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CHARITY & NFP LAW UPDATE

NOVEMBER 2020

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

NOVEMBER 2020

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Thursday February 11, 2021

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as well as **Tony Manconi**, Director General of the Charities Directorate of the Canada Revenue Agency.
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RECENT PUBLICATIONS AND NEWS RELEASES

COVID-19 UPDATE

COVID-19 Update: Recent Federal and Ontario Special Measures

By Terrance S. Carter, Luis R. Chacin and Barry W. Kwasniewski

With the ongoing COVID-19 pandemic persisting and expected to continue well into 2021, both the federal and Ontario governments have implemented new and modified special measures and programs to relieve some of the burden currently being experienced by individuals and organizations, including charities and not-for-profits. From a public health perspective, the Ontario government has also implemented additional measures to slow down the spread of COVID-19. This *Charity and NFP Bulletin* provides a brief overview of some of the recent special measures being adopted by the federal and Ontario governments. However, it is not intended to be comprehensive, but rather provides a brief update and summary of these measures which, given the volatile nature of the pandemic, may change at any given time.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 480.

COVID-19 CRA News

By Jennifer M. Leddy

Extended T3010 Filing Deadline Ending December 31, 2020

This past March, in response to the COVID-19 pandemic, the Canada Revenue Agency ("CRA") provided certain relief to charities by extending the deadline for filing the T3010, *Registered Charity Information Return*. As reported in *Charity & NFP Law Bulletin* No. 469, the deadline to file T3010s that were due between March 18, 2020 and December 31, 2020 was extended to December 31, 2020. With the extended deadline fast approaching, the CRA posted a reminder of the deadline, and encouraged charities that have not yet filed their T3010s to file online as early as possible using My Business Account for Charities.

CRA Updates to its COVID Response Page

The CRA has indicated that as of October 2, 2020, it has resumed its review of digital and paper-based applications for charitable registration. However, as a result of the COVID-19 pandemic, applicants

should expect delays beyond the CRA's published service standards for paper-based applications, and therefore digital applications are encouraged in order to reduce delays. The CRA is also encouraging organizations seeking to provide pandemic relief programs to consider donating or offering services to existing registered charities before applying for charitable status.

According to its Updates Page, the CRA has also resumed its compliance activities, with a "people first" approach to ensure health and safety, as well as an "education-first" approach to compliance where possible. In this regard, the Charities Directorate will be contacting charities to: (1) resume ongoing audits; (2) begin Canada Emergency Wage Subsidy ("CEWS") post-payment audits, with a focus on CEWS applications made for the first four claim periods; and (3) begin new audits. In addition to the resumption of audits, the CRA is also now processing revocations for failure to comply with charity registration requirements, including filing and reporting obligations. The revocations will be for reporting periods that predate the COVID-19 pandemic.

OTHER CHARITY AND NFP MATTERS

Update on the Advisory Committee on the Charitable Sector

By Jacqueline M. Demczur

The Advisory Committee on the Charitable Sector ("ACCS") held a videoconference on October 29, 2020 to discuss the progress of their working groups, and next steps for developing recommendations. The ACCS was joined by Minister of National Revenue, the Honourable Dianne Lebouthillier, who indicated that she is committed to "working towards a regulatory environment that supports the work of charities." CRA Commissioner Bob Hamilton also joined the ACCS videoconference meeting to speak about the committee's work to develop recommendations in five working groups:

- Modernizing the regulatory framework in Government as it relates to the charitable sector;
- Supporting the work of charities serving vulnerable populations;
- Exploring charity-related regulatory and legislative issues faced by Indigenous Peoples and organizations;

- Examining the regulatory approach to charitable purposes and activities, including its impact on charities working with non-qualified donees, and charities engaging in revenue-earning activities; and
- Improving data collection and analysis related to the charitable sector.

Lead committee members from each of the five working groups presented their progress thus far, including "priorities that had been identified, completed consultations, findings, and draft recommendations." Members discussed how the working groups' priorities overlap and the overall mandate of the ACCS, which was announced in 2018 to "engage in meaningful dialogue with the charitable sector, to advance emerging issues relating to charities, and to ensure the regulatory environment supports the important work that charities do."

