

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

FEBRUARY 2016

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RECENT PUBLICATIONS AND NEWS RELEASES

Ontario OCA Corporations Going Federal: Issues to Consider

By Theresa L.M. Man, *Charity & NFP Law Bulletin* No. 379, February 25, 2016

As a result of the repeated delay in the proclamation of the Ontario [Not-for-Profit Corporations Act, 2010](#) (“ONCA”), some Ontario not-for-profit corporations under Part III of the [Corporations Act](#) (“OCA”) are considering whether to give up waiting for the proclamation of the ONCA by continuing under the federal [Canada Not-for-Profit Corporations Act](#) (“CNCA”). The CNCA was enacted in 2009 and proclaimed on October 17, 2011. Is it suitable for an OCA corporation to do so?

Ever since the enactment of the ONCA in 2010, OCA corporations have been waiting for the proclamation of the ONCA. The Ontario Ministry of Government and Consumer Services announced on September 17, 2015, that the ONCA will not come into effect for at least another two years until two things have happened: (a) the Legislature has passed technical amendments to the ONCA and related legislation; and (b) technology at the Ministry is upgraded to support these changes and improve service delivery. Once the ONCA is proclaimed, existing OCA corporations will have three years to transition under the ONCA.

Ontario not-for-profit corporations have been left in corporate limbo for six years since 2010, having to make the difficult decision whether to update their objects and by-laws to further their mission or to wait for the proclamation of the ONCA before making those changes. The problem with waiting is that they do not know how long the wait might be. On the other hand, the problem with updating the objects and by-laws first is that those updates would have to be made under the rules in the OCA and they may have to be updated again after proclamation to comply with the new rules in the ONCA. The question is whether continuing into the CNCA is a suitable solution to avoid these difficulties.

Another issue to consider is whether it would be desirable for OCA corporations to move into the federal jurisdiction for other reasons. This question is worth asking since this option was not available under the [Canada Corporations Act](#), the predecessor to the CNCA, which did not permit corporations from another jurisdiction to continue under the Act.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 379](#).

CRA News

By Jennifer M. Leddy

Announcement on Improvements to CRA Correspondence

On February 11, 2016, the Minister of National Revenue, Diane Lebouthillier, announced improvements in how CRA communicates with Canadians. Beginning in February 2016, CRA will send taxpayers simplified and easier-to-read Notices of Assessment with respect to their income tax and benefit returns. In July 2016, recipients will receive simplified Benefits Notices for family benefits and the GST/HST credit. Furthermore, CRA will make the majority of its correspondence, such as the Notices, available online through a service called [My Account](#).

These changes come as a result of a review of international best practices, feedback from the public and extensive user-experience testing to ensure that the notices can be understood and used by Canadians with varying information needs. The content of more customized and technical correspondence with the public is scheduled for streamlining over the next two years.

Webpage with Questions and Answers about Making Donations

On February 9, 2016, CRA published a new webpage called [Questions and answers about making donations](#), which provides information in response to frequently asked questions about making charitable donations. More specifically, the webpage provides information about how individuals can find out if a charity is registered, whether a charity has to give a receipt when it receives a donation, whether a charity can return a donation and whether a charity can lend its registration number to another organization so that it can give receipts. The Webpage also provides helpful responses to questions about receipting and information about how taxpayers can make complaints about charities and report charity fraud.

CRA Publishes Guide for Filling out Form T3010

On February 9, 2016, CRA published [T4033 – Completing the Registered Charity Information Return](#) (the “Guide”), which provides comprehensive information on how to fill out Form T3010, Registered Charity Information Return and [Form TF725, Registered Charity Basic Information Sheet](#). It is targeted toward Canadian charities and national arts service organizations that are registered under the [Income Tax Act](#) (“ITA”) and are eligible to issue official donation receipts.

Under the ITA, every registered charity must file an information return each year. The return must be filed no later than six months after the end of the charity’s fiscal period. The Guide provides information about what must be included in a complete information return, where it is to be sent and how other correspondence is to be provided to CRA. The Guide also contains very specific information about how

to fill out Form T3010, including line-by-line commentary on what information registered charities must provide to CRA to maintain registration and tax-exempt status.

Testamentary Charitable Giving - The New Regime

By M. Elena Hoffstein – Guest Contributor, *Charity & NFP Law Bulletin* No. 380, February 25, 2016

On December 16, 2014, Bill C-43 received Royal Assent. The new rules introduced by the Bill affect the manner in which testamentary trusts are taxed, and in addition, change significantly the manner in which testamentary charitable gifts will be dealt with under the *Income Tax Act*, RSC 1985, c.1 (5th Supp.) (“ITA”).

In order to better appreciate the significance of the changes, it is important to review briefly the law as it was prior to 2016.

