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2007 CHARITY LAW DEVELOPMENTS: THE YEAR IN REVIEW

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A. INTRODUCTION

The charitable sector in Canada has seen a number of important legislative, regulatory and common law developments in 2007 which have significantly impacted how charities operate both in Canada and abroad. The following article provides an up to date summary of some of the more important of these developments over the whole of 2007, 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 legislative issues affecting charities, as well as a selection of some of the more significant court decisions during the past year.

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

1. 2007 Federal Budget Passed as Bill C-28

The March 19, 2007 Federal Budget[3] ("2007 Budget") introduced a number of measures which will have a substantial impact on tax planning for charities and their donors. These measures include the elimination of capital gains tax on publicly-listed securities donated to private foundations, new excess business holding rules that limit the shareholdings of private foundations, and a special deduction for corporations

[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] For more information, see *Budget 2007: A Stronger, Safer, Better Canada*, available online at: http://www.budget.gc.ca/2007/index_e.html and Karen J. Cooper and Terrance S. Carter, "Federal Budget 2007 – Highlights for Charities" in *Charity Law Bulletin* No. 113 (March 29, 2007) online: http://www.carters.ca/pub/bulletin/charity/index.html.

that make donations of medicines from their inventory to registered charities that have received a disbursement under a program of the Canadian International Development Agency in respect of activities of the charity outside of Canada. These legislative initiatives were contained in Bill C-28[4], which received Royal Assent on December 14, 2007 and enacted as *Budget and Economic Statement Implementation Act, 2007,* c. 35.[5]

Among the tax measures enacted by Bill C-28 are the proposed new excess business holding rules ("EBHR"). In general, the new EBHR require a private foundation to divest itself of excess public and private shareholdings beyond the limits permitted by the new rules, and to disclose material corporate shareholdings in its annual information return.

A private foundation that holds an "insignificant interest" (i.e. two per cent or less) in respect of a class of shares of a corporation will not be subject to the divestiture or the public disclosure requirements under the EBHR. If the total shareholdings of a private foundation and "relevant persons" in respect of the private foundation who hold a material interest in a class of shares is over two per cent of all outstanding shares of that class, the private foundation will be required to disclose in its annual information return the name of the corporation, the foundation's holdings of that class of shares, and the total shareholdings of the relevant persons of that class of shares.

In addition, "material transactions" of a private foundation and its relevant persons are also required to be disclosed. A "material transaction" means a share transaction or a series of transactions involving more than $100,000 or 0.5 per cent of a class of shares. A "relevant person" is generally a person who does not deal at arm's length with any person who controls the private foundation, or with any member of a non-arm's length group of persons that controls the foundation. The existing rules of s. 251 of the ITA, which determine when a corporation is related to another person, will apply as if the foundation were a corporation. However, a "relevant person" does not include an estranged family member. For example, an individual who is at least 18 years old, living separate and apart from the controlling person or member of the controlling group, and whom the minister, on review of an application by the foundation, has agreed

[4] For more information, see Theresa L.M. Man, "New Rules Require Foundations to Get Rid of Excess Shareholdings", in *The Lawyer's Weekly*, Vol. 27, No. 29, November 30, 2007 and Theresa L.M. Man in *Charity Law Update*, December 2007 at p. 2, online: http://www.carters.ca/pub/update/charity/index.html.

[5] The statute is available online at: http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=15&Type=0&Scope=I&query=5334&List=toc-1

is dealing at arm's length with the controlling person or member of the controlling group, would not be a "relevant person."

If the total corporate shareholdings of a private foundation and its relevant persons exceeds 20 per cent, the foundation will be required to divest itself of the shares over the 20 per cent threshold within certain time periods required by the EBHR, depending on how the excess arose. For example, if the excess arose as a result of the private foundation acquiring shares for consideration, the excess must be divested within the same year; and if the excess arose as a result of a donation by way of a bequest, the excess must be divested within five years. Under certain conditions, the Minister of National Revenue may defer a divestment obligation by up to five years upon application by the foundation, such as a large donation of shares involving complex corporate structures.

The EBHR exempt certain shares from divestiture. A private foundation will not be required to divest shares donated before March 19, 2007, if the donation was made subject to a trust or direction that the foundation may not dispose of them. This exemption also applies to donations made on or after March 19, 2007, and before March 19, 2012, pursuant to the terms of a will signed before March 19, 2007, that has not been amended. It also applies to donations made after March 19, 2007, under the terms of a testamentary or inter vivos trust created before March 19, 2007, and not amended after that date.

