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**Charity Law – The Year 2006 in Review
(Current as of December 22, 2006)**

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A. INTRODUCTION

The charitable sector in Canada has seen a number of important legislative, regulatory and common law developments during the last year which have significantly impacted how charities will operate both in Canada and abroad. The following article provides a brief summary of some of the more important of these developments, including recent changes under the *Income Tax Act* (“ITA”)¹, new policies and publications from the Charities Directorate of the Canada Revenue Agency (“CRA”)², select federal and provincial legislative issues affecting charities, as well as a selection of some of the more significant court decisions during the past year.³

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

1. Budget 2006: Elimination of Tax on Gifts of Public Company Shares⁴

In the 2006 Federal Budget released on May 2, 2006, the Conservative government upheld its commitment to remove the capital gains tax on publicly listed securities donated to charitable organizations and public foundations, as well as extending this measure to gifts of ecologically sensitive land, effective immediately. On June 22, 2006, Bill C-13, the *Budget Implementation Act, 2006*,⁵ implementing the provisions through the enactment of amendments to the ITA, received Royal Assent. For qualifying gifts made on or after May 2, 2006, donors will not be taxed on any of the capital gain accrued on the donated property and would receive the full

* During 2006, Terrance S. Carter and other lawyers at Carters Professional Corporation (Mervyn F. White, Karen J. Cooper, Theresa L.M. Man, U. Shen Goh, D. Ann Walters and Nancy E. Claridge) published numerous articles in *Charity Law Bulletin* (www.charitylaw.ca), as well as *The Lawyers Weekly*, *Charity Talk* (Canadian Bar Association), *Charitable Thoughts* (Ontario Bar Association), *The Philanthropist*, *Canadian Fundraiser*, *Gift Planning in Canada*, *The Bottom Line*, *Checkmark* and *International Journal of Civil Society Law*. Portions of some of those previous articles have been incorporated in this article. Terrance Carter acknowledges Paula J. Thomas, an articling student at Carters, for her assistance in the compilation and editing of this article, as well as Sean S. Carter for his assistance in articles related to anti-terrorism law.

¹ R.S.C. 1985, c. 1 (5th Supp.) as amended.

² Charities Directorate of Canada Revenue Agency, online: www.cra-arc.gc.ca/tax/charities.

³ Some important developments which occurred later in 2005 are also included in this article.

⁴ For more information, see Karen J. Cooper, “Budget 2006: Elimination of Capital Gains Tax on Certain Gifts” in *Charity Law Bulletin* No. 94 (May 30, 2006).

⁵ S.C. 2006, c. 4.

benefit of the donation tax credit on the donation, *i.e.*, the entire amount of the donation tax credit will be available to be used against other sources of income. For example, a donation of publicly traded shares or an ecological gift with an adjusted cost base of \$100 and a fair market value of \$1000 will result in no taxable capital gain. Therefore, the entire amount of the federal donation tax credit of \$262 will be available to be used against other sources of income. In effect, this means that the tax benefit arising from a gift of publicly traded securities or ecologically sensitive land would be the same as if it were a gift of cash.

From a practical perspective, donors should instruct their broker to transfer the shares intended to be gifted directly to an investment account which the charity would need to set up with its own broker, with the transfer of shares being carried out electronically where possible. For purposes of valuation, CRA will accept the closing bid price of the share on the date it is received or the mid-point between the high and the low trading prices for the day, whichever provides the best indicator of fair market value. Any gift acceptance policy that a charity might develop with respect to the receipt of publicly traded shares should deal with these issues, as well as consider under which circumstances the organization might refuse to accept such a gift, for example where the business or activities of the corporation conflict with the objects and values of the organization.

While the elimination of capital gains tax on publicly listed securities and gifts of ecologically sensitive land does not currently apply to gifts to private foundations at the time of writing, the government has indicated in the Budget that it is intending to extend the measure, but in the interim will be consulting with the sector to develop some self-dealing rules to safeguard against potential conflicts of interest.

2. Donations of Securities Acquired Through an Employee Stock Option Agreement

The Department of Finance released Explanatory Notes on June 15, 2006,⁶ related to the amendments arising from Bill C-13, the *Budget Implementation Act, 2006*.⁷ As a consequence of amendments relating to the elimination of taxable capital gains on donations of publicly listed shares and ecological gifts, paragraph 110(10)(d.01) of the ITA was also amended by Bill C-13

⁶ Department of Finance, online: www.fin.gc.ca/drleg/ITABud06_e.html.

⁷ *Supra* note 5.

to ensure that donations of securities acquired through an employee stock option agreement (or the donation of the proceeds of the disposition of such shares) received similar treatment. The effect of the amendment is to eliminate any tax on the employment benefit associated with the acquisition of securities under an employee stock option where the securities or proceeds of disposition are donated to a registered charity.

3. Federal Budget 2006: Provincial Harmonization

On August 3, 2006, the Ontario Ministry of Finance announced that it would introduce legislative measures to ensure that the provincial tax treatment of donations of publicly-traded shares and ecological gifts would parallel the federal measures announced in the 2006 Federal Budget, and that both would be exempt from the Corporate Minimum Tax.⁸ Similarly, the Québec government confirmed that it would ensure that measures are introduced to eliminate the provincial tax on capital gains resulting from gifts of publicly-traded shares and ecological gifts. In addition, as part of the 2006-2007 provincial budget, the Québec government extended similar capital gains treatment to gifts of musical instruments to educational institutions and added a new category of organizations authorized to issue provincial donations receipts: cultural or communications organizations.⁹

4. Bill C-33 - Proposed Amendments to the *Income Tax Act* Affecting Charities¹⁰

On November 9, 2006, the Department of Finance (“Department”) released the long-awaited Notice of Ways and Means Motion to move forward with a lengthy list of proposed amendments to the ITA. The motion was introduced as Bill C-33, and received its first reading in the House of Commons on November 22, 2006 as the *Income Tax Amendments Act, 2006*. The proposed changes were last released by the Department on July 18, 2005, which amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003 and February 27, 2004. A number of the proposed changes contained in Bill C-33 will substantially impact the operations of registered charities in Canada. Some of the most significant proposed changes involve the introduction of split-receipting rules and rules to curtail abusive donation tax shelter

⁸ Ontario Ministry of Finance, online: www.fin.gov.on.ca/english/tax/2006/infdonate.html.

⁹ Revenu Québec, online: www.revenu.gouv.qc.ca/eng/ministere/.

¹⁰ For more information, see Theresa L.M. Man and Terrance S. Carter, “Bill C-33 – Proposed Amendments to the Income Tax Act Affecting Charities” in *Charity Law Bulletin* No. 104 (December 7, 2006).

schemes. These changes are contained in subsections 248(30) to (41) of the ITA. Other proposed amendments include new definitions for charitable organizations and public foundations, rules affecting the revocation of charitable registrations, municipal or public bodies performing a function of government in Canada as new qualified donees, and new expanded disclosure of information concerning registered charities to the public. The provisions contained in Bill C-33 are, for the most part, the same as the amendments released in July 2005, with a few exceptions reviewed below.

Withdrawal of Reasonable Inquiry Requirement

One of the main differences between Bill C-33 and the July 2005 proposed amendments is that the previously proposed requirement in subsection 248(40) imposed a heavy onus on a charity to make inquiries of a donor who made a gift with an eligible amount in excess of \$5,000 on or after January 1, 2006. The charitable sector and its advisors were very concerned with the proposed statutory onus placed on charities when issuing receipts. In response to a submission made by the Government Relations Committee of the Canadian Association of Gift Planners, Len Farber of the Department of Finance in a letter dated November 22, 2005, advised that the Department “recognize[d] the difficulties that have been brought to light by this proposal” in placing an administrative burden on charities. Mr. Farber indicated that the Department was “prepared to recommend to the Minister of Finance that proposed subsection 248(40) be withdrawn.” As a result, the proposed reasonable inquiry requirement has been withdrawn from Bill C-33. Notwithstanding the withdrawal of this proposed onerous rule, charities are still required to exercise due diligence when issuing charitable donation receipts to ensure that the information on the receipts is accurate.

Inter-Charity Gifts

In place of the withdrawn reasonable inquiry requirement, the Department inserted a new provision in subsection 248(40) of the ITA to provide that subsection 248(30), which deals with the intention to give where there is an advantage to the donor, does not apply in respect of a gift received by a qualified donee from a registered charity. This proposed rule does not apply in respect of gifts made before November 9, 2006.

