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CHARITY & NFP LAW UPDATE

SEPTEMBER 2019

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

SEPTEMBER 2019

SECTIONS

HIGHLIGHTS

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RECENT PUBLICATIONS AND NEWS RELEASES

Court of Appeal Holds Communications to Alter Grant is Lobbying

By Ryan M. Prendergast

In the case of *R v Carson*, released on May 15, 2019, the Court of Appeal for Ontario considered an appeal by the Crown of a summary conviction appeal in relation to offences under the federal *Lobbying Act*. The respondent, Mr. Carson, had been a federal employee in a position that qualified him as a "designated public office holder" under the *Lobbying Act* between 2006 and 2009. On February 4, 2009, Mr. Carson left his government job and took a position as Executive Director of the Canada School of Energy and Environment ("CSEE"), at which time he became subject to a statutory five-year prohibition from carrying out lobbying activities pursuant to section 10.11 of the *Lobbying Act*. As the CSEE is an "organization" for the purposes of the Act, section 10.11 prohibited Mr. Carson from lobbying on behalf of the CSEE as an employee during the five-year period after the day on which he ceased to be a "designated public office holder", including communicating with public officer holders regarding "the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada."

In 2007, prior to Mr. Carson becoming the Executive Director, the CSEE had entered into an agreement with Industry Canada for a $15 million grant ("Funding Agreement"), which provided that the CSEE would commit the funds received by March 31, 2010, unless amendments and modifications were made in consultation with the Minister. Otherwise, any unspent portion of the uncommitted amount would be returned to the Minister.

In 2009, a public office holder from Industry Canada contacted Mr. Carson about potentially changing the Funding Agreement, as approximately $12.2 million of the original grant was not likely to be committed by March 31, 2010. Over the next few months, Mr. Carson corresponded with various public office holders at Industry Canada about amending the Funding Agreement. This resulted in the parties entering into an amending agreement. Four years later, Mr. Carson was charged with three offences under the *Lobbying Act*, including a charge for "as an employee of CSEE, undertak[ing] to communicate with public office holders in respect of the awarding of a grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada."

The Summary Conviction Appeal Judge had set aside Mr. Carson's conviction, indicating that "in certain circumstances, negotiating for extension of existing funding and for renewal of an agreement could become lobbying" but that in these circumstances, Mr. Carson had not been guilty of lobbying. However, the Court of Appeal disagreed, indicating that the *Lobbying Act* does not require a person to have instigated communications with a public office holder to be in breach of section 10.11. Rather, to be in breach, a person is merely required to "carry on any of the activities" referred to in paragraph 7(1)(a), including communications "in respect of... the awarding of any grant, contribution or other financial benefit by or on behalf of her Majesty in right of Canada." Additionally, the Court of Appeal noted that it was irrelevant that Industry Canada's officials did not consider Mr. Carson's conduct to be lobbying, and that it was for the courts to determine whether he had indeed conducted lobbying activities. Having reviewed the evidence, the Court of Appeal found that Mr. Carson had conducted lobbying activities by communicating with Industry Canada for the purpose of ensuring that the CSEE did not have to forfeit $12.2 million, and that if successful, the result of his efforts would have "constituted the award of a financial benefit." It therefore allowed the Crown's appeal, set aside the Summary Conviction Appeal Judge's decision, and reinstated Mr. Carson's conviction.

While this case is fact-specific, it is an important reminder to charities and not-for-profits of the importance of understanding whether their activities may be caught under applicable lobbying legislation. Although this case focuses on the five-year lobbying prohibition for an ex-public office holder, it was found, in the broader context, that communication with public office holders to alter the terms of a grant was considered lobbying. However, this does not mean that every charity that engages with the federal government concerning the awarding of a grant or negotiating the renewal of a grant needs to register for the purposes of the *Lobbying Act*, as the balance of the requirements to register needs to be taken into consideration based upon their specific facts. With the introduction of public policy dialogue and development activities ("PPDDAs") under the *Income Tax Act*, as discussed in *Charity & NFP Law Bulletin* No. 453, PPDDAs may include lobbying activities as defined in federal and provincial lobbying legislation. In this regard, when engaging with public office holders, charities should therefore be aware of their activities and the reporting requirements that may be imposed on them as a result of those activities.