The EBHR provides transitional rules for private foundations with total corporate holdings exceeding the 20 per cent threshold on March 18, 2007. These foundations will have up to 20 years to divest the excess, provided that they divest at least 20 per cent of the excess every five years. In order to encourage private foundations to divest their excess as soon as possible, donations of publicly listed shares to a private foundation that has not divested all excess by March 18, 2012, will be subject to capital gains tax resulting from the disposition and will not enjoy the capital gains tax exemption proposed by the 2007 federal budget. A penalty tax may be imposed on a foundation that has not divested its excess shareholdings as required or that fails to comply with the disclosure requirements. Repeated or uncorrected infractions of the EBHR may result in the revocation of the foundation's charitable status.

Finance's News Release on November 13, 2007, indicates that it is continuing its consultation with private foundations and intends to further review the EBHR that have been enacted, especially in relation to unlisted securities held on March 19, 2007 and the treatment of corporations wholly-owned by private foundations. Proposed new changes to the EBHR are expected to be released sometime in 2008.

The application of the EBHR is complicated and unclear in many respects. As such, private foundations, their donors and advisers will need to become familiar with the EBHR to ensure compliance. Where appropriate, private foundations may want to consider applying to be redesignated as either public foundations or charitable organizations.

2. Former Bill C-33 to Amend the ITA is Now Bill C-10

On October 29, 2007, the former Bill C-33 to amend the *Income Tax Act* was re-introduced in Parliament as Bill C-10[6]. The former Bill C-33 had been introduced in November 2006[7], containing a package of proposed amendments to the *Income Tax Act* that were first introduced by Finance on December 20, 2002. A number of the proposed changes will impact the operations of registered charities in Canada in a substantial way, including the definition of "gift," split-receipting, designation of charitable organizations and public foundations, revocation of charitable registrations, etc. These amendments have undergone various incarnations on December 5, 2003, February 27, 2004, and July 18, 2005, resulting in the introduction of Bill C-33 in November 2006. Since Parliament was prorogued in September 2007, Bill C-33 died on the Order Paper. The amendments were reintroduced as Bill C-10 in October 2007. Bill C-10 received three readings in the House of Commons on October 29, 2007, and received second reading in the Senate on December 4, 2007. Bill C-10 is expected to be passed early in 2008.

3. CRA Begins to Administer New Charity Designation Test[8]

The CRA has clarified that although Bill C-10 has not yet been enacted, CRA has begun reviewing applications for charitable status and for re-designation by using the proposed new definition for charitable organization and public foundation (which also affect the definition for private foundation). The new definition replaced the "contribution test" with a "control test." Under the new "control test," more than 50% of the capital of a charitable organization or public foundation can be contributed by a person or a group of related persons, provided that they do not control the charity in any way. In addition, this person, or members of the related group, may not represent more than 50% of the directors, trustees,

[6] The text of Bill C-10 is available online at: http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=15&Type=0&Scope=I&query=5296&List=toc-1

[7] For more information on the details of bill C-33, 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) online: http://www.charitylawbulletin.ca and Theresa L.M. Man in *Charity Law Update*, November 2007 at p. 3 and Theresa L.M. Man in *Charity Law Update*, December 2007 at p. 3, online: http://www.charitylawbulletin.ca.

[8] Theresa L.M. Man in *Charity Law Update*, July/August 2007 at p. 2, online: http://www.carters.ca/pub/update/charity/index.html.

officers and similar officials of the charitable organization or public foundation. Charities that do not meet this test will be designated as private foundations.

Applications for re-designation can be made retroactively for taxation years that begin after 1999. Registered charities will have until 90 days after Bill C-10 receives Royal Assent to apply for retroactive re-designation. Applications received after that date will fall under these new rules, but the re-designation will only become effective for future taxation years. CRA is currently developing guidelines for applying the new "control test." To view further details on the administration of these changes, please refer to CRA's website at http://www.cra-arc.gc.ca/tax/charities/whatsnew/changes-e.html.

C. NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY

1. New CRA Policy Statement on Associated Charities[9]

CRA released a Policy Statement (CPC-028) on February 26, 2007, to clarify that two unrelated charities that carry on a joint project can apply to CRA to be designated as associated charities pursuant to subsection 149.1(7) of the ITA. The effect of the designation would allow one charity to transfer over 50% of its annual income to the other charity so designated. An application would need to be submitted to CRA disclosing details regarding the joint project. The designation would be in effect for the duration of the joint project. If the joint project is not completed within the time frame specified, the charities can request to have the designation extended. On the other hand, if the joint project is completed earlier than the expected time frame, the charities should request the revocation of the designation. This policy statement is consistent with CRA's circular IC77-6 "Registered Charities: Designation as Associated Charities," April 18, 1977.