At common law, in order to qualify as a gift, property must be transferred voluntarily with an intention to make a gift. Where the transferor has received any form of consideration or benefit, it is generally *presumed* that such an intention is not present. Subsection 248(30) provides the transferor with an opportunity to rebut this presumption. Specifically, subsection 248(30) provides that the existence of an advantage in respect of a property transferred to a qualified donee (*e.g.*, a registered charity) does not "in and by itself" disqualify the transfer from being a gift under two situations, namely (a) where the amount of the advantage does not exceed 80% of the fair market value of the transferred property, and (b) where the transferor establishes to the satisfaction of the Minister of National Revenue (the "Minister") that the transfer was made with the intention to make a gift. Under the latter scenario, the Explanatory Notes indicate that the taxpayer would need to apply to the Minister for a determination of whether the transfer was made with the intention to make a gift.

By stating that subsection 248(30) does not apply to inter-charity gifts, this means that the common law rule would apply. The Explanatory Notes to Bill C-33 indicate that the application of the presumption rebuttal rule "is unnecessary in the context of inter-charity transfers and could lead to complications of the 'disbursement quota' calculation of a charity." By providing that the presumption rebuttal rule does not apply to inter-charity gifts, the explanatory notes further indicate that "the eligible amount of a gift under new subsection 248(31) should always equal its fair market value."

However, the practical implication and application of this provision is unclear. For example, it is not clear how this rule would apply in situations where the transferor charity of an inter-charity gift receives a benefit from the transferee charity, such as a gift of a property that is subject to a debt. In such a situation, it is not clear what would be the amount to be included in the disbursement quota calculation, *i.e.*, the fair market value of the property gifted, or the net value of the property after deducting the debt.

Non-Application of Deemed Fair Market Value

The proposed subsection 248(35) of the ITA introduces a new deeming provision to require the fair market value of the property that is the subject of a gift, for purposes of determining the eligible amount of the gift under subsection 248(31), be *deemed* to be the lesser of (i) the "fair

market value of the property otherwise determined," and (ii) the cost (or the adjusted cost base in the case of capital property) of the property to the donor immediately before the gift is made.

The proposed subsection 248(37) sets out a list of circumstances in which the deeming provision would not apply, including inventory, real property or an immovable situated in Canada, certified cultural property, publicly traded shares or ecological gifts. The deeming provision also does not apply to circumstances involving a shareholder transferring property to a controlled corporation in exchange for shares issued by the corporation, and then donating the shares to a charity, or having the corporation donate the shares to a charity. If subsections 85(1) or 85(2) of the ITA applied to the transfer of such an exempt property to the corporation, then subsection 248(37) would preclude the application of subsection 248(35) to that property if it were then donated by the corporation.

In addition to the above, a new exception is introduced in Bill C-33. In this regard, the proposed paragraph 248(37)(g) provides that "a property that was acquired in circumstances where subsection 70(6) or (9) or 73(1), (3) or (4) applied" would be exempt from the application of the deeming provision. The explanatory notes to Bill C-33 indicate that under those situations, the donor has acquired the property from a transferor (such as a spouse) on a tax-deferred rollover basis. Pursuant to paragraph 248(37)(g), unless the transferor acquired the property within the three-year period referred to in subsection 248(35) (or the 10-year period, where applicable), subsection 248(35) will not apply in these circumstances to deem the value of the gift to the donor's rollover cost or adjusted cost base.

5. Foundations Incurring Debts to Purchase Investments¹¹

In a Technical Interpretation dated October 21, 2005,¹² CRA reversed its position with respect to public and private foundations incurring debts for the purpose of acquiring investments, enabling both to now do so. Previously, CRA had always been of the view that the phrase "debts incurred in connection with the purchase and sale of investments" in paragraphs 149.1(3)(d) and 149.1(4)(d) of the ITA would only permit a miscellaneous type of debt, such as brokerage fees or other incidental amounts that could relate either to the purchase or the sale of investments. CRA

¹¹ For more information, see Theresa L.M. Man, "Foundations Incurring Debts to Purchase Investments" in *Charity Law Bulletin* No. 86 (February 7, 2006).

¹² CRA Technical Interpretation 2005-015475117, Debts Incurred By Charitable Foundations, October 21, 2005.

explained that the reason for the change in its policy was because “jurisprudence has confirmed that the phrase ‘in connection with’ has very broad meaning.” However, CRA indicated that debt arrangements would continue to be reviewed by CRA, especially those involving non arm’s length parties, in order to ensure that there are no other compliance issues, such as personal benefit.

6. Meaning of “Charitable Activities”

In a Technical Interpretation dated October 23, 2006,¹³ CRA considered the meaning of “charitable activities” for the purpose of providing guidance on the difference between expenditures on charitable activities and expenditures on management and administration when determining whether a registered charity has met its 80% disbursement quota. In cases where expenditures are partly attributable to charitable programs and partly to management and administration, it is necessary to allocate the expenditures between these two categories and the allocation should be made on a consistent and reasonable basis. For example, a charity has leased a building from an arm’s length landlord and the building has an office for a person that devotes 20% of his/her time to administration and 80% of his/her time to charitable activities. The office occupies 10% of the square footage of the building and the remaining 90% is used exclusively for charitable purposes. If the annual rent is \$10,000, the portion of the rent allocated to administration would be \$200 (20% of 10% of \$10,000). Heat and utilities would be allocated using the same formula. CRA recognized that in practice it is not always easy to draw the line between these two categories and indicated that it has undertaken to review the issue further.

7. Reward Points/Airline Tickets¹⁴

In a Technical Interpretation dated July 18, 2006,¹⁵ CRA reiterated its policy with respect to charitable donations of air travel points. Care must be taken to determine if the donation qualifies as a gift for the purposes of section 118.1 of the ITA, particularly with respect to whether the points may be transferred. A charity that receives premium points which qualify as

¹³ CRA Technical Interpretation 2006-0168601E5, Meaning of the term “charitable activities”, October 23, 2006.

¹⁴ For more information, see Karen J. Cooper, “Donations of Premium Points” in *Charity Law Bulletin* No. 99 (September 21, 2006).

¹⁵ CRA Technical Interpretation 2006-0193261E5, Reward Points/Airline Tickets, July 18, 2006.

a gift must include the value of the points in determining its income, and it may issue an official tax receipt for the gift. If a receipt is issued, the value of the premium points will be included in the calculation of the charity's disbursement quota. As long as the gift is used by the charity in connection with its charitable activities, there should be no other tax implications for the charity. It is not recommended that premium points be held for a long period of time because their value could possibly diminish or the points could expire, causing potential problems from a valuation perspective. It could also possibly expose the charity to the consequences of failing to devote its resources on charitable activities.

8. Split-Receipting

On August 2, 2006, with respect to the application of the proposed split-receipting legislation, CRA issued an advance income tax ruling involving the donation of a work of art to a museum which provided a loanback of the work to the donor for the remainder of his or her life.¹⁶ While CRA could not rule on the application of the proposed legislation, it provided an opinion to the effect that the advantage resulting from the loanback would not invalidate the gift. The eligible amount of the gift would be the certified fair market value of the work less the amount of the advantage accorded in respect of the loanback. As well, assuming the work qualified as cultural property within the meaning of the definition of "total cultural gifts" in subsection 118.1(1) of the ITA, proposed subsection 248(35) (new deemed fair market value rules) would not apply.

9. Parking – A Related Business

On October 25, 2006, CRA released an advance income tax ruling concluding that the operation of a parkade on a for-profit basis was a related business of a registered charity in the circumstances of the ruling request.¹⁷ The charity was an organization that provided a number of physical education facilities to schools and families. Because of its experience in the past with respect to running out of available low cost parking for its members, when it constructed its new facility it provided for additional parking below the building. It proposed to rent out some of that excess capacity in the short term, using a professional parkade management company. Based on the facts contained in the ruling, CRA concluded that the provision of a parkade of the size

¹⁶ CRA Technical Interpretation 2006-017039, don d'un bien et prêt à usage, August 2, 2006.

¹⁷ CRA Technical Interpretation 2005-0160481R3, Charitable Organization – Related Business, October 25, 2006.

proposed for use by members was integral to the furtherance of the charitable objects of the organization.

