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# NIAGARA ESTATE PLANNING COUNCIL

St. Catharines – March 3, 2009

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## Recent Legal Developments Affecting Charities (Current as of March 2, 2009)

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

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(Current as of March 2, 2009)

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A. INTRODUCTION

- This presentation provides brief highlights of the following topics affecting charities:
  - Recent Changes, Rulings, and Tax Decisions Under the *Income Tax Act* (“ITA”)
  - New Policies, Publications, and Sanctions by Canada Revenue Agency (“CRA”)
  - Other Recent Federal and Provincial Issues Affecting Charities
  - Other Recent Case Law Affecting Charities

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B. RECENT CHANGES, RULINGS, AND TAX DECISIONS UNDER THE *INCOME TAX ACT* (“ITA”)

1. Bill C-10 Proposed Amendments to the *Income Tax Act* Affecting Charities
  - Bill C-10 amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003, February 27, 2004, July 18, 2005, November 18, 2006, and October 29, 2007
  - On September 7, 2008, Bill C-10 died on Order Paper as a result of the dissolution of Parliament

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**2. 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**
- **Extending anti-avoidance provisions to address certain inappropriate uses of trusts**
- **Introducing concept of “substituted shares”**
  - **“Substituted shares” are shares acquired in 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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**3. 2009 Federal Budget**

- On January 27, 2009, Canada’s federal government released its annual budget (“the Budget”)
- In the lead up to the Budget, Imagine Canada submitted a brief (“the Brief”) to the Prime Minister and the Finance Minister
- The Brief put forward the following three key stimulative measures to assist Canada’s vulnerable populations and the charitable and non-profit sector that supports them:

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**1) maintain direct funding through federal grants and contributions agreements**

**2) earmark federal infrastructure funding for community and social services, arts and culture, sports and recreation and green retrofit initiatives**

**3) provide a time-limited enhanced tax credit measure to stimulate giving**

- The sector has expressed disappointment that, while the Budget provides for various grants, contributions, and earmarks that will benefit charities and non-profits, it does not establish any new tax incentives that might stimulate giving

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**4. CRA Rulings on Flow-through Shares**

- CRA released a number of advance income tax rulings approving the donation of flow-through shares
  - February 6, 2008 ruling (2007–0242361R3)
  - May 14, 2008 ruling (2007–0232271R3)
  - July 23, 2008 (2008–0281941R3 and 2008-0269281R3)
- However, there is need for caution in valuing flow-through shares for receipting purposes

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**5. Supreme Court of Canada Decision on CRA’s Access to Donor Information**

- The SCC released its judgment on July 31, 2008 in *Redeemer Foundation v. Canada (Minister of National Revenue)*, upholding the Federal Court of Appeal’s decision
- The appellant Foundation, a registered charity, operated a forgivable loan program that financed the education of students at an affiliated college
- CRA was concerned that some donations to the program were not valid charitable donations because the donors’ contributions were made to finance their children’s education

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- CRA requested donor information, which the Foundation ultimately refused to provide
- The SCC held that CRA was not required to obtain prior judicial authorization for the requested donor information, as the Minister was entitled to it under paragraph 230(2)(a) and subsection 231(1) of the ITA, which set out book and record keeping requirements for inspection, audit, and examination purposes
- As well, the information was requested for a legitimate purpose, which was to investigate the validity of the loan program operated by the Foundation

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**6. Taxpayer Jailed for Providing False Donation Tax Receipts**

- In December 2008, Ambrose Danso Dapaah was sentenced to 51 months in jail after pleading guilty of fraud related to providing false donation tax receipts
- As indicated in CRA’s news release, Dapaah helped his clients claim over \$21 million in false charitable donations, which resulted in approximately \$6 million in non-refundable tax credits

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- He accomplished this by providing fictitious or overstated charitable donations receipts from several charities, including one of which he was the president, CanAfrica International Foundation (“CIF”)
- CRA notes that individuals who have not filed returns for previous years or have not reported all of their income because of such donation receipts can still voluntarily correct their tax affairs

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**7. Federal Court Decides Operating a Hostel is Not Charitable**

- In a December 2008 decision, the Federal Court of Appeal upheld the Minister of National Revenue’s (the “Minister”) decision to revoke the charitable status of Hostelling International Canada – Ontario East Region
- The organization had been registered as a charity since 1973 for the purpose of promoting education by providing affordable accommodation to youth in order to encourage them to have a greater knowledge and appreciation of the world

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- As a result of a CRA audit of the organization, the Minister issued a notice of intention to revoke the charitable status of the organization in 2006, which was confirmed by the Minister in January 2008 after reviewing the organization’s objection
- The Minister took the position that operating a hostel is an unrelated business activity, and as such the organization failed to devote all of its resources to charitable activities
- In upholding the Minister’s decision, the Court rejected the hostel’s argument that facilitating travel by providing low-cost accommodation is a charitable activity that promotes the advancement of education

