
**ASSOCIATION OF FUNDRAISING PROFESSIONALS
GREATER TORONTO CHAPTER – CONGRESS 2011**

Toronto – November 28, 2011

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

**By Theresa L.M. Man – Carters Professional Corporation
and Laura E. West – Fasken Martineau DuMoulin LLP**

CARTERS

Barristers, Solicitors and Trademark Agents
www.charitylaw.ca

**FASKEN
MARTINEAU** 

Fasken Martineau DuMoulin LLP
www.fasken.com

AFP CONGRESS
November 28, 2011

Essential Charity Law Update:
What Every Fundraiser Needs to Know

By Theresa L. M. Man, Carters Professional Corporation
and Laura E. West, Fasken Martineau DuMoulin LLP

OVERVIEW

- Federal Budget 2011
- 2010 DQ Changes: Review and Update
- Fundraising Guidance Update
- Corporate Update
- Recent CRA Publications
- Legislative and Case Law Update

2

A. FEDERAL BUDGET 2011

- The 2011 Federal Budget was initially introduced on March 22, 2011 and was reintroduced on June 6, 2011 in almost identical form
- Received first reading on October 4, 2011 as part of Bill C-13
- Budget contains significant changes to the regulation of charities and other qualified donees
- CRA's comment on the rules in the Budget (<http://www.cra-arc.gc.ca/chrts-qvng/chrts/bdgts/2011/menu-eng.html>)

3

1. New Regulatory Regime for Qualified Donees

- “Qualified donee” (QD) is defined in the *Income Tax Act*
 - may issue official donation receipts for gifts and may receive gifts from registered charities
- Budget proposes to extend certain regulatory requirements, that currently apply only to charities, to the following types of QDs
 - Registered Cdn. amateur athletic asso. (“RCAAAAs”)
 - Municipalities in Canada
 - Municipal and public bodies performing a function of government in Canada
 - Housing corporations in Canada that exclusively provide low-cost housing for the aged
 - Prescribed universities
 - Charitable organizations outside of Canada that received a gift from Her Majesty in right of Canada in the current or preceding year

- The remaining QDs are not affected by the new rules
 - The Government of Canada
 - The provincial and territorial governments in Canada
 - The United Nations and its agencies
- Registered national arts service organizations are deemed to be “registered charities,” so they are already subject to the same regulatory requirements
- The effective date of these proposals is the later of January 1, 2012 and the date of Royal Assent for the enacting legislation

- Proposed requirements to apply to QDs listed above
 - QDs will be identified in a publicly available list maintained by CRA
 - If a QD does not issue donation receipts in accordance with the *Income Tax Act* and its regulations, it could have its receipting privileges suspended or its QD status revoked
 - RCAAAs will be subject to monetary penalties if they issue improper receipts or fail to file an information return
 - QDs will be required to maintain proper books and records and provide access to those books and records to CRA when requested. Failure to do so may result in suspension of receipting privileges or revocation of its QD status

- Proposed additional regulatory requirements to RCAAAs (which currently apply to registered charities)
 - Promotion of amateur athletics in Canada on a nation-wide basis as their *exclusive* (not primary) purpose and *exclusive* (not primary) function
 - Monetary penalties, suspension of receiving privileges, or revocation if an RCAA provides an undue benefit to any person (e.g., excessive compensation to staff or professional fundraiser)
 - CRA may make available to the public certain information and documents in respect of RCAAAs (e.g. governing documents, annual information returns, applications for registration and the names of directors)

7

2. New Governance Regime for Registered Charities and RCAAAs

- The Budget identifies a CRA concern that applications for charitable status are being submitted by individuals who have been involved with other charities and RCAAAs that have had their status revoked for serious non-compliance
- Currently, CRA cannot refuse to register or revoke the status of a registered charity or RCAA based on these grounds