10. Charity Texas Hold'em Tournaments

On April 25, 2006, CRA released a Technical Interpretation¹⁸ in connection with subsections 248(31) and 248(32) of the ITA. CRA indicated that when determining the “eligible amount” of a gift for the purposes of an income tax receipt for a Texas Hold'em poker tournament, the amount of the “advantage” allocated to each participant will include the total prize money divided by the number of participants and an amount equal to what a participant would pay to play in a similar Texas Hold'em poker tournament that is not sponsored by a charity. However, charities should be aware that in many provincial jurisdictions, including Ontario, such tournaments may not be legal as they would not fall within the “charitable gaming” exception in the *Criminal Code*.¹⁹

11. Private Foundations Investing in Limited Partnerships

In an advance income tax ruling dated June 27, 2006,²⁰ CRA considered the issue of whether a private foundation would be considered to be carrying on a business by virtue of its foreign limited partnership such that the private foundation's registration could be revoked pursuant to paragraph 149.1(4)(a) of the ITA. CRA took the position that the foundation's registration could be revoked if it was established that the foreign limited partnership was a partnership for Canadian tax purposes.

C. NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY

1. CRA Guidelines for Registering a Charity: Meeting the Public Benefit Test²¹

To be charitable at common law, an organization must not only engage in activities that are intended to achieve its charitable purpose, but such activities must also result in a benefit to the public, or a sufficient section of it. The meaning and significance of this notion of “public benefit,” however, has been surrounded with much confusion, leading charitable organizations

¹⁸ CRA Technical Interpretation 2005-014243, Charitable Organizations and Split Receipts, April 25, 2006.

¹⁹ R.S., 1985, c. C-46.

²⁰ CRA, Document number: 2006-016742117, Private Foundation Investing in Limited Partnership, June 27, 2006.

²¹ For more information, see Terrance S. Carter and Karen J. Cooper, “CRA Releases New Policy on Meeting the Public Benefit Test” in *Charity Law Bulletin* No. 93 (April 19, 2006).

and legal commentators to express concerns with its lack of clarity and uncertainty. In response to this confusion, on March 10, 2006, CRA released its long-awaited policy on meeting the public benefit test, entitled “Guidelines for Registering a Charity: Meeting the Public Benefit Test.”²² The Guidelines attempt to clarify the meaning of the term “public benefit” and explain how it factors into CRA’s determination of charitable status. Thus, the Guidelines will be of great interest to both potential and current charitable organizations, as they set out CRA’s requirements for meeting and maintaining its standards with respect to the public benefit. The test is described in the Guidelines’ introduction as being “at the heart of every inquiry into an organization’s claim to charitable status.”

In this regard, the Public Benefit Test consists of two parts: (1) a tangible benefit must be conferred, directly or indirectly; and (2) the benefit must have a public character. CRA’s Guidelines indicate that applicants for registered charitable status are required to establish three elements: (1) the benefit must generally shown to be tangible; (2) the benefit must generally be shown to be direct; and (3) there must be a net benefit for the public.

2. CRA Registered Charities Newsletter No. 26 – Winter 2006

In January 2006, CRA released the Winter 2006 edition of its Registered Charities Newsletter.²³ Many questions relating to books and records had been raised by charities involved in work outside of Canada in the wake of the December 2004 tsunami which devastated areas of south-east Asia. In response, CRA provided guidance in this newsletter concerning the ways in which charities can ensure that they are maintaining adequate books and records. Their summary for books and records is as follows: “A registered charity must keep adequate books and records at a Canadian address it has on file with us, so that we can verify official donation receipts issued, as well as its revenue and expenditures. It must also include information that will enable the Minister to determine if there are any grounds for revocation. A charity must also keep source documents that support the information in the records and books of account.” There is also commentary on Federal Court of Appeal decisions relating to the books and records of charities, including *Canadian Committee for the Tel Aviv Foundation v. Canada, College rabbinique de*

²² CRA, Reference Number CPS-024, online: www.cra-arc.gc.ca/tax/charities/policy/cps/cps-024-e.html.

²³ CRA, online: www.cra-arc.gc.ca/tax/charities/newsletters-e.html.

Montreal Oir Hachaim D'Tash v. Canada (Minister of the Customs and Revenue Agency) and *The Lord's Evangelical Church of Deliverance and Prayer of Toronto v. Canada*.²⁴

3. CRA Registered Charities Newsletter No. 27 – Fall 2006

In December 2006, CRA released the Fall 2006 edition of its Registered Charities Newsletter.²⁵ Included in the newsletter is information concerning the application of new intermediate sanctions for non-compliance of charities. CRA's Guidelines concerning these penalties will be made available on the Charity Directorate's website at: www.cra-arc.gc.ca/charities. There is a series of questions and answers relating to identifying the donor with respect to official donation receipts,²⁶ enduring property (see paragraph below for more information), and planned giving arrangements, including charitable gift annuities,²⁷ life insurance policies and charitable remainder trusts.²⁸ The newsletter also addresses CRA's policy on "public benefit,"²⁹ debts incurred by charitable foundations,³⁰ restrictions on private foundations,³¹ the definition of "non-qualified investment" under the ITA,³² and the gift of residue qualifying as a "gift by the individual's will."³³ The decisions noted under Court News include: *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (in relation to the promotion of amateur sports)³⁴, *Bayit Lepletot v. Minister of National Revenue* (with regard to conducting activities in a foreign country)³⁵ and *MacDonald Estate v. The Queen* (with respect to donations where there is no provision in the will).

²⁴ See also footnote 86 for a summary of *Redeemer Foundation v. MNR*.

²⁵ *Supra* note 23.

²⁶ See paragraphs 3501(1)(g) and 3501(1.1)(g) of the *Income Tax Regulations*, C.R.C., c. 945. See also CRA, Policy Commentary CPC-010, *Name on Official Donation Receipt*, online: www.cra-arc.gc.ca/tax/charities/policy/cpc/cpc-010-e.html.

²⁷ More information on charitable gift annuities can be found in *Income Tax - Technical News No. 26*, which is available on the CRA website at: www.cra-arc.gc.ca/E/pub/tp/itnews-26/README.html.

²⁸ More information on the valuation of charitable remainder trusts can be found in IT-226R, *Gift to a Charity of a Residual Interest in Real Property or an Equitable Interest in a Trust*, which is available on the CRA website at: www.cra-arc.gc.ca/E/pub/tp/it226r/README.html.

²⁹ *Supra* note 22.

³⁰ *Supra* note 11 and 12.

³¹ For example, see CRA's Policy Statement CPS – 019, "What is a related business?", online: www.cra-arc.gc.ca/tax/charities/policy/cps/cps-019-e.html.

³² *Supra* note 1 at subsection 149.1(1).

³³ *Supra* note 1 at subsection 118.1(5).

³⁴ *Infra* note 70.

³⁵ *Infra* note 80.

CRA's summary of "enduring property" arising from amendments to the ITA in May 2005 is helpful and provides as follows: "The definition of "enduring property" applies for the purpose of the definition "disbursement quota" and applies to fiscal periods that begin after March 22, 2004. Gifts of enduring property are generally excluded from the charity's disbursement quota in the year they are received. However, the charity must consider these gifts when calculating the average value of property for its 3.5% disbursement quota requirement. When the charity spends or transfers some or all of the enduring property, 80% of the amount spent or 100% of the amount transferred must be included when calculating the disbursement quota requirement. Transfers from registered charities to charitable organizations were previously exempt from the recipient charitable organization's disbursement quota. Under the new disbursement quota rules, there are three types of property transfers between charities: specified gifts, enduring property and other gifts, which are each treated differently."

4. CRA Eliminates Advisory Committees

In June 2006, the Minister of National Revenue announced that CRA was temporarily suspending the activities of all of its advisory committees while it reviewed the role and mandate of these bodies. Among the suspended advisory committees was the Charities Advisory Committee ("CAC"), which was formed based upon a recommendation of the Joint Regulatory Table and was included in the March 2004 Federal Budget. The CAC functioned well over the last two years in providing an effective bridge between the charitable sector and CRA, as well as the Minister of National Revenue. It was therefore disappointing that the CAC had been put in a state of suspension. In a letter to members of the advisory committees, Minister Carol Skelton indicated that the review, which was expected to be completed by the end of the summer of 2006, was intended to ensure that CRA received the best possible value from the advisory committee process. However, effective September 25, 2006, the Government announced that as a result of its decision to reduce program expenditures, the advisory committees of CRA would be eliminated, including the CAC.