In the past, income and capital gains retained in *inter vivos* trusts were taxed at a different rate than testamentary trusts. *Inter vivos* trusts have always been taxed at the top marginal rates of tax. On the other hand testamentary trusts and certain pre-1971 *inter vivos* trusts have enjoyed access to progressive rates of tax and other benefits not available to *inter vivos* trusts. Bill C-43 has eliminated the various differences between *inter vivos* and testamentary trusts commencing in 2016. There are two exceptions to these new rules. Firstly, the progressive tax rates will continue to apply to the first thirty-six (36) months of an estate that arises as a consequence of the death of an individual and that is a testamentary trust. This type of trust has been given a new name, the graduated rate estate or GRE, as it is now affectionately named. The second exception is for trusts that qualify as qualified disability trusts or QDTs for disabled individuals. It is not intended to discuss QDTs in this *Bulletin*.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 380](#).

Ontario Court Recognizes New Invasion of Privacy Tort

By Sepal Bonni

New technology in the digital age involves the routine collection and aggregation of highly sensitive personal information that is readily available in electronic formats. This poses new threats to the right of privacy and is continually forcing Canadian courts to develop novel invasion of privacy laws.

As discussed in our [Charity Law Bulletin No. 277](#), the Ontario Court of Appeal first recognized an invasion of privacy tort called “intrusion upon seclusion” in the 2012 case of [Jones v. Tsige](#) (“Jones”). On January

21, 2016, in *Jane Doe 464533 v N.D.* (“*Doe*”), the Ontario Superior Court of Justice (the “Court”) recognized yet another invasion of privacy tort called “public disclosure of private facts”, again expanding the scope of privacy laws in Ontario.

In *Doe*, the plaintiff and defendant previously had a relationship with one another. Under pressure from the defendant, the plaintiff recorded an intimate video of herself and sent it to the defendant upon reassurances that nobody else would see it. The plaintiff later learned that the defendant had shared the video with members of their mutual social circle and posted it on an Internet pornography website. According to uncontested facts, this has had a significant and long-lasting effect, both mentally and physically, on the plaintiff.

In coming to its decision, the Court drew heavily on the *Jones* decision which referenced a seminal legal article outlining four common law privacy torts in the United States, including the tort of intrusion upon seclusion, and the tort of public disclosure of embarrassing private facts. The Court determined that the facts of this case best fit within the tort of public disclosure of private facts. The Court stated the elements of the new tort as follows: “one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other’s privacy, if the matter publicized, or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Applying the facts to the elements of the tort, the Court held that a reasonable person would find that the defendant’s actions were highly offensive and that the published material was not of public concern. As a result, the Court awarded \$100,000 in damages, the maximum amount of damages procedurally available under Ontario’s Simplified Procedure. This was quite different than the modest \$10,000 award in *Jones*. In awarding damages, the Court held that the facts had similarity to the impact of a sexual assault and stated that “[a]lthough there was no physical violence, in these circumstances, especially in light of the multiple times the video was viewed by others and, more importantly, the potential for the video still to be in circulation, it is appropriate to regard this as tantamount to multiple assaults on the plaintiff’s dignity”. Notably, the defendant did not defend the action and the award was a default judgment. Had the defence argued the case fully the damages awarded may have been different.

In recognizing the increasingly rapid emergence of new technologies and online platforms, the Court noted that “[i]n the electronic and Internet age in which we all now function, private information, private facts and private activities may be more and more rare, but they are no less worthy of protection. Personal and private communications and the private sharing of intimate details of persons’ lives remain essential

activities of human existence and day to day living”. It will be interesting to see if Canadian courts in other jurisdictions will be receptive to this tort. For charities and not-for-profits, this case illustrates that care must be taken to protect the privacy of individuals as the courts continue to recognize new invasion of privacy torts.

Discriminatory Will Provision Ruled Invalid

By Terrance S. Carter & Nancy E. Claridge

Ontario’s Superior Court of Justice (the “Court”) has reaffirmed the common law prohibition against enforcing testamentary trusts that are contrary to public policy by striking down a fund that was discriminatory on the basis of race, gender and sexual orientation. In its February 16, 2016 decision in [*Royal Trust Corporation of Canada v The University of Western*](#), the estate trustee for the testator, Dr. Victor Hugh Priebe (“Dr. Priebe”), applied for direction from the Court concerning certain provisions contained in the will concerning the establishment of a fund for “awards and bursaries” which were to be restricted to certain male and female candidates on the basis of race, gender and sexual orientation. The estate trustee applied for direction from the court concerning these provisions pursuant to section 60 of the [*Trustee Act*](#), section 10 of the [*Charities Accounting Act*](#) and Rules 14.05(3)(a), (b) and (d) of the [*Rules of Civil Procedure*](#).

Paragraph 3(d)(ii)(E) of Dr. Priebe’s will provided for a fund for “awards or bursaries” to be awarded to “Caucasian (white) male, single, heterosexual students in scientific studies...”. Further requirements stated that candidates must “not be afraid of manual labour” or “anyone who plays intercollegiate sports”. A separate award, to be named the Ellen O’Donnel Priebe Memorial Award, was to be awarded to “a hard-working, single, Caucasian white girl who is not a feminist or a lesbian, with special consideration, if she is an immigrant, but not necessarily a recent one.” Justice Mitchell concluded at paragraph 14 of the decision that she had “no hesitation in declaring the qualifications relating to race, marital status and, in the case of female candidates, philosophical ideology, in paragraph 3(d)(ii)(E) of the Will void as being contrary to public policy.”