8

- Proposed to allow CRA to refuse or revoke the registration of a charity or a RCAA or suspend its ability to issue official donation receipts, if a member of the board of directors, a trustee, officer or equivalent official, or any individual who otherwise controls or manages the operation of the charity or RCAA is an "ineligible individual" – a person who:
 - Has a relevant criminal offence - found guilty of a criminal offence in Canada or similar offence outside of Canada relating to financial dishonesty (including tax evasion, theft or fraud), or any other criminal offence that is relevant to the operation of the organization, for which he or she has not received a pardon

9

– Has a relevant offence - found guilty of an offence in Canada within the past five years (other than a relevant criminal offence), or similar offence committed outside Canada within the past five years relating to financial dishonesty or any other offence that is relevant to the operation of the charity or RCAA

- Includes offences under charitable fundraising legislation, convictions for misrepresentation under consumer protection legislation or convictions under securities legislation)

10

– Has been a member of the board of directors, a trustee, officer or equivalent official, or an individual who otherwise controlled or managed the operation of a charity or RCAA during a period in which the organization engaged in serious non-compliance for which its registration has been revoked within the past five years

– Has been at any time a promoter of a gifting arrangement or other tax shelter in which a charity or RCAA participated and the registration of the charity or RCAA has been revoked within the past five years for reasons that included or were related to its participation

11

EXAMPLE

- Charity X has a 25 member board. One of the directors, Carter, was previously employed as the manager of another charity, Charity Y, in 2001-2002
- Charity Y is audited in 2004 in respect of the 2001 and 2002 taxation years. Charity Y loses its status in February 2006 for substantial non-compliance, as a result of the imprudent actions of Charity Y's board of directors, actions which Carter strongly objected to and which ultimately caused Carter to resign in 2002
- Because Carter managed a charity that lost its status for substantial non-compliance, Carter is an ineligible individual for the period of 5 years from the date of revocation in February 2006 to February 2010
- Charity X's charitable status could now potentially be revoked because an ineligible individual on its board

12

- Budget states that CRA will look at the particular circumstances of a charity or RCAA but does not state what those circumstances are
- Budget does state that CRA will take into account whether appropriate safeguards have been instituted to address any potential concerns – but no explanation of what these safeguards might be
- What due diligence will be required by a charity to ensure that an ineligible individual does not become involved or continue to be involved in the management of the charity?

13

- Budget states that a charity will not be required to conduct background checks, but even if the charity wanted to the information required to independently assess whether an individual is ineligible may not be publicly or easily available:
 - Possible to search for relevant criminal offences in Canada, but abroad?
 - Many relevant offences are not tracked in publicly available databases in Canada, and unlikely abroad
 - Names of directors and like officials of revoked charities not maintained in a single publicly available database
 - Not likely that an individual who otherwise controlled or managed the operation would be identified in publicly available documents – likely information solely in CRA's control

14

- Since most of the information is only available to CRA, the onus should be on CRA to maintain a list of ineligible individual" (which may exist internally for the purpose of enforcing these provisions) and making it publicly available (unlikely because of privacy and other legal concerns)
- Onus is shifted to charities to comply in a situation where it is impossible to ensure 100% compliance because the necessary information is not available
- This new cause for revocation is similar to a strict liability offence – no due diligence defence is available in the legislation
- Charities will be required to undertake other forms of due diligence and hope CRA will excuse any inadvertent non-compliance?

15

- Are all charities going to be required to conduct police checks even if not dealing with ineligible individuals a simple matter of due diligence?
- Is a questionnaire necessary and if so, how frequent is a questionnaire to be used, how broad should the questions be and to whom should it apply?
 - Likely all directors, trustees, officers and like officials
 - Who is an individual who otherwise controls or manages the charity - likely all senior staff ?
- How does a charity deal with a director or officer that is an ineligible individual – usually only the members or directors can remove a director?
- How does a charity remove staff that is an ineligible individual – could have important employment law ramifications?