5. CRA Policy Regarding Pending Legislation

On November 28, 2006, at the Annual Conference of the Canadian Tax Foundation (“CTF”) in Toronto,³⁶ a representative of CRA participated in a round-table discussion of the CRA’s policies on a variety of issues, including the re-introduction and application of the draft technical amendments to the ITA. CRA was asked whether it has any further comments regarding the position enunciated at the 2005 CTF Annual Conference concerning the filing of income tax returns in the context of pending legislation amending the ITA. The response was that its administrative practice continues to be to ask taxpayers to file their returns based on proposed legislation. However, where proposed legislation increases government expenditures (such as an increase in refundable tax credits), CRA’s practice is to wait for the legislation to be enacted. Where a taxpayer files a return in accordance with draft legislation and the implementation date for the legislation is subsequently postponed, CRA will permit the taxpayer to refile its return in accordance with the unamended legislation.

6. Policy Commentary on Publishing Magazines and Advancement of Education³⁷

On February 3, 2006, CRA released a Policy Commentary, “Charitable purposes – Whether publishing a magazine can be considered a charitable activity under the advancement of education.”³⁸ The policy clarifies CRA’s position on granting charitable status to organizations that publish magazines in furtherance of educational purposes, indicating that CRA accepts that registered charities can advance education through the publication and distribution of magazines, but the contents of the publications must be predominantly educational in the sense understood by charity law. Material that would not be considered educational, *e.g.*, games, entertainment, opinion and advertising, is allowable, provided that it is highly limited and always remains ancillary and incidental to the main educational purpose.

³⁶ For more information, see Theresa L.M. Man and Terrance S. Carter, “Bill C-33 – Proposed Amendments to the *Income Tax Act* Affecting Charities” in *Charity Law Bulletin* No. 104 (December 7, 2006).

³⁷ For more information, see Theresa L.M. Man, “Publication of Magazines for the Advancement of Education” in *Charity Law Bulletin* No. 92 (April 18, 2006).

³⁸ CRA, Reference Number CPC-027, online: www.cra-arc.gc.ca/tax/charities/policy/cpc/cpc-027-e.html.

7. CRA Clarification Regarding Fair Market Value

In an update to its “Gifts and Income Tax” Guide,³⁹ CRA clarified how the fair market value (“FMV”) of a gift is to be calculated, in that it “is usually the highest dollar value one can obtain for a particular piece of property in an open and unrestricted market, between a willing buyer and a willing seller who are acting independently of each other.” With respect to the FMV of donated property, it is necessary to determine the “eligible amount” of the gift, which CRA defines as “the amount by which the FMV of the gifted property exceeds the amount of an advantage, if any, received or receivable for the gift. ... The advantage is generally the total value of all property, services, compensation, or other benefits that you are entitled to as partial consideration for, or in gratitude for, the gift. The advantage may be contingent or receivable in the future, either to you or a person or partnership not dealing at arm’s length with you.” The Guide also contains a section on donation appraisals with guidelines for donors and qualified donees approaching appraisers and dealers. One or more appraisals may be required in order to establish the FMV of the property a person is donating. The appraised FMV is used to calculate the eligible amount of the gift unless the deemed FMV rules apply. “The eligible amount is used to calculate the tax credit you can claim on your return. The appraised FMV is also used in the calculation of any capital gain or loss you may have from donating your property.”

8. New Process for Re-Registration

On August 25, 2006, CRA announced a new process for re-registration of charities whose status has been revoked for failure to file their annual return (Form T3010).⁴⁰ As of September 1, 2006, organizations re-applying for registration as Canadian charities may be subject to a penalty depending upon their taxation year and when they received their Notice of Intention to revoke.

9. List of Qualified Donees

Revisions to the attachment to *IC84-3R5: Gifts to Certain Charitable Organizations Outside Canada*⁴¹ were posted to the CRA website on November 23, 2006, expanding the list of qualified donees to which Her Majesty in right of Canada has made gifts since January 2000. The inclusion of an organization on this list means that it is a qualified donee for the purposes of the

³⁹ CRA, Gifts and Income Tax (P113), online: www.cra-arc.gc.ca/E/pub/tg/p113/README.html.

⁴⁰ CRA, New Re-Registration Process, online: www.cra-arc.gc.ca/tax/charities/newregistration-e.html.

⁴¹ CRA, online: www.cra-arc.gc.ca/E/pub/tp/ic84-3r5/README.html.

ITA and eligible to receive receiptable donations from donors claiming Canadian tax relief and gifts from Canadian registered charities.

D. OTHER FEDERAL AND PROVINCIAL LEGISLATION AFFECTING CHARITIES

1. New Anti-Terrorism Legislation Passed/Granted Royal Assent⁴²

On October 5, 2006, the Minister of Finance introduced Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*,⁴³ in the House of Commons. Bill C-25 received Royal Assent on December 14, 2006. Some of the most important amendments in Bill C-25 that are applicable to charities and their legal counsel are amendments that will:

- (1) Bolster client identification, record-keeping and reporting measures applicable to financial institutions and intermediaries;
- (2) Allow the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) to disclose additional information to both domestic and foreign law enforcement and intelligence agencies;
- (3) Allow CRA to disclose to FINTRAC, RCMP and the Canadian Security Intelligence Service information about charities, including identifying information of the charities’ directors and officers suspected of being involved in terrorist financing activities;
- (4) Exempt lawyers from reporting obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.⁴⁴

The exemption of lawyers from reporting obligations is the result of over four years of litigation and negotiation by the Federation of Law Societies and the federal government. The Federation of Law Societies will likely reach an accord within the next few months to agree to voluntarily undertake professional standards to combat money laundering and terrorist financing. The amendments will greatly increase the level of information sharing and collection among virtually all federal agencies that would potentially investigate or bring allegations and charges against charities and their directors and officers. The amendments also highlight the increasing focus on,

⁴² For more information, see Terrance S. Carter and Sean S. Carter, “Unprecedented Due Diligence Standards Emerge for Charities Internationally” in *Anti-Terrorism and Charity Law Alert* No. 9 (July 17, 2006) and Terrance S. Carter, “Canadian Charities: The Forgotten Victims of Canada’s Anti-Terrorism Legislation” in *Anti-Terrorism and Charity Law Alert* No. 10 (September 20, 2006).

⁴³ Parliament of Canada, Bill C-25, online: www2.parl.gc.ca/HouseBills.

⁴⁴ 2000, c. 17.

and investigation of, charities and their possible links to terrorism. Bill C-25 is one of the most substantial pieces of anti-terrorism legislation to be passed since 2001, and is dedicated in large part to specifically bolstering government powers around the potential investigations of charities. Consequently, charities need to take careful note of this legislation in recognition of the increasing scrutiny of the charitable sector in Canada.

2. Interim Report on *Anti-terrorism Act* Issued

On October 23, 2006, the Standing Committee on Public Safety and National Security recommended that two clauses contained in Canada's *Anti-terrorism Act*⁴⁵ that were to expire on December 31, 2006, should be extended for a further five years, and subjected to another review at that time. The clauses deal with investigative hearings and preventive detentions. The committee also recommended that the investigative hearing clause be amended so that it could only be used "when there is imminent peril that a terrorist offence will be committed." Two members of the committee submitted a dissenting opinion, suggesting that the clauses should only be renewed for three years. The two dissidents agreed with the amendment to the investigative hearing clause. A final report is required to be tabled no later than December 22, 2006, but was not available at the time of writing.

3. Implications of New Ontario Health Legislation for Charities⁴⁶

Significant changes were made to Ontario's health care system with the passage of Bill 36, the *Local Health System Integration Act, 2006* (the "Act").⁴⁷ This "made in Ontario" model of health care is based on the principle of community-based care that is intended to be more capable of responding to local health care needs. As such, the management of local health services will devolve to a series of 14 local health integration networks ("LHINs"). Bill 36 passed Third Reading on March 1, 2006, with only limited opposition or discussion, despite the potential for significant impacts on health service providers, registered charities and non-profit organizations who work in the health care field in Ontario. Bill 36 received Royal Assent on March 28, 2006,

⁴⁵ 2001, c. 41.

⁴⁶ For more information, see Terrance S. Carter, "Implications of New Ontario Health Legislation for Charities" in *Charity Law Bulletin* No. 90 (March 16, 2006).