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- The Court held that simply providing an opportunity for people to educate themselves by making available tourist accommodation is not sufficient for the activity to be charitable
- Although the organization argued that the Minister should have annulled its charitable status, instead of revoking it, the Court noted that the power of the Minister to annul the charitable status of an organization is a discretionary one and it was open for the Minister to proceed with a revocation in this case

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**C. NEW POLICIES, PUBLICATIONS, AND SANCTIONS BY CANADA REVENUE AGENCY**

1. **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*
  - 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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2. 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 direction 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 CRA

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3. CRA Proposed Policy on Fundraising by Registered Charities

- On March 31, 2008, CRA released its proposed policy in fundraising to provide registered charities with information pertaining to the use of resources for fundraising and the limits imposed by law
- On June 26, 2008, CRA released a 30-page background information document explaining the proposed policy
- The proposed policy provides a framework that explains how to distinguish between fundraising and other expenditures, and when fundraising activities may preclude registration or may result in revocation of registration
- Consultation on the proposed policy was open until August 31, 2008 for comments

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- CRA plans to share the results of the consultation in its Fundraising Guidelines for Canadian Charities, which it expects to publish by the end of March 2009
- CRA is not currently planning a press release or other communications around the release of the Guidelines but, rather, expects to just post the guidelines on its website within the above time frame
- For more details on this topic, reference should be made to Terrance S. Carter’s 2009 Ottawa Region *Charity Law Seminar* presentation entitled, “The Impact of the New CRA Proposed Fundraising Policy for Charities” at <http://www.carters.ca/pub/seminar/chrchlaw/ott/09/tsc0211b.pdf> and Charity Law Bulletin #142 attached

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4. New Checklists and Forms 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
  - On December 12, 2008, CRA also released its GST/HST Checklist

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- In December 2008, CRA released a revised Form T2050, application for charitable status along with a revised guide T4063 on how to complete Form T2050
  - The revisions to Form T2050 are intended to improve its general ease of use
  - Similarly, revisions to Guide T4063 put need to know information about the advantages, requirements, and obligations of registered charities front and centre, all in order to facilitate the process of applying for charitable registration under the ITA

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- In February 2009, CRA released the new Registered Charity Information Return package, which includes the following Forms:
  - T3010B (09), Registered Charity Information Return
  - T1235 (09), Directors/Trustees and Like Officials Worksheet
  - T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations
- New T3010B is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009, only

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- For fiscal periods ending on or before December 31, 2008, registered charities must continue to use Form T3010A (05), with accompanying Forms T1235 and T1236
- The new T3010B is now comprised of a simple core form with topic-related schedules
- Concerns about new T3010B
  - Disclosure of non-resident donors of donations over \$10,000
  - Public disclosure of intermediaries outside of Canada
  - See attached Charity Law Bulletin #158 for more details

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5. CRA Policy Statement on Promotion of Volunteerism
- On May 1, 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 or otherwise qualified donees
- 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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- 6. CRA Policy Statement on Umbrella and Title Holding Organizations**
- On May 6, 2008, CRA released its final form of 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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- 7. 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

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- For an organization to be registered, the sport activities an organization 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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- 8. CRA Releases Model Objects**
- On May 21, 2008, CRA released a non-exhaustive list of model objects that would be acceptable to 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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- 9. CRA Revises Policy Regarding Valuation of Gifts of Life Insurance**
- CRA's Interpretation Bulletin, IT-244R3 – *Gifts by Individuals of Life Insurance Policies as Charitable Donation*, sets out CRA's previous policy and interpretation of the ITA as it relates to gifts by an individual of a life insurance policy to a registered charity or other qualified donee
  - Paragraph 3 of IT-244R3 provides that the amount of the gift is equal to the value of the policy (the cash surrender value of the policy less any outstanding policy loans) and any accumulated dividends and interest

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- However, CRA Technical Interpretation (#2008-026709) issued on February 25, 2008 indicates that the following factors should now be considered when determining the fair market value of a gift of life insurance:
  - The health and life expectancy of the insured
  - Any conversion privileges
  - The replacement value
  - Any other important policy terms
- It is important that this new position be taken into account in the context of paragraph 3 of IT-244R3 when determining the eligible amount of a gift

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**10.Important CRA Policies Expected by March 31, 2009**

- CRA expects that by March 31, 2009:
  - The first draft of the CRA policy on Advancement of Religion is to be published
  - As well, the draft policy on Foreign Activities and a draft policy on Human Rights Charities are to be made public
- These policies will be of significant importance to charities across Canada, and as such will need to be carefully scrutinized once they are released

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**11.CRA Revocations/Annulments Regarding Involving Tax Shelters**

- Through its various news releases, CRA has been sending a strong reminder to registered charities that it is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter, and investor
- The following are some organizations that had their registered status revoked due in part to their participation in a donation tax shelter:
  - Francis Jude Wilson Foundation,
  - Canadian Amateur Football Association,
  - ICAN,
  - The Banyan Tree Foundation,
  - Millenium Charity Foundation, and
  - The Pheonix Community Works Foundation