2. CRA Guidelines for Applying the New Intermediate Sanctions[10]

On April 10, 2007, the CRA released a new policy document, "Guidelines for Applying the New Sanctions" (the "Guidelines").[11] This document sets out CRA's approach to the application of the new intermediate sanctions resulting from amendments to the ITA enacted by Bill C-33, *A second Act to*

[9] Theresa L.M. Man in *Charity Law Update*, March 2007 at p. 4, online: http://www.carters.ca/pub/update/charity/index.html .
[10] For more information, see Karen J. Cooper and Paula J. Thomas, "Guidelines for Applying the New Intermediate Sanctions for Charities", in *Charity Law Bulletin No. 117* (June 14, 2007) online: http://www.charitylawbulletin.ca and Karen J. Cooper and Kimberley A. Cunnington-Taylor in *Charity Law Update*, November 2007 at p. 4, online: http://www.carters.ca/pub/update/charity/index.html.
[11] Available online at: http://www.cra-arc.gc.ca/tax/charities/policy/newsanctions-e.html.

implement certain provisions of the budget tabled in Parliament on March 23, 2004, which received Royal Assent on May 13, 2005.[12]

The ITA now includes two new kinds of penalties: (1) financial penalties; and (2) a one-year suspension of the charity's ability to issue official donation receipts. Usually a financial penalty is invoked first. Repeated violations may lead to higher financial penalties and sometimes the suspension of the right to issue official donation receipts. Initially, this right is normally suspended for the duration of one year only. In order to avoid the imposition of more rigorous sanctions, there are a number of obligations that a charity must fulfill while its charitable status is under suspension, including informing any individuals and organizations planning to make a donation to the charity of its suspended status. The charity is permitted to receive donations but it cannot issue official donation receipts. If it does so, CRA intends to revoke the organization's charitable status. Where one charity is making a gift to another suspended charity and the donating charity is aware of the charity's suspended status and accepts an official donation receipt, CRA intends to suspend the donating charity's charitable status.[13]

There are various types of non-compliance which can be subject to sanction. They include unrelated business activities, control of a corporation (foundations only), gifts to non-qualified donees, conferring an undue benefit, issuing an official donation receipt containing false or incorrect information, maintaining inadequate books and records, exchanging gifts in order to delay expenditures required to meet a charity's disbursement quota, failure to file an annual return on time and failure to divest of excess business holdings (private foundations only).

Until recently, the end product of an audit was either revocation of the charity's registered status or the issuance of an undertaking letter requiring the charity to carry out certain corrective actions to become compliant. Under the new regime, CRA will have four tools to ensure that registered charities comply with their obligations:

- Education (either general publications or a letter specifically addressed to a charity explaining its obligations under the ITA);
- Compliance agreement (similar to the former undertaking letter);

[12] See Karen J. Cooper, "Changes to Sanctions, Penalties and Appeals Process for Charities" in *Charity Law Bulletin* No. 82 (January 11, 2006) online: http://www.charitylawbulletin.ca.
[13] Subsection 188.2(3) of the ITA deems the suspended charity not to be a qualified donee.

- Imposition of an interim sanction or penalty (a financial penalty or the suspension of the charity's status as a qualified donee and the capacity to issue official donation receipts; and
- Revocation of registered charitable status.

As a general rule, the Charities Directorate intends to start with educational methods to obtain compliance, and then move progressively through compliance agreements, sanctions, and the ultimate sanction of revocation, if necessary. However, in cases of serious non-compliance, CRA intends to move directly to the imposition of a sanction or revocation.

3. CRA Issues Warning to Charities on Tax Shelter Gifting Arrangements[14]

The CRA issued a warning to registered charities on June 4, 2007[15] and a Tax Alert on August 13, 2007[16] with respect to the consequences of participating in a tax shelter gifting arrangement. CRA has warned that participating in such arrangements can jeopardize their charitable status or expose them to monetary penalties. Examples of tax shelter gifting arrangements identified by CRA include gifting trust arrangements, leveraged cash donations, and buy-low, donate-high schemes.[17] The CRA warns that it intends to challenge and proceed with compliance action against any arrangement that does not comply with the ITA and that charities which knowingly exploit their tax receipting privileges by participating in schemes that are abusive or fraudulent, or that fail to devote their resources to legitimate charitable activities, will be subject to revocation and/or significant penalties. In addition, the CRA may also apply penalties against those persons who promote such arrangements or who participate in making false statements to the CRA. In the Tax Alert, CRA urges taxpayers to avoid tax shelter gifting arrangements and warns that it intends to audit all such arrangements.

