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CHARITY & NFP LAW UPDATE

NOVEMBER/DECEMBER 2017

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

NOVEMBER/DECEMBER 2017

SECTIONS

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RECENT PUBLICATIONS AND NEWS RELEASES

Bill 148 Passes Bringing Major Changes to Ontario Employment Legislation

By Barry W. Kwasniewski

As anticipated in *Charity & NFP Law Bulletin* No. 405, the Ontario Government has moved swiftly to pass Bill 148, *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148"), which received Royal Assent on November 27, 2017. The final version of Bill 148 contains several changes to what was first introduced on June 1, 2017, including a new Schedule 3 amending the *Occupational Health and Safety Act*, and other amendments to the *Labour Relations Act, 1995*. However, the focus of this Bulletin is on the amendments to the *Employment Standards Act, 2000* ("ESA"), including changes to the minimum wage, paid vacation entitlements, job protected leaves of absence, scheduling rules and the treatment of independent contractors, as the most relevant to charities and not-for-profits in Ontario. With the significant changes made to Bill 148 since *Charity & NFP Law* Bulletin No. 405 was posted in June 2017, this Bulletin provides an update to Bill 148 now that is has received Royal Assent.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 411.

CRA Announces New Charities Education Program

By Jacqueline M. Demczur and Terrance S. Carter

On November 6, 2017, the Canada Revenue Agency ("CRA") announced the launch of a new Charities Education Program ("CEP") to provide early support and guidance to registered charities "that will help them comply with their obligations, and to answer any questions they may have regarding their activities, the maintenance of their books and records, and the filing of their annual information return." Under the CEP, a Charity Education Officer ("Officer") from the CRA will conduct an in-person visit with a charity, which will consist of information sharing along with a review of the charity's books and records.

Prior to the visit, the charity in question will receive a letter from the CRA, which will include the name and contact information of the assigned Officer, as well as their team leader, both of whom can be contacted prior to the visit for further information.

Concerning the information sharing aspect of the visit, the Officer will ask questions about the charity's books and records, purposes and activities in order to ensure the charity continues to meet its legal requirements and to educate the charity on how to change its operations, where needed. The Officer will

also provide further information on registration, filing, receipting and will answer any questions that the charity may have. The books and records review is intended to "identify any issues that could prevent the charity from meeting its regulatory obligations." After this review, the Officer will provide feedback on their accuracy and completeness, along with advice for regulatory compliance and accurate filing of the charity's information return. The visit will conclude with the Officer providing a Summary of Findings and Recommendations and asking an authorized representative of the charity to sign it, confirming that the charity "understand their responsibilities and have received information to help them comply with their regulatory obligations." Although not stated by the CRA, the Summary of Findings and Recommendations would most likely be used as a reference tool to measure compliance on a return CEP visit or in the event of a future audit by the CRA.

The CRA has stated that all charities are eligible to be selected for a CEP visit, and that 500 visits are expected to be conducted annually and could be selected for a number of reasons, including the fact that a charity is newly registered, on account of certain information from its T3010 return, or because of common areas of non-compliance, such as receipting and reporting issues.

While the CRA states that the CEP "is not part of the traditional audit program, but rather a complement to it," it is not clear exactly what the CEP visit actually is, as it includes elements of both an educational purpose as well as the possibility of a pre-audit. In this regard, the CRA states that "a CEP visit does not preclude the possibility that the charity could be audited in the future." With this in mind, any charity receiving a CEP letter should contact their legal counsel to discuss how to prepare for and handle a CEP visit prior to it taking place, as well as to receive advice on how to address any Summary of Findings and Recommendations presented to the charity by the CRA.

Legislation Update

By Terrance S. Carter

Bill C-63, *Budget Implementation Act, No. 2, 2017*

On October 27, 2017, the Minister of Finance introduced Bill C-63, *Budget Implementation Act, 2017, No. 2* ("Bill C-63") in the House of Commons, which passed second reading on November 8, 2017 and was reported without amendments by the Standing Committee on Finance on November 22, 2017. As mentioned in the October 2017 *Charity & NFP Law Update* in reference to the draft legislation before it was introduced as Bill C-63, the proposal includes amendments to the *Income Tax Act* concerning

ecological gifts that were proposed in the 2017 Federal Budget, along with amendments to the *Excise Tax Act* regarding the calculation of net tax for charities. For more information on the 2017 Federal Budget see *Charity & NFP Law Bulletin* No. 399.

Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*

On November 20, 2017, Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* ("Bill C-51") was reported on with amendments by the Standing Committee on Justice and Human Rights. Bill C-51, as introduced by the Minister of Justice on June 6, 2017, included the repeal of section 176 of the *Criminal Code*, which prescribes the offence of obstructing or violence to or arrest of an officiating clergyman or minister and the offence of disturbing religious worship or certain meetings. However, after submissions made to the Standing Committee on Justice and Human Rights, it was recommended that Bill C-51 make minor amendments to the current wording of section 176 of the *Criminal Code* rather than repeal the section.

Budget Consultations

On November 9, 2017 the Minister of Finance launched pre-budget consultations for 2018. The general public, including charities and not-for-profits, are invited to submit their opinions online at the #YourBudget2018 website and via Twitter with the hashtag #YourBudget2018. The website has four surveys; a video from the Minister highlighting the focus of the consultations, which it states includes the middle class, technology, lifelong learning and gender equality; and email contact for submissions. For additional information on accessing submitted briefs, witnesses' transcripts and the scheduled meetings of the Standing Committee on Finance, visit the parliamentary website.

Ontario Bill 148, *Fair Workplaces, Better Jobs Act, 2017*

On November 27, 2017, Bill 148, *Fair Workplaces, Better Jobs Act, 2017* ("Bill 148"), received Royal Assent. Bill 148 amends three employment-related acts, introducing significant changes applicable to employers in Ontario, including charities and not-for-profits. For a detailed review of the most relevant changes introduced by Bill 148, see *Charity &and NFP Law Bulletin* No. 411, above.

Ontario Bill 154 Receives Royal Assent

On November 14, 2017, Bill 154, *Cutting Unnecessary Red Tape Act, 2017* ("Bill 154"), received Royal Assent, with several provisions concerning amendments to the Ontario *Corporations Act* ("OCA"), the Ontario *Not-for-profit Corporations Act, 2010* ("ONCA"), and the *Charities Accounting Act* ("CAA")

coming into force the same day and others scheduled to come into force at a later time. Further information on the Bill 154 amendments to the CAA on "social investments" is available in *Charity & NFP Law Bulletin* No. 407 and "Social Investments Now Permitted under Charities Accounting Act", below. Further information on the Bill 154 amendments to the OCA is available in *Charity & NFP Law Bulletin* No. 406 and *Charity & NFP Law Bulletin* No. 412, below. For information on the Bill 154 amendments to the ONCA, see *Charity & NFP Law Bulletin* No. 409.

Ontario's Seniors Active Living Centres Act, 2017 now in force

On October 1, 2017, the *Seniors Active Living Centres Act, 2017*, (the "Act") replaced the *Elderly Persons Centres Act* in accordance with the *Protecting Patients Act, 2017*, previously discussed in the June 2017 *Charity & NFP Law Update*. The Act regulates "corporations without share capital having objects of a charitable nature" with regard to the approval of programs and the payment of grants, as described in the Act.

Changes to Ontario Condominium Act, 1998

On November 1, 2017, new changes to the *Condominium Act, 1998* as well as the new *Condominium Management Services Act, 2015* came into force, as contemplated in *Bill 106, Protecting Condominium Owners Act, 2015*. Among the many changes that are now in force, several of which target condominium boards as well as new corporate requirements, there are new forms, mandatory training for condominium board directors, disclosure requirements for board members, mandatory licensing of managers, and information certificates, as well as the establishment of a new online tribunal of the Condominium Authority of Ontario.

Restriction on Frequent Charitable Auction Liquor Permits Repealed in BC

On September 18, 2017, British Columbia Regulation 172/2017 repealed the prohibition on section 127 of the British Columbia's *Liquor Control and Licensing Regulation* under the *Liquor Control and Licensing Act*. Section 127 previously did not allow the issuance of a charitable auction permit to a non-profit corporation or a representative of a non-profit corporation to sell liquor by auction on a date that was less than 31 days after the latest permit to sell liquor by auction had been issued to the non-profit corporation or representative.

