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CHARITY LAW 2011 – YEAR IN REVIEW

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A. INTRODUCTION

Over the past year, the charitable sector in Canada has experienced a number of important regulatory and common law developments at the federal and provincial level that will have a significant impact on how charities operate in Canada and abroad. The purpose of this *Charity Law Bulletin* is to provide a brief overview of some of the more important developments in 2011, including changes to the *Income Tax Act*[1] ("ITA"), new publications from the Charities Directorate of the Canada Revenue Agency ("CRA"), and court decisions. Recent developments in federal and provincial legislation, such as the proclamation of the *Canada Not-for-profit Corporations Act* ("CNCA") and preparation for the proclamation Ontario *Not-for-profit Corporations Act* ("ONCA"), will also be discussed.

B. RECENT LEGISLATIVE INITIATIVES UNDER THE ITA

The 2011 Federal Budget was initially introduced on March 22, 2011. After the dissolution of Parliament and the subsequent election of the new Tory majority government, the budget was reintroduced on June 6,

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[1] R.S.C. 1985, c. 1 (5th Supp.).

2011 in almost identical form. The Ministry of Finance also released a Notice of Ways and Means to Implement Certain Provisions of the 2011 Budget as Updated on June 6, 2011 ("Ways and Means"). A revised version of the Ways and Means was released on October 3, 2011 in advance of the Introduction and First Reading of Bill C-13, *An Act to Implement Certain Provisions of the 2011 Budget as Updated on June 6, 2011 and Other Measures* on October 4, 2011. Bill C-13 received Royal Assent on December 15, 2011,[2] The following paragraphs summarize amendments made to the ITA under Bill C-13.[3]

1. New Regulatory Regime for Qualified Donees

Qualified donees may issue official donation receipts for gifts. "Qualified donees" is a termed defined in the ITA to include various types of entities, the largest group of which are registered charities.[4] Bill C-13 has extended certain regulatory requirements that currently apply to registered charities to the following list of qualified donees:

- registered Canadian amateur athletic associations ("RCAAAs");
- municipalities in Canada;
- municipal or public bodies performing a function of government in Canada (these entities are proposed to be added to the list of qualified donees and were previously included in the proposed technical amendments to the ITA released on July 16, 2010);
- housing corporations in Canada constituted exclusively to provide low-cost housing for the aged;
- prescribed universities outside of Canada, the student body of which ordinarily includes students from Canada; and
- certain other charitable organizations outside of Canada that have received a gift from Her Majesty in right of Canada.

The extension of these new requirements will not apply to the balance of qualified donees, i.e., the Government of Canada, provincial and territorial governments in Canada, and the United Nations and its agencies. Registered national arts service organizations are deemed to be "registered charities" and are therefore currently subject to the same requirements that apply to registered charities.

[2] Available online at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5339192.
[3] For more information see Theresa L.M. Man, Karen J. Cooper, Terrance S. Carter and Ryan M. Prendergast "Budget 2011 will have Broad Impact on the Charitable Sector" in Charity Law Bulletin No. 245 (March 30, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb245.htm. See also Theresa L.M. Man, Karen J. Cooper, and Terrance S. Carter "Finance Releases Draft Legislative Proposals for 2011 Federal Budget" in Charity Law Update July/August (August 19, 2011) online: http://www.carters.ca/pub/update/charity/11/jul-aug11.pdf.
[4] A new definition of "qualified donees" has been enacted in subsection 149.1(1).

The new requirements that apply to the above list of qualified donees include:

(1) Certain qualified donees will have to apply to be identified in a publicly available list maintained by CRA. This will enable the public to determine which organizations may issue official donation receipts and whether an organization is a qualified donee for grant-making purposes.

(2) If a qualified donee does not issue donation receipts in accordance with the ITA and its regulations, it may be subject to suspension of receipting privileges or revocation of qualified donee status.

(3) Monetary penalties associated with improper issuance of receipts and failing to file an information return that currently apply to registered charities will be extended to RCAAAs.

(4) Certain qualified donees will be required to maintain proper books and records and provide access to those books and records to CRA when requested. If a qualified donee fails to do so, CRA may suspend its receipting privileges or revoke its qualified donee status.

As well, Bill C-13 has extended the following additional regulatory requirements (which currently apply to registered charities) to RCAAAs:

(1) Exclusivity of Purpose and Function-To qualify as an RCAAA, an association must have the promotion of amateur athletics in Canada on a nation-wide basis as its *exclusive* purpose and exclusive function, rather than its primary purpose and primary function. This change is not intended to prevent RCAAAs from staging or engaging in international events and competitions. RCAAAs will also be permitted to carry on related business activities, such as selling merchandise related to their sport, and to engage in limited non-partisan political activities. Breach of these requirements will result in the RCAAA possibly being subject to monetary penalties, suspension of receipting privileges, or revocation.

