
ASSOCIATION FOR HEALTHCARE PHILANTHROPY (AHP) CONFERENCE 2008

Halifax – April 14, 2008

Charity Law Highlights: The Past Year in Review (Current as of April 10, 2008)

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

© 2008 Carters Professional Corporation

CARTERS.ca

CARTERS PROFESSIONAL CORPORATION

Société professionnelle Carters

Barristers, Solicitors & Trade-mark Agents

Affiliated with **Fasken Martineau DuMoulin LLP**

Avocats et agents de marques de commerce

Affilié avec Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l.

Offices / Bureaux

Ottawa (613) 235-4774

Mississauga (416) 675-3766

Orangeville (519) 942-0001

Toll Free: 1-877-942-0001

By Appointment / Par rendez-vous

Toronto (416) 675-3766

London (519) 937-2333

Vancouver (877) 942-0001

www.charitylaw.ca

ASSOCIATION FOR HEALTHCARE
PHILANTHROPY (AHP) CONFERENCE 2008

Halifax – April 14, 2008

Highlights in Charity Law:
The Year in Review
(Current as of April 10, 2008)

By Terrance S. Carter, B.A., LL.B., Trade-mark Agent
© 2008 Carters Professional Corporation



CARTERS PROFESSIONAL CORPORATION
BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
Affiliated with Fesken Martineau Duboulin LLP

Offices in Ottawa, Mississauga & Orangeville
Locations also in Toronto, London, Guelph & Vancouver
Toll Free: 1-877-942-0001

www.carters.ca
www.charitylaw.ca

A. INTRODUCTION

- This presentation provides brief highlights of the following:
 - Recent changes 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
 - Some of the more significant court decisions during the past 12 months

2

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

1. October 2007, Bill C-10 - Proposed Amendments to the *Income Tax Act* Affecting Charities
 - On October 29, 2007, Bill C-10 was introduced to address a lengthy list of proposed amendments to the ITA
 - Bill C-10 amends and consolidates earlier proposed amendments released on December 20, 2002, December 5, 2003, February 27, 2004, July 18, 2005 and November 18, 2006
 - Bill C-10 is expected to be passed early in 2008

3

- Some of the more significant changes proposed by Bill C-10 involve the introduction of
 - Split-receipting rules
 - Provisions which curtail abusive donation tax shelter schemes
 - New definitions for charitable organizations and public foundations
- The provisions contained in Bill C-10 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

4

- Inter-Charity Gifts
 - Split-receipting rules will not apply to inter-charity transfers, so common law will continue to apply
 - As such, where there is a gift of property involving a debt, 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 property being gifted or the net amount after deducting the debt

5

- 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
- Although Bill C-10 has not been enacted, CRA has begun reviewing applications for charitable status and re-designation by using the new proposed definitions for charitable organization and public foundation
 - The new definition replaces the “contribution test” with a “control test”
 - Charities that do not meet this test will be designated as private foundations

6

2. 2007 Federal Budget Passed as Bill C-28

- **The March 19, 2007 Budget (“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, and a special deduction for corporations that make donations of medicines to registered charities**
- **The 2007 Budget’s legislative initiatives were contained in Bill C-28, which received Royal Assent on December 14, 2007, subject to certain amendments in the February 26, 2008 Budget**

7

- **Extension of Capital Gains Exemption to Private Foundations**
 - **The March 2007 Budget eliminates the taxation of capital gains arising from donations of publicly-listed securities to private foundations, but not ecologically sensitive lands**
 - **This also applies to donations of publicly listed securities by an arms length employee who acquired the security under an option granted by the employer and which will exempt the associated employment benefit from taxation**

8

- **Excess Business Holdings Rules**
 - **The government was concerned that persons connected with a private foundation, by virtue of the combined shareholdings between them and the foundation’s, have influence that they may use for their own benefit**
 - **The new excess business holdings rules will require a private foundation to continuously monitor its holdings and acquisitions of both publicly-listed and private corporation shares**
 - **#1 Insignificant Interest (2% or less)**
 - **A private foundation is permitted to hold a maximum of 2% of all outstanding shares in a particular class of shares in any one corporation**

