

Updating Charities and Not-For-Profit Organizations on recent legal developments and risk management considerations.

JULY/AUGUST 2014

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RECENT PUBLICATIONS AND NEWS RELEASES

Differential Pay-Schemes Ruled Discriminatory

By Barry W. Kwasniewski in *Charity Law Bulletin* No. 345, August 26, 2014.

The Human Rights Tribunal of Ontario is likely the first Canadian court or tribunal to consider a discriminatory pay scheme affecting persons with developmental disabilities. In February 2014, the Tribunal Vice-Chair Ken Bhattacharjee ruled in *Garrie v Janus Joan Inc.* (2014 HRTO 272 (CanLII)) that paying developmentally-disabled employees \$1.25 per hour, while paying employees without disabilities minimum wage for doing substantially similar work was discriminatory. This decision, to be discussed in this *Charity Law Bulletin*, is important for charities and not-for-profits that employ people with disabilities. It will also have a wide-reaching impact on any potential situation dealing with a differential pay scheme.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb345.pdf>

CRA News

By Theresa L.M. Man.

Foreign Charities as Qualified Donees

In August 2014, the Canada Revenue Agency (CRA) delisted all foreign charities that received a gift from the Canadian Crown as qualified donees (QDs). The CRA's website shows that the list is now empty (<http://www.cra-arc.gc.ca/chrts-gvng/qlfd-dns/qd-lstngs/gftsfrmhrmjsty-lst-eng.html>). A "qualified donee" is essentially an entity to which a tax deductible or tax creditable donation may be made. QDs consist of a list of entities set out in the *Income Tax Act*. Prior to January 1, 2013, charitable organizations outside Canada that had received a gift from the Government of Canada (the federal government or its agents) for 24 months from the date they received the gift qualified to be QDs. However, in accordance with the Federal Budget in 2012, beginning January 1, 2013, these organizations are now limited to only those that pursue activities related to disaster relief or urgent humanitarian aid or in the national interest of Canada. The 2013 new rule will impose an additional requirement that must be met in order to be on this list. The CRA is processing applications from foreign charities to be on this list.

New Political Activities Webpage Added to CRA Website

On July 21, 2014, CRA added a new political activities webpage to its website. It contains information about regulating the political activities of charities. It states that the process for identifying which charities will be audited for any reason is handled by the Charities Directorate and is not subject to political direction. The webpage was likely posted as a response to the recent media attention given to numerous charities that are under audit for political activity. The page can be accessed at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/cmmnctn/pltcl-ctvts/nfrmtn-eng.html>.

Cathy Hawara's 2014 CBA Charity Law Symposium Speech Now Posted

The CRA posted Director General of the CRA Charities Directorate Cathy Hawara's speech from the 2014 CBA Charity Law Symposium, delivered on May 23, 2014, on its website. Ms. Hawara's speech focuses on the importance of an independent and effective charities regulator in Canada. She discussed constitutional issues surrounding regulating charities and the place of a charities regulator inside a taxing authority. The speech can be accessed at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/2014-lwsympsm-eng.html>.

CRA Revokes Jesus of Bethlehem Worship Centre's Charitable Registration

The CRA revoked the charitable registration of the Jesus of Bethlehem Worship Centre ("the Centre") effective July 12, 2014. CRA's decision was based on a finding that the Center failed to maintain adequate books and records, issued receipts in a manner not in accordance with the *Income Tax Act*, and did not file accurate T3010 information returns. The audit also revealed that the board of directors of the Centre included "ineligible individuals". Finally, the CRA believes that the Centre provided false or misleading information when it applied for charitable status.

Reminder of Federal Corporations to Continue Under the CNCA

On August 22, 2014, the CRA posted a reminder to charities that are incorporated federally under the *Canada Corporations Act* to continue under the *Canada Not-for-profit Corporations Act* by October 17, 2014, or risk losing their registered status. Charities are directed to CRA's webpage on "Transition to the Canada Not-for-profit Corporations Act (NFP Act)" at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/menu-eng.html>. As noted in this issue's Corporate Update, dissolution for failure to continue by October 17, 2014, is not automatic. (See Charity Law Bulletin No. 336 (<http://www.carters.ca/pub/bulletin/charity/2014/chylb336.pdf>) for an overview of the dissolution

process and how to revive such dissolved corporations.) However, in the event that a corporation was dissolved by Corporations Canada for failure to continue under the CNCA, it will no longer qualify to be a registered charity (available online at <http://www.carters.ca/pub/bulletin/charity/2014/chylb330.pdf>).

