
**THE LAW SOCIETY OF UPPER CANADA
12TH ANNUAL ESTATES AND TRUSTS SUMMIT**

Toronto – November 12, 2009

**Charity Law Update for
Estates and Trusts Practitioners:
The Past Year in Review**

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

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**Charity Law Update for Estates and Trusts
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(Current as of October 30, 2009)**

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A. INTRODUCTION

- The law of charities is an important part of an estate and trust practice
- This presentation provides brief highlights of the following:
 - Recent legislative initiatives under the *Income Tax Act* (“ITA”)
 - New guidances, commentaries and other publications from the Charities Directorate of the Canada Revenue Agency (“CRA”)
 - Recent technical interpretations and Federal Court of Appeal decisions under the ITA
 - Other federal and provincial legislative initiatives affecting charities

B. OVERVIEW OF THE CHARITABLE SECTOR

- As of 2007 there were over 83,000 registered charities in Canada
- Over 81,000 not-for-profit organizations
- In 2006, charities spent \$111.8 billion in carrying out their charitable programs
- Over 2 million full time workers or 7.29% of Canadian working population
- 40% of charities fell under the head of advancement of religion for their charitable purposes

- In 2007, 84% of the population made a financial donation to a charitable or non-profit organization
- Total amount donated in 2004 was \$8.9 billion, which increased by 12% in 2007 to \$10 billion
- Religious organizations accounted for 46% of the total dollar value of donations
- In 2007 46% of the population volunteered 2.1 billion volunteer hours
- 77% of Canadians not only trust charities, but also the leaders of charities

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C. RECENT LEGISLATIVE INITIATIVES UNDER THE ITA

1. 2009 Federal Budget

- Released on January 27, 2009
- Did not provide any direct mechanism to encourage charitable donations through enhanced tax-measures
- It is hoped that the 2010 Federal Budget that is currently in the planning process will include some type of tax incentives, such as a “stretch” charitable tax credit that has been proposed by Imagine Canada

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2. Possible Disbursement Quota Reform

- On July 20, 2009, the National Charity and Not-For-Profit Law Section of the Canadian Bar Association submitted a concept paper to the Department of Finance regarding the upcoming 2010 Federal Budget to motivate discussions for an alternative regime to the disbursement quota calculation
- Suggests either the simplification of the current formula by the repeal of the 80% component of the DQ formula, or the replacement of both the 80% and 3.5% components of the DQ formula with a penalty tax on “undue accumulations.”

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D. NEW GUIDANCE, COMMENTARIES AND OTHER PUBLICATIONS FROM CRA

1. 3.5% DQ Extended to Charitable Organizations

- As of January 1, 2009, the 3.5% DQ has been extended to all charitable organizations with assets not used in charitable activities or administration in excess of \$25,000, in addition to public and private foundations
- 3.5 DQ is based on an average fair market value of the those assets averaged over the previous 2 years

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2. New T2050 Application Form for Charitable Status

- In December 2008, CRA released a revised Form T2050, application for charitable status
- Requires more detailed questions on fundraising activities
- Includes more questions on source of revenue from major donors
- Includes more detailed questions on activities outside of Canada
- Questions on revenue from sources outside of Canada
- Questions on ownership of more than 2% of a class of shares

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3. Introduction of New T3010B Annual Information Return

- On February 20, 2009, the CRA released the new form T3010B, which is the new annual information return for registered charities
- New form is anticipated to generally benefit smaller charities (income under \$100,000), the form is also designed to require additional information
- Concerns about having to name donors making gifts in excess of \$10,000 who are not residents of Canada, subject to certain exceptions
- Concerns about having to name third party intermediaries outside of Canada that receive resources of the charity

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4. CRA Introduces Anti-Terrorism Checklist

- On March 29, 2009, CRA released the long-awaited Checklist for Charities on Avoiding Terrorist Abuse
- Constitutes only a brief checklist with only passing reference to external guidelines
- Concerns about the charity being forced to reconcile multiple international standards in order to comply with Canadian anti-terrorism legislation
- Some of the recommendations are potentially excessive
- There is need for a practical “made in Canada” guidance

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5. CRA Releases Policy Commentary on Requests for Disbursement Quota Relief

- On April 6, 2009, the CRA released a Policy Commentary to clarify the procedure for applications for disbursement quota relief
- The following are the relevant considerations:
 - A charity may apply a disbursement excess from one year to offset disbursement shortfalls
 - The excess may be applied in the year before the year of the shortfall and in the five years immediately following

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- The charity must first use all disbursement excesses from previous years
- The charity must be unable to meet the disbursement quota due to unforeseen circumstances that are beyond its control
- The charity must demonstrate that it is incapable of making up any part of the disbursement shortfall in the following year
- All of the charity’s information returns must be filed before any requests are considered, and relief will not be granted in advance or anticipation of a shortfall