Although the ACCS was formed before the outbreak of COVID-19, the ongoing pandemic was a recurring topic of discussion at the meeting. Members discussed the "significant impact" of the pandemic across the charitable sector, specifically how it has "illuminated some of the restrictions and limitations of the current regulatory framework for charities." Minister Lebouthillier and Commissioner Hamilton both expressed their eager anticipation for the ACCS recommendations, their intentions to support the charity sector and "better serve Canadians."

A review of preliminary recommendations and confirmation of a follow-up plan is scheduled for a virtual ACCS meeting to be held on December 1, 2020.

Special Senate Committee on the Charitable Sector's Report Adopted by Senate

By Terrance S. Carter

The first report of the Special Senate Committee on the Charitable Sector ("Committee"), entitled *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* ("Report"), was adopted by the Senate of Canada on November 3, 2020. The Committee was formed in 2018 to "examine the impact of federal and provincial laws and policies governing charities, non-profit organizations, foundations, and other similar groups; and to examine the impact of the voluntary sector in Canada," and initially released the Report on June 20, 2019.

As outlined in *Charity & NFP Law Bulletin* No. 451, the Report sets out the Committee's findings from a year-long study with respect to the charitable and non-profit sector, and makes 42 recommendations to the Government of Canada, focusing on various key themes to strengthen the sector, as well as proposes measures to modernize the legal and regulatory framework of the charities and non-profits.

While the Committee's recommendations in the Report are not binding on the federal government, the Senate's adoption of the Report, together with a request for a complete and detailed response from the Minister of National Revenue, provide the Report with further life and will ensure that the recommendations are given consideration by the government. Those in the charitable and non-profit sector will therefore want to carefully monitor the Report for the government's response to the Report and recommendations, the need for which the Senate has indicated "has become even greater with the pandemic, [with] the rise in unemployment across the country and the fact that many people with lower incomes have been affected," and given the fact that "charities have a very important role to play in helping them get beyond that." It will be interesting to see what the government's response will be.

Ontario Court Denies Request of Monitor to Manage Charity's Affairs

By Ryan M. Prendergast

The Ontario Superior Court of Justice released its decision in *Malik v Sabha* on September 18, 2020, in which a faction (the "Plaintiffs") of Hindu Sabha, a religious temple and registered charity incorporated under the Ontario *Corporations Act* (the "OCA"), had alleged governance and financial irregularities and sought the interim appointment of a monitor to manage Hindu Sabha's financial affairs. The Plaintiffs submitted that the current Board of Management was improperly constituted and therefore lacked authority, and further that the directors had fundamentally mismanaged Hindu Sabha's financial affairs. They also sought relief under section 332 of the OCA, claiming they were aggrieved by the directors' failure to perform their duties.

In considering the matter, the court found that Hindu Sabha was also a trustee pursuant to the *Charities Accounting Act*, and it was therefore "answerable for its activities and the disposition of its property as though it were a trustee." Further, it stated that the directors have a fiduciary obligation to carry out the trust for Hindu Sabha's charitable purpose, and must act "with reasonable prudence, diligence, good faith, honesty and loyalty, [and] avoid conflicts of interest."

The court then considered the relevant legislation and case law, and found that "judicial intervention in the affairs of a corporation without share capital is rarely done", and that the OCA's "fundamental policy […] is to view those who come together to form the corporation as being capable of self-governance." It also found that courts were not to interfere unduly in the affairs of religious or non-profit organizations. It therefore considered whether it would be "just or convenient" to appoint a monitor, adopting the three-part test set out in *OSPCA v Toronto Humane Society*, considering evidence:

> (i) to determine whether the allegations of a breach of trust made by the applicants give rise to serious questions to be tried; (ii) to assess and compare the nature and degree of the harm that would result from granting or not granting the relief sought, taking into account any need to preserve the assets, undertaking or activities of the [entity] in order to enable it to continue pursuing its charitable objectives; and (iii) to consider any other factor in the context of the court's supervisory jurisdiction over charities.

