disclosure should "meet relevant accounting practices." Further, it outlines the OPGT's guidelines for disclosure within financial statements which, among other things, require the information to be placed in the financial statement's notes, the director in question to be named, and the nature of the transaction to be mentioned in broad terms.

The Guidance also states that the requirements for authorizing payment are reduced in instances where a payment is being made by one charitable corporation to either a not-for-profit corporation or a for-profit corporation wholly owned by the charitable corporation, as long as the payment does not benefit the director who is connected to the corporation. In such instances, the only requirements that must be met are that the payment cannot be made for fundraising services or transactions related to the purchase or sale

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of real property, it must be made with the charitable corporation's best interests in mind, and the authorized amount must be reasonable for the charitable corporation to pay for the goods, services or facilities.

E. CONCLUSION

While the amendments to the Regulation brought into force beneficial changes that now ease the process for charitable corporations to authorize certain payments to their directors, a number of requirements must be met. The Guidance provides a degree of clarity on the Regulation's requirements, and in particular the record keeping requirements related to the Regulation. As charitable corporations are required by the Regulation to consider the Guidance when approving payments to directors or connected persons, those directors and connected persons should review and become familiar with the Guidance in addition to the Regulation prior to contemplating authorizing certain payments.

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CHARITY & NFP LAW BULLETIN NO. 419

APRIL 25, 2018

EDITOR: TERRANCE S. CARTER

IMPLICATIONS OF THE EU'S GENERAL DATA PROTECTION REGULATION IN CANADA

By Esther Shainblum & Sepal Bonni*

A. INTRODUCTION

The European Union's ("EU") *Regulation 2016/679, General Data Protection Regulation* ("GDPR")¹ will be implemented across the EU as of May 25, 2018. The GDPR harmonizes data protection and privacy laws across all EU jurisdictions and has been referred to by the House of Commons Standing Committee on Access to Information, Privacy and Ethics ("Standing Committee"),² as well as the Office of the Privacy Commissioner of Canada ("OPC"),³ as a point of comparison for Canadian legislation. Of particular note, while the GDPR will apply to organizations with a physical presence in the EU, it has also been given an extraterritorial scope, applying also to organizations that are not established in the EU if they process personal data of EU residents to offer them goods or services (whether or not a fee is charged) or to monitor their behaviour within the EU.⁴ Therefore, in certain circumstances, organizations in Canada, including charities and not-for-profits, may be subject to the GDPR and must comply with it, including its breach notification requirements, because of the strict sanctions for non-compliance. Breaches of the GDPR can attract fines as high as €20 million, or up to 4% of the total worldwide annual turnover of the

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¹ Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119, 4/5/2016, p. 1–88 ["GDPR"].

² House of Commons Canada Standing Committee on Access to Information, Privacy and Ethics, "Towards Privacy Design: Review of the *Personal Information Protection and Electronic Documents Act*", online: Parliament of Canada https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-12/>.

³ Office of the Privacy Commissioner of Canada, "Draft OPC Position on Online Reputation" (26 January 2018), online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/.

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preceding financial year, whichever is higher.⁵ Additionally, the ramifications of the GDPR's extraterritorial scope also impact "WHOIS" domain name data of EU residents. This Bulletin provides a brief outline of the more prominent changes introduced to privacy law through GDPR, and discusses its application to Canadian charities and not-for-profits, as well as its potential impact on WHOIS domain name search databases.

B. OVERVIEW OF THE GDPR

The GDPR applies to "processing" of "personal data." "Personal data" is defined as "any information relating to an identified or identifiable natural person" and includes a broad range of identifiers, such as "a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person." "Processing" of data is also defined broadly and includes any operation performed on personal data, such as "collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." The GDPR applies to "controllers", *i.e.* natural or legal persons, public authorities, agencies or other bodies that determine the purposes and means of the processing of personal data, as well as "processors", *i.e.* natural or legal persons, public authorities, agencies or other bodies that process personal data on behalf of the controller.8

The GDPR strengthens and enhances data protection rights for individuals and imposes strict requirements on organizations engaged in data processing. At a high level, the core principles of the GDPR require that personal data be:

- processed lawfully, fairly and in a transparent manner;
- collected and processed for specified, explicit and legitimate purposes;
- minimized, *i.e.* adequate, relevant and limited to what is necessary in relation to those purposes;
- accurate and kept up to date inaccurate data must be erased or rectified without delay;

⁶ *Ibid*, art 4(1).