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6. CRA Releases Guidelines for Sports and Charitable Registration

- On April 30, 2009, CRA released the final form of Guideline on sports 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 charitable purpose(s) and be a reasonable way to do so, 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 to be achieved

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7. CRA Proposed Guidance on the Protection of Human Rights and Charitable Registration

- On May 8, 2009, CRA released a draft guidance for consultation regarding human rights charities (“Guidance”)
- According to the Guidance, “protecting human rights” refers to activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically, such as the Canadian *Charter of Rights and Freedoms*, or U.N. Conventions
- It does not include advocating for the establishment of new legal rights

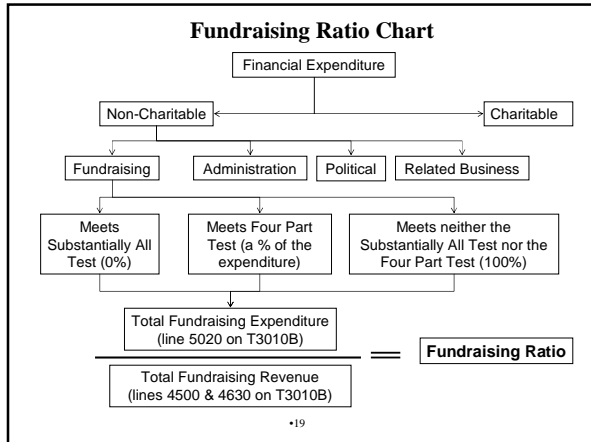
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- The Guidance indicates that CRA recognizes that the protection of human rights can further all four heads of charity
- Human rights charities often work outside existing legal and political structures but must ensure that their purposes are not political in nature, which is not charitable, e.g. to investigate and report violations of specified human rights instruments is not political in nature
- However, it would be unacceptable to focus on one particular country and pressure its legislature or government to sign an international human rights convention

8. CRA's New Guidance on Fundraising

- On June 11, 2009, the Charities Directorate of the CRA released its much anticipated Guidance (CPS-028): Fundraising by Registered Charities
- The Guidance also includes a 23 page "Additional Information" which contains essential details in explaining the Guidance
- The Guidance focuses on the calculation of fundraising ratio, i.e., the ratio of fundraising costs compared to fundraising revenue on an annual basis

- The ratio will place a charity in 1 of 3 categories
 - Under 35%: Unlikely to generate questions or concerns by CRA
 - 35% to 70%: CRA will examine the average ratio over recent years to determine if there is a trend of high fundraising costs requiring a more detailed assessment of expenditures
 - Above 70%: This will raise concerns with CRA and the charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable



- **Lingering concerns about the Guidance include**
 - Many factors and criteria are subjective in nature and may lead to inconsistencies in the administration of the Guidance and CRA audits
 - The fundraising ratio is calculated on an annual basis – perhaps a rolling average approach would be more appropriate
 - The Guidance is complicated and may be difficult for charities to understand and comply with at a practical level
 - The required disclosure of fundraising costs, revenues and practices may impact the ability to attract donors
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- 9. CRA's Proposed New Guidance for Charities Operating Outside Canada**
- On June 30, 2009, CRA released a draft consultation paper entitled *Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities* ("Guidance")
 - Guidance reiterates that charities can operate outside of Canada through third party intermediary:
 - Agents
 - Joint venture participants
 - Co-operative participants
 - Contractors
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- Guidance that focuses on “owns activities test”, which generally will require a written agreement
- The Guidance is an improvement over the previous policy but still has challenging aspects to it, such as:
 - Requirement that an intermediary produce receipts, invoices and vouchers at the end of a charitable program
 - The “own activities” interpretation by CRA tends to restrict the ability of the charity to operate overseas
 - The requirement that books and records be kept in Canada when information can now be accessed electronically

- E. RECENT TECHNICAL INTERPRETATIONS AND DECISIONS UNDER THE *INCOME TAX ACT***
- 1. Donating the Temporary Use of a Cottage is Not a Gift**
- In a technical interpretation dated November 12, 2008, CRA confirmed its position that the gratuitous loan of property, including money or a cottage, is not a gift for purposes of sections 110.1 and 118.1 of the ITA since a loan does not constitute a transfer of property
 - However, it is possible for a charity to pay rent or interest on a loan of property and later accept the return of all or a portion of the payment as a gift, provided the return of the funds is voluntary

- 2. Split Receipting for Cemetery Plots**
- CRA issued a technical interpretation dated November 24, 2008, which deals with the issuance of charitable donation receipts in a situation where a member-donor is entitled to pay less for a cemetery plot than a non-member
 - CRA stated that in applying the proposed split-receipting amendments, the “eligible amount” of the gift will be reduced by the value of the “advantage” provided to the members, which would include the right to purchase a cemetery plot at a discount