Paragraph 3(d)(ii)(G) of the will also provided that if any of the provisions of Dr. Priebe’s will were found to be of a non-charitable nature or were declared void for public policy by the courts, that the gift “shall be deleted without prejudice to the remaining provisions of this paragraph 3(d)(ii)”. The Court found that this provision precluded it from applying the doctrine of *cy-pres*, which meant that the Court was unable to exercise its inherent jurisdiction to alter the offending paragraph in a manner that was not

discriminatory. As a result, the Court was bound to delete the discriminatory provision of paragraph 3(d)(ii)(E) from the will.

The Court cited [Canada Trust Co. v Ontario Human Rights Commission](#) as the leading authority on this matter, as well as authority for the principle that each trust must be evaluated on a case-by-case basis and that not all restrictions amount to discrimination that are contrary to public policy. However, testamentary provisions that are blatantly contrary to applicable human rights legislation will almost certainly be found to be void as being contrary to public policy. Whether such provisions can be saved based upon the Court's inherent *cy-pres* jurisdiction will depend upon the specific wording of each will, as was evident in this case. For a discussion of another recent testamentary freedom and public policy decision, reference can be made to the [July/August 2015 Charity & NFP Law Update](#) concerning the [McCorkill v Streed](#) decision.

Ontario Human Rights Commission Updates Policy on Creed

By Barry Kwasniewski, *Charity & NFP Law Bulletin* No. 378, February 25, 2016

On December 10, 2015, the Ontario Human Rights Commission (the "OHRC") announced the release of an update to its *Policy on preventing discrimination based on creed* (the "Policy"). The updated Policy, which replaces the previous policy on creed from 1996, surveys current and historical trends and issues that have shaped discrimination based on creed and introduces an expanded definition of creed. This expanded definition of creed leaves open the possible inclusion of non-religious belief systems that substantially influences a person's identity, world view, and way of life. The Policy also provides a range of specific situations in which accommodation may be required based on creed and how they may be accommodated.

For the balance of this Bulletin, please see [Charity & NFP Law Bulletin No. 378](#).

FCA Revokes Charitable Status Based on Failure to Maintain Proper Books and Records

By Terrance S. Carter

On February 10, 2016, the Federal Court of Appeal ("FCA") delivered from the Bench a summary decision in [Al Uloom Al Islamiyyah Ontario v The Queen](#). The FCA confirmed a decision of the Minister of National Revenue (the "Minister"), acting through the Canada Revenue Agency Charities Directorate (the "Charities Directorate"), to issue a Notice of Intent to Revoke ("NIR") the charitable status of Jaamiah Al Uloom Al Islamiyyah Ontario (the "Charity").

The NIR resulted from an audit by Canada Revenue Agency (“CRA”) of the Charity for its 2007 and 2008 taxation years. The NIR was issued on the basis that the Charity failed to maintain adequate books and records in accordance with the [Income Tax Act](#) (“ITA”), issued receipts for gifts otherwise than in accordance with the ITA and the [Income Tax Regulations](#) (the “Regulations”), and failed to file information returns when required. The Canada Revenue Agency Appeals Branch confirmed the decision by the Charities Directorate to issue the NIR.

In its appeal to the FCA, the Charity did not deny that it had been non-compliant with the requirements of the ITA and the Regulations. Rather, the Charity asserted that it understood why its actions were not in compliance, that they would not occur again, and that it had already hired experienced accountants to address the deficiencies. The Charity asserted that the sanction of revocation was too extreme under the circumstances and failed to address the remedial steps that the Charity had taken.

In its analysis, the FCA stated that the privilege of issuing charitable donation receipts is one that comes with important responsibilities, one of which is to maintain proper books and records. The FCA went on to say that the absence of proper books and records prevented the Minister from fulfilling her obligation to verify the accuracy and validity of the charitable donation receipts that the Charity has issued. As a result, the failure by the Charity to maintain adequate books and records was considered by the FCA to be serious and justified the Minister’s conclusion that the penalty of revocation was warranted.

This decision underscores the importance of a charity maintaining proper books and records in accordance with CRA requirements under the ITA and Regulations. This decision is also important in demonstrating that even if remedial actions are taken, charitable status may still be revoked if CRA is of the opinion that the incidents of non-compliance are either “serious” or “aggravated” under the circumstances.

CRA Views: Non-Resident Donors Required to File a Tax Return

By Jacqueline M. Demczur

On February 10, 2016, Canada Revenue Agency (“CRA”) released technical interpretation 2013-0496461E5, which addresses whether non-resident individuals are required to file Canadian tax returns for years in which they elect under subsection 118.1(6) of the [Income Tax Act](#) (“ITA”) to make donations of taxable Canadian property (“TCP”), particularly donations of undeveloped land, to qualified donees. The technical interpretation states that, in such a situation, the ITA would generally require the non-resident to file a tax return.