Legislation Update

By Terrance S. Carter

Amendments to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

As referenced in the June 2014 *Charity Law Update*, on June 19, 2014, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“PCMLTFA”), was amended by Bill C-31, *Economic Action Plan 2014 Act, No. 1*, to allow those being investigated under the PCMLTFA more flexibility and avenues for redress in cases of error. The changes to the PCMLTFA are meant to fit with analogous changes found in the *Customs Act*. In this regard, section 25 of the PCMLTFA has been amended to allow persons from whom goods have been seized, or persons who have received a penalty notice, to request a decision of the Minister. This can be done by written notice to the Recourse Directorate electronically or through mail.

Further legislative amendments were introduced to address flawed enforcement actions. As per section 24.1 of the PCMLTFA, the Canada Border Services Agency (“CBSA”) will now have 90 days to cancel or reduce an enforcement action if there was no contravention, or if it is found that an error occurred. This ensures that the time allowed to perform a corrective measure is analogous to the time allowed to submit an appeal. If a person fails to appeal an action within this timeframe, further amendments in section 25.1 of the PCMLTFA will allow an application to the CBSA for an extension of time. This amendment is intended to provide further consistency between the *Customs Act* and the PCMLTFA.

The amended PCMLTFA can be found online at: <http://laws-lois.justice.gc.ca/eng/acts/P-24.501/>

Tax Credit for Food Program Donations by Farmers in Ontario

On August 15, 2014, Ontario Regulation 153/14 came into force under the *Taxation Act, 2007*. This regulation is to be read in conjunction with section 103.1.2 of the *Taxation Act, 2007*, which came into force under Bill 36, *Local Food Act, 2013*. In combination, the regulation and legislation establish a community food program donation tax credit for farmers. This program allows for Ontario farmers to claim a tax credit for all donations of agricultural product made on or after January 1, 2014.

Only eligible persons, who are persons or corporations engaged in the business of farming in Ontario, may qualify for the credit. Donations must also be provided to a defined “eligible community food program.” These include food banks, charities, as well as programs that provide food to students in elementary or secondary schools. The tax credit may not exceed 25% of the total value of the goods.

Taxation Act, 2007 can be found online at:

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_07t11_e.htm#BK154

Ontario regulation 153/14 can be found online at:

http://www.e-laws.gov.on.ca/html/source/regs/english/2014/elaws_src_regs_r14153_e.htm

White Paper Proposes Amendments to British Columbia’s *Society Act*

The Ministry of Finance in British Columbia is in the process of a consultation regarding proposed amendments to the *Society Act*. Comments are currently being accepted on the “Societies Act White Paper: Draft Legislation with Annotations” (“White Paper”), a culmination of past work and draft legislation. For more information regarding the White Paper and its proposed amendments, please see the article below entitled, “White Paper Proposes Updates to B.C.’s Not-for-profit Governance Legislation” by Terrance S. Carter.

Corporate Update

By Theresa L.M. Man

Canada Not-for-Profit Corporations Act

The number of corporations incorporated under Part II of the *Canada Corporations Act* (CCA) that have continued under the new *Canada Not-for-profit Corporations Act* (CNCA) grew from 4,175 at the end of May to 5,419 by the end of July. This still leaves 11,581, i.e., 68%, of approximately 17,000 corporations that have not continued. Failure to continue by the deadline may result in those corporations being dissolved. However, dissolution is not automatic. See Charity Law Bulletin No. 336 (<http://www.carters.ca/pub/bulletin/charity/2014/chylb336.pdf>) for an overview of the dissolution process and how to revive such dissolved corporations. As a side note, it is interesting that there are a total of 9,919 CNCA corporations as of August 8, 2014, including new incorporations under the CNCA and those that have continued into the CNCA.

Corporations Canada continues to actively remind Part II CCA corporations of the need to continue by the deadline. With less than two months left before the deadline, time is fast running out to complete the

continuance process, let alone time to hold two separate meetings to collapse membership classes in order to avoid class approval. As well, registered charities that want to revise their corporate objects may want to consider first continuing using the same objects and then revising the objects afterwards.

Ontario Not-for-Profit Corporations Act

In May 2014, Bill 85 amending portions of the *Ontario Not-for-Profit Corporations Act, 2010* (“ONCA”) died on the Order Paper as a result of the calling of the provincial election on May 2, 2014. This means that a new bill will need to be introduced. The government had previously indicated that the ONCA would not be proclaimed until at least 6 months after the enactment of Bill 85 in order to allow not-for-profit corporations to prepare for the transition. Since June, 2014, the Ontario Ministry of Government and Consumer Services’ website has indicated that the ONCA is not expected to come into force before 2016 (online at: <http://www.sse.gov.on.ca/mcs/en/Pages/onca3.aspx>). The status has not changed since June, 2014. With the Ontario Liberal Party, which originally introduced the ONCA, winning the election, many in the sector are cautiously hopeful that there might be an earlier proclamation date, possibly late summer of 2015, if Bill 85 is reintroduced into the Legislature by fall 2014.

