

# CARTERS

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## THE 24<sup>TH</sup> ANNUAL *Church & Charity Law*<sup>TM</sup> Seminar Thursday, November 9<sup>th</sup>, 2017

### “RECENT DEVELOPMENTS IN THE LAW”

#### WELCOME

Welcome to the 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar, which is designed to assist churches and charities in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability. Although the topics presented are directed at churches and charities, many aspects of the presentations will also be of interest to other not-for-profits. This seminar is eligible for **5 substantive hours CPD credits** with the Law Society of Ontario and CPA PD requirements.

The Annual *Church & Charity Law*<sup>TM</sup> Seminar, held every year since 1994, is presented by **Carters Professional Corporation (Carters)**, a law firm with offices in the Toronto and Ottawa areas, experienced in advising churches, charities and not-for-profits across Canada, as well as internationally. The firm is assisted by various expert speakers this year.

#### CHECK-IN

If you have REGISTERED AND PAID the registration fee, please obtain your name tag and/or pre-paid handout package at the “Information Centre” on the main level and then help yourself to complimentary coffee and muffins in the Gym.

If you NEED TO PAY the registration fee, please proceed to the “UNPAID AND NEW REGISTRATION” desk as you enter the building. The registration fee can be paid by cash or cheque payable to *Carters Professional Corporation*. Please obtain a handout package from one of our greeters for more information.

#### LUNCH

While complimentary coffee and tea is provided throughout the day and muffins in the morning, lunch is not included unless shown on your name tag. Our caterer will have assorted sandwiches, salads, assorted cookies, fruit, coffee, tea, water, pop and juice for those who have purchased tickets. The Church has requested that **food and beverages** be consumed only in the Gym, Foyers and overflow areas, **not** in the Auditorium please.

#### REMINDERS

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

#### RESOURCE MATERIALS

Included in this handout package are copies of today's presentation materials. These materials, along with numerous other articles, seminar materials, and newsletters of interest to churches and religious charities, including back issues of *Charity Law Bulletins*, *Church Law Bulletins*, and *Charity & NFP Law Updates* are available free of charge at our websites at [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca), [www.carters.ca](http://www.carters.ca), and [www.antiterrorism.ca](http://www.antiterrorism.ca). Copies of *Church Law* and *Charity Law Bulletins* are on display at the Carters booth in the entrance Foyer.

Copies of the booklet entitled “**2017 Legal Risk Management Checklist for Charities**” are available for \$2.00 during breaks, and at no charge on our website at <http://www.carters.ca/pub/checklist/CRMchklstNov17.pdf>.

#### CHARITY & NFP LAW UPDATE

To receive the monthly *Charity & NFP Law Update*, e-mail us at [info@carters.ca](mailto:info@carters.ca) with “mailing list” in the subject line. Alternatively, please add your name and email address to our Sign-Up List at the Carters booth indicating your consent to receive firm newsletters and information about future seminars. A limited number of copies of the [October 2017 edition](#) of the *Charity & NFP Law Update* are available at the Carters booth today.

#### QUESTION PERIOD

Questions are encouraged and will be answered at the end of both the morning and afternoon sessions. A question sheet is provided at the back of this handout and should be left at the front podium in the Auditorium. Unfortunately, not all questions can be answered due to time constraints.

#### ACKNOWLEDGEMENTS AND THANKS

We gratefully acknowledge and thank the pastors, leadership, and congregation of the **PORTICO Community Church** for the use of their facilities. We would like to also acknowledge and thank Tony Manconi and the Honourable Justice David Brown for their contribution as our guest speakers at this year's seminar. All lawyers and guest speakers have volunteered their time for this event. We also wish to thank our many sponsors listed below who help to keep the cost of this seminar as low as possible.

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## THE 24<sup>TH</sup> ANNUAL *Church & Charity Law*<sup>TM</sup> Seminar *Thursday, November 9<sup>th</sup>, 2017*

### AGENDA

7:30 a.m.	Check-In (Coffee, Tea, Juice and Muffins provided)	
8:30 a.m.	Opening Remarks and National Anthem	
8:40 a.m.	Essential Charity & NFP Law Update	Jacqueline M. Demczur
9:10 a.m.	Direction and Control: What It is and How to Comply	Theresa L.M. Man
9:40 a.m.	Critical Privacy Issues Involving Children's Programs	Esther Shainblum
10:10 a.m.	Morning Break (Coffee and tea provided) (30 minutes)	
10:40 a.m.	Remuneration of Directors of Charities: What's New?	Ryan M. Prendergast
11:05 a.m.	Changes and Developments in Employment Law	Barry W. Kwasniewski
11:30 a.m.	Governance Disputes Involving Charities and Not-for-Profits: The View from the Bench	The Honourable Justice David M. Brown
12:15 p.m.	Questions for the Honourable Justice David M. Brown	
12:30 p.m.	Lunch Break (55 minutes)	
1:25 p.m.	Acknowledgements (And a Few After Lunch Jokes)	
1:30 p.m.	Corporate Documents and Procedures to Help Avoid Governance Disputes	Esther S.J. Oh
2:00 p.m.	The Investment Spectrum for Churches & Charities	Terrance S. Carter
2:30 p.m.	Challenges in Regulating the Charitable Sector: Looking Back and Going Forward	Tony Manconi Director General
3:10 p.m.	Question Period	
3:30 p.m.	Program Ends	

Please see **Speaker Biographies** on the following pages. Please take a moment to complete the **Evaluation Form** included at the back of this handout to help us make the next Annual *Church & Charity Law*<sup>TM</sup> Seminar even better.

## SEMINAR HOSTS

**Carters Professional Corporation** is a law firm with expertise in the area of church, charity and other not-for-profits and is committed to assisting clients in avoiding legal problems before they occur through effective legal risk management advice, including assistance with:

- Anti-bribery Compliance
- Anti-terrorism Policy Statements
- CRA Charity Audits
- Charitable Organizations & Foundations
- Charitable Incorporation & Registration
- Charitable Trusts
- Church Discipline Procedures
- Church Incorporation
- Corporate Reorganization
- Continuance Under the CNCA
- Corporate Record Maintenance
- Director and Officer Liability
- Dissolution and Wind-Up
- Employment Issues
- Endowment Agreements
- Foreign Charities Commencing Operations in Canada
- Fundraising and Gift Planning
- Gift Acceptance Policies
- Human Rights Compliance and Litigation
- Incorporation and Organization
- Insurance and Risk Management
- CRA Sanctions and Penalties
- International Trade-mark Licensing
- Investment Policies and Opinions
- 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
- Transitioning Under the ONCA

## PROTECTION FROM REGULATORY OFFENCES FOR CHURCHES AND CHARITIES

Churches and charities often face significant liability and financial challenges due to increasing enforcement of federal and provincial regulatory legislation dealing with such matters as water, working conditions and environmental issues. Carters is able to provide advice and assistance at all stages from an initial investigation through to a full defence at a trial. For more information, contact Sean Carter at Carters (1-877-942-0001).

## SEMINAR SPONSORS

Carters would like to thank the following companies for their sponsorship of the Annual *Church & Charity Law*™ Seminar that helps to keep the registration fee to a minimum:

- **BDO Canada LLP**, Natalie G. Saarimaki, 519-941-0681, [www.bdo.ca](http://www.bdo.ca)
- **Colliers International**, 416-643-3739, <http://www.collierscanada.com/en/services/not-for-profit-advisory-group>
- **LexisNexis Canada Inc.**, 1-800-668-6481, <https://store.lexisnexis.ca/en>
- **RLB Chartered Professional Accountants**, 519-822-9933, <http://www.rlb.ca/>
- **Thomson Reuters**, 1-800-387-5164, <http://store.thomsonreuters.ca/>
- **GMS Chartered Professional Accountants Professional Corporation**, 905-919-3543, [www.gmscpa.ca](http://www.gmscpa.ca)
- **Abundance Canada**, 1-888-212-7759, [www.abundance.ca](http://www.abundance.ca)

## SEMINAR RESOURCE EXHIBITORS

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

- **Abundance Canada**, [www.abundance.ca](http://www.abundance.ca)
- **BDO Canada LLP**, Natalie G. Saarimaki, 519-941-0681, [www.bdo.ca](http://www.bdo.ca)
- **Canadian Council of Christian Charities**, <https://www.cccc.org/>
- **Christian Legal Fellowship**, [www.christianlegalfellowship.org](http://www.christianlegalfellowship.org)
- **Colliers International**, <http://www.collierscanada.com/en/services/not-for-profit-advisory-group>
- **GMS Chartered Professional Accountants Professional Corporation**, [www.gmscpa.ca](http://www.gmscpa.ca)
- **LexisNexis Canada Inc.**, <https://store.lexisnexis.ca/en>
- **RLB Chartered Professional Accountants**, <http://www.rlb.ca/>
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## GENERAL DISCLAIMER

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## SPEAKER BIOGRAPHIES



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



**Terrance S. Carter**, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Thomson Reuters), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2018), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorism.ca](http://www.antiterrorism.ca).



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



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



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



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



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



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



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

## UPCOMING CARTERS' SEMINARS OF INTEREST

**BDO Canada LLP – Dufferin Area** will host a conference on November 30, 2017. Terrance S. Carter will present on the topic of "Duties and Liabilities of Directors and Officers of Charities and NFPs".

**COMING SOON – Thursday, February 15, 2018 - Ottawa Region Charity & Not-for-Profit Law Seminar** hosted by Carters at the Centurion Conference Centre in Ottawa, Ontario. More details will be available soon at [www.carters.ca](http://www.carters.ca).

**Carters Webinars: 2018 Winter Series** - Details to follow at [www.carters.ca](http://www.carters.ca).

## SAVE THE DATE 2018

**The 25<sup>th</sup> Annual Church & Charity Law™ Seminar** will tentatively be held on **Thursday November 8, 2018**. More details will be available in the New Year at [www.carters.ca](http://www.carters.ca).