Pursuant to subsections 116(1) and 116(3) of the ITA, non-residents that dispose of TCP are required to notify CRA and submit prescribed information to CRA within 10 days of the said disposition by way of [Form T2062 Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property](#). There are though, exceptions to this rule, such as if the property is described in subsection 116(5.2) or if it is otherwise defined as “excluded property” in subsection 116(6). In this particular case though, undeveloped land is addressed in paragraph 248(1)(a) of the definition of “taxable Canadian property” in the ITA and, therefore, does not fall within these exceptions and is TCP.

Additionally, if a non-resident wishes to make a designation under subsection 118.1(6) of the ITA with respect to such a disposition, the non-resident must also file a statement of intent to make the said designation as well as a letter from the charity or prescribed donee to confirm that the property is to be donated. Such a designation can only be made by attaching the supporting documentation to the non-resident’s income tax return. Where this designation is not properly filed with CRA, tax will be assessed by CRA in relation to the disposition of the property in question.

[Information Circular IC72-17R6, Procedures concerning the disposition of taxable Canadian property by non-residents of Canada – Section 116](#) states that non-resident vendors may not have to file a Canadian tax return under certain circumstances. One of these is when a non-resident has no Part I tax payable for the taxation year. Although an election made under section 118.1(6) of the ITA may result in a non-resident having no Part I tax payable, it is important to note that such a designation may only be made by including the above-referenced Form T2062 and statement of intent as attachments to the non-resident individual’s income tax return for the taxation year in which the donation was made. Therefore, the filing of the underlying tax return by the non-resident is a necessary part of the process.

CRA Views: No Change in CRA’s Position on Public Bodies as Qualified Donees

By Linsey E.C. Rains

On July 17 2015, Canada Revenue Agency’s (“CRA”) Income Tax Rulings Directorate (“ITRD”) provided CRA’s Charities Directorate with its comments on whether a taxpayer continued to qualify as a “municipal or public body performing a function of government for purposes of 149(1)(c) of the [*Income Tax Act*] and the definition of a qualified donee in subsection 149.1(1).” The comments were publicly released on February 10, 2016 and confirm that CRA has not made any significant changes to its previously published positions.

CRA's Charities Directorate is responsible for granting qualified donee status to organizations that meet the definition of a municipal or public body under paragraph 149(1)(c) of the [Income Tax Act](#). Once approved by the Charities Directorate, such organizations are eligible to issue receipts for official donations and subject to additional [books and record keeping requirements](#).

In this situation, the Charities Directorate had contacted the ITRD to verify whether changes to "the manner in which the [the taxpayer's] Board of Directors is appointed" would impact the taxpayer's status as a public body. The ITRD confirmed that public body status continued:

- to "be determined on a case-by-case basis";
- to require that incorporated taxpayers be subject to "some specific control over the actions and operation of the corporation" by the federal, provincial, or territorial government or public that it serves;
- to mean that the taxpayer must be accountable "to the residents of the region over which it has jurisdiction"; and
- to mean that a taxpayer must "have the ability and powers to govern, tax, pass by-laws and/or provide municipal-or-provincial-type services to its members or citizens."

BC New Societies Act Coming Into Force on November 28, 2016

By Theresa L.M. Man

Following the enactment of the new British Columbia [Societies Act](#) on May 14, 2015, the Lieutenant Governor in Council issued [Order No. 673](#) on November 23, 2016, stating that a majority of the provisions in the new Act will come into force on November 28, 2016 (sections 1 to 263, 265 to 268, 270 to 274, 276, 279, 281 to 288, 291 to 295, 297 to 299, 301 to 322, 324, 325, 327 to 338, 340 to 349, 351 to 354 and 356 to 365).

The Order also introduced a new *Societies Regulation*, effective November 23, 2016, repealing the [Society Act Regulations](#), B.C. Reg. 4/78. The new Regulation address various issues referred to in the new Act, including a new model by-law for societies; the maximum fees that may be charged in various scenarios; how reporting on remuneration of directors, employees and contractors in the financial statements are to be made; when a person who is 16 or 17 years old may be a director or senior manager of a society; the funding threshold for member-funded societies; and reporting society provisions.

A pre-existing society must transition under the new Act within two years of it coming into force by filing a constitution, by-laws (consolidated into a single set of bylaws) and a statement of directors and registered office of the society.

Claim of Breach of Fiduciary Duty Struck in Class Action Against University

By Ryan M. Prendergast

On July 10, 2015, the Ontario Superior Court of Justice released its decision in [*Creppin v The University of Ottawa and Allan Rock*](#), in which it dealt with a motion to dismiss a claim on the basis that it did not disclose a reasonable cause of action pursuant to Rule 21.01(1)(b) of the [*Rules of Civil Procedure*](#). In the statement of claim, which was brought under the [*Class Proceedings Act*](#), the plaintiffs, through Mr. Creppin as the lead plaintiff (the “Plaintiffs”), alleged that the University of Ottawa and its president, Allan Rock (the “Defendants”), mishandled allegations of sexual assault against two members of the university hockey team. Specifically, the plaintiffs allege that publicly announcing a suspension of the entire team unfairly cast suspicion and guilt on the entire team and breached their duties to the plaintiffs in several ways.