9

- #2 Disclosure Requirements (over 2%)

- If a private foundation's holdings of one or more classes of shares of a company exceeds 2% of all outstanding shares of that particular 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
- A "relevant person" is generally a person who does not deal at arms length with any person who controls the private foundation, or with any member of a non arm's length group of persons that control the foundation, with certain exemptions, such as an "estranged family member"

10

- The private foundation will also be required to report to CRA any "material transactions" during the year by the foundation or relevant persons for any period during which the foundation was outside the safe harbour in respect of the corporation
- A material transaction involves the acquisition or disposition of more than \$100,000 worth of shares of a particular class or more than 0.5% of all outstanding shares of that class

11

- #3 Divestment Requirements (over 20%)

- If a private foundation is outside the safe harbour range and the foundation and its relevant persons together hold more than 20% of the outstanding shares of a particular class of shares of a corporation, a divestment will be required
- Penalties will be imposed if the divestment does not occur within the time periods specified by the rules

12

- The length of the period within which a foundation will be required to divest itself of excess shares will depend on the manner by which the excess arose:

- If the foundation purchased shares which would result in an excess at the end of the year, the foundation would be required to divest itself of the excess before the end of that year
- If the excess was acquired as a result of an acquisition of shares by a relevant person or by a donation to the foundation by a relevant person, the foundation would be required to divest itself of the excess before the end of the subsequent taxation year

13

- If the excess is the result of a donation from a person who is not a relevant person or the result of the redemption, acquisition or cancellation of the shares by the corporation, the foundation would be required to divest itself of the excess before the end of the 2nd subsequent taxation year
- If the excess is the result of a donation by way of a bequest, the foundation would be required to divest itself of the excess before the end of the 5th subsequent taxation year

14

– Exemptions

- No obligation to divest will be imposed on donations of shares made before March 19, 2007, that were made subject to a trust or direction that they be retained by the foundation, if the terms of the gift prevent the foundation from disposing of them (entrusted shares)
- The same exemption applies to donations made on or after March 19, 2007 and before March 19, 2012 pursuant to the terms of a will signed or an *inter vivos* trust settled before March 19, 2007 and not amended after that date

15

- However, these shares will be taken into account in determining the application of the excess business holdings regime to other shareholdings of the same class of shares
- Penalty
 - A penalty will apply in respect of a foundation’s excess business holdings that have not been divested as required
 - The proposed penalty is 5% of the value of excess holdings, increasing to 10% if a second infraction occurs within 5 years
 - A penalty tax of 10% if it fails to comply with the disclosure requirements

16

- Transition
 - Private foundations may divest, over a period of 5 to 20 years, excess business holdings existing as of March 18, 2007 at a rate of 20% every 5 years until the excess is eliminated
- 3. 2008 Federal Budget
 - The February 26, 2008 Federal Budget (“2008 Budget”) proposes a number of measures which will impact registered charities and their donors, but technical legislation has not been released yet
 - Bill C-50, an act to implement certain provisions of the 2008 Budget, passed first reading in the House of Commons on March 13, 2008, but does not include provisions of the 2008 Budget dealing with charities

17

- Finance proposed to extend the exemption to donations of unlisted securities that are exchanged for publicly traded securities before being gifted to a registered charity on or after February 26, 2008, within 30 days of the exchange
- Finance proposed to amend the excess business holding rules that were enacted in December 2008, including
 - Exempting certain unlisted shares that were held on March 18, 2007 from the divestiture requirements, subject to certain exceptions

18

- New rules with respect to shares held on March 18, 2007 by “non arm’s-length” trusts considered to be “relevant persons” of a private foundation
- Introducing concept of “substituted shares”
 - generally “substituted shares” are shares acquired by a person in the context of a corporate reorganization in exchange for other shares
 - “substituted shares” will be treated the same as the shares for which they were exchanged for purposes of applying the exemption from the excess business holding rules
- Extending anti-avoidance provisions to address certain inappropriate uses of trusts

