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CAISAP REGIONAL PROFESSIONAL DEVELOPMENT DAY

Oakville – June 25, 2008

Highlights in Charity Law: The Past 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 and Rulings Under the *Income Tax Act* ("ITA")
  - New Policies and Publications From the Charities Directorate of the Canada Revenue Agency
  - Other Recent Federal and Provincial Issues Affecting Charities
  - Recent Case Law Affecting Charities

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B. RECENT CHANGES AND RULINGS UNDER THE *INCOME TAX ACT* ("ITA")

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 later in 2008

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- **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 new definition replaces the "contribution test" with a "control test"**
    - **Charities that do not meet this test will be designated as private foundations**

2. **2007 Federal Budget Passed as Bill C-28**

- **The March 19, 2007 Budget ("2007 Budget") introduced a number of important measures for charities**

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- **The 2007 was legislated in Bill C-28, which received Royal Assent on December 14, 2007, subject to amendments in the February 26, 2008 Budget**
- **Extension of Capital Gains Exemption to Private Foundations**
  - **Eliminates the taxation of capital gains on donations of publicly-listed securities to private foundations**
  - **Also applies to donations of publicly listed securities by an arms length employee who acquired the security under an option granted by the employer**

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- **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, might have influence that they may use for their own benefit**
  - **The new excess business holdings rules will require a private foundation to monitor its holdings of both publicly-listed and private corporation shares**

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- #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 in any one corporation
- #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, the private foundation will be required to disclose in its T3010 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

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- 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"
- 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

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- 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
- #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

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- **The compliance period for divestiture of excess shares depends on the manner by which the excess arose:**
  - **If the excess shares were acquired by the foundation for consideration, divestiture of the excess is required before the end of that taxation year**
  - **If the excess shares were acquired by a relevant person or by a donation to the foundation by a relevant person, divestiture of the excess is required before the end of the subsequent taxation year**

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- **If the excess shares were acquired as a 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, divestiture of the excess would be required before the end of the 2nd subsequent taxation year**
- **If the excess shares were acquired by way of a bequest, divestiture of the excess would be required before the end of the 5th subsequent taxation year**

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– **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 the shares be retained by the foundation, if the terms prevent the foundation from disposing of those 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**

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– **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**

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– **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 proposes a number of measures which will impact registered charities**
- **Bill C-50, an act to implement certain provisions of the 2008 Budget, received Royal Assent on June 18, 2008, and includes some but not all of the 2008 Budget's provisions dealing with charities**

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Included in Bill C-50

- **Provisions to extend the capital gains tax 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**

Not included in Bill C-50

- **The 2008 Budget's measures to amend the excess business holding rules that were enacted in December 2007, by**
  – **Exempting certain unlisted shares that were held on March 18, 2007 from the divestiture requirements, subject to certain exceptions**

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- 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

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- Extending anti-avoidance provisions to address certain inappropriate uses of trusts

4. CRA Ruling on Flow-through Shares

- CRA released an advance income tax ruling on February 6, 2008
- CRA approved a form of flow-through share gifting strategy, indicating that the arrangement would constitute a "gifting arrangement" and a tax shelter pursuant to subsection 237.1(1) of the ITA

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C. NEW POLICIES AND PUBLICATIONS FROM CHARITIES DIRECTORATE OF THE CANADA REVENUE AGENCY ("CRA")

1. CRA Warning to Charities on Tax Shelter Gifting Arrangements

- CRA warnings cautioned that:
  - CRA intends to challenge and proceed with compliance actions against tax shelter gifting arrangements
  - CRA intends to audit all such arrangements and re-assess donors involved
  - 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

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- **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**

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- **Recently, CRA investigated the donation tax shelter, Banyan Tree Foundation Gift Program, and is in the process of disallowing donation tax receipts claimed by donors for the period between 2003 to 2007**
- **A group of donors who participated in Banyan Tree has decided to look to the promoters of Banyan Tree to recover any losses they may suffer as a result of the CRA reassessments and has launched a class action law suit**

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2. Application of Intermediate Sanction by CRA - Notice of Suspension & Intention to Revoke

- **On November 29, 2007, CRA announced a Notice of Suspension to International Charity Association Network (ICAN)**
- **The one-year suspension of charitable status was imposed for "failing to maintain and/or provide, and failing to provide access to, books and records relating to its involvement with tax shelter arrangements"**
- **ICAN failed to provide required documentation to support payments and expenditures including $26,372,685 in fundraising payments and $244,323,422 in charitable program expenditures**
- **On December 3, 2007, CRA issued a Notice of Intention to Revoke ICAN's charitable status**

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3. **Application of New Intermediate Sanction by CRA – Revocation of Charitable Status**

- **On March 5, 2008, CRA revoked the charitable status of the Francis Jude Wilson Foundation**
- **The Foundation was apparently 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**
- **This case is a reminder that CRA is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter and investor**

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4. **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 $499,055**
- **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**