The court found that, for the most part, there were no serious questions to be tried. It found that the Board of Management was properly constituted and had requisite authority to act. It was also not persuaded by the Plaintiffs' allegations of improper use of Hindu Sabha's funds to indemnify directors, as well as of unaccounted-for donations, and of inappropriately signed cheques. Instead, the court found that the Board of Management had properly complied with the governing documents. Where anomalies existed, they were not serious questions to be tried. Although some of Hindu Sabha's donation cash count forms lacked legible names or signatures, the court could not infer serious mismanagement, since there was no evidence that funds were missing as a result of cash counts. Further, despite Hindu Sabha's corporation profile report containing mistakes, the court found that the directors had "tried in good faith to diligently update the temple's corporate profile, albeit with some errors that are relatively minor and likely resulted from inadvertence."

The court did, however, find that the Board of Management did not comply with the OCA and its by-laws when it failed to provide audited financial statements for several years. Nonetheless, the court found that the directors "made good faith efforts to prepare unaudited financial statements […] in an attempt to exercise prudent management over Hindu Sabha's financial affairs" and that they "acted honestly and in what they considered were Hindu Sabha's best interests." In considering the nature and harm, the court therefore saw "no useful purpose" in appointing a third-party monitor to manage Hindu Sabha's financial affairs in order for it to continue pursuing its charitable objectives.

Finally, in considering other factors, the court stated that the irregularities could be adequately addressed by directing Hindu Sabha to (1) have audited financial statements prepared for its outstanding and future fiscal years; (2) accurately update and maintain its corporation profile report; and (3) train its volunteers on donation counting procedures. Being mindful that courts generally do not interfere in the activities of religious organizations, the court denied the Plaintiffs' request to appoint a monitor.

Given the court's focus on the good faith efforts of the directors in its analysis, this case is a helpful reminder of fiduciary duties placed on directors of charities and, further, of the courts' reluctance to intervene in the affairs, particularly of religious organizations, unless there has been serious mismanagement and the court has genuine reason to do so.

Ontario Superior Court Applied *Cy-Près* Doctrine to Testamentary Gift to Dissolved Parish

By Theresa L.M. Man

The Ontario Superior Court of Justice released its reasons for judgement in the case of *Romanic et al v. La Fabrique de la Paroisse Sainte-Sophie et al*, on June 5, 2020. In this case, an application was brought to the court seeking direction with regard to a gift of the residue in the Last Will and Testament of Joseph Jacques Wilfrid Clavelle dated August 29, 2012 (the "Will") to the Paroisse Sainte-Therese-de-L'Enfant-Jesus ("Sainte-Therese"), which had been dissolved prior to Mr. Clavelle's death. Applying the *cy-près* doctrine, the court directed the testamentary gift to be received by another parish.

Sainte-Therese was created in 2001 as a result of the amalgamation of the old La Fabrique de la Paroisse Sainte-Sophie ("Old Sainte-Sophie") with Saint-Antoine parish ("Old Saint-Antoine"). However, several months before Mr. Clavelle's death, Sainte-Therese was dissolved and two new parishes were formed, being New Sainte-Sophie and New Saint-Antoine. The New Sainte-Sophie parish continued to operate out of the Old Sainte-Sophie/Sainte-Therese church site and argued that it was the successor of Sainte-Therese and thereby was entitled to receive the gift.

Because Sainte-Therese had been dissolved at the time of Mr. Clavelle's death, the court held that the bequest to Sainte-Therese lapsed. The court also held that the law of successorship did not apply because New Sainte-Sophie was not a successor to Sainte-Therese, which simply ceased to exist with no successor entity.

However, the court directed the gift to be received by New Sainte-Sophie by applying the *cy-près* doctrine. In this regard, the court referred to the decision of the British Columbia Supreme Court in *Re McGregor Estate,* which held that where a testator leaves a legacy to an institution which later ceases to exist, then the gift either lapses and falls to be distributed on an intestacy, or comes under the *cy-près* doctrine if the court can infer that the testator intended to devote that property to a general charitable purpose. The *cy-près* doctrine may be used to direct a testamentary gift to an institution or organization other than the one named in the Will if: (a) the gift in the Will is impractical or impossible; (b) the testator manifested a general charitable intention in making the gift in the Will; and (c) the gift to the alternative institution or organization would be a gift resembling the initial purpose of the gift in the Will.

