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CHARITY & NFP LAW UPDATE

SEPTEMBER 2020

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

SEPTEMBER 2020

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RECENT PUBLICATIONS AND NEWS RELEASES

COVID-19 UPDATE

Federal and Ontario COVID-19 Relief Update

By Terrance S. Carter, Adriel N. Clayton and Luis R. Chacin

Federal Government Announces Further COVID-19 Support in Speech from the Throne

A new session of Parliament opened on September 23, 2020, with the Speech from the Throne delivered by Governor General Julie Payette. In the Speech from the Throne, the government outlined its plan to support Canadians through the COVID-19 pandemic. Among the relief measures referenced the government committed to extending the Canada Emergency Wage Subsidy ("CEWS", discussed most recently in *Charity & NFP Law Bulletin* No. 477), to the summer of 2021; expanding the Canada Emergency Business Account ("CEBA"), discussed in *Charity & NFP Law Bulletin* No. 471 and the May 2020 *Charity & NFP Law Update*, and immediately below, to help businesses with fixed costs; as well as "introducing further support for industries that have been the hardest hit, including […] cultural industries like the performing arts". The government also indicated that it would invest in housing, including partnering with not-for-profits and housing co-operatives in the mid- to long-term.

Federal Government Extends CEBA Applications for Small Business Loans

In an announcement on August 31, 2020, the Department of Finance Canada announced that the application deadline for CEBA was extended from August 31, 2020 to October 31, 2020. CEBA was introduced on April 9, 2020 to provide interest-free, partially forgivable loans of up to $40,000 to help cover the operating costs of small businesses and certain charities and not-for-profits whose revenues have been impacted by the COVID-19 pandemic.

In addition to extending the deadline for CEBA applications, the government indicated that it was increasing flexibility to allow more organizations to access CEBA. In this regard, the government stated that it was working with financial institutions to make CEBA available to applicants with qualifying payroll or non-deferrable expenses that have, to date, been unable to apply for CEBA because they do not operate from a business banking account.

Federal Government Extends CECRA Rent Relief

The Department of Finance Canada announced on September 8, 2020, that the Canada Emergency Commercial Rent Assistance ("CECRA") for small businesses would be extended by one month through to the end of September, 2020 to provide commercial rent relief for eligible small businesses, including charities and not-for-profits. As discussed in *Charity & NFP Law Bulletin* No. 475, the CECRA program lowers commercial rent payments for small businesses that rent property from qualifying commercial landlords by 75%. Landlords and tenants must agree that tenants will pay 25% of their monthly rent, with landlords covering another 25%, and with the federal and provincial government covering the remaining 50% through forgivable loans. With this extension, CECRA relief will now be available for the months of April to September, 2020, with the opt-in deadline extended to October 30, 2020. The government has indicated that this is the final extension of CECRA.

Ontario Amends Stage 3 Order and Extends Current Orders to October 22, 2020

As announced on September 19, 2020, the Ontario government has amended O. Reg 364/20, *Rules for Areas in Stage 3*, under the *Reopening Ontario (A Flexible Response to COVID-19) Act*. As a result, the limits on "unmonitored and private social gatherings", as well as organized public events, have been lowered across the province to 10 people for indoor gatherings and 25 for outdoor gatherings. It is not entirely clear whether the limits for weddings, funerals and religious services, rites and ceremonies remain unchanged from those discussed in *COVID-19 Resource for Charities & NFPs: Ontario Moving to Stage 3 of COVID-19 Reopening Framework*. The regulation provides that **social gatherings** associated with a wedding, a funeral or a religious service, rite or ceremony, such as a wedding *reception* are subject to the lower limits of 10 people for indoor gatherings and 25 for outdoor gatherings, while the limits that apply to the wedding, funeral or religious service, rite or ceremony *itself* remain unchanged from the limits of 50 for indoor gatherings and 100 for outdoor gatherings.

The government also extended all orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act*, in force on September 17, 2020 until October 22, 2020. Those orders, including O. Reg 364/20, *Rules for Areas in Stage 3*, discussed above, had been set to expire on September 22, 2020. Orders that have been extended are listed in O. Reg 458/20, *Extension of Orders*, under the *Reopening Ontario (A Flexible Response to COVID-19) Act*.

COVID-19 Corporate Update

By Theresa L.M. Man

Ontario Temporary Relief Measures Coming to an End

In an email to stakeholders on September 8, 2020, the Ministry of Government and Consumer Services provided a reminder that the temporary amendments to Ontario legislation, enacted in the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*, will be expiring soon. The expiration of the temporary relief comes as a result of the termination of Ontario's declared emergency as of July 24, 2020, pursuant to the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*.