CRA News

By Theresa L.M. Man

Application Form T2050 to be Phased Out

As part of the Canada Revenue Agency's ("CRA") rollout of the Charities IT Modernization Project (CHAMP) under way since June 1, 2019, the CRA implemented a new online application for charitable status through the CRA's My Business Account ("MyBA"). During the early days of implementation of the online application process, the CRA has been continuing to accept applications using Form T2050, *Application to Register a Charity Under the Income Tax Act*. However, the CRA will no longer accept the T2050 Form after September 30, 2019. There are differences in the questions contained in the online application form and the T2050 Form. Those who do not wish to use the online application may obtain from the CRA a paper form of the application (Form T1789).

To assist with filing applications online, the CRA has recently added more information on the CRA's MyBA webpage and has posted a webpage to guide applicants through the application process. The information includes directions on setting up MyBA, as well as tips about the online application form and tips to avoid delays. For example, to guide applicants, the CRA notes that applicants will need to provide detailed information for each charitable activity, either currently carried out or proposed to be carried out. It further indicates that multiple individuals can take turns logging in to complete different sections of the form. Further, once an application has been submitted, applicants will be able to log into MyBA to review their application status.

Applicants should also be aware that the online application has not been updated to reflect the new PPDDA regime that replaced the previous "political activities" regime under the *Income Tax Act*. In this regard, the CRA has indicated that the online application will be revised to reflect the new rules in November 2019. Prior to this, applicants will need to follow the CRA's instructions on the CRA's webpage on how to complete the application as if it concerned PPDDAs rather than political activities, rather than following the wording in the online application itself.

OPC Concludes Consultation on Data Transfers

By Esther Shainblum

On September 23, 2019, the Office of the Privacy Commissioner of Canada ("OPC") announced that it had concluded its consultation on data transfers of personal information for processing ("Consultation"). As was discussed in the June 2019 *Charity & NFP Law Update*, the Consultation was originally launched on April 9, 2019 alongside the OPC's Equifax Report of Findings, and was reframed on June 11, 2019. In the Equifax Report of Findings, the OPC had strayed from its longstanding position on transfers of personal information for processing, characterizing them as "disclosures" of personal information, rather than "use", within the meaning of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), and therefore requiring consent. However, the OPC has now concluded that its position under the current law, as outlined in the January 2009 Guidelines for processing personal data across borders, will remain unchanged and that consent will not be required in such instances.

In coming to this conclusion, the OPC took into consideration the 87 submissions it had received, including the Canadian Bar Association's submission discussed in the August 2019 *Charity & NFP Law Update*. The vast majority of the submissions to the OPC took the view that there was no consent requirement under PIPEDA for transfers for processing and doing so would create enormous challenges for business processes. Further, the OPC relied on the Federal Court of Appeal's decision in *Englander v Telus Communications Inc.* to illustrate that the "non-legal drafting" of PIPEDA makes it open to be interpreted in more than one way, and in such situations, "flexibility, common sense and pragmatism will best guide the Court." As such, the OPC applied a pragmatic approach in maintaining the status quo until legislative reform occurs (for which it is currently in the process of developing recommendations) in order to modernize Canada's federal private sector law.

In its announcement, the OPC further reminded organizations of the legal requirement of transparency in handling personal information and advising customers of the potential of their personal information being sent to another jurisdiction where it may be accessed by law enforcement, courts, or national security authorities. In addition, the OPC also shared its expectation that organizations will continue to apply the 2018 Guidelines for obtaining meaningful consent, and allow individuals to make informed decisions regarding the handling of their personal information by specifying certain key elements, including "what personal information is being collected; with which parties personal information is being shared; for what

purposes personal information is collected, used or disclosed; and any residual meaningful risk of harm or other consequences."