(2) Undue Benefits - If an RCAAA provides an undue benefit to any person (e.g. excessive compensation to staff, professional fundraiser or any individual or company with whom it does business), it may be subject to monetary penalties, suspension of its receipting privileges, or revocation.

(3) Public Access to Information - CRA is authorized to make available to the public certain information and documents in respect of RCAAAs, in the same manner as applies to registered charities, e.g. governing documents, annual information returns, applications for registration and the names of directors.

2. New Governance Regime for Registered Charities and RCAAAs[5]

As of January 1, 2012, CRA has been given the discretion to refuse or to revoke the registration of a charity or a RCAAA or to suspend its authority to issue official donation receipts, if a member of the board of directors, a trustee, officer or equivalent official, or any individual who controls or manages the operation of the charity or RCAAA is an "ineligible individual" on the basis that he or she:

- has been convicted of a criminal offence in Canada or an offence outside of Canada that, if committed in Canada, would constitute a criminal offence under Canadian law, relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon ("relevant criminal offence");

- has been convicted of an offence in Canada within the past five years, or an offence committed outside Canada within the past five years that, if committed in Canada, would constitute an offence under Canadian law, relating to financial dishonesty (including offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation) or any other offence that is relevant to the operation of the charity or RCAAA ("relevant offence");

- was a director, a trustee, officer or like official of, or an individual who controlled or managed, a charity or RCAAA during a period in which the organization engaged in serious non-compliance and for which its registration has been revoked within the past five years; or

[5] For more information see Karen J. Cooper, "Ineligible Individuals - New Governance Provisions for Charities" in Charity Law Bulletin No. 269 (December 1, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb269.pdf.

- was a promoter (as defined by section 237.1 of the ITA) of a tax shelter that involved a charity or RCAAA, the registration of which was revoked within the past five years for reasons that included or were related to its participation.

3. Recovery of Tax Assistance for Returned Gifts

The amendments to the ITA by Bill C-13 permits CRA to reassess a taxpayer outside the normal reassessment period and disallow a taxpayer's claim for a credit or deduction in any situation where the gifted property is returned to a donor in order to ensure that tax assistance is not improperly retained. Where a qualified donee issued an official donation receipt in respect of a gift of property and subsequently returns that property to the donor, if the fair market value of that returned property is greater than $50, the qualified donee must file an information return with CRA (e.g. a letter) with prescribed information and provide a copy to the donor.

With respect to the return of donated property, Bill C-13 provides rules which address various scenarios that could occur on the return of a gift, some of which can be summarized as follows:

(1) Irrespective of whether the transfer of the original property was a gift, the person is considered not to have disposed of the original property at the time that it was provided to the qualified donee.

(2) If the returned property is identical to the original property, the returned property is deemed to be the original property.

(3) If the returned property is not the original property, the person is deemed to have disposed of the original property at the time that the person acquires the returned property.

A qualified donee faced with the return of a gift will therefore want to give consideration to the above rules depending on the situation and the property donated, as it may result in a different outcome for the donor depending upon the nature of the original gift and what property is being returned to the donor.

4. Gifts of Non-Qualifying Securities

Under Bill C-13, where a qualified donee has received a gift of a non-qualifying security ("NQS"), the tax credit or deduction will be deferred until such time, within five years of the donation of the NQS, the qualified donee disposes of the NQS in exchange for consideration that is not another NQS. If the NQS is not disposed of by the charity within the five-year period following the date of the gift, there will be no tax recognition of the gift.

Bill C-13 has also created new anti-avoidance rules to catch situations whereby, through a series of transactions, a donor avoids the application of the above NQS rules, but at the end of the series of transactions the charity receives a NQS.

5. Granting of Options to Qualified Donees

Effective for gifts made on or after March 22, 2011, Bill C-13 delays the recognition of a gift to a qualified donee of an option to acquire property until the option has actually been exercised. Where an option granted to a DQ is exercised and either the total of any consideration paid for the option and the property by the qualified donee exceeds 80 per cent of the fair market value of the underlying property, or the donor can establish that the granting of the option and the exercise thereof was made with the intention of making a gift to a qualified donee, the gift will be recognized. The new provisions also deal with the value of the gift for receipting purposes when the option is exercised, and when the option is disposed of by the qualified donee prior to being exercised, the proceeds of disposition to the donor and the value of the gift for receipting purposes.

6. Donations of Publicly Listed Flow-Thru Shares

Bill C-13 limits the availability of the exemption from tax on capital gains where flow thru shares ("FTS") are donated to a qualified donee. Effective on or after March 22, 2011, the exemption from tax on the capital gain that arises from the donation of FTS will only apply to the extent that the cumulative capital gains in respect of the gift exceeds the original cost of the FTS. This will have the effect of substantially reducing the tax benefits of a gift of FTS so that they are generally no more attractive an option than any other gift of shares or cash. The Budget also contains anti-avoidance provisions that are intended to ensure taxpayers are not able to structure around these changes.