Certain OCA Amendments Under Bill 154 Now In Effect

By Theresa L.M. Man

Following the introduction of Bill 154 on September 14, 2017, proposing changes to the OCA, the ONCA, as well as other legislation, Bill 154 was passed by the Ontario Legislature at an amazing speed on November 1, 2017, and received Royal Assent on November 14, 2017. Notwithstanding the introduction of Bill 154 amending the ONCA, it is still not known when the ONCA will be proclaimed. Since the Ontario Government continues its commitment to give the not-for-profit sector at least 24 months' notice before the ONCA comes into force, the earliest that the ONCA might be proclaimed will be at least 2 years from now. As such, amendments to the OCA contained in Bill 154 are of immediate interest to Ontario Part III OCA not-for-profit corporations because the changes would allow them to enjoy some of the modernized rules contained in the ONCA and would provide more flexibility to their operations. In this regard, upon Royal Assent of Bill 154, a number of the changes to the OCA contained in schedule 7 became effective immediately, and other changes will become effective 60 days later (*i.e.*, January 13, 2018). These changes are reviewed in this Bulletin.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 412.

Social Investments Now Permitted under *Charities Accounting Act*

By Terrance S. Carter

As indicated above, Bill 154 received Royal Assent on November 14, 2017. Schedule 2 of Bill 154 includes amendments to the CAA that permit "social investments", as explained in *Charity & NFP Law Bulletin* No. 407 dated September 28, 2017. The only change from the original wording of Bill 154 concerning social investments is the new subsection 10.2(7) added before third reading in order to provide liability protection for directors and trustees if certain conditions are met. The new subsection 10.2(7) reads as follows:

> A trustee is not liable for loss to the trust arising from the making of a social investment if, in doing so, the trustee acted honestly and in good faith in accordance with the duties, restrictions and limitations that apply under this Act and the terms of the trust.

While this is a welcome addition to the original proposed legislation which had not provided any liability protection for directors and trustees with regard to social investments, the wording of section 10.2(7) does not go as far as the protection from liability provided for prudent investments under section 28 of the

Trustee Act. In this regard, and for comparison purposes, section 28 provides that "a trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances."

It is expected that the Ministry of the Attorney General's Office of the Public Guardian and Trustee ("OPGT") will in due course provide some type of written guidance to clarify the new provisions of the CAA on social investments. As such, before making a social investment, charities may want to wait for what the OPGT has to say about these new rules under the CAA, which may include insight on the protection from liability available under subsection 10.2(7). As well, it will be important for charities wishing to make a social investment to first seek advice from their legal counsel to assist them with understanding all of the legal requirements involved in making a social investment, including whether or not to seek advice pursuant to section 10.4 of the CAA and what sort of advice it would need to be.

Supreme Court of Canada Clarifies the Scope of Freedom of Religion

By Jennifer M. Leddy

On November 2, 2017, the Supreme Court of Canada (the "SCC") delivered its judgement in the case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, which arose after the British Columbia Minister of Forests, Lands and Natural Resource Operations declared that reasonable consultation had occurred prior to the approval of a proposed ski resort development in an area of spiritual significance for the Ktunaxa people. The Ktunaxa people played an active role in a lengthy regulatory approval and consultation process extending over twenty years and some of their concerns were addressed. However, the Ktunaxa eventually rejected the development altogether claiming it would drive Grizzly Bear Spirit, "a principal spirit within Ktunaxa religious beliefs and cosmology", away from their sacred land, and irrevocably impair their freedom of religion under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Although the SCC took into account many considerations in rendering its judgment, this Church Law Bulletin provides only a brief overview of its ruling on freedom of religion under s. 2(a) of the *Charter*.

For the balance of this Bulletin, please see *Church Law Bulletin* No. 51.

Ontario Court Rejects Corporate Actions Contrary to By-law

By Esther S.J. Oh

On September 22, 2017, the Ontario Superior Court of Justice released its decision in *Ahmed v Hossain*, which involved a governance dispute at the Danforth Community Center (the "Center"), a not-for-profit corporation established under the OCA. The By-law for the Center (the "By-law") established two separate boards, a "Board of Trustees" and a "Board of Directors" to govern different aspects of the Center. The By-law stated that the Board of Trustees was responsible to hold the property for the Center, monitor usage of the said property, provide accountability over the Board of Directors, and act as the Board of Directors if that board was dissolved, but only until such time that a new Board of Directors had been elected. The By-law stated that the Board of Directors was responsible for the day-to-day operations of the Center, as outlined in greater detail in the By-law.

An emergency meeting of the members was called, at which the Board of Trustees purported to dissolve the Board of Directors and usurp the authority of the Board of Directors. In separate incidents, the Board of Trustees also purported to bar a member indefinitely from entering the Center's mosque and also bar two of the members (who were also applicants to the above case) from running for any administrative office at the Center for ten years.