These temporary amendments, discussed in the May 2020 *Charity & NFP Law Update*, provide relief to *Corporations Act* ("OCA") and *Co-operative Corporations Act* ("CCA") corporations during the COVID-19 pandemic by allowing them to defer their annual general meetings ("AGMs") in certain circumstances, as follows:

- If the AGM was originally required to be held during the state of emergency in Ontario (*i.e.* March 17, 2020 to July 24, 2020), the AGM could be delayed until no later than the 90th day after the day the state of emergency is terminated (*i.e.* October 22, 2020).
- If the AGM was originally required to be held within 30 days after the state of emergency is terminated (*i.e.* July 24, 2020 to August 23, 2020), the AGM can be delayed to no later than the 120th day after the day the emergency is terminated (*i.e.* November 21, 2020).
- If the AGM was originally required to be held more than 30 days after the state of emergency is terminated (*i.e.* after August 23, 2020), no extension would be granted.

The Ministry also indicated that there would be no further extensions to timelines for AGMs because AGMs are an essential component of the democratic functions and self-governance of corporations, and represent an important opportunity for members to raise issues and to monitor the fiscal health, performance and governance of their corporations.

The *COVID-19 Response and Reforms to Modernize Ontario Act, 2020* also temporarily amends the OCA and CCA to permit corporations to call and hold meetings electronically, despite any provision in the letters patent, supplementary letters patent or by-laws that provides otherwise. As indicated by the Ministry, this relief will terminate on the 120th day after the day the emergency is terminated (*i.e.* November 21, 2020), unless further extended by regulation. Additionally, the Ministry indicated that it is

exploring other options to extend this period to permit corporations to conduct AGMs by electronic means, and will provide updates as they become available.

COVID-19 CRA News

By Jacqueline M. Demczur

CRA Resumes Regular Activity Schedule after Temporary COVID-19 Reprieve

The Canada Revenue Agency ("CRA") has resumed work on charitable status revocations, after a brief suspension of activity due to the COVID-19 pandemic. The CRA announced its resumption of investigating registered charities this month after the government temporarily suspended some programs as a relief measure, including collection and compliance actions. "As a result, you may receive a call or letter from us, with a specific call to action," the CRA stated on its website.

According to the CRA, starting September 2020, the "Charities Directorate will begin processing revocations for failure to comply with the requirements of charity registration." This could result in a loss of charitable status and the concomitant tax benefits under the *Income Tax Act*. "Your charity may receive a letter by registered mail explaining the reasons why we intend to revoke your charity's registration," the CRA stated. "The letter will also include your objection and appeal rights." Appeals, audits, debt collections, compliance and outreach activities — including the Charities Education Program — will also recommence this month.

The CRA also sent a reminder that the filing deadline has been extended for the T3010 Registered Charity Information Return Form, to December 31, 2020

COVID-19 Employment Update

By Barry W. Kwasniewski

Ontario Stage 3 Regulations Require Compliance with COVID-19 Screening Recommendations

As of September 26, 2020, employers responsible for a workplace that is open for business are required to comply with COVID-19 screening practices as advised, recommended, or instructed by the Office of the Chief Medical Officer of Health. Ontario's executive council filed Ontario Regulation 530/20 on Sept. 25, an amending regulation to O Reg 364/20, *Rules for Areas in Stage 3*, under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* ("the Regulation"), which initially came into force on July 24. The government stated its aim "to tighten public health measures in response to the recent rise in cases of

COVID-19." The Regulation mandates "[t]he person responsible for a business or organization that is open shall operate the business or organization in compliance with the advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health on screening individuals."

At the same time, the Ontario Ministry of Health published a "COVID-19 Screening Tool for Workplaces (Businesses and Organizations)" online on September 25, 2020, that includes a questionnaire ("the Screening Tool"). The Screening Tool contains the Ministry of Health's recommendations and instructions for screening before entering the workplace. Three questions must be asked:

1. "Do you have any of the following new or worsening symptoms or signs?" Eight lines describing possible symptoms of the COVID-19 illness are listed, each with a checkbox for "Yes" or "No."
2. "Have you travelled outside of Canada in the past 14 days?"
3. "Have you had close contact with a confirmed or probable case of COVID-19?"