- C. NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY**
1. New Guidelines for Applying the New Sanctions
 - On April 20, 2007, CRA released guidelines for applying the new sanctions under the ITA
 - The document sets out CRA’s approach to the application of the new penalties and sanctions resulting from the amendments to the ITA in May 2005
 - Until recently, the end product of an audit was either revocation of charitable status or the issuance of an undertaking letter requiring the charity to undertake certain corrective actions to become compliant

- Under the new regime, CRA will have four options to ensure compliance
 - Education, either general publications or a letter to a charity explaining its obligations under the ITA
 - A compliance agreement (similar to the undertaking letter)
 - Imposition of an interim sanction or penalty
 - Revocation of charitable status
- Generally, CRA will start with educational method to obtain compliance, and then move more progressively through compliance agreement, sanctions, and the ultimate sanction of revocation if necessary

2. CRA Warning to Charities on Tax Shelter Gifting Arrangements

- On June 4, 2007 and August 13, 2007 the CRA issued warnings to registered charities cautioning that participating in tax shelter gifting arrangements can jeopardize charitable status or expose them to monetary penalties
- CRA intends to challenge and proceed with compliance actions against any arrangement that does not comply with the ITA
- In the August 2007 tax alert, CRA warns that it intends to audit all such arrangements

22

- CRA has audited over 26,000 individuals who have participated in these tax shelters and about \$1.4 billion in claimed donations have been denied
- CRA will soon complete audits of another 20,000 taxpayers, involving close to \$550 million in donations
- CRA is about to begin auditing another 50,000 taxpayers
- CRA recommends that anyone considering participating in tax shelter donation arrangements obtain independent legal and tax advice

23

- CRA also warns that the fact that investors in some of these tax shelter donation arrangements have not been reassessed should not be interpreted as the CRA's acceptance of the arrangement and that such audits may take more than one year to complete
- CRA's aggressive reassessments on taxpayers involved donation tax shelters and art-flips have led to a number of cases in the tax court
- Charities that knowingly undertake the following actions will be subject to revocation and/or significant penalties
 - Exploit tax receiving privileges
 - Fail to devote resources to legitimate charitable activities

24

- Most recently, in its Winter 2008 Registered Charities Newsletter No. 29, CRA additionally warned that taxpayers will be denied tax benefits if they participate in tax shelter arrangements that do not have a tax shelter identification number
- A tax shelter number is used for identification purposes only and offers no guarantee that the tax shelter transactions have been approved by the CRA as being legitimate
- CRA also warned that new arrangements are being marketed that claim to be different from those for which the CRA has previously issued warnings, but in fact are not

25

3. Application of New Intermediate Sanction by CRA - Notice of Suspension & Intention to Revoke
- On November 29, 2007, CRA announced that it had issued a Notice of Suspension to International Charity Association Network (ICAN), which was involved with tax shelter arrangements
 - 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” (subsection 188.2(2) of ITA)
 - This suspension was the first sanction of this sort imposed by CRA since the introduction of the intermediate sanctions

26

- 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
- On December 3, 2007, CRA issued a Notice of Intention to Revoke ICAN’s charitable status, which becomes effective upon the publication of a Notice of Revocation in the Canada Gazette
- ICAN filed a Notice of Objection with respect to CRA’s decision to revoke, and on February 22, 2008, filed a motion to extend the period for publication of the Notice of Revocation until the disposition of its notice of objection and any subsequent appeal
- This motion has been opposed by CRA

27

- 4. Application of New Intermediate Sanction by CRA – Revocation of Charitable Status**
- On March 5, 2008, CRA announced that it had revoked the resisted charity status of the Francis Jude Wilson Foundation
 - The news release appeared to indicate that the Foundation was involved in a donation tax shelter arrangement resulting in the Foundation receiving actual cash returns of only \$23,716 in fiscal 2005 and \$81,951 in fiscal 2006 while issuing receipts totaling \$10,560,650
 - CRA’s news release appears to be intended to serve as a reminder to registered charities that CRA is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter and investor

