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**ASSOCIATION OF FUNDRAISING PROFESSIONALS  
GREATER TORONTO CHAPTER – CONGRESS 2010**

**Toronto – November 30, 2010**

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**Essential Charity Law Update:  
What Every Fundraiser Needs to Know**

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**By Terrance S. Carter – Carters Professional Corporation  
and M. Elena Hoffstein – Fasken Martineau DuMoulin LLP**

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**GREATER TORONTO CHAPTER –  
CONGRESS 2010**  
Toronto – November 30, 2010

**Essential Charity Law Update:  
What Every Fundraiser Needs to Know**  
(Current as of November 22, 2010)

By Terrance S. Carter – Carters Professional Corporation  
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**A. INTRODUCTION**

- Brief highlights of the following:
  - Recent legislative initiatives under the *Income Tax Act* (“ITA”)
  - Recent publications from Canada Revenue Agency (“CRA”)
  - Changes to corporate law
  - Anti-Terrorism law update
  - Ontario legislative update
  - Recent case law affecting charities

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**B. RECENT LEGISLATIVE INITIATIVES UNDER THE  
INCOME TAX ACT (“ITA”)**

1. Disbursement Quota Reform under Federal Budget 2010
  - a) Background
    - Disbursement quota (DQ) is prescribed amount that registered charities must disburse each year in order to maintain charitable registration

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- Purposes of DQ
  - Curtail fundraising costs
  - Limit administration costs
  - Limit capital accumulation
  - Ensure significant resources devoted to charitable activities
- DQ introduced in 1976
- Rules reformed by 2004 Budget – much more complex

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b) Pre 2010 Budget 80% DQ and 3.5% DQ Rules

- A charity had to spend each year on charitable activities (including gifts to other charities) what is at least equal to 80% DQ + 3.5% DQ
- Failure to meet DQ was and continues to be grounds for revocation

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- 80% DQ (“charitable expenditure rule”)
  - In general terms it was the sum of:
    - 80% of gifts received in the immediately preceding year (except gifts of enduring property)
    - 80% of enduring property expended in the year
    - 80% of gifts received from other charities

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- 3.5% DQ (“capital accumulation rule”)
  - Must expend 3.5% of assets not used directly in charitable activities or administration (“investment assets”)
  - Based on the average value of assets in 24 months immediately preceding the taxation year
  - 3.5% DQ did not apply if property is \$25,000 or less

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c) 2010 Budget DQ Rules

- 2010 Budget released March 4, 2010
- Draft legislation released on August 27, 2010
- Provides for significant reform of the DQ regime as set out below
- Repeal of 80% DQ
- Repeal of 80% DQ related concepts
  - Enduring property (including ten-year gifts)
  - Capital gains pool
  - Specified gifts

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- Increased threshold for 3.5% DQ to \$100,000 for charitable organizations (but remains at \$25,000 for foundations)
- Expanded anti-avoidance provisions have been introduced to avoid perceived potential abuses of the 3.5% DQ
  - Extend existing anti-avoidance rules to situations where it can reasonably be considered that purpose of a transaction was to unduly delay or avoid applications of DQ
  - To ensure amounts transferred between non-arm's length charities will be used to satisfy the DQ of only one charity

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- Specifics of anti-avoidance provisions
  - A charity enters into a transaction and it may reasonably be considered that a purpose of the transaction is to avoid or unduly delay expenditures on charitable activities
    - “Transaction” includes gifts to other charities
    - May be grounds for revocation
    - 110% penalty of expenditure delayed or avoided can be imposed
    - Where gift to another charity - both charities are jointly and severally, or solidarity, liable for the penalty

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- The fair market value of property received from non-arm's length charity will need to be expended by end of the next taxation year (in addition to its 3.5% DQ)
  - Unless the transferor charity elects that gift will not count toward satisfying its own 3.5% DQ (“designated gift”)
  - Otherwise may be grounds for revocation
  - 110% penalty of fmv of the property that exceeds the amount expended can be imposed

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- CRA will be given discretion to exclude accumulated property from 3.5% DQ
  - CRA has discretion to allow charities to accumulate property for a particular purpose, such as a building project
  - Currently, property accumulated (and income earned) with CRA approval is deemed to have been spent on charitable activities

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- Changes effective for fiscal years that end on or after March 4, 2010
- Finance will monitor effectiveness of CRA's Fundraising Guidance and take action if needed to ensure its stated objectives are achieved