7. Motion 559 Concerning Tax Incentives for Charitable Donations[6]

The 2011 Budget included Motion 559, a motion sponsored by the Honorable Peter Braid, which called for the Standing Committee on Finance ("SCOF") to study tax incentives for charitable donations. On Tuesday, September 20, 2011, SCOF moved to undertake a comprehensive study of no less than 12 meetings on the current tax incentives for charitable donations with a view to encouraging increased giving, including but not limited to:

- Changes to the charitable tax credit amount;
- Reviewing the possible extension of the capital gains exemption to private company shares and real estate when donated to a charitable organization; and
- Considering the feasibility and cost of implementing these and other measures.

C. NEW GUIDANCE, COMMENTARIES AND OTHER PUBLICATIONS FROM CRA

1. CRA Notice on Disbursement Quota Reform[7]

On February 2, 2011, CRA released a Charities and Giving Notice on Disbursement Quota Reform. The Notice outlines several disbursement quota changes that affect charities as a result of the 2010 federal Budget. Topics include the new requirements under the disbursement quota reform, details surrounding the capital accumulation rule and the anti-avoidance rule, and the repeal of the charitable expenditure rule.

2. CRA Notice on Anti-Avoidance Rules and Designated Gifts[8]

On March 8, 2011, CRA released a Charities and Giving Notice on Anti-Avoidance Rule and Designated Gifts. The 2010 federal Budget introduced new anti-avoidance provisions regarding gifts made between registered charities that are not at arm's length and also introduced the concept of a designated gift. In the Notice, CRA reviews the provisions and clarifies the concept of a designated gift, which is a type of gift made between registered charities that are not at arm's length. CRA

[6] For more information see Terrance S. Carter, "Update on Motion 559 Concerning Tax Incentives for Charitable Donations" in Charity Law Update July/August (August 19, 2011) online: http://www.carters.ca/pub/update/charity/11/jul-aug11.pdf. See also Terrance S. Carter, "Update on Motion 559 Concerning Tax Incentives for Charitable Donations" in http://www.carters.ca/pub/update/charity/11/oct11.pdf.
[7] For more information on the Notice please visit CRA's website at http://www.cra-arc.gc.ca/gncy/bdgt/2010/chrt-eng.html.
[8] For a more detailed explanation of the provisions, please visit CRA's website at http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/gfts/nt-vdnc-eng.html.

indicates that in order to designate a gift the donor charity must indicate this in its information return for the fiscal period in which the gift is made. The donor charity cannot use the designated gift to satisfy its disbursement quota.

3. IC84-3R – Gifts to Certain Charitable Organizations Outside Canada[9]

On March 15, 2011, a revised attachment was added to CRA Publication IC84-3R, *Gifts to Certain Charitable Organizations Outside of Canada*. This attachment lists charitable organizations outside of Canada to which Her Majesty in the right of Canada has made a gift. These organizations are deemed to be qualified donees and are therefore eligible to receive gifts from Canadian registered charities and donors. New organizations were added to the list, such as Christchurch Earthquake Appeal.

4. Non-qualified investments[10]

CRA updated its policy on non-qualified investments and has replaced the previous guidance, Summary Policy CSP-N04, with CG-006. This policy refers to situations where a registered charity that is designated as a private foundation holds a non-qualified investment.

5. Donation of Gift Certificates or Gift Cards[11]

CRA updated its policy on donations of gift certificates or gift cards and replaced Policy Statement CPS-018 with CG-007. This policy provides that registered charities can issue official donation receipts for income tax purposes for the eligible amount of gifts of gift certificates and gift cards under specific circumstances. This may be an issue where registered charities accept gift certificates and use them in fundraising events, such as auctions and raffles, or to acquire goods or services for use in their charitable activities.

6. Confidentiality – Public Information[12]

CRA updated its policy on confidentiality and has replaced Summary Policy CSP-C12 with CG-008. Generally, the confidentiality provisions of the ITA prevent the CRA from discussing the affairs of a

[9] The revised attachment is available on the CRA website at http://www.cra-arc.gc.ca/E/pub/tp/ic84-3r-attach/ic84-3r-attach-e.html.
[10] The new policy is available on the CRA website at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nqfdnvmt-eng.html.
[11] This new policy is available on the CRA website at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/gftcrt-eng.html.
[12] This new policy is available on the CRA website at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/cnfdntl-eng.html.

particular organization without the consent of an authorized representative. There are, however, specific exceptions that allow CRA to make available to the public certain information about registered or previously-registered charities. For instance, general information on a registered or previously registered charity, including its status, as well as the information contained in the public portion of a charity's Information Return (T-3010) is available to the public in the Charities Listings.