28

- 5. Application of New Intermediate Sanction by CRA - Notice of Suspension**
- On March 12, 2008, CRA suspended the tax receipting privileges of the Adath Israel Poale Zedek Anshei Ozeroff synagogue (“Adath Israel”) in Montreal for one year and imposed a monetary penalty of \$500,000
 - The suspension arose as a result of CRA’s allegations that Adath Israel issued improper tax receipts in relation to the sale of cemetery plots and child nursery expenses
 - Adath Israel offered \$10,000 plots to its congregants for \$3,750, provided that they pay an annual membership fee. The fees were treated like donations and members received receipts for tax purposes

29

- CRA indicated that the privileges conveyed by membership, namely purchasing plots with the synagogue cemetery, clearly constitutes a benefit
- Adath Israel also issued tax receipts to parents for fees they paid to have their children attend a synagogue-run nursery
- It is not clear whether the CRA will now audit every Adath Israel member who bought a plot

30

6. CRA Publishes Proposed Guidelines for Research as a Charitable Activity

- On January 9, 2008, CRA published the draft policy *Consultation on Proposed Guidelines for Research as a Charitable Activity* (“Proposed Guidelines”). Within the Proposed Guidelines, the CRA sets out its proposed policy pertaining to “the legal and administrative requirements a registered charity is expected to fulfil in order to conduct or fund research as a charitable activity”
- The CRA generally defines research, in the charitable sense, as “the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge

31

- Moreover, to be considered charitable, the research must be disseminated and made freely available to others who might want access to it”
- Research that does not directly further a charitable purpose, or the delivery of a charitable program, is not considered to be research in the charitable sense
- Additionally, the mere accumulation and production of information on a given subject or about a specific event, or its gathering of market research about consumers’ needs and preferences, will not, in and of itself, be considered to be a charitable research activity

32

- Research, as a charitable activity, must be carried out for the public benefit that could arise from it. The research cannot be carried out primarily for self interest or private commercial consumption
- In addition to charitable organizations with a charitable purpose to conduct or fund research in a particular field, the Proposed Guidelines also apply to charitable organizations that have some other charitable purpose and carry out research as a way of furthering or achieving that purpose (i.e. a hospital or a school)

33

7. New CRA Guide on Charitable Work and Ethnocultural Groups

- On January 29, 2008, CRA released a new Guide to help ethnocultural organizations that want to apply for charitable status
- The Guide also provides some further guidance on the “advancement of religion” head of charity
 - The Guide reiterates that “it is a charitable purpose for an organization to teach the religious tenets, doctrines, practices, or culture associated with a specific faith or religion” but adds that “the religious beliefs or practices must not be subversive or immoral”

34

- “[T]eaching ethics or morals is not enough to qualify as a charity in the advancement-of-religion category”
- “There has to be a spiritual element to the teachings and the religious activities have to serve the public good”
- A group's social events or cultural celebrations, such as "banquets, picnics, and Canada Day celebrations", are not considered charitable purposes by the CRA
- Charities can carry on social activities "to help achieve its charitable purposes and to help raise funds". However, if a charity is charging admission to such an event, they can only write a charitable donation receipt for the portion of the ticket that was a gift

35

8. New Checklists for Charities

- On March 26, 2008, CRA released a number of new checklists for charities to provide an overview of the various requirements that charities are required to comply with
- These checklists include a Basic Guidelines Checklist, Activities Checklist, Books and Records Checklist, Receipting Checklist, Spending Requirement Checklist, Receipting Checklist, Spending Requirement Checklist, T3010 Checklist, Legal Status Checklist, and Change Checklist
- Useful links to other policies and information on CRA’s websites are also provided

36

9. **CRA Releases a Consultation Paper for a Proposed Policy on Fundraising by Registered Charities**

- **On March 31, 2008, CRA released a Consultation Paper for a proposed policy (“Fundraising Policy”) to provide registered charities with information pertaining to the use of resources for fundraising and the limits imposed by law**
- **Consultation open until June 30, 2008**
- **The Fundraising Policy will assist charities by:**
 - **Explaining how to distinguish between fundraising and other expenditures**
 - **Clarifying how to classify and report activities intended both to raise funds and advance charitable programming**