For a motion to strike a pleading to be successful, it must be plain and obvious that it does not disclose a reasonable cause of action. Courts must approach this analysis in a generous manner and remain open to allowing novel but arguable claims to proceed. In response to the Plaintiffs’ various accusations, the Defendants argued:

- the Defendants, as university leaders have broad discretion and even if unfair there is no cause of action having to do with a breach of natural justice,
- the Plaintiffs did not plead sufficient facts to make out a claim for negligence on part of the Defendants,
- the university president did not have a fiduciary duty to the students in this case, and
- there is not a cause of action against Mr. Rock for misfeasance in public office

In response to the first ground, Justice Phillips found that although the Defendants do enjoy broad discretion, their actions could be construed as disciplinary against students that were not involved with the sexual assault allegations. Discretion, albeit broad, is not unlimited and the court, therefore, found that it was not plain and obvious that the actions were within the Defendants’ discretion.

In response to the second ground, the Court again found that it was not plain and obvious that a claim for negligence could not be made out. A duty of care has been judicially recognized to arise within the relationship between a university and its students. Failing to become informed of all the facts before reprimanding uninvolved students could be seen to have created foreseeable harm.

In contrast, the Court found that it was plain and obvious that a claim for breach of fiduciary duty could not succeed. The court found that the Plaintiffs, as paying students, represent a vulnerable class of persons, and they had substantial practical interests that were negatively affected by the Defendants' actions. However, the Court reviewed the objects and purposes in the [University of Ottawa Act](#) and determined that "the objects and purposes of the University are to look out for its various constituent elements as a whole." As a result, the Defendants were obligated to consider all of these elements in making a decision and the Court therefore struck the claim of breach of fiduciary duty.

Finally, the Court also found that it was plain and obvious that misfeasance in public office was not a reasonable cause of action. As the Court stated, this tort involves bad faith and/or dishonesty and, as an intentional tort, the Defendants must have been aware that such conduct would cause harm. While the actions of the Defendants may well have been negligent, Justice Phillips stated that the deliberate moral turpitude was not present to meet the misfeasance claim and accordingly struck this allegation from the pleadings.

Since the motion to strike the statement of claim by the Defendants was not successful, the claim that the Defendants acted negligently may be determined in a further court decision. As a result, universities, but also other charities and not-for-profits that are involved in disciplining their students, members, or other beneficiaries, should follow this case to determine how the outcome of the claim may impact their discipline process.

Tax Preparers Convicted of Fraud in BC Court

By Jacqueline M. Demczur

On December 2, 2015, the Supreme Court of British Columbia released its decision in [R. v. Raza](#), in which it convicted three individuals for defrauding the provincial and federal governments of tax revenue by way of a false charitable donation scheme. The three accused, Fareed Raza, Saheem Raza (collectively the "Razas") and Faiz Kahn (with all three being the "Accused") were convicted under section 380(1)(a) of the [Criminal Code](#) for defrauding the federal and provincial governments for amounts exceeding \$5,000

for the periods of December 31, 2002 to June 24, 2011 for the Razas, and June 31, 2008 to June 24, 2011 for Mr. Kahn, respectively,.

The Razas were both directors in an accounting corporation where tax returns were prepared for clients who approached them on a referral basis hoping to receive better tax refunds for their respective businesses. The evidence provided by police and former client witnesses revealed that clients were told by the Accused that they would be able to collect refunds if they made donations to a registered charity named Mehfuz Children Welfare Trust (“Mehfuz”). In most cases, clients were told to donate \$500 to Mehfuz, though amounts ranged from a few hundred dollars to several thousand. The said clients would then provide the Accused with these cash donations for each tax year and, in return, their tax returns were prepared reflecting charitable donations to Mehfuz that grossly exaggerated the amounts actually donated. The Razas also attached receipts from Mehfuz to their clients’ tax returns that they were not authorized to issue on behalf of Mehfuz.

The number of alleged false tax returns prepared by the Razas during the period in question was over 1,700. The total of false donations set out on the said fraudulent returns amounted to \$11.4 million, and amounted to \$4.909 million in lost revenue for the Crown. By comparison, the total amount of donation revenue reported by Mehfuz during the same period of time was \$815,000.

The court found that the evidence against the Accused was sufficient to prove beyond a reasonable doubt that all of them were guilty of the charges. The Razas were convicted of fraud over \$5,000 for generating false documentation that deprived the Crown of tax revenue. Since there was only evidence that Mr. Kahn prepared one false return, he was convicted of the lesser charge of attempted fraud under \$5,000 for his role. Since he was not a director of the company and did not have his name on an office, he was not found to be implicated in the broader scheme, as with the case with the Razas.

This case serves as a reminder for organizations that proper records of cash donations to registered charities need to be maintained in order to avoid becoming an unwitting victim of charitable tax fraud schemes.