7. Qualified Donees[13]

CRA updated its guidance on qualified donees and replaced Summary Policy CSP-Q01 with CG-010. .

8. CRA Guidance: Working with Intermediaries[14]

On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* (the "Guidance"). The Guidance will assist charities and applicants for charitable status who are intending on conducting charitable activities through an intermediary within Canada. For the Guidance, an intermediary is defined by CRA as an individual or non-qualified donee. The Guidance clarifies that CRA's administrative guidance concerning operating outside Canada applies equally within Canada as well. As such, the Guidance is a modified version of Guidance CG-002, *Guidance for Canadian Registered Charities Carrying Out Activities Outside Canada*. While the Guidance contains relatively little new information, the Guidance modifies certain provisions of CG-002. Specifically, the Guidance modifies the examples provided in CG-002 with respect to intermediaries, such as agents and contractors so that they are localized within Canadian borders.

It is recommended that charities, even if they do not conduct any activities outside Canada, that are conducting any activities through an intermediary review the Guidance to ensure that they are able to document the necessary direction and control over their charitable resources.

[13] This new policy is available on the CRA website at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/qlfddns-eng.html.
[14] For more information see Terrance S. Carter, "CRA Guidance on Working Through Intermediaries in Canada" in Charity Law Bulletin No. 259 (August 19, 2011) online: http://www.carters.ca/pub/update/charity/11/jul-aug11.pdf.

9. CRA Guidance: Promotion of Animal Welfare and Charitable Registration[15]

On August 19, 2011, CRA released its new Guidance on the "*Promotion of Animal Welfare and Charitable Registration*[16] ("Guidance"). As explained in the Guidance, promoting the welfare of animals falls under one or both of the charitable heads of "advancement of education" (second head) or "other purposes beneficial to the community" (fourth head). According to common law, a charitable purpose must also provide a benefit to the public. In this context, the courts have determined that the promotion of animal welfare provides an intangible moral benefit to humanity. Therefore, the public benefit test is satisfied by the very acts of showing kindness to animals in need of assistance or care. The Guidance provides a non-exhaustive list of acceptable charitable activities that could promote animal welfare.

10. CRA Draft Guidance: Arts Organizations and Charitable Registration[17]

On November 1, 2011, CRA released a draft *Guidance on Arts Organizations and Charitable Registration* (the "Draft Guidance") for public consultation. The Draft Guidance is intended to be an interpretation of the applicable common law and clarifies the position and practice of CRA's Charities Directorate for the purpose of determining whether an arts organization is eligible for initial and on-going registration as a charity. Once finalized, this Guidance will replace CRA's Summary Policy CSP-A08 and Summary Policy CSP-A0A24. Comments or questions for inclusion in the Questions and Answers to supplement the Draft Guidance were due to CRA on January 13, 2012.

D. TECHNICAL INTERPRETATIONS INVOLVING NON-PROFIT ORGANIZATIONS ("NPOS")

1. Summary of CRA's view on NPOs

In technical interpretation Document no. 2010-038058I7, dated April 7, 2011, the issue was whether an unregistered charity can qualify for a tax exemption provided by s. 149(1)(l) of the ITA. CRA responded by summarizing its views on NPOs. NPOs must operate "exclusively" for purposes other

[15] For more information see Terrance S. Carter and Jacqueline M. Demczur, "Draft CRA Guidance on Promotion of Animal Welfare and Charitable Registration" in Charity Law Bulletin No. 243 (February 24, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb243.pdf. See also Jacqueline M. Demczur, "Promotion of Animal Welfare is Added as New Acceptable Charitable Purpose" in Charity Law Update September (September 29, 2011) online: http://www.carters.ca/pub/update/charity/11/sep11.pdf.

[16] Available online at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlfr-eng.html.

[17] For more information see Theresa L.M. Man, "CRA Draft Guidance on Arts Organizations and Charitable Registration" in Charity Law Bulletin No. 271 (December 1, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb271.htm.

than a profit. It is permissible for an organization to earn profits, but the profits should be incidental and arise from activities that are undertaken to meet the organization's not-for-profit objectives. Earning profits to fund not-for-profit objectives is not considered to be itself a not-for-profit objective. An organization should fund capital projects and establish reasonable operating reserves from capital contributed by members, from gifts and grants, or from accumulated, incidental profits. Capital contributions, gifts and grants, and incidental profits should generally be accumulated solely for use in the operations of the organization should not be used to establish long-term reserves designed primarily to generate investment income.

Maintaining reasonable operating reserves or bank accounts required for ordinary operations will generally be considered to be an activity undertaken to meet the not-for-profit objectives of an organization. Consequently, incidental income arising from these reserves or accounts will not affect the status of an organization. Limited fundraising activities involving games of chance or sales of donated or inexpensive goods generally do not indicate that the organization as a whole is operating for a profit purpose. In determining whether an organization has any profit purpose, the activities of the organization must be reviewed both independently and in the context of the organization as a whole.