The court held that neither the Board of Trustees nor the members had the authority under the Center's general operating by-law, the OCA, or under the applicable common law to dissolve the Board of Directors, to install the Trustees in place of the Board of Directors, or to suspend the rights of the members as outlined above. As such, the court declared the purported dissolution of the previous Board of Directors and the steps taken by the Board of Trustees to suspend the rights of the applicant members to be unlawful and of no force or effect. The court noted that since proper notice of the emergency membership meeting was not given, even if the By-law did provide authority to carry out the above actions, those decisions would have been invalid due to insufficient notice.

This case confirms that while courts are generally reluctant to intervene in the internal affairs of not-for-profits, where an organization does not comply with its general operating by-law or the applicable corporate statute, the courts may take steps to intervene in those situations. In addition, as a practical suggestion, a single board structure is much simpler to work with from a governance perspective and will help to avoid confusion on the allocation of responsibilities that could otherwise arise where a double-board structure is utilised, as evidenced by this case.

Ontario Court of Appeal Upholds Unenforceable Gift Due to Insufficient Funds

By Jacqueline M. Demczur

On October 26, 2017, the Court of Appeal for Ontario (the "Court of Appeal") released its decision in *Teixeira v Markgraf Estate*, upholding the trial court's decision previously reported in the September 2017 *Charity & NFP Law Update* concerning an unfunded cheque. The trial court had held that a gift by means of a $100,000 cheque from Maria Markgraf ("Markgraf") to Arlindo Teixeira ("Teixeira") was unenforceable when the cheque could not be cashed due to insufficient funds in Markgraf's chequing account, as it could not be properly delivered to the intended recipient, Teixeira. On appeal, Teixeira advanced four separate arguments, two of which included that the gift by cheque was perfected by delivery, and the principle from the English trusts law case *Pennington v Waine* that "equity will not strive officiously to defeat a gift."

Concerning the argument that the gift by cheque was perfected by delivery, the Court of Appeal upheld the trial court's holding that the cheque was an *inter vivos* gift, and that the three elements of a gift outlined by the trial court were required for the gift to be valid. As the third element of a gift requires a sufficient act of delivery or transfer of the property, the Court of Appeal considered whether the delivery of the cheque into Teixeira's hands could be a sufficient act of delivery despite insufficient funds in Markgraf's account.

The Court of Appeal stated that cheques are directions by the drawer to the bank to pay money to a payee and can be revoked by the drawer before the cheque is cashed. As such, it stated that a gift by cheque is not complete until the cheque has been cashed or has cleared. Additionally, it stated that the death of a cheque drawer prior to the cheque being cashed would subsequently revoke the bank's authority to pay funds to the payee. The Court of Appeal therefore upheld the trial court's decision that the *inter vivos* gift failed because it was not delivered before the bank had received notice of Markgraf's death.

Concerning the principle that equity will not strive officiously to defeat a gift, Teixeira argued that "an imperfect gift, which is not perfected by a transfer of possession to the donee, may nevertheless be effective where the donor retains possession of the gift but makes a declaration evidencing an intention to hold the property in trust for the donee." However, the Court of Appeal stated that there must be a "clearly ascertainable point in time at which it can be said that the gift was completed, and this point in time must be arrived at on a principled basis." Given the extensive law concerning delivery of gifts by way of cheque, the Court of Appeal found no basis for the application of this principle.

As all three elements of a gift are required to create a valid gift, this case is a reminder to charities that the receipt of a physical cheque is insufficient to satisfy the delivery element of a gift, and that the cheque must be cashed before the gift is considered to be made. Further, *inter vivos* gifts given via cheque should be cashed soon after they are received to avoid the loss of a potential gift due to unforeseen circumstances, including cancelled cheques or the death of a donor, as was the case here.

Ontario Court of Appeal Upholds Denial of Religious Accommodation Request

By Sean S. Carter

The Court of Appeal for Ontario released its decision in *ET v Hamilton-Wentworth District School Board* on November 22, 2017 (the "Appellate Decision"). This case was an appeal of a 2016 trial court judgement in the application that upheld the Hamilton-Wentworth District School Board's denial of the appellant's ("ET") request for accommodation on religious grounds. While the Court of Appeal's decision reached the same result as that of the trial court, it held, contrary to the trial court, that ET's freedom of religion under s. 2(a) of the *Charter* was not violated and ultimately dismissed the appeal for evidentiary reasons. In its analysis, the Court of Appeal considered issues surrounding parental authority over the education of children, as well as ET's s. 2(a) freedom of religion under the *Charter*. This Bulletin focuses on the Appellate Decision only as it concerns freedom of religion in a summary fashion.