For corporations that are interested in collapsing their membership classes, the delay in the proclamation of the ONCA will give more time for corporations to amend their by-laws to do so. In this regard, many in the sector are concerned about the fact that under the ONCA, if a corporation has two or more classes of members, members of separate classes (regardless of whether the membership class is a voting class or non-voting class) will be entitled to vote separately by a class if the corporation wants to revise the articles to change the membership class structure or membership rights or to make certain fundamental changes (such as amalgamation). As such, each class of members (including non-voting members) will have a *de facto* veto right for these matters. Class voting rights will kick in as soon as the ONCA is proclaimed. This means that if a corporation wants to collapse its multiple membership structure without the need to obtain class approval of such change, it will need to amend its by-law before the proclamation of the ONCA. Part of the proposed changes contained in Bill 85 delays the class vote rights of non-voting members (but not the voting members) until at least three years after proclamation of the ONCA. If the same proposed amendments are also contained in the new bill to be introduced, then corporations may collapse their non-voting membership classes during the three-year transition period

without the need for class approval of the non-voting members, but this would not affect the timing to collapse voting classes.

Those interested in the progress of the ONCA are encouraged to monitor the Ministry's website for updates at http://www.sse.gov.on.ca/mcs/en/pages/not_for_profit.aspx.

CRTC Clarifies Application of CASL to Charities

Ryan M. Prendergast in *Charity Law Bulletin* No. 346, August 26, 2014

Prior to Canada's anti-spam legislation (CASL) coming into force on July 1, 2014, there was general uncertainty concerning how CASL would apply to registered charities. When the final Governor-in-Council regulations for CASL were announced on December 4, 2013, a specific exemption was included for commercial electronic messages (CEMs) sent by or on behalf of a registered charity where the "primary purpose" of the CEMs is to raise funds for the charity.

On July 4, 2014, three days after CASL came into effect, the Canadian Radio-Television and Telecommunications Commission (CRTC) updated their "Frequently Asked Questions about Canada's Anti-spam Legislation" webpage (FAQ) concerning the application of CASL to registered charities. In particular, the CRTC attempted to address the uncertainty concerning the meaning of "primary purpose" with regard to the exemption. This *Charity Law Bulletin* provides a summary of the information contained in the updated CRTC FAQ.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb346.pdf>

CRA Practice Tip: Public Information and Charitable Registration

By Linsey Rains

Section 241 of the *Income Tax Act* (Canada) ("ITA") prohibits CRA officials from providing or allowing any person to access "taxpayer information." Taxpayer information is broadly defined at subsection 241(10) to mean "information of any kind and in any form relating to one or more taxpayers that is ... obtained by or on behalf of the Minister for the purposes of this Act, or...prepared from information" obtained by or on behalf of the Minister for the purposes of the ITA. Many readers may be surprised to note that registered charities and registered Canadian amateur athletic associations (RCAAs) are considered taxpayers for the purpose of section 241. Despite the general prohibition

designed to protect taxpayer information, section 241 allows CRA officials to disclose certain taxpayer information relating to organizations that were “at any time a registered charity” or RCAA.

In particular, paragraphs 241(3.2)(a), (b), (c), and (d) permit CRA officials to provide the following registration related information to the public:

- copies of the registered charity or RCAA’s governing documents, including the former’s statement of purpose and the latter’s function;
- any information provided in prescribed form on application for registration;
- the names of directors and time periods during which they served; and
- a copy of the registration letter or notice, including “any conditions and warnings”.

Both CRA application forms T2050, Application to Register a Charity Under the *Income Tax Act* and T1189, Application to Register a Canadian Amateur Athletic Association Under the *Income Tax Act* caution applicants that if registration is granted, the information listed above may be made available to the public. As well, the CRA does designate some information, such as the occupation, addresses, birth dates, and telephone numbers of directors as confidential and will not release this information to the public. However, it is important to keep these information sharing provisions in mind when determining what materials to include with an application or in support of a response to a request for additional information or an administrative fairness letter from CRA.

For example, applicants are often required to provide proof of an educational instructor or religious leader’s qualifications and credentials. Moreover, documents like résumés or transcripts may contain confidential information such as addresses, emails, occupations, dates of birth and phone numbers which could potentially be provided to the public if they are submitted in support of an application. In such cases, applicants may wish to consider redacting confidential information from supplemental application material in order to avoid risking unnecessary disclosure while still meeting CRA’s requirements for registration.

When is a Conditional Charitable Gift Effective?

By Jacqueline M. Demczur

The British Columbia Court of Appeal (BCCA) recently considered the validity of a conditional donation made to a registered charity. In *Norman Estate v Watch Tower Bible and Tract Society of*

Canada (2014 BCCA 277), the BCCA agreed with the trial judge's decision that the conditional gift in question was an *inter vivos* gift (meaning it took effect during the lifetime of the donors) and not a testamentary gift as the Estate argued.