In this case, the court found that Mr. Clavelle's gift in question met all the requirements because (a) Sainte-Theresa had ceased to exist making it impossible to carry out the gift; (b) there was a general charitable intention that the court could infer from the Will in the absence of a gift over or alternate residual beneficiary, because Mr. Clavelle was a devout Catholic and had long-standing ties to New Sainte-Sophie, where he chose to be buried, and because at the time the Will was made the work of the church was carried out by Sainte-Therese; and (c) directing the gift to New Sainte-Sophie would be a gift that best resembles the initial purpose of the gift in the Will. Accordingly, the court held that not directing the gift of the residue of Mr. Clavelle's estate to New Sainte-Sophie would be to defeat his clear intentions.

Digital Charter Implementation Act, 2020

By Esther Shainblum and Luis R. Chacin

On November 17, 2020, the Minister of Innovation Science and Industry introduced Bill C-11, the proposed *Digital Charter Implementation Act, 2020* ("Bill C-11"). If passed, Bill C-11 would replace the privacy protection measures set out in the *Personal Information Protection and Electronic Documents Act* with the *Consumer Privacy and Protection Act* ("CPPA") and the *Personal Information and Data Protection Tribunal Act* significantly overhauling Canada's private sector privacy law regime. The balance of this *Bulletin* will provide a high-level overview of the CPPA and, where applicable, its relevance to charities and not-for-profits.

For the balance of this Bulletin, please see *Charity & NFP Law Bulletin* No. 481.

Court of Appeal Confirms Innocent Misrepresentation by Diocese

By Sean S. Carter

The Court of Appeal for Ontario released its decision in *Deschenes v Lalonde* on May 20, 2020, in the midst of a large volume of cases related to COVID-19, amongst other legal matters. In its decision, the court dismissed the appeal from the judgment of the Superior Court of Justice, dated November 27, 2018 (the "Original Decision"). The Original Decision had resulted from a case which had previously been settled on consent and dismissed by the parties. However, there had been an attempt to rescind and set aside the settlement agreement between the appellant, the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario (the "Diocese"), and the respondent, Irene Deschenes ("Deschenes").

The underlying facts of the case relate to an action against Father Sylvestre and the Diocese by Deschenes in 1996 ("1996 Action"), alleging she was sexually assaulted as a child by Father Sylvestre in the early 1970s and claiming that the Diocese was vicariously liable for Father Sylvestre's actions and negligent in failing to prevent the assaults when it knew or ought to have known that Father Sylvestre was or might be assaulting members of the parish.

During the time of the settlement of the 1996 Action, a representative of the Diocese affirmed that, having conducted a search of the records of the Diocese and made diligent inquiries, no one in the Diocese had any knowledge or reason to believe there were any problems with Father Sylvestre until 1989, when a fellow priest raised concerns about his possible alcohol abuse and he was removed from the parish where he was then serving and sent to a treatment centre. The Diocese also stated that it had no knowledge of the alleged sexual propensities or acts of Father Sylvestre until October 1992, before he retired in 1993. Based on the Diocese's representations with regard to its knowledge of the conduct of Father Sylvestre, Deschenes agreed to settle the 1996 Action in 2000 for a payment of $100,000 by the Diocese.

Father Sylvestre, however, in 2006 pleaded guilty to having sexually assaulted 47 girls under the age of 18, including Deschenes. At this point, it came to light that, well before Deschenes was assaulted, the Diocese had received police statements in 1962 alleging that Father Sylvestre had assaulted other girls. The executive assistant of the Bishop of the Diocese was able to find the police statements from 1962 in a filing cabinet where they had been misfiled with old accounting records. As such, Deschenes commenced a new action against the Diocese and others, claiming rescission of the settlement agreement entered into in 2000 and other relief, and the parties brought competing motions for summary judgment.

In its analysis, the Court of Appeal stated that, there is a strong presumption in favour of the finality of settlements in broad terms and a settlement agreement will not be rescinded on the basis of new information that has come to light after the settlement. The Court of Appeal noted, however, that a settlement agreement (which is simply a contract) may be rescinded on the basis of the equitable basis of misrepresentation. This means that if a false or misleading representation is material to forming a contract, even if the misrepresentation was made innocently by a party who believed it was true, that contract may be rescinded.