For the balance of this Bulletin, please see *Church Law Bulletin* No. 52.

Provincial Legislation Held Applicable to Federal Not-for-Profit

By Ryan M. Prendergast

On October 30, 2017, the Ontario Superior Court of Justice released its decision in *Amir-Afzal Watto v ICC* concerning allegations that a not-for-profit's by-laws were oppressive. Amir-Afzal Watto (the "Applicant") was a member of the not-for-profit regulatory body, Immigration Consultants of Canada Regulatory Council (the "ICC"). After numerous efforts to oppose and have amendments to the ICC's by-laws set aside, the Applicant sought an order under s. 253 of the *Canada Not-for-profit Corporations Act* ("CNCA") declaring that the amendments were oppressive, unfairly prejudicial and unfairly disregarded his interests as a member.

In the fall of 2013, the Applicant campaigned to become an elected director, and in doing so, published defamatory comments relating to ICC, its directors, officers and staff. He was not voted to the board. Four

separate actions were launched between 2013 and 2015 by ICC against the Applicant for his defamatory comments, and by the Applicant against ICC. In the spring of 2014, ICC amended its by-laws to include paragraph 45.1(m) and (n), which provided that no individual member would be eligible to be on the Board of Directors if they institute or have instituted any suit, action or proceeding against ICC or *vice versa*. These new provisions were passed through a resolution on May 22, 2014 and voted favourably upon by a majority at ICC's 2014 Annual General Meeting ("AGM"), which the Applicant attended.

Although the Applicant had brought the case more than two years after the by-law amendments, he argued that inter-jurisdictional immunity prevented the provincial *Limitations Act* from regulating entities that fell within matters exclusively assigned to federal government and, in this case, governed by the CNCA. The court found that the *Limitations Act* did apply to CNCA corporations, as it does not encroach upon the "core" of a federal undertaking, that being not-for-profit corporations. It noted that the CNCA "is not tied to the regulation of rights and obligation of corporation members" and that the Applicant's right to pursue a statutory remedy was not an essential part of not-for-profit law. Rather, the purpose of the CNCA is to "allow the incorporation of, or continuance of bodies corporate as, corporations without capital for the purpose of carrying on legal activities throughout Canada." Having found that the *Limitations Act* applied to CNCA corporations, the court then noted that the Applicant was presumed to have known that legal action was the appropriate means to remedy his injury at the latest by late 2014 at the AGM. With this, the court held that the Applicant's cause of action was barred, as it was not commenced within two years of that time.

This case provides a reminder to the members and directors of charities and not-for-profits incorporated under the CNCA that provincial legislation of a general nature will continue to apply to them, and that if they want to challenge, or are concerned about corporate by-laws being subject to challenge, the legal remedies under the CNCA should be pursued on a timely basis. In particular, federal organizations and members contemplating litigation should be aware that they will be subject provincially instituted limitation periods to bring legal claims.

Woman Filmed Jogging Without Consent Awarded for Breach of Privacy

By Esther Shainblum

In the case of *Vanderveen v Waterbridge Media Inc.*, released on November 20, 2017, the Ontario Superior Court of Justice Small Claims Court considered a claim under the tort of intrusion upon seclusion when

the plaintiff was filmed jogging on a walking trail without her consent. The court awarded the plaintiff the sum of $4000 in damages after her image was used for commercial purposes without her knowledge or consent. This recent decision highlights the increasingly shifting and fluid boundaries between being public and being private and expands the elements of the tort of intrusion upon seclusion recently recognized in Ontario.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 413.

Deadline for Filing AODA Compliance Reports By Barry W. Kwasniewski

December 31, 2017, is the deadline under the current reporting cycle for organizations to file the accessibility report in section 14(1) of the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"). The deadlines of the reporting cycle are provided in Ontario Regulation 191/11, *Integrated Accessibility Standards*, under the AODA, which states that public and private organizations in Ontario, including not-for-profits, are required to file a report showing compliance with accessibility standards depending on the type of organization and its number of employees. There are three relevant categories of organizations: i) small organizations with less than 20 employees; ii) small organizations with more than 20 but fewer than 50 employees; iii) large organizations, defined as those with 50 employees or more; and iv) designated public sector organizations.

i) Small organizations with less than 20 employees are exempt from the requirement to file an accessibility report under s. 14 of the AODA, but are still required to have accessibility policies in place and to train their employees and volunteers.

ii) Small organizations with more than 20 but fewer than 50 employees are also exempt from the requirement to file an accessibility report under s. 14 of the AODA, but are still required to report compliance with the accessibility standards for customer service in Part IV.2 of the regulation and the reporting cycle is every 3 years starting December 31, 2014.

iii) Large organizations are required to file the accessibility report under s. 14 of the AODA and that reporting cycle is also every 3 years starting December 31, 2014.

iv) For designated public sector organizations, such as hospitals and other public bodies as defined in the regulation, the reporting cycle is every 2 years starting December 31, 2013.