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d) Implications Of New DQ Rules

- Welcome change
- Simplicity of DQ calculation
- Eases administrative burden for charities (especially small and rural charities)
- No need to spend scarce resources allocating expenses between charitable vs administrative expenses for 80% DQ
- Increase of \$100,000 threshold for charitable organizations allows them greater ability to maintain reserves to deal with contingencies

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- Need to use "designated gift" option with transfers between non-arms length charities in order to avoid immediate disbursement requirement for recipient charity
- What to do with existing endowment funds, long-term gifts and ten-year gifts?
  - Can capital be encroached?
  - Still need to track 10-year period?
  - Still need to track hold period?
- Need to review all existing gift agreements and trust provisions in this regard

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– Whether the charity can encroach will depend on language of agreement

- Does agreement permit encroachment of capital or expenditure of income only?
- Does language specifically allow encroachment up to capital gains pool?
- May need *cy pres* court order to vary terms
  - If terms impractical or impossible
  - e.g. Ontario – section 13 order under *Charities Accounting Act*

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- New gifts
  - No need to struggle with structuring long-term gifts or endowment funds to comply with complex ITA language related to enduring property
  - There is now flexibility in structuring new gifts – can focus on balancing:
    - Donor desire for long-term financial stability for the charity
    - Need for flexibility to meet changing economic conditions

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- Length of hold period
  - 10 years is no longer a “magic number”
  - Discuss with donor appropriate length
  - May be “long term” rather than “perpetual”
- Encroachment
  - Ability to encroach capital?
  - Discuss with donor under what circumstances
- Income and capital
  - Possibly remove reference to income and capital
  - Might use total return investment and payout strategy instead

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2. July 2010 Draft Amendments

- On July 16, 2010, Finance released draft legislative proposals to implement outstanding income tax technical measures (the "July 2010 Amendments")
- Included within the July 2010 Amendments are proposed changes that will substantially impact the operations of registered charities in Canada, including split-receipting provisions and new definitions of charitable organizations and public foundations

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- Many of the proposed changes included in the July 2010 Amendments were first introduced by Finance on December 20, 2002 and in numerous amendments since then
- Although these proposed changes have yet to be enacted into law, many have already been implemented by CRA in their administrative policies
- The following is a list of some of the key amendments relating to charities in the July 2010 Amendments:

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- The split-receipting rules allow a donor to receive a limited advantage in respect of a gift having been made with only the "eligible amount" of a gift to be receipted
- The broad definition of "advantage" reduces the eligible amount of a charitable receipt where the donor received an advantage
- Complicated rules to curtail abusive donation tax shelter schemes based on a receipt for a deemed fair market value of cost (or adjusted cost base) for certain types of transactions

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– New definitions of charitable organization and public foundation replace the contribution test with the control test, permitting a charity to receive contributions of more than 50% of its capital from a donor, provided that the donor does not control the charity or represent more than 50% of the directors and trustees of the charity

– Gifts made by a charity to a non qualified donee are cause for revocation of the charity's status

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3. Amendments to ITA Regulations Add a New Prescribed Donee

- On September 23, 2010, an amendment to the ITA Regulations adds a new prescribed donee, American Friends of Canadian Land Trusts
- This amendment allows non-resident owners of Canadian real property to make a gift to a U.S. charity (resulting in U.S. donation tax benefits) and still benefit from a reduction in the amount of capital gains subject to Canadian tax

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4. Bill C-470, Private Members' Bill

- Bill C-470 would give CRA the discretion to revoke charitable status of a charity if it pays a single executive or employee annual compensation over \$250,000.00
- It would also allow CRA to publish the name, job title and annual compensation of each of a charity's five highest paid employees and executives
- If passed, effective 2011 onward
- Received second reading, now going to Finance Committee for review in November, 2010

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**C. RECENT PUBLICATIONS FROM CRA**

1. Fundraising Guidance

- From the media's perspective this is a number one compliance issue for charities
- With repeal of 80/20 DQ, emphasis will now be on fundraising expenses
- While the CRA accepts that charities can have fundraising costs, its expectation is that these expenses be reasonable and proportionate to the charitable activity being conducted

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- CPS-028, *Fundraising by Registered Charities* ("Guidance") available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-028-eng.html>
  - The Guidance was released in June 2009 but is still not widely understood by charities
  - Focus 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:

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- 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