The donors, Lloyd and Lily Norman, made regular monetary gifts to the Watch Tower Bible and Tract Society ("Society"), a registered charity. One of their gifts included a letter from Mr. Norman stating that the money (\$200,000) should be returned to the Normans on their request and that, on both of their deaths, the money would remain the property of the Society. The letter stated that, in the case of a conditional donation, any funds that had not previously been returned to the donors would automatically remain with the Society. The Normans and the Society subsequently entered into a Conditional Donation Agreement ("Agreement") to confirm this arrangement. Accordingly, after the deaths of Lloyd and Lily Norman, the Society issued a charitable donation receipt for the amount of funds, but the Normans' Estate claimed that the Society was not entitled to the said monies.

The issue before the courts was whether the Agreement between the Normans and the Society was a testamentary disposition or an *inter vivos* trust. If it was found that the Agreement created a testamentary disposition, then the result would be that the Agreement would be found to be invalid because it was signed without witnesses and, therefore, did not comply with the British Columbia *Wills Act* (RSBC 1996, c 489).

The trial judge concluded that the gift was an *inter vivos* trust because the Normans made the gift during their lifetime with the intent that the gift would be effective immediately. The trial judge used the "guiding principle" of considering whether the donor intended that the gifts should be dependent on his death. She concluded that:

the Conditional Donation Agreement on its face did have immediate effect and the extrinsic evidence is consistent with that conclusion. The Conditional Donation Agreement itself was not revocable, although the Normans had the right to a refund of their donations in accordance with its terms... the [Society] obtained both an immediate and future interest in the funds and the Normans' rights in respect of the funds became subject to the Conditional Donation Agreement.

The BCCA upheld the trial decision and found that the Society had an immediate interest in the donated funds and any refund request from the Normans had to be in accordance with the terms of the Agreement. As a result of the finding that the gift was *inter vivos*, the Society was entitled to keep the funds in question. As a result of this decision, charities should be careful when drafting conditional donation agreements if they want to ensure that any gift given under such Agreement will remain with the charity after the death of the donor(s).

The case is available online at: <http://canlii.ca/t/g7x3h>.

CRA View Regarding Taxing Donated Long-Service Awards

By Linsey E.C. Rains

On March 13, 2014, the Canada Revenue Agency (“CRA”) released a technical interpretation (2013-0510791E5) which considered whether an employee who opts to forego receipt of a non-cash gift from his or her employer in recognition of long-service and instead directs the employer to make a cash donation to a registered charity will realize a taxable benefit under paragraph 6(1)(a) or subsection 56(2) of the *Income Tax Act* (ITA). CRA also advises that such determinations are fact specific.

Notwithstanding certain exceptions, in computing their income from an office or employment under paragraph 6(1)(a) of the ITA, taxpayers must include the amount of “board, lodging and other benefits of any kind whatever received or enjoyed ... in the course of, or by virtue of the taxpayer’s office or employment.” While the ITA does not recognize long service awards as exempt from income inclusion, CRA has an administrative policy that exempts non-cash long-service awards valued at \$500 or less from an employee’s income. Exempt awards must recognize a minimum of five years of service and cannot be given more frequently than every five years. Any amount over \$500 is included in the employee’s income. In this instance, the taxpayer was entitled to, but decided to forego receiving, a non-cash gift valued at over \$500.

Subsection 56(2) of the ITA operates to include in income payments or transfers of property “made pursuant to the direction of, or with the concurrence of, a taxpayer to another person.” Such payments or property transfers are included in the taxpayer’s income when:

- made for the benefit of the taxpayer or for the benefit of another person whom the taxpayer desired to benefit; and
- they would have been included in the taxpayer’s income if it had been received by the taxpayer.

Accordingly, CRA viewed the amount of the foregone non-cash long-service award in excess of \$500, that was directed to the registered charity, as requiring inclusion in the employee’s income pursuant to subsection 56(2). Although the technical interpretation did not address whether the taxpayer would be eligible to claim a charitable tax credit for the donation, registered charities receiving similar gifts from employers should consult CRA Policy Commentary CPC-010, *Issuing a Receipt in a Name Other than*

the Donor's (21 February 1994) for guidance. CPC-010 is available online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cpc/cpc-010-eng.html>.

White Paper Proposes Amendments to B.C.'s *Society Act*

By Terrance S. Carter

In August, 2014, the British Columbia Ministry of Finance published the “Societies Act White Paper: Draft Legislation with Annotations” (“White Paper”) as part of its ongoing goal to update provincial legislation which provides for the incorporation and governance of not-for-profit corporations in British Columbia. This update of the *Society Act* (“Act”) has been in progress since 2009, with several opportunities for stakeholders and the public to submit comments. The White Paper is a culmination of the comments received and includes policy recommendations as well as draft legislation. The Ministry invites further comments on the White Paper, with a deadline of October 15, 2014 before any government action is taken.

