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CHARITY & NFP LAW UPDATE

AUGUST 2017

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

AUGUST 2017

SECTIONS

HIGHLIGHTS

RECENT PUBLICATIONS AND NEWS RELEASES

Tribunal Upholds Religious School Right to Reject Applicants Based on Creed

By Terrance S. Carter and Theresa L.M. Man

On July 5, 2017, in *HS v The Private Academy*, the Human Rights Tribunal of Ontario (the "HRTO") dismissed three applications by a same-sex married couple (the "Parents") alleging discrimination by an Evangelical Christian school (the "School") that refused to admit their child into its preschool program. The Parents argued the School discriminated with respect to services against their child because of sex, creed, family status and marital status. However, the School responded that it was entitled to rely on the exemption in section 18 of the Ontario *Human Rights Code* (the "Code") because it, as a "special interest organization", is primarily engaged in serving the interest of persons identified by a particular creed and it is entitled to restrict participation to parents who subscribe to its creed. This decision provides an important precedent concerning the application of the protection contained in section 18 of the Code for organizations primarily dedicated to providing services, goods and facilities to individuals identified by any of the prohibited grounds of discrimination, such as creed, sex, age, marital status, family status or disability, in their specific communities without the obligation to extend equal treatment to the broader public.

For the balance of this Bulletin, please see *Church Law Bulletin* No. 49.

CRA News

By Jennifer M. Leddy

New Videos on the CRA Website

On July 20, 2017, the Canada Revenue Agency ("CRA") added two new videos to its online charities video gallery. The new videos are part of the "Series: Gifting and Receipting" introduced in late October 2016 and covered in our November 2016 *Charity & NFP Law Update*. In this new release, the CRA provides guidance to charities and other qualified donees with respect to issuing donation receipts for items donated and funds raised at auctions. The first video explains when and how to issue donation receipts to people who donate items they have made, such as food or even a five course meal, covers whether the value of the skill or the materials involved can be receipted, and points out that a winning bid at an auction can't determine fair market value. The second video provides guidance on how to calculate donor advantage and the 80% rule at auctions, highlighting the importance of displaying the fair market

value of all items offered at auction **before** any bidding is allowed. This is because the bidder needs to know when he or she is making a gift beyond the value of the item received and a charity needs to know the fair market value of the donation (bid) and the advantage (item) in order to give a receipt A receipt may only be issued if the advantage is 80% or less than the bid.

Update to HST/GST Info Sheet GI-121

On August 15, 2017, the CRA updated its GST/HST info sheet GI-121 from August 2011. This info sheet provides a guide for public service bodies ("PSBs") to determine their residency status and to claim the PSB rebate on the provincial portion of the HST. It complements Guide RC4034, GST/HST Public Service Bodies' Rebate. The update eliminates the previous worksheet, but provides a new version of the questionnaire for determining whether a PSB has a permanent establishment in a province.

CRA Courtesy Calls to Charities

The CRA announced earlier this month that it has started making automated courtesy calls to remind registered charities to file their completed information return in time. A complete return is due within six months after the end of the charity's fiscal year. For privacy reasons, the automated call is not a personalized message. Charities may therefore still receive this call even after they have filed their return. Charitable status can be revoked for failure to file a complete information return, even if the charity was inactive or is no longer operating.

Legislation Update

By Terrance S. Carter

National Security and Intelligence Committee of Parliamentarians

The *National Security and Intelligence Committee of Parliamentarians Act* (the "Act"), previously known as Bill C-22, received Royal Assent on June 22, 2017 and is set to come into force on a day to be fixed by order of the Governor in Council. The Act establishes the National Security and Intelligence Committee of Parliamentarians (the "Committee") and makes several amendments to other acts, including the *Access to Information Act*, the *Privacy Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, among others. The mandate of the Committee is to review the existing framework of national security and intelligence and any matter that a minister of the Crown refers to it, while cooperating with each "review body" to avoid duplication of work. "Review body" is defined by the Act as any of the following: i) the Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, ii) the Commissioner of the Communications Security Establishment or iii) the Security Intelligence

Review Committee. For more information on Bill C-22, see the "Anti-Terrorism & Money-Laundering Update" from the June 2016 *Charity & NFP Law Update*, and the "Legislation Update" from the November 2016 *Charity & NFP Law Update*.