⁴⁷ S.O. 2006, Chapter 4.

with a number of issues still having to be resolved through regulation. The Act requires public consultation before making regulations.

The Act provides that LHINs are agents of the Crown. As such, a LHIN is a “qualified donee” under the ITA, and can receive gifts from other registered charities and issue charitable receipts without having to be a registered charity. The Act also states that the property of LHINs is not charitable property, and that the *Charities Accounting Act*⁴⁸ and the *Charitable Gifts Act*⁴⁹ do not apply to LHINs, their directors, officers, employees or agents. As well, a Health Service Provider does not include hospital foundations or other types of parallel foundations, community foundations or testamentary charitable trusts.

Sections 30 and 31 of the Act pertain to the transfer of property held for a charitable purpose. Subsection 30(1) provides that if a LHIN’s integration decision or a Minister’s integration order calls for the transfer of property that the transferor holds for a charitable purpose, then all gifts, trusts, bequests, devises and grants that form part of the property being transferred will be deemed to be gifts, trusts, bequests, devises or grants of property to the transferee. Subsection 30(2) provides that should any of the charitable property be held by the transferor for a special purposes as specified in a will, deed or other document by which the gift, trust, bequest, devise or grant was made, the transferee entity will be required to use the property for such specified purpose, regardless of whether the transfer was made before or after section 30 came into force.

4. Exemptions Added for Charities in Ontario’s *Safe Streets Act*

Certain fundraising activities of registered charities may be exempt from Ontario’s anti-panhandling legislation. The *Safe Streets Statute Law Amendment Act, 2005*⁵⁰ added a new provision to the *Safe Streets Act, 1999*,⁵¹ exempting fundraising activities that meet two conditions: (1) they are conducted by a charitable organization registered under the ITA on a roadway where the maximum speed limit is 50 kilometres per hour; and (2) they are permitted by a by-law of the municipality in which the activities are conducted. A similar amendment was

⁴⁸ R.S.O. 1990, c. C.10.

⁴⁹ R.S.O. 1990, c. C.8.

⁵⁰ S.O. 2005, c. 32.

⁵¹ S.O. 1999, c. 8.

made to the *Highway Traffic Act*.⁵² The *Safe Streets Act, 1999*, applies the definition of “roadway” from the *Highway Traffic Act*.⁵³ These amendments were intended to specifically address the problems faced by organizations, like firefighter associations, that had previously raised funds by soliciting money in the middle of a roadway. Charities engaging in other types of fundraising activities should be aware of the restrictions to other types of solicitations (aggressive and captive audience solicitations) that are contained in the *Safe Streets Act, 1999*.

5. Deadlines for Removal or Upgrade of Ontario’s Fuel Oil Storage Tanks⁵⁴

For more than sixty years, fuel oil storage tanks have been installed and used in properties owned by Ontario charities. In addition to the rising cost of fuel to heat these charitable facilities, charities with fuel oil storage tanks should be aware of the deadlines contained in Ontario Regulation 213/01 – Fuel Oil, which supplements the *Technical Standards and Safety Act, 2000*.⁵⁵ In this regard, an underground fuel oil tank system originally installed 25 years ago or more (or if the installation date is unknown) had to be removed or upgraded by October 1, 2006. The Fuel Oil Regulation provides greater flexibility for owners of aboveground fuel oil storage tanks. While they are not required to be registered with the Technical Standards and Safety Authority, they must meet certain standards unless they are grandfathered from previous regulations. Ontario charities with aboveground or underground fuel oil storage tanks should therefore be aware of the significant regulatory requirements governing their use and existence. This includes the need for registration of underground fuel oil storage tanks, the need for regular inspections, and the owner’s liability for any spills.

6. Proposed New Auditing Requirements Under the *Corporations Act (Ontario)*⁵⁶

On December 12, 2006, Bill 152 (the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*)⁵⁷ received Third Reading in the Ontario Legislature, but at the time of writing has not yet received Royal Assent. The *Corporations Act (Ontario)* is one among many provincial statutes to be amended by this Bill. The *Corporations Act (Ontario)* is to be

⁵² R.S.O. 1990, chapter H.8.

⁵³ *Ibid.* at s. 1(1).

⁵⁴ For more information, see Terrance S. Carter, “Deadline for Removal or Upgrade of Ontario’s Fuel Oil Storage Tanks Fast Approaching” in *Charity Law Bulletin* No. 88 (February 8, 2006).

⁵⁵ S.O. 2000, c. 16.

⁵⁶ R.S.O. 1990, c. C-38.

⁵⁷ Legislative Assembly of Ontario, online: www.ontla.on.ca/documents/Bills/38_Parliament/session2/index.htm.

amended so that all non-share capital corporations, including charitable corporations, with an annual income of less than \$100,000 will no longer require an audit. The Explanatory Notes for Bill 152 with respect to the amendments of these subsections provide as follows: “The Bill amends the audit requirements of the Act. At present, a company is exempt from the audit requirements only if its annual income is less than \$10,000. Under section 96.1 of the Act, this threshold is increased to \$100,000. Under section 133 of the Act, charitable corporations will be entitled to the same exceptions from the audit requirements of the Act as other companies.”⁵⁸ These amendments to the *Corporations Act* (Ontario) will be welcome news for smaller provincially incorporated charitable and not-for-profit organizations that have limited funds and cannot afford the expense of a yearly audit.

E. RECENT CASE LAW AFFECTING CHARITIES

Meaning of Charity and Gift

1. Court Decisions Regarding False Receipts⁵⁹

On September 15, 2005, in *Her Majesty the Queen v. Mark Doubinin*,⁶⁰ the Federal Court of Appeal upheld a decision of the Tax Court of Canada⁶¹ considering the meaning of a gift in a complex donation scheme. The taxpayer was told by his financial planner that if he donated \$6,887 to a registered charity (“ABLE”), he would receive charitable donations receipts totalling \$27,548, if a non-resident trust (“PPF”) made a charitable donation to ABLE on his behalf equal to three times his donation of \$6,887. While the taxpayer initially claimed a donation tax credit in respect of the full amount of \$27,548, he reduced his claim to the \$6,887 cash amount that he had donated to ABLE after hearing from the Minister that PPF had not made the donation to ABLE on the taxpayer’s behalf. The Tax Court allowed the claim in respect of \$6,887 on the basis that the taxpayer was not in any way involved with this scheme, that the required charitable intent was present, and that his was a genuine gift that was not given with any expectation of receiving a material benefit from PPF, because the PPF donation was just a “mere possibility.”

⁵⁸ Legislative Assembly of Ontario, online: www.ontla.on.ca/documents/Bills/38_Parliament/session2/b152rep.pdf.

⁵⁹ Carters, *Charity Law Update* (March 2006), online: www.carters.ca/pub/update/charity/06/mar06.pdf.

⁶⁰ [2005] F.C.J. No. 1535.

⁶¹ [2004] T.C.J. No. 321.

In a decision dated February 9, 2006, *Nassar et al. v. The Queen*,⁶² the Federal Court of Appeal maintained the decision of the Tax Court of Canada disallowing charitable donation tax credits for 1990 to 1995 in respect of gifts allegedly made by the taxpayers to the Order *antoniien libanais des maronites* and imposing penalties on the basis, in part, that the taxpayers participated with the Order in a scheme to generate receipts showing amounts not corresponding to donations actually made.

2. CRA Split-Receipting Guidelines Upheld⁶³

On January 5, 2006, the British Columbia Court of Appeal rendered an oral judgment,⁶⁴ dismissing an appeal from the decision of the B.C. Supreme Court in the case of *Richert v. Stewards' Charitable Foundation*.⁶⁵ The Foundation indicated in its invitation to a fundraising luncheon that, in return for a \$1,000 gift, donors would receive admission to the luncheon, as well as a coffee table book. Mr. Richert forwarded a \$1,000 gift to the Foundation and had his accountant attend the luncheon on his behalf, who received a voucher for the book. In compliance with CRA's guidelines on split-receipting, Mr. Richert later received an income tax receipt for \$855, as the value of the luncheon (\$45) and the book (\$100) was subtracted from the \$1,000 gift. Mr. Richert opposed the split receipting of the funds he had donated to the Foundation, but his action at the trial level and his appeal were dismissed. Therefore, the lower court's decision continues to be good law in Canada, thereby upholding compliance rules on split-receipting set out by CRA in its Technical News No. 26,⁶⁶ notwithstanding the fact that legislative provisions for split-receipting contained in the proposed amendments, most recently released on November 9, 2006 by the Department of Finance, had not yet been enacted into law. See footnote 10 for a detailed summary of Bill C-33 which contains proposed amendments to the *Income Tax Act*, many of which affect charities. The provisions contained in Bill C-33 are, for the most part, the same as the amendments released in July 2005, including the introduction of split receipting rules.