While the draft amendments retain much of the *Society Act's* basic framework, the White Paper updates and supplements the Act with proposed new rules of procedure from the *Business Corporations Act* and other corporate legislation in British Columbia. The most significant amendment proposed in the draft legislation is distinguishing “member funded” societies from societies that are funded by public donations or government. In accordance with Part 12 of the proposed amendments, in order to increase efficiency, member funded societies will have fewer accountability requirements. The relaxed requirements for member funded societies will include requiring only one director, not being required to publish financial statements publically, and not being subject to an asset lock on dissolution.

Societies that are funded by public donations or government will not be affected by the amendments described above for member funded societies, as they will continue to operate under existing rules in the *Society Act*. The amendments that would affect those societies include a new requirement that a majority of the society's directors may not be employed by the society, and the requirement for the public disclosure of a society's director remuneration, as well as the remuneration of the highest paid employees and contractors.

In addition to proposing the creation of a new online filing system for incorporation, bylaw changes, and other filings at the corporate registry, the White Paper makes a number of recommendations, a few highlights of which are listed below:

- allowing indemnification and restoration without court order (sections 61 and 155);
- setting out default governance provisions (Part 6);
- rationalizing distribution rules to prevent assets from being improperly disbursed (section 4) and clarifying directors' liability for improper payments (section 59);
- providing greater protections for directors, who are often volunteers, including court-ordered relief in legal proceedings (section 103) and a defence for reasonable reliance on expert reports (section 60); and
- clarifying that bylaw authorization is needed if directors are to be paid for their services (section 45).

The deadline for feedback regarding the White Paper is October 15, 2014 and can be sent to:

fcsp@gov.bc.ca.

The full copy of the White Paper can be found online at:

<http://www.fin.gov.bc.ca/pld/fcsp/pdfs/SocietyActWhitePaper.pdf>.

Upholding Procedural Fairness in Internal Discipline Procedures

Sean S. Carter & Terrance S. Carter in *Charity Law Bulletin* No. 347, August 26, 2014

On April 7, 2014, a judicial review by the Ontario Superior Court of Justice Divisional Court of *Tsimidis v. Certified General Accountants of Ontario* (2014 ONSC 4236, 120 OR (3d) 545) quashed the order of Certified General Accountants of Ontario ("CGA Ontario"), as well as the order of its Appeals Committee. The matter was remitted by the Court to the Appeals Committee for rehearing.

The Divisional Court found CGA Ontario to have breached its duties of natural justice, procedural fairness and to have made an unreasonable decision in expelling an applicant from its membership. Neither the written policies nor the procedure followed for disciplining the applicant were found adequate given the standard of procedural fairness he was warranted. This decision, to be discussed in this *Charity Law Bulletin*, points out the importance of organizations becoming informed of applicable procedural rights, creating disciplinary policies which give respect to them and, most importantly, enforcing those policies consistently.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2014/chylb347.pdf>

Privacy Commissioner of Canada is Calling for More Transparency on Digital Privacy

By Sepal Bonni

As charities and not-for-profits continue to use digital and technological means for the collection and handling of personal information, the Privacy Commissioner of Canada stresses the importance of clear, unambiguous and transparent privacy policies in order to ensure compliance with privacy laws. In this regard, the Privacy Commissioner has called for more transparency on how organizations use personal data that is collected online.

In his 2014 annual report on compliance with the federal privacy regime, dated August 2014, the Privacy Commissioner stated “it is becoming increasingly apparent that the protection of privacy demands a partnership between individuals and the corporations with which they interact.” He continued, “like any successful partnership, this must be based on trust and therefore openness. Now that personal data has become such a precious coin of commerce, the rules governing its collection, use and disclosure must be crystal clear, well understood, and actively accepted.”

The Commissioner also stressed the need for easily accessible, user-friendly privacy policies on websites. Websites should explain clearly what personal information is collected, how it is used, that it is appropriately safeguarded, whether it is disclosed to third parties, and for what purposes. This explanation should also include the contact information of a person designated within the organization that customers can bring questions or concerns. This transparency is necessary for individuals to give meaningful informed consent necessary for an organization to collect their personal information.

Of interest to charities and not-for-profits, the 2014 annual report also discussed findings in a case regarding Apple Canada requesting credit card and birth date information from individuals prior to creating a unique Apple ID. The Privacy Commissioner recommended that Apple clearly notify individuals that providing credit card information is optional, and update their privacy policy to fully explain the practice of collecting birth date information. In this regard, charities and not-for-profits should ensure that privacy policies disclose all personal information collected and used. As charities and not-for-profits continue to use digital means for the collection of personal information, monitoring of the organization’s information gathering practices and enhancing the ability of individuals to take greater control of their personal information will be necessary.