PHIPA Regulations Update

Ontario Regulation 329/04, proposed on July 7, 2017 as Proposal 17-HLTC024, will come into effect on October 1, 2017, and specifies when a health information custodian will be required to notify the Information and Privacy Commissioner regarding the theft, loss or unauthorized use or disclosure of personal health information. The new requirement to notify the Commissioner is prescribed by s. 12(3) of the *Personal Health Information Protection Act*. In addition, the regulation requires each health information custodian to report annually to the Commissioner on the number of times personal health information in the custody or control of the health information custodian was stolen, lost, used or disclosed without authorization in the previous calendar year. The reporting requirement commences March 1, 2019 and continues annually thereafter.

Child, Youth and Family Services Act, 2017

Bill 89, *Supporting Children, Youth and Families Act, 2017* ("Bill 89") received Royal Assent on June 1, 2017 and came into force on the same day. However, each of the four schedules contained in Bill 89 come into force on dates set by proclamation of the Lieutenant Governor. Schedule 1 replaces the *Child and Family Services Act* with the new *Child, Youth and Family Services Act, 2017*; schedules 2 and 3 provide transitional amendments; and schedule 4 provides additional amendments to another thirty-six acts. In particular, schedule 1: *Child, Youth and Family Services Act, 2017*, which is not yet in force, introduces several changes aimed at the promotion of diversity and inclusion in the provision of services for children and families, including First Nations, Inuk and Métis. For more information on Bill 89, see "Amendments Proposed to Child Protection Laws in Ontario" from the January 2017 *Charity & NFP Law Update*.

Implementation of Patients First Act, 2016

In the process of implementing the changes introduced by the *Patients First Act, 2016*, the Ministry of Health and Long-Term Care published Proposal 17-HLTC029 on July 4, 2017, proposing amendments to the six Ontario Regulations under the *Local Health System Integration Act* and is accepting comments from the public until September 4, 2017. In addition to several changes regarding the planning of French Language Services by the Local Health Integration Networks ("LHINs"), the proposal includes the establishment of an Audit Committee, Community Nominations Committee and Quality Committee by the board of directors of each LHIN. These committees will be required to report and be accountable to

the board of directors of the LHIN and will be mandated to carry out various functions such as risk management, nominations and quality improvement. More information on the *Patients First Act, 2016* can be found in our *Charity & NFP Law Bulletin* No. 401.

Gender Identity or Expression

On June 19, 2017, Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code* received Royal Assent and came into force. The Bill amended the *Canadian Human Rights Act* to include gender identity and gender expression as prohibited grounds of discrimination, and also amended the *Criminal Code* to include both terms in the definition of 'identifiable group' in relation to offences of hate propaganda. For additional information on this development, see "Gender Identity or Expression Now Prohibited Grounds of Discrimination", below.

Corporate Update

By Theresa L.M. Man

Corporations Canada Dissolves Part II CCA Corporations

As reported in our February 2017 *Charity & NFP Law Update*, Corporations Canada released a notice in mid-February, 2017 stating that all corporations operating under Part II of the *Canada Corporations Act* ("CCA") were required to complete their transition to the *Canada Not-for-Profit Corporations Act* ("CNCA") and receive their certificate of continuance by July 31, 2017, or they would be dissolved. This deadline has since past, and Corporations Canada has now dissolved most Part II CCA corporations that had not continued by the deadline. Corporations Canada is also continuing to work with a small number of corporations that have filed transition applications but have not completed their continuance due to various deficiencies. Apart from this small exception, all federal not-for-profit corporations are now operating under the CNCA or have been dissolved. After all Part II CCA corporations have been continued or dissolved, the process to repeal Part II of the CCA and its regulations can begin. However, Part II CCA corporations dissolved because they failed to transition to the CNCA can apply to be revived and transitioned into the CNCA in one step by submitting Form 4032: *Articles of Revival (transition)* after having obtained approval from the members. For more information see Corporations Canada's *Revival (transition) guide*.