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### Ottawa Office

117 CentrepoinTE Dr., Suite 350  
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### Mississauga Meeting Location

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**

## **LIST OF POWERPOINTS**

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- ◆ **Essential Charity & NFP Law Update**  
Jacqueline M. Demczur, B.A., LL.B.
- ◆ **Direction and Control: What Is It and How To Comply?**  
Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- ◆ **Critical Privacy Issues Involving Children's Programs**  
Esther Shainblum, B.A., LL.B., LL.M., CRM
- ◆ **Remuneration of Directors of Charities: What's New?**  
Ryan M. Prendergast, B.A., LL.B.
- ◆ **Changes and Developments in Employment Law**  
Barry W. Kwasniewski, B.B.A., LL.B.
- ◆ **Governance Disputes Involving Charities and Not-For-Profits: A View From the Bench**  
The Honourable Justice David M. Brown, Court of Appeal of Ontario
- ◆ **Corporate Documents and Procedures to Help Avoid Governance Disputes**  
Esther S.J. Oh, B.A., LL.B.
- ◆ **The Investment Spectrum For Churches & Charities**  
Terrance S. Carter, B.A. LL.B., TEP, Trade-mark Agent
- ◆ **Challenges in Regulating the Charitable Sector: Looking Back and Going Forward**  
Tony Manconi, B.A., Director General of the Charities Directorate of Canada Revenue Agency





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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**


**Toronto – November 9, 2017**

## **ESSENTIAL CHARITY & NFP LAW UPDATE**

**By Jacqueline M. Demczur, B.A., LL.B.**

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**24<sup>th</sup> Annual  
Church and Charity Law  
Seminar  
Toronto – November 9, 2017**

**Essential Charity and NFP Law Update**  
(Current as of November 3, 2017)

**By Jacqueline M. Demczur, B.A., LL.B.**  
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2

**OVERVIEW**

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

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3

**2017 FEDERAL BUDGET HIGHLIGHTS**

- Federal Budget legislative development
- Budget 2017 proposed a number of measures to protect Ecogifts, now in Bill C-63, *Budget Implementation Act, 2017, No. 2* tabled October 27, 2017, including:
  - New ministerial approval in certain situations
  - Private foundations no longer eligible to receive Ecogifts
- Repeal of Additional Corporate Donation Deductions on Medicine for International Aid
- The First-Time Donor Super Credit will be allowed to expire in 2017 due to low take-up

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4

**RECENT CRA PUBLICATIONS**

- New CRA Guidance: *Relieving Conditions Attributable to Being Aged and Charitable Registration* (CG-026)(December 8 2016)
  - Replaces the CRA's Policy Statement CPS-002, *Relief of the Aged* that was released on July 6, 1990
  - Clarifies what CRA considers charitable for Canadian charities serving the aged
  - Having attained a certain age is not a condition that is eligible for charitable relief
  - Members of the eligible beneficiary group must be those affected by one or more conditions attributable to being aged

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5

- The CRA provides a non-exhaustive list of conditions: frailty, social isolation, decline in motor skills, flexibility, strength, speed of execution, or hand-eye co-ordination, physical or mental health conditions attributable to being aged, difficulty functioning in, or adapting to, current technology, vulnerability to elder abuse
- The applicant is required to include in its charitable purposes a "purpose description" with the scope of the activities that will be conducted to relieve the conditions attributable to being aged, the eligibility group, and the conditions that will be relieved
- There needs to be a connection between the condition to be relieved and activities to be conducted

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6

- The CRA's New Cause-related Marketing Webpage
  - On February 11, 2017, the CRA introduced a new webpage to explain the CRA's interpretation of cause-related marketing
  - The CRA defines cause-related marketing as fundraising activity where a registered charity (or other qualified donee) works with a for-profit entity to promote the sale of the for-profit's items or services on the basis that part of the revenues will be donated to the registered charity

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7

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

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8

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

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9

- Changes to charitable registration application process (June 29, 2017)
  - Charities Directorate no longer reviewing applications submitted with draft governing documents
  - However, draft revised charitable purposes can still be sent in for existing charities
- Online services to come November 2018 (July 21, 2017)
  - Filing T3010 annual returns online
  - Update and manage account information
  - Apply for registration (T2050) and check file status
  - Corresponding with the CRA
- Changes to CRA’s Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) (August 9, 2017)
  - Permits support for small businesses in disaster areas under certain circumstances for 2 years after the date of the disaster

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10

- Changes to the Voluntary Disclosure Program
  - On June 9, 2017, proposed changes were announced for the CRA Voluntary Disclosures Program (“VDP”) to be implemented as of January 1, 2018
  - The VDP is intended to allow taxpayers to come forward and correct previous omissions in their dealings with the CRA to avoid penalties and prosecutions
  - The VDP only applies to registered charities in very limited context of employee source deductions and HST
  - The specifics of the proposed changes will therefore be of limited interest to registered charities

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11

- However, the CRA provides a voluntary disclosure process for charities that have been involved in matters of non-compliance and want to bring themselves back into compliance
- This voluntary disclosure process is set out on the CRA webpage entitled, “Bringing Charities Back into Compliance”
- Serious matters of non-compliance or repeat non-compliance that could lead to a sanction or revocation of charitable status may benefit from a pre-emptive voluntary disclosure to the CRA
- It is important to conduct a due diligence review identifying all issues of non-compliance before commencing a voluntary disclosure with the CRA

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12

## RECENT TAX DECISIONS, RULINGS, AND INTERPRETATIONS INVOLVING CHARITIES

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

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13

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

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- The CRA Issues a Technical Interpretation of Charities Returning Gifts
  - On May 17, 2017, the CRA released technical interpretation 2016-0630351 providing its response to the questions "1) Can a registered charity return a gift of a life insurance policy to a donor?" and "2) If so, what are the tax consequences to the registered charity and to the donor?"
  - The CRA concluded that the answer to these questions is case-specific and the obligation to return a gift is a matter for the court to determine
  - However, it warned that the return of a gift might be treated for ITA purposes as a charity giving a gift to a non-qualified donee which could result in revocation

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15

## CORPORATE LAW UPDATE

- Corporations Canada dissolves Part II CCA corporations
  - In August 2017 Corporations Canada dissolved the remaining Part II CCA corporations that had not continued by July 31, 2017
  - Apart from a few exceptions, all federal not-for-profit corporations now operate under the CNCA
- Ontario not-for-profit corporations under the OCA are now required to keep records of land ownership
  - Effective as of December 10, 2016, a register of ownership interests in land must be kept at registered office
  - Any corporations incorporated after December 10, 2016 must comply now with new requirements
  - Corporations incorporated prior to December 10, 2016, have until December 10, 2018, to comply with the new record keeping requirements

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- Recent amendments made to the Ontario *Corporations Act* ("OCA")
  - Good news that Ontario government has proceeded with corporate reform for NFP sector
  - Ontario Bill 154, *Cutting Unnecessary Red Tape Act, 2017*, passed third reading on November 1, 2017, introduces changes to the OCA, OBCA and Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") to aid proclamation of the ONCA
  - With these amendments, existing OCA corporations will soon benefit from remedial changes long anticipated to come from the ONCA
    - Proposed interim provisions for Part III of the OCA will allow OCA corporations to implement certain ONCA features before the ONCA is proclaimed, including:

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- Special legislation and charity law will prevail over the OCA in the event of a conflict
- Corporations will have the rights of a natural person
- Objective standard of care for directors and officers
- The removal of directors by majority vote of members
- Member meetings may be held by phone or electronic means
- Notice to members may be given by electronic means
- Adoption of pre-incorporation contracts
- A person who is not a member may be a director

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18

- Pursuant to an extraordinary resolution (80%), decide not to have an audit if annual revenue is less than \$100,000 or an amount prescribed by the regulations
- The court may make an order appointing the required number of directors if a corporation has no directors or members
- The coming into force of these OCA amendments is staggered and complicated
  - Some are scheduled to come into force upon receiving Royal Assent (e.g. member meetings held by electronic means and removal of directors by majority vote)
  - Others will come into effect 60 days after receiving Royal Assent (e.g. objective standard of care for directors and officers)

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- Bill 154 also includes substantially similar amendments to the ONCA as those previously in Bill 85 (which had died on the order paper in 2014), with the addition of several new amendments, including:
  - Bill 154 provides that the ONCA will not apply to corporations sole “except as is prescribed”
    - Exempting the application of the ONCA to corporations sole had never come up in prior consultations
    - The ONCA already has a mechanism dealing with special act corporations
  - Consent to be a director must be in writing
  - Threshold to be considered a public benefit corporation

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20

- Circulation of annual financial statements to members
- Optional proxy votes
- Delay implementation of membership class votes
- Transition from OCA to ONCA
  - Certain provisions from by-laws or special resolutions will continue to be valid indefinitely until articles of amendment are endorsed
- Distribution of net assets on winding up or dissolution of public benefit corporations
- By-law amendments by directors
- Coming into force date of the ONCA is unknown and these ONCA amendments will take effect on varying dates

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21

## FEDERAL LEGISLATION UPDATE

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

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- Bill C-59 (on Anti-terrorism) Proposes to Amend the *Security of Canada Information Sharing Act* and the *Criminal Code*
  - Clarifying that advocacy, protest, dissent or artistic expression will not generally fall under the definition of activity that undermines the security of Canada
  - Inserting “threaten” into the definition, which would not require proof as to the effect of the activity
  - Mandatory review of the list every 5 years (or 5 years after an entity is added)
  - Replacing the offence of “advocating or promoting commission of terrorism offences” (s.83.221 of the *Criminal Code*), with the offence of “counselling”

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- *National Security and Intelligence Committee of Parliamentarians Act* and Regulations in force as of October 6, 2017
  - Makes several amendments to other acts, including *Access to Information Act*, the *Privacy Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*
- *Corruption of Foreign Public Officials Act* was amended on October 31, 2017
  - Repeals the “facilitation payments” exemption from the offence of bribing a foreign public official
  - Charities could be exposed to possible criminal liability for payments to expedite or secure the performance of certain routine activities