3. Gifts of Marketable Securities – Enduring Property?

- In a technical interpretation dated January 15, 2009, CRA considered whether the donation of marketable securities to a charity may be characterized as a gift of enduring property and, if so, would the charity be prevented from disposing of the marketable securities and maintaining the substitute property as enduring property
- CRA confirmed that gifts of marketable securities will qualify as enduring property if the donor provides written direction at the time of the donation that the securities are to be held by the charity for ten years or longer

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4. Gift of Capital Property by Will

- In a technical interpretation dated February 4, 2009, regarding gifts of capital property by will, CRA confirmed that proposed subsections 118.1(5.4) and (6) contained in Bill C-10 will override the application of paragraph 70(5)(a) of the ITA
- As such, where a Canadian resident dies making a bequest of a capital property by his will to a registered charity and the FMV of the capital property immediately before the individual's death exceeds its ACB, the legal representative can designate an amount between the FMV and ACB which will be deemed to be the individual's disposition of property

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5. Clarification by CRA on Enduring Property for Purposes of the Disbursement Quota

- On April 20, 2009, the CRA released a Q&A to provide clarification on issues concerning enduring property:
 - Can a ten year gift define income to include capital gains?
 - The circumstances under which a charity may encroach on its enduring property
 - The importance of tracking a charity's "capital gains pool"
 - How ten-year gifts are required to be tracked
 - The impact on the charity's disbursement quota if it encroaches on its enduring property

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6. CRA Withdraws Compliance Agreement

- *Christ Apostolic Church of God Mission Intl. v. The Queen – Federal Court of Appeal, (May 30, 2009):*
- Church appealed the decision to revoke its charitable status
- Church’s principle argument was that a “compliance agreement” it signed during an audit could not be unilaterally withdrawn by the Minister
- The court held that it was open to the Minister to conclude that the church’s non-compliance could not have been remedied by promise made by the church in the agreement
- Compliance agreements are therefore not binding on CRA

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F. OTHER FEDERAL LEGISLATION AFFECTING CHARITIES

1. Update on the New *Canada Not-for-profit Corporations Act*

- On June 23, 2009, Bill C-4, the *Canada Not-for-profit Corporations Act* received its third reading in the Senate and received Royal Assent on the same day
- Intended to replace Parts II and III of the current *Canada Corporations Act*, a statute first enacted in 1917 and substantively unchanged since that time, which Parts govern federal non-share capital corporations

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- Provisions of the new Act will only come into force on a day or days still to be fixed by order of the Governor in Council
- The order is not expected until the regulations proposed by Industry Canada have been approved
- The New Act is similar in substance to Bill C-21 from 2004, with certain exceptions
- Every federal corporation under Part II of the *Canada Corporations Act* will need to continue under the new Act within 3 years of the new Act coming into force

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G. ONTARIO LEGISLATION EFFECTING CHARITIES

1. Ontario Corporate Update

- In the spring of 2007, the Ontario Ministry of Government and Consumer Services announced that it was undertaking a project to review and revise the *Ontario Corporations Act* (the “OCA”)
- OCA provides the statutory framework governing the creation, governance, and dissolution of non-share capital corporations, including charitable corporations in Ontario

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- Many of its provisions are severely outdated and are no longer relevant to the not-for-profit sector in Ontario
- The new legislation, to be entitled the Ontario *Not-for-profit Corporations Act*, is currently in its drafting stage, with a first reading expected in late Spring, 2010
- The new legal framework will be essential to ensure that Ontario will continue to be an attractive jurisdiction for the incorporation of non-share capital corporations, given the significant reform that has occurred at the federal level

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2. Bill 212, *Good Government Act 2009*, Proposed Reforms to Legislation Concerning Charities

- On October 27, 2009, the *Good Government Act, 2009* (“the Act”) was introduced in the Ontario legislature
- The Act contains significant reforms for the charitable sector in the province of Ontario
 - Among these proposed changes is the repealing of the *Charitable Gifts Act*, which limits the ability of charities in Ontario to own more than a 10% interest in a business or undertake business activities

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- The Act proposes amendments to the *Charities Accounting Act*

- Expands power of the Ontario Public Guardian and Trustee (“OPGT”) to require documents and make inquiries where an executor or trustee holds a substantial interest in an entity (i.e. more than 20%)
- New proposed section 8 provides that a person who holds an interest in real or personal property for a charitable purpose must use the property for the charitable purpose (old section 8 permitted OPGT to vest real property in its name if the property had not been used for charitable purposes within 3 years)

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- Amendment to the *Accumulations Act* to the effect that the common law and statutory rules regarding accumulations do not and are deemed to have never applied to a charitable purpose trust

- *Religious Organizations’ Lands Act* would be amended so that the 40 year term limit for which a religious organization may lease land is repealed


- Some clarification will be needed before the bill becomes law, particularly with regard to section 8 of the *Charities Accounting Act*

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