Proposed Ontario Regulations Authorizing Charitable Corporations to Pay Directors in Limited Situations

By Ryan M. Prendergast

On July 10, 2017, the Office of the Public Guardian and Trustee of Ontario ("PGT") posted Proposal Number 17-MAG008 (the "Draft Amendments"), which contains draft amendments to Ontario Regulation 4/01 under the *Charities Accounting Act* ("CAA"). The Draft Amendments were open to public comment until August 29, 2017. The Draft Amendments propose to amend Ontario Regulation 4/01 to provide relief from the common law rule prohibiting the remuneration of directors of charitable corporations and persons related to them by outlining certain circumstances where charitable corporations would be authorized to pay directors and related persons for goods, services, or facilities. Previously, Ontario Regulation 4/01 did not address director remuneration. The Draft Amendments would not apply to directors of unincorporated associations or trustees of charitable trusts.

Currently, in order for directors of charitable corporations to receive remuneration in a capacity other than as a director, charitable corporations and their directors must obtain a consent order from the PGT under section 13 of the CAA. This process can be time intensive and generally requires the assistance of legal counsel. The Draft Amendments would simplify this process by dispensing with the need for a consent order in prescribed circumstances for charitable corporations. Under the Draft Amendments, directors would continue to be prohibited from receiving direct or indirect payment for services they provided in their capacity as directors or employees of the charitable corporation, for fundraising services, for selling goods or services for fundraising, or in connection to the purchase or sale of real property.

Before payments can be made to a corporate director or a related person, the charitable corporation would first need to meet a number of conditions set out in the Draft Amendments. For example, the amount paid must be reasonable considering the goods or services received; the amount must be paid with a view to the best interests of the charity; and the board must have (a) at least five voting directors for every director who is either receiving payment or connected to a person receiving payment, or (b) a minimum of four voting directors excluding such director.

The Draft Amendments, if enacted into law will ease the process for incorporated charities that want to rely upon their board members who can provide services in another capacity without the need for a consent order. As such, incorporated charities should continue to follow developments with respect to the Draft Amendments should they wish to be able to remunerate their directors in another capacity.

Proposed Changes to the Voluntary Disclosures Program (VDP) Put in Context

By Terrance S. Carter

On June 9, 2017, The Ministry of National Revenue announced changes to the CRA Voluntary Disclosures Program ("VDP") by publishing two documents outlining the proposed changes as of January 1, 2018, Draft Information Circular - IC00-1R6 - Voluntary Disclosures Program and Draft GST/HST Memorandum 16.5 – Voluntary Disclosures Program (collectively, the "Proposals"). The general purpose of the VDP is to provide taxpayers with an opportunity to voluntarily come forward and correct previous omissions in their dealings with the CRA in order to avoid penalties and prosecutions. The Proposals outline extensive proposed changes to the VDP aimed at preventing abuse of the system by sophisticated taxpayers, including those with offshore accounts in order to avoid detection by the CRA. The Proposals were open for public consultation for a period of 60 days from June 8, 2017 until August 8, 2017. While the VDP has application to non-profit organizations ("NPOs"), it only applies to registered charities in the limited context of employee source deductions and HST. As such the specifics of the Proposals will be of limited interest to registered charities.

In lieu of the VDP applying to registered charities other than in the above mentioned limited context, the CRA does provide for a process for charities that have been involved in matters of non-compliance to bring themselves back into compliance. This process is set out on the CRA webpage entitled, "Bringing Charities Back into Compliance" (the "CRA Guide"). The CRA Guide encourages registered charities that have been involved in unintentional or accidental matters of non-compliance to contact the Charities Directorate in writing either on a general or no-name basis, or by telephone to correct errors made in the past. After contacting the CRA, charities may be required by CRA to correct the effects of past non-compliance, enter into a compliance agreement, or present a plan to demonstrate what action has been taken or what measures will be put into place to prevent future non-compliance. There is nothing, though, in the CRA Guide that promises a particular outcome as there is with the VDP.