Therefore, the Court of Appeal noted that, although the motion judge in the Original Decision characterized the misrepresentation as a "unilateral mistake of the Diocese," there was no error in the motion judge's analysis that the settlement agreement should be rescinded. Although it had previously been alleged as material to the settlement of the 1996 Action, the Court of Appeal found that there had been a material misrepresentation in light of the fact that the Diocese did have knowledge of Father Sylvestre's abuse of children as far back as 1962. The Court of Appeal found that this misrepresentation was material, and that Deschenes had relied on the misrepresentation in accepting the terms of the settlement agreement in 2000 of the 1996 Action. As such, the Court of Appeal dismissed the appeal and agreed with the conclusion of the motion judge in the Original Decision that it would be fair and just to rescind the settlement agreement.

On August 14, 2020, the Diocese filed an application for leave to appeal to the Supreme Court of Canada. There has been no decision with regard to this application, but the progress can be followed on the Supreme Court of Canada website. This case is an important reminder to charities and not-for-profits that although settlements of proceedings before the courts usually provide relative certainty for the future regarding liability, it cannot be founded on a material misrepresentation by any party, as the settlement may be revoked.

Ontario Court Rejects Property Tax Exemption Based on Hypothetical

By Jacqueline M. Demczur

The Ontario Superior Court of Justice released its decision in *London Jewish Community Village v The Municipal Property Assessment Corporation, Region 23 et al* on November 5, 2020, which serves as an important reminder to charities and not-for-profits that they are generally subject to property taxes unless

their property is specifically exempt. In this case, the court heard an application brought by the London Jewish Community Village ("the Village") concerning the tax assessment of a portion of property that it owned. The Village is a not-for-profit corporation, with stated objects to provide housing and accommodation of senior citizens and/or low-income families, and to promote social services benefitting those individuals.

The Village owns 3.33 acres of land in London on which a seniors' apartment building and community centre were constructed in 1980. Subsequently in 2008, the Village constructed a separate building on its land, which was leased to a not-for-profit Hebrew day school co-operative (the "School").

The Village sought tax relief solely for the portion of its property occupied by the School pursuant to an exemption under paragraph 3(1)5 of the *Assessment Act*, which exempts from property tax "[l]and owned, used and occupied solely by a non-profit philanthropic, religious or educational seminary of learning or land leased and occupied by any of them if the land would be exempt from taxation if it was occupied by the owner. This paragraph applies only to buildings and up to 50 acres of land." The Village argued that its land was only 3.33 acres in size, the space was "leased and occupied" by the School as a "non-profit philanthropic, religious or educational seminary of learning", and the land would be exempt from taxation if it was occupied by the Village.

In relation to its third argument, the Village's position was that the land would be exempt if it was occupied by the owner pursuant to paragraph 3(1)5, relying indirectly on subparagraph 3(1)12(iii), which exempts from tax "[l]and owned, used and occupied by any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported in part by public funds." In support of this, the Village argued that it is and would remain a charitable, non-profit philanthropic corporation; that, while it did not currently provide relief of the poor, it "could and would" own, use and occupy the space "for the relief of the poor"; and that it would be "supported in part by public funds."

The court, however, stated property tax exemptions should be based on current circumstances, rather than what *could* be. The court also stressed that, despite the good work provided by the Village, "it bears repeating that it was not the Legislature's intention to grant tax exemptions to all worthwhile charitable institutions, however commendable their work might be." Rather, the exemptions were limited, and the Village's use of the property did not or would not in actuality have fallen within the enumerated exemptions – their *intention* to carry out relief of the poor was insufficient, even with these activities

included in their incorporating documents. The court therefore dismissed the Village's application for an exemption.

This case is a helpful reminder to charities and not-for-profits that they will not be exempt from paying property taxes based solely on their status as a charity or not-for-profit. Rather, property taxes are levied based on their actual, and not hypothetical, use of the lands in question. Where lands are leased to a seminary of learning, the lands may be exempt from property tax as well, provided that the owner has objective evidence to demonstrate through its present circumstances that its hypothetical use of the lands would also result in an exemption.

