
ONTARIO BAR ASSOCIATION
2007 Institute of Continuing Education – Trusts & Estates Section
Gone...But Not Forgotten

Toronto – February 6, 2007

Charity Law – 2006
The Year in Review

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent

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A. INTRODUCTION

This presentation provides brief highlights of the following:

- Recent changes, rulings and interpretations under the *Income Tax Act* (“ITA”)
- New policies and publications from the Charities Directorate of the Canada Revenue Agency (“CRA”)
- Federal and provincial legislative issues affecting charities
- The more significant court decisions during the past year

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

1. Budget 2006: Elimination of Tax on Gifts of Public Company Shares
 - In the 2006 Federal Budget released on May 2, 2006, the Conservative government upheld its commitment to remove the capital gains tax on publicly listed securities donated to charitable organizations and public foundations, as well as extending this measure to gifts of ecologically sensitive land, effective immediately

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

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2. **Bill C-33 - Proposed Amendments to the *Income Tax Act* Affecting Charities**

- On November 9, 2006, the Department of Finance (“Department”) released the long-awaited Notice of Ways and Means Motion to move forward with a lengthy list of proposed amendments to the ITA
- The motion was introduced as Bill C-33, and received its first reading on November 22, 2006
- The proposed changes were last released by the Department on July 18, 2005, which amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003 and February 27, 2004

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- Some of the more significant changes proposed involve the introduction of split-receipting rules and provisions to curtail abusive donation tax shelter schemes
- The provisions contained in Bill C-33 are, for the most part, the same as the amendments released in July 2005, with a few exceptions
 - Withdrawal of Reasonable Inquiry Requirement for gifts over \$5,000
 - Inter-Charity Gifts
 - Split-receipting rules will not apply to inter-charity transfers

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- However, it is not clear whether the amount to be factored into the disbursement quota calculation for both the transferor and transferee charity is the fair market value of the gift or the net amount after deducting the debt
- The amendments also mean that inter-charity transfers involving consideration between charities cannot be structured as a gift because the common law rule prohibiting consideration still applies
- Instead, need to structure such transactions as transfer or sale, but not gifts

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- **Non-Application of Deemed Fair Market Value Provisions**
 - The deeming provisions will not apply where the donor has acquired property from a transferor (such as a spouse) on a tax-deferred rollover basis
- 3. **Foundations Incurring Debts to Purchase Investments**
 - CRA reversed its position with respect to public and private foundations incurring debts for the purpose of acquiring investments, enabling both to now do so

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- 4. **Meaning of “Charitable Activities”**
 - In a Technical Interpretation dated October 23, 2006, CRA considered the meaning of “charitable activities” for the purpose of providing guidance on the difference between expenditures on charitable activities and expenditures on management and administration when determining whether a registered charity has met its 80% disbursement quota
 - In cases where expenditures are partly attributable to charitable programs and partly to management and administration, it is necessary to allocate the expenditures between these two categories and the allocation should be made on a consistent and reasonable basis

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5. Reward Points/Airline Tickets

- In a Technical Interpretation dated July 18, 2006, CRA reiterated its policy with respect to charitable donations of air travel points
 - A charity that receives premium points which qualify as a gift must include the value of the points in determining its income, and it may issue an official tax receipt for the gift
 - If a receipt is issued, the value of the premium points will be included in the calculation of the charity’s disbursement quota

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6. Private Foundations Investing in Limited Partnerships

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

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C. NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY

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

- On March 10, 2006, CRA released its long-awaited policy on meeting the public test, entitled “Guidelines for Registering a Charity: Meeting the Public Benefit Test”

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• CRA's Guidelines indicate that applicants for registered charitable status are required to establish three elements:

- (1) the benefit must generally be shown to be tangible;
- (2) the benefit must generally be shown to be direct; and
- (3) there must be a net benefit for the public

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2. CRA Eliminates Charity Advisory Committee

- The Minister of National Revenue announced that CRA was temporarily suspending the activities of all of its advisory committees while it reviewed the role and mandate of these bodies
- Among the suspended advisory committees was the Charities Advisory Committee ("CAC")
- Effective September 25, 2006, the Government announced that as a result of its decision to reduce program expenditures, the advisory committees of CRA would be eliminated, including the CAC

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3. Policy Commentary on Publishing Magazines and Advancement of Education

- On February 3, 2006, CRA released a Policy Commentary, "Charitable purposes – Whether publishing a magazine can be considered a charitable activity under the advancement of education"
- It clarifies CRA's position on granting charitable status to organizations that publish magazines in furtherance of educational purposes, indicating that CRA accepts that registered charities can advance education through the publication and distribution of magazines, but the contents of the publications must be predominantly educational in the sense understood by charity law