Given the limited scope of the CRA Guide to assist charities wanting to come back into compliance compared to the VDP available for for-profits and NPOs (even with the changes outlined in the Proposals), it would be helpful for the charitable sector if the CRA Charities Directorate was to develop a practical voluntary disclosure program for registered charities similar in scope to the VDP. In this regard, in a letter addressed to the Charities Directorate dated August 8, 2017, the Charities and Not-for-Profit Law Section of the Canadian Bar Association recommended the development of a guidance dealing with voluntary

disclosures by registered charities and that such guidance be addressed by the Charities Directorate of the CRA, as opposed to the Tax Services Offices under the VDP.

Until such guidance is available, charities that discover they are non-compliant should first seek advice from legal counsel under the protection of solicitor-client privilege with respect to the current CRA Guide to determine if and how best to make a disclosure to CRA, and what steps may be necessary to bring the charity back into compliance.

CRTC Issues Undertaking Under CASL Alleging Personal Liability

By Ryan M. Prendergast

On June 12, 2017, the Canadian Radio-television and Telecommunications Commission ("CRTC") issued an undertaking to a Mr. Halazon in his individual capacity under section 21 of Canada's Anti-spam Legislation ("CASL") as the former CEO of various bankrupted corporations.

The undertaking included a monetary payment of $10,000 by Mr. Halazon in his personal capacity under section 31 of CASL which imposes liability on officers and directors of corporations that "directed, authorized, assented to, acquiesced in or participated in the commission of the violation", as it was alleged that he was personally liable for violations under CASL. Specifically, the CRTC alleged that the bankrupted corporations sent commercial electronic messages with a non-functioning unsubscribe mechanism, or unsubscribe requests were not met within the statutory timeframe under CASL.

The undertaking also included a requirement that Transformational Capital Corp. and its subsidiaries, which were also represented by Mr. Halazon, enter into a compliance program.

It is interesting to note that the undertaking resolves alleged liability for CEMs "from 2 July 2014 up to the date of undertaking". That is, the undertaking included alleged non-compliance with CASL from the day after the coming into force of CASL. While no registered charities or not-for-profits, or their directors, have been publicly issued undertakings or been issued notices of violations under CASL, the imposition of personal liability under CASL is an important reminder that CASL includes personal liability for directors and officers. As such, registered charities and other not-for-profits, along with their boards, that may be sending commercial electronic messages should ensure they are familiar with the requirements of CASL in order to avoid exposure to possibility of personal liability.

Supreme Court Rules Google Must Block Certain Search Results Globally

By Sepal Bonni

On June 28, 2017, the Supreme Court of Canada upheld a British Columbia court decision that ordered Google to remove website search results from its global search index. The case began when Equustek accused Datalink Technology Gateways ("Datalink") of allegedly infringing Equustek's trademarks and trade secrets to create similar competing products. Equustek obtained a number of court orders prohibiting Datalink from carrying on business. Datalink contravened the court orders and then fled the province, but continued business outside of Canada. Equustek, unable to enforce the court orders, requested that Google assist by blocking the websites that included the infringing intellectual property. Google agreed to do so, but only with respect to the Canadian version of the search engine. As a result, if an individual was searching on google.com, websites with Datalink's products would still appear in the search results, but not if they were searching from google.ca. As such, Equustek requested that the court order Google to de-index the websites globally as opposed to only on the google.ca search engine.

At the Supreme Court of B.C. Equustek was awarded a broader interlocutory injunction restraining Google from including the infringing websites in search results worldwide. The B.C. Court of Appeal upheld the decision.

