

CHARITIES/NOT-FOR-PROFIT LAW

RECENT DEVELOPMENTS OF IMPORTANCE

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During 2008, there have been a number of important developments which affect the operations and activities of charities both within Canada and abroad.

This summary reviews several of the more significant developments which include changes to the *Income Tax Act (ITA)*, policies and publications made by the Charities Directorate of the Canada Revenue Agency (CRA), federal and provincial legislative developments affecting charities and a brief review of some of the more significant court decisions.

RECENT CHANGES, RULINGS AND INTERPRETATIONS UNDER THE *INCOME TAX ACT*

2008 Federal Budget

The Federal Budget released February 26, 2008 (Budget 2008) introduced a number of technical changes. These changes were implemented by the enactment of Bill C-50, which received Royal Assent on June 18, 2008. Prior to the enactment of Bill C-50, the capital gains exemption applied to donations of publicly traded securities to registered charities. Bill C-50 extends the exemption to certain types of securities that, while they are not publicly traded, are exchangeable to securities that are publicly listed so long as they are donated to a registered charity within 30 days of the exchange. Some limits apply when the security is a partnership interest. Bill C-50 also provides a tax incentive for corporations that make donations of securities to qualifying recipients in developing countries.

Rules were introduced in 2007 to extend the exemption for donations of publicly traded securities to private foundations. At the same time the excess business holdings rules were introduced with the intent of limiting the potential for individuals to use their own shareholding and those of a private foundation to which they are connected for their own benefit.

Budget 2008 introduced certain amendments to these rules but these were not contained in Bill C-50. Instead draft proposals were motioned and a Notice of Ways and Means Motion was tabled November 28, 2008. As Parliament was prorogued on December 4, 2008, a new motion will have to be introduced in 2009 when Parliament is in session again.

Bill C-10

Bill C-10 has had a long history. Some of the changes proposed by this bill involve the strict reporting rules intended to prevent abusive tax shelter arrangements and changing of the test for charity organizations and public foundations from a "contribution test" to a "control test". Despite amendments and revisions in 2002, 2003, 2004, 2005, 2006 and 2007, the Bill died on September 7, 2008 as a result of the dissolution of Parliament.

CRA Rulings on Flow-Through Shares

In a number of recent rulings,¹ the CRA has confirmed that a donation of flow through shares is a gift for the purposes of the *ITA*. These rules also confirm that the Canadian exploration expenses and investment tax credit flowing to the donor through the flow-through share financing before a gift was made does not constitute an advantage under the split registering rules.

Generally, such gifting arrangements involve the donation of shares of a research company to a charity, which enters into a contract with a liquidity provider to sell the flow-through shares immediately after the transfer and prior to the completion of any hold provisions that might otherwise apply. The charity also pays a percentage fee to the corporation which puts the transaction together based on the gross selling price of the sold shares. Not unexpectedly, CRA did not make any rulings with respect to fair market value and in fact indicated that a charity must satisfy itself that the amount reported on the donation receipt reflected the fair market value of the proposed donation to the charity and that the sale price received by the charity from the sale of the units to the liquidity provider may not be representative of the fair market value of the units at the time they were donated. It seems that there is nothing problematic about gifts of flow-through shares. However caution must be exercised by charities considering such gifts.

In the current economic climate, it is likely that there will not be many gifts of flow-through shares, given the lack of liquidity providers.

NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY

Proposed Guidelines for Research as a Charitable Activity²

On January 9, 2008, CRA published the draft policy *Consultation on Proposed Guidelines for Research as a Charitable Activity*³ ("Proposed Guidelines"). CRA sets out its policy in the Proposed Guidelines pertaining to "the legal and administrative requirements a registered charity is expected to fulfill in order to conduct or fund research as a charitable activity." CRA generally defines research, in the charitable sense, as "the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge." CRA also states that "to be considered charitable, the research must be disseminated and made freely available to others who might want access to it."⁴ The Proposed Guidelines apply to charitable organizations with a charitable purpose, as set out in their governing documents, to conduct or fund research in a particular field. In addition, the Proposed Guidelines also apply to charitable organizations that

have some other charitable purpose, such as organizations of a hospital or a school, and carry out research as a way of furthering or achieving that purpose.⁵ It is not clear at this time when the final guidelines will be issued.