⁶² 2006 FCA 58.

⁶³ For more information, see Suzanne E. White and Terrance S. Carter, "B.C. Court Upholds CRA Guidelines on Split-Receipting" in *Charity Law Bulletin* No. 68 (April 7, 2005).

⁶⁴ [2006] B.C.J. No. 86.

⁶⁵ [2005] B.C.J. No. 279 (B.C.S.C.).

⁶⁶ CRA, *Technical News No. 26*, December 24, 2002, was premised upon proposed draft technical amendments to the *Income Tax Act* released on December 20, 2002, by the Department of Finance.

3. Court Decision Concerning the Requirements of a Gift⁶⁷

On March 24, 2006, the Tax Court of Canada released a decision concerning gifts, *Benquesus et al. v. The Queen*.⁶⁸ In 1997, Mr. Benquesus transferred funds to a charitable foundation in Ontario. In a letter from Mr. Benquesus to the foundation accompanying the funds, he indicated that he was transferring the funds on behalf of his four children as interest-free loans, and that should the children require the funds, the foundation was to repay it. The letter further indicated that should the children forgive the loans, the foundation should then treat them as donations. In 1999, the children forgave part of the loan and charitable receipts were issued to the children by the foundation for the amounts forgiven. In reassessing the children's tax returns, CRA disallowed the children's charitable donation tax credits claimed for the forgiven loans. At issue was whether the father gifted the funds to the children, leaving it up to them to decide how much to donate to the foundation, or whether the father made the donations himself and transferred the donation credits to his children. After reviewing the three requirements for a valid gift at common law (*i.e.*, an intention to donate, acceptance of the gift by the donee, and delivery of the gift to the donee), the court found that all three requirements were met and found that Mr. Benquesus did gift the funds to the children and that it was up to the children to decide how much to donate to the foundation.

4. Amateur Sport Organizations Precluded from Attaining Charitable Status⁶⁹

On April 5, 2006, in *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*,⁷⁰ the Federal Court of Appeal ("FCA") released a decision with respect to the refusal of an application to register the appellant as a charitable organization. The purposes of the organization were to promote amateur youth soccer and offer youths the opportunity to develop pride in their ability and soccer skills. The appellant's main argument focused on the language in an Ontario court decision, *Re Laidlaw Foundation*,⁷¹ which held that the promotion of amateur sport involving the pursuit of physical fitness is a charitable purpose. The appellant argued that since the common law in Ontario recognizes the promotion of amateur sport as a charitable

⁶⁷ T.L.M. Man, *Charity Law Update* (April 2006), online: www.carters.ca/pub/update/charity/06/apr06.pdf.

⁶⁸ 2006 TCC 193.

⁶⁹ K.J. Cooper, *Charity Law Update* (April 2006), online: www.carters.ca/pub/update/charity/06/apr06.pdf, and *Charity Law Update* (September 2006), online: www.carters.ca/pub/update/charity/06/sep06.pdf.

⁷⁰ 2006 F.C.A. 136.

⁷¹ (1984), 13 D.L.R. (4th) 491 at 506 and 523-24 (Ont. H.C.J.).

purpose and the proposed activities are confined to Ontario, the law of Ontario should apply to the determination of its charitable status. The FCA held that there was no need to have recourse to the common law of Ontario since the ITA provides for the tax status of the appellant which precludes the possibility of it being registered as a charitable organization. In providing for the status of a registered Canadian amateur athletic association in 1972, “Parliament must be taken to have been aware that no association which has, as its main purpose, the pursuit of amateur sport, could qualify as a charity under the common law, and hence, under the Act.” The scheme of the ITA precludes the possibility of an amateur sport organization being registered as a charity, and only permits the separate registration of Canadian amateur athletic associations where they operate on a nation-wide basis. On September 21, 2006, the Supreme Court of Canada granted leave to appeal. At the time of writing, the appeal has not been inscribed for hearing.⁷²

5. Promotion of “Ethical Tourism” Not Considered Charitable⁷³

On October 24, 2006, the Federal Court of Appeal (“FCA”) released its decision in *Travel Just v. Canada Revenue Agency*,⁷⁴ which represents an important decision concerning what is considered to be charitable at common law. This case involved the refusal by CRA to register a charity with the object “to create and develop model tourism development projects that contribute to the realization of international human rights and environmental norms.” The FCA concluded that the organization’s objects were “vague and subjective” and were not sufficiently analogous to purposes already recognised by the Courts under the fourth category of charity: other purposes beneficial to the community. In addition, the language left open the possibility of the organization financing and operating luxury holiday resorts, activities with a strong commercial and/or private benefit aspect. The FCA also indicated that there was no evidence of a connection with Québec, noting that the issue of whether an organization is charitable for the purposes of the ITA is likely a public law concept, rendering the private law of Québec irrelevant, and thus avoiding a decision on this issue.

⁷² [2006] S.C.C.A. No. 206.

⁷³ For more information, see Karen J. Cooper and Terrance S. Carter, “Promotion of Ethical Tourism Not Considered Charitable” in *Charity Law Bulletin* No. 106 (December 19, 2006).

⁷⁴ [2006] F.C.J. No. 1599.

Regulation of Charities

1. Decision in Favour of Acorn Foundation Extends Judicial Review to Undertaking Letters⁷⁵

Subsequent to the release of CRA's Technical Interpretation with respect to debts of private foundations on October 21, 2005,⁷⁶ the Federal Court of Canada issued an order on December 16, 2005 in *Acorn Foundation v. Minister of National Revenue*⁷⁷ on a preliminary motion in a case involving the CRA's application of the provisions of the ITA limiting the debt incurred by charitable foundations. The order allowing the Acorn Foundation's case to proceed concludes that in some circumstances a CRA "undertaking letter" may be considered a decision subject to judicial review and may require CRA to extend rights of administrative fairness to the charities that receive them. Please refer to footnote 12, however, the discussion above with respect to CRA's change in policy in this regard.

2. CRA Granted Order to Require Disclosure of Donor List⁷⁸

In *All Saints Greek Orthodox Church v. Minister of National Revenue*,⁷⁹ a decision released on March 22, 2006, the Federal Court of Canada (the "Federal Court") considered an application by CRA for an order authorizing it to require that the Church furnish a list of all persons who made donations to it of comic books and trading cards. CRA had already obtained the information during the course of an audit of the charity but for it to be able to use the information in the context of a tax avoidance investigation related to donors, CRA would need to be granted a court order pursuant to section 231.2 of the ITA. While the court order was granted to CRA, since CRA had already used the names provided to it in the context of the charity audit to reassess many of the donors without initially advising the court of this fact, the Federal Court penalized CRA by ordering solicitor and client costs, as CRA had obtained the court order without properly disclosing that it was already using the donor list.

⁷⁵ Carters, *Charity Law Update* (February 2006), online: www.carters.ca/pub/update/charity/06/feb06.pdf.

⁷⁶ *Supra* note 12.

⁷⁷ Court File No. T-1784-05, 16 December 2005.

⁷⁸ But see *Redeemer Foundation v. MNR*, *infra* note 86.

⁷⁹ [2006] F.C.J. No. 481.

3. Court Decision Concerning Agency Relationships Outside of Canada

On March 28, 2006, in *Bayit Lepletot v. Minister of National Revenue*,⁸⁰ the Federal Court of Appeal (“FCA”) considered whether a Canadian charitable organization was carrying on its own charitable activities when it funded an orphanage in Israel of the same name through an agent. The agent requested funds from the appellant, who approved the request, transferred the funds to the agent and then the agent disbursed them to the orphanage. The FCA noted that the agent was part of the “Directorate in residence” of the orphanage and that he presumably exercised the same control over its operations, but that there was no evidence to what extent. Moreover, there was no evidence that he exercised any control over the activities of the orphanage in his capacity as agent of the appellant. The FCA affirmed the position that CRA has taken over the years with respect to agency relationships: it must be shown that the agent is actually carrying on the charitable works of the Canadian charity and the activities of the agent must be subject to the Canadian charity’s control.