At the Supreme Court of Canada, the lower courts' decisions were upheld along with the worldwide injunction restraining Google from displaying search results which included Datalink's websites.

In its decision, the Supreme Court of Canada stated "the problem, in this case, is occurring online and globally. The internet has no borders; its natural habitat is global. The only way to ensure the interlocutory injunction [order] attained its objective was to have it apply where Google operates – globally".

This decision provides charities and not-for-profits that own intellectual property with new tools to enforce their rights when infringers are transcending borders. Canadian intellectual property owners may now prevent a defendant located outside of Canada from offering infringing products and services online by applying for an order from the court requesting that search engines such as Google stop indexing the infringer's websites in search results. This is a welcome decision for the charity and not-for-profit sector as it provides intellectual property owners who rely on the internet as their primary market with effective strategies for enforcing their rights.

Orders Amending By-laws Outside the Jurisdiction of Arbitrators

By Jacqueline M. Demczur

On May 30, 2017, the Ontario Superior Court of Justice delivered its decision in *Cricket Canada v Bilal Syed*, whereby it partially allowed an application by Cricket Canada, a national sports organization incorporated under the CNCA, to set aside in part an arbitral award (the "Award") that had ordered Cricket Canada to include specific provisions in its by-laws in order to implement the arbitrator's decision.

The Award concerned a claim by a candidate for Cricket Canada's board of directors who, after an unsuccessful bid for directorship, challenged the organization in arbitration before the Sport Dispute Resolution Centre of Canada (the "SDRCC"). Among other things, the claimant argued the election had not been carried out in accordance with Cricket Canada's by-laws, and that the process had been compromised by discrimination and a lack of neutrality.

At the end of the proceeding, the arbitrator found no discrimination. However, he did find some "improprieties" in the election process. Specifically, the Award ordered Cricket Canada to amend its by-laws to include the following: i) that any person involved in selecting the members of the Nomination Committee be prohibited from running in the election; ii) that candidates who, as members of the board of a provincial sports organization, had voting rights to elect the board of Cricket Canada, must resign their position before the election; and iii) to prohibit the exchange of benefits for votes.

Cricket Canada brought an application before the Ontario Superior Court of Justice ("Court") to challenge the portion of the Award instructing it to amend its by-laws. It alleged that, even though there was no formal arbitration agreement as required by Cricket Canada's dispute resolution policy, the extent of the jurisdiction granted to the arbitrator was reflected in the provisions of the SDRCC Code, as well as in the party submissions in the arbitration. The Court agreed these documents did not grant the arbitrator the jurisdiction to order a change in the by-laws and policies of Cricket Canada because these were not part of the dispute. In the words of the Court: "[w]hile the Arbitrator could consider the by-laws as they affected [the claimant's] candidacy, he had no jurisdiction to tell Cricket Canada that they should be changed."

In the view of the Court, the aspects of the Award challenged by Cricket Canada were each a "core issue of internal governance" and outside the scope of authority of the arbitrator, who had been called to determine the procedural fairness of the election process and not the rules that governed that process, provided such rules were in compliance with the CNCA. Following previous decisions suggesting that, absent gross irregularities in the electoral process, a decision maker should not readily interfere with the

internal governance of a corporation, the Court asserted that "[n]on-profit organizations […] should not be required to adhere rigorously to all of the technical requirements of corporate procedure for their meetings as long as the basic process is fair." Finally, the Court concluded that introducing changes to Cricket Canada's by-laws, policies and procedures was a matter for the members to decide after their own negotiations and consultations, and could not be imposed unilaterally by the arbitrator.