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- Amendments to the *Trade-marks Act* expected to come into force in early 2019
  - Will eliminate the requirement to use a trademark in Canada before a registration can be obtained
- Bill C-51, *an Act to amend the Criminal Code...*
  - Proposes to repeal the offence of obstructing or violence to or arrest of officiating clergyman or minister and the offence of disturbing religious worship or certain meetings (s. 176 of the *Criminal Code*)

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## PROVINCIAL LEGISLATION UPDATE

- Proposed Ontario regulations under the CAA authorizing charitable corporations to pay directors in limited situations (see presentation by Ryan Prendergast)
- Proposed amendments to the CAA in Bill 154 would permit charities to also make "social investments" (see presentation by Terrance Carter)
- Ontario Bill 160, *Strengthening Quality and Accountability for Patients Act, 2017*
  - Introduced on September 27, 2017, it amends enacts and repeals a number of Acts regulating healthcare in Ontario
  - Amendments to the *Long-Term Care Homes Act, 2007* and new rules to deal with both restraining and confining of residents of a retirement home

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- Ontario Bill 166, *Strengthening Protection for Ontario Consumers Act, 2017*, enacts the *Ticket Sales Act, 2017*, which restricts the sale of tickets to recreational, sporting, cultural or other prescribed events in the secondary market, but provides an exception to registered charities
- Charities Operating in Quebec are Still Required to Submit an Annual Information Return in Quebec
  - Although registered charities that collect donations from Quebec residents are no longer required to register separately as charities in Quebec, they are still required to file the annual information return TP-985.22-V within 6 months after the charity's year-end

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- O. Reg. 191/11, *Integrated Accessibility Standards* under the *Accessibility for Ontarians with Disabilities Act, 2005* requires that public and private organizations in Ontario file an accessibility report:
  - For designated public sector organizations, such as hospitals and other public bodies, the report is due every 2 years starting December 31, 2013
  - For organizations with at least 20 employees, the report is due every 3 years starting December 31, 2014
  - If your organization falls into either of these categories, then your next accessibility report will be due December 31, 2017

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## CASE LAW OF INTEREST

- Trinity Western University ("TWU")
  - On November 1, 2016, the Court of Appeal of BC unanimously upheld the decision of the BC Supreme Court to quash the decision of the Law Society of BC
  - On February 23, 2017, the Supreme Court of Canada granted leave to appeal in *Trinity Western University, et al v Law Society of Upper Canada* and in *Law Society of British Columbia v Trinity Western, et al*.
  - By orders dated July 27 and July 31, 2017, the hearing is scheduled for November 30 and December 1, 2017 and motions for leave to intervene were granted

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

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- Tribunal Upholds Religious School Right to Reject Applicants Based on Creed
  - On July 5, 2017, in *HS v The Private Academy*, the Human Rights Tribunal of Ontario dismissed three applications by a same-sex married couple alleging discrimination by an Evangelical Christian school that refused to admit their child into its preschool program
  - Ontario *Human Rights Code* ("OHRC"), s.1 requires that equal treatment with respect to services, goods and facilities, be provided without discrimination
  - OHRC, s.18 provides an exception to s.1 when the organization is "primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination"

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31

- The Tribunal applied a three step test adopted in previous tribunal decisions with regard to the section 18 exemption:
  1. Is the entity a religious, philanthropic, educational, fraternal or social institution or organization?
  2. Is the institution or organization “primarily engaged in serving the interests of persons identified by a prohibited ground”?
  3. Is the membership or participation in the institution or organization restricted to those identified by that prohibited ground?
- The Tribunal found that the school was exempt from the requirements under s.1 of the Code because it met all aspects of the three part test in s.18.

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

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- *Ahmed v Hossain*, 2017 ONSC 5660 (Sep 22, 2017)
  - The applicants claimed that the trustees of Danforth Community Center (“DCC”), a not for profit, charitable corporation, serving as a Mosque for members of the Sunni Muslim faith, unlawfully took control of the board of directors and purported to bar the applicants from entering the Mosque and from running for any administrative office of the DCC for 10 years
  - The Ontario Superior Court held that neither the board of trustees nor the members had the right under the corporation's constitution or the *Ontario Corporations Act* to dissolve the board of directors or to oust the applicants

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34

- Ktunaxa Nation's Freedom of Religion (Nov 2, 2017)
  - This case arose after Ministerial approval of a ski resort development in an area of spiritual significance for the Ktunaxa people
  - After consultation with the Ktunaxa people, they rejected the project claiming it would drive “Grizzly Bear Spirit” away from their sacred land
  - The Supreme Court of Canada held that the approval did not violate the Ktunaxa's right to freedom of religion, as it did not interfere with their freedom to believe or to manifest their belief
  - The Court stated that the *Charter* could not protect the presence of “Grizzly Bear Spirit” itself or the subjective spiritual meaning that the Ktunaxa derived from it

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**


**Toronto – November 9, 2017**

## **DIRECTION AND CONTROL: WHAT IS IT AND HOW TO COMPLY?**

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

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2

**A. INTRODUCTION**

- "Direction and control" is not a term in the *Income Tax Act* (ITA)
- "Direction and control" is CRA's requirement as a result of how CRA interprets the ITA
- The onus is upon the charity to evidence that they have fully complied with CRA requirements

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- "Direction and control" occurs in three contexts in CRA's policies
  - When a registered charity engages in activities with a non-qualified donee acting as an intermediary (regardless of whether the activities are inside or outside Canada)
  - When a registered charity engages in program-related investments ("PRIs")
  - When a registered charity conducts its own programs through internal divisions, departments, chapters, etc.

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**B. BASIS FOR "DIRECTION AND CONTROL" IN ITA**

- ITA provides that a charity can only use its resources in two ways
  - a) Making gifts to qualified donees
    - See definition for QDs below
    - Does not involve direction and control
  - b) Conducting its own activities by one of two ways
    - By charity's own staff and volunteers
    - Through third parties ("intermediaries") – CRA's guidance requires charity to exercise direction and control

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**C. MAKING GIFTS TO QUALIFIED DONEES (QDs)**

- "Qualified donee" is defined in the ITA
- QDs in Canada
  - Registered Canadian charities
  - Registered Canadian amateur athletic associations
  - Registered Canadian national arts service organizations
  - Listed housing corporations resident in Canada constituted exclusively to provide low-cost housing for the aged
  - Listed Canadian municipalities
  - Her Majesty in right of Canada or a province
  - Listed municipal or public bodies performing a function of government in Canada

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- QDs outside Canada - only 3 categories
  - Prescribed universities – universities outside Canada with student body that ordinarily includes students from Canada
  - Listed charitable organizations outside Canada to which Her Majesty in right of Canada has made a gift in past 24 months and pursue activities related to disaster relief or urgent humanitarian aid or in the national interest of Canada
    - 2015 federal budget expanded "charitable organizations" to include foundations
    - A rolling list
  - The United Nations and its agencies
    - E.g., UNCDF, ILO, IFC, UNICEF
    - CRA does not have a list

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- Cannot make gifts to non-QDs
- Examples of non-QDs (unless they meet one of 3 categories in previous slide)
  - US 501(c)(3) tax exempt organizations
  - UK charities
  - International NGOs
- Funds to QDs are “gifts” under the ITA
- Charities are not required to exercise “direction and control”
- Can make the gift by deed of gift - short document
- Can make gift by funding agreement - more detailed, sets out terms of gift, for due diligence and monitoring purposes, not a CRA requirement

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8

## D. CONDUCTING OWN ACTIVITIES

- “Own activities” test = activities must be directly under the charity’s direction, control and supervision and for which it can account for any funds expended
- CRA recognizes two ways to meet this test
  - A charity sending its own staff and volunteers on the ground to conduct the activities
  - Through third parties - “intermediaries”
- The charity is actively involved in programs that are intended to achieve its charitable purposes (e.g. directly funding its own employees and/or volunteers in carrying out its programs)
- The charity cannot carry out its charitable purposes by simply giving monies or other resources to an other organization that is not a qualified donee

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## E. CONTEXT #1 CHARITY USING NON-QD AS INTERMEDIARY TO CONDUCT ACTIVITIES

### 1. General Requirements

- CRA permits charities to make payments to and work with third parties (i.e. an “intermediary”) - a person or non-qualified donee that is separate from the charity and who the charity works with to carry out its activities
- Charity must exercise “direction and control” over the intermediary

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10

- Relevant CRA guidance:
  - CRA *Guidance on Canadian Registered Charities Carrying Out Activities Outside of Canada*, CG-002 is available at <http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cgd/tsd-cnd-eng.html>
  - CRA *Guidance Using An Intermediary to Carry Out a Charity’s Activities Within Canada* CG-004 <http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/cgd/ntrmdry-eng.html?rss>
- See Carters Charity Law Bulletins #219, #259 and #307 at [www.charitylaw.ca](http://www.charitylaw.ca)

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- Must comply with requirements in the Guidance
  - How to conduct activities outside/inside Canada through third parties
  - What to include in written agreements with third parties
  - How to maintain direction and control over third parties
  - What books and records to obtain from third parties
- Failure to comply may risk the charity paying a penalty of 105% on the amount of the gift to non-QDs, increased to 115% on repeat infractions, and losing charitable status
- If a charity engages in activities (especially outside of Canada) using intermediaries, the question is not if it will be audited by CRA but rather when

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- Activities funded are activities of the funding charity, not activities of the third party intermediaries (to meet “own activities” test)
  - A charity cannot fund third party to help their programs or operations
  - A charity must give funds to third party to conduct the charity programs on behalf of the charity - i.e., it is the charity’s own programs
- Guidance states that “When working through an intermediary, a charity must direct and control the use of its resources” = “direction and control” is key
- Third party intermediaries do not have to be QDs, can be non-QDs, such as international NGOs, for-profits, or individuals

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- Before working with an intermediary and throughout the course of the arrangement, the charity must investigate the status and activities of the intermediary to ensure
  - The intermediary has the capacity to carry out the charity's activity (e.g., personnel, experience)
  - There is a strong expectation the intermediary will use the charity's resources as directed by the charity
- Must also do appropriate due diligence of intermediary concerning anti-terrorism compliance issues, particularly when working in conflict areas