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- **CRA stated that the privileges conveyed by membership, namely purchasing plots in the synagogue cemetery clearly constituted a benefit**
- **Adath Israel also issued tax receipts to parents for fees they paid to have their children attend a synagogue-run nursery**
- **There is no indication from CRA with respect to whether or not it will immediately seek revocation of Adath Israel's charitable status, as it has done in the case of ICAN discussed earlier**

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5. **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***
- **The CRA generally defines research, for charitable purposes, as "the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge"**

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- **To be considered charitable, the research must be disseminated and made freely available to others who might want access to it, as opposed to being used for private or commercial purposes**
- **The mere accumulation and production of information on a given subject or about a specific event, or the gathering of market research about consumers' needs and preferences, will not, in and of itself, be considered to be a charitable research activity**

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6. **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 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"**

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- **"[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**

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7. New Checklists for Charities

- **On March 26, 2008, CRA released a number of new checklists:**
  - **Basic Guidelines Checklist**
  - **Activities Checklist**
  - **Books and Records Checklist**
  - **Receipting Checklist**
  - **Spending Requirement Checklist,**
  - **Receipting Checklist**
  - **T3010 Checklist**
  - **Legal Status Checklist**
  - **Change Checklist**

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8. 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 on Fundraising ("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 August 31, 2008 for comments**
- **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**

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- 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

- **Fundraising is not a charitable activity**
  - **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**

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- **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**

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- **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

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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**

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- **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**

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- **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**

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- **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**

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– **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**

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- **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, which is based upon a ratio of fundraising costs to fundraising revenue, which is different than the 80/20 disbursement quota**

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- 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%)

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9. CRA Policy Statement on Promotion of Volunteerism

- In early May 2008, CRA released a policy statement and summary policy in relation to organizations established to promote volunteerism in the community-at-large through broad-based activities
- To be registered under this policy, the applicant has to satisfy the following criteria:
  - Its formal purposes must clearly state that it is promoting volunteerism generally for the benefit of the community-at-large
  - It must accomplish its purpose through broad-based activities, which may or may not be set out in the objects, but must not be limited merely to fundraising

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- The applicant has to clearly promote volunteerism to the community-at-large as opposed to supporting only one organization or one particular type of organization that reflects a single interest, unless the beneficiaries are registered charities
- The applicant can provide services only to qualified donees and non-profit organizations
- If the applicant funds any organizations, they must be registered charities and other qualified donees

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10. CRA Policy Statement on Umbrella and Title Holding Organizations

- **In early May 2008, CRA released a policy statement and summary policy in relation to umbrella organizations and title holding organizations**
- **Umbrella organizations are described as organizations that support the charitable sector by promoting the efficiency and/or effectiveness of registered charities, or that advance a charitable purpose by working with and through member groups**
- **Title holding organizations can also be charitable if they are holding property for a registered charity or other qualified donee**

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11. CRA Releases a Consultation Paper for Proposed Guidelines for Sport and Charitable Registration

- **On May 9, 2008, CRA released a consultation draft policy intended to clarify the ways in which organizations carrying out activities that include sport can potentially qualify for charitable registration**
- **Although the promotion of sport is not recognized as charitable, there are circumstances in which sports activities can be used to further a charitable purpose**
- **To qualify for registration, all of the purposes of the applicant organization must be both charitable and for the benefit of the public**

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- **For such an organization to be registered, the sport activities it pursues should:**
  - **Relate to and support its wholly charitable purpose(s) and be a reasonable way to achieve them, such as:**
    - **Promotion of health**
    - **Advancement of education**
    - **Advancement of religion**
    - **Relieving conditions associated with disabilities**
  - **Be incidental in nature**
- **Whether or not a sports activity will be acceptable will depend on the facts of each case and the charitable purpose the activity is intended to further**

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12. CRA Releases Model Objects

- **On May 21, 2008, CRA released a non-exhaustive list of model objects that would be acceptable to the CRA in order to assist organizations that wish to apply for charitable status or registered charities that want to amend one or more of their purposes**
- **CRA indicates that it will likely only need to consider whether:**
  - **The organization will deliver a public benefit**
  - **The proposed activities are charitable, will be carried out in a manner allowed by the Act, and will further one of its charitable objects**
  - **The organization is appropriately set up**

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13. CRA Revises Policy Regarding Valuation of Gifts of Life Insurance

- **Par.3, *IT-244R3 – Gift by Individuals of Life Insurance Policies as Charitable Donations* is no longer correct i.e. cash surrender value less outstanding policy loans**
- **CRA Technical Interpretation (#2008-026709) issued on February 25, 2008 indicates that the factors listed in paragraphs 40 and 41 of *Information Circular 89-3* should now be taken into consideration when determining the fair market value of a gift of life insurance**

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14. Who Qualifies As a Student for the purposes of Prescribed Universities Outside of Canada