New CRA Guide on Charitable Work and Ethnocultural Groups⁶

On January 29, 2008, CRA released a new guide to help ethnocultural organizations that want to apply for charitable status. The purpose of the guide, entitled *Charitable Work and Ethnocultural Groups – Information on registering as a charity*⁷ (the “Guide”), is to “put important general information together in one place.” The Guide is intended to complement the more detailed information contained in CRA’s Policy Statement CPS-023, *Applicants Assisting Ethnocultural Communities*.⁸

The Guide discusses the role of the Charities Directorate, the steps involved in applying for charitable status, and the requirements an organization must meet in order to qualify as “charitable.” The Guide reiterates much of what is discussed in Policy Statement CPS-023, such as the definition of “Ethnocultural”, the Public Benefit test, and examples of ethnocultural group activities that could qualify as charitable under each of the four heads of charity. Many of the examples provided by the Guide under each heading are already listed in Policy Statement CPS-023. However, the Guide does provide some further guidance on the “advancement of religion” head of charity. It should be noted that, although the Guide states that it is written specifically to assist ethnocultural groups, its contents provide general guidance that will be of assistance to all charities.

New CRA Consultation and Proposed Policy on Fundraising⁹

On March 31, 2008, CRA released a consultation paper regarding the preparation of a proposed policy on fundraising by registered charities (“Proposed Policy”). The stated objective of the Proposed Policy is to replace the previous CRA policy statement “Applicants that are Established to Hold Periodic Fundraisers” and to provide all registered charities with information pertinent to the use of resources for fundraising and the limits imposed by law. Specifically, the Proposed Policy aims to assist charities by explaining how to distinguish between fundraising and other expenditures, clarifying how to classify and report activities intended to both raise funds and advance charitable programming, explaining when fundraising activities may preclude registration or result in revocation of registration, and explaining what factors are considered by CRA when assessing whether the fundraising undertaken puts a charity’s registration status at risk.

Following the release of the Proposed Policy on fundraising on March 31, 2008 CRA released a 30-page background information document on June 26, 2008 providing a detailed explanation of various terms and concepts contained in the Proposed Policy. On December 10, 2008, CRA announced that it expects to have the final version of the revised document up on its website early in 2009.¹⁰

New CRA Policies on the Promotion of Volunteerism¹¹

CRA has released a number of new policies which indicate that organizations established to promote volunteerism in the community-at-large through broad-based activities can qualify for charitable registration. CRA’s policy position on this issue is set out in the Summary Policy on Volunteerism (CSP-V02)¹² dated May 6, 2008, as well as the Policy Statement entitled “Promotion of

Volunteerism” (CPS-025) effective May 1, 2008 (the “Policy”).¹³

In articulating its position on the promotion of volunteerism, CRA indicated that the promotion of volunteerism is analogous to other charitable purposes recognized by legal authorities in the United Kingdom, such as the charitable purpose to foster good citizenship. The promotion of industry, commerce, agriculture, horticulture and craftsmanship have been held to be charitable where the organization’s mandate was directed to providing a benefit to the general public by enhancing the activity in question, such as providing for greater efficiency and higher standards. CRA notes that given the scope of the voluntary sector as the third major sector of activity in Canada, in addition to the public and private sectors, promoting volunteerism could arguably be compared to promoting industry, trade and commerce for the benefit of the community-at-large.

The Policy also emphasizes the importance of volunteerism in Canadian society. In addition, CRA indicates that its position on volunteerism in the Policy is consistent with an international trend being followed by national governments and governmental organizations in recognizing the importance of volunteerism.