4. Donation Tax Shelter Valuations⁸¹

On April 20, 2006, the Supreme Court of Canada dismissed an application for leave to appeal (without reasons)⁸² from the Federal Court of Appeal (“FCA”) decision in *Klotz v. Canada*,⁸³ which had affirmed the Tax Court of Canada’s ruling⁸⁴ in connection with donation tax shelter valuations. At trial, Associate Chief Justice Bowman found that the best evidence of fair market value was the very transaction through which the taxpayers purchased art from the promoter. Mr. Klotz was one of 660 people who acquired limited edition prints which were immediately donated to prescribed colleges and universities under the ITA. The average cost of the prints was \$300 yet the receipt that was issued was based on an average fair market value per print of about \$1,000, which the Tax Court of Canada found to be unrealistic. The FCA agreed with the Tax Court Judge in finding “that the best evidence of the fair market value of the prints was the price paid by the taxpayer – that is \$75,000.”

⁸⁰ 2006 FCA 128.

⁸¹ For more information, see Karen J. Cooper and Terrance S. Carter, “Beware of Donation Tax Shelter Valuations” in *Charity Law Bulletin* No. 87 (February 8, 2006).

⁸² [2005] S.C.C.A. No. 286.

⁸³ [2005] F.C.J. No. 754.

⁸⁴ [2004] T.C.J. No. 52.

5. CRA Audits of Registered Charities⁸⁵

On October 10, 2006, in *Redeemer Foundation v. Minister of National Revenue*,⁸⁶ the Federal Court of Appeal (“FCA”) considered the process CRA must follow to obtain the names of donors during the course of an audit of a registered charity. After having audited a charity that operated a “forgivable loan program,” CRA obtained from the charity, upon a verbal request, donor information with which CRA contacted the donors to advise them that they would be reassessed to disallow the donation tax credits claimed for their donations to the charity. After providing the list of donors to CRA, the Foundation brought an application in the FCA for judicial review of the auditor’s request 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 initial decision of the FCA declared that the actions of the auditor were unlawful and ordered that the reassessments of the donors be vacated. This decision was appealed by CRA, and the FCA overturned the initial decision on the basis that there were other provisions in the ITA authorizing the auditor to make the request that he did and to use that information for the purposes of subsequent tax assessments. Specifically, subsection 231(2) of the ITA requires charitable organizations to maintain certain records, including duplicates of all receipts, and section 231.1 of the ITA authorizes an auditor to examine the organization’s books and records. The FCA concluded that if an auditor is entitled to obtain the information and compile the list of donors by his own examination of the books and records of the organization, there is no reason for the auditor to have to resort to the process established in subsection 231.2(2) of the ITA.

6. Khawaja Decision Affords Little Relief for Charities⁸⁷

Since the first wave of anti-terrorism legislation was declared in force in late 2001, its impact has loomed large over Canadian charities and their foreign operations. The case of Mohammad Momin Khawaja, the first person to be charged under the core “terrorism” provisions in Part II of the *Criminal Code* (“Code”),⁸⁸ presented the first chance to judicially review this controversial law. In *R. v. Khawaja*,⁸⁹ Mr. Justice Rutherford of the Ontario Superior Court of Justice struck

⁸⁵ See *All Saints Greek Orthodox Church v. MNR*, *supra* note 79.

⁸⁶ 2006 FCA 325.

⁸⁷ For more information, see Terrance S. Carter and Sean S. Carter, “*Khawaja* Decision Offers Little Relief for Charities” in *Anti-Terrorism and Charity Law Alert* No. 11 (December 20, 2006).

⁸⁸ *Supra* note 19.

⁸⁹ [2006] O.J. No. 4245.

down a portion of the definition of “terrorist activity” in the Code that dealt with purpose and motive. The decision, released on October 24, 2006, was met with mixed reviews by anti-terrorism legal commentators, some of whom initially heralded the case as a powerful blow to draconian legislation. However, the impact upon Canadian charities, which are particularly vulnerable to the sweeping “facilitation of terrorist activity” provision in section 83.19 of the Code, is not encouraging. The decision offers charities little relief from their susceptibility to unintentional contravention of the law because the court decided to uphold the legislation notwithstanding its breadth and the limited *mens rea* requirement concerning the definition of “facilitation”. As a result, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to still have facilitated a terrorist activity.

Directors’ Liability and Governance

1. Non-Share Capital Corporations Must Strictly Adhere to Corporate Governance Procedures⁹⁰
Rexdale Singh Sabha Religious Centre v. Chattha, a decision released by the Ontario Superior Court of Justice on January 24, 2006,⁹¹ involved a dispute over the corporate governance procedures of three inter-related non-share capital corporations. The three charitable organizations appealed the application judge’s order to fix the membership of the three corporations as set out in an affidavit of one of the respondent directors, as well as to require the existing directors to convene a meeting within 30 days to elect new directors by means of a fair vote. The Ontario Court of Appeal decision was released on November 27, 2006,⁹² allowing the appeal. In the Court’s opinion, there had been a failure to properly change the members of the corporation in accordance with the *Corporations Act* (Ontario), and that the application judge had incorrectly concluded that four of the five directors of Rexdale were permitted to have approved the creation of a list of new members. As well, the Court of Appeal held that where proper election of directors has not occurred, the initial incorporators would continue to be the first directors of the corporation. While the courts came to different conclusions, both decisions

⁹⁰ For more information, see Terrance S. Carter and Paula J. Thomas, “Non-Share Capital Corporations Must Strictly Adhere to Corporate Governance Procedures in *Charity Law Bulletin* No. 101 (October 27, 2006) and “Court of Appeal Update on Corporate Governance Compliance” in *Charity Law Bulletin* No. 106 (December 20, 2006).

⁹¹ [2006] O.J. No. 328.

⁹² [2006] O.J. No. 4698.

illustrate that non-share capital corporations must adhere as strictly to corporate governance procedures as for-profit corporations.

2. Supreme Court of Canada Decision Impacts Insurance Claims by Charities⁹³

On June 1, 2006, the Supreme Court of Canada rendered its decision in *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*.⁹⁴ The decision outlines the elements that must be present in a report/demand received by an insured in order to constitute a “claim” on the insured’s policy. In order for a claim to trigger coverage, a demand must be made by the victim or his representative, and there must be a clear expression by the victim of an intention to hold the insured liable for damages. The decision also underscores the importance of understanding the scope of coverage provided, as well as the need to be mindful that gaps in coverage can occur as a result of a charity changing its insurer. It is possible that during a policy period, a charity may become aware of circumstances that could give rise to a potential claim, but this information may be insufficient to constitute a claim on the policy. However, if the charity then changes insurers, the new policy will likely exclude coverage for claims arising from circumstances that were known to the charity prior to commencement of the subsequent policy period. Were those circumstances to subsequently crystallize into a claim, it is possible that the claim would not fall within the purview of either the charity’s current or prior policy.

3. Trustees of a Church Found Liable for “Quasi-Participation” in Lien Action⁹⁵

In *Crownwood Construction Ltd. v. Omartech Construction Inc.*,⁹⁶ a decision released on June 20, 2006, the Ontario Superior Court of Justice found the trustees of a church jointly and severally liable for costs, as well as pre- and post-judgment interest, based on their conduct in a construction lien action brought by a sub-contractor against the contractor. The plaintiff sub-contractor was successful at trial in establishing that payment was due to them for renovations performed for the benefit of the lands held by the trustees on behalf of the Revivaltime Tabernacle Adelphi Church. Based on the contractor’s achieving greater success at trial than settlement offers, the court awarded substantial indemnity costs in the amount of \$78,000.00. It

⁹³ A. Walters, *Charity Law Update* (October 2006), online: www.carters.ca/pub/update/charity/06/oct06.pdf.

⁹⁴ [2006] S.C.J. No. 21.

⁹⁵ A. Walters, *Charity Law Update* (July/August 2006), online: www.carters.ca/pub/update/charity/06/julaug06.pdf.

⁹⁶ [2006] O.J. No. 2466.

was by virtue of the trustees' failure to pay required holdback monies into court, and by their failing to participate in the litigation, that the trustees of the church were held jointly and severally liable for the costs that the sub-contractor was forced to incur in order to recover the payment that was due to them.