Charities and not-for-profits that are either subject to or choose to comply with PIPEDA and that may transfer personal information for processing would not be required under the current law, or under the OPC's practices and policies, to obtain the consent of parties whose personal information is being used. However, these charities and not-for-profits should continue to ensure compliance with the privacy obligations imposed by PIPEDA as described in the previous paragraph.

Corporate Update

By Theresa L.M. Man

New Brunswick Passes New *Cooperatives Act*

On June 14, 2019, New Brunswick's Bill 35, *Cooperatives Act* received Royal Assent. The new *Cooperatives Act* has not yet been brought into force, and will come into force on a day or days to be fixed by proclamation. As indicated by New Brunswick's Financial and Consumer Services Commission, this date is currently targeted to be January 1, 2020. Once in force, the new *Cooperatives Act* will repeal and replace the current *Co-operative Associations Act*, which came into force in 1978 and has not had substantial updates since then, along with the regulations under the Act.

The new *Cooperatives Act* governs "persons that wish to organize, operate and carry on business on a cooperative basis." In this regard, section 6 sets out the requirements for an organization operating on a "cooperative basis," including matters such as open membership; no proxy votes for members; membership interest on any membership loan and dividends on any membership share being limited to the maximum percentage fixed in the by-laws; requirements to have surplus funds arising from the cooperative's operations; and requirements for cooperatives to educate their members, officers, employees and the public on the principles and techniques of cooperative enterprise. The new Act modernizes the cooperatives regime in New Brunswick to bring it in line with the modern corporate law approach and best practices in other Canadian jurisdictions, modernizes the administrative processes for cooperatives, and reduces administrative red tape. Additionally, it enhances cooperatives' access to capital by allowing them to issue investment shares in addition to membership shares, and by providing for small business tax credit incentives for investment shares.

Once the new Act is proclaimed into force, all existing co-operative associations incorporated or continued under that Act will be deemed to be continued as a cooperative under the new *Cooperatives Act*. Their letters of incorporation, directors and by-laws in force at the time of the transition will be deemed to be valid articles of incorporation, directors and by-laws in force under the new *Cooperatives Act*, despite any inconstancies with provisions of the new Act. However, articles of amendment for the continued articles of incorporation and by-laws to ensure that those documents are in compliance with the new Act and its regulations will need to be filed within 18 months of the deemed continuance. Failure to do so may result in the dissolution of the cooperative.

Federal Court Interprets Discipline Section of the CNCA

By Terrance S. Carter

On July 30, 2019, the Federal Court released its decision (along with supplementary reasons on August 20, 2019) in *Watto v Immigration Consultants of Canada Regulatory Council* ("*Watto*"), being one of numerous court proceedings initiated by a disaffected member of the Immigration Consultants of Canada Regulatory Council ("ICCRC"), a federal not-for-profit corporation governed by the *Canada Not-for-profit Corporations Act* ("CNCA"). In *Watto*, the Federal Court held that section 158 of the CNCA does not restrict the power to discipline a member or to terminate their membership to only "the directors, the members or any committee of directors or members of a corporation".

The ICCRC is the self-governing body for individuals who represent or advise paying clients with regard to immigration matters, as designated by the Minister of Citizenship and Immigration pursuant to the *Immigration and Refugee Protection Act*. As part of its mandate, the ICCRC establishes entry-to-practice requirements, receives, investigates and adjudicates complaints against members and administers a disciplinary process through the ICCRC's Discipline Committee (the "Committee"), which is composed of a three-member panel, at least one of whom must be a public member.