Final CRA Policy Statement on Umbrella and Title Holding Organizations¹⁴

On May 6, 2008, CRA released a new policy statement entitled “Guidelines for the Registration of Umbrella Organizations and Title Holding Organizations”¹⁵ (“Guidelines”). The Guidelines replace CRA’s earlier policy statements on similar issues, namely CPS-008¹⁶ and CPS-009,¹⁷ in their entirety. The Guidelines are intended to clarify certain portions of subsection 149.1(1) of the *ITA*,¹⁸ which sets out the basic framework for the registration of an organization as a charity. Specifically, CRA identifies the following part of this subsection as being most relevant in relation to the Guidelines:

...“charitable” organization means an organization, whether or not incorporated, (a) all of the resources of which are devoted to charitable activities carried on by the organization itself.”¹⁹

Generally, in order to be registered as a charity under this subsection of the *ITA* an organization must show that its activities are charitable in the sense understood by law and that those said activities are carried on by the organization itself. However, CRA makes clear that “an organization does not have to work directly with individual charitable beneficiaries in order to be considered to be advancing a charitable purpose.”²⁰ Rather, it is indicated that CRA “accepts that Umbrella Organizations can advance a charitable purpose by directing their activities at improving and enhancing the charitable activities of other generally community-level organizations.”²¹ The activities being carried out by umbrella organizations are viewed by CRA as being “charitable in so far as [they] contribute to an improvement in the quality of service to the public, as well as increasing the level of service available to the public.”²² CRA does make it clear that, while the Guidelines anticipate that arrangements will be established whereby a registered charity may work with and through non-charitable entities, registered charities are still prohibited from making gifts of their charitable property to non-qualified donees, as well as operating or using their resources for the private benefit of non-qualified donees.²³

New CRA Draft Policy on Sports and Charitable Registration

On May 15, 2008, the Charities Directorate released a draft consultation paper on proposed guidelines for sport and charitable registration under the *ITA* ("Draft Policy"). This Draft Policy states that it is intended to clarify the ways in which organizations carrying on activities that include sport can potentially qualify for charitable registration and follows on the heels of the decision of the 2007 Supreme Court of Canada in the *Amateur Youth Soccer Association v. Canada* case ("A.Y.S.A.").²⁴ The A.Y.S.A. case reaffirmed the long standing principle that promotion of sports is not a charitable purpose,²⁵ and was the first case to stand for the proposition that a gift which encourages sports is not charitable.

The Draft Policy confirms that an organization whose purpose is to promote one or more sports for their own sake cannot be registered as a charity. Thus groups such as minor hockey leagues or amateur soccer clubs are not eligible for this reason. However, the Draft Policy goes on to identify two ways in which an entity involved in sports activity may be registered as a charity. One is if the sports activities relate to and support the wholly charitable purposes of the charity and be a reasonable way to achieve them and the second is if the sports activities are incidental in nature. Incidental means that only a small portion of the total resources of the organization (including personnel, funds and property) are devoted to the sport activity in question. At this time the Draft Policy has not been finalized.

The Canada Revenue Agency Introduces a New Registered Charity Information Return for Fiscal Periods Ending On or After January 1, 2009²⁶

CRA's new Registered Charity Information Return package, which includes Form T3010B (09), Registered Charity Information Return, Form T1235 (09), Directors/Trustees and Like Officials Worksheet, and Form T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations, is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009, only. For fiscal periods ending on or before December 31, 2008, registered charities must continue to use Form T3010A (05), with accompanying Forms T1235 and T1236. Returns filed on the wrong form will be returned with requests to file on the right form. The Registered Charity Information Return is now comprised of a simple core form with topic-related schedules. CRA anticipates that the new form will reduce the filing burden for smaller charities. It will also provide the public with more meaningful information about registered charities, allowing them to make better informed donor decisions.

New Position by CRA on the Value of a Donated Life Insurance Policy²⁷

CRA's Interpretation Bulletin, IT-244R3 – *Gifts by Individuals of Life Insurance Policies as Gifts*²⁸ ("IT-244R3"), sets out CRA's previous policy and interpretation of the *ITA* as it relates to gifts by an individual of a life insurance policy to a registered charity or other qualified donee. Paragraph three of IT-244R3 provides that the amount of the gift is equal to the value of the policy (the cash surrender value of the policy less any outstanding policy loans) and any accumulated dividends and interest. This valuation method has always been inconsistent with the factors listed in an Income Tax Information Circular, IC89-3 – *Policy Statement on Business Equity Valuations*,²⁹ to be considered in valuing a life insurance policy.