⁵ *Ibid*, art 83.

⁷ *Ibid*, art 4(2).

⁸ *Ibid*, art 4(7), (8).

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- stored for no longer than is necessary for the purposes; and
- processed in a manner that ensures appropriate security of the personal data.⁹

Organizations to which the GDPR applies must comply with these principles or risk incurring the potentially severe penalties available under it.

Organizations caught by the GDPR must also comply with the enhanced rights for individuals under the GDPR, including the right of access to personal data; ¹⁰ providing greater transparency about how data is processed; ¹¹ ensuring data portability rights (*i.e.* the transfer of personal data from one organization to another); ¹² the so-called "right to be forgotten" (advising individuals of and complying with their right to request access to and rectification or erasure of personal data, discussed as the "right to erasure" in the March 2018 *Charity & NFP Law Update*); ¹³ the duty to inform individuals without undue delay of serious data breaches that are likely to result in a high risk to the individual; ¹⁴ and ensuring that any consent obtained for the processing of an individuals' personal information is "freely given, specific, informed and unambiguous." ¹⁵

Rules for controllers and processors include the requirement to have a "data protection officer" who is responsible for data protection for businesses that process data on a large scale; ¹⁶ a requirement to build data protection safeguards into products and services; ¹⁷ requirements for "pseudonymisation" and data encryption where appropriate; ¹⁸ breach notification requirements; ¹⁹ a requirement to carry out impact assessments when data processing may create a high risk for individuals' rights or freedoms; ²⁰ and the requirement to keep records of processing activities only where processing is regular or likely to create a high risk for individuals' rights or freedoms.

⁹ *Ibid*, art 5.

¹⁰ *Ibid*, art 15.

¹¹ *Ibid*.

¹² *Ibid*, art 20.

¹³ *Ibid*, art 13(2)(b). For discussion on the right to erasure, see Esther Shainblum, "House of Commons Standing Committee Report on PIPEDA", *March 2018 Charity & NFP Law Update*, online: http://www.carters.ca/pub/update/charity/18/mar18.pdf#es1>.

¹⁴ *Ibid*, art 34.

¹⁵ *Ibid*, arts 6(1)(a) and 4(11).

¹⁶ *Ibid*, ch IV s 4.

¹⁷ *Ibid*, art 25.

¹⁸ *Ibid*, arts 25, 32.

¹⁹ *Ibid*, art 33 and 34.

²⁰ *Ibid*, ch IV s 3.

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C. EXTRATERRITORIAL NATURE OF THE GDPR

As noted above, even if not established in the EU, Canadian charities and not-for-profits may be caught by the GDPR if they process personal data of EU residents to offer them goods or services or to monitor their behaviour within the EU. It is not clear what constitutes "offering goods or services" within the meaning of the GDPR. Merely having a website that is accessible in the EU will not be enough to constitute "offering goods or services."²¹ It must also be apparent that the organization "envisages services to data subjects" in one or more EU member states by, for example, mentioning users who are in the EU or using a language or a currency generally used in the EU.²² "Monitoring behaviour" includes tracking individuals on the internet to analyze or predict their personal preferences, behaviours and attitudes.²³

Given the vague language of the GDPR, it is possible that, in certain circumstances, organizations in Canada, including charities and not-for-profits, may be subject to the GDPR and must comply with it because of the strict sanctions for non-compliance.