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– Seven best practice indicators that will decrease the risk of CRA finding unacceptable fundraising

1. Prudent planning processes
2. Appropriate procurement processes
3. Good staffing processes
4. Ongoing management and supervision of fundraising practice

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5. Adequate evaluation processes
6. Use made of volunteer time and volunteered services or resources
7. Disclosure of fundraising costs, revenues and practice

- See also Office of the Public Guardian and Trustee, *Charitable Fundraising: Tips for Directors and Trustees*  
<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bulletin-8.asp>

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2. CRA Provides Instruction on Avoiding Improper Receipting

- On December 21, 2009, CRA released *Registered Charities Newsletter No. 33*, which provides education on receipting
- Improper receipting occurs when a receipt is issued that violates the ITA
- It can include:
  - Issuing a receipt with inaccurate or missing information
  - Issuing a receipt for a transaction that does not qualify as a gift
  - Issuing a receipt on behalf of another organization
  - Issuing a receipt for an inflated amount

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3. CRA Guidance: Upholding Human Rights and Charitable Registration

- On May 17, 2010, CRA released *Upholding Human Rights and Charitable Registration* ("Guidance") available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cqd/hmn-rghs-eng.html>
- According to the Guidance, "upholding 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

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- It does not include advocating for the establishment of new legal rights
- 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

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- However, it would be unacceptable to focus on one particular country and pressure its legislature or government to sign an international human rights convention
- Guidance adds additional information with respect to political activities and anti-terrorism issues, as well as, helpful Appendix containing questions and answers for both applicants and registered charities that wish to pursue charitable purposes that "uphold human rights"

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4. CRA Guidance on Charities Carrying on Activities Outside Canada

- July 8, 2010, CRA released Guidance entitled *Canadian Registered Charities Carrying on Activities Outside of Canada* (“Guidance”) available at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cqd/tsd-cnd-eng.html>
- Updates and replaces the previous CRA publication on foreign activities entitled *Registered Charities: Operating Outside Canada* RC4106 and Registered Charities Newsletter No. 20

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- Two means available under the ITA by which a registered charity can pursue its charitable purposes
  - a) The charity can make gifts to qualified donees (generally other registered charities)
  - b) The charity can carry out its own charitable activities, which in turn would require that the charity must control all of its activities and resources (referred to as the “own activities test”)

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- The key consideration that a charity must have when carrying on activities abroad is whether it meets the “own activities” test
- Defined in the Guidance as activities *“which are directly under the charity’s control and supervision, and for which it can account for any funds expended.”*
- Charities cannot act as a passive funding body or conduit for a non-qualified donee

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- One part of the “own activities” test is the control and direction that the charity exercises over its resources
- A charity should always have an agreement in place with any intermediaries that it works with
- In some cases, the agreement may only require a verbal discussion, while other situations will call for all six measures of control recommended by CRA

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- Six “measures of control” to assist in meeting the “own activities test”
  - a) Written agreements
  - b) Description of activities
  - c) Monitoring and supervision
  - d) Ongoing instruction
  - e) Segregated funds (if agency)
  - f) Periodic transfers

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- Additional issues addressed by Guidance
  - Compliance with local laws
  - Activities that put people at risk
  - Disclosure of names of recipients
  - Anti-terrorism considerations
  - Foreign activities and the disbursement quota
  - CRA treatment of funding from CIDA

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**D. CORPORATE UPDATE**

1. New *Canada Not-For-Profit Corporations Act* (CNCA)

- There have been several attempts at legislative reform to the *Canada Corporations Act* (“CCA”)
- On June 23, 2009 *Canada Not-for-Profit Corporations Act* (“CNCA”) received Royal Assent, but not yet proclaimed in force
- Draft regulations were published by Industry Canada on June 25, 2010 but not yet finalized
- Estimated that CNCA will likely come into force in mid 2011

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- Overview of the Key Elements of the CNCA
  - Simplified process of incorporation
  - A corporation has the capacity and rights of a natural person
  - Concept of a corporation’s activities being *ultra vires* now eliminated once and for all
  - Objective standard of care
  - Due diligence defence available
  - Enhanced member’s rights

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- Enhanced member’s remedies
- Special exemption from remedies for religious corporations
- Introduces concept of soliciting and non-soliciting corporations
- Graduated audit requirements
- All existing CCA corporations will be required to continue under the new Act within 3 years of it coming into force (or face possibility of dissolution)