CRA Technical Interpretation (#2008-026709)³⁰ issued on February 25, 2008 indicates that the following factors should now be considered when determining the fair market value of a gift of life insurance: the health and life expectancy of the insured; any conversion privileges; the replacement value; and any other important policy terms. It is important that this new position be taken into account in the context of paragraph three of IT-244R3 when determining the eligible amount of a gift.

SIGNIFICANT CRA REVOCATIONS INVOLVING TAX SHELTERS

The past year has seen a spate of revocations of charities involved in tax shelter arrangements and the CRA has sent a clear message that it "is reviewing all tax shelter donations arrangements (for example schemes that typically promise donors tax receipts worth more than the actual value of the donation) and it plans to audit every participating charity, promoter and investor". Charities that are being scrutinized include not only those charities that receive donations from those shelter programs but also those that received tax shelter gifts and those that received such gifts from other charities. In addition, such charities face class actions from donors seeking compensation for costs of reassessment by CRA, as well as funds paid into the tax shelter scheme (Banyan Trust Give Programme).

A number of charities that have been deregistered include the following: Francis Jude Wilson Foundation, Canadian Amateur Football Association, International Charity Association Network, The Banyan Tree Foundation, Choson Kallah Fund of Toronto, Pinnacle Foundation and Fondation des Arts H.B. Ltée/H.B. Arts Foundation Ltd.

The message sent by this spate of deregistrations is clear. Any charity considering receipt of large volume gifts should exercise extreme caution and seek legal advice.

OTHER FEDERAL AND PROVINCIAL LEGISLATION AFFECTING CHARITIES

First Charge Laid under Canada's Anti-Terrorism Financing Regime³¹

On March 14, 2008, the first person in Canada to be charged under Canada's anti-terrorism financing laws was arrested in New Westminster, British Columbia. The accused, a Toronto area resident, has been charged with committing an offence under section 83.03(b) of the *Criminal Code*,³² the section that makes it an offence to provide, or make available property or services for terrorist purposes. It is alleged that the accused solicited donations in British Columbia for the World Tamil Movement (WTM), a humanitarian organization, which the police claim is the leading Liberation Tigers of Tamil Eelam ("LTTE") front organization in Canada.

The Canadian government in 2006 designated the LTTE as a 'listed entity' under the amendments to the *Criminal Code* brought about by the *Anti-Terrorism Act* in late 2001. This case represents the first time formal charges have been laid under Canada's sweeping and controversial anti-terrorism financing regime. This case will merit careful attention from charities and not-for-profits, as it highlights the need to take seriously the impact of anti-terrorism financing laws on fundraising and operational procedures.

First Canadian Non-Profit Added to Terrorism List³³

A growing aspect of the federal government's anti-terrorism initiative is the designation of organizations to a list established under the terrorism provisions of the *Criminal Code*. Until now, the entities on this list have primarily included widely-recognized foreign organizations, such as Hezbollah and Al-Qaeda. However, for the first time since the list was established in 2002, a Canadian non-profit organization, the World Tamil Movement, has been added to the list of over 40 entities deemed to have facilitated or been associated with terrorist activities. Both not-for-profit organizations and registered charities, therefore, should take note of the federal government and its regulatory agencies' increasing scrutiny of fundraising activities and their willingness to utilize the considerable enforcement powers afforded to them by Canada's extensive anti-terrorism legislation.

Do-Not-Call List, Telemarketing Rules in Effect³⁴

On September 30, 2008, the Canadian Radio-television and Telecommunications Commission ("CRTC") launched Canada's National Do-Not-Call List ("National DNC List"), a nationwide registry to assist the public in reducing the number of unsolicited telemarketing calls. Registered charities are among a select list of organizations exempted from the National DNC Rules.³⁵ Despite this exemption, amendments made to the Unsolicited Telecommunications Rules in May 2008 mean that all telemarketers and clients of telemarketers, including those exclusively making unsolicited telecommunications that are exempt from the National DNC Rules, are required to register with, and provide information to the National DNC List operator (Bell Canada), pay applicable fees that may be charged by the Complaints Investigator, and maintain records on registration and payment. September 30, 2008, also marked the introduction of the new telemarketing rules that apply to all telemarketers, even those exempted under the National DNC Rules. Although the CRTC intended to delegate the investigation of complaints, it was unable to identify an appropriate third party and will now investigate complaints itself.³⁶