Court of Appeal Upholds Application of Clubman's Veto

By Esther S.J. Oh

On July 5, 2017, in *Polish Alliance Association of Toronto Limited v. The Polish Alliance of Canada*, the Court of Appeal for Ontario ("the Court of Appeal") dismissed an appeal by The Polish Alliance of Canada ("National") and upheld the 2016 decision of the Superior Court of Justice in *Polish Association of Toronto Limited v The Polish Alliance of Canada* ("2016 Case"), which was previously reported on in our June 2017 *Charity & NFP Law Update*. In its decision, the Court of Appeal confirmed that all the members of Branch 1-7 ("Branch") an unincorporated branch of the National, were entitled to leave the National and take with them the property used by the Branch, which was held in trust for the members of the Branch by a separate corporation, the Polish Association of Toronto Limited. In this regard, the Court of Appeal upheld the application of the common law rule known as the "clubman's veto", which, as explained by the Court in the 2016 Case "[…] provides that with the approval of 100% of the members of an unincorporated association, the members can leave the association and take the property of the association with them."

On appeal, the National had argued that the trial court in the 2016 Case had erred in applying the clubman's veto because the National was incorporated under the Ontario Corporations Act and therefore the clubman's veto (which applies to unincorporated associations) does not apply.

In its reasons, the Court of Appeal stated that while the National is a corporation, the Branch is an unincorporated voluntary association which does not have any "statute that governs how the contractual relationship of all of the members of Branch 1-7 with each other is to be terminated." In upholding the trial court decision, the Court of Appeal noted the following comments from the 2016 Case:

> While the clubman's veto, like any common law principle, can be displaced by a clear statute as was found to be the case of political parties in *Ahenakew*, there is nothing in the *Corporations Act* or any regulatory scheme that regulate this situation…Nothing in the *Corporations Act* deals with the problem of how trust beneficiaries whose interests are defined with reference to their membership in an unincorporated branch of an incorporated entity can leave with their property.

As mentioned in the previous article in our June 2017 *Charity & NFP Law Update*, given the uniqueness of the background facts involved in the above decisions, it is unclear whether a court would apply the clubman's veto in future cases involving a not-for-profit corporation under different circumstances. Reference can be made to our previous article for details concerning the background facts and history in this regard. However, the Court of Appeal decision confirms the possibility that a branch of a corporation in an analogous fact situation might become so independent and separately identified that it might be entitled to leave the not-for-profit corporation and take its branch assets with them if the decision was approved unanimously by the branch members. In light of the above, charitable and not-for-profit corporations with branches may want to consider taking steps to ensure that the governing board of the corporation exercises a sufficient degree of control over its branches, both in practice and within the corporation's governing documents.

Gender Identity or Expression Now Prohibited Grounds of Discrimination

By Barry W. Kwasniewski

On June 19, 2017, Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code* ("Bill C-16") received Royal Assent and came into force. Bill C-16 amended the *Canadian Human Rights Act* ("the Act") to include gender identity and gender expression as prohibited grounds of discrimination, and also amended the *Criminal Code* to include both terms in the definition of 'identifiable group' in relation to offences of hate propaganda.

The Act applies to federal and federally-regulated works and industries, such as the federal government, federal agencies and Crown corporations, chartered banks and airlines, among others. As such, the changes will have little direct impact to the charitable sector, which for the most part is subject to provincial human rights laws. With these changes, it is now a discriminatory practice to deny the provision of goods, services, facilities or accommodation, ordinarily available to the general public, to any individual for reason of gender identity or expression. Similarly, it is a discriminatory practice to deny commercial premises or residential accommodation, as well as to refuse or limit employment on these prohibited grounds, unless there is a *bona fide* justification as described in s.15(1) of the Act.

The definitions for "gender identity" and "gender expression" were not included in Bill C-16. However, federal courts and tribunals may follow generally accepted interpretations, such as those of the Ontario Human Rights Commission in its policies from 2000 and 2014:

> **Gender identity** is each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex.
>
> **Gender expression** is how a person publicly expresses or presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways of expressing gender. Others perceive a person's gender through these attributes. A person's gender identity is fundamentally different from and not related to their sexual orientation.

The amendments to the Act follow like changes in provincial human rights legislation in the past five years, starting with Ontario in 2012, as reported in our *Charity Law Bulletin* No. 285.