Failure to file a compliance report on time can result in a monetary penalty of up to $100,000.00 in the case of a corporation, with or without share capital, and $50,000.00 in the case of an individual or unincorporated organization.

Charities and not-for-profits should evaluate their current policies and practices to ensure they are in compliance with the requirements of AODA and its regulation and be ready to file their reports before the upcoming deadline of December 31, 2017.

Imagine Canada Submits Anti-Spam Recommendations to House of Commons

By Ryan M. Prendergast

In October 2017, Imagine Canada submitted its Review of Canada's Anti-Spam Law (the "Review") to the House of Commons Standing Committee on Industry, Science and Technology, along with its recommendations concerning the regulations under *Canada's Anti-Spam Law* ("CASL"), particularly as they affect registered charities and other not-for-profits.

The Review recommends an exemption for registered charities from the requirements under CASL for consent. While CASL provides a limited exemption for commercial electronic messages ("CEMs") sent by or on behalf of charities when their primary purpose is to raise funds for the charity, the Review stated that there is currently uncertainty over the existing exemption and the degree to which registered charities must comply with CASL, which has led to compliance costs. These includes costs incurred by charities that do not sent CEMs but that nonetheless believe they must comply with CASL. The Review does not recommend an exemption from the prescribed information requirements of CASL, *i.e.*, including an unsubscribe mechanism or sender identification, where a charity sends a CEM that is not otherwise exempt.

The Review also recommends an exemption for certain other not-for-profits, which it refers to as "public-benefit nonprofits", as no such exemption currently exists, as some entities that are not registered charities provide the same or similar community services as do charities.

Finally, the Review recommends an exemption to private rights of action against registered charities and other not-for-profits under CASL. Although the coming into force of the provisions in CASL concerning private rights of action has been temporarily suspended, their eventual coming into force may expose charities to the risk of private claims and class actions.

The Review provides insight into some pitfalls of CASL as it pertains to charities and not-for-profits, and into some of the liabilities that these organizations may face. Organizations sending CEMs may be interested in reading the recommendations under the Review to better understand various pitfalls, and should consult with legal counsel to discuss compliance with CASL.

Anti-Terrorism/Money Laundering Law Update

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

Facilitation Payment Exemption in *Corruption of Foreign Public Officials Act* Repealed

As reported in our February 2013 *Charity Law Update* and further discussed in *Charity Law Bulletin* No. 323 dated October 29, 2013, Bill S-14, *An Act to amend the Corruption of Foreign Public Officials Act* received Royal Assent on June 19, 2013, and introduced important amendments to the *Corruption of Foreign Public Officials Act* ("Act"). One amendment included the repeal of subsection 3(4) that had established the "facilitation payment" exemption on a date to be fixed by order of the Governor in Council. On October 26, 2017, Global Affairs Canada published an order fixing October 31, 2017 as the day on which this exemption would be repealed and facilitation payments would be prohibited.

While the Act prohibits bribery of foreign public officials, the facilitation payment exemption had previously allowed for "facilitation payments" to be made in order to "expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions." The Explanatory Note accompanying the order explains that the intent of the four-year delay in the repeal was, in part, to give Canadian organizations operating abroad sufficient time to transition their internal policies and procedures to ban facilitation payments in their day-to-day operations abroad. Now that the exemption has been repealed, charities operating abroad that have made use of the exemption may now be exposed to potential criminal liability in instances where they continue to make facilitation payments. For charities which operate in conflict zones, developing countries, or those which deliver disaster relief, "facilitation payments" were and continue to be a consistent reality and charities need to understand the consequences, which under the Act may include imprisonment for a term of not more than 14 years. Charities that have not stopped such practices yet should take immediate steps to amend internal policies and procedures to ensure that no facilitation payments are made by themselves, or by their agents, in the future. This should also be of note to for-profit businesses too, especially those with divisions that operate internationally, particularly those in the developing world.