To date, the CRA has reassessed over 26,000 taxpayers who participated in these schemes, and denied about $1.4 billion in donations claimed. Audits of another 20,000 taxpayers involving $550 million in donation claims are just about complete and audits on other arrangements involving over 50,000 taxpayers are about to begin. Both charities and donors alike are advised to exercise caution when considering any involvement in such schemes and should consider obtaining independent professional advice before participating in a tax shelter gifting arrangement. Terry De March, Director General of the

[14] Terrance S. Carter in *Charity Law Update,* May/June 2007 at p. 3, online: http://www.carters.ca/pub/update/charity/index.html and Karen J. Cooper in *Charity Law Update*, September 2007 at p.3, online: http://www.carters.ca/pub/update/charity/index.html.
[15] The warning is available on our website at http://www.carters.ca/news/2007/CRA0604.pdf.
[16] For more information see http://www.craarc.gc.ca/newsroom/releases/2007/august/nr070813-e.html and http://www.cra-arc.gc.ca/newsroom/alerts/2007/a070813-e.html.
[17] For more information, see Theresa L.M. Man, "Tax Shelters and Charitable Donations – a Miss-Match", July 4, 2006, available online at: http://www.carters.ca/pub/article/charity/2006/tlm_taxshelters.pdf.

CRA Charities Directorate, has been quoted as stating that "[the CRA] will use whatever tools [they] have to stop abusive charities from harming the public and the system"[18]

In this regard, on November 29, 2007, CRA announced that it had issued a Notice of Suspension to International Charity Association Network (ICAN)[19], a registered charity under the ITA. The one-year suspension of charitable status was imposed upon ICAN for "contravention of … the [ITA] … by failing to maintain and/or provide, and failing to provide access to, books and records relating to its involvement with tax shelter arrangements."[20] CRA explained that "ICAN failed to maintain sufficient documentation to support payments and expenditures including $26,372,685 in fundraising payments and $244,323,422 in charitable program expenditures and failed to provide required documentation to the CRA"[21] This suspension is the first sanction of this sort imposed by CRA since the introduction of the intermediate sanctions. The Tax Court of Canada, in a judgment released on January 3, 2007[22], denied ICAN's application for a postponement of the suspension. The court was not satisfied with the affidavits in support of the application and stated that "to postpone the suspension in the circumstances would handcuff the CRA's capacity to administer the charities' provisions of the [ITA], to ensure compliance and protect public interest"[23]. ICAN plans to appeal the judgment.[24]

4. Meaning of Gift in Quebec[25]

The CRA recently expressed its views on the meaning of gift for the purposes of issuing a donation tax receipt in Quebec in the context of the acquisition of property during a fundraising auction[26]. CRA indicated that for the purposes of determining whether a gift had been made in Quebec, the relevant law is the *Civil Code* of Quebec and that the proposed split-receipting rules do not all apply to gifts made in Quebec. Specifically, it is CRA's view that proposed subsection 248(30) is intended to alter the common law presumption that if consideration is received when making a gift there is no donative intent by providing that the receipt of consideration will not, in itself, invalidate a gift and that where the value of

[18] Kevin Donovan, "Charity Rules Beefed Up", in *The Toronto Star* (December 21, 2007).
[19] For more information, see Karen J. Cooper and Kimberley A. Cunnington-Taylor in in Charity Law Update, November 2007 at p.4, online: http://www.carters.ca/pub/update/charity/07/nov07.pdf.
[20] For more information, see "CRA Issues Notice of Suspension to International Charity Association Network", available online at: http://www.cra-arc.gc.ca/newsroom/releases/2007/nov/nr071129-e.html.
[21] *Ibid.*
[22] International Charity Association Network v. R., 2008 T.C.C. 3.
[23] *Ibid.* at 78.
[24] Paul Waldie, "Charity Hits Another Roadblock", in *The Globe and Mail* (January 5, 2008).
[25] Karen J. Cooper in *Charity Law Update*, October 2007 at p. 3, online: http://www.carters.ca/pub/update/charity/index.html.
[26] For additional information, see CRA Technical interpretation #2007-024845, issued in French on September 20, 2007.

the consideration received represents 80% or less than the value of the gift an intention to give will be presumed. Since, according to the civil law in Quebec, it is possible to make a gift where consideration is received in return, CRA is of the view that the presumption in subsection 248(30) would not apply. Therefore, determining whether a receipt can be issued in the circumstances will involve more than the simple mathematical calculation of whether the value of the property received is 80% or less than the price paid at the auction. For split-receipted gifts in Quebec organizations will have to examine all of the circumstances surrounding the gift to determine whether a gift has been made according to the civil law in Quebec.