37

- **Explaining when fundraising activities may preclude registration or result in revocation of registration**
- **Explaining what factors are considered by CRA when assessing whether the fundraising undertaken puts a charity's registration status at risk**
- **Differences between fundraising and charitable purposes or activities**
 - **Courts have determined that fundraising is not charitable in-and-of-itself**
 - **Costs of fundraising generally cannot be reported as charitable expenditures and fundraising activities are not normally treated as advancing a charity's charitable purpose**

38

- **Every action of a registered charity does not have to be in-and-of-itself charitable**
- **Under common law, charities can fundraise in support of their charitable purposes even though fundraising activities, taken alone, would not necessarily be charitable**
- **Some purposes and activities are permitted under provisions of the ITA which, considered separately from the legislation, would not necessarily be charitable – e.g. fundraising through related business or fundraising to disburse funds to qualified donees that are not registered charities**

39

- Allocation of fundraising expenses vs charitable expenses
 - In general, charities are to report on their T3010A return as fundraising expenditures all costs related to any activity that includes a solicitation of support or is undertaken as part of the planning and preparation for future solicitations of support, unless it can be demonstrated that the activity would have been undertaken without the solicitation of support

40

- To demonstrate that the activity would have been undertaken without the solicitation of support, charities must demonstrate either A or B below:

A. Substantially all of the resources devoted to the activity advance an objective other than fundraising

or

B. All of the following apply to the activity:

1. The main objective of the activity was not fundraising based on the resources devoted to fundraising in the activity, the nature of the activity, or the resources used to carry it out

41

2. The activity does not include ongoing or repeated requests, emotive requests, gift incentives, donor premiums, or other fundraising merchandise

3. The audience was selected for reasons other than their ability to give

4. Commission-based remuneration or compensation derived from the number or amount of donations is not being used

- Where the test in A is met, all costs for the activity may be allocated as non-fundraising expenditures on the T3010A return

42

– Where the tests in B are met, a portion of the costs for the activity may be allocated on the T3010A return as non-fundraising expenditures, and a portion as fundraising expenditures

– In some instances, even if the activity would not have been undertaken without the solicitation of support, charities may be allowed to allocate a portion of the costs other than to fundraising expenditures, where the activity also demonstrably furthers one of the charity's purposes

43

• The Fundraising Policy sets out:

– Conduct considered as decreasing the risk of unacceptable fundraising (e.g. prudent planning process, good staffing process, etc.)

– Conduct considered as increasing the risk of unacceptable fundraising, e.g.

- Sole-sourced fundraising contracts and/or non-arm's length fundraising contracts without proof of fair market value
- Activities where most of the gross revenues go to contracted non-charitable parties

44

- Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations
- Total resources devoted to fundraising exceeding total resources devoted to program activities
- Misrepresentations in fundraising solicitations or disclosures about fundraising or financial performance
- Combined fundraising and charitable program activity, where contracted to a party that is not a registered charity or that is compensated based on fundraising performance

45

– Other circumstances that the CRA may consider (presumably as mitigating factors)

- Small charities or charities with limited appeal
- Charities that are investing resources in donor acquisition or other types of fundraising in which the return will not be realized in the same year in which the investment is made
- Charities whose main or major purpose is to make gifts to qualified donees, or to one or more registered charities and as a result have a different cost structure than charities that carry on their own activities

46

- Charities whose activities include lotteries or charitable gaming that is regulated provincially
- Charities engaging in cause-related marketing initiatives
- Charities with extraordinary spending, relative to their size, on infrastructure to ensure compliance with this fundraising policy

• The Fundraising Policy sets out an evaluation grid

47

– The ratio of fundraising costs to fundraising revenue during a fiscal period will place a charity in one of five categories ranging from rarely acceptable to acceptable:

- Rarely acceptable: More than 70% (charity nets less than 30%)
- Generally not acceptable: 50% to 70% (charity nets 30% to 50%)
- Potentially not acceptable: 35.1% to 49.9% (charity nets 50.1% to 64.9 %)
- Generally acceptable 20% to 35% (charity nets 65% to 80%)
- Acceptable Less than 20% (charity nets more than 80%)