2. Shareholders' cottages built on organization's property

In technical interpretation Document no. 2011-0397881E5, dated June 23, 2011, the issue was whether there was a benefit to a shareholder for use of property of a s. 149(1)(l) corporation at a cost below fair market value. CRA has previously expressed the view that gains realized from the sale of a particular piece of the property would likely not be taxable to the corporation, which would be able to make payments to its shareholders without jeopardizing its NPO status, as long as those payments were made from the gains realized from the sale. Upon receiving additional information CRA expressed further views that though shareholders may have acquired a right to use the property along with their shares (or as a share right), there may be a shareholder benefit if the shareholders are only paying a cost amount for the use of the property, unless separate fair market value consideration was paid for the use of the property either at the time of purchase or subsequently. The shareholder benefit would be the difference between the current annual cost to the shareholders and the fair market value of the use of the property.

3. Condo renting space to cell tower

In technical interpretation Document no. 2011-0405541I7, dated July 13, 2011, the issue was whether a cell tower arrangement would jeopardize the tax-exempt status of a condominium corporation. CRA was of the view that incidental income from the rental of common areas may be treated as income of the condo corporation and generally will not affect the tax-exempt status of the condo. However, where applicable provincial condo legislation supports that the common area rented out does not belong to the condo corporation, but belongs to the condo owners as tenants in common, then the income is not the income of the corporation but is instead the income of the unit owners. In that situation, CRA was of the view that the condo may be better viewed as acting as an agent for the unit owners in entering into any cell tower arrangements. If this is the case, then such arrangements generally would not jeopardize the tax-exempt status of the condo, although the related profit would have to be allocated appropriately among unit owners for tax purposes.

On the other hand, where the relevant provincial law indicates that the income is the income of the condo corporation, and the income generated is not incidental, then the corporation may not qualify as an NPO, since the income from a cell tower arrangement would likely be available for the personal benefit of members of the condo through a material reduction in members' condo fees.

E. CORPORATE UPDATE

1. Canada Not-Profit Corporations Act[18]

As of October 17, 2011, the CNCA came into force as the law that governs the internal affairs of federal not-for-profit corporations. It is important to note that although the CNCA is in force, it does not automatically apply to federal not-for-profit corporations. Corporations incorporated under Part II of the *Canada Corporations Act* ("CCA") will still continue to be governed by the CCA until they transition to the CNCA. All federal not-for-profit corporations are required to transfer to, or continue under the CNCA before October 17, 2014, and if they fail to do so they will be assumed to be inactive and will be dissolved. In order to assist in compliance, Corporations Canada has produced a helpful guide to transition, which is available at http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04954.html.

[18] For more information see http://www.carters.ca/nfp/index.htm.

Until such time as a corporation transitions to the CNCA, it must continue to fulfil all obligations under the CCA.

2. Ontario Not-For-Profit Corporations Act, 2010[19]

With the anticipated proclamation of the ONCA in late 2012, it is an appropriate time for not-for-profit ("NFP") corporations incorporated under Part III of the Ontario *Corporations Act* ("OCA") to begin familiarizing themselves with the changes that the ONCA will have on their future corporate structure and governance, and to plan toward continuance under the ONCA.

For more information, see Ontario's Ministry of Consumer Services website, http://www.sse.gov.on.ca/mcs/en/Pages/Not_For_Profit.aspx.

F. ANTI-TERRORISM LAW UPDATE

1. Interim Report of Senate Committee on Anti-terrorism[20]

The Special Senate Committee on Anti-Terrorism ("the Committee") released its Interim Report entitled *Security, Freedom and the Complex Terrorist Threat: Positive Steps Ahead* in March, 2011. The Committee was created and authorized on May 27, 2010 by Order of Reference from the Senate "to examine and report on matters relating to anti-terrorism." In preparing this report the Committee held 11 hearings between May 13, 2010 and February 14, 2011 and heard from 32 witnesses.

2. Bill C-10: Justice for Victims of Terrorism Act

The Conservative government introduced Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act etc.*, which is referred to as the Safe Streets and Communities Act. To date, Bill C-10 has passed Second Reading in Senate and was referred to the Standing Senate Committee on Legal and Constitutional Affairs on December 16, 2011.

[19] For more information see Terrance S. Carter and Theresa L.M. Man, "The Nuts And Bolts of the Ontario Not-For-Profit Corporations Act, 2010" in Charity Law Bulletin No. 262 (September 30, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf.

[20] For more information see Terrance S. Carter and Nancy E. Claridge , "Interim Report of the Special Senate Committee on Anti-Terrorism" in Anti-terrorism and Charity Law Alert No. 24 (May 26, 2011) online: http://www.carters.ca/pub/alert/ATCLA/ATCLA25.pdf.