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**12. Application of New Intermediate Sanctions by CRA Leading to 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

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- The fees were treated like donations and members received receipts for tax purposes
- 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

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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 against Prapaharan (Prapa) Thambithurai
  - 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 was 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**

- The CRTC launched Canada’s National Do-Not-Call List (“National DNC List”) and the new Telemarketing Rules on September 30, 2008
- Registered charities are exempted from the National DNC List, but they must still comply with the Telemarketing Rules, which require that they maintain their own do-not-call list
- Registered charities must also register with, and provide information to the National DNC List operator (Bell Canada), pay applicable fees and maintain records on registration and payment

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- Imagine Canada and The Association of Fundraising Professionals made a petition to the Governor in Council requesting it to require the CRTC to vary or rescind the requirement that all telemarketers (including those that are exempt from the National DNCL rules) to register with the National DNCL operator and to pay a fee to the National DNCL Investigator
- However, the federal cabinet has denied a request to relieve Canadian registered charities from requirements to register and pay fees in relation to Canada’s National DNCL

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- 4. Reform of Not-for-Profit Corporations Legislation in Ontario**
- 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”]
- Draft legislation is expected later in 2010

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- 5. Introduction of New Federal Legislation Governing Non-Share Capital Corporations**
- Bill C-4, *An Act respecting not-for-profit corporations and certain other corporations*, received second reading in the House of Commons of Canada on February 12, 2009 and is currently being reviewed by the Industry, Science, and Technology Committee
  - Bill C-4 is intended to replace Parts II and III of the current *Canada Corporations Act* (“CCA”), which govern federal non-share capital corporations

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**6. Lobbyists Registration Legislation**

- The *Federal Accountability Act* (enacted in December 2006) both amended and renamed the *Federal Lobbyist Registration Act* and on July 2, 2008, the *Lobbying Act* and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists
- Ontario also has a *Lobbyists Registration Act*, which has been in effect since 1998
- Some charities and non-profit organizations are either unaware of the existence of lobbyist registration legislation or are uncertain of its application to them

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**7. Human Rights Regime Change in Ontario**

- The *Ontario Human Rights Code Amendment Act, 2006* (also referred to as *Bill 107*) came into effect on June 30, 2008
- As a result, the Human Rights Tribunal of Ontario will now be processing human rights complaints instead of the Ontario Human Rights Commission
- Other human rights regime changes include the addition of an administrative branch, removing restrictions on damage awards for mental anguish, and permitting human rights violations pleadings in civil actions

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**E. OTHER RECENT CASE LAW AFFECTING CHARITIES**

**1. The Christian Horizons Decision**

- On April 28, 2008, the Ontario Human Rights Tribunal found that Christian Horizons (“CH”) had violated Connie Heintz’s rights under the *Human Rights Code* (Ontario)
  - CH offered its services to the general public and did not restrict its services to “co-religionists”
  - Compliance with the Lifestyle and Morality Statement was not a reasonable or *bona fide* qualification for employment

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– CH also infringed the complainant's rights as a result of the work environment and how she was treated in light of her sexual orientation

- CH has filed its Notice of Appeal, and as such, any comments on the lasting impact of the decision may be subject to change, depending on the outcome of that appeal

2. **Badesha Decision—Motorcycle Helmets and Religion**

- On March 6, 2008, the Ontario Court of Justice released its decision in *R. v. Badesha* (“Badesha”), which discusses religious freedom

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- In Ontario, section 104(1) of the *Highway Traffic Act* requires individuals to wear an approved helmet while operating a motorcycle
- Mr. Baljinder Badesha is a member of the Sikh faith and believes that because of his faith, he must wear a turban when in public and that he cannot wear anything over the turban
- When Mr. Badesha was charged with contravening the motorcycle helmet law, he challenged the validity of the law on the basis that it violated his freedom of religion and right to equality, and therefore did not comply with the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code* (Ontario)

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- *Badesha* is significant as it indicates that religious freedom remains subject to limitations, particularly when matters of health and safety are involved
- As in many legal disputes, *Badesha* required the court to balance competing interests of the state and the individual
- In this case, the court decided that the government's interest in protecting individuals by requiring motorcycle helmets on Ontario's roads was a reasonably necessary limitation to an individual's freedom to not wear a helmet due to religious convictions

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**3. First Conviction Under C-45 Criminal Code Amendments**

- Bill C-45 creates a *Criminal Code* duty for organizations and their representatives to take every reasonable precaution in order to protect their workers, as well as the general public
- In *R. c. Transpavé inc.*, 2008 QCCQ 1598, Transpavé inc. pled guilty to criminal negligence causing death after a 2005 workplace fatality
- Although only the corporation was charged, all employers and boards of directors can be liable under the *Criminal Code* for failing to adhere to industry and regulatory standards for health and safety in the workplace, including volunteer workplaces operated by charities

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