Freedom of Religion and Speech

1. *Kempling* Appeal Denied⁹⁷

On January 19, 2006, the Supreme Court of Canada denied leave to appeal⁹⁸ to a British Columbia school teacher who was disciplined for writing letters to the local newspaper because the writings could “bring harm to the integrity of the school system as a whole.”⁹⁹ In *Kempling v. British Columbia College of Teachers*, both the B.C. Supreme Court¹⁰⁰ and the Court of Appeal supported the governing body's decision to discipline the teacher by suspending him after he wrote letters to the editor associating homosexuals with immorality, abnormality, perversion and promiscuity. The College discipline panel found that the appellant's writings were discriminatory and that they demonstrated that he was not prepared to accommodate the core values of the educational system, one of which is non-discrimination. On judicial review, the court determined that whether the discipline panel was correct in concluding that the teacher was guilty of conduct that was unbecoming of a member of the College of Teachers turned on two questions: (1) whether the teacher's writings were discriminatory; and (2) whether they caused harm. While the Court of Appeal determined that the teacher's freedom of expression was infringed, it also found that the teacher's off-duty discriminatory remarks crossed the line from protected political speech by ignoring the inherent dignity of the individual.

2. *Supreme Court of Canada Gives Strong Endorsement to Freedom of Religion*¹⁰¹

In a decision rendered on March 2, 2006, the Supreme Court of Canada sent a strong message that Canada's public education institutions must embrace diversity and develop an educational culture respectful of the right to freedom of religion. In *Multani v. Commission scolaire*

⁹⁷ *Supra* note 59.

⁹⁸ [2005] S.C.C.A. No. 381.

⁹⁹ [2005] B.C.J. No. 1288 at para. 42.

¹⁰⁰ [2004] B.C.J. No. 173.

¹⁰¹ For more information, see Terrance S. Carter and Anne-Marie Langan, “Supreme Court of Canada Gives Strong Endorsement to Freedom of Religion” in *Church Law Bulletin* No. 17 (March 16, 2006).

Marguerite-Bourgeois,¹⁰² the Court confirmed the right of an orthodox Sikh student to wear his ceremonial dagger at school. The Court concluded that the *Canadian Charter of Rights and Freedoms*¹⁰³ establishes a minimum constitutional protection for freedom of religion that must be taken into account by the legislature and by administrative tribunals. Safety concerns must be unequivocally established for the infringement of a constitutional right to be justified. As such, the Court gave new guidance to administrative bodies dealing with *Charter* issues, declaring that administrative bodies must apply the principles of constitutional justification when a *Charter* right has been infringed.

3. Freedom of Speech Upheld in Hugh Owens Appeal

On April 13, 2006, in *Owens v. Saskatchewan (Human Rights Commission)*,¹⁰⁴ the Saskatchewan Court of Appeal concluded that a newspaper advertisement paid for by Mr. Owens did not violate s. 14(1)(b) of the *Saskatchewan Human Rights Code* (“Code”).¹⁰⁵ This controversial advertisement consisted of four biblical passages followed by an equal sign then two stickmen holding hands surrounded by a circle with a diagonal line across it. The Saskatchewan Queen’s Bench decision¹⁰⁶ found that the advertisement in question “exposed or tended to expose homosexuals to hatred or ridicule, or may otherwise affront their dignity on the basis of their sexual orientation” and did not constitute a permissible exercise of the freedom of speech within the meaning of s. 14(2) of the Code. The Court of Appeal overturned this decision, legally interpreting the notions of “hatred”, “ridicule”, “belittlement” and “affronts to dignity” found in s. 14(1)(b) to be aimed at expressions involving feelings of an “ardent and extreme nature” and, in particular, “unusually strong and deep-felt emotions of detestation, calumny and vilification.” The advertisement in question, taken in context and measured against an objective standard, was not found to promote the kind of extreme emotion required for a finding that it violated the Code. Furthermore, the advertisement was seen to “take on the character of a position advanced in a continuing public policy debate.” The Court of Appeal found that the biblical passages in the advertisement, when taken in their context, would be assessed in different ways by objective

¹⁰² [2006] S.C.J. No. 6.

¹⁰³ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁰⁴ [2005] S.J. No. 515.

¹⁰⁵ S.S. 1979, c. S-24.1.

¹⁰⁶ [2002] S.J. No. 732.

observers and ascribed different meanings, and as such, were highly unlikely to incite hatred for homosexuals.

4. Operator's Licenses and Religious Freedom¹⁰⁷

In *Hutterian Brethren of Wilson Colony v. Alberta*,¹⁰⁸ a decision released on May 8, 2006, the Alberta Court of the Queen's Bench affirmed once again that the government has a duty to accommodate the religious beliefs and practices of its citizens to the point of undue hardship. In this decision, section 3 of the Alberta Regulation 137/2003, a regulation passed under the *Operator Licensing and Vehicle Control Regulation* which requires all individuals to be photographed in order to obtain a license, was declared unconstitutional. The Regulation was challenged by a Hutterian community that interprets the Bible's Second Commandment as prohibiting the willing capture of their image in photographs. The community successfully argued that the Regulation violated their guarantee of freedom of religion and equality under the *Charter of Rights and Freedoms*.

Other Caselaw Relating to Charities

1. Canada's National Ballet School Wins Injunction in Trade-mark Battle¹⁰⁹

On January 24, 2006, the National Ballet School/l'École national de Ballet ("NBS/ENB") succeeded in defending its name and trade-mark from being used in a confusing manner by a Montreal-based ballet school operating under the name École national de ballet contemporain. The Québec Superior Court issued a permanent injunction in favour of NBS/ENB, prohibiting the other school from using the name École national de ballet contemporain, or any other name, that is similar to National Ballet School/l'École national de Ballet. This decision serves as a reminder to charitable and not-for-profit organizations that they should exercise due diligence when naming their organization to avoid allegations of trade-mark infringement, passing off or confusion. It can also save charitable and not-for-profit organizations from expending valuable money, time and effort to promote and advertise something that they cannot trade-mark. As well, the decision encourages due diligence in protecting and enforcing trade-mark rights, as

¹⁰⁷ For more information, see Mervyn F. White and Anne-Marie Langan, "Operator's Licenses and Religious Freedom: A Case Comment" in *Church Law Bulletin* No. 18 (July 19, 2006).

¹⁰⁸ 2006 ABQB 338.

¹⁰⁹ For more information, see U. Shen Goh, "Comment on Canada's National Ballet School Trade-mark Case" in *Charity Law Bulletin* No. 91 (April 11, 2006).

trade-marks are one of the most important assets that an organization can possess to enhance the reputation and associated branding for the organization.

2. Royal Winnipeg Ballet Employment Case¹¹⁰

On March 2, 2006, in *Royal Winnipeg Ballet v. Minister of National Revenue*, the Federal Court of Appeal (“FCA”) released its decision¹¹¹ to overturn the Tax Court of Canada ruling involving the Ballet with regard to whether there was an employment or contractual relationship.¹¹² The FCA held that the “intention of the parties” with respect to the nature of an employment relationship will be examined and given appropriate weight in determining whether the hired party is an employee or an independent contractor. The FCA held that the three dancers in question were independent contractors, and as such, the Royal Winnipeg Ballet did not have to pay contributions under the Canada Pension Plan or premiums under the *Employment Insurance Act*.¹¹³ In addition to considering factors of control, equipment, financial risk and degree of responsibility, the FCA also considered the fact that, although there was no written contract characterizing the dancers as independent contractors, it was the understanding between the parties and they acted in accordance with that understanding. The FCA affirmed that “[w]hen a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search.”

F. CONCLUDING COMMENTS

The year 2006 brought a number of significant changes to charitable organizations which will be of particular concern for their directors and officers, as well as for their legal counsel. The number of legislative changes, CRA policy initiatives and rulings that have occurred during 2006, as well as the release of numerous significant decisions from the courts underscore how complicated the law pertaining to charitable organizations has become in Canada. It is therefore important for practitioners in this area to keep abreast of developments in the law as they occur.

¹¹⁰ U. Shen Goh, *Charity Law Update* (April 2006), online: www.carters.ca/pub/update/charity/06/apr06.pdf.

¹¹¹ [2006] F.C.J. No. 339.

¹¹² [2004] T.C.J. No. 291.

¹¹³ 1996, c. 23.