In December 2015, the applicant was the subject of a complaint to the ICCRC and the matter was referred to the Committee. One of the objections raised by the applicant was with respect to the composition of the panel on the basis that one of its members was not a member of the ICCRC, contrary to section 158 of the CNCA. Section 158 provides as follows:

> The articles or by-laws may provide that the directors, the members or any committee of directors or members of a corporation have power to discipline a

> member or to terminate their membership. If the articles or by-laws provide for such a power, they shall set out the circumstances and the manner in which that power may be exercised.

The Committee found that, although a narrow interpretation of section 158 was possible, a contextual interpretation of the CNCA would suggest that this section was not intended to exhaustively limit a corporation's ability to make by-laws to create a discipline committee composed of only directors or members. The Committee reasoned that the language of section 158 was different from that of section 194(1) of the CNCA, which requires a specific composition "of not less than three directors, a majority of whom are not officers or employees" for an audit committee. The Committee also relied on section 152 of the CNCA, which provides that directors have a broad power to regulate the "activities or affairs" of the corporation through by-laws. As such, the Committee concluded that section 158 was intended to confirm that corporations incorporated under the CNCA have the authority to discipline members and was not intended to circumscribe the manner in which a corporation might choose to exercise that authority.

After canvassing similar provisions in provincial corporate statutes and finding no other authoritative sources with respect to the intended meaning of section 158, including no other reported decisions dealing with these provisions, the Federal Court agreed with the Committee's broader interpretation as being consistent with the CNCA as a whole. Further, the Federal Court agreed with the panel that if Parliament had intended to limit the power to discipline members or circumscribe the class of persons who may exercise this power it would have done so expressly.

The Federal Court concluded that "[t]he reference to directors, members or committees of directors or members in section 158 of the [CNCA] doubtless reflects the fact that for most bodies incorporated under this Act, there would be no reason for anyone else to be involved in disciplining members. Of course, the articles or by-laws of a corporation that provide for a discipline power could limit its exercise to directors, members or committees of members or directors. However, section 158 of the [CNCA] does not require the corporation to limit the class of those who may exercise this power in this way. As long as a corporation that chooses to adopt articles or by-laws providing for a power to discipline members sets out in those by-laws 'the circumstances and the manner in which that power may be exercised,' section 158 of the [CNCA] is complied with."

Alberta Appeal Court Upholds Decision Denying Third Party Standing to Bring Court Application

By Esther S.J. Oh

In a decision released on September 16, 2019, the Court of Appeal of Alberta dismissed an appeal by the Chinese Benevolent Association of Edmonton ("Association") in *Chinese Benevolent Association of Edmonton v Chinatown Multilevel Care Foundation* ("*Chinese Benevolent*"). In this case, the court dealt with an appeal of a lower court decision in which the Association and various individual appellants (the "Appellants") had sought an order declaring that by-laws adopted in 2009 ("2009 By-laws") by the Chinatown Multilevel Care Foundation ("Foundation") were invalid, a determination of who the members of the Foundation were, and a court order on other corporate matters, as discussed in the January 2018 *Charity & NFP Law Update*.

By way of background, the Foundation was incorporated under the Alberta *Societies Act* in 1985 and registered by-laws at that time ("1985 By-laws"). The 2009 By-laws limited the maximum number of members to ten and limited the term of office for directors. At the trial level, the chambers judge found that only two of the individual applicants, Mr. Gee and Ms. Hung, had standing to bring the application, given their status as members of the Foundation (none of the other individual applicants were members or directors of the Foundation nor had any material interest in the Foundation), since the Association and the Foundation were independent corporations. Further, the chambers judge held that the relief sought was remedial and was barred under the *Limitations Act*. Finally, the chambers judge found that the 2009 By-laws had been properly enacted.

On appeal, the court considered whether the chambers judge erred in finding that only Mr. Gee and Ms. Hung had standing to bring the application. The remaining Appellants had argued that they had standing because they had conducted fundraising and volunteer efforts for the Foundation, and the remaining Appellants requested the court to exercise its "inherent jurisdiction to direct and control the administration of charities." The court took the position that its inherent power was limited to "where charitable trusts are not being properly administered, where funds are being mismanaged or where the trustees of the funds are breaching their fiduciary obligations," which did not apply in this case.