Where the GDPR applies to controllers or processors based outside of the EU, Article 27 of the GDPR requires them to designate a representative within the EU who must be mandated to ensure the controller or processor's compliance with the GDPR.²⁴ If a Canadian charity or not-for-profit is caught by the GDPR for "offering goods and services" or "monitoring behaviour" in the EU, it will have to designate a representative in the EU, unless it can claim an exemption on the basis that its data processing is "occasional", does not deal with certain categories of particularly sensitive data and does not pose a risk to the rights and freedoms of natural persons.²⁵

As noted, administrative fines can be imposed for any infringement of the GDPR. While fines are supposed to be "effective, proportionate and dissuasive" 26 , certain infringements are subject to fines of up to 00 million or up to 02% of the total worldwide annual turnover for the undertaking for the previous financial year, whichever is higher. Other more serious infringements, such as non-compliance with the core principles described earlier in this article, are subject to fines of up to 020 million or up to 04% of the

²¹ *Ibid*, recital 23.

²² *Ibid*, recital 23.

²³ *Ibid*, recital 24.

²⁴ *Ibid*, art 27.

²⁵ *Ibid*.

²⁶ *Ibid*, art 83.

²⁷ *Ibid*.

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total worldwide annual turnover for the undertaking for the previous financial year, whichever is higher.²⁸ Therefore, Canadian charities or not-for-profit organizations who may be caught by the GDPR should implement a plan to bring themselves into compliance as soon as possible.

D. THE GDPR, DOMAIN NAMES AND TRADEMARK ENFORCEMENT

Regardless of whether or not a Canadian charity or not-for-profit is a controller or processor subject to the GDPR, the GDPR will have implications on "WHOIS" data held by the Internet Corporation for Assigned Names and Numbers ("ICANN") and by the Canadian Internet Registration Authority ("CIRA"). Whereas ICANN's functions include overseeing the coordination and management of the top-level domain name system (*e.g.*, .com, .net, .org, .edu), CIRA is the domain name authority for the .ca top-level domain, managing Canada's internet community policies and representing the .ca registry internationally.

The WHOIS systems maintained by ICANN and CIRA make some personal information (e.g., names, addresses, emails, phone numbers) that is collected when an individual registers a domain name publicly available. WHOIS searches can therefore be used by trademark owners to identify domain name holders in order to enforce trademark rights against them for alleged trademark violations, such as for trademark or domain name infringement.

However, as the WHOIS information held by ICANN and CIRA may include personal information of EU citizens (*i.e.* data subjects) which has been provided in order to register a domain name, ICANN, CIRA and the WHOIS system will be required to comply with the requirements under the GDPR. In this regard, ICANN has stated that while "the extent of the impact of the GDPR on WHOIS and other contractual requirements related to domain name registration data is uncertain", the GDPR will have "an impact at least on open, publicly available WHOIS" data.²⁹ CIRA has remained relatively silent on the impact of the GDPR on .ca domain names, other than to say that "the rules in Canada are already quite similar to those being put in place in Europe."³⁰ However, regardless of similarities and differences, CIRA will need to comply with the GDPR with regard to WHOIS data where it is currently not in compliance. Until ICANN and CIRA provide GDPR-compliant solutions, such publicly available data may no longer be

²⁸ *Ibid*.

²⁹ Internet Corporation for Assigned Names and Numbers, "Statement from Contractual Compliance", online:

https://www.icann.org/resources/pages/contractual-compliance-statement-2017-11-02-en>.

³⁰ Canadian Internet Registration Authority, "IT Security Threat Review (From a Canadian Perspective): Data Breaches" online: https://cira.ca/resources-0/IT-security-threat-review/data-breaches.

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available, which may make trademark enforcement more difficult for Canadian organizations relying on WHOIS data to identify alleged online trademarks violators.

E. CONCLUSION

The GDPR will introduce sweeping changes to the privacy landscape within the EU with ramifications that will be felt globally as a result of its extraterritorial scope. As these measures will provide individuals with greater rights over the protection of their personal data, organizations will need to ensure that they comply with the GDPR where they are controllers or processors, regardless of jurisdiction. While the Standing Committee has proposed measures in its report, "Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act",³¹ that would align PIPEDA with measures in the GDPR on a more domestic level, it remains to be seen whether measures similar to the GDPR will be implemented in Canadian legislation. However, in the meantime, Canadian charities and not-for-profits that may be categorized as controllers or processors should become familiar with the GDPR's regulations and, where necessary, seek legal advice to ensure compliance with the GDPR, particularly given the high potential fines.