48

D. OTHER RECENT FEDERAL AND PROVINCIAL LEGISLATION AFFECTING CHARITIES

1. First Charge Laid Under Canada’s Anti-Terrorism Financing Regime

- On March 14, 2008, the first formal charges under Canada’s sweeping anti-terrorism financing regime were laid
- The accused was charged with committing an offence under s. 83.03(b) of the *Criminal Code* which makes it an offence to provide, or make available property or services for terrorist purposes
- It is alleged that the accused solicited donations for a humanitarian organization that the police claim is the Canadian front organization for a “listed entity”, i.e. the Tamil Tigers

2. New Auditing Requirements Under the Corporations Act (Ontario)

- Under Bill 152, the *Corporations Act* (Ontario) was amended so that all Ontario non-share capital corporations, including charitable corporations, with an annual income of less than \$100,000 will no longer require an audit
- Bill 152 received Royal Assent on December 20, 2006
- The amendment came into effect on August 1, 2007

3. Telemarketing and the National Do Not Call List

- On July 3, 2007 the Canadian Radio-Television and Telecommunication Commission (CRTC) released telecom decision CRTC #2007-48
- This decision established a National Do Not Call List (“NDNC”) but
 - Charities registered under s.248(1) of the ITA have been exempted from the rules and guidelines of the NDNC list
- However, with respect to individual Do Not Call lists, registered charities must continue to maintain their own lists and honour consumer requests not to be called

- This decision also removed a requirement, originating in a 2004 decision, that a toll free number manned during business hours must always be provided to the consumer at the beginning of a call
 - However, a contact number must still be provided when requested
 - The number must be local or toll free
 - The number must be answered by an individual or voicemail and returned in three business days

52

- On December 21, 2007, the CRTC named Bell Canada as the National DNC list operator to manage the filing of complaints while the CRTC maintains the roles of investigator and issuer of notices of violation and monetary penalties
- On January 28, 2008 the CRTC released telecom decision 2008-6, which announced that, “[a]ll telemarketers, *including those making exempt calls*, will pay fees to the investigator to cover its costs ...”
- In that regard, charities, although exempt from the rules of the National DNC list, will be required pay levies to help finance its DNCL activities
- The fee amount has not yet been determined

53

E. RECENT CASE LAW AFFECTING CHARITIES

Meaning of Charity and Gift

1. Provincial Amateur Sport Organizations Precluded from Attaining Charitable Status
 - On May 16, 2007, the Supreme Court of Canada (“SCC”) heard an appeal from the FCA, in *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (“AYSA”), with respect to the refusal 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

54

- 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 had held that there was no need to have recourse to the common law of Ontario since the ITA precludes the possibility of an amateur sports organization being registered as a charity, since the ITA only permits the separate registration of Registered Canadian Amateur Athletic Associations (“RCAAA”) where they operate on a nation-wide basis
- The SCC released its decision on October 5, 2007

55

- The SCC held that just because AYSA, and other sports organizations do not qualify as a RCAAA, does not automatically preclude them from being found to be a charity at common law
- The RCAAA regime in the ITA is not a complete code for amateur sporting activities, and its provisions are not to be read as an exhaustive statement on the charitable status of all sports organizations in all circumstances
- The SCC held that sport, if ancillary to another recognized charitable purpose, such as education, can be charitable, but not sport in itself

56

- The ITA does not support a wide expansion of its definition of charity, and so the extension of charitable status to include sports would be a matter of widespread reform better suited to Parliament than the courts

Regulation of Charities

1. **Supreme Court of Canada Decision Permits Judicial Interference In Religious Disputes**
 - On December 14, 2007, the SCC held that the failure to perform a religious obligation may give rise to civil damages
 - *Bruker v. Marcovitz* the SCC 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

57

- The majority concluded that agreement to give a *get* was a valid and binding contractual obligation
- Although moral obligations are traditionally not enforceable under contract law, the majority held that moral obligations could be transformed into legally valid and binding ones
- The majority 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"
- Justices Deschamps and Charron disagreed with the majority and wrote a dissenting opinion