3. Clarification on Charitable Gifts Returned to Donors

- The Budget clarifies the effect of a charity returning a donation with respect to the *Income Tax Act*
- CRA will be able to reassess a taxpayer outside the normal reassessment period and disallow a taxpayer's claim for a credit or deduction when gifted property is returned to a donor
- If a charity has issued an official donation receipt for donation and subsequently returns the gift to the donor, if the value of the returned property is greater than \$50, the charity must issue a revised donation receipt and file a copy with CRA
- Effective for gifts returned on or after March 22, 2011
- Budget does not address the issue of whether or not a gift can be returned to the donor at law
- Legal advice should be sought in this regard

4. Gifts of Non-qualifying Securities (NQS)

- A NQS is generally a share, debt obligation, or other security (but not publicly listed securities and deposit obligations of financial institutions) of a corporation that is not at arm's length to the donor
- NQS rules currently apply to donations to private foundations and charities not at arm's length to donor
- Budget extends rules to gifts of NQS to all registered charities and to defer tax recognition until the recipient charity disposes of the NQS to a third party for consideration. If the NQS is not disposed of by the charity within the five-year period following the date of the gift, there will be no tax recognition of the gift
- Budget also proposed new anti-avoidance rules
- Effective for securities disposed of by donees on or after the March 22, 2011

5. Granting of Options to Qualified Donees

- Budget proposes to delay the recognition of a gift of an option to acquire property given to a QD
- Previously, where a donor granted an option to purchase property to a QD, the gift was recognized on the date of the gift and a receipt could be issued immediately for the fair market value of the option
- Budget proposes to delay recognition until the option is exercised by the QD, e.g. the property is purchased based on the amount by which the fair market value of the property at that time exceeds the total of amounts paid by the QD
- New rules to coincide with proposed split-receipting rules
- Effective for options granted on or after March 22, 2011

19

6. Donations of Flow-thru Shares ("FTS")

- Currently, the combined effect of the deduction of the "flow-thru" expenses, the elimination of the capital gains tax, and the charitable donation deduction or credit substantially reduces or virtually eliminates the after-tax cost of making a charitable donation of FTS
- The Budget proposes to limit the availability of the exemption from tax on capital gains where FTS are donated to a qualified donee to the extent that the cumulative capital gains in respect of the gift exceeds the original cost of the FTS
- The proposed rules apply where a taxpayer acquires shares issued pursuant to a FTS agreement entered into on or after March 22, 2011

20

7. Examination of Charitable Donation Incentives

- Motion 559 referenced in the 2011 Budget calls for the Standing Committee on Finance ("FINA") to study current tax incentives for charitable donations
 - Review changes to the charitable tax credit amount
 - Review the possible extension of the capital gains exemption to private company shares and real estate when donated to a charitable organization
 - Consider the feasibility of implementing these measures
- On Sept. 20, 2011, FINA approved a motion to undertake a comprehensive study of no less than 12 meetings on the current tax incentives for charitable donations with a view to encouraging increased giving
- See FINA's website www.parl.gc.ca/FINA-e for scheduled meetings open to the public or to view webcasts or read meeting minutes

21

B. 2010 DQ CHANGES: REVIEW AND UPDATE

- DQ is prescribed amount that registered charities must disburse each year in order to maintain charitable registration
- Purposes of DQ
 - Curtail fundraising costs
 - Limit excessive capital accumulation
 - Ensure significant resources devoted to charitable purposes and activities
- DQ introduced in 1976
- Significant reforms in 2004, whereby the DQ regime became significantly more complex
- Federal Budget of 2010 reformed and simplified the DQ regime

22

Pre-2010 Budget DQ Rules

- All registered charities required to expend on own charitable activities or on distribution to qualified donees the an amount equal to:
 - 80% of donations received in previous year
 - 80% of gifts from other registered charities (100% for private foundations)
 - 3.5% of value of property not used in charitable activities of administration (for amounts over \$25,000)
- Failure to meet DQ is grounds for revocation