Further, the remaining Appellants relied on *Ontario (Public Guardian & Trustee) v AIDS Society for Children (Ontario)* ("*AIDS Society*") and argued that there was a fiduciary relationship between the

Foundation and the public, which allowed them as interested parties to enforce the Foundation's own governance rules against it. However, the court indicated that the *AIDS Society* case involved a clear breach of the society's fiduciary obligations through the "misapplication of charitable funds or failure to follow charitable objects." In the *Chinese Benevolent* case, the court found no such breach. Further, the court indicated that the *AIDS Society* case was brought by the Ontario Public Guardian and Trustee under the Ontario *Charities Accounting Act*, which provides statutory remedies that were not included in the Alberta *Societies Act*.

In finding that the only Appellants who had standing were Mr. Gee and Ms. Hung, the court also relied on *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta* ("*Sandhu*"), discussed in the March 2015 *Charity Law Update*, and held that the Association did not have a material interest in the Foundation. In both the *Sandhu* case and the *Chinese Benevolent* case, the court found the non-member appellants had "no civil or property interest, contractual or otherwise, at issue on the application," and that they therefore had no standing.

This decision is a reminder that anyone, including corporations, directors and members, objecting to the validity of a charity or not-for-profit's by-laws will need to take into consideration whether they have proper standing to do so, and that mere involvement with the organization, such as volunteering or fundraising for it, will not likely be sufficient to grant standing. In addition, where anyone wishes to raise objections regarding the by-laws, this should be done in a timely fashion to ensure that the objections are not statute-barred.

British Columbia Court Reinstates Membership in Procedural Fairness Case

By Jacqueline M. Demczur

The Supreme Court of British Columbia released its decision in *Brun v Deep Cove Yacht & Sport Club* on August 22, 2019 concerning the termination of the membership of the appellant, Robert Brun, at the Deep Cove Yacht & Sport Club (the "Club"), a non-profit recreational association incorporated under the British Columbia *Societies Act*. Numerous invoices had been sent to Mr. Brun over the course of 2017 for mooring fees, which were not immediately paid. As a result, various emails and letters for overdue accounts were sent to Mr. Brun before he eventually paid his fees, sometimes more than 90 days late.

The Club's by-laws provide that "[e]very member must uphold the Constitution and comply with these By-laws and the Policies and Regulations as approved by the Executive Committee, including the prompt payment of dues, moorage assessment and other member accounts." Section 2.9 of the by-laws contains provisions for member expulsion "for cause", and contains general terms for the process, including members' appeal rights. Additionally, the Club's policies indicate that membership may be terminated where membership dues are 90 days in arrears. However, they do not specify a termination procedure.

As a result of Mr. Brun's overdue accounts, on November 14, 2017, the Club's Executive Committee had decided to terminate Mr. Brun's membership. At a December 12, 2017 Executive Committee meeting, a motion was brought and passed to send Mr. Brun an expulsion letter for non-payment. He was advised that he could write to the Commodore if he wished to appeal his expulsion. Mr. Brun did so, and attended an Executive Committee meeting on January 9, 2018 where he explained that cash flow problems had prevented him from paying his fees on time. The Executive Committee put forward a motion to consider upholding its November 2017 decision to expel Mr. Brun, and a majority voted not to overturn that decision. Mr. Brun was then given a final avenue of recourse, which was to have an active member provide a petition for his reinstatement. However, he instead brought the matter to court.

The court reviewed sections 102 and 105 of the British Columbia *Societies Act*, which contain provisions respectively concerning member complaints and giving the court jurisdiction to address errors and irregularities in the conduct of societies' affairs. Having considered the sections and relevant case law, the court stated that:

> Even where a society fails to comply with its by-laws and does not extend procedural fairness to a member whose expulsion is being voted upon, the court will not necessarily grant an order requiring reinstatement or reconsideration of the decision. Such remedies may be refused where they may be futile, *i.e.*, reconsideration would lead to the same result, or where the practical effect of reinstatement would significantly challenge the continued operation of the club.