With respect to the amendments to the *Criminal Code*, Bill C-16 introduced gender identity or expression to the s. 318(4) definition of "identifiable group". This definition applies to the s.318 offence of "advocating genocide" and the s. 319 offence of "public incitement of hatred." Thus, the promotion of genocide or hatred towards a group of individuals based on their gender identity or expression can now be punishable by imprisonment.

Moreover, Bill C-16 amended subparagraph 718.2(a)(i) of the *Criminal Code* to allow a sentencing judge to consider if the offender was motivated by bias, prejudice or hatred based on gender identity or expression as an aggravating factor that might lead to harsher sentences.

Information and Privacy Commissioner Reports on "Big Data" Raises Privacy Concerns

By Esther Shainblum

In May 2017, the Information and Privacy Commissioner of Ontario ("IPC") published its Big Data Guidelines (the "Guidelines"). The Guidelines refer to "big data" in the context of managing "combined data sets of linked information about individuals" that is collected indirectly and used for a different purpose than that for which it was collected – activities that conflict with the most basic principles of privacy protection. The IPC's fact sheet on big data explains that it "has the potential to provide governments with greater insights into the quality and effectiveness of services and programs such as healthcare, social services, public safety and transportation." However, the IPC also cautions that big data's collection and use of personal information may give rise to specific privacy and human rights concerns, such as the fact that discrete sets of personal information can be combined to create a larger picture that might amount to surveillance; the creation of permanent databases containing vast quantities

of sensitive personal information that could be wrongfully targeted or accessed; poor quality data; use of discriminatory proxies; data set bias, which could lead to discriminatory or inadequate outcomes; and profiling, which could lead to individuals being improperly treated or harmed. The Guidelines point out that many of the information practices involved in big data do not comply with the privacy protections set out in Ontario's public sector privacy laws (the *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act*), which pre-date the technology used to conduct big data projects.

The highly technical Guidelines are aimed at government institutions subject to public-sector privacy laws and provide a set of best practices applicable at all stages of any big data project. Examples of best practices discussed in the Guidelines include having research ethics boards or similar bodies review and approve all big data projects, notifying the public about big data projects by publishing information about them on their websites, treating publicly available personal information as if it were non-public, de-identifying any personal information in linked data sets and taking steps to ensure that information used in data sets is representative of the target population and that it does not use variables (*e.g.* geography) as proxies for prohibited discrimination. As noted above, the Guidelines raise concerns about big data projects using predictive models to profile individuals and to predict or evaluate their attributes, thus generating a new element of personal information about that individual. People who are profiled may not be aware of it, even though profiling can result in significant decisions being made about them. Profiling can also lead to false predictions that can significantly harm individuals who may be denied services or benefits as a result.

In this regard, the Guidelines recommend that individuals whose personal information may be subject to profiling be notified appropriately and that consultations be conducted with the public and with civil society organizations to evaluate the effects of these projects in people's lives and the community.

Anti-Terrorism Law Update

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

Court of Appeal Upholds Ruling Against Iran

On June 30th, 2017, the Ontario Court of Appeal (the "Court") dismissed an appeal by the Islamic Republic of Iran, the Iranian Ministry of Information and Security and the Iranian Revolutionary Guard Corps ("Iran") in *Tracy v Iran (Information and Security)*. This ruling upholds the lower court decision previously reported in *Anti-Terrorism and Charity Law Alert No. 45*, whereby the Ontario Superior Court

of Justice, in accordance with the *Justice for Victims of Terrorism Act* ("JVTA"), had dismissed Iran's motion to reverse the court-ordered seizure of certain non-diplomatic assets in Ontario and the recognition orders for the enforcement of a series of US judgements in favour of American victims of terrorism.

According to the Court, Iran submitted the same arguments previously made before the lower court, which, if accepted, would render JVTA enforcement actions "a cumbersome and largely unworkable process that would provide very limited rights of recourse to victims of terrorism". It therefore dismissed the appeals, with two limited exceptions.