D. OTHER FEDERAL LEGISLATION AFFECTING CHARITIES

1. Major Changes to Anti-Terrorism Laws Recommended By House of Commons Subcommittee Report[27]

The final report of the House of Commons Subcommittee on the Review of the *Anti-terrorism Act* ("House Subcommittee") was published on March 27, 2007. Unlike the report from the Special Senate Committee, this report appeared to show the first echoes of acknowledgement from Parliament of the distressing reality that charities face under this legislation.

a) Recommended Changes to the Charities Registration (Security Information) Act

Among the recommendations of the House Subcommittee's report are substantial changes to the *Charities Registration Act*, which was created by the *Anti-Terrorism Act* ("ATA") and outlines the process of issuing of a "certificate" by which a charity can be deregistered. In order to remedy some of the deficiencies in the law surrounding the deregistration process and bring clarity with respect to the due diligence burden that charities face, the House Subcommittee has recommended changes including:

- "Due Diligence" defense for charities facing deregistration:
- Creation of "Best Practice" guidelines for Canadian charities:
- Institution of a knowledge (*mens rea*) requirement:
- Right to Appeal a Finding of Reasonableness

[27] Terrance S. Carter & Sean S. Carter, "Major Changes to Anti-Terrorism Laws Recommended By House of Commons Subcommittee Report" in *Anti-Terrorism and Charity Law Alert* No. 13 (April 18, 2007) online: http://www.carters.ca/pub/alert/ATCLA/index.htm.

b) Other Recommended Changes Impacting Charities

There are several other recommended legislative changes that would impact charities in the House Subcommittee's report. One of these recommendations is the establishment of a "Panel of Special Counsel" to test the need for confidentiality and closed hearings, as well as to test the evidence not disclosed to a party in proceedings. The Panel of Special Counsel would participate in proceedings surrounding the establishment of "listed entities," the deregistration process under the Charities Registration Act, and the security certificate process under the Immigration and Refugee Protection Act[28].

The House Subcommittee also recommends that section 145 of the ATA be amended to require another comprehensive review of its provisions and operation, to be commenced no later than December 31, 2010.

2. Recent CRTC Changes: Telemarketing and The National Do Not Call List[29]

The Canadian Radio-Television and Telecommunications Commission ("CRTC") laid the foundation for Canada's first national do-not call list and provided further clarification and modification of the telemarketing rules established by Telecom Decision 2004-35 in Telecom Decision CRTC 2007-48.[30] Although registered charities obtained a legislated exemption from the National Do-Not-Call List ("National DNC list"), the new telemarketing regime includes a requirement for individual do-not-call lists that are separate and distinct from the NDNC list and from which there is no exemption.

The telemarketing rules established by Decision 2004-35 brought about a number of restrictions, including restrictions on unsolicited live voice and fax calls made for the purpose of solicitation, requiring self-identification, prohibitions against sequential dialling and restrictions on calls to emergency lines and healthcare facilities, among others. There was no exemption from these rules. Decision 2004-35 also discussed the potential for a National DNC list in general and Bill C-37 (S.C. 2005, c. 50) granted the CRTC powers to establish and enforce a National DNC list, as well as providing an exemption from the National DNC list for charitable organizations registered under s. 248(1) of the ITA (Canada).

[28] S.C. 2001, c. 27.
[29] For more information, see Terrance S. Carter & Nancy E. Claridge, "Charities, Telemarketing and The National Do Not Call List: An Update On Recent CRTC Changes" in *Charity Law Bulletin* No. 119, (July 30, 2007) online: http://www.charitylawbulletin.ca.
[30] Decisions 2004-35 and 2007-48 can be viewed at: http://www.crtc.gc.ca.

For telemarketers in general, the most relevant portion of Decision 2007-48 was the establishment of rules and guidelines for a NDNC list, which have the potential to severely restrict the current abilities of telemarketers throughout Canada, but will not be implemented until an independent operator has been selected. The exemption for registered charities under Bill C-37 does not extend to non-registered charities or the non-registered affiliates of registered charities or to not-for-profit organizations.

Although the CRTC relaxed a number of the telemarketing rules that had been introduced in Decision 2004-35 the rules remain a significant burden on the organizational and funding capacity for charitable and not-for-profit organizations. What will likely be a source of confusion for many registered charities is the requirement under the telemarketing rules for each organization to maintain its own do-not-call list even though they may be exempted from the NDNC list.

Guidelines for handling consumer complaints about the violation of the telemarketing rules were also outlined in Decision 2007-48. Although Bell Canada, the National DNC list operator chosen by the CRTC on December 21, 2007, will manage the actual filing of complaints, the CRTC will maintain the roles of investigator and issuer of notices of violation and monetary penalties.