CRTC Issues Second Warrant Under CASL

By Ryan M. Prendergast

On January 27, 2016, the Canadian Radio-television and Telecommunications Commission (“CRTC”) made an [announcement](#) that it executed a warrant pursuant to [Canada’s anti-spam legislation](#) (“CASL”) at two sites in Ontario’s Niagara Region. This is the second warrant that has been issued since CASL came

into force in 2014. Further information about the first of these warrants, issued on December 3, 2015, may be found in our [January 2016 Charity & NFP Law Update](#).

The CRTC is responsible for enforcement under CASL, and actions taken by the CRTC can include administrative monetary penalties and investigations, among other actions. The CRTC does not comment on active investigations or names of individuals or companies that are being investigated but disclosed that this particular warrant was in response to an ongoing investigation of the installation of malware and the alteration or transmission data. The investigation was initiated after the CRTC received information from FireEye Inc., a company that specializes in cyber threat protection and forensics.

In the announcement, the CRTC asserted that it will continue to collaborate with local and international authorities to “aggressively pursue investigations of alleged violations under CASL” and encouraged Canadians to report spam and electronic threats to the [Spam Reporting Centre](#). Charities and not-for-profits should take measures to ensure that their networks are not compromised by various forms of malware or viruses in order to protect themselves and their constituents from similar attacks.

ONN Submission Focuses on “Nonprofit Social Enterprise”

By Terrance S. Carter

The [Ontario Nonprofit Network](#) (“ONN”) made a [written submission](#) to the Social Enterprise Branch of the Ministry of Economic Development, Employment and Infrastructure on December 1, 2015, (the “Submission”) proposing that the Branch ensures a “real focus on nonprofit social enterprise” in the development of social enterprises in Ontario, notwithstanding that the for-profit model for social enterprise may currently be better understood. The Submission by ONN is directed at the Ontario government’s recent initiative to facilitate the growth and success of social enterprises in Ontario. For more information about the government initiative, see [Impact: A Social Enterprise Strategy for Ontario](#).

The Submission encourages a “principled approach” that recognizes that social enterprises, whatever their corporate form, must exist “to provide public benefit, contribute to and grow community wealth and wellbeing.” In consultation with its network of 55,000 not-for-profits and charities in Ontario, ONN developed six key policy recommendations which are set out below along with a brief summary of accompanying commentary where appropriate:

1. **“Approaches to social enterprise development must maintain a clear focus and clarity of purpose and principle”** In this regard, ONN submits that social enterprise development must maintain commitment to the public good and operate with a holistic approach. This could be

facilitated if social enterprises received funding similar to that received by other application of social enterprise, such as for-profit or dual-purpose enterprises.

2. **“The Government of Ontario should focus on improving access to appropriate capital investment for social enterprise.”** The government should recognize that social enterprises require access to a wide variety of capital and improve accessibility accordingly.
3. **“The Government should develop a Social Procurement Action Plan.”** Targeted social procurement could help provide economic opportunities for social enterprises.
4. **“A provincial approach means including regional approaches.”** The government need to focus on social enterprise initiatives in rural and remote contexts, as well as in urban contexts.
5. **“The government of Ontario should move forward with enabling amendments to legislation and regulation for the 88% of social enterprises operating as non-share capital organizations, so they may earn income to grow their enterprises, attract capital, and increase sustainability while maintaining the public’s trust.”**
6. **“Modifications to the *Ontario Business Corporations Act* to provide for dual purpose ‘private profit and social good’ corporations should not be undertaken at this time.”** ONN’s background research indicates that dual purpose corporations do not adequately address the needs of social entrepreneurs, communities, investors or governments. For more information concerning the possibility of dual purpose corporations in Ontario, see [Dual Purpose Corporate Structure Legislation: Stakeholder Engagement Report](#), which was released by the Ontario Ministry of Government and Consumer Services on January 29, 2015.

For more information on the submission by ONN, please see the ONN’s [Policy Blueprint for Social Enterprise](#).

FATF Plenary Meeting Held this Month

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

From February 17 to 19, 2016, a [Plenary Meeting](#) (the “Plenary”) of the Financial Action Task Force (“FATF”) was held in Paris, France. The FATF is an inter-governmental policy-making institution responsible for setting and monitoring international standards for combating money laundering and the financing of terrorism, which is promulgated, among other ways, via a series of [Recommendations](#) for its

member countries. This most recent Plenary was largely focused on advancing the FATF's work to combat terrorist financing in a variety of sectors.

At the Plenary, the FATF adopted a [Consolidated FATF Strategy on Combatting Terrorist Financing](#) ("Consolidated Strategy"), which lays out an updated consolidation of the FATF's stated "key objectives" to meet terrorist threats from perceived facilitating organizations that fund and support the terrorist groups or individuals. The Consolidated Strategy seeks to achieve the following: achieving a full understanding of the scope of terrorist financing, ensuring that FATF Recommendations provide appropriate counter measures and that member countries are maintaining compliance.