FATF Adopts Guidance on AML/CFT Measures and Financial Inclusion

The Financial Action Task Force ("FATF") held its November 2017 plenary meeting ("Plenary"), where it adopted a supplement to the 2013 FATF Guidance on AML/CFT Measures and Financial Inclusion on customer due diligence ("Supplement"). While the Supplement is not intended specifically for charities and not-for-profits, it recognizes that the due diligence required of financial institutions by the FATF standards can have unintended consequences of excluding legitimate participants, including charities and not-for-profits, from the regulated financial system. The Supplement states that its objective is "to encourage countries to implement the FATF Recommendations and the [risk-based approach] in a way that responds to the need to bring the financially excluded into the regulated financial sector." The Supplement also provides country examples of customer due diligence measures adapted as incentives to financial inclusion, such as entry-level types of financial products and limitations on certain product's functionality or availability. The Plenary also published a statement expressing its support for responsible financial innovation in line with FATF Standards ("FinTech Statement"). The FinTech Statement builds on the principles that were discussed by the participants of the 1st FATF FinTech & RegTech Forum held in May 2017, namely to:

i) Fight terrorism financing and money laundering as a common goal;

ii) Encourage public and private sector engagement;

iii) Pursue positive and responsible innovation;

iv) Set clear regulatory expectations and smart regulation which address risks as well as allow for innovation; and

v) Fair and consistent regulation.

These developments show that financial inclusion continues to be a top priority for the FATF. However, the Supplement does not specifically address the concerns of charities and not-for-profits working in remote areas where only limited or no formal financial infrastructure exist. In addition, charities need to be aware of the ultimate consequences of a multi-national financial services information collection and sharing regime, organized by multi-national policy making institutions like the FATF, which can potentially have unintended consequences, particularly for those working in conflict zones or disaster areas where prohibited organizations may operate.

OFSI Releases Factsheet on Financial Sanction Compliance for Charities

By Adriel N. Clayton

According to Global Affairs Canada, economic sanctions, sometimes referred to as financial sanctions, are financial restrictions imposed against countries, non-state actors (including, for example, corporations or terrorist organisations) or other designated persons from a target country. Examples of financial sanctions include asset freezes, export/import restrictions, financial prohibitions, technical assistance prohibitions, and arms embargoes. Financial sanctions, as a general rule, are not to be violated. This can raise challenges for charities, particularly those that operate abroad in regions where financial sanctions are in force and that may inadvertently accept money from or provide monetary assistance to sanctioned targets. To provide guidance in this regard, the United Kingdom's Office of Financial Sanctions Implementation ("OFSI"), under HM Treasury department, has released a Financial Sanctions Guidance ("Guidance") of general application, along with a FAQ Factsheet for Charities and Other Non-Governmental Organizations ("Factsheet") addressing charity-specific issues for UK charities.

The Guidance provides a general overview of financial sanctions, discussing what financial sanctions are, why they exist, when and how to comply with them, as well as OFSI's approach to licensing, exemption, compliance and enforcement of sanctions. As OFSI recognises that "financial sanctions regimes are in force in many areas where NGOs and charities operate," the Factsheet acts as a supplement to the Guidance and provides additional information specifically pertaining to charities regarding compliance with financial sanctions. The Factsheet provides a list of frequently asked questions and answers, and discusses general issues concerning charities and financial sanctions, licenses that allow activity prohibited by financial sanctions, dealing with financial services organisations, and provides a list of resources with additional information for charities.

As the Factsheet was produced by OFSI, which is under a UK governmental department, it provides helpful insight to charities in the UK operating abroad, and particularly those operating at the forefront of international development and humanitarian assistance in regions where financial sanctions are in force. While the Factsheet does not have application to Canadian charities, certain Canadian practices regarding sanctions have similarities to those in the UK, such as the availability of permits and certificates. As such, the Factsheet may be a helpful resource to Canadian charities for understanding financial sanctions as they apply specifically to charities, and to assist charities with general due diligence and compliance with financial sanctions.

Legal Risk Management Checklists for Ontario-based Charities and Not-for-Profits

By Terrance S. Carter and Jacqueline M. Demczur

The annual Legal Risk Management Checklist for Ontario-Based Charities, as well as the Legal Risk Management Checklist for Ontario-Based Not-for-Profits updated as of November 2017 are now available through our website at http://www.carters.ca/.