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- A charity cannot act as a "conduit" to funnel money to non-QDs
  - A conduit is an organization that accepts donations for which it typically issues tax-deductible receipts and then funnels the money, without maintaining direction and control to a non-QD
  - To avoid being a conduit, the charity must have demonstrable control over the use of its money
- Examples of amounts spent on charitable activities:
  - The costs of goods transferred to an intermediary to provide eligible beneficiaries with charitable relief
  - Payments for buying goods and services to provide eligible beneficiaries with charitable relief

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## 2. Four types of Intermediaries

- Four common types of intermediaries that can be used
  - Agents**
  - Joint venture participants**
  - Co-operative participants**
  - Contractors**
- CRA does not recommend using one type of intermediary over the other
- Regardless of which option is used
  - Must meet own activities test
  - Must maintain direction and control
  - Must have written agreement

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16

- 1) Agents
  - A charity can appoint an agent to act as the charity's representative to carry out specific tasks on behalf of the charity
  - The charity relies entirely on the agent to carry out its activities on its behalf
  - The common law principle that the acts of the agent are that of the principal does not automatically meet the own activities test unless the charity is in fact directing what the agent does
  - A charity may have one general agency agreement that covers most of the terms in a relationship with its intermediary and additional directions that are specific for each particular activity

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17

- Liability concerns - Actions of the agent are deemed to be the actions of the principal, therefore the principal is vicariously responsible for the actions of the agent, could include civil and criminal liabilities
- Insurance concerns - Some insurers may be concerned about vicarious liability risks and not provide coverage
- Disbursement quota concerns - Until the agent spends funds from the charity, there is no charitable expenditure that can be counted toward the charity's disbursement quota

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- 2) Joint venture participants
  - A charity can carry on its activities jointly with other organizations or individuals through a joint venture relationship where the participants pool their resources to accomplish their goal in accordance with the terms of a joint venture agreement
  - The charity is not relying entirely on the joint venture participant to carry out activities for the charity but instead does so on a pooled basis
  - A charity can work with non-QDs as long as the charity exercises control over the activities proportionate to the resources it is providing and it can demonstrate this fact

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19

- Generally, a joint venture governing committee is required to establish, conduct and oversee the joint venture
- A charity must be able to show that its share of authority and responsibility over a joint venture allows it to dictate, and account for how its resources are used
- For example – If a charity contributes 40% of the funding for the project, then the charity should have 40% of the voting rights on the governing committee
- However, since the charity may be outvoted, the agreement needs to provide an exit strategy

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20

### 3) Co-operative participants

- A “co-operative participant” is an organization that works side-by-side with a charity to complete a charitable activity
- The charity and the co-operative participants do not pool their resources or share responsibility for the project as a whole - each co-operative participant is responsible for only parts of the project
- For example - a charity that provides care for the sick joins with a non-QD to build and operate a medical clinic in an isolated area
  - The charity agrees to provide qualified nursing staff at the clinic, but will not participate in other parts of the project, such as the construction of the building, buying medicine, etc.

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21

### 4) Contractors

- A contractor is an organization or individual that a charity retains to provide goods and/or services through a contract for services
- The charity must give specific instructions to its contractors
- The charity must exercise direction and control over the contractor and monitor the use of its resources
- There are several advantages in using a contractor
  - Limitations in liability - No automatic vicarious liability, however plaintiff may argue that the charity had exercised too much day-to-day control over the contractor's activities and therefore should be vicariously liable

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- Insurance – No vicarious liability may make a contract for service more attractive to an insurer
- Financial statements - Assets transferred to contractor in exchange for services are no longer the assets of the charity and therefore do not need to be reflected in the charity's financial statements
- Segregation of funds – (Unlike agency) there is no need to segregate funds into separate bank accounts by the contractor, however contractor still needs to be able to account for monies received and expended
- Disbursement quota - Once assets are transferred to contractor to implement an activity for the charity, they are expended for the purposes of the charity's 3.5% disbursement quota at the time of payment to the contractor

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23

### 3. Direction and control of resources

- CRA requires charities to take all necessary measures to direct and control the use of its resources through an intermediary
- Although not formally required under the Guidance, CRA recommends that charities should have a written agreement in place with any intermediaries that they work with
- Possible exceptions: If the money spent on a one-time activity is \$1,000 or less, charitable goods, or transfer to “head bodies” involving the lesser of \$5,000 or 5% of total expenditures
- Other forms of communication may be used to show direction and control, but a written agreement provides the best evidence

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- CRA recommends that the following measures be adopted to direct and control the use of a charity's resources
  - Create a written agreement and implement its terms
  - A clear, complete, and detailed description of activities is communicated to the intermediary
  - Monitor and supervise the activity
  - Provide clear, complete, and detailed instructions to the intermediary on an ongoing basis
  - (If an agency relationship) segregate funds and maintain separate books and records
  - Periodic transfer of resources based on performance
- Charities must maintain a record of steps taken to direct and control the use of its resources, as well as detailed books and records (in French or English)

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- Monitor and supervise the activity - i.e., receiving timely and accurate reports to make sure that its resources are being used for its own activities – may involve the following
  - progress reports
  - receipts for expenses and financial statements
  - informal communication via telephone or email
  - photographs
  - audit reports
  - on-site inspections by the charity's staff
- CRA does not provide a black and white threshold or form to complete to evidence sufficient direction and control - what is sufficient depends on the facts in each case
- The larger the amount of funding, CRA would likely expect higher level of due diligence

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26

#### 4. Need for detailed records and documents

- Charities must keep document trail to evidence due diligence and compliance with CRA requirements
- Upon CRA audit, CRA has right to access all books and records pertaining to the operations (not just financial records) – including written agreements, proposals, working papers, reports from intermediaries, emails, memos, committee meetings, records of phone meetings, website, publications, etc., as well as website, Facebook, publications of intermediaries
- Need to take care what is recorded in these documents
- Need to use the correct language in all documents
- Consider educating intermediaries on CRA rules in which the charity works and the language that should be used when communicating with the charity

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27

#### 5. Transfers to head bodies outside Canada

- Many religious organizations and international organizations work with head bodies or umbrella organizations
- If the head bodies or umbrella organizations are located in Canada, they could likely be registered charities as well
- If the head bodies or umbrella organizations are located outside Canada, there may be issues for the local organization in Canada to send funds to the head bodies
- CRA's guidance states that having the head body act as an intermediary is *not practical* because the nature of the relationship may prevent the charity from *instructing* its head body in how to use the money

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- CRA warns that charities must still adhere to the same principles with respect to direction and control and cannot simply send gifts to the head body
- CRA recognizes that head bodies may provide charities with goods and services such as training, literature, policies and use of intellectual property
- Charities must make sure that they are "receiving goods and services equivalent in value to the amounts they are sending"
- CRA accepts that if the amount is small (lesser of \$5000 or 5% of the charity's annual total expenditures) no further evidence of benefit is required
- If the amount transferred exceeds the threshold amount, the charity must be sure that the goods and services received reflect the value of the funds transferred

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#### F. CONTEXT #2 CHARITY MAKING PRIs TO NON-QDs

- Charities can make "program-related investments" (PRIs) with QDs and non-QDs = an activity that directly furthers the investor charity's charitable purposes
- If PRIs are made to non-QDs, the charity must maintain direction and control over the program to achieve the charitable purpose – same requirement as the "own activity" test when conducting activities through intermediaries inside/outside Canada
- Must also show that any private benefit is incidental
- CRA Guidance CG-014, *Community Economic Development Activities and Charitable Registration*

<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cmtcnmcdvpm-eng.html>

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- Types of PRIs
  - Loans and loan guarantees - to another organization to allow it to achieve the charitable purpose of the investor charity, e.g., to acquire job training equipment for eligible beneficiaries
  - Leasing land and buildings - buying a building and leasing it to an organization to accomplish a charitable purpose, e.g., for education purposes
  - Share purchases - in a for-profit company to accomplish charitable purpose, e.g., operating an apartment complex for the poor – but there are restrictions for foundations

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- Charities conducting PRIs must have
  - A policy describing how the charity will make decisions regarding PRIs
  - Documentation explaining how each PRI furthers its charitable purpose
  - Exit mechanisms to withdraw from a PRI or convert it to a regular investment if it no longer meets the charity's charitable purpose
  - Evidence of direction and control over PRIs to non-QDs
  - Must also meet all applicable trust, corporate and other legal and regulatory requirements
  - Must ensure that any private benefit is incidental

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### G. CONTEXT #3 CHARITY'S OWN INTERNAL ACTIVITIES

- We have seen in recent CRA audits that CRA requires charities to demonstrate direction and control over its own programs and those conducted by its internal divisions (eg branches, sections, parishes, congregations, divisions or chapters) ("Internal Divisions")
- CRA's guidance refers to "direction and control" in contexts #1 and #2 where non-QDs are involved – but not in the context where a charity operates its own programs in context #3
- Only 3 brief references to this requirement in CRA's website, with no explanation or details on how to comply or what CRA requires and there is no reference or analogy to how direction and control is to be exercised where non-QDs are involved

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(1) CRA's *Basic Guidelines for Maintaining Charitable Registration* (checklist) (<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/checklists-charities/basic-guidelines.html>)

"A registered charity must maintain direction and control over its activities (whether carried out by the charity, or by an agent or contractor on its behalf) and must not engage in prohibited political activities or unrelated business activities."

(2) CRA's webpage *Charitable activities* (<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/activities/charitable-activities.html>)

"It can carry on its own charitable activities. These activities are conducted under the charity's direction and control. Such activities may be carried out by the charity's employees or volunteers, or by its intermediaries (agents, contractors, or partners)."