These questions are stated as a "minimum" compliance with the Screening Tool, and are to be asked of all workers when entering the workplace at the start of their shift, as well as all "essential visitors" when they arrive; however, the Screening Tool may be "adapted based on need and the specific setting." The Screening Tool describes "workers" as all staff, including "students, contractors or volunteers that conduct business or related activities where applicable and appropriate." Further, "essential visitors" are described as "individuals providing a service in the establishment who are not employees or patrons of the establishment (e.g., delivery, maintenance, contract workers)." If any worker or essential visitor answers "Yes" to any question, they should not enter the workplace, but "should go home to self-isolate immediately and contact their health care provider or Telehealth Ontario (1 866-797-0000) to find out if they need a COVID-19 test." An exception is made for "essential workers who travel outside [of] Canada for work purposes" if they only answer "Yes" to the question for travelling outside Canada.

Ontario Government Extends IDEL Relief Until January 2, 2021

The provincial executive branch filed Ontario Regulation 492/20 on September 3, 2020, extending the "COVID-19 Period" for infectious disease emergency leave ("IDEL") under the *Employment Standards Act, 2000* ("ESA") until January 2, 2021. The new regulation amends O Reg 228/20, *Infectious Disease Emergency Leave*, which declared the COVID-19 Period for the IDEL provision of the ESA under Section 50.1. IDEL provides unpaid, job-protected leave of absence for non-unionized employees temporarily laid off due to an infectious disease emergency, such as the current coronavirus pandemic, to be determined

by regulation. This gives employers relief, at least for a few more months, from potentially expensive termination and severance payments, which could be triggered by the reduction in work hours as a constructive dismissal.

In Ontarian and Canadian law, a constructive dismissal occurs when the terms and conditions of employment are substantially altered, and is treated by the courts effectively as a legal repudiation of the employment contract without cause — allowing employees to claim wrongful dismissal. The COVID-19 Period initially was to last from March 1, 2020 until "six weeks after the day that the emergency declared by Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the *Emergency Management and Civil Protection Act* is terminated or disallowed." That emergency declaration terminated on July 24, 2020, when the *Re-opening Ontario (A Flexible Response to COVID-19) Act, 2020* came into force, leaving the IDEL clock running for at least six more weeks until September 4, 2020.

In its announcement of the extension of IDEL into early in the new year, the Ontario government stated its intention to "protect jobs and businesses by extending protection to prevent temporary layoffs from automatically becoming permanent job losses." IDEL law was introduced by an amendment to the ESA — the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* — that came into force earlier this year on March 19. See our August 2020 *Charity & NFP Law Update* for more information on the potential impact of IDEL for employers in charities and not-for-profits.

AFP Publishes Survey on Fundraising Activities During COVID-19

By Esther S.J. Oh

According to a recent survey published by the Association of Fundraising Professionals ("AFP"), COVID-19 has resulted in layoffs or staff pay-cuts for nearly a third of reporting charities. The AFP's *Coronavirus Response Survey* ("the Survey") reports 70% of Canadian charities expect to raise less money in 2020 than they did in 2019 and over two-thirds believe the same will happen in 2021.

More than 160 fundraisers participated in the Survey, which was distributed to all AFP members in May 2020, with 45% reporting decreases in donations already in the first quarter of 2020 compared with 2019. Still, over a quarter (27%) reported an increase in giving.

"We expected to see a significant drop in giving because of COVID-19, and our data shows that it will be a difficult time for fundraising for 2020 and well into 2021," stated the AFP's President and CEO Mike

Geiger. "However, it's too early to say exactly what will happen by the end of the year, and charities are still adjusting. There is one general rule that is the most important for charities to follow during difficult and challenging times. Organizations cannot afford to stop fundraising, and those charities that continue to raise funds—and even increase their fundraising—will do the best. We have to raise funds with sensitivity, but we must continue to raise funds to support our critically needed missions." Only 11% and 13% of charities intended to increase their fundraising efforts in 2020 and 2021, respectively.

In an effort to make up for some of the expected shortfall, the Survey reports 38% of charities intend to increase their fundraising activities. The most popular areas where charities are expanding their fundraising include the following:

- Donor retention and stewardship (connecting donors to the cause and inspiring them to get more involved), 88%;
- Social media, 83%;
- Virtual events, 81%;
- Online fundraising, 79%;
- Fundraising through e-mail, 71%.

Government grants have also been a key source of revenue for some charities.

The Survey also reported a significant impact on fundraising events, with 92% of respondents indicating they would reduce the number of in-person fundraising events during 2020. More than two in ten organizations (23%) have already postponed five or more special events, and 14% have canceled five or more events.