The 24th Annual Church & Charity Law™ Seminar Materials – November 9, 2017

By Terrance S. Carter

The 24th Annual Church & Charity Law™ Seminar hosted by Carters Professional Corporation in Mississauga, Ontario, on November 9, 2017, had more than 1,000 registered from the charitable and not-for-profit sector, including leaders of charities and churches, as well as accountants and lawyers. Designed to assist churches and charities in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability, the Church & Charity Law™ Seminar has been held annually since 1994. All handouts and presentation materials are now available at the links below in the order as presented, with the web links being Power Point slide shows.

- Introduction, Agenda and Speaker Details
- Essential Charity & NFP Law Update presented by Jacqueline M. Demczur, B.A., LL.B.
- Direction and Control: What It is and How to Comply presented by Theresa L.M. Man, B.Sc., M.Mus., LL.B., LL.M.
- Critical Privacy Issues Involving Children's Programs presented by Esther Shainblum, B.A., LL.B., LL.M., CRM
- Remuneration of Directors of Charities: What's New? presented by Ryan M. Prendergast, B.A., LL.B.
- Changes and Developments in Employment Law presented by Barry W. Kwasniewski, B.B.A., LL.B.
- Governance Disputes Involving Charities and Not-for-Profits: The View from the Bench presented by The Honourable Justice David M. Brown
- Corporate Documents and Procedures to Help Avoid Governance Disputes presented by Esther S.J. Oh, B.A., LL.B.
- The Investment Spectrum for Churches & Charities presented by Terrance S. Carter, B.A., LL.B.

- Challenges in Regulating the Charitable Sector: Looking Back and Going Forward presented by Tony Manconi, B.A., Director General of the Charities Directorate with the Canada Revenue Agency

IN THE PRESS

Charity & NFP Law Update – October 2017 (Carters Professional Corporation) was featured on *Taxnet Pro*™ and is available online to those who have OnePass subscription privileges.

Ontario Court Allows Parent Charity to Change its Governance Structure written by Ryan M. Prendergast was published in The Lawyers' Daily on November 28, 2017.

Why Do Directors Get Into Trouble and How to Avoid it in the First Place written by Terrance S. Carter was published in CSAE Forum Trillium Chapter on September 12, 2017.

RECENT EVENTS AND PRESENTATIONS

The 24th Annual Church and Charity Law Seminar was hosted by Carters Professional Corporation in Greater Toronto, Ontario on Thursday November 9, 2017.

Legal Issues in Social Media for Charities was presented by Terrance S. Carter at the AFP Congress 2017 on November 21, 2017 in Toronto, Ontario.

The following topics were presented at the Child Development Resource Connection Peel (CDRCP) at a full-day conference on November 23, 2017 in Brampton, Ontario:

- Legal Check-Up: 10 Tips to Effective Legal Risk Management – Terrance S. Carter
- Hiring, Firing, and Employment Contracts – Barry W. Kwasniewski
- Legal Issues in Social Media and Related Policies – Terrance S. Carter
- The Top Ten Human Resources Mistakes Employers Make (And How to Avoid Them) – Barry W. Kwasniewski
- Update on Bill 148: "*Fair Workplaces, Better Jobs Act, 2017*" – Terrance S. Carter and Barry W. Kwasniewski

Real Estate Issues Unique to Charities was presented by Theresa L.M. Man at the OBA Institute hosted by the Ontario Bar Association Charity & Not-for-Profit Law Section CLE on February 7, 2017 in Toronto.

UPCOMING EVENTS AND PRESENTATIONS

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

The Ottawa Region *Charity and Not-for-Profit Law*™ Seminar hosted by Carters Professional Corporation will be held at the Centurion Conference Center in Ottawa, Ontario, on **Thursday February 15, 2018**. Guest Speakers include the Honourable Justice David Brown, Court of Appeal of Ontario and Tony Manconi, Director General of the Charities Directorate of the CRA. Brochure and online registration are available on our website.

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

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Luis R. Chacin, LL.B., M.B.A., LL.M. - Luis graduated from Osgoode Hall Law School in 2017 with a Master of Laws in Canadian Common Law. Prior to this, he worked in the financial services industry in Montreal and Toronto for over 9 years, assisting both individual and institutional clients. Having previously worked as legal counsel in Venezuela, Luis has a broad perspective on both the civil and the common law traditions. He is involved in fundraising activities for various organizations and is interested in real estate, investments and taxation issues, particularly as they pertain to charities and non-profit corporations.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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