E. RECENT CASE LAW AFFECTING CHARITIES

Meaning of Charity and Gift

1. Supreme Court of Canada Confirms the Common Law With Respect to Charity and Sports Organizations[31]

On October 5, 2007, the Supreme Court of Canada ("SCC") unanimously upheld a Federal Court of Appeal's decision by stating that an Ontario amateur youth soccer association did not qualify as a registered charity within the meaning of subsection 248(1) of the ITA. Writing for the majority in *A.Y.S.A. Amateur Youth Soccer Association v. Canada (Revenue Agency)*[32], Justice Marshall Rothstein concluded that although some sports organizations, other than registered Canadian amateur athletic associations, might be found to be charities under the common law, the appellant did not qualify for charitable registration because its purposes and activities were not charitable. The majority judgment confirms the existing common law with respect to the determination of what is charitable in the context of sports organizations, indicating that recognition of an organization, such as the appellant, would result in

[31] For more information, see Karen.J. Cooper & Terrance S. Carter, "Supreme Court of Canada Confirms the Common Law With Respect to Charitable Sports Organizations" in *Charity Law Bulletin* No. 126 (October 17, 2007) online: http://www.charitylawbulletin.ca.
[32] 2007 SCC 42.

a significant change to the common law beyond the incremental changes mandated by the jurisprudence and would be best left to Parliament.

The SCC's decision does not establish any new principles of law. Instead, it merely confirms the existing common law as it relates to the question of whether particular sports organizations may be recognized as registered charities. Unlike the Federal Court of Appeal decision, the majority decision leaves open the possibility that a sports organization may become registered as a charity, provided that sport is ancillary to another recognized charitable purpose. However, this possibility is nothing more than a statement of what is already clearly recognized in practice, since any activity by a charity will be acceptable if it is a means of achieving a recognized charitable purpose. The real issue is whether sport in and of itself can be seen as a charitable purpose at common law under the fourth head, which the court ruled it cannot.

The Court also reaffirms the view that any significant changes to the definition of charity will need to come from Parliament, a clear indication that the SCC has no interest, particularly in light of the facts before it in this case, to be interventionist in this regard. As such, the issue of reform to the definition of charity will need to change forum from the courts to Parliament given the limitations of what the SCC is prepared to do.

2. Promotion of "Ethical Tourism" Not Considered Charitable[33]

On May 3, 2007, the SCC dismissed the application for leave to appeal by the appellant in *Travel Just v. Canada Revenue Agency*, 2006 F.C.A. 343. On October 24, 2006, the FCA had released its decision in this case,[34] representing 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

[33] For more information, see Karen J. Cooper and Terrance S. Carter, "Promotion of Ethical Tourism Not Considered Charitable" in *Charity Law Bulletin* No. 105 (December 19, 2006) online: http://www.charitylawbulletin.ca.
[34] *Travel Just v. Canada Revenue Agency,* [2006] F.C.J. No. 1599.

the ITA is likely a public law concept, rendering the private law of Québec irrelevant, thus avoiding a decision on this issue.

Regulation of Charities

1. Supreme Court of Canada Decision Permits Judicial Interference In Religious Disputes[35]

In a 7-2 decision released on December 14, 2007, the SCC has held that the failure to perform a religious obligation may give rise to civil damages. In Bruker v. Marcovitz[36], the Court upheld a decision of the Quebec Superior Court ordering a Jewish husband to pay $47,500 in damages to his ex-wife for withholding his consent to a religious divorce, or a *get*, despite contractually agreeing to do so 15 years earlier.

Madame Justice Abella, writing for the majority, concluded that the agreement to give a *get* was a valid and binding contractual obligation under Quebec law. Although moral obligations are traditionally not enforceable under contract law, Justice Abella held that "there is nothing in the [Quebec] Civil Code preventing someone from transforming his or her moral obligations into legally valid and binding ones."[37]

Justice Abella did not accept the husband's argument that he should not be compelled to provide the *get,* as doing so would violate his freedom of religion. To the contrary, the Court held that "any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment is significantly outweighed by the harm caused by his unilateral decision not to honour it."[38] In coming to this conclusion, Justice Abella noted that withholding the *get* infringed the equality rights and dignity of Jewish women by denying them independence and the ability to divorce and remarry. As a result, the husband could not rely on the Quebec Charter to avoid the consequences of his legal commitment to provide the *get*, and the wife's appeal was allowed.

Although the outcome was equitable in the circumstances, the Court's analysis of religious freedom issues in the case raises a number of challenging and troubling issues for religious institutions and their members. Of particular concern was the Court's statement that its role under the Canadian Charter of Rights and Freedoms is to "ensure that members of the Canadian public are not arbitrarily disadvantaged by their

[35] For more information, see Terrance S. Carter and Derek B. Mix-Ross in, "Supreme Court of Canada Decision Permits Judicial Interference In Religious Disputes", in *Church Law Bulletin No. 21* (December 20, 2007), online: http://www.carters.ca/pub/bulletin/church/2007/chchlb21.pdf.
[36] 2007 SCC 54.
[37] *Ibid*. at para. 51.

religion." This foray into the forum of religious doctrine and practice is alarming and represents a significant shift from the Court's traditional role of remaining neutral towards such matters. In the words of Justice Deschamps, who wrote for the two dissenting justices in this case, such interference was improper and "it is not up to the state to promote a religious norm"; that is a role that should be "left to religious authorities."[39]

It remains to be seen how this decision will be interpreted in future decisions. It may be limited in application to its own facts, and may only be employed to impose liability where a party contracts to fulfil a religious obligation. On the other end of the spectrum, it may be interpreted more broadly to justify further judicial interference with religious practices. It would seem that the majority's reasons would certainly grant lower courts the flexibility to employ the latter approach, a development which should be of concern to people and communities of faith in Canada.