New Accessibility Standards for Websites and Web Content of Large Employers

By Luis R. Chacin

By January 1, 2021, pursuant to subsection 14(4) of the *Integrated Accessibility Standards* (O Reg 191/11) under the *Accessibility for Ontarians with Disabilities Act, 2005*, designated public sector organizations as well as organizations, including charities and not-for-profits, with 50 or more employees in Ontario, must make their internet websites and web content conform with the World Wide Web Consortium Web Content Accessibility Guidelines 2.0 ("WCAG 2.0 Guidelines"), Level AA, except with regard to success criteria 1.2.4 (regarding the use of captions for all live audio content in synchronized media), and 1.2.5 (regarding the use of audio description for all pre-recorded video content in synchronized media). Since January 1, 2014, designated public sector organizations and organizations with 50 or more employees in Ontario are already required to comply with WCAG 2.0 Guidelines, Level A, with regard to any new internet websites such as a website with a new domain name or a website with an existing domain name undergoing a significant refresh, as well as web content on those sites.

It is important to note that, according with subsections 14(5) and (6) of the *Integrated Accessibility Standards,* this obligation to conform with WCAG 2.0 Guidelines, Level AA by January 1, 2021 applies to websites and web content, including web-based applications, that an organization controls directly or through a contractual relationship that allows for modification of the product, as well as to web content published on a website after January 1, 2012, except where meeting the requirement is not practicable.

The Ontario government has also provided a guidance on "How to make websites accessible: How to make new or significantly updated websites accessible for people with disabilities", which at the time of

writing was last updated on October 19, 2020, including general information regarding who must comply with WCAG 2.0 Guidelines, how to comply and what to do if compliance is not practicable, as well as tips for testing websites for accessibility and for working with web developers.

Charities and not-for-profits with 50 or more employees in Ontario should review their websites for compliance with the *Integrated Accessibility Standards* and engage web developers under a service provider agreement, as appropriate.

Proposed Amendments to the *Insurance Act* Affecting Donations of Life Insurance Policies

By Theresa L.M. Man

On October 20, 2020, Ontario private members' Bill 219, *Life Settlements and Loans Act, 2020* ("Bill 219") was introduced to amend section 115 of the Ontario *Insurance Act* to permit a life insurance policy be donated to a charity, sold or assigned by the original policyholder or a transferee, or used as collateral security. Currently, section 115 of the *Insurance Act* prohibits any person, other than an insurer or its duly authorized agent, from trafficking or trading in life insurance policies. At this time, Bill 219 passed second reading and was referred to the Standing Committee on Finance and Economic Affairs.

The preamble to Bill 219 indicates that Ontario has a large and growing population of seniors on fixed incomes, who are currently prohibited from surrendering their policies to anyone other than their insurer, and as a result receive significantly less value than they would receive in a well-regulated secondary market. As such, the preamble indicates that the intent of the Bill is to modernize the *Insurance Act* to allow life settlements and life loans to provide Ontario seniors with an alternative financial resource, and allow them to access the fair market value of their life insurance policies, and thereby allowing Canadian seniors to benefit from secondary markets similar to those in the United States, United Kingdom, Europe, Japan and Quebec.

Bill 219 also requires that the original policy holder or transferee has held the policy for at least 24 months before donating it to a charity, selling or assigning it, or using it as collateral security; the transaction is in accordance with an agreement that provides full, true, and plain disclosure; the transaction is subject to a 10-day cooling-off period during which time the transaction may be cancelled without any reason; and the person or entity to whom the life insurance policy is sold or assigned, or who receives it as collateral security or as a donation, is prescribed by regulations.

Charities interested in the progress of Bill 219 may monitor the page of the Standing Committee on Finance and Economic Affairs at the Ontario Legislative Assembly for any notices of hearings, agendas and reports.