The court also reviewed the Club's by-laws and policies and found that it did not contain any procedure for expulsion. Given that the policy was "designed only to complement the [by-laws]", the court held that the expulsion should have been conducted pursuant to section 2.9 of the by-laws. Given that the Club did not follow the procedures in section 2.9 of the by-laws, the court found that Mr. Brun had been denied procedural fairness and ruled in favour of Mr. Brun.

The court noted that there would be practical obstacles arising from Mr. Brun's reinstatement as a member, due to the docks having been given to other members since Mr. Brun's expulsion. Despite the Club's argument that Mr. Brun's reinstatement would be impractical, the court noted that these obstacles were "not insurmountable," and provided a remedy that preserved Mr. Brun's membership rights and his entitlement to two docks without challenging the Club's operation or prejudicing innocent third parties' interests. It further required Mr. Brun to pay his fees on time.

Despite the court's discretion under the British Columbia *Societies Act* to refuse remedies where a charity or not-for-profit has not complied with its by-laws, this case is a reminder that such measures will only be utilized in limited situations where providing such remedies is impractical. Organizations should, therefore, comply with their by-laws, policies and other governance documents, particularly in contentious matters, such as member expulsion, and should ensure procedural fairness in all such cases.

Legalization and Sale of Cannabis Edibles and Workplace Impairment Issues

By Barry W. Kwasniewski

As was referenced in the *Charity & NFP Law Bulletin* No. 431, federal Bill C-45, the *Cannabis Act* received Royal Assent on June 21, 2018, legalizing the use of recreational cannabis in Canada. Following this, the final *Regulations Amending the Cannabis Regulations (New Classes of Cannabis)* ("Regulations") were published in the *Canada Gazette* on June 26, 2019. The Regulations, in addressing the public health and public safety risks, will come into force on October 17, 2019 and legalize the sale of "edible cannabis, cannabis extracts, and cannabis topicals" (collectively, "cannabis edibles") in Canada. While initially limited in supply, Health Canada has stated that these products are anticipated to be made available for sale by mid-December 2019.

Once available, employers may potentially face the challenge of employees using cannabis edibles at work and thereby having to manage workplace impairment issues. While there are restrictions on the smoking and vaping of cannabis in enclosed workplaces in Ontario, no such restriction exists for the ingestion of cannabis edibles in the workplace at either the federal or provincial levels. Regardless, employers have the right and obligation to set rules and workplace policies to ensure the health and safety of employees in their workplaces, such as under Ontario's *Occupational Health and Safety Act*.

Some examples of strategies to avoid employee workplace impairment may include setting up and implementing hazard prevention programs that prohibit the consumption of cannabis edibles in the workplace, or restriction on attending work impaired due to the consumption of cannabis edibles. Any existing policies requiring employees showing "fit" to work or relating to drug or alcohol use, should also be updated to include a new category for recreational cannabis, including consumption of cannabis edibles.

Unlike some other substances, cannabis edibles may take a longer time to take effect after consumption, and may have longer-lasting and unanticipated effects for the consumer. As such, both employers and employees need to be mindful of these potential effects, which may cause workplace impairment. Further, self-assessing impairment as both a consumer of cannabis edibles and for an employer is also harder than for other substances, creating further challenges.

The legalization and sale of recreational cannabis edibles will bring novel and challenging issues for employers to monitor employee conduct in the workplace. Charities and not-for-profits need to be aware of these challenges and take proactive measures in avoiding potential issues.

New Model Crowdfunding Legislation from the Uniform Law Conference of Canada

By Terrance S. Carter

The Uniform Law Conference of Canada (the "ULCC"), a conference that brings together appointees from all the governments of Canada, academics, members of the bench and bar, as well as representatives from law reform commissions or similar bodies, for the purpose of promoting uniformity of legislation among the provinces, has released a Consultation Paper with regard to a proposed *Uniform Informal Public Appeals and Crowdfunding Act* (the "Proposed Uniform Act").