OTHER CHARITY AND NFP MATTERS

Corporate Update

By Theresa L.M. Man

ONCA Proclamation Deadline Extended to December 31, 2021

The Legislative Assembly of Ontario carried a vote in favour of Motion 89 on September 21, 2020, extending the final deadline for the Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") to be passed. Pursuant to the *Legislation Act, 2006*, legislation that remains unproclaimed for nine or more years

prior to December 31 of the preceding calendar year is subject to repeal by December 31st of the 10th year. In relation to the ONCA, which was enacted in 2010, it means that the ONCA must be proclaimed by December 31, 2020, or it would be subject to repeal.

Motion 89 extends the proclamation period by one year, allowing the ONCA until December 31, 2021 to be proclaimed into force. However, the extension does not apply to provisions in the ONCA dealing with class voting and non-voting members' rights.

CRA News

By Jacqueline M. Demczur

New Public Service Bodies Rebate information for Charities and Non-profits

The CRA has updated its Public Service Bodies Rebate info sheets, available online. The Public Service Bodies' Rebate ("PSB rebate") is a recovery of a portion of federal and provincial sales tax available to registered charities, qualifying non-profit organizations and selected public service bodies such as municipalities, universities, public colleges, school authorities, or hospital authorities, as prescribed under the federal *Excise Tax Act* and its regulations. The CRA publishes PSB rebate info sheets for charities and qualifying non-profit organizations residing in participating provinces (*i.e.* Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador), as well as non-participating provinces, pursuant to the *Public Service Body Rebate (GST/HST) Regulations*. Among the updated PSB rebate info sheets available are the following:

- GI-176 Public Service Bodies' Rebate for Charities Resident Only in Ontario
- GI-178 Public Service Bodies' Rebate for Charities Resident in One or More Non participating Provinces
- GI-184 Public Service Bodies' Rebate for Qualifying Non-profit Organizations Resident Only in Ontario
- GI-186 Public Service Bodies' Rebate for Qualifying Non-profit Organizations Resident in One or More Non-participating Provinces
- GI-187 Public Service Bodies' Rebate for Qualifying Non-profit Organizations Resident in Two or More Provinces, at Least One of Which Is a Participating Province

New Lobbying Requirements in Saskatchewan for In-House Lobbyists, NFPs and Gifts

By Ryan M. Prendergast

Substantial amendments to Saskatchewan's *The Lobbyists Act* (the "Act") came into force September 14, 2020, bringing the Act more in line with other provinces' legislation, as well as improving transparency and accountability. Changes to the Act were introduced through *The Lobbyists Amendment Act, 2019*, which received Royal Assent on July 3, 2020. In the provincial government's announcement describing the amendments, then Justice Minister and Attorney General Don Morgan indicated that "[t]his legislation will ensure the public knows who is lobbying and who plans to lobby elected officials in Saskatchewan."

The Act applies to "individuals who are paid to lobby by a client (a consultant lobbyist) and organizations with employees whose duties include lobbying on their behalf (an in-house lobbyist)," according to the government's announcement. Among the legislated changes:

- A new provision prohibiting in-house lobbyists or consultant lobbyists from providing gifts, favours or other benefits to public office holders.
- Requiring non-profit organizations, without a charitable mandate, to register any in-house lobbyists. There will be an exception for non-profit charitable organizations with less than five employees who spend a total of less than 30 hours annually lobbying.
- A threshold reduction for registration as an in-house lobbyist from 100 hours to 30 hours annually.

Ontario's threshold registration for in-house lobbyists is set at 50 hours annually, pursuant to sections 5 (persons and partnerships) and 6 (organizations) of the *Lobbyists Registration Act, 1998*.

See the August 2019 *Charity & NFP Law Update* for more information on lobbying and elections legislation in Canada.

Mount Pleasant Costs Awarded Against Public Interest Litigants

By Jennifer M. Leddy

A decision on costs has been released by the Court of Appeal for Ontario in *Friends of Toronto Public Cemeteries Inc. v Public Guardian and Trustee* concerning the legal battle between Friends of Toronto Public Cemeteries Inc. and Kristyn Wong-Tam (collectively, the "FTPC") and Mount Pleasant Group of Cemeteries ("MPGC"). The Court of Appeal had ruled in favour of MPGC on the substantive matters concerning the nature and governance of MPGC on May 5, 2020, finding that MPGC was not a charitable

purpose trust subject to the *Charities Accounting Act* ("CAA") and affirming that an investigation by the Public Guardian and Trustee ("PGT") was not required. For further discussion of the Court of Appeal's decision on the substantive matters see *Charity & NFP Law Bulletin* No. 473.