23

- Exceptions to 80% charitable expenditure rule
 - Enduring property
 - Endowments subject to 10 year hold (“10 Year Gifts”)
 - Bequests
 - Proceeds of life insurance
 - RRSPs, RRIFs and TFSA
 - Specified gifts – certain inter charity transfers
 - Optional Capital Gains Pool Reduction

24

Pre-2010 Budget DQ Rules – Problems and Issues

- Administrative Difficulties
 - Arbitrary Expenditure Requirements
 - Not sensitive to operational needs of charities
 - Not sensitive to prevailing market conditions
 - Ongoing time and expense spent on compliance
- Complicated and Hard to Understand
 - Enduring Property Rules
 - Capital Gains Pool Concept
 - 80% DQ Requirements
- Hard to Characterize Expenses
 - Administration
 - Charitable Activities
 - Fundraising

25

Budget 2010 DQ Reform

- 80% charitable expenditure requirement
 - Repealed
- 3.5% disbursement requirement
 - Remains – for amounts in excess of \$100,000 for charitable organizations and for amounts in excess of \$25,000 for charitable foundations
- Concepts of enduring property, specified gift and capital gains pool
 - Eliminated

26

Budget 2010 DQ Reform – Anti Avoidance Provisions

- Non-Arm’s Length Inter-Charity Gifts
 - For non-arms-length inter-charity gifts –recipient charity must expend 100% of the gift in the year or in the following year
 - Possible penalty of 110% of amount of gift not expended and/or possible revocation of registered charity status
 - Can be avoided is gift is declared to be a “designated gift”
 - If a “designated gift”, it cannot count toward satisfying DQ requirements of transferor charity

27

- Anti-Avoidance Transaction
 - Where a registered charity entered into a transaction (which may include an inter-charity gift) where it “may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities
 - Applies regardless of whether the two charities are at arm’s length
 - 110% penalty – if inter-charity transfer, both charities are jointly and severally, or solitarily liable for the penalty
 - Both charities risk revocation

28

Implications

- Easing of administrative burden
- Simplification of DO calculation
- No need to disburse 80% of receipted gifts or gifts from arm’s length charities
- No need to track receipted and non-receipted gifts
- Only need to comply with 3.5% DO
- Lessens need for restrictive endowment conditions to meet enduring property definition (i.e., no need for 10 Year Gifts)
- New Endowments
 - Review of Agreements
 - Flexibility Available

29

- Administration of existing endowments and 10 year gifts
 - Careful Consideration of Issues
 - Not just a Tax Issue
 - Trust and Charity law Issues Relevant
 - Review of all Relevant Documentation
- With DQ Reform, more focus on compliance with CRA’s Fundraising Guidance
- Released June 11, 2009 - Regulates fundraising practices and fundraising costs
- CRA is expected to release a revised Fundraising Guidance in early 2012
- Fundraising issues increasingly important to public and has become media focus

30

C. FUNDRAISING GUIDANCE UPDATE

- On June 11, 2009, CRA introduced Guidance (CPS-028): Fundraising by Registered Charities
- The charitable sector was asked to provide feedback on this Guidance and as a result CRA has recognized the need to make the Guidance more practical
- CRA's review of the Guidance has resulted in a new draft Fundraising Guidance
- However, the revised Guidance is not yet available for distribution

31

- Guidance does not represent a new policy position of CRA but rather provides information on the current treatment of fundraising under the *Income Tax Act* and common law
- As such, the Guidance will have impact on current CRA audits, not just future audits
- The Guidance is intended to provide general advice only and is based on principles established by caselaw that fundraising must be a means-to-an-end, rather than an end-in-itself

32

- Current Guidance
 - Among other things, Fundraising Guidance deals with calculation of fundraising ratio, i.e., the ratio of fundraising costs compared to fundraising revenue on an annual basis
 - Charities will fall into one of three categories based on their fundraising ratio

33

CRA's Fundraising Ratio – remains the same in the revised Guidance

- 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% - will raise concerns with CRA and the charity must be able to provide an explanation and rationale for this level of expenditure – otherwise, not acceptable