58

- The dissent framed the case differently and observed that the primary issue was "whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking"
- The dissent concluded that the wife's claim was not justiciable, stating that courts have long refused to intervene in religious disputes, unless some property or civil right is affected
- Here, it was not civil law that prevented the wife from remarrying, it was only her religion, and Justice Deschamps emphasized that courts should not involve themselves in such matters
- Religion had never been used "as a means of forcing another person to perform a religious act, nor have the courts been used to sanction the failure to perform such an act"

59

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

- In a judgment released on October 3, 2007, the Ontario Superior Court of Justice ordered that a church, incorporated pursuant to the *Corporations Act* (Ontario), be wound up for various statutory breaches
- The decision in *Warriors of the Cross Asian Church v. Masih* 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

60

- 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
- However, where the error goes to the heart of an important corporate matter, i.e. the election of directors, 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, the courts will invoke their discretion to dissolve a non-share capital corporation outright

61

3. CRA Audits of Registered Charities

- On May 10, 2007, the SCC granted leave to appeal in *Redeemer Foundation v. Minister of National Revenue*
- This appeal was heard by the SCC on February 28, 2008 and the judgment has been reserved
- In this case, the FCA considered the process CRA must follow to obtain the names of donors during the course of an audit on a registered charity

62

- This case involved a request for donor information which was used by the CRA to contact the donors and advise them that they would be reassessed in order to disallow the donation tax credits claimed for their donations to the charity
- Initially the court declared that actions of the CRA auditor to be unlawful and ordered the reassessments of the donors to be vacated
- On appeal the FCA overturned the initial decision on the basis that there were other provisions of the ITA authorizing the auditor to make the request he did and to use that information for subsequent tax assessments

63

4. **Special General Meeting Validly Convened in *Somali Society of Canada v. Hassan***
- On November 26, 2007, the Ontario Superior Court of Justice rendered its decision in *Somali Society of Canada v. Hassan*
 - That cases involved the issue of whether or not a special meeting of the society was validly convened and conducted pursuant to the society's by-laws, and whether or not the directors elected at that meeting were validly elected

64

- Upon carefully reviewing the provisions of the general operating by-law for the Society and the applicable circumstances, the court found that the special members' meeting was properly called by the members in accordance with the relevant provisions of the by-law
- This decision joins a growing body of jurisprudence which indicates that non-share capital corporation that carry out programs for charitable or non-profit purposes must carefully adhere to corporate governance procedures set out in their governing documents, i.e. letters patent and by-laws, or constitution, as well as applicable law

65

Directors' Liability and Governance

1. **Fairness, Reasonableness and Good Faith Expectations**
- *Chu v. Scarborough Hospital Corp.* is a recent Ontario Divisional Court decision released on July 6, 2007
 - The decision involved a dispute between Lai Chu ("Chu"), an annual member of the Scarborough Hospital, and the hospital's board of directors
 - The decision considered several provisions of the *Corporations Act* (Ontario), the statute under which many Ontario not-for-profit organizations incorporate

66

- The hospital’s governance structure, classes and terms of membership, the calling of special meetings and the interpretation of by-laws were carefully canvassed by the court
- In dismissing the appeal, the court quoted from the Ontario Superior Court’s sound admonishment of the board of directors for having acted unfairly and not in good faith toward the hospital’s membership

67

- The Divisional Court concluded that there was no palpable and overriding error in the trial judge’s decision which stated that “a board of directors of a *Corporations Act* corporation must interpret and apply its by-laws fairly, reasonably and in good faith”
- This decision joins a growing body of jurisprudence which indicates that non-share capital corporations must rigorously follow corporate governance procedures
- Fairness, reasonableness and good faith are expected at all levels of corporate life irrespective of the type of organization in question

68

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2008 Carters Professional Corporation

CARTERS.ca
CARTERS PROFESSIONAL CORPORATION
 BARRISTERS, SOLICITORS & TRADE-MARK AGENTS
 Affiliates with Fasken Martineau Duffin LLP

Offices in Ottawa, Mississauga & Orangeville
 Locations also in Toronto, London, Guelph & Vancouver
 Toll Free: 1-877-942-0001
www.carters.ca
www.charitylaw.ca