The Proposed Uniform Act revises the *Uniform Informal Public Appeals Act*, which was released by the ULCC in 2011 and was recommended for adoption in all provinces and territories. For information on the *Uniform Informal Public Appeals Act*, which was adopted in Saskatchewan and implemented in the Internet crowdfunding campaign involving the Humboldt Broncos incident in 2018, see the October 2018 *Charity and NFP Law Update.*

The ULCC is seeking feedback from interested persons and organizations with regard to the Proposed Uniform Act until January 15, 2020.

Distinctiveness of Trademarks

By Sepal Bonni

As was recently reported in the June 2019 *Charity & NFP Law Update* and August 2019 *Charity & NFP Law Update*, significant amendments to the *Trademarks Act* came into force on June 17, 2019. One significant change is that applications will be examined for inherent distinctiveness.

"Distinctiveness" is defined in section 2 of the Act as "a trademark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or that is adapted so to distinguish them." Trademarks can be either inherently distinctive or acquire distinctiveness through long-standing use. The inherent distinctiveness of a mark can fall within a range from no inherent distinctiveness to high inherent distinctiveness and directly impacts the scope of protection afforded to the trademark. If nothing about a trademark refers the consumer to a multitude of sources when assessed in relation to the associated goods or services, then the trademark is said to have some inherent distinctiveness. On the other hand, where a trademark may refer to many sources, it is considered to have no inherent distinctiveness. As mentioned above, if a trademark does not have inherent distinctiveness, it may still acquire distinctiveness through continuous, long-standing use. To establish this acquired distinctiveness, it must be shown that the public associates that trademark as originating from one particular source.

The Canadian Intellectual Property Office's Trademarks Examination Manual provides a non-exhaustive list of examples of trademarks that would, generally speaking, be considered to have no inherent distinctiveness. Amongst other things, these include trademarks which are primarily geographic locations, consist of a generic design common in the trade, are names of colours in association with goods that would typically be that colour, are one or two letter marks or number marks commonly used in a specific field, consist of words or phrases that are clearly descriptive of the associated goods or services in both English and French, or are laudatory words and phrases.

If "the Registrar's preliminary view is that the trademark is not inherently distinctive," and the objection is not overcome by way of legal argument, the applicant may be required to submit evidence that the trademark is distinctive throughout Canada in association with the applied for goods and services. If sufficient evidence is filed and the Registrar determines that the trademark is distinctive, the registration that accrues from the application may be restricted to the goods or services with which the mark has been

shown to be distinctive, and to the geographic areas in Canada where the trademark has acquired distinctiveness. If the examiner is not convinced on the evidence that the trademark is distinctive, the application may be refused.

Given that this change will make it more difficult to register non-distinctive trademarks, it is important for charities and not-for-profits to work closely with their trademark counsel when filing an application to consider appropriate filing strategies that take into account the new distinctiveness requirement at examination. Careful consideration at an early stage will avoid objections, as well as unnecessary delays and costs that may be incurred from having to prepare evidence of distinctiveness later on. It is also important to note that the distinctiveness of a trademark can be lost through improper assignments or licensing, or if the mark is allowed to become generic or a commonly used term in association with the goods or services. As a result, charities and not-for-profits should be careful to ensure that trademarks maintain their distinctiveness so that trademark rights are not lost.

Anti-Terrorism/Money Laundering Update

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

On September 9, 2019, President Donald Trump signed Executive Order 13886 ("EO 13886"), amending Executive Order 13224 ("EO 13224"), which had been signed by President George W. Bush on September 25, 2001 in the wake of the 9/11 attacks in the United States ("US"). Of note, EO 13886 allows the Secretary of the Treasury to prohibit or impose restrictions on the opening and maintenance in the US of correspondent accounts or payable-through accounts of any foreign financial institution that is determined to have knowingly conducted or facilitated a significant transaction on behalf of any person whose property and interests in property are blocked pursuant to EO 13886.