In light of MPGC's successful appeal and cross-appeal, it sought a total of $625,000 in costs from FTPC for the appeal, cross-appeal, and initial application. Although the PGT had been brought in as a respondent, MPGC did not seek costs from the PGT. FTPC, however, argued against costs on the bases that (i) they had brought the application solely in the public interest and for no personal gain; (ii) their application was successful on "the fundamental underlying issue in the case," being the existence of a statutory trust, which was conceded by MPGC at the last minute; and (iii) they were successful against MPGC's argument that FTPC had no standing. They also argued, in the alternative, that even if FTPC was not a public interest litigant, Ms. Wong-Tam was, and costs should not be awarded personally against her.

The court followed a previous Court of Appeal decision in citing that the factors to be considered in determining whether an unsuccessful party should be exempt from paying costs because it was acting in the public interest include: "the nature of the litigants, whether the nature of the dispute was in the public interest, whether the litigation had any adverse interest on the public interest, and the financial consequences to the parties". MPGC argued, among other reasons, that FTPC was not a public interest litigant because it was incorporated specifically for the purpose of this litigation and "does not rise above being an interloper or busybody." It also argued that Ms. Wong-Tam joined the litigation in her personal capacity to provide standing to FTPC and was aware of her potential exposure for costs, particularly given that she and FTPC had an oral understanding and draft written agreement to indemnify her against adverse costs orders.

The court found that there was an element of "NIMBYism (not in my back yard)" present in the litigation, given that residents near other MPGC cemeteries did not file any affidavits on the application. The fact that MPGC was a statutory trust, as eventually conceded by MPGC, was also "a factor that imports a public element." Further, it found that the PGT had supported FTPC's application, but not its request for an investigation under section 10 of the CAA. In the court's view, "[a]ccess to justice would tend to favour treating the respondents as public interest litigants." With regard to Ms. Wong-Tam, the court found that she had chosen to participate as an individual rather than in her capacity as a city councillor. Finally, the court found that the application judge had previously found that FTCP and Ms. Wong-Tam

were public interest litigants for the purposes of standing, and found no reason to overturn the application judge's decision on the matter.

The court therefore found that FTPC and Ms. Wong-Tam, in her personal capacity, were public interest litigants, but this conclusion did not preclude a costs award against them. It was only a factor in determining the quantum of the award. Taking into account the importance of the issues, the proceedings' complexity, and FTPC's reasonable expectations as the unsuccessful party, the court considered that it was "fair and reasonable" to award $350,000 in costs to be paid by FTPC to MPGC. Further, given Ms. Wong-Tam's secondary role in the litigation, and the fact that she had an unexecuted indemnity from FTPC, the court restricted her exposure to $10,000.

This decision on costs is an important reminder of the high stakes and potential costs involved in litigation. Even where parties are identified as public interest litigants, courts may still award costs (and, as in this case, high costs) against such unsuccessful litigants, particularly where the surrounding circumstances deem it appropriate to do so.

BC Court of Appeal Rules PIPEDA is not a "Comprehensive Code"

By Esther Shainblum

On August 31, 2020, the British Columbia Court of Appeal released its decision in *Tucci v Peoples Trust Company*. The decision concerned the certification of a class action against the defendant financial services provider, Peoples Trust Company ("PTC"), which in 2013 suffered a data breach compromising the personal information of its customers. The clients affected by this breach initiated the class action seeking compensation for harm caused by the dissemination of their personal information.

By way of background, PTC maintained on its webserver an unencrypted copy of a database containing a considerable amount of personal information pertaining to its online customers, including names, addresses, email addresses, telephone numbers, dates of birth, social insurance numbers, occupations, and, in the case of credit card applicants, their mothers' birth names. PTC failed to apply adequate cyber-security safeguards, including patches and software updates, leaving its database vulnerable to bad actors.

In the lower court's decision, the judge accepted that there were arguable claims for breach of contract and for negligence and held that an arguable claim for breach of privacy or intrusion upon seclusion could be advanced under federal common law.

PTC appealed the lower court's decision with regard to the certification of claims framed in breach of contract and negligence, and from certification of claims under federal common law. PTC argued that the terms of use set out on its website clearly exclude liability for data breaches, an issue which the lower court judge did not address in its decision. PTC also argued that the *Personal Information Protection and Electronic Documents Act* ("PIPEDA") constitutes a complete code that comprehensively regulates all aspects of personal information collection, retention, and disclosure in the federally-regulated private sector, and that therefore no action, other than an application to the Federal Court as contemplated by PIPEDA, can be brought in respect of a data breach.