34

CRA's Fundraising Guidance includes seven best practice indicators:

- Prudent planning processes
- Appropriate procurement processes
- Good staffing processes
- Ongoing management and supervision of fundraising practice
- Adequate evaluation practices
- Use made of volunteer time and volunteered services or resources
- Disclosure of fundraising costs, revenues and practices

35

Fundraising Guidance also sets out eight indicators that could cause the CRA to conduct a further review of a charity's fundraising activities:

- Sole source fundraising contracts without proof of fmv
- Non-arm's length fundraising contracts without proof of fmv
- Fundraising initiatives or arrangements that are not well-documented
- Fundraising merchandise purchases that are not at arm's length, not at fmv, or not purchased to increase fundraising revenue

36

- Activities where most of the gross revenues go to contracted non-charitable parties
- 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 in disclosures about fundraising or financial performance

37

D. CORPORATE UPDATE
New Canada Not-for-Profit Corporations Act ("CNCA")

- *Canada Corporations Act* (CCA) has not been substantively amended since 1917
- CNCA enacted on June 23, 2009, in force October 17, 2011
- Replaced Part II of CCA
- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations will be required to continue under the CNCA by October 17, 2014 by filing articles of continuance and adopting new by-laws that comply with the CNCA
- Failure to continue will result in dissolution of the corporation

38

- See Industry Canada's website for resources: http://strategis.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs03925.html
- See paper by Theresa Man "The Practical Impact of the *Canada Not-For-Profit Corporations Act*" May 2011, <http://www.carters.ca/pub/article/charity/2011/tlm1005.pdf>
- See Fasken Martineau Bulletin "New Canada Not for Profit Corporations Act – In Force" <http://www.fasken.com/en/new-canada-not-for-profit-corporations-act-in-force/>

39

- See CRA's comments on registered charities continuing under the CNCA:
<http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtnng/nfpc/menu-eng.html>
- Provides CRA's comments on completing Form 4031, Articles of Continuance
- Sets out documents that have to be filed with the CRA following continuance
- Provides a continuance (transition) checklist to be completed by registered charities

40

New Ontario *Not-For-Profit Corporations Act, 2010* ("ONCA")

- Enacted on October 25, 2010, expected to be proclaimed in force late 2012
- Regulations not released, many details missing
- See *Charity Law Bulletin*. 262 "Nuts And Bolts of the Ontario *Not-For-Profit Corporations Act, 2010*"
<http://www.carters.ca/pub/bulletin/charity/2011/chylb262.htm>
- See Fasken Martineau bulletin: "Ontario Not-for-Profit Companies Need to Act Now"
<http://www.fasken.com/en/ontario-not-for-profit-companies-need-to-act-now/>

41

- Unlike the CNCA:
 - Optional for corporations to file articles of continuance or adopt new by-laws to comply with ONCA requirements in 3 years of ONCA in force
 - If no continuance process taken, then
 - Corporation will not be dissolved
 - LP, SLPs and by-laws will be deemed amended to comply with new ONCA requirements, resulting in non-compliant provisions deemed invalid
 - Will result in uncertainty in relation to which provisions remain to be valid

42

E. RECENT CRA PUBLICATIONS

Guidance for The Promotion of Animal Welfare and Charitable Registration

- August 19, 2011, CRA released the Guidance on the Promotion of Animal Welfare and Charitable Registration (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlf-eng.html>)
- The Guidance sets out guidelines on promoting the welfare of animals and charitable registration
- Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals

Guidance on Working With an Intermediary Within Canada

- On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>)
- Guidance assists charities who are or intend to conduct charitable activities through an intermediary within Canada
- An intermediary is defined by CRA as an individual or a non-qualified donee (e.g. a non-registered charity)
- Complements Guidance CG-002, *Canadian Registered Charities Carrying out Activities Outside of Canada*

Guidance on Arts Organizations and Charitable Registration under the *Income Tax Act*