- **On April 30, 2008, CRA released document 2008-0275391C6, which addresses questions pertaining to distance education programs and the determination of who qualifies as a Canadian student for the purposes of "prescribed universities outside of Canada" under Schedule VIII of the ITA Regulations**
- **Upon confirmation of status as a prescribed university, Canadian students who attend that school may qualify for an education tax credit for tuition fees paid to that school**

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- **With respect to the question of whether the term "student body" includes students enrolled through a distance-learning program, CRA indicates that it does**
- **CRA also clarifies that, in determining whether a student is "from Canada," the said student must qualify as a resident in Canada for purposes of the ITA**
- **CRA confirms that foreign universities may fulfill the requirement that its student body must "ordinarily include students from Canada" by having Canadian students who are enrolled in distance learning programs while remaining in Canada to study**

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D. OTHER RECENT FEDERAL AND PROVINCIAL ISSUES 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**

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2. First Canadian Non-Profit Organization Placed on Terrorist List

- **On June 16, 2008, the World Tamil Movement "WTM" was added to the "List of Entities" under s.85.05 of the Criminal Code**
- **The WTM an Ontario non-profit association, is the first Canadian non-profit organization to be added to the over 40 entities listed under s.85.05 which have been deemed to have associated with or facilitated a "terrorist activity"**
- **No notice given to WTM prior to their designation as a listed entity and the appeal process is very limited**

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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 registered charities have been exempted from the rules and guidelines of the NDNC list**

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- **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**

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- **On December 21, 2007, the CRTC named Bell Canada as the NDNC 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 announced that, "[a]ll telemarketers, *including those making exempt calls,* will pay fees to the investigator to cover its costs …"**
- **Charities, although exempt from the rules of the NDNC list, will be required to register with the NDNC operator and pay levies to help finance its NDNC list activities**
- **The fee amount has not yet been determined**
- **CRTC expects to launch the NDNC list by September 2008**

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4. Reform of Not-for-Profit Corporations Legislation

- **In the spring of 2007, the Ontario Ministry of Government and Consumer Services ("Ministry") announced that it was undertaking a project to review and revise the Ontario *Corporations Act* (the "OCA")**
- **Currently, the OCA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations**
- **The primary basis for proposing reform to the OCA was the concern that the OCA is antiquated, cumbersome, and unable to meet requirements of the modern not-for-profit sector**

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- **The original version of the OCA was enacted in 1907 and has not been substantially revised since 1953. During this 50 year period where there has been no substantial change to legislation, the not-for-profit sector itself has experienced tremendous change**
- **The Ministry's main goal of reform is to "create a new statute dedicated to non-profit corporations that is easily understood and that responds to the realities of the 21st century nonprofit sector" [the "new Act"]**
- **Also the proposed *Canada Not-for-Profit Corporations Act* was re-introduced as Bill C-62 in Parliament on June 13, 2008**

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E. RECENT CASE LAW AFFECTING CHARITIES

Meaning of Charity

1. Provincial Amateur Sport Organizations Precluded from Attaining Charitable Status

- **On May16, 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**

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- **The common law in Ontario recognizes the promotion of amateur sport as a charitable purpose and the AYSA's proposed activities were confined to Ontario**
- **In a decision released October 5, 2007, 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**

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Regulation and Governance 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**
- **The majority concluded that agreement to give a *get* was a valid and binding contractual obligation**

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- **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"**
- **The dissent concluded that the wife's claim was <u>not</u> justiciable, stating that courts have long refused to intervene in religious disputes, unless some property or civil right is affected**

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2. The Christian Horizons Decision (Ontario Human Rights Tribunal: April 28, 2008)

- **Complaint brought by a former employee of Christian Horizons ("CH") on the allegation that CH violated the *Human Rights Code* by discriminating against her based on her sexual orientation**
- **In order to avoid such a finding, CH had to show that it fell within the special employment provisions of section 24(1)(a)**
- **To do so, CH needed to establish that, on a balance of probabilities:**
  - **It was a religious organization**
  - **It was primarily engaged in serving the interests of persons similarly identified by their creed, and**

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- **The qualification (the restriction in employment to persons similarly identified by creed) was a reasonable and bona fide qualification because of the nature of the employment**

- **The adjudicator found that:**
  - **CH failed the second branch of the test because it offered its services to the general public and did not restrict its services to "co-religionists"**
  - **The final element of s. 24(1)(a) was not met, because compliance with the Lifestyle and Morality Statement was not a reasonable or *bona fide* qualification for employment**
  - **Independent of s. 24(1)(a), CH also infringed the complainant's rights as a result of the work environment and how she was treated once her sexual orientation came to light**

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3. 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 concerning the level of deference afforded to not-for-profit corporations for technical corporate procedure requirements for meetings**

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- **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**

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4. **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**
- **In dismissing the appeal, the court quoted from the Ontario Superior Court of Justice's sound admonishment of the board of directors for having acted unfairly and not in good faith toward the hospital's membership**

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- **The Ontario 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**

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