B.C. Court of Appeal Upholds Decision on Membership Admission

By Esther S.J. Oh

The Court of Appeal for British Columbia dismissed an appeal by the Delta Hospice Society (the "Society") of a trial court ruling on the admission of members in the November 13, 2020 *Farrish v Delta Hospice Society* decision. Differing views on medical assistance in dying ("MAiD") led to a disagreement between certain members of the Society that were in support of MAiD and the Society's Board of Directors ("Board") of whom a majority took a position that was not in support of MAiD. The Board had called a membership meeting to obtain membership approval over proposed significant changes to the Society's constitution and bylaw prohibiting MAiD. The member petitioners alleged, in part, that in the period of time leading up to the membership meeting, the Board had refused membership to many applicants who did not support the Board's position, while granting membership to those applicants who were in support of their position.

As discussed in the August 2020 *Charity & NFP Law Update*, on the issue of the Board's rejection of membership applications that were not in support of its position, the court found that, "unless the criteria for membership are set out in the bylaw, the directors do not have the discretion to deny membership on some other basis that they themselves determine." The Society's bylaw had contained generic wording stating that "…on acceptance by the directors [a person] is a member."

The Society appealed the trial court's decision, arguing that the trial court committed an error in law "in finding that the Board's conduct in rejecting applications for membership from those seen as pro-MAiD or potentially pro-MAiD, contravened the Act or Bylaws so as to justify the orders granted by the chambers judge."

The Society argued that the trial court had erred by treating its past practice with membership applications (*i.e.* an open approach, granting membership to anyone who applied and paid an application fee) as being binding. The Court of Appeal stated that this fact was important, as it was ultimately relevant to questions of bad faith and remedy. Although the Society's past practice was not decisive when considered in

isolation, the Society's bylaws contained no membership criteria and did not require anything other than payment of a fee. The Board therefore did not have discretion to determine membership based on anything other than that. The Court of Appeal stated that "if particular religious or conscientious views were intended to be requirements of membership, that should have been made clear in the constating documents. In the absence of clear and specific provisions in the Constitution and Bylaws, it was not for the [Board] to apply their own private criteria to keep out others who think differently than they." The Court of Appeal indicated that if the Board's proposed special resolutions to amend the Society's governing documents were adopted, those new amendments would be similarly respected and enforceable by courts.

The Society argued that the "underlying *Charter* values" of freedom of association and freedom of conscience should inform a statutory discretion that was exercised by the trial court. While the Court of Appeal accepted that *Charter* values should not be ignored by courts in resolving private disputes, it concluded that the *Charter* rights "do not equate to, or indeed support, a right of the Board to control the Society's membership lists on the basis of criteria not stated in the Bylaws," and that a finding in favour of the Society would constitute the court's acceptance of the directors' acts, which were intended to exclude from membership those with opposing views.

Finally, while the Court of Appeal reiterated that it is not the role of courts to interfere on the issue of whether the Society should carry out programs that facilitate MAiD, the Court of Appeal did recognize that courts may intervene under the remedial provisions of the Act where a society acts in breach of its Bylaws or the Act. Based on these findings, the Court of Appeal dismissed the Society's appeal.

This case underscores the importance of clearly drafting governing documents for an organization in order to reflect the intended parameters to apply. Further, when dealing with membership matters, charities and not-for-profits should ensure that their actions are in compliance with the provisions contained in their governing documents, as well as applicable incorporating legislation.

Disciplined Professional's Social Media Posts Allowed by Saskatchewan Appeal Court

By Barry W. Kwasniewski

The Court of Appeal for Saskatchewan released its decision in *Strom v Saskatchewan Registered Nurses' Association* on October 6, 2020. The decision concerned the appeal by a registered nurse (the "Appellant") whose off-duty conduct on social media had prompted the Discipline Committee of the Saskatchewan

Registered Nurses' Association (the "Association") to investigate and make a finding of professional misconduct against the Appellant.

In her social media posts, the Appellant complained about the treatment that her grandfather received in the last days before he died at a public long-term care centre in Macklin, Saskatchewan, sharing an article that criticized the level of care her grandfather received, advocating for increased government spending in hospice and palliative care. The Appellant also shared her social media posts with Saskatchewan's Minister of Health and the Saskatchewan Opposition Leader. A number of employees of the health centre took offence at the Appellant's social media posts and a complaint was made to the Association.