On appeal, the court found no error in the lower court's certification of the class proceedings for breach of contract and negligence. The court rejected PTC's argument that PIPEDA was intended to be a complete code and held that it does not displace common law remedies. The court pointed out that caution should be exercised in concluding that PIPEDA was intended to abolish existing private law rights, particularly because it applies to the private sector and not to public bodies exercising a statutory mandate.

The court noted that this case involved private law relations between private citizens and a commercial enterprise and found nothing in PIPEDA to suggest that it was intended to prevent aggrieved parties from pursing common law causes of action. The court stated that it was "unfortunate" that there had been no appeal of the lower court's ruling that no cause of action for breach of privacy or intrusion upon seclusion exists in British Columbia. Going further, the court stated that the time may have come for it to revisit its jurisprudence on the tort of breach of privacy, pointing to the Court of Appeal for Ontario's 2012 decision in *Jones v Tsige,* discussed in *Charity Law Bulletin* No. 277, which recognized the common law tort of intrusion upon seclusion, and stating that "a failure to recognize at least some limited tort of breach of privacy may be seen by some to be anachronistic." The court further stated that "the interesting question of whether the law needs to be rethought will have to await a different appeal."

The court pointed out that the division of powers between the federal and provincial levels of government is not "watertight" and that there are areas in which either level of government can properly introduce legislation. The court rejected the lower court's finding that there is a "federal common law", holding that there is neither a "federal" nor "provincial" common law, but rather a single common law covering matters within federal and provincial jurisdiction. The court therefore set aside the lower court's certification of claims under federal common law.

This decision is a reminder that claims for breach of privacy and negligence are an ever-present risk faced by all types of organizations, including charities and not-for-profits, and that appropriate data security measures must be taken to protect personal information under an organization's control.

Ontario Minimum Wage Increases by 25¢ on October 1st

By Barry W. Kwasniewski

Charities and not-for-profits paying minimum wage to their employees in Ontario must give them a raise. To comply with the rising minimum wage pursuant to subsection 23.1(4) of Ontario's *Employment Standards Act, 2000* ("ESA"), employers will have to pay at least $0.25 per hour more for employees when the statutory general minimum wage increases from $14.00 to $14.25 per hour, as of the 1st of October, 2020. The ESA does not make an exception for charities and not-for-profits. Also, under Section 23.1 of the ESA, the general minimum wage is adjusted for different classes of employees:

- For employees who are students under 18 years of age "if the student's weekly hours do not exceed 28 hours or if the student is employed during a school holiday," the minimum wage increases from $13.15 to $13.40 an hour;
- "For employees who, as a regular part of their employment, serve liquor directly to customers, guests, members or patrons in premises for which a licence or permit has been issued under the *Liquor Licence Act* and who regularly receive tips or other gratuities from their work," the increase is from $12.20 to $12.45 an hour;
- For homeworkers — including student homeworkers — their rates increase from $15.40 to $15.70 an hour. Homeworkers are defined under the ESA as individuals who perform work "for compensation in premises occupied by the individual primarily as residential quarters but does not include an independent contractor";
- For hunting and fishing or wilderness guides, their minimum rates also increase, with variations depending on their number of hours worked;
- For all other workers, the new general minimum wage rate of $14.25 applies.

Subsection 23.1(4) of the ESA provides that the minimum wage is adjusted based on the increase in the Consumer Price Index ("CPI") between the previous calendar year and the year preceding that, published by Statistics Canada, rounded up or down to the nearest 5 cents. Unless the CPI drops, annual minimum

wage increases on the 1st of October are expected. Employers must ensure they are compliant with these laws. Subsection 23.1(6) of the ESA states that the minimum wage does not decrease, regardless of the change in the CPI.

Imagine Canada Report on Investment Readiness in Canada's Charitable Sector

By Terrance S. Carter

Imagine Canada recently released its report entitled *Are Charities Ready for Social Finance? Investment Readiness in Canada's Charitable Sector* (the "Report"). For purposes of the Report, "social finance" is defined as being "an investment that seeks a measurable social, cultural, and/or environmental impact as well as a financial return for the investor(s)." The Report was sponsored by the federal government's Investment Readiness Program, a two-year pilot program to support social purpose organizations, consisting of charities, not-for-profits, and for-profit social enterprises ("SPOs")", in the context of the $755 million Social Finance Fund, which is expected to contribute to the availability of social finance capital to SPOs. For background information on the Social Finance Fund, see the April 2019 *Charity & NFP Law Update*.