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D. OTHER FEDERAL AND PROVINCIAL LEGISLATION AFFECTING CHARITIES

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

- On October 5, 2006, the Minister of Finance introduced Bill C-25
- Bill C-25 received Royal Assent on December 14, 2006

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- Some of the most important amendments in Bill C-25 that are applicable to charities and their legal counsel are amendments that will:

- Bolster client identification, record-keeping and reporting measures applicable to financial institutions and intermediaries;
- Allow the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) to disclose additional information, to both domestic and foreign law enforcement and intelligence agencies;

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- Allow CRA to disclose to FINTRAC, RCMP and the Canadian Security Intelligence Service information about charities, including identifying information of the charities’ directors and officers suspected of being involved in terrorist financing activities; and
- Exempt lawyers from reporting obligations under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

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- The amendments will greatly increase the level of information sharing and collection among virtually all federal agencies that could potentially investigate or bring allegations and charges against charities and their directors and officers
- The amendments also highlight the increasing focus on, and investigation of, charities and their possible links to terrorism

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2. Implications of New Ontario Health Legislation for Charities

- Significant changes were made to Ontario’s health care system with the passage of Bill 36, the *Local Health System Integration Act, 2006* (the “Act”)
- The management of local health services will devolve to a series of 14 local health integration networks (“LHINs”) responsible to oversee health service providers, such as hospitals, but excluding hospital foundations

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- Sections 30 and 31 of the Act pertain to the transfer of property held for a charitable purpose by a health service provider
- Subsection 30(1) provides that if a LHIN’s integration decision or a Minister’s integration order calls for the transfer of property that the transferor holds for a charitable purpose, then all gifts, trusts, bequests, devises and grants that form part of the property being transferred will be deemed to be gifts, trusts, bequests, devises or grants of property to the transferee

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• Subsection 30(2) provides that should any of the charitable property be held by the transferor for a special purposes as specified in a will, deed or other document by which the gift, trust, bequest, devise or grant was made, the transferee entity will be required to use the property for such specified purpose, regardless of whether the transfer was made before or after section 30 came into force

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

- The *Corporations Act* (Ontario) was amended so that all non-share capital corporations, including charitable corporations, with an annual income of less than \$100,000 will no longer require an audit

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E. RECENT CASE LAW AFFECTING CHARITIES

MEANING OF CHARITY AND GIFT

1. Amateur Sport Organizations Precluded from Attaining Charitable Status

- On April 5, 2006, in *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*, the Federal Court of Appeal (“FCA”) released a decision with respect to the refusal of an application to register the appellant as a charitable organization
- The purposes of the organization were to promote amateur youth soccer and offer youths the opportunity to develop pride in their ability and soccer skills

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- The appellant argued that since the common law in Ontario recognizes the promotion of amateur sport as a charitable purpose and the proposed activities are confined to Ontario, the law of Ontario should apply to the determination of its charitable status
- The FCA held that there was no need to have recourse to the common law of Ontario since the ITA provides for the tax status of the appellant which precludes the possibility of it being registered as a charitable organization
 - The scheme of the ITA precludes the possibility of an amateur sport organization being registered as a charity, and only permits the separate registration of Canadian amateur athletic associations where they operate on a nation-wide basis

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- On September 21, 2006, the Supreme Court of Canada granted leave to appeal
 - At the time of writing, the appeal has not been inscribed for hearing
- 2. Promotion of “Ethical Tourism” Not Considered Charitable
- On October 24, 2006, the Federal Court of Appeal (“FCA”) released its decision in *Travel Just v. Canada Revenue Agency*, which represents an important decision concerning what is considered to be charitable at common law

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- 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: i.e. other purposes beneficial to the community

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REGULATION OF CHARITIES

1. Court Decision Concerning Agency Relationships Outside of Canada

- On March 28, 2006, in *Bayit Lepletot v. Minister of National Revenue*, the Federal Court of Appeal (“FCA”) considered whether a Canadian charitable organization was carrying on its own charitable activities when it funded an orphanage in Israel of the same name through an agent
- The FCA affirmed the position that CRA has taken over the years with respect to agency relationships: it must be shown that the agent is actually carrying on the charitable works of the Canadian charity and the activities of the agent must be subject to the Canadian charity’s control

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2. Donation Tax Shelter Valuations

- On April 20, 2006, the Supreme Court of Canada dismissed an application for leave to appeal (without reasons) from the Federal Court of Appeal (“FCA”) decision in *Klotz v. Canada*, which had affirmed the Tax Court of Canada’s ruling in connection with donation tax shelter valuations
- Mr. Klotz was one of 660 people who acquired limited edition prints which were immediately donated to prescribed colleges and universities under the ITA