Introduction of Short-lived New Federal Legislation Governing Non-Share Capital Corporations (Bill C-4)³⁷

On December 3, 2008, and one day prior to Parliament being prorogued, Bill C-4, An Act respecting not-for-profit corporations and certain other corporations,³⁸ received first reading in the House of Commons of Canada before dying on the Order Paper. Bill C-4 was intended to replace Parts II and III of the current *Canada Corporations Act*,³⁹ a statute that was first enacted in 1917 and has not been substantively changed since that time, which Parts govern federal non-share capital corporations. This was the third attempt by the Federal Government to reform the *Canada Corporations Act*, with earlier Bills C-62 (2008)⁴⁰ introduced by the Conservatives and C-21 (2004)⁴¹ introduced by the Liberals, each dying on the Order Papers in the House of Commons when Parliament was dissolved for a general election. For the most part, the content of Bill C-4 was largely identical to what was contained in its predecessor, Bill C-62. However, there are a few differences including, but not limited to, clarification of section 154 which deals with the filing of by-laws with the Director of Industry Canada, several changes in relation to Special Act non-share capital corporations and several changes related to the implementation of bijuralism, i.e. the co-existence of two legal systems (English common law and French civil law) in the proposed legislation.

Lobbyist Registration Legislation: Impact on Ontario Charities and Non-Profit Organizations⁴²

Lobbyist registration legislation has been in place in Canada since the passage of federal lobbyist registration legislation some 20 years ago.⁴³ The *Lobbyist Registration Act* ("Federal LRA") was the first Canadian legislation to govern the conduct of lobbyists by requiring them to register and file reports to a lobbyist registry. Ontario was the first Canadian province to regulate lobbying activity and the *Lobbyist Registration Act*,⁴⁴ ("Ontario LRA") was enacted in 1998 with similar provisions and registration requirements to the Federal LRA. Many other provinces have since followed suit and enacted similar legislation.

The *Federal Accountability Act*⁴⁵ ("FAA") was enacted in December 2006 in an effort to improve the transparency of lobbying and the accountability of government decision-making.

The FAA both amended and renamed the Federal LRA and on July 2, 2008, the *Lobbying Act*⁴⁶ ("Federal LA") and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists.

RECENT CASE LAW AFFECTING CHARITIES**Supreme Court of Canada Releases Decision on CRA's Access to Donor Information**⁴⁷

The Supreme Court of Canada ("SCC") released its judgment on July 31, 2008 in *Redeemer Foundation v. Canada (Minister of National Revenue)*,⁴⁸ upholding the Federal Court of Appeal's ("FCA") decision by a four-three majority. The appellant Foundation, a registered charity, operated a forgivable loan program that financed the education of students at an affiliated college. CRA was concerned that some donations to the program were not valid charitable donations because the donors' contributions were made solely to finance the education of their own children. CRA requested the donor information, which the Foundation initially provided, but later refused in respect of subsequent taxation years. The Foundation applied for judicial review of the auditor's request for donor information on the basis that the auditor should have followed the process provided for in subsection 231.2(2) of the *ITA* requiring prior judicial authorization. The reviewing judge declared that the request was improper without prior judicial authorization and that the Minister of National Revenue ("Minister") should be prevented from acting upon the information originally provided to reassess the donors. CRA appealed and the FCA overturned the decision on the basis that there were other provisions in the *ITA* that authorized the auditor to make the request that he did and to use that information for the purposes of subsequent tax assessments.

The Foundation appealed to the SCC and the appeal was dismissed. The SCC held that the Minister was not required to obtain prior judicial authorization. The Minister was entitled to the donor information through the combined effects of paragraph 230(2)(a) and subsection 231(1) of the *ITA*. Moreover, the Minister requested that information for a legitimate purpose, which was to investigate the validity of the loan program operated by the Foundation.