The stated purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters. Under section 4(1), any person that has suffered loss or damage in or outside Canada on or after January 1, 1985, as a result of an act or omission that is punishable under the *Anti-terrorism Act*, may bring an action to recover an amount equal to the loss or damage proved to have been suffered.

G. FEDERAL LEGISLATIVE UPDATE

1. Draft Regulations for Anti-Spam Legislation[21]

Bill C-28 is new legislation that regulates spam and related unsolicited electronic messages (the "Anti-spam Legislation"). Although the Anti-spam Legislation will not apply to electronic messages — i.e., email or other electronically distributed messages – that a charity may send requesting donations or other solicitations for volunteers, charities and non-profit organizations which send "commercial electronic messages" as it is defined in the Anti-spam Legislation will need to ensure they are in compliance with the new legislation. In this regard, charities and non-profit organizations which send emails or other electronic messages which, for example, contain offers concerning goods, products or services, or that advertise or promote such opportunities will want to review the Anti-spam Legislation and the draft regulations described in this *Charity Law Bulletin.* According to a press release from the Minister of Industry released on August 1, 2011, the Anti-spam Legislation will likely come into force early in 2012.

2. Canada Consumer Product Safety Act

The *Canada Consumer Product Safety Act* ("CCPSA") received Royal Assent on December 15, 2010 and was proclaimed in force as of June 20, 2011. Among other things, the CCPSA generally requires those who manufacture, import or sell consumer products for commercial purposes to prepare and maintain certain records to ensure that unsafe products can be traced back to their source. Charities and non-profit organizations that sell "for a commercial purpose" consumer products regulated by the CCPSA will be required to maintain records of the name and address of the supplier and purchaser, as

[21] See Ryan M. Prendergast "Regulations for Anti-Spam Legislation Released for Consultation" in Charity Law Update July/August (August 18, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb257.pdf.

well as the location and time period of when that consumer product was sold or transferred, for a minimum of six years.

However, Health Canada is currently developing a regulatory proposal to allow for an exemption from the record keeping requirements for those persons who receive consumer products that are donated by a person other than a person who manufactures, imports, or sells consumer products. This exemption is being prepared in recognition that there may be situations involving certain donated consumer products, where records of the source and date of receipt would do little to support product traceability.. This exemption, if adopted, would arguably apply to charities receiving donations of consumer products from individuals, such as used clothing and other household goods.

H. ONTARIO LEGISLATIVE UPDATE

1. Accessibility for Ontarians with Disabilities Act, 2005[22]

January 1, 2012 was the deadline to meet the accessibility standards required by the *Accessibility for Ontarians with Disabilities Act, 2005*. Part of what this statute requires is that all organizations (public, private and non-profit), that provide goods or services either directly to the public or to other organizations in Ontario and that have one or more employees in Ontario, have accessible customer service. These requirements are detailed in the Regulation *Accessibility Standards for Customer Service*.

I. RECENT CASE LAW AFFECTING CHARITIES (IN CHRONOLOGICAL ORDER)

1. *Marriage Commissioners Reference Decision*[23]

On January 10, 2011 the Saskatchewan Court of Appeal ("the Court of Appeal") released its decision in the *Marriage Commissioners Reference.*[24] The reference arose out of the Court of Appeal's decision on November 5, 2004 and the federal *Civil Marriage Act* of 2005, which broadened the definition of marriage to include same-sex couples. Following the Court of Appeal decision, the Director of the

[22] For more information see Barry W. Kwasniewski, "Ontario Accessibility Standards to be in Place as of January 1, 2012 " Charity Law Bulletin No. 263 (October 27, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb263.pdf.
[23] For more information see Jennifer M. Leddy, "Public Officials and Freedom of Religion: The Marriage Commissioner Reference" in Church Law Bulletin No. 32 (February 14, 2011) online: http://www.carters.ca/pub/bulletin/church/2011/chchlb32.pdf.
[24] *Marriage Commissioners Appointed Under The Marriage Act (Re),* 2011 SKCA 3 (CanLII). The full decision is available online at: http://canlii.org/en/sk/skca/doc/2011/2011skca3/2011skca3.html.

Marriage Unit in the Ministry of Justice and Attorney General advised marriage commissioners that they would be required to perform marriages for same-sex couples. This resulted in some marriage commissioners resigning and others becoming involved in human rights and other civil proceedings.

In an effort to accommodate the religious beliefs of marriage commissioners, the provincial government proposed two amendments to the *Marriage Act*: one a "grandfathering provision" that would not require a marriage commissioner appointed before November 5, 2004 to solemnize a marriage if to do so would be contrary to his or her religious beliefs, and the second which would apply to all marriage commissioners irrespective of their date of appointment.