Anti-Diversion Issues for Charities Operating Abroad

Terrance S. Carter & Sean S. Carter in *Anti-Terrorism and Charity Law Bulletin* No. 37, August 25, 2014.

Many Canadian charities pursue charitable purposes abroad by conducting activities such as disaster relief, poverty reduction, and missionary programs. However, these charities are often unaware of the impact that Canadian legislation can have on their charitable activities outside of Canada.

The emergence of “anti-diversion” issues involved in international operations is becoming an increasingly important area of compliance concern for charities that carry on or are contemplating carrying on operations abroad. “Anti-diversion” generally means the practice of ensuring that funds or other aid are not diverted away from their intended beneficiaries, intentionally or not. In this regard, anti-terrorism and anti-bribery legislation are prominent forms of government anti-diversion initiatives that charities must consider before embarking on foreign operations. Specifically, all charities that conduct activities or provide funding abroad must proactively comply with anti-diversion legislation in Canada in order to avoid potentially significant penalties and even criminal liability. These legislative requirements can be challenging for charities, but non-compliance is not an option. “Nonprofit Organizations” & “Terrorism Financing”. This *Anti-Terrorism and Charity Law Alert* explores various anti-diversion initiatives for charities.

Read More:

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA37.pdf>

New Zealand Court Finds That a Political Purpose May Be Charitable

By Jennifer Leddy

On August 6, 2014, the Supreme Court of New Zealand allowed the appeal from the Court of Appeal decision in *Re Greenpeace of New Zealand Incorporated* ([2014] NZSC 105) that a political purpose cannot be a charitable purpose. In its decision, the Supreme Court held that the strict political purpose exclusion should no longer be applied in New Zealand. The New Zealand courts therefore joined the Australian courts in broadening the definition of charitable purpose to include some types of political activity (see *Aid/Watch Incorporated v Commissioner of Taxation* ([2010] HCA 42).

The Charities Commission in New Zealand originally denied Greenpeace’s application for charitable status because it said that the purpose of promoting peace and disarmament was too political, which decision was upheld by the High Court.

Greenpeace appealed to the Court of Appeal, where it agreed to recommend to a general meeting of members that its objects be changed from simply promoting disarmament to promoting “nuclear disarmament and the elimination of all weapons of mass destruction.” This wording reflects New Zealand’s international obligations and domestic law, as well as popular opinion in the country. Although Greenpeace won on this point, the Court of Appeal continued to maintain that political purposes or activities should exclude an organization from being a charity.

The case then moved to the Supreme Court of New Zealand, which decisively held that a strict exclusion of political purposes is unnecessary and distracts from the underlying inquiry of whether a proposed charitable purpose is for the public benefit. The court held that “advocacy, including through participation in political and legal processes, may well be charitable.”

It is important to note that the Supreme Court of New Zealand did not open the door for any political purpose to be charitable. Rather, it stated that, “an assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit.”

The Supreme Court, therefore, referred the case back to the body of first instance, now known as the chief executive of the Department of Internal Affairs and the Charities Board for reconsideration in light of the decision of the Supreme Court.

Read together with the 2010 Australian decision, this case could have a significant long-term impact throughout the Commonwealth jurisdictions, including Canada, where organizations found to be political pressure groups have been denied charitable status.

UK Tribunal Provides Precedent for Charities Upholding the Law

By Ryan M. Prendergast.

On July 9 2014, the UK First-Tier Tribunal (Charity) General Regulatory Chamber released its decision in *The Human Dignity Trust v The Charity Commission for England and Wales* ([2014] CA/2013/0013). The decision could provide a relevant precedent for charities in Canada, particularly those engaged in upholding the law by challenging policies in court or seeking to clarify the law. The decision also comments on what charitable purposes are caught within the tangled web of “political purpose.”

The Human Dignity Trust (HDT) uses test case litigation to challenge the legality of laws around the world which criminalize private consensual sexual activity between same-sex adults.

HDT applied to the Charity Commission of England and Wales (the “Charity Commission”) for charitable status. It was refused because the Charity Commission said HDT’s purposes were vague and political. HDT’s purposes include:

“to promote and protect human rights (as set out in the Universal Declaration of Human Rights and subsequent United Nations conventions and declarations) throughout the world, and in particular (but without limitation)

- the rights to human dignity and to be free from cruel, inhuman or degrading treatment or punishment;
- the right to privacy and to personal and social development; and
- to promote the sound administration of the law.”