The limited exception considered by the Court concerned the dates of certain terrorist attacks. Subsection 4(1) of the JVTA creates a cause of action for loss or damage due to acts of terrorism on or after January 1, 1985. However, some of the terrorist acts occurred prior to 1985 and were, therefore, beyond the retroactive scope of the JVTA. For this reason, the Court accepted that two of the US judgements fell outside the remedial protection afforded by the JVTA and could not be enforced in Canada. The lower court had accepted these judgements under the premise that, in the interpretation of the motion judge, subsection 4(1) of the JVTA referred to the date "when the losses were suffered and not the date that a terrorist attack occurred." On appeal, the Court rejected this view in light of subsections 4(5) of the JVTA and 6.1(2) of the *State Immunity Act*, the latter of which clearly prescribes that a foreign state's immunity is only removed for its support of terrorism on or after January 1, 1985.

This case is important because it establishes that the retroactive effect of the JVTA is limited to January 1, 1985. Furthermore, charities and not-for-profits that work internationally, particularly in conflict zones, should remember that the JVTA does not only affect foreign states, but applies to any person or organization involved in the support or sponsorship of terrorist activities.

Best Lawyers in Canada 2018

Terrance S. Carter, Theresa L.M. Man and Jacqueline M. Demczur of Carters Professional Corporation were again recognized as leaders in the area of Trusts and Estates Law in the Charity and Not-For-Profit Law subspecialty by the 2018 edition of The Best Lawyers in Canada. Terrance S. Carter has been recognized since 2006, Theresa L.M. Man has been recognized since 2012, and Jacqueline M. Demczur has been recognized since 2014.

Lexpert® Rankings 2017

Several partners of Carters Professional Corporation were recognized as leaders in the areas of Charity and Not-for-Profit Law, in Canada by The Canadian Legal Lexpert® Directory 2017. Terrance S. Carter, has been recognized as one of the most frequently recommended practitioners in the area of charities and not-for-profits in Canada since 2004. Theresa L.M. Man has been recognized as consistently recommended practitioners in charity & not-for-profit law since 2011, and Jacqueline M. Demczur and Esther S.J. Oh have been recognized as repeatedly recommended practitioners, also since 2011.

IN THE PRESS

Charity & NFP Law Update – June 2017 (Carters Professional Corporation) was featured on *TaxNet Pro*™ and is available online to those who have OnePass subscription privileges. Future postings of the *Charity & NFP Law Update* will be featured in upcoming posts.

RECENT EVENTS AND PRESENTATIONS

Social Media and Privacy Pitfalls Involving NPOs and Charities was presented by Terrance S. Carter at the CSAE Trillium 2017 Summer Summit Conference on July 13, 2017 in Alliston, Ontario.

UPCOMING EVENTS AND PRESENTATIONS

2017 Christian Legal Fellowship (CLF) National Conference will be held on September 22, 2017 in Mississauga, Ontario. Terrance S. Carter will present on the topic of "Charity Law Update".

Association of Treasurers of Religious Institutes (ATRI) Conference will be held on September 30, 2017. Terrance S. Carter will present on the topic of "Legal Issues in Social Media and Related Policies".

BDO Canada LLP – Waterloo Office will host a conference in Kitchener, Ontario on October 4, 2017. Terrance S. Carter will present on the topic of "Duties and Liabilities of Directors and Officers of Charities and NFPs".

BDO Canada LLP – London Office will host a conference in London, Ontario on October 11, 2017. Terrance S. Carter will present on the topic of "Duties and Liabilities of Directors and Officers of Charities and NFPs".

The Estates & Trusts Summit hosted by the Law Society of Upper Canada will be held on October 17, 2017 in Toronto, Ontario. Terrance S. Carter will present on the topic of "Annual Charity Law Update".

24th Annual Church and Charity Law Seminar – Early Bird Registration now Available

The upcoming 24th Annual *Church & Charity Law*™ Seminar hosted by Carters in Greater Toronto, Ontario, will be held on **Thursday November 9, 2017**. Click here for details and "Early Bird" online registration.

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ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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