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- The average cost of the prints was \$300 yet the receipt that was issued was based on an average fair market value per print of about \$1,000, which the Tax Court of Canada found to be unrealistic
- The FCA agreed with the Tax Court Judge in finding that the best evidence of the fair market value of the prints was the price paid by the taxpayer not the fair market value price claimed

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3. *Khawaja* Decision Affords Little Relief for Charities Concerning Anti-terrorism Provisions

- In *R. v. Khawaja*, Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down a portion of the definition of “terrorist activity” in the Code that dealt with purpose and motive
- The decision, released on October 24, 2006, was met with mixed reviews by anti-terrorism legal commentators, some of whom initially heralded the case as a powerful blow to draconian legislation

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- However, the impact upon Canadian charities of the sweeping “facilitation of terrorist activity” provision in section 83.19 of the Code is not encouraging
- The decision offers charities little relief from their susceptibility to unintentional contravention of the law because the court decided to uphold the legislation notwithstanding its breadth and the limited *mens rea* requirement concerning the definition of “facilitation”
- As a result, there are significant risks that a charity involved in conducting aid or humanitarian programs in a conflict area could unwittingly be found to still have facilitated a terrorist activity

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Directors’ Liability and Governance

1. Non-Share Capital Corporations Must Strictly Adhere to Corporate Governance Procedures

- *Rexdale Singh Sabha Religious Centre v. Chattha*, a decision released by the Ontario Superior Court of Justice on January 24, 2006, involved a dispute over the corporate governance procedures of three inter-related non-share capital corporations

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- The three charitable organizations appealed the application judge’s order to fix the membership of the three corporations as set out in an affidavit of one of the respondent directors, as well as to require the existing directors to convene a meeting within 30 days to elect new directors by means of a fair vote
- The Ontario Court of Appeal decision was released on November 27, 2006, allowing the appeal

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- In the Court’s opinion, there had been a failure to properly change the members of the corporation in accordance with the *Corporations Act* (Ontario), and that the application judge had incorrectly concluded that four of the five directors of Rexdale were permitted to have approved the creation of a list of new members
- As well, the Court of Appeal held that where proper election of directors has not occurred, the initial incorporators would continue to be the first directors of the corporation
- While the courts came to different conclusions, both decisions illustrate that non-share capital corporations must adhere as strictly to corporate governance procedures as for-profit corporations

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Freedom of Religion and Speech

1. Supreme Court of Canada Gives Strong Endorsement to Freedom of Religion
 - In *Multani v. Commission scolaire Marguerite-Bourgeoys*, a decision rendered on March 2, 2006, the Supreme Court of Canada (the “Court”) sent a strong message that Canada’s public education institutions must embrace diversity and develop an educational culture respectful of the right to freedom of religion
 - The Court confirmed the right of an orthodox Sikh student to wear his ceremonial dagger at school

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- The Court concluded that the *Canadian Charter of Rights and Freedoms* establishes a minimum constitutional protection for freedom of religion that must be taken into account by the legislature and by administrative tribunals
- As such, the Court gave new guidance to administrative bodies dealing with Charter issues, declaring that administrative bodies must apply the principles of constitutional justification when a Charter right has been infringed

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2. Operator's Licenses and Religious Freedom

- In *Hutterian Brethren of Wilson Colony v. Alberta*, a decision released on May 8, 2006, the Alberta Court of the Queen's Bench affirmed once again that the government has a duty to accommodate the religious beliefs and practices of its citizens to the point of undue hardship

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- A regulation passed under the Operator Licensing and Vehicle Control Regulation which requires all individuals to be photographed in order to obtain a license, was declared unconstitutional
- The community successfully argued that the Regulation violated their guarantee of freedom of religion and equality under the *Charter of Rights and Freedoms* because they interpret the Bible's Second Commandment as prohibiting the willing capture of their image in photographs

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Other Case Law Affecting Charities

1. Canada’s National Ballet School Wins Injunction in Trade-mark Battle

- **On January 24, 2006, the National Ballet School/l’École national de Ballet (“NBS/ENB”) succeeded in defending its name and trade-mark from being used in a confusing manner by a Montreal-based ballet school operating under the name École national de ballet contemporain**

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- **The Québec Superior Court issued a permanent injunction in favour of NBS/ENB, prohibiting the other school from using the name École national de ballet contemporain, or any other name, that is similar to National Ballet School/l’École national de Ballet**
- **This decision serves as a reminder to charitable and not-for-profit organizations that they should exercise due diligence when naming their organization to avoid allegations of trade-mark infringement, passing off or confusion**

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- **It can also save charitable and not-for-profit organizations from expending valuable money, time and effort to promote and advertise something that they cannot trade-mark**
- **As well, the decision encourages due diligence in protecting and enforcing trade-mark rights, as trade-marks are one of the most important assets that an organization can possess to enhance the reputation and associated branding for the organization**

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