On appeal, the Tribunal found that the purpose was neither vague nor political. The Tribunal stated that the Charity Commission’s decision demonstrated a “fundamental misunderstanding of the nature of a constitutional human rights challenge because litigation aimed at upholding a citizen’s constitutional rights does not seek to change the law of the relevant jurisdiction but rather enforces and upholds the superior rights guaranteed by that country’s constitution.”

While the Charity Commission argued that HDT’s purpose was political because it sought to change the law of foreign states, HDT submitted that its work involves upholding existing human rights law, not changing laws. In response, the Tribunal found that challenging a law because it is contrary to a country’s prior commitment to an international treaty or constitutional law is not a “political purpose”. The Tribunal emphasized the difference between changing a domestic law through pressure on Parliament versus properly using a constitutional scheme meant to test the laws of a country. It concluded that “HDT’s activities engage[d] in a legitimate constitutional process.”

Although the judge in this case was careful to confine the decision to its own facts, her reasoning provides useful parameters for Canadian decision-makers to determine when using litigation to achieve a charitable purpose will be acceptable. This decision means that Canadian charities using litigation to uphold the law concerning human rights and other laws could, in the future, have a clearer understanding of how to engage in litigation as part of their activities. As well, the decision will also

provide guidance to organizations applying for charitable status in determining how to draft their charitable purposes.

A Press Summary from the Tribunal of the HDT decision is available online at: <http://www.judiciary.gov.uk/wp-content/uploads/2014/07/human-dignity-trust-v-charity-commission-press-sum.pdf>

Avoiding Abuse by Terrorist Organizations in the Not-for-profit Sector

By Nancy E. Claridge

In June 2014, the Financial Action Task Force (FATF) released “Risk of Terrorist Abuse in Non-Profit Organizations” (“Report”), a report to help not-for-profit organizations understand steps that they can take to prevent terrorist abuse through financing. The 130-page Report used over 100 case studies from governments and other sources to identify how terrorist organizations are currently taking advantage of the not-for-profit sector. Among these findings was that not-for-profits have interconnected vulnerabilities, which terrorist organizations exploit concurrently. Further, service-based not-for-profits, and those that operate in close proximity, though not necessarily geographically, to active terrorist organizations, are most at risk for abuse. Above all, the FATF identifies this as an evolving problem that requires a multi-faceted response in order to be effective.

The Report contains several findings regarding current threats to not-for-profits, and also recommendations for future research. The Report begins by noting that 57% of evaluated states were not compliant or only partially compliant with the current FATF Recommendation 8 and only five percent of states were fully compliant or largely compliant with Recommendation 8. Recommendation 8, Measures to Prevent the Misuse of Non-Profit Organizations, originated from the FATF’s 40 Recommendations and was updated in 2012.

The Report commences by identifying the nature of the risk to not-for-profits, including different categories for abuse of risk, noting that a recent study found that the level of understanding of the risk to the not-for-profit sector was uneven globally. These categories include the diversion of funds and support in recruitment, known or unknown affiliation with a terrorist entity, support in recruitment, abuse of programming at the point of delivery and false representation.

The Report further examines how organizations have best set themselves up to mitigate these risks, including how to detect such activity, and then how to remove it. Effective methods to mitigate the risk

of terrorist abuse identified by the Report include education of the threat, criminal prosecution (although it is less common) and targeted regulatory measures. Administrative means, like targeted regulatory measures, use tools such as financial sanctions, enforcing suspended operations or being denied registration. These tools are effective because they can target specific organizations without affecting the sector as a whole. The report concludes by advising that much more work needs to occur, including a focus on the source of not-for-profit organization funds, and research in individual countries, to gain a more nuanced and comprehensive perspective for further action.

The entire Report is available online at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>

IN THE PRESS

Non-profit Management Chapter in Updated Text

Terrance S. Carter, in conjunction with Karen J. Cooper, has co-authored a chapter entitled “The Legal Context of Nonprofit Management” in a recently updated edition of *Management of Nonprofit and Charitable Organizations in Canada*, Third Edition, edited by Keith Seal (LexisNexis Canada, 2014). The chapter covers topics such as legal environment, rules and regulations affecting registered charities, risk management and liability, and legal structures for nonprofit organizations,

For more information, see:

http://store.lexisnexis.ca/store/ca/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&catId=&prodId=prd-cad-00792&changeLocale=fr_CA

Lexpert Rankings

Four partners of Carters Professional Corporation have been recognized as leaders in the areas of charity and not-for-profit law, as well as Trusts and Estates Law in Canada by *The Canadian Legal Lexpert® Directory 2014, 18th Edition*. Terry S. Carter, Managing Partner of the firm, has been recognized as one of the most frequently recognized practitioners in the area of charities and not-for-profits since 2004. Theresa L.M. Man, Jacqueline M. Demczur, and Esther S.J. Oh have been recognized since 2011.