The published outcomes of the Plenary make special note that since 2015, the FATF has been "call[ing]" on its member states to provide more information on terrorist financing and identify barriers to "effective information sharing – at international and domestic levels." The FATF has been reviewing this information and sharing practices and tools for overcoming these "barriers" with member states. The FATF has restated its commitment to ensuring the free flow of information in order to combat terrorist financing. The FATF reaffirmed their commitment to continue this work at all levels domestically and internationally, with government agencies and in the private sector.

This campaign to strengthen and remove perceived barriers to information sharing was reflected recently in Canada in the [Anti-terrorism Act, 2015](#) (otherwise known as Bill C-51). This legislation garnered some significant concern about safeguards that might be necessary in an evolving world where information is shared between government agencies, the private sector and internationally. Charities and not-for-profits, particularly those that have programs internationally or that operate in "conflict zones" need to be aware of this increasingly free-flow of information globally, as it is being institutionalized and significantly increased. The impact of this globally shared information should not be underestimated as the information (which may include simple allegations) could lead to or be a part of potential revocation of charitable status and/or charges under the broad definition of "facilitation" of the *Criminal Code*, among other serious liabilities. For more information please see [Anti-Terrorism & Charity Law Bulletin No. 39](#), which discusses the impact of Bill C-51 on charities and not-for-profits.

Giving Australia 2015-2016 Project

By Esther S.J. Oh

On February 4, 2016, the [Australian Centre for Philanthropy and Nonprofit Studies](#) ("ACPNS") at the Queensland University of Technology ("QUT") in Brisbane, Australia, published a [webpage for the](#)

[Giving Australia 2015-2016 Project](#) (the “Project”). The Project, led by ACPNS, is carried out in conjunction with the [Centre for Social Impact](#) at Swinburne University of Technology and the [Centre for Corporate Public Affairs](#) and is the largest ever study concerning philanthropic behaviour conducted to better understand how, why and how much Australians give to charity. The Project has received \$1.7 million in funding and will operate through to September 30, 2016, with the end goal of developing new policies and ideas to assist organizations and communities across Australia.

The Project will involve the collection of data from individuals, charities, philanthropists and businesses in order to identify any potential barriers and opportunities to make giving and volunteerism more accessible to Australians, and raise awareness and increase education about the needs of non-profit organizations. The Project has formed research partnerships with a [variety of research centres and actors in the non-profit sector](#). Recent publications from participants in the Project may be found in a separate tab on its [website](#).

The Project is part of the Australian Prime Minister’s [Community Business Partnership](#), whose mandate is to advise the Australian government on practical strategies that encourage philanthropic giving, volunteering and investment in Australia. The Project invites anyone interested in participating in its research to apply in the “Participate in Our Research” tab of its [website](#).

Ottawa Region Charity & NFP Law Seminar Materials Available

The Ottawa Region Charity & Not-for-Profit Law Seminar, hosted by Carters Professional Corporation in Nepean, Ontario, on February 11, 2016, was attended by more than 350 leaders from the sector, including directors of charities, government officials, accountants and lawyers. Designed to provide practical information to assist charities and not-for-profits in understanding and complying with recent developments in the law, the related Church & Charity Law seminar has been held annually in Toronto since 1994, with an Ottawa seminar first added in 2008. All handouts and presentation materials are now available at the links below.

- [2016 Essential Charity & NPO Law Update](#) by Jennifer Leddy
- [The ABCs of GST/HST for Charities & NPOs](#) by Linsey E.C. Rains
- [Mysteries of the T3010: Focus on Special Issues](#) by Jacqueline M. Demczur
- [Be Careful What You Sign: Leasing and Related Issues for Charities and NPOs](#) by Nancy E. Claridge

- [Human Rights Challenges in the Workplace](#) by Barry Kwasniewski
- [Going into Business? The Social Enterprise Spectrum](#) by Terrance S. Carter
- [Membership Meeting Nightmares to Avoid](#) by Theresa L.M. Man
- [Going Social: Using Social Media to Accomplish Your Mission](#) by Sepal Bonni
- [CRA Update: Views from the Regulator](#) by Cathy Hawara

IN THE PRESS

[Charity & NFP Law Update – January 2016 \(Carters Professional Corporation\)](#) was featured on *TaxNet Pro* and is available to those who have subscription privileges. Future postings of the *Charity & NFP Law Update* will be featured in upcoming posts.

RECENT EVENTS AND PRESENTATIONS

[Ontario Bar Association’s Institute 2016](#) hosted a session on “Critical Issues for Investment by Charities” presented by Terrance S. Carter on Friday February 5, 2016.

[The Ottawa Region Charity & Not-for-Profit Law™ Seminar](#) presented by Carters Professional Corporation in Ottawa, Ontario, on **Thursday February 11, 2016**. [Handout materials](#) available at www.carters.ca

UPCOMING EVENTS AND PRESENTATIONS

[Canadian Association of Gift Planners \(CAGP\) Conference](#) is being held at the Banff Centre in Banff, Alberta from April 6 to 8, 2016, and includes a presentation entitled “When is a Gift Not a Gift (And Why Should You Care) to be presented by Terrance S. Carter and Theresa L.M. Man on Thursday April 7, 2016.