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- Ongoing Concerns with the CNCA
  - Definition of soliciting corporation [\$10,000] threshold is too low
  - Directors must be elected. There is no provision for ex-officio directors
  - Non-profits that are soliciting face a predicament on dissolution (i.e. to “qualified donees”)
  - Different approval requirements (i.e. simple v. 2/3 majority) for by-laws may be difficult to administer

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- Non-voting members have a right to vote to approve certain fundamental changes
- Filing of financial statements by soliciting corporations with The Director and the level of financial review imposes an increased burden on soliciting corporations
- Amendment of charitable objects on continuance expected to trigger CRA review
- CRA to develop policy on requirements for charities continuing under CNCA (current estimated number of 7,600 federally incorporated charities)

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2. *New Ontario Not-For-Profit Corporations Act (ONCA)*

- The Ontario *Corporation Act* (“OCA”) has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act* (“ONCA”)
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- However, ONCA not expected to be proclaimed in force until sometime in 2012
- Regulations have not yet been released

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- Overview of the Key Elements of the ONCA
  - Incorporation as of right
  - Capacity, rights and powers of a natural person
  - Minimum of 3 directors
  - Ex officio directors permitted
  - Objective standard of care
  - Due diligence defence available
  - Enhanced membership rights

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- Public benefit corporation is concept similar to soliciting corporation in *CNCA*
- Definition of “charitable corporation” is now common law definition
- Graduated audit requirements
- For existing non share capital corporations once the Act is enacted there will be a period of up to 3 years to continue

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- Ongoing Concerns with the ONCA
  - Definition of PBC [\$10,000] threshold is too low
  - Non-voting members rights to vote on fundamental changes may lead to problems, i.e. churches and other large membership based organizations

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- Weak liability protection, as the government rejected the recommendation to include a partial liability shield for directors. Due diligence defence by itself not adequate
- Mandatory provision requiring solicitation of proxies instead of allowing a corporation to structure its own decision making process regarding absentee members (i.e. allowing an option to vote by secret mail in or by electronic ballot) (s.65)

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**E. ANTI-TERRORISM LAW UPDATE**

1. Bill C-17: *Combating Terrorism Act*
  - Bill C-17, *Combating Terrorism Act* passed Second Reading in the House of Commons on September 22, 2010 and is now at the committee stage
  - Bill C-17 proposes to reintroduce *Criminal Code* provisions relating to investigative hearings and recognizance which first came into force with Bill C-36 *Anti Terrorism Act*, but had expired on March 1, 2007

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2. Report of the Air India Inquiry – Terrorist Financing
  - The final report of the Air India Inquiry was released on June 17, 2010
  - Selected findings regarding terrorist financing laws include the following:
    - Neither FINTRAC nor CRA are sufficiently incorporated into the flow of intelligence to maximize attempts at detecting terrorist financing
    - The lack of prosecutions indicates a possible lack of "significant success"

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– Terrorists can use charities and NPO's as a way to finance their activities although it is not possible to state how many registered Canadian charities have been involved in terrorist financing

– CRA has reported that a significant number of charities related to terrorism have been denied registration – these denials are based on traditional CRA powers and not new powers from the anti-terrorism legislation

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– CRA has been making use of its intermediate sanctions, which include monetary penalties and suspension of registration

– Charity status is more difficult to obtain due to the new terrorist financing requirements

– Measures to defeat the use of charities for terrorist financing should not unnecessarily impede the valuable activities of legitimate organizations

– The work of honest charities should not be hindered by unrealistic guidelines or best practices

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**F. ONTARIO LEGISLATIVE UPDATE**

1. Bill 212: *Good Government Act*

- On December 15, 2009, the *Good Government Act*, 2009 ("the Act") received Royal Assent
- The Act contains significant reforms of the charitable sector in the province of Ontario
  - The Act repeals the *Charitable Gifts Act*, which had limited the ability of charities in Ontario to own no more than a 10% interest in a business

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– The Act also amended the *Charities Accounting Act*

- Expands power of the Ontario Public Guardian and Trustee (“OPGT”) to require documents and make inquiries
- New 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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– *Accumulations Act* amended to the effect that the common law and statutory rules regarding accumulations do not and are deemed to have never been applied to a charitable purpose trust

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

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2. Bill 168: *The Occupational Health and Safety Amendment Act*