The Court of Appeal unanimously held that both proposed amendments were inconsistent with the *Canadian Charter of Rights and Freedoms* (the "*Charter")* because they violated the equality rights of gay and lesbian individuals in a way that could not be justified within the meaning of section 1 of the *Charter*.

2. *Bentley v. Anglican Synod of the Diocese of New Westminster*[25]

The Supreme Court of Canada refused to grant leave to appeal by four break-away Anglican parishes from the B.C. Court of Appeal's decision in *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506. On November 25, 2009, the B.C. Supreme Court ruled that the properties of four incorporated parishes that had left the ACC in February 2008 were to remain within the Anglican Church of Canada ("ACC").[26] While the parishes were separate corporations, the act of incorporation, the making and amending of by- laws, rules and regulations and mortgage, sale or other disposition of the property required the consent of the Executive Committee and the local bishop of the ACC. These limitations led the trial judge to conclude that they "are intrinsically part of the Diocese and must be approached in that context."

On November15, 2010, the B.C. Court of Appeal upheld the decision of the B.C. Supreme Court on the basis that the purpose of the trusts on which the parish corporations held the church buildings and

[25] For more information see Ryan M. Prendergast, "Supreme Court of Canada Refuses to Grant Leave in Anglican Synod Decision" in Charity Law Update (June 23, 2011) online: http://www.carters.ca/pub/update/charity/11/jun11.pdf.
[26] *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2009 BCSC 1608 (CanLII). The full decision is available online at: http://canlii.org/en/bc/bcsc/doc/2009/2009bcsc1608/2009bcsc1608.html.

other assets is to further "Anglican ministry in accordance with Anglican doctrine."[27] The B.C. Court of Appeal held that the General Synod of the ACC has the final word on doctrinal matters and the definition of "Anglican ministry."

3. *S.L., et al. v. Commission scolaire des Chênes, et al.*[28]

On May 18 2011, the Supreme Court of Canada heard a significant appeal from a decision of the Québec Court of Appeal concerning the implications of freedom of religion and conscience under the Canadian *Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*. The case, *S.L., et al. v. Commission scolaire des Chênes, et al* concerns whether parents in a public school can exempt their children from participation in Québec's "Ethics and Religious Culture" course (the "ERC"), which is mandatory for all elementary and secondary students and required to be taught from a neutral perspective.

The issue in the case is whether the mandatory nature of the ERC course interferes with the freedom of religion of the Catholic parents who asked that their children be exempted from the course because it forced them to have premature contact with beliefs that were incompatible with those of the family. It is widely anticipated that the case will have repercussions on freedom of religion and the rights of parents to direct the religious education of their children far beyond the province of Québec. The Supreme Court is not expected to render its decision for a few months.

4. *News to You Canada v. Minister of National Revenue*[29]

On June 7, 2011 the Federal Court of Appeal released its ruling in *News to You Canada v. Minister of National Revenue.*[30] After CRA refused its application for charitable registration, News to You Canada appealed on the basis that its purposes fell within two heads of charity, the advancement of education

[27] *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506 (CanLII). The full decision is available online at: http://canlii.org/en/bc/bcca/doc/2010/2010bcca506/2010bcca506.html.
[28] For more information see Jennifer M. Leddy, "Top Court Hears Case on Freedom of Religion" in Charity Law Update (May 26, 2011) online: http://www.carters.ca/pub/update/charity/11/may11.pdf.
[29] For more information see Karen J. Cooper, "Federal Court of Appeal Rules "Dissemination of News" is Not Charitable" Charity Law Update (June 22, 2011) online: http://www.carters.ca/pub/update/charity/11/jun11.pdf.
[30] *News to You Canada v. Minister of National Revenue*, 2011 FCA 192. The full decision is available online at: http://decisions.fca-caf.gc.ca/en/2011/2011fca192/2011fca192.pdf.

and other purposes beneficial to the community as a whole in a way which the law regards as charitable.

With respect to the advancement of education, the Court determined that the production and dissemination of in-depth news and public affairs programs are not sufficiently structured to meet the test established in *Vancouver Society* for educational purposes. Regarding the fourth head, the Court reviewed the decision in *Native Communications* and concluded, in part because the corporation identified its audience as the general public and not any group or community in need of charitable assistance and that the corporation's purposes were already being carried out on a commercial basis, that the mere dissemination of news was not charitableat law. Finally, the Court stated that, in order to be charitable, the Corporation's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context. The Court did not accept the Corporation's contention that presenting the news in an "unbiased and objective" form met this requirement.

5. *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah*[31]

On August 15, 2011, the Ontario Superior Court of Justice released its decision in *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah*.[32] The plaintiff, Nigerians in Diaspora Organization Canada ("NIDO"), a federally incorporated non-share capital corporation under letters patent dated July 9, 2004, sought summary judgment concerning whether the issue of whether the defendants were validly elected as the directors of NIDO was a valid issue for trial.