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(3) New CRA Guidance *Head bodies and their internal divisions* (released September 2017) ("Head Body Guidance")

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/head-bodies-and-their-internal-divisions.html>

"Head body must ... appoint and control the board of the internal division, approve the budget of the internal division, exercise a measure of control over the activities of the internal division"

- Guidance explains how head bodies located in Canada and their Internal Divisions can be registered as charities
- Implies head bodies need to have some level of control over their Internal Divisions
- Level of "control" referred to in this guidance seems to be lower than audits we have seen

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- CRA stakeholder letter released on July 21, 2017, indicates that all Internal Divisions will be issued a new BN (9-digit business number) in order to facilitate electronic system at CRA (eg for e-filing)
  - Instead of the current system of Internal Divisions using 9-digit BN of its head body with different suffix for Internal Divisions
- Both the Head Body Guidance and the stakeholder letter indicate that Internal Divisions have some level of autonomy from their head bodies – e.g., Internal Divisions have their own charitable registration, own financials, own T3010 filings, etc. – which is different from what CRA requires on recent CRA audits we have seen

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- What CRA requires (from audits we have seen) (not from CRA's policies)
  - A charity must demonstrate how it exercises direction and control over its own programs
  - If an Internal Division carries on an activity that the charity cannot show there is central control (by the board or central management)
    - CRA may take the position that that Internal Division is acting independently and is a separate entity from the charity
    - Even though the Internal Division is not legally a separate entity
    - An oxymoron?

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- If CRA recognizes the Internal Division to be a separate entity (instead of being part of the charity), serious consequences could follow for the charity
  - The Internal Division is a non-QD
  - The charity allows its resources to be used by a non-QD
  - The charity does not maintain direction and control over the use of its resources
  - The charity lends its charitable status for use by a non-QD in issuing donation receipts
  - The charity makes gifts to a non-QD
  - The charity confers undue benefit to a non-QD
  - .... and the list goes on –
- Which may result in the charity being subject to penalties, sanctions or revocation

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- Examples of evidence that CRA is looking for (from audits we have seen)
  - Whether the Internal Division is located separately from the main location of the charity
  - Whether the Internal Division has authority to hire its staff or engage volunteers
  - Whether the Internal Division has its own website
  - Whether the Internal Division conducts fundraising separate from that of the charity
  - Whether the Internal Division maintains its own books, records, financials, etc.
  - Whether the board of the charity actively participates in the programs of the Internal Division

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- Whether the Internal Division is overseen by a committee or group that does not actively engage the participation of the board
- Whether the charity is named or referred to prominently in the activities, programs, website, publications, Facebook, etc. of the Internal Division
- Whether the board actively instructs the Internal Division on what to do, monitors its activities, and is able to instruct the Internal Division what to do, or shut down the Internal Division
- Whether the Internal Division reports back to the board on its activities and whether the reports are subject to approval by the board

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- Lessons learned
  - The level of “direction and control” required on CRA audits seem to be more onerous than the requirements set out in the Head Body Guidance
  - Charities must ensure that the board is in control of all programs conducted by the charity
  - If a charity has Internal Divisions, it must ensure that there is central control of their operations
  - Allowing its Internal Divisions to have any degree of autonomous operations may be risky
  - If an Internal Division is intended to be autonomous, consider having the Internal Division set up as a separate charity
- It is hoped that CRA’s policies will be updated to clarify what CRA requires on this issue


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41

## H. CONCLUSION

- Important for charities to evidence that they have fully complied with CRA requirements
- If a charity engages in activities by working through third party intermediaries (context #1 and #2), it needs to ensure that it exercise direction and control over the intermediaries as required in CRA’s guidance
- If a charity has operations involving branches, sections, parishes, congregations, divisions or chapters, etc., it must have control of those operations, or the operations out into a separate charity
- When in doubt, seek legal advice

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**


**Toronto – November 9, 2017**

## **CRITICAL PRIVACY ISSUES INVOLVING CHILDREN'S PROGRAMS**

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**24th Annual  
Church & Charity Law™  
Seminar  
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## Critical Privacy Issues Involving Children's Programs

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2

### INTRODUCTION

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

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### A. WHAT IS PRIVACY?

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

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### B. THE PRIVACY LAW CONTEXT IN CANADA

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

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

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

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

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

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7

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

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

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

- Privacy law is evolving area - most prudent for a charity or NFP to treat all personal information that it collects, uses or discloses in the course of its activities as if it were subject to PIPEDA
- Also - charities and NFPs operating in other provinces may be subject to their privacy laws - e.g. BC PIPA applies to NFPs and charities, AB PIPA applies to religious societies, federally incorporated NFPs and others

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## C. PERSONAL INFORMATION

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

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## D. FAIR INFORMATION PRINCIPLES

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

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## E. PRIVACY RIGHTS OF CHILDREN

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

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## E. PRIVACY RIGHTS OF CHILDREN (cont.)

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

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## E. PRIVACY RIGHTS OF CHILDREN (cont.)

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

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## F. CONSENT TO COLLECTION, USE, DISCLOSURE

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

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## G. HEALTH NUMBERS

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

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## H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS

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

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## H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

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

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## H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

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

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## H. PHOTOGRAPHING CHILDREN/POSTING PHOTOS (cont.)

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

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## I. COLLECTING PERSONAL INFORMATION FROM CHILDREN

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

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## I. COLLECTING PERSONAL INFORMATION FROM CHILDREN (cont.)

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

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## J. COLLECTING PERSONAL INFORMATION FROM CHILDREN ONLINE

- Charities and NFPs with websites should limit or avoid the online collection of personal information from children
- Problem of inadvertent collection of personal information - OPC, e.g. many children use their real names as username
- OPC and Working Group - concerns about online advertisements aimed at children and aligned with their specific interests - interest-based advertising (cookies) and disguised marketing

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

- United States - the *Children's Online Privacy Protection Act* ("COPPA") requires websites to obtain "verifiable" parental consent before collecting information from a child under 13
- No such law in Canada, and complaints that COPPA has been ineffective
- Charities and NFPs with websites are expected to have effective procedures to protect personal information - especially to protect the personal information of children

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

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

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## K. COLLECTING PERSONAL INFORMATION FROM THIRD PARTIES

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

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## K. COLLECTING PERSONAL INFORMATION FROM THIRD PARTIES (cont.)

- The OPC found that the complaint was well-founded - the camp had breached the child's privacy by collecting personal information without the child's/parent's knowledge or consent
- When collecting information about a child from a third party - e.g. background checks, a charity or NFP must have the individual's knowledge and consent to do so

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## L. DISCLOSING PERSONAL INFORMATION TO THIRD PARTIES

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

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## M. SURVEILLANCE

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

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## M. SURVEILLANCE (cont.)

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

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## M. SURVEILLANCE (cont.)

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

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## M. SURVEILLANCE (cont.)

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

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## N. CHILD, YOUTH AND FAMILY SERVICES ACT, 2017

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

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

- Individuals are presumed to be capable - able to understand information relevant to deciding whether to consent and the reasonably foreseeable consequences of giving, withholding or withdrawing consent
- Decision of a child younger than 16 who is capable prevails over a conflicting decision by a substitute decision-maker
- Child and youth service providers will need to develop processes that are compliant with Part X of CYFSA

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## O. HELP/COUNSELLING/ADVICE LINES FOR CHILDREN

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

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## P. PRAYER REQUESTS BY/FOR CHILDREN

- Whether communicated online or verbally - these could contain personal information that trigger privacy considerations
- Information will be about an "identifiable individual" where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other information (*Gordon v. Canada*)
- Circulating prayer requests on a prayer chain by phone or email could lead to identification of the child

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## P. PRAYER REQUESTS BY/FOR CHILDREN (cont.)

- Leaving out names may not be sufficient to render anonymous if other facts divulged would lead to identification, especially in small congregations/communities
- Prayer chains involving children should be completely anonymized to mitigate risk
- Positive obligation to report if reasonable grounds to suspect that a child is or may be in need of protection

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## Q. PREVENTING PRIVACY BREACHES

- Churches, charities and other NFPs are required to protect children's personal information against loss or theft, unauthorized access, disclosure, copying, use, or modification
- Fair information principles - onus is on organizations to use safeguards that are appropriate to the sensitivity of the personal information
- Consider amount and sensitivity of information in determining what safeguards are appropriate, e.g. health information

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## Q. PREVENTING PRIVACY BREACHES (cont.)

- Must use appropriate safeguards:
  - technical (passwords, encryption, auditing)
  - administrative (training, security clearances, "need-to-know" access)
  - physical (secure areas, ID, locked cabinets)
- Only retain personal information as long as necessary to fulfill the purposes for which it was collected
- Securely dispose of personal information so that reconstruction is not reasonably possible

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## Q. PREVENTING PRIVACY BREACHES (cont.)

- Ontario Information and Privacy Commissioner - most common causes of privacy breaches:
  - Insecure disposal of records (paper and electronic)
  - Lost/stolen portable devices (laptops, USB)
  - Unauthorized access (snooping, hacking)
- Failure to appropriately safeguard children's personal information or to destroy it securely can place a church, charity or NFP at risk of a privacy breach

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## R. RISK EXPOSURE FOR CHURCHES, CHARITIES AND NOT-FOR-PROFITS

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

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**


**Toronto – November 9, 2017**

## **REMUNERATION OF DIRECTORS OF CHARITIES: WHAT'S NEW?**

**By Ryan M. Prendergast, B.A., LL.B.**

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**24<sup>th</sup> Annual  
Church & Charity Law™  
Seminar  
Toronto – November 9, 2017**

## Remuneration of Directors of Charities: What's New?

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### A. INTRODUCTION

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

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### B. OVERVIEW OF TOPICS

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

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### C. WHO WILL BENEFIT FROM THE DRAFT AMENDMENTS?

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

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

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

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## D. WHAT IS THE CURRENT LAW IN ONTARIO?

### 1. Fiduciary duties of directors of charities

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

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

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

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

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

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

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### 2. What about the corporate law?