Based on a survey of over 1000 Canadian registered charities, the Report classifies the responses to the survey in five key themes regarding social finance: awareness and opinions, barriers, organizational capacity, debt experience, and demand.

First, regarding awareness of social finance, the Report highlights that two-thirds of respondents stated either that they had never heard of social finance or knew little about it, suggesting that a large number of charities have a low awareness of social finance. Second, among the potential barriers to seeking a social finance loan, more than one in five respondents said their organization is not currently involved in earned income activities, they are uncertain about their ability to repay, or their board would not consider or approve of a social finance loan. Third, in terms of organizational capacity, about a third of respondents expressed concern about their ability to raise unrestricted funds when needed, draw on diverse range of revenue sources, collect evaluation data, assess full social/environmental impact of work, consistently and predictably generate an operating surplus, and draw on existing assets when needed. Fourth, regarding debt experience, the Report states that almost half of charities do not currently hold any debt, and those that do would not be considered social finance loans. Finally, the Report states that a majority of charities are not interested in taking out a social finance loan.

However, the Report states that charities with larger annual revenues are more likely to report being aware of and holding positive opinions about social finance, report holding (or would consider taking) a social finance loan, and indicate having a stronger organizational capacity to access social finance.

The Report concludes that many charities are likely not investment-ready. Among the various considerations supporting this conclusion, the Report states that charities are not participating in the social finance market due to the risk-averse position of boards of directors, in addition to lack of knowledge, experience, and expertise in social finance. The Report further states that in addition to investment readiness, the design of funds and financial instruments made available would also have an impact on whether social purpose organizations are able to access social finance.

New Zealand Court Finds Public Environmental Advocacy is Charitable

By Ryan M. Prendergast

The High Court of New Zealand released its decision in *Greenpeace of New Zealand Inc v Charities Registration Board* on August 10, 2020. The decision considers questions of charitable purposes related to advocacy and education, as well as whether an organization that carries out illicit activities may be precluded from obtaining charitable status.

As early as 2008, Greenpeace of New Zealand Inc ("Greenpeace") had begun to seek charitable status in New Zealand, generally speaking, on the basis of protecting the environment, educating the public about environmental protection, and promoting peace, nuclear disarmament and the elimination of weapons of mass-destruction. The Charities Registration Board (the "Board") had rejected Greenpeace's applications for charitable status on the basis that: (i) its advocacy for environmental protection was not charitable, but instead involved promoting its views that were not of public benefit in a way the law recognizes as charitable; (ii) with regard to education, it promoted its own views and did not advance a genuine, objective education; (iii) its purpose of promoting peace, nuclear disarmament and the elimination of weapons of mass-destruction was non-ancillary and were not a benefit in the way the law recognizes as charitable; and (iv) Greenpeace and its members are involved in illegal activities from which an illegal purpose could be inferred.

Regarding environmental advocacy, the court found that environmental advocacy could be charitable in itself, as protecting the environment often requires broad-based support and effort. It further held that advocating for environmental protection by promoting its views in opposition to competing interests and

views was no less in the public interest despite those competing interests. It therefore found that Greenpeace was not ineligible for charitable status on the ground of environmental advocacy.

In considering Greenpeace's "advancement of education", the court found that its advocacy was "aimed at persuading the public to adopt a particular attitude on some broad social question," which was different from the "advancing education" head of charity under New Zealand's *Charities Act*. The court instead found that Greenpeace's educational activities fell under the "any other matter beneficial to the community" head of charity, insofar as Greenpeace educates the public in support of its environmental advocacy activities, which the court found constituted a charitable purpose of public benefit.

Based on the evidence, the court also found that the purpose of promoting peace, nuclear disarmament and the elimination of weapons of mass-destruction was a "historic" purpose, and that Greenpeace had not pursued any activities in furtherance of this purpose since 2004. The court therefore found this purpose to be ancillary and subsidiary to its "overall aspirational object [...] to protect the planet of which humanity is part." The court therefore found Greenpeace was not disentitled to charitable status because it retained this historic, and now subsidiary, purpose.

Finally, with regard to illicit activities, the court found that these activities have historically involved "trespass, unlawfully being on property, resisting police, obstructing a public way, bill sticking, and disturbing meetings." However, in examining the evidence, the court held that the examples of illicit activities that the Board has raised as issues were isolated incidents, and that the Board had not established that Greenpeace promoted illegal activity. Further, it held that all the activities were a form of non-violent protest "intended to draw attention to activities that are harmful to the environment," and further that "[s]ometimes breaches of the law of the land ultimately advance a public benefit." In any event, as these activities formed a small part of Greenpeace's activities, the court held that it could not be inferred that Greenpeace has an illegal purpose based on those illicit activities. Given the court's findings, it held that there was a charitable public benefit in Greenpeace's advocacy work, and that it was entitled to charitable registration.