The court found that the election and composition of the board is governed by the *Canada Corporations Act*, under which NIDO was incorporated, and the general operating by-laws of the corporation. In this regard, the court adopted the approach of Justice Lederer in the decision of *Warriors of the Cross Asian Church v. Masih*, wherein the court found an error that went to the very heart of an election and as a consequence ordered a winding-up of the corporation in that matter. As the error in this case pertained to the qualification of the individuals who purported to vote in the

[31] For more information see Ryan M. Prendergast, "Who's on First? Knowing Who Your Directors Are" in Charity Law Bulletin No. 260 (September 29, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb260.pdf.
[32] *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah*, 2011 ONSC 4696 (CanLII). The full decision is available online at: http://canlii.org/en/on/onsc/doc/2011/2011onsc4696/2011onsc4696.html.

defendant board or directors, the court found that there was no genuine issue for trial with respect to the identity of the directors of NIDO, as the only directors could be the original incorporators.

6. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*[33]

On September 27, 2011, the Ontario Superior Court of Justice confirmed that charitable property raised for the benefit of a particular charitable purpose cannot be unilaterally applied for a different charitable purpose by simply amending its objects through supplementary letters patent. In the case of *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*,[34] the applicants, the Victorian Order of Nurses for Canada ("VON Canada") and its Ontario branch ("VON Ontario"), were successful in obtaining a court order finding that the Greater Hamilton Wellness Foundation (the "Foundation") was in breach of its fiduciary and trust obligations to VON. As a result of those breaches, the assets and income of the Foundation as of December 15, 2009, were to be transferred in trust to VON Ontario in accordance with the Foundation's original charitable purposes.

While the Court's conclusion is not at all surprising, given the facts of the case, the decision serves as a helpful reminder to charities that charitable property raised for the benefit of a particular charitable purpose must be applied to that purpose. Otherwise the charity will need to obtain court approval in order to change the purpose through a *cy-près* order, or in Ontario, the consent of the PGT on a non-contested basis under section 13 of the *Charities Accounting Act*. In addition, the case also provides useful guidance concerning the interpretation of a charity's purposes as set out in its corporate objects.

7. *St. John's Evangelical Lutheran Church of Toronto v. Steers*[35]

On October 24, 2011, Justice Perell of the Ontario Superior Court of Justice certified a class action against The English District Lutheran Church Missouri Synod (Canada) and The English District Lutheran Church Missouri Synod (U.S.A.) in the case of *St. John's Evangelical Lutheran Church of*

[33] For more information see Ryan M. Prendergast and Terrance S. Carter, "Foundation in Breach of Fiduciary and Trust Obligations" in Charity Law Bulletin No. 265 (October 27, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb265.pdf. See also Ryan M. Prendergast and Terrance S. Carter, "Court Issues Supplementary Reasons in VON Decision" in Charity Law Bulletin No. 267 (November 30, 2011) online: http://www.carters.ca/pub/bulletin/charity/2011/chylb267.pdf.

[34] *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (CanLII). The full decision is available online at: http://canlii.org/en/on/onsc/doc/2011/2011onsc5684/2011onsc5684.html.

[35] For more information see Mervyn F. White, "Class Action Certified Against Church" in Charity Law Update November/December (December 1, 2011) online: http://www.carters.ca/pub/update/charity/11/nov-dec11.pdf.

Toronto v. Steers, [2011] O.J. No. 4758.[36] The representative plaintiffs included St. John's Evangelical Lutheran Church of Toronto ("St. John's Church") and three of its directors.

The class action arose out of the series of disputes between the leaders and members of the congregation and the defendants regarding the ownership, autonomy, and operation of St. John's Church and its property. Although the parties settled their disputes, without court approval, a settlement would not be binding and all the class members would not be bound by its terms. Accordingly, the class action certification was sought for the purpose of obtaining court approval of the settlement.

The class action was certified for the purposes of the settlement, pursuant to the *Class Proceedings Act* (Ontario) on the basis of the following common issues: breach of fiduciary duty; violation of the Human Rights Code (Ontario); negligent misrepresentation (regarding the defendant's authority and legal status to install their own church council without the approval of the members and to appropriate church property); conversion of church property; conspiracy (to disband and disenfranchise the class members); and damages.

J. CONCLUSION

The broad extent and number of changes that have occurred during the past 12 months underscore how complicated the law pertaining to charities has become in Canada. It is therefore important for those interested in the sector to keep abreast of developments in the law as they occur.

[36] St. John's Evangelical Lutheran Church of Toronto v. Steers, 2011 ONSC. The full decision is available online at: http://canlii.org/en/on/onsc/doc/2011/2011onsc6308/2011onsc6308.html.