- The *Occupational Health and Safety Amendment Act, (Violence and Harassment in the Workplace), 2009* came into force on June 15, 2010
- The legislation designates workplace violence and harassment as occupational health and safety hazards under the OHSA
- Establishes new obligations for employers with respect to workplace violence and harassment prevention

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- The new legislation will require employers to:
  - Develop and communicate workplace violence and harassment prevention policies and programs to workers
  - Assess the risks of workplace violence, and take reasonable precautions to protect workers from possible domestic violence in the workplace
  - Allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence

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3. Land Transfer Tax Amendments Affecting Charities

- October 1, 2010 the Ontario Ministry of Finance filed Ontario Regulation 386/10 made under the *Land Transfer Tax Act* which permits the exemption from land transfer tax for certain transfers of property between charities
- Announced as part of March 2010 Budget
- Will facilitate reorganizations of charities that might have been subject to land transfer tax if there was an assumption of debt

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- Transfers of land after March 25, 2010 from trustees to a non share capital corporation or between two non share capital corporations will be eligible for exemption if :
  - The non share capital corporation will be continuing the same charitable purposes for the same members
  - No consideration is paid other than the assumption of any existing liabilities registered on the land

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**G. RECENT CASE LAW AFFECTING CHARITIES**

1. *Christian Horizons* Decision
- The *Christian Horizons* (2010 ONSC 2105) decision in May 2010 by the Ontario Divisional Court provides churches and religious organizations with insight into how to carefully plan, document and implement employee lifestyle statements where such statements are on their face contrary to the *Human Rights Code*

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- The decision affirmed that in order for a religious organization to claim the benefit of the s.24(1)(a)exemption with regard to a lifestyle statement that is contrary to the Code, the religious organization must prove that:
  1. It is a religious organization
  2. It is primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified

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3. The restriction in employment to persons similarly identified by creed is a reasonable and *bona fide* qualification because of the nature of the employment (“BFOQ requirement”)
- The Court found that Christian Horizons met requirements 1 and 2 above but not requirement 3
- The Court also found that in any event there was evidence of a “poisoned work environment”

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- The *Christian Horizons* decision provides little guidance as to what constitutes a “poisoned work environment” and whether the test is objective, subjective or has elements of both
- Therefore, churches and religious organizations should keep in mind that satisfying all the elements of the statutory exemption under s. 24(1)(a) will not necessarily protect them if they are found to have created a “poisoned work environment.”

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2. *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2009 BCSC 1608 (Nov 25, 2009)

- B.C. Supreme Court ruled that the properties of four incorporated parishes, which had voted to leave the Anglican Church of Canada, remain within the Anglican Diocese of New Westminster
- The Bishop had no jurisdiction to appoint or dismiss trustees of the parish corporations and they are required to exercise their authority in accordance with their incorporating Act, as well as the Constitution, Canons, Rules and Regulations of the Diocese
- The court based its decision on the statute under which the parishes were incorporated

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- Court held that “A parish does not have authority to unilaterally leave the Diocese, and it is consequently *ultra vires* for it to pass a resolution purporting to do so”
- “Additionally, while parish corporations may hold title to real property, the effect of the Act is that property effectively remains within the Diocese unless the Executive Committee and Bishop agree to mortgage, sell or otherwise dispose of it”
- The ruling was appealed to the B.C. Court of Appeal, which upheld the decision on the Superior Court based upon a broader principle of trust law

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3. *Innovative Gifting Inc. (IGI) v. House Of Good Shepherd et al.* [2010] O.J. 2210

- A fundraiser (IGI) charged exorbitant commissions and misrepresented legality of fundraising activities
- Arrangement was that if shares and cash gifted, 40% commission to be paid, but if cash gifted then commission would be 90%
- Court ordered fundraiser to pay back commissions it received from four charities

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4. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 2182 (April 13, 2010)

- Affirms that directors of charitable organizations have fiduciary duties toward the charity
- Also emphasizes that with these enhanced duties comes an enhanced power of the courts to monitor and regulate charities
- This authority extends so far as to provide the court with the authority to order the destruction of charitable property

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5. *Paterson v. CRA*, 2010 FC 644

- CRA denied the applicant, a tax preparer, permission to file his clients' income tax returns electronically
- For a fee of \$25, he assisted his clients in obtaining donation tax receipts for amounts in excess of the amounts actually donated
- The Court indicated that ignorance of the charitable receipting rules was no excuse for the applicant's participation in the scheme

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