Although this decision is from New Zealand and therefore not binding in Canada, the court's findings will be of interest to the charitable sector in Canada. In Canada, an expansion concerning what is permitted as advocacy is no longer necessary given recent amendments to the *Income Tax Act* (Canada) permitting public policy dialogue and development activities discussed in *Charity & NFP Law Bulletin* No. 434 and No. 438. As such, a broad range of advocacy related activities such as those carried on by Greenpeace are

permitted so long as they advance a stated charitable purpose. Other aspects of the decision may also be of interest in Canada and other common law jurisdictions, including the court's analysis of "illegal" activities and whether a charity operates for an illegal purpose.

Global NPO Coalition on FATF Provides Input on Recommendation 8

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

The Global NPO Coalition on FATF, a network of diverse not-for-profits, has released its submission to the Financial Action Task Force (FATF) Secretariat's Strategic Review process, seeking to "initiate a discussion on whether the existing country evaluation/assessment framework for the not-for-profit sector and for Recommendation 8 […] is fully appropriate, feasible or effective for the purposes of achieving the goals of the FATF." The FATF's Recommendation 8 deals with combating the abuse of non-profit organizations particularly with regard to money laundering and terrorist financing, as discussed in *Anti-Terrorism and Charity Law Alert* No. 46.

The submission states that, unlike other sectors subject to FATF Recommendations, the not-for-profit sector plays a special role in society and is protected by international humanitarian and human rights law. Therefore, the submission states that the current one-size-fits-all methodology of the FATF Recommendations cannot easily or effectively fit all sectors, as it does not allow for the specific nuances of the not-for-profit sector and its internationally-protected role. Instead, the FATF could adopt a risk assessment methodology that is uniquely effective for the not-for-profit sector for the Mutual Evaluation process of Recommendation 8.

The submission argues that many countries are struggling significantly to achieve effective implementation of Recommendation 8 under the current system, and further cites the latest report of the United Nations Security Council's Counter-Terrorism Committee Executive Directorate, which stated "fewer than 50 per cent of reporting States indicated that their approach to non-profit organizations was risk-based and in accordance with international human rights obligations" and that "54 per cent of responding States indicated that they had never identified cases of terrorism financing through the non-profit sector."

The submission reiterates that the risk in the not-for-profit sector lies in only a very small subset of organisations; and that any measures, which must be proportionate and targeted, must be compatible with

international humanitarian, human rights and refugee law. As such, the submission includes a set of suggestions to improve the country evaluation methodology for the implementation of Recommendation 8.

IN THE PRESS

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

RECENT EVENTS AND PRESENTATIONS

OBA Business Law Program hosted a one-day webinar on September 30, 2020 from 9:00 am to 4:00 pm, entitled "Buying and Selling a Business: A Comprehensive Guide." The webinar was co-chaired by Luis R. Chacin and Andrea Brinston.

UPCOMING EVENTS AND PRESENTATIONS

AFP Breakfast Webinar will consist of a panel discussion to be held on Friday, October 23rd from 8:30 to 10:00 am. The topic of discussion will be "Are You Ready? Governing in Uncertain Times". Members of the three-person panel include Terrance S. Carter, Managing Partner of Carters Professional Corporation, Jennifer Bernard, CEO of Women's College Hospital Foundation, and Rickesh Lakhani, Executive Director of Future Possibilities. Ken Mayhew will be moderator of the webinar.

The 2020 Annual Church & Charity Law™ Webinar hosted by Carters Professional Corporation will be held on Thursday, November 5, 2020. 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 are available online.

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

Adriel N. Clayton, B.A. (Hons), J.D. - Called to the Ontario Bar in 2014, Adriel Clayton rejoins the firm to manage Carters' knowledge management and research division, as well as to practice in commercial leasing and real estate. Before joining Carters, Adriel practiced real estate, corporate/commercial and charity law in the GTA, where he focused on commercial leasing and refinancing transactions. Adriel worked for the City of Toronto negotiating, drafting and interpreting commercial leases and enforcing compliance. Adriel has provided in-depth research and writing for the *Corporate and Practice Manual for Charitable and Not-for-Profit Corporations*.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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