- On November 1, 2011 CRA released proposed guidance for consultation with feedback accepted until January 13, 2012 (http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/rtse-eng.html#_edn4)
- Sets out guidelines regarding the eligibility requirements for charitable registration of arts organizations
- Organizations will fall within one of two charitable heads
 - The advancement of education (2nd)
 - Other purposes beneficial to the community (4th)

Technical Interpretations on Non-Profit Organizations (NPOs)

- To qualify as an NPO, an organization must meet all 4 criteria under paragraph 149(1)(l) of the *Income Tax Act* throughout any taxation year
 1. Not be a charity
 2. Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 3. Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 4. Not distribute or otherwise make available for the personal benefit of a member any of its income

- CRA has taken a more restrictive view of what is required to meet these four criteria – has released many technical interpretations expressing these restrictive views
- CRA has focused its attention on NPOs
- CRA's NPO Risk Identification Project is gathering information to assist in determining "the level of non-compliance, any significant data gaps that may require mandatory filing of prescribed forms, and whether recommendations to the Department of Finance for more robust legislation are necessary"

Technical Interpretation Concerning Claim to Charitable Donation by Spouse of Deceased Person

- October 26, 2010, CRA released a technical interpretation, which confirmed that the spouse of a deceased person can claim a tax credit for a charitable donation made by his or her deceased spouse's will in the year that the spouse died, provided that:
 - A spousal or common law relationship existed at the time of death
 - The donation qualifies as a gift under the *Income Tax Act*
 - The donation is made in accordance with the terms of the deceased's Will

Other Technical Interpretations Relevant to Charities and Gifts

- CRA #2010-038401 - Whether a charity can issue T2202A Tuition, Education and Textbook Amount Certificates
- CRA #2011-0405881E5 - Gifts to a public body performing a function of government in Canada eligible for receipt, public body must retain discretion regarding how funds are spent – cannot be a conduit
- CRA #2009-033887 - split-receipted ecological gift of a servitude

49

Other CRA Publications

- East Africa Drought Relief Fund (Fund) - see <http://www.cra-arc.gc.ca/chrts-gvng/chrts/drghtrlfnd-eng.html>
- Charities Connection No. 8 – information on carrying on golf tournaments
- CRA service standards - see http://www.cra-arc.gc.ca/chrts-gvng/chrts/bt/tpfn_srvc-eng.html
- Public Service Body GST/HST Info Sheet - see <http://www.cra-arc.gc.ca/E/pub/gi/gi-121/README.html>

50

F. LEGISLATIVE AND CASE LAW UPDATES

Bill C-470, Private Members' Bill

- Bill C-470 proposed a disclosure obligation requiring charities to disclose the name, job title, and annual compensation of all executives or employees who receive \$100,000 or more (including taxable and non-taxable income) in compensation
- Prior to amendments, a charity that paid a single executive or employee annual compensation over \$250,000.00 may be subject to revocation
- As a result of the dissolution of Parliament on March 26, 2011, Bill C-470 died on the order paper, unlikely that the Bill will be re-introduced
- However, the charitable sector will need to carefully monitor what may develop in the future concerning compensation disclosure requirements

51

Bill C-28 (Anti-spam Legislation)

- Bill C-28 creates a new regulatory scheme for spam and unsolicited electronic messages
- Received Royal Assent on December 14, 2010, and is expected to come into force in early 2012
- Broad definitions of “electronic message” and “commercial activity” and will include charities
- Prohibits sending an electronic message without the express or implied consent of the recipient
- A two year limitation on implied consent can arise from: a donation or gift made to a charity; membership or volunteering in a charity or non-profit
- Significant monetary penalties, which can include a maximum fine of \$10,000,000

52

Recent Cases

News to You Canada v. Minister of National Revenue (2011 FCA 192)

- On June 7, 2011 the Federal Court of Appeal released its ruling in that “dissemination of news” is not charitable
- One of the corporate objects is to research and produce in-depth news and public affairs programs to provide unbiased and objective information concerning significant issues and current events that are relevant to a large sector of the general public and to disseminate these programs in order to encourage a well-informed general public for the benefit of society