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

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- In Ontario, the common law overrides these provisions
- For Ontario corporate statutes, clarification in this regard is forthcoming:
  - Bill 154, the *Cutting Unnecessary Red Tape Act, 2017* will amend the *Corporations Act* (Ontario) and an existing paragraph in the *Not-for-profit Corporations Act, 2010* (Ontario)
  - "If a provision in this Act or in a regulation made under it that applies to a corporation, the objects of which are exclusively for charitable purposes, conflicts with a law relating to charities, the law relating to charities prevails, regardless of whether it is a provision in another Act or regulation or a rule or principle of common law or equity."
    - New ss.117.1(2) and ss. 5(2) respectively

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

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

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

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

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

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### E. WHAT ARE THE PROPOSED CHANGES?

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

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

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

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

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

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

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## F. COMMENTS ON THE PROPOSED CHANGES IN THE DRAFT AMENDMENTS

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



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

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- As pointed out by the OBA, Draft Amendments may create confusion with other statutes
  - Existing and future not-for-profit corporate legislation includes exceptions with respect to conflicts of interest arising from a directors interest in a contract or transaction concerning insurance and indemnification
  - This conflicts with the requirement that the director who receives payment under the Draft Amendments is require not to attend the meeting during which the decision to authorize the payment is discussed or vote

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

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- Requirement that payments be reasonable
  - How does a board evidence that it has satisfied itself that payments are reasonable?
    - Do multiple quotes need to be obtained?
    - What about situations where expertise is in a small field and therefore FMV is hard to ascertain?
- No limitation on length of contract or transaction
  - Typically, a section 13 order is not a blanket approval, and is limited as to a particular contract or transaction
  - Board members might change and not have the background to a previous approval, or may not agree with the approval given by prior boards.


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## G. CONCLUSION

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

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**


## **CHANGES AND DEVELOPMENTS IN EMPLOYMENT LAW**

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

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**24<sup>th</sup> Annual  
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Toronto – November 9, 2017

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## Changes and Developments in Employment Law

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### A. OVERVIEW

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



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### B. Bill 148 - Amendments to Employment Standards Act, 2000 ("ESA")

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

- Minimum standards applicable to the employer-employee relationship in Ontario
- It applies to the vast majority of charities and not-for-profits in Ontario
- Deals with a variety of matters such as minimum wages, vacation time, hours of work, termination and severance, liability of directors, etc.



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#### 2. Background of Fair Workplaces, Better Jobs Act, 2017 ("Bill 148")

- Bill 148 came about as a result of the Changing Workplaces Review Final Report released by the Ontario Minister of Labour on May 23, 2017
  - To access the full report:  
<https://www.labour.gov.on.ca/english/about/workplace/>
- Special Advisors retained by the Ontario government made a total of 173 recommendations for amendments to the ESA and the *Labour Relations Act, 1995* ("LRA")
- Bill 148 was carried after Second Reading and is being considered by Standing Committee
  - To access Bill 148 and monitor its progress:  
[http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=4963&detailPage=bills\\_detail\\_the\\_bill](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4963&detailPage=bills_detail_the_bill)

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### 3. Minimum Wage

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

**General Minimum Wage/hr**



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


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### 3. Minimum Wage (cont...)

- Bill 148 will increase the student minimum wage from \$10.70/hr to \$13.15/hr on January 1, 2018, and to \$14.10/hr on January 1, 2019 to employees who are students under 18 years of age, if the weekly hours of work do not exceed 28 hours or if the student is employed during a school holiday
- Overtime Costs will increase, as overtime pay to eligible employees will be based on 1.5 times the increased minimum wage rate



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## 4. Equal Pay for Equal Work

- Currently, s.42(1) ESA prohibits differential pay on the basis of the employee's sex if employees:
  - (1) perform the same kind of work in the same establishment
  - (2) use substantially the same skill and effort and take on the same responsibilities, and
  - (3) work under similar conditions
- However, s. 42(2) ESA provides that different pay rates are permitted based on: (1) a seniority or merit system, (2) a system that measures earnings by quantity or quality of production; or (3) any other factor other than sex



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

- If Bill 148 passes, differential pay on the basis of "employment status" will not be permitted
- Bill 148 provides that "no employer shall pay an employee at a rate of pay less than the rate paid to another employee [...] because of a difference in employment status"
- "Difference in employment status" means
  - (a) a difference in the number of hours regularly worked by the employees; or
  - (b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or



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

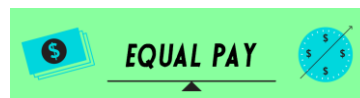
- Bill 148 maintains the exception based on a seniority system and it states that "a seniority system includes a system that provides for different pay based on the accumulated number of hours worked"
- If the employee believes the employer is paying different rates based on sex or employment status, Bill 148 will allow the employee to request a review by the employer
- In response to the employee's request for review, the employer must either (1) adjust the employee's pay accordingly, or (2) provide a written response to the employee setting out the reasons for the disagreement

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

- Bill 148 also provides protection against reprisal against an employee for exercising these pay review rights



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## 5. Paid Vacation Time

- Under the ESA, an employee is entitled to 2 weeks' vacation time for each vacation entitlement year, with minimum vacation pay of 4% of wages earned in the 12 month vacation entitlement year
- Bill 148 will provide for an increase in these entitlements to 3 weeks' vacation time and to 6% vacation pay, if the employee's period of employment is 5 years or more
- Vacation policies may need to be revised



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## 6. Job Protected Leaves of Absence

- ESA requires an employer to reinstate an employee to former position (or comparable position) upon return from a "job protected leave of absence"
- Under Bill 148:
  - Pregnancy Leave, under certain circumstances, will be extended from 6 weeks to 12 weeks after birth, miscarriage or still-birth
  - Parental Leave will be extended from 35 weeks to 61 weeks (with pregnancy leave) and from 37 weeks 63 weeks (without pregnancy leave)
  - Parental Leave may begin 78 weeks (currently no later than 52 weeks) after the child is born or comes into custody, care and control of employee



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

- Bill 148 introduces new Domestic or Sexual Violence Leave
  - An employee who has been employed by an employer for at least 13 consecutive weeks may take a leave of absence without pay in the event the employee or their child experiences sexual or domestic violence (or is threatened with it)
  - It is for 10 days, but may be extended to 15 weeks, provided the employee advises in writing



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

- Bill 148 introduces new Domestic or Sexual Violence Leave (cont...)
  - The employer has the right to require evidence that is “reasonable in the circumstances” of the need for the leave
  - There may be very little or no warning to the employer before the employee has begun the leave



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

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



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

- Crime-related Child Death or Disappearance Leave currently under section 49.5 ESA
- Bill 148 will separate into two leaves:
  - Child Death Leave, for employees who have been employed for at least 6 months, leave without pay for up to 104 weeks. This leave is not limited to crime related death; and
  - Crime-related Child Disappearance Leave, also up to 104 weeks maximum leave without pay entitlement (currently at 52 weeks)



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

- Family Medical Leave, currently up to 8 weeks under the ESA if a qualified health practitioner issues a certificate stating that the employee has a serious medical condition with a significant risk of death occurring within a period of 26 weeks
- Bill 148 extends Family Medical Leave to a maximum of 27 weeks for serious medical conditions with significant risk of death occurring within 52 weeks



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

- There are a number of changes coming that will impact employee leave policies of charities and not-for-profits
- Need to make sure those policies will not conflict with Bill 148 requirements



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## 7. Scheduling Provisions

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



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## 7. Scheduling Provisions (cont...)

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



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## 7. Scheduling Provisions (cont...)

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



Service on Call

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## 8. Independent Contractors

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



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## 8. Independent Contractors (cont...)

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



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## 8. Independent Contractors (cont...)

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




Canada Revenue Agency  
Agence du revenu du Canada

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25



## 9. Conclusion Regarding Bill 148

- When Bill 148 passes, it will result in challenges for many employers, including those in the not-for-profit sector
- Identify strategies and best practices to meet proposed compliance obligations
- Need to be prepared and stay ahead of the curve

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26

## C. RELEVANT CASE LAW

- Civil Lawsuit for Workplace Harassment
  - Ontario Superior Court of Justice decision in *Merrifield v AG of Canada* (Feb 28, 2017) held that an employee can sue their employer for harassment, provided this four-part test is met:
    - Was the conduct by the employer outrageous;
    - Did the employer intend to cause emotional stress or did they have a reckless disregard for causing emotional stress;
    - Did the employee suffer from severe or extreme emotional distress; and
    - Was the employer's outrageous conduct the actual and proximate cause of the emotional distress?

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27


- Employer's Right to Require Independent Medical Examination ("IME") in Accommodation
  - Ontario Superior Court of Justice (Divisional Court) decision in *Bottiglia v Ottawa Catholic School Board* (May 19, 2017) held that employers, in certain circumstances, have a right to request an IME as part of the accommodation process under the Human Rights Code
  - The complainant was a superintendent with the School Board who was on sick leave since April 2010
  - In August 2012 he submitted a doctor's note stating he could return to work, provided certain accommodations were made regarding his work hours

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28

- However, the School Board was concerned that, only 5 months prior, the same doctor had stated that the employee would be off for a "prolonged period of time"
- School Board became suspicious of the doctor's opinion and required an IME, but the employee refused
- The Court held:
  - There must be a reasonable and *bona fide* ground to question the accommodation proposed by the employee
  - The employee has a duty to cooperate with a reasonable request by the employer for IME
  - The employer cannot take any steps that would interfere with the objectivity of the medical examiner performing the IME

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**

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

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

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

OR

**YOU REALLY DON'T WANT TO END UP IN COURT**

Justice David Brown  
Court of Appeal for Ontario

The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar  
Mississauga, Ontario

November 9, 2017

## DISCLAIMER/CAUTION

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

## DISCLAIMER/CAUTION

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

## MY KEY ASSUMPTIONS

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

## THREE COMMON GOVERNANCE PROBLEMS FOUND IN THE COURT CASES

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

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

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

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

## COMMON PROBLEM NO. 1

**WHO IS A MEMBER?**

**WHO IS A DIRECTOR?**



## WHO IS A MEMBER? WHO IS A DIRECTOR?

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

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

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

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

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

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

7

## WHO IS A MEMBER? WHO IS A DIRECTOR?

### *Corporations Act*, Part III:

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

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

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

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

8

## WHO IS A MEMBER? DIRECTOR?

### Case study: *Rexdale Singh Sabha Religious Centre*

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

What lay behind the court litigation:

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

9

## WHO IS A MEMBER? DIRECTOR?

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

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

- The Court of Appeal disagreed and reversed:

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

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

10

## WHO IS A MEMBER? DIRECTOR?

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

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

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

11

## WHO IS A MEMBER? DIRECTOR?

- The 2008 Application judge stated:

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

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

12

### WHO IS A MEMBER? DIRECTOR?

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

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

13

### WHO IS A MEMBER? DIRECTOR?

#### NOTE:

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

14

### WHO IS A MEMBER? DIRECTOR?

- 2008 Application judge's decision:

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

15

### WHO IS A MEMBER? DIRECTOR?

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

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

16

### WHO IS A MEMBER? DIRECTOR?

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

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

17

### WHO IS A MEMBER? DIRECTOR?

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

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

18

## WHO IS A MEMBER? DIRECTOR?

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

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

19

## WHO IS A MEMBER? DIRECTOR?

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

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

20

## COMMON PROBLEM NO. 2

### WAS THAT MEETING VALID?

21

### WAS THAT MEETING VALID?

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

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

22

### WAS THAT MEETING VALID?

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

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

...