Canadian Council of Christian Charities (CCCC) is hosting [The Pursuit ’16 Conference](#) from April 27 to 29, 2016, in London, Ontario. Terrance S. Carter is presenting two sessions on Thursday April 28 as follows:

- 12:00 – 1:00 pm - [12 Steps to Effective Legal Risk Management for Churches and Charities](#)
- 3:00 – 4:00 pm – [Pitfalls in Drafting Gifting Agreements](#)

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Terrance S. Carter, B.A., LL.B, TEP, Trade-mark Agent – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, and is counsel to Fasken Martineau on charitable matters. Mr. Carter is a co-author of *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations* (Carswell), a co-editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2016), and co-author of *Branding and Copyright for Charities and Non-Profit Organizations* (2014 LexisNexis Butterworths). He is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, and is a Past Chair of the Canadian Bar Association and Ontario Bar Association Charities and Not-for-Profit Law Sections. He is editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorism.ca.



Sean S. Carter, B.A., LL.B. – Sean Carter is a senior associate and head of Carters' litigation practice group. Sean has broad experience in civil litigation and joined Carters in 2012 after having articulated with and been an associate with Fasken Martineau DuMoulin LLP (Toronto office) for three years. Sean has published extensively, co-authoring several articles and papers on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*, as well as presentations to the Law Society of Upper Canada and Ontario Bar Association CLE learning programs.



Nancy E. Claridge, B.A., M.A., L.L.B. – Called to the Ontario Bar in 2006, Nancy Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity 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.



Bart Danko, B.Sc. (Hons.), M.E.S., J.D. – Mr. Danko was called to the Ontario Bar in 2015 following the successful completion of his articles at Carters. He now practices in corporate and commercial law, anti-terrorism law, real estate law, charity and not-for-profit law, and wills and estates. Mr. Danko obtained his Juris Doctor from Osgoode Hall Law School and a Master of Environmental Studies from York University. Prior to this, he graduated with a Bachelor of Sciences (Honors) from the University of Toronto, with High Distinction. In his free time, Mr. Danko volunteers with Peel Regional Police as an Auxiliary Constable.



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 Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law™* Seminar.



Cathy Hawara, LL.B. – is the Director General of the Charities Directorate with the Canada Revenue Agency (CRA). She is responsible for the overall management of the federal regulation of registered charities under the Income Tax Act. Prior to joining the CRA, Ms Hawara served as the Director of Appointments with the Senior Personnel Secretariat at the Privy Council Office. She holds a Bachelor of Arts in Political Science and a Bachelor of Law, both from the University of Ottawa. Ms Hawara clerked for Mr. Justice Ian Binnie at the Supreme Court of Canada and was called to the Ontario bar in 2000. She carried on a general litigation practice before joining the public service in 2002.



M. Elena Hoffstein, B.A., M.A., LL.B., as our guest contributor, is a partner with the national firm of Fasken Martineau and is engaged in personal tax and estate planning, family business succession planning, wills and trusts, corporate reorganizations, marriage contracts and charities and not for profit law. Ms. Hoffstein has been ranked by *Lexpert* as one of the most frequently recommended Toronto private client and charity law practitioners and as one of the top 500 lawyers in Canada. Martindale-Hubbell has given her a rating of AV. In 2006, she received the Ontario Bar Association Award of Excellence in Trusts and Estates in recognition of her leadership and contribution to estates and trusts.



Barry 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.



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



Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M. – A partner with Carters, Ms. Man practices in the area of charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers in Canada*. She is chair of the Executive of the Charity and Not-for-Profit Section of the OBA and an executive member of the CBA Charities and Not-for-Profit Law Section. 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 Carswell. She has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Hilborn:ECS eNews* and *Charity Law Bulletin*.



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



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Linsey E.C. Rains, B.A., J.D. - 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. Ms. Rains is also a student member of STEP Canada and the Ottawa Branch's student representative on the STEP Canada Student Liaison Committee.



Tom Baker, B.A. (Hons.), M.S., J.D. - Mr. Baker graduated from Osgoode Hall Law School and commenced his articles at Carters Professional Corporation in 2015. Prior to law school, he completed Bachelor degrees in Classical Studies and Psychology, as well as a Master's degree in Classical literature. He has published several scholarly articles in academic journals and was an associate editor for the Osgoode Hall Law Journal. During law school, he completed the mediation intensive program and was an executive member of the Entertainment and Sports Law Association. He also represented Osgoode in trial advocacy competitions at both the provincial and national levels.



Shawn Leclerc, B.A., J.D. – Mr. Leclerc graduated from the University of Ottawa, Faculty of Law, in 2015. While attending his law studies, Shawn gained legal experience through an internship with the Evangelical Fellowship of Canada where he researched various legislation and legal issues. Prior to attending law school he graduated with distinction from the University of Lethbridge with a B.A. in Anthropology. Shawn spent 11 years in automotive sales and finance, as well as over 15 years as a volunteer and board member in various charitable organizations. Shawn has participated in overseas mission trips where he was engaged in humanitarian work.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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