As such, foreign financial institutions with correspondent bank relationships in the US may need to implement additional due diligence mechanisms in order to prevent their property and interests in property in the US from being blocked. This will add to the issue of "de-risking", when financial institutions decide to terminate, rather than manage, accounts or transactions perceived as higher risk, resulting in reduced availability of traditional financial channels for charities and not-for-profits with operations in conflict and remote areas.

As was discussed in the June 2019 *Charity & NFP Law Update*, promoting financial access for charities and not-for-profits is an important policy objective in order to further their humanitarian and developmental efforts. The secondary sanctioning regime in the US as a result of EO 13886, however, may push financial institutions and their affiliates towards more de-risking by denying services to humanitarian organizations, and thereby hindering their efforts of providing aid and other peacebuilding activities. As well, given the breadth of EO 13886, Canadian charities and not-for-profits working with US counterparts will need to be diligent to make sure that they are not caught by the expanded scope of the US regime, especially in light of the ever burgeoning information sharing regime between countries.

Chambers and Partners Rankings 2020

Carters has been ranked as one of only six Canadian law firms under Charities/Non-profits law by **Chambers and Partners**, an international lawyer ranking service. In addition, Terrance S. Carter and Theresa L.M. Man have been ranked, reviewed and listed on the Chambers and Partners website.

Branding and Copyright for Charities and Non-Profit Organizations, 3rd Edition

Terrance S. Carter and co-author, U. Shen Goh, have just published the 3rd edition of their book, **Branding and Copyright for Charities and Non-Profit Organizations** (LexisNexis Canada, 2019). The book, written specifically for charities and non-profit organizations, explains why branding and copyright are just as important in the not-for-profit sector as in the commercial world and provides practical guidance on what organizations can do to protect and defend these trademark and copyright assets.

IN THE PRESS

Charity & NFP Law Update – August 2019 (Carters Professional Corporation) was featured on Taxnet Pro™ and is available online to those who have OnePass subscription privileges.

Senate Report on Charitable Sector: Building Strength written by Terrance S. Carter and Theresa L.M. Man was featured in The Lawyer's Daily. **Part I** appeared on September 6, 2019, and **Part II** appeared on September 12, 2019.

RECENT EVENTS AND PRESENTATIONS

Terrance S. Carter participated in a panel discussion for the Ontario Nonprofit Network's webinar on **Election Rules**, which was held on September 18, 2019.

UPCOMING EVENTS AND PRESENTATIONS

Christian Legal Fellowship National Conference is being held from Thursday, September 26 to Sunday, September 29, 2019. Terrance S. Carter will be presenting on the topic of Essential Charity Law Update on September 27, 2019.

ATRI 32nd Annual Conference (Association of Treasurers of Religious Institutes) is being held in Calgary, Alberta. Terrance S. Carter will be presenting on the topic of Legal Challenges and Options for Boards in Transition on September 29, 2019.

The Orangeville & Area SBEC is hosting a session on Succession Planning on October 9, 2019, at which Nancy E. Claridge will be presenting.

Volunteer Ottawa is hosting a session on October 16, 2019, at which the following topics will be covered:

- Essential Privacy Issues for Charities & Not-for-Profits by Esther Shainblum, and
- Duties and Liabilities of Directors and Officers of Charities and NFPs by Terrance S. Carter

Estate Planners Council of London is hosting an evening session on October 21, 2019, entitled Investment Challenges and Opportunities for Charities Including Donor Advised Funds presented by Terrance S. Carter in London, Ontario.

The **26th Annual Church & Charity Law Seminar™** will be held on **Thursday, November 7, 2019**, hosted by Carters Professional Corporation in Greater Toronto, Ontario. Details, brochure and registration are available online.

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