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

23

### WAS THAT MEETING VALID?

#### Source No. 2: Statute

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

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

...

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

24

### WAS THAT MEETING VALID?

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

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

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

25

### WAS THAT MEETING VALID?

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

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

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

26

### WAS THAT MEETING VALID?

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

27

### WAS THAT MEETING VALID?

Three legal problems illustrated by this type of conduct:

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

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

28

### WAS THAT MEETING VALID?

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

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

29

### WAS THAT MEETING VALID?

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

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

30

### WAS THAT MEETING VALID?

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

[1] Directed a special meeting of members be held within 60 days to conduct elections of directors and officers;

[2] Directed the parties select a corporate lawyer or former judge to supervise all aspects of the election process;

31

### WAS THAT MEETING VALID?

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

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

32

### COMMON PROBLEM NO. 3

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

33

#### MEMBERS DEPARTING WITH PROPERTY

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

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

34

#### MEMBERS DEPARTING WITH PROPERTY

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

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

35

#### BIG PICTURE “TAKE-AWAYS” FROM THESE STORIES

[1] Set clear and lawful governance rules about who is a member, who is a director, and how meetings are to be called and conducted.

[2] Follow carefully and fairly the rules you set.

[3] Act in the best interests of the organization as a whole, not in the interests of a faction.

[4] Recognize that a court fight can weaken an organization's long-term ability to pursue its objects and inevitably will result in very significant legal fees.

[5] Also recognize that by going to court, an organization may lose the ability to govern its own affairs. A court may place temporary control of the organization in the hands of an outside third party, such as a monitor, who reports to the court, not to the organization's members.

36



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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**


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

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

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**24<sup>th</sup> Annual  
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**Corporate Documents and Procedures  
to Help Avoid Governance Disputes**

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2

**A. INTRODUCTORY COMMENTS**

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



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3

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

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4

**B. DIFFERENT TYPES OF LEGAL STATUS**

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

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5

**C. TYPES OF GOVERNANCE DISPUTES THAT CAN OCCUR**

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


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6

**D. STEPS TO AVOID DISAGREEMENTS INVOLVING CORPORATE AND GOVERNANCE MATTERS**

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



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

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



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



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## 2. Issues Within Corporate Documents That Organizations May Proactively Consider

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

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- Do the purposes encompass the current activities of the Organization? (or has "mission drift" occurred since incorporation)
  - In the context of a legal dispute, Ontario corporations incorporated under the OCA that carry on activities outside its corporate authority may expose directors to liability for *ultra vires* activities, i.e. activities outside its corporate powers



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

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



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13

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

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

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



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

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17

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



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18

### 3. Consider Establishing Closed Membership

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

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

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

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



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



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## 22 4. Transparency and Collaboration with Membership When Making Important Decisions

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

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- The following slides reflect suggestions that may be useful for an Organization, subject to its particular circumstances
- Each Organization and each situation is different and therefore legal counsel should be consulted where guidance is required
- a) Option of Holding a Town Hall Meeting
  - Where changes to the letters patent/ articles or by-law will be made the board can prepare draft documents, which can then be presented to the membership for feedback and questions
  - In order to reflect legal requirements, legal assistance should be sought in the drafting process given the complexity of the CNCA and ONCA

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



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25

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



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26

## b) Establish a Committee of Members and Directors

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

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27

## c) Informal Consultations with Members

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

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28

## E. BRIEF REVIEW OF APPLICABLE CASE LAW

- The following cases illustrate the importance of having complete corporate records and following correct procedures in the event of a legal dispute
- *Colgan v. Canada's National Firearms Association 2016 ABQB 412 (CanLII)*
- Decision of the Court of Queen's Bench in Alberta involving disputes between two factions on the board of directors of a corporation governed by the CNCA
- In reviewing whether the Court should intervene in the Club's affairs, the Court stated:
  - "[C]ourts do not intervene in a club's affairs unless the club is guilty of breaching its rules or the rules of natural justice, or if there is bad faith in decision-making."

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- "Courts have no interest in the day-to-day activities of voluntary associations" and "[t]hat certainly includes internal politics and inter-factional sniping."

### Lesson to be learned:

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

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

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

### Lesson to be learned:

- This case underscores the importance of adopting a general operating by-law after incorporation



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

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

***Lesson to be learned:***

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

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***Bhadra v. Chatterjee, 2016 ONSC 4845 (CanLII)***

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

***Lesson to be learned:***

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

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***Ahmed v Hossain, 2017 ONSC 5660 (CanLII):***

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

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

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35

***Lesson to be learned:***

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

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

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

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37

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

Justice Brown said the following in the above case:


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

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38

In commenting on Justice Brown's statement in the *Singh v. Sandhu* case, the Office of the Ontario Public Guardian and Trustee said the following in its PowerPoint entitled "Why Do Director's Get Into Trouble?"

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



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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**

## **THE INVESTMENT SPECTRUM FOR CHURCHES & CHARITIES**

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

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**24<sup>th</sup> Annual  
Church & Charity Law™  
Seminar  
Toronto – November 9, 2017**

## The Investment Spectrum for Churches & Charities

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2

### A. INTRODUCTION

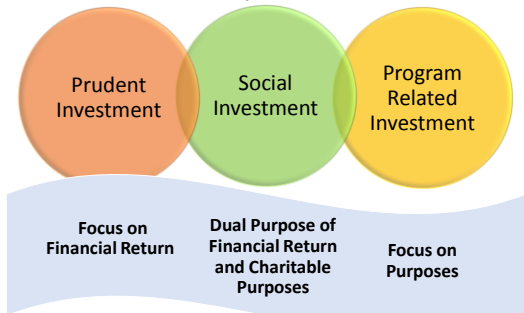
- This presentation is intended to provide churches and charities with a basic understanding of the spectrum of options available when investing charitable funds
- The options reviewed in this presentation include:
  - Prudent Investments under the *Trustee Act*
  - Program Related Investments under the CRA's Guidance: *Community Economic Development Activities and Charitable Registration* (CG-014) ("CED Guidance")
  - New Social Investments under Ontario Bill 154 amending the *Charities Accounting Act* ("CAA")

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### The Investment Spectrum for Charities



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4

- What is not covered by this presentation includes:
  - "Related business" under the *Income Tax Act* ("ITA")
  - Non-qualified investment rules for private foundations
  - Excess business holding rules for private foundations
- For additional resource materials, see:
  - Investment Powers of Charities and Not-For-Profits Under Ontario's Trustee Act*, Terrance S. Carter: <http://www.carters.ca/pub/bulletin/charity/2010/chylb192.pdf>
  - Consideration in Drafting Investment Policies in Ontario*, by Terrance S. Carter: <http://www.carters.ca/pub/bulletin/charity/2010/chylb207.pdf>
  - Bill 154 to Permit "Social Investments" in Ontario*, by Terrance S. Carter: <http://www.carters.ca/pub/bulletin/charity/2017/chylb407.pdf>

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5

### B. PRUDENT INVESTMENTS UNDER THE TRUSTEE ACT

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

#### 1. Application of the Trustee Act to Charities

- The reference to "trustees" in this presentation includes directors, governors, council members, deacons, elders, etc. - e.g., whoever is in charge of the church or charity
- S. 1(2) of the CAA provides that charitable corporations are deemed to be trustees of their charitable property within the meaning of that *Act*
- S. 10.1 of the CAA confirms that charitable corporations must comply with the investment decision making requirements set out in ss. 27 to 31 of the *Trustee Act*

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6

- However, ss. 27(9) and (10) of the *Trustee Act* provide that the *Act* does not require a trustee to act in a manner inconsistent with the terms of the trust (which include the constating documents of a corporation)
- Situations where the *Trustee Act* will generally not apply:
  - The letters patent or articles of continuance of a charity state that the *Trustee Act* does not apply
  - A special purpose trust in a will or gift agreement establishes a different investment power from that contained in the *Trustee Act*
  - A different investment power is set out in special legislation creating the charity
  - Program related investments under the CRA's CED Guidance (discussed below)
  - New social investments under the CAA (see below)

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7

## 2. Prudent Investor Standard

- "A trustee may invest trust property in any form of property in which a prudent investor might invest." (s. 27(2) of the *Trustee Act*)

## 3. Standard of Care Required

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




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8

## 4. Specific Types of Investments Permitted


- Investments in mutual funds are permitted (s. 27(3) of the *Trustee Act*)
  - But no definition of mutual funds
- Investing in pooled funds is specifically permitted
  - But no definition of pooled funds
- Investing in segregated funds under insurance contracts is also permitted
- As well, while there are no specific references to Exchange Traded Funds (ETFs) in the *Trustee Act*, ETFs would generally be considered to be a type of pooled funds and would therefore appear to be permitted