2. Non-Compliance Results in Court-Ordered Wind Up of Not-for-Profit Corporation Under the Corporations Act (Ontario)[40]

In a judgment released on October 3, 2007, the Ontario Superior Court of Justice ordered that a church, incorporated by letters patent pursuant to the *Corporations Act* (Ontario)[41] ("OCA"), be wound up for various statutory breaches. The decision in *Warriors of the Cross Asian Church v. Masih*[42] assists in explaining the application of the Act with respect to not-for-profit corporations. Specifically, this decision attempted to clarify some confusion, which was born out in the case law, as to the level of deference afforded to not-for-profit corporations with respect to the technical corporate procedure requirements for meetings as set out under the Act. Where an error is technical in nature and does not affect the results of an election of directors or some other serious corporate matter, some leniency may be afforded to the not-for-profit corporation. However, where the error goes to the heart of an important corporate matter, such as the election of directors in this case, then it appears that the courts will demand that the internal workings of the not-for-profit corporation strictly adhere to the requirements of the Act. Where this cannot be, or has not been, achieved, particularly where the original incorporators are no longer part of

[38] *Ibid*. at para. 17.
[39] Ibid. at para. 132.
[40] For more information, see Jacqueline M. Demczur, "Non-Compliance Results in Court-Ordered Wind Up of Not-for-Profit Corporation Under the Corporations Act (Ontario)" in *Charity Law Bulletin* No. 129 (December 20, 2007) online: http://www.carters.ca/pub/bulletin/charity/2007/chylb129.htm.
[41] R.S.O. 1990, c. C.38.
[42] [2007] O.J. No. 3794.

the said not-for-profit corporation, the courts will invoke their discretion to dissolve a non-share capital corporation outright.

3. What Constitutes a Service Available to the Public Under B.C. Human Rights Legislation?[43]

On January 11, 2007, the British Columbia Court of Appeal released its decision in Buntain et al. v. Marine Drive Golf Club ("Marine Drive")[44]. Marine Drive Golf Club ("Golf Club") and a group of its members and their guests ("Members") were in dispute with respect to a resolution passed by the Golf Club's Board of Directors preventing females from having the ability to enter or use the 'men's lounge' located in the Golf Club. The Members filed a complaint to the British Columbia Human Rights Coalition alleging that the Golf Club, a private club and non-profit society for the purposes of the ITA and its Board of Directors had discriminated against them contrary to the British Columbia Human Rights Code[45] ("the Code"), on the basis of their sex and sexual orientation. The Court was asked to determine whether this discrimination fell under the jurisdiction of the Service Provision in the Code, section 8, which prohibits discrimination against a person or class of persons regarding any 'accommodation, service or facility that is customarily available to the public'. The Human Rights Tribunal[46] found that the commercial service of providing food and beverage and access to the 'men's lounge' were customarily available to the public of the Golf Club and thus it was within the jurisdiction of the Tribunal to find that discrimination had taken place.

The Supreme Court of British Columbia[47] and subsequently the British Columbia Court of Appeal disagreed with the Tribunal and held that those services were not customarily available to the public. The Supreme Court of British Columbia held that while the Golf Club may lack control over all of the users of its service, as a private club, with a formal membership selection process, the relationship between the Golf Club and those users remains a private relationship and thus, the Golf Club and the 'men's lounge' were not services customarily available to the public and accordingly were not subject to the scrutiny of

[43] For more information, see Dawn E. Philips and Terrance S. Carter, " What Constitutes a Service Available to the Public Under B.C. Human Rights Legislation?", in *Charity Law Bulletin No. 127* (October 29, 2007), online: http://www.charitylawbulletin.ca.
[44] (2007) 278 D.L.R. (4th) 309.
[45] R.S.B.C. 1996, c. 210.
[46] *Buntain v. Marine Drive Golf Club*, [2005] B.C.H.R.T.D. No. 119.
[47] *Marine Drive Golf Club v. Buntain*, [2007] B.C.J. No. 37.

the Service Provision in the Code. The Members were denied leave to the SCC on June 28, 2007 without reason.[48]

