

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

MAY 2018

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Friday, June 8, 2018

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RECENT PUBLICATIONS AND NEWS RELEASES

OPGT Releases Guidance on Payments to Directors

By [Ryan M. Prendergast](#)

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

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

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 421](#).

Supreme Court of Canada Releases Decision in the Wall Case

By [Terrance S. Carter](#) & [Adriel N. Clayton](#)

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

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

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

CRA News

By [Jacqueline M. Demczur](#)

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

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

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

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

Legislation Update

By [Terrance S. Carter](#)

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

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

Child, Youth and Family Services Act, 2017 Proclaimed

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

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

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

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

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

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

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

Regulations under *Child Care and Early Years Act, 2014 Amended*

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

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

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

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

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

Corporate Update

By [Theresa L.M. Man](#)

Bill C-25 Receives Royal Assent

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

New Direct Access to Corporations Canada Examiners for Registered Intermediaries

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

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

By [Esther Shainblum](#)

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

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

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 422](#).

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

By [Ryan M. Prendergast](#)

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

The balance of the paper can be accessed [here](#).

GDPR Now in Force

By [Esther Shainblum](#)

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

As discussed in [Charity & NFP Law Bulletin No. 419](#) and in the [March 2018 Charity & NFP Law Update](#), the GDPR introduced sweeping changes to the privacy rights of individual “data subjects” with global effects that may extend to organizations operating in Canada.

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

Similarly, as discussed in the [March 2018 Charity & NFP Law Update](#), Canadian charities and not-for-profits that may collect or process personal data of European Union residents could be caught by the

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

Special Senate Committee Update

By [Terrance S. Carter](#)

Special Senate Committee Continues Study on Charitable Sector

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

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

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

CBA Makes Submissions to Special Senate Committee

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

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

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

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

Standing Senate Committee Publishes Report on Social Finance

By [Jennifer M. Leddy](#)

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

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

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

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

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

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

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

Employer Not Liable for Sexual Assault

By [Barry W. Kwasniewski](#)

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

For the balance of this *Bulletin*, please see [Charity & NFP Law Bulletin No. 423](#).

514-Billets Enters Into Voluntary Undertaking for CASL Violation

By [Ryan M. Prendergast](#)

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

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

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

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

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

Public Holiday Pay Review

By [Barry W. Kwasniewski](#)

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

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

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

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

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

Federal Court Upholds Photographer's Copyright and Moral Rights

By [Terrance S. Carter](#)

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

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

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

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

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

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

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

Federal Government Launches Intellectual Property Strategy

By [Sepal Bonni](#)

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

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

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

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

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

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

US Court Holds Pledge to be Enforceable Contract

By [Theresa L.M. Man](#)

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

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

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

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

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

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

Charity Commission Publishes Report on Insider Fraud Affecting Charities

By [Esther S.J. Oh](#)

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

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

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

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

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

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

Anti-Terrorism/Money Laundering Update

By [Terrance S. Carter](#), [Nancy E. Claridge](#) and [Sean S. Carter](#)

Bill C-59 Amended by Committee

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

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

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

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

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

IN THE PRESS

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

[**The Expanding Investment Spectrum for Charities in Ontario**](#), written by Terrance S. Carter, was featured in *The Lawyer's Daily* on April 26, 2018.

RECENT EVENTS AND PRESENTATIONS

[Critical Privacy Issues Involving Children's Programs](#) was presented by Esther Shainblum on Wednesday, May 9, 2018. This session is available "on demand" by clicking [here](#).

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

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

UPCOMING EVENTS AND PRESENTATIONS

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

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

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

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

[2018 CSAE Trillium Summer Summit](#) will be held on July 12, 2018 in London, Ontario. “Your Association’s Brand and Reputation: Why it Matters?” will be the topic covered by Terrance S. Carter and Sepal Bonni.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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