Lexpert Canada online: <http://www.lexpert.ca/directory/find-lawyers-or-law-firms/>

Best Lawyers in Canada

Terrance S. Carter and Theresa L.M. Man of Carters Professional Corporation were again recognized as leaders in the area of Trusts and Estates Law in the Charity and Not-For-Profit Law subspecialty by the 2015 edition of *The Best Lawyers in Canada*. Terrance S. Carter has been recognized since 2006, while Theresa L.M. Man has been recognized since 2011.

Best Lawyers online: <http://www.bestlawyers.com>

UPCOMING EVENTS AND PRESENTATIONS

What You Missed Over the Summer: Recent Developments in Charity Law being hosted by the Canadian Bar Association and the Ontario Bar Association will include Theresa L.M. Man as speaker on September 9, 2014.

Details available at http://www.cbapd.org/details_en.aspx?id=ON_14CHA0909T.

Imagine Canada's Free Charity Tax Tools Webinar will be held on September 23, 2014 presented by Terrance S. Carter entitled "Political Activities by Charities: If you do it, do it smart!"

Registration available at <http://sectorsource.ca/training-and-events/webinar/political-activities-charities-if-you-do-it-do-it-smart>.

St. Michael's College School and Carters Professional Corporation are hosting a half-day Seminar on September 29, 2014. The following topics will be presented:

- Anti-Spam Legislation: Practical Guidance for Compliance
- Legal Issues in Managing Endowment Funds
- Split Receipting Rules: A Refresher
- CRA Fundraising Guidance: What You Need to Know

Registration available at <https://www.mysmcs.com/event-registration----carters-professional-corporation-half-day-seminar->

Brampton Arts Council is hosting an evening session on October 8, 2014, at the Brampton Golf Club with Terrance Carter presenting on the topic of "The Changing Landscape of Ontario Corporations".

Institute of Corporate Directors (ICD) Ontario Chapter (Peel Region) is hosting a seminar at the Credit Valley Golf Course on October 30, 2014 entitled "NFP Board's Role versus NFP C.E.O./Executive Director's Role" with Terrance Carter participating in the panel discussion.

The 21st Annual Church & Charity Law™ Seminar will be held at Portico Community Church in Mississauga, Ontario, on Thursday, November 13, 2014.

Details and online registration available at <http://www.carters.ca/pub/seminar/chrchlw/2014/brochure.htm>.

CSAE Trillium Chapter is offering a number of *Accessibility for Ontarians with Disabilities Act* (AODA) Workshops in various locations. Please see the following link for more information: <http://www.csae.com/Chapters/Trillium/AODAResourcesWorkshopsandWebinars.aspx>.

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Terrance S. Carter – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell 2013), and a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2014). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is Past Chair of the CBA National and OBA Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca.



Sean S. Carter – Called to the Ontario Bar in 2009, Sean practices general civil, commercial and charity related litigation. Formerly an associate at Fasken Martineau DuMoulin LLP, Sean has experience in matters relating to human rights and charter applications, international arbitrations, quasi-criminal and regulatory matters, proceedings against public authorities and the enforcement of foreign judgments. Sean also gained valuable experience as a research assistant at Carters, including for publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*.



Nancy E. Claridge – Called to the Ontario Bar in 2006, Ms. Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.



Jacqueline M. Demczur – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Mrs. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*. 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 Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law*TM Seminar.



Barry W. Kwasniewski - Mr. Kwasniewski joined Carters' Ottawa office in October, 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, not-for-profits and law firms.



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



Theresa L.M. Man – 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*. She is vice chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA. In addition to being a frequent speaker, Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Planned Giving Pulse*, *Canadian Fundraiser eNews* and *Charity Law Bulletin*. She is co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* published by Carswell in 2013.



Ryan Prendergast –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 concerning incorporation, ongoing corporate compliance, registration of charities, audits and internal appeals with CRA, as well as the amalgamation and merger of charities. Ryan is a regular speaker and author on the topic of directors' and officers' liability for not-for-profit corporations, and has co-authored papers for Law Society of Upper Canada. In addition, Ryan has contributed to several *Charity Law Bulletins* and other publications on www.charitylaw.ca, and is a regular presenter at the annual *Church & Charity Law Seminar*.



Linsey E.C. Rains - Called to the Ontario Bar in 2013, Ms. Rains joined Carters Ottawa office to practice charity and not-for-profit law with a focus on federal tax issues after more than a decade of employment with the Canada Revenue Agency (CRA). Having acquired considerable charity law experience as a Charities Officer, Senior Program Analyst, Technical Policy Advisor, and Policy Analyst with the CRA's Charities Directorate, Ms. Rains completed her articles with the Department of Justice's Tax Litigation Section and CRA Legal Services.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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