The Association conducted an investigation and found professional misconduct on the part of the Appellant, contrary to the *Registered Nurses Act* ("RNA"), the *Code of Ethics for Registered Nurses, 2008* and the *Standards & Foundation Competencies for the Practice of Registered Nurses, 2013*, which the Association interpreted broadly in what it described as "principles of responsibility for off duty conduct". The Association found that the Appellant had identified herself as a registered nurse to give credibility and legitimacy to her comments.

The Appellant challenged the Association's decision before the Queen's Bench for Saskatchewan, which affirmed the disciplinary decision and found that the Association had balanced the fundamental importance of open and forceful criticism of public institutions with the need for civility in the regulated profession.

The Court of Appeal for Saskatchewan found that the Association's discretionary authority to discipline its members in accordance with its bylaws, such as the *Code of Ethics for Registered Nurses, 2008*, are provided in accordance with the RNA, which highlights the overriding purpose of protecting and promoting the public interest. The court held that criticism of the healthcare system is in the public interest and that the Association focused solely on the personally critical portions of the Appellant's social media posts and failed to recognize that her comments were "self-evidently intended to contribute to public awareness and public discourse".

Therefore, the Court of Appeal for Saskatchewan allowed the appeal and set aside the disciplinary decision by the Association that the Appellant's conduct constituted professional misconduct. The decision of the Court of Appeal for Saskatchewan is important with respect to the issue of freedom of expression, and the limits of professional governing bodies in imposing discipline on their members.

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 2020, are now available through our website at http://www.carters.ca/.

The 2020 Annual Church & Charity Law™ Seminar – Goes Virtual: November 5, 2020

The 2020 Annual Church & Charity Law™ Webinar, hosted by Carters Professional Corporation on November 5, 2020, had over 1,100 registered attendees from the charitable and not-for-profit sector, including leaders of charities and churches, as well as accountants and lawyers. The special speakers this year were The Honourable Ratna Omidvar, C.M., O.Ont., Senator for Ontario and Former Deputy Chair of the Special Senate Committee on the Charitable Sector, as well as Tony Manconi, Director General of the Charities Directorate of the Canada Revenue Agency.

Designed to assist churches and charities in understanding developing trends in the law in order to reduce unnecessary exposure to legal liability, with a focus this year on legal issues that churches and charities can face when operating virtually, the Church & Charity Law™ Seminar has been held annually since 1994. The handouts and presentation materials from this year's webinar are now available at the following link.

The date for the 2021 Annual Church and Charity Law™ Seminar has been set for **Thursday, November 4, 2021**, so save the date.

Charities Legislation & Commentary, 2021 Edition + Supplement Now Available

Co-Edited by Terrance S. Carter, Maria Elena Hoffstein, and Adam Parachin (LexisNexis Butterworths, November 2020)

The 2021 Charities Legislation & Commentary, co-edited by Terrance S. Carter, M. Elena Hoffstein and Professor Adam Parachin, was published on November 24, 2020, and is now available. This consolidation provides an updated tool to facilitate charity law research by setting out excerpts from, and in some cases the entire text of approximately 145 key federal and Ontario statutes and 75 regulations that apply to charities current to September 19, 2020, with a forthcoming supplement on COVID-19 legislation and the

Ontario *Not-for-Profit Corporations Act, 2010*, as applicable, to be included. Order the book by clicking here.

IN THE PRESS

Charity & NFP Law Update – October 2020 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

UPCOMING EVENTS AND PRESENTATIONS

CPA Not-for-Profit Forum hosted by CPA Canada is being held February 9 to 10, 2021 as a virtual forum. Terrance S. Carter will be speaking on February 9, 2021, on the topic of *Considering Going Into Business? The Social Enterprise Spectrum for Charities and NPOs*.

SAVE THE DATE - The 2021 Annual Ottawa Charity & NFP Law Seminar Goes Virtual! The webinar this coming year will be hosted by Carters Professional Corporation on **Thursday, February 11, 2021**. The special speakers this year will be **The Honourable Ratna Omidvar**, C.M., O.Ont., Senator for Ontario and Former Deputy Chair of the Special Senate Committee on the Charitable Sector, as well as **Tony Manconi**, Director General of the Charities Directorate of the Canada Revenue Agency. Details will be available soon at our website www.carters.ca.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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