53

- CRA refused application for charitable registration and this refusal was confirmed following objection
- Organization appealed on the basis that its purposes fell within two heads of charity, the advancement of education and other purposes beneficial to the community as a whole in a way which the law regards as charitable
- Advancement of education - the Court determined that while the production and dissemination of in-depth news and public affairs programs may improve the sum of communicable knowledge about current affairs, such activities are not sufficiently structured to meet the test established in Vancouver Society

54

- Fourth head - the Court reviewed the decision in *Native Communications* and concluded that the mere dissemination of news was not charitable at law - in part because the organization identified its audience as the general public and not any group or community in need of charitable assistance
- Court held in order to be charitable, the organization's purposes must be of special benefit to the community, with an eye to society's current social, moral, and economic context
- The Court did not accept the organization's argument that presenting the news in an "unbiased and objective" form met this requirement

55

Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation, 2011 ONSC 5684 (Unreported)

- A parallel foundation unilaterally amended its objects so that it could disburse both existing and current funds to charities other than the operating charity that had created it
- Prior to doing so, the foundation had fundraised from the public on the basis that said funds would go to the operating charity's programs

56

- Superior Court confirmed that charitable property raised for the benefit of a particular charitable purpose cannot be unilaterally applied for a different charitable purpose by simply amending charity's objects through supplementary letters patent
- The funds raised on the basis that they would go to the operating charity were to be held in trust for the charity
- To change the charitable purpose of funds, charities need to seek the approval of the Public Guardian and Trustee under the *Charities Accounting Act*, not "self-help" remedies

57

Bentley v. Anglican Synod of the Diocese of New Westminster 2010 BCCA 506

- On June 16, 2011, the Supreme Court of Canada refused to grant leave to appeal in *Bentley*
- In Nov. 25, 2009 decision, B.C. Supreme Court ruled that the properties of four incorporated parishes were to remain within the Anglican Church of Canada ("ACC")
- B.C. Supreme Court based its decision on the parishes' incorporating statute

58

- Even though the parishes were separate corporations, the act of incorporation, the making and amending of by-laws, rules, regulations etc. were all subject to the consent of the executive committee and local bishop of the ACC
- B.C. Court of Appeal upheld the lower court's decision on the basis that the purpose of the trusts upon which the parish corporations held the buildings and other assets was to further "Anglican ministry in accordance with Anglican doctrine"

59

Oloya v. R 2011 TCC 308

- Appeal by a taxpayer from reassessments in respect of donation receipts that he and his wife claimed to charity of which he was the founder
- Taxpayer found to operate charity with best of intentions but insufficient attention was paid to the form and content of donation receipts issued to donors
- Numerous tax credits were improperly claimed
- Claimed charitable receipts for gifts of services – impermissible as a gift must be a transfer of property and a supply of services not a transfer of property
- Gifts and receipts not properly documented, resulting in disallowance of claim for charitable credits
- Highlights importance of knowing and following charitable receipting rules

60

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

- Ontario Superior Court of Justice released on May 18, 2010
- A fundraiser (IGI) charged exorbitant commissions and misrepresented legality of fundraising activities
- Arrangement was that if shares and non-cash gifted, 40% commission to be paid, but if cash gifted, then commission would be 90%
- Court ordered fundraiser to pay back commissions received from four charities

61

Tax preparer found guilty of fraud in charitable donations scheme

- (<http://www.cra-arc.gc.ca/nwsrm/cnvctns/on/on110617-eng.html>)
- On June 8, 2011, CRA announced that Eric Armah who plead guilty in the Ontario Court of Justice in Brampton on April 29, 2011, for one count of fraud over \$5,000 for setting up false charitable donation claims has been sentenced to three years imprisonment

62

DISCLAIMER

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

© 2011 Carters Professional Corporation
© 2011 Fasken Martineau DuMoulin LLP