4. CRA Audits of Registered Charities[49]

The SCC granted the appellant's application for leave to appeal in *Redeemer Foundation v. Minister of National Revenue*, 2006 D.T.C. 6712 ("FCA") on May 10, 2007 and is scheduled to hear the appeal on February 28, 2008. In this case, the FCA considered the process CRA must follow to obtain the names of donors during the course of an audit of a registered charity. Initially, the Federal Court[50] ("FC") declared that the actions of the CRA in verbally requesting donor information from a charity being audited and using that information to contact donors and advise them that their donation tax credits were being disallowed and that they would be reassessed, were unlawful. The FC ordered that the reassessments of the donors be vacated. This decision was overturned by the FCA on the basis that there were other provisions, in addition to the process provided for in subsection 231.2(2) of the ITA requiring prior judicial authorization, which allowed 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.

Directors' Liability and Governance

5. Non-Share Capital Corporations Must Interpret By-Laws Fairly, Reasonably and in Good Faith[51]

On July 7, 2007, the Ontario Divisional Court[52] dismissed an appeal from the Ontario Superior Court's judgement in *Chu v. Scarborough Hospital Corp.*[53] This case involved a dispute between an annual

[48] *Marine Drive Golf Club v. Buntain*, [2007] S.C.C.A. No. 112.
[49] Karen J. Cooper in *Charity Law Update*, May/June 2007 at p. 4, online: http://www.carters.ca/pub/update/charity/index.html and Karen J. Cooper in *Charity Law* Update, October 2006 at p. 6, online: http://www.carters.ca/pub/update/charity/index.html; See also *All Saints Greek Orthodox Church v. Minister of National Revenue*, [2006] F.C.J. No. 481.
[50] [2005] F.C.J. No. 1678.
[51] Terrance S. Carter & Paula J. Thomas, "Non-Share Capital Corporations Must Interpret By-Laws Fairly, Reasonably and in Good Faith" in *Charity Law Bulletin* No. 110, (February 21, 2007) online: http://www.charitylawbulletin.ca, and Terrance S. Carter & Paula J. Thomas, "Ontario Divisional Court Update on Fair and Reasonable Interpretation of By-Laws" in *Charity Law Bulletin* No. 118, (July 30, 2007) online: http://www.charitylawbulletin.ca.
[52] [2007] O.J. No. 3131.
[53] [2006] O.J. No. 5147.

member of the Scarborough Hospital (the "Hospital"), and the Hospital's board of directors. The trial decision canvassed a number of provisions of the OCA[54] pertaining to the interpretation of by-laws, the calling of special meetings, classes and terms of membership, and the Hospital's governance structure.

The trial and appeal decisions echo the growing trend in case law which insists that charitable and not-for-profit organizations comply with corporate governance procedures as set out in their governing statutes, constating documents and by-laws. It is essential that such compliance be conducted in a manner which is reasonable, fair and in good faith. Furthermore, the court decisions indicate that control over such governance procedures is to be shared among the directors, officers and voting members, not centred in the hands of a few people acting on their own accord. The Divisional Court has reaffirmed earlier case law that a corporation, as well as the individuals who become members, which would include directors, have entered into an implicit contractual obligation to comply with the constating documents and by-laws of the corporation.

6. Corporation's Right to Regulate Qualifications of Directors[55]

Although courts have traditionally expressed reluctance to interfere in the internal affairs of associations and clubs, in *Rakowski v. Malagerio* (2007), 84 O.R. (3d) 696 (Sup. C.J.), a judge of the Ontario Superior Court of Justice concluded, in a decision released on February 1, 2007, that the court has jurisdiction to intervene in the affairs of an incorporated student federation in order to determine if a policy prohibiting members of other student associations or student advocacy groups from serving on the board of directors was unreasonable, discriminatory, inconsistent with the objects of the corporation, contrary to the *Canadian Charter of Rights and Freedoms* and the OCA, and passed in bad faith. The court concluded that since the impugned policy was enacted to prevent conflicts of interest, it was neither objectionable on its face, nor was it discriminatory, contrary to public policy or public interest and did not interfere with *Charter* rights.

[54] R.S.O. 1990, c. C.38.

[55] For more information, see Nancy E. Claridge and Terrance S. Carter, "Court Upholds Corporation's Right to Regulate Qualifications of Directors" in *Charity Law Bulletin* No. 121, (July 31, 2007) online: http://www.charitylawbulletin.ca.

F. CONCLUDING COMMENTS

2007 brought a number of significant changes to the area of charity law which will be of particular concern for the directors and officers of charities, as well as for their legal counsel. The number of legislative changes, CRA policy initiatives and CRA rulings that have occurred during 2007, 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.

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