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



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10


- In addition, as of April 2015, all registered charities under the ITA can invest in limited partnerships provided that:
  - The charity must be a "limited partner" of the partnership (e.g., limited liability) as opposed to a general partner;
  - The charity - together with all non-arm's length entities - holds 20% or less of the fair market value of all interests in the partnership; and
  - The charity deals at arm's length with each general partner of the partnership

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11

## 5. Mandatory Investment Criteria


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



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- The expected total return from income and appreciation of capital
- Needs for liquidity, regularity of income and preservation or appreciation of capital
- An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries
  - Arguably this last criteria would permit a socially responsible investment, or even a social investment separate from the requirements provided for under the CAA for social investments set out below




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13

## 6. Mandatory Diversification Obligation

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




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14

## 7. Commingling of Restricted Funds


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



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




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## 8. Delegation of Investment Decision Making

### a) Power to Delegate

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




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17

### b) Investment Policy Required for Delegation

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




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### c) Agency Agreement Requirement (Investment Management Agreement)

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




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19

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

Requirements




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20

### d) Prudent Selection of an Agent

- The *Trustee Act* imposes a requirement upon the board of a charity to exercise prudence in selecting an agent (investment manager), in establishing the terms of the agent's authority and in monitoring the agent's performance to ensure compliance with the applicable terms (s. 27.1(4) of the *Trustee Act*)
- Prudence in the selection requires compliance with regulations concerning who is qualified to act as an agent, but no regulations have been made to date (s. 27.1(5)(a) of the *Trustee Act*)
- Pending the adoption of regulations, it is essential to select agents who have appropriate professional credentials as investment managers




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### e) Prudence in Monitoring of Agents Required


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



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




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### f) Prohibition on Sub-delegation by Agents

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




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### g) Duties of an Agent (Investment Manager)

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




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### h) Liability of the Agent (Investment Manager)

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




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### i) What Liability Exposure Do Trustees Face From Imprudent Investment Decisions?


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



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- Failure to comply with mandatory requirements for delegation will preclude liability protection under the *Trustee Act* and will expose trustees to liability for breach of trust by unauthorized delegation of investment decision making
- If a trustee is liable to the charity for losses arising from investment decisions, the court assessing damages may take into account the overall performance of the investments (s. 29 of the *Trustee Act*)




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### C. PROGRAM-RELATED INVESTMENTS (PRIs)

#### 1. What are PRIs?

- Involves a focus on charitable purposes
- PRIs are defined by CRA as investments that "directly further" the charitable purposes of the charity
- PRIs are not investments in the conventional financial sense because, while PRIs may generate a financial return, they are not made for that reason
- According to CRA's CED Guidance, PRIs may further charitable purposes that relieve poverty, advance education, benefit the community in other ways the law regards as charitable, but not advancement of religion on its own without another charitable purpose




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29

- PRIs usually involve the return of capital within a period of time, but this is not required, and yields of revenue from the investment, if any, can be below market rates
- A charity can make a PRI with a Qualified Donee ("QD")
- A charity can also make a PRI with a non-QD, provided the charity maintains ongoing direction and control and any private benefit is incidental

#### 2. Types of PRIs


- Loans and loan guarantees - to another organization to allow that other organization to pursue the charitable purpose of the investor charity, e.g., making a loan to a third party so that the third party can acquire job training equipment for eligible beneficiaries of the investor charity



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30

- Leasing land and buildings - buying a building and leasing it to an organization to accomplish a charitable purpose, e.g., for education purposes
- Share purchases - in a for-profit company to accomplish charitable purpose, e.g., operating an apartment complex for the poor
  - However, foundations cannot acquire a controlling interest in a company
  - Private foundations are also subject to other restrictions, such as divestment obligations resulting from holdings above 20% of any class of shares in a company, under the excess corporate holding regime




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31

### 3. Requirements of Charities Engaging in PRIs

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



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32

### 4. Accounting for PRIs and Loans

- Charities must account for their assets contributed to PRIs and loans in their financial statements and annual T3010 information returns
- PRIs are not included in the asset base for the calculation of the 3.5% disbursement quota ("DQ")
- Unfortunately, though, PRIs are not considered by CRA to be a charitable expenditure in meeting the 3.5% DQ
  - Unless, if a charity does not meet its disbursement quota, CRA *may* consider the lost opportunity cost of the charity's PRIs as equivalent to expenditures
- However, since PRIs must further a charity's charitable purposes, the assets contributed arguably should qualify in meeting the 3.5% DQ

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33


### D. SOCIAL INVESTMENTS

- Involves achieving the dual purpose of financial return and charitable purposes (dual purposes)
- Amendments to the CAA in Bill 154, which passed third reading on November 1, 2017, (to come into force on Royal Assent) will permit charities to make "social investments" where the trustee applies or uses trust property to:
  - directly further the purposes of the trust, and
  - achieve a "financial return" for the trust (s.10.2(2) CAA)
- "Financial return" is defined as an "*outcome in respect of the trust property [that] is better for the trust in financial terms than expending all the property*" (s.10.2(3) CAA)

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34


- Bill 154 imposes a limitation on social investments with regard to using funds that are subject to a limitation on the expenditure of capital (e.g. endowment funds):
  - "social investment may not be made in relation to trust property that is subject to a limitation on capital being expended for the purposes of the trust, unless the trustee expects that making the social investment will not contravene the limitation or the terms of the trust allow for such an investment" (s.10.3(2) CAA)
  - It is not clear how this provision will be interpreted
- Also, must not contravene any restrictions or exclusions in the trust document, which would include the constating documents of a corporation, e.g. the letters patent or articles of incorporation or continuance (s.10.3(4) and s.10.2(6) CAA)



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35


- Need to check whether the constating documents of a charity may preclude the ability of the charity to invest in social investments
- Trustees must:
  - ensure that "it is in the interests of the trust" before making a social investment
  - review the investment periodically, after making a social investment; and
  - both before and after making a social investment, determine whether, in the circumstances, advice should be obtained and, if so, obtain and consider the advice (s.10.4(1) CAA)
- But no guidance in Bill 154 concerning who the charity should seek advice from
- Therefore, prudent to ensure that the advice sought is in writing and that the board of the charity records having received and considered the advice



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36

- Bill 154 provides protection from liability for losses to the trust from a social investment, but only if in doing so "the trustee acted honestly and in good faith in accordance with the duties, restrictions and limitations that apply under [the CAA] and the terms of the trust" (s.10.2(7) CAA)
- The proposed amendment for social investments will now require charities to decide whether the proposed investment is to be:
  - A prudent investment under the *Trustee Act*,
  - A program related investment under the CRA's CED Guidance, that requires significant evidence of "direction and control" and an exit strategy to avoid revocation, as discussed above, and/or
  - A social investment under the CAA



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37

E. CONCLUSION

- Investments of charitable funds by churches and charities need to be carefully considered given the complexities that are involved
- It is important to understand the spectrum of options that are available when investing charitable funds as outlined in this presentation
- It is advisable that churches and charities develop and implement an appropriate investment policy to reflect the specific type of investment that the church or charity intends to embark on before investing

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# **The 24<sup>th</sup> Annual *Church & Charity Law*<sup>TM</sup> Seminar**

**Toronto – November 9, 2017**

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

**By Tony Manconi, B.A.**  
Director General of the Charities Directorate  
of Canada Revenue Agency





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

by Tony Manconi, Director General



Canada Revenue Agency / Agence des revenus du Canada

## The past

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

## Today

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

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




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

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


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

### Registering charities




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

## Engaging with the sector



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



## Educating the sector

- ✦ Through Q & A (i.e. disaster relief);
- ✦ New guidance:
  - ✦ Relieving conditions attributable to being aged and charitable registration
  - ✦ Prescribed Universities;
- ✦ Going forward, we plan to update the following guidance:
  - ✦ the advancement of education
  - ✦ the relief of poverty
  - ✦ the protection of the environment
  - ✦ private benefit
  - ✦ related business



## Political activities consultations

### What we did to clarify the rules on political activities:

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

### What we did with the feedback:

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

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

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

Canada

## Protecting charities from terrorist abuse

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

Canada

## Monitoring charities

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

Canada

## International Regulators' conference

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



Canada

## New Strategic planning and program development team

- ✦ Goal: ensure that resources are aligned with the right priorities so that day-to-day responsibilities, emerging priorities and long-term program objectives can all be met;
- ✦ Ongoing priorities:
  - ✦ Identifying strategies to address evolving priorities impacting the future direction of the program;
  - ✦ Drafting a forward looking business plan, setting out the strategic priorities and objectives;
  - ✦ Enhancing consistent program delivery;
  - ✦ Identifying the scope of broad-reaching program challenges and providing options for resolution; and
  - ✦ Leading innovation projects.

Canada

## Challenges

### Constitutional framework

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

Canada

## Challenges cont'd

### Continuous environmental changes

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

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## Challenges cont'd

### Common Law

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

### Policy Development

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

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## The future

### A few items on our agenda for the year ahead:

- Strategic planning: roadmap and business plan;
- Charities modernization project: e-services;

#### What is CHAMP?

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

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

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#### Accessed through My Business Account

<b>My Business Account</b> <b>Communications</b> Message Centre Submit documents Audit Enquiries <b>Manage</b> Representatives Online mail Addresses Direct deposit Operating names Profile <b>View</b> Direct deposit transactions Operating names Mail <b>Make payments</b> Pre-authorized debit My payment <b>Resources</b> Help with this page Personal preferences New Scotia	<b>Welcome Charity ABC</b> Select a Business Number (BN) 123456789 <b>Access BN</b> Charity ABC Message Centre You have 1 unread message(s) <b>Registered Charity</b> RA 0003 <b>Y</b> <ul style="list-style-type: none"> <li>Apply for registration</li> <li>View application status</li> <li>File a return</li> <li>Alert my return</li> <li>View expected and filed returns</li> <li>"View My Charity Details"</li> <li>Update registered charity information</li> <li>Manage address</li> </ul> <b>ACT/POST</b> RA 0003 <b>Y</b> <b>Resources</b> Help with this page Personal preferences New Scotia
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### A few items on our agenda for the year ahead (cont'd):

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

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Final Thoughts

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