In addition to the effects of the GDPR on controllers and processors, any Canadian organizations holding intellectual property should be aware of the GDPR's implications on their ability to enforce trademark rights through the WHOIS system, and should continue to monitor ICANN for updates on its policies. Charities and not-for-profits wishing to enforce trademark rights against domain name holders should act now before this invaluable research tool changes, perhaps forever, and critical domain name registration information is no longer publically accessible.

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³¹ Supra note 2.

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

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Representing clients in both contentious and non-contentious estate litigation matters, Elena assists with will challenges, mental capacity matters, applications for advice, direction of the court and the passing of fiduciary accounts.

Elena is recognized as a leading expert in charity and not for profit law. In Elena's charity law practice, she advises charity clients on legislative, tax and regulatory matters and provides proactive advice to both charities and donors on tax effective charitable gifting.

In recognition of her leadership and career contributions, Elena received the Ontario Bar Association's "Award of Excellence in Trusts and Estates." She is also a recipient of Lexpert's "Zenith Award" and has earned the preeminent "AV" ranking in Martindale-Hubbell's Peer-Review Ratings. She is a frequent speaker at the Canadian Tax Foundation, Society of Trusts and Estates Practioners conferences, the Law Society of Upper Canada, The Ontario Bar Association and Canadian Association of Gift Planners. She is a co-author of Charity Law in Canada and coeditor of charities Legislation and Commentary.

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Areas of Practice

Tax Law | Tax Litigation and Dispute Resolution | Litigation and Dispute Resolution | White Collar Defence and Investigations

Education

2018, LLM, Osgoode Hall Law School at York University 2004, In-Depth Tax Course, Canadian Institute of Chartered Accountants

2002, Tax Law for Lawyers, Canadian Bar Association 1999, LLB, Queen's University

1992, BA (Hons), University of Toronto

Year of Call/Admission

Ontario, 2001

Languages

English Greek

Jenny P. Mboutsiadis is an expert tax litigator with over a decade of trial experience as lead counsel. She has extensive successful experience arguing tax cases in the Tax Court of Canada, the Ontario Superior Court of Justice, the Federal Court, and the Federal Court of Appeal.

Jenny provides clients with exceptional knowledge on resolving tax disputes with Canadian tax authorities, from the start of a tax audit to trial. She has expertise in corporate tax matters, including transfer pricing, the GAAR and tax avoidance, GST/HST, and treaty interpretation.

Recently, Jenny spent eleven years as a tax litigator for the Department of Justice Canada. Prior to that, she was a tax litigator at another leading Bay Street law firm.

Recognized for her skillful and efficient conduct of trials, Jenny regularly presents on trial advocacy, discovery skills, and effective courtroom practice.

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Areas of Practice

Corporate/Commercial

Education

2009, JD, Queen's University 2005, BA (Hons), University of Toronto

Year of Call/Admission

Ontario, 2010

Languages

English

Laurie Turner has an active corporate/commercial practice and advises clients in the for-profit and not-for profit (specifically hospital sector) on a diverse range of matters including corporate restructurings, (e.g. mergers and amalgamations) corporate governance, procurement and privacy, with a particular focus on the health sector. Laurie is a graduate of Queen's University, Faculty of Law. Prior to attending law school, Laurie earned her undergraduate degree from the University of Toronto (Distinction) and was an Executive Research Assistant to the Canadian Research Chair in Breast Cancer at Sunnybrook & Women's College Health Sciences Centre. Laurie also worked as a Research Assistant for Professor Jurgen Rehm at the Centre for Addiction and Mental Health. Laurie has gained valuable experience through recent secondments at two large teaching hospitals in Toronto and a shared service organization where she advised on a wide range of matters.