Christian Horizons Decision⁴⁹

On April 28, 2008, the Ontario Human Rights Tribunal (HRTO) released its decision in the case of *Heintz v. Christian Horizons*⁵⁰ ("the Decision"). The respondent, Christian Horizons is a charity that required one of its employees (Ms. Heintz) to sign a Lifestyle and

Morality Statement, which (among other things) prohibited employees from engaging in homosexual relationships. Heintz identifies herself as a Christian who (during her employment with Christian Horizons) came to an understanding that she is also a lesbian.

Ms. Heintz eventually resigned from her position at Christian Horizons after an encounter with her supervisor who confronted her about her sexual orientation. Although she resigned, representatives of Christian Horizons admitted that she would have been terminated had she not done so. After her resignation, Ms. Heintz filed a human rights complaint with the HRTO.

Chief Commissioner Barbara Hall asserted what the Decision means for charities' compliance with the *Human Rights Code* (Ontario). She says, "[the case] sets out that when faith-based and other organizations move beyond serving the interests of their particular community to serving the general public, the rights of others, including employees, must be respected."⁵¹ Whether one agrees with her statements or not is open to debate; nevertheless, the Decision highlights the need for charities to consider the human rights implications of their actions and policies.

It should be noted that Christian Horizons has filed its Notice of Appeal, and as such, any comments on the lasting impact of the decision may be subject to change, depending on the outcome of that appeal.

CONCLUDING COMMENTS

2008 brought a number of significant changes to the area of charity law which will be of particular interest for charities, as well as for their legal counsel. The number of legislative changes, CRA policy initiatives and CRA rulings that have occurred during 2008, as well as the release of numerous significant decisions from the courts, underscore how complicated the law pertaining to charities has become in Canada. It is therefore important for those interested in the sector to keep abreast of developments in the law as they occur. ■

During the last 12 months, various lawyers at Carters Professional Corporation (Terrance S. Carter, Jane Burke-Robertson, Karen J. Cooper, Theresa L.M. Man, Jacqueline M. Demczur, Esther S.J. Oh, and Nancy E. Claridge) published numerous articles in Charity Law Bulletins and Charity Law Updates (available at www.charitylaw.ca), as well as The Lawyers Weekly, Charitable Thoughts (Ontario Bar Association), Canadian Fundraiser, The Bottom Line, International Journal of Civil Society Law, The Globe and Mail, Good Times Magazine, Bar-Ex News, The Ottawa Citizen, Linex Legal, and Inside Internal Control. Portions of these previous articles have been incorporated into this summary as a compilation, and as such, the authors would like to acknowledge these contributions by the other mentioned authors at Carters. The authors would also like to acknowledge Pamela Shin, articling student at Carters, for her assistance in the compilation and editing of this Charity Law Bulletin, as well as prior articling students Derek B. Mix-Ross and Kimberly A. LeBlanc, and Sean S. Carter, articling student at Fasken Martineau DuMoulin, for their assistance with the various excerpted articles.

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16. Canada Revenue Agency, Policy Statement, "Organizations Established to Assist Other Charities CPS-008" (12 January 1996).
17. Canada Revenue Agency, Policy Statement, "Holding of Property for Charities CPS – 009" (12 March 1996, Revised January 14, 2003).
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19. *Ibid.*
20. *Supra* note 15.
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23. These guidelines were first proposed by CRA in 2005 in the form of a consultation paper entitled "Consultation on Proposed Guidelines for the Registration of Umbrella Organization" For more information, see Terrance S. Carter and Jacqueline M. Connor, "New CRA Policy on Umbrella Organizations", in *Charity Law Bulletin No. 78* (October 12, 2005), online: <http://www.carters.ca/pub/bulletin/charity/2005/chylb78.pdf>
24. (2006) 267 D.L.R. (4th) 724 (F.C.A.)
25. *Re Nottage* (1895) 2 Ch. 649
26. All CRA forms and publications are available on the CRA's Web site at www.cra.gc.ca/tx/chrts/formspubs/menu-eng.html, or by calling 1-800-267-2384.
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30. Available only through commercial subscription or direct request to CRA.
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