

ONTARIO LAND TRUST ALLIANCE
Orillia – October 19, 2012

Demystifying Tax Changes for Land Trusts

Karen J. Cooper LL.B., LL.L., TEP
kcooper@carters.ca
1-866-388-9596

© 2012 Carters Professional Corporation

CARTERS PROFESSIONAL CORPORATION
TOLL FREE: 1-877-942-0001 Ottawa Toronto Mississauga Orangeville
www.carters.ca www.charitylaw.ca www.anti-terrorism-law.ca

2

A. OVERVIEW

- Federal Budget 2012 – political activities and other changes
- Federal Budget 2011 – ineligible individuals and other changes
- Recent CRA Publication on Fundraising
- Recent Case Law

www.charitylaw.ca www.carters.ca

3

B. HIGHLIGHTS OF FEDERAL BUDGET 2012

- Budget 2012 was introduced on March 29, 2012 (Budget 2012) and is available online at <http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html>
- Bill C-38, received Royal Assent on June 29, 2012
- Budget 2012 does not include any new donation tax incentives, such as the charitable donation tax credit proposed by Imagine Canada
- Budget 2012 focuses the perceived lack of transparency and accountability concerning political activities, as well as a number of other ad hoc charity issues
- See *Charity Law Bulletin* No. 280 at <http://www.carters.ca/pub/bulletin/charity/2012/chylb280.htm>

www.charitylaw.ca www.carters.ca

4

POLITICAL ACTIVITIES

1. Putting the Budget 2012 in Context
 - Prior to the announcement of Budget 2012, there have been many allegations made against environmental charities, eg:
 - Senate debates have raised the fear that “foreign foundations” have been funding Canadian charities, and that Canadian charities, particularly environmental charities, have been using those funds for untoward political objectives
 - Government “Strategy on Counter-Terrorism” equating environmentalism with white supremacy and the terrorist activities in Oklahoma City in 1995 and Norway in 2011

www.charitylaw.ca www.carters.ca

5

- Chilling effect on charities becoming involved in political activities
- No significant changes to rules permitting political activities under the ITA and CRA’s policies
- Changes in Budget 2012 do not stop charities from becoming involved in political activities
- Charities will need to carefully comply with the rules introduced by Budget 2012

www.charitylaw.ca www.carters.ca

6

2. Key CRA Policies
 - CRA Policy Statement (CPS – 022) “Political Activities” dated September 2, 2003
 - CRA Advisory on Partisan Political Activities
 - CRA Policy Commentary, Political Party Use of Charity Premises (CPC-0070)
 - Speech by the Director General of the Charities Directorate on May 4, 2012
 - These documents are available on the CRA website
3. Three Categories of Activities
 - Currently, politically related activities undertaken by a registered charity can be separated into three categories

www.charitylaw.ca www.carters.ca

7

(a) Charitable Activities (permitted without limits)

- A charitable activity is an activity undertaken to achieve a charitable purpose
- If an activity is considered by CRA to be charitable, then it is permitted without limits
- Under certain circumstances, communication with a public official or the public can be a charitable activity (e.g. submission to a public official on a law or policy provided that it relates to and is subordinate to the charity's charitable purpose, is well reasoned, and does not contain information that is false, inaccurate or misleading)

www.charitylaw.ca www.carters.ca

8

(b) Political Activities (permitted up to certain limits)

- An activity is presumed to be political if a charity
 - Explicitly communicates a call to political action, or to the public that the law, policy or decision of any level of government in Canada or a foreign country should be retained, opposed or changed, or
 - Explicitly indicates in its material that its activity is intended to incite, organize or pressure governments to retain, oppose or change the law, policy or decision of a government
- Political activities are permitted if they are non-partisan, connected to and subordinate to charity's purpose, and up to 10% of resources
- How resources (i.e., funds, property and people) is to be calculated is not clear

www.charitylaw.ca www.carters.ca

9

(c) Prohibited Activities

- Prohibited activities are either illegal or involve partisan political activities
- "Partisan political activity" involves the "direct or indirect support of, or opposition to, any political party or candidate for public office"
- CRA's examples
 - Gifting charity funds to a political party that supports the charity's views on a given matter
 - Making public statements (written or oral) that endorse or denounce a candidate or political party

www.charitylaw.ca www.carters.ca

10

- 4. Impact of Budget 2012
 - Budget 2012 impacts charities and RCAAs with regards to political activities in three ways
 - #1 – Expanded definition of political activities in ITA
 - To include “the making of a gift to a qualified donee if it can reasonably be considered that a purpose of the gift is to support the political activities of the qualified donee”
 - Focus is intent of the donor charity - not the intent of recipient QD
 - Would result in a double count of political activities, once by the donor charity and once by the recipient QD

www.charitylaw.ca www.carters.ca

11

- Three possible scenarios in determining “can reasonably be considered”
 - Written designation to use the gift for the political activities of the QD
 - Written designation to not use the gift for the political activities of the QD
 - No written designation, then look at other circumstances to see if there was “a purpose”
- Likely best to avoid multi-purpose gifts, because Budget 2012 simply refers to “a purpose” so any political purpose for any part of the gift may taint the whole gift

www.charitylaw.ca www.carters.ca

12

- Funding charities that are caught by the new inclusion rules will have to track and report political activities the same way as charities directly involved in political activities
- Funding charities that do not want to have to track political activities in their T3010 should designate in writing those gifts that are not to be used for political activities by the recipient QD

www.charitylaw.ca www.carters.ca

13

- #2 - New intermediate sanctions
 - If a charity exceeds the limits in the ITA for political activities (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receiving privileges (in addition to revocation)
 - If a charity fails to report any information (not just political activities) that is required to be included on a T3010 annual return, CRA can suspend its tax receiving privileges until CRA notifies the charity that it has received the required information
 - Therefore important to have the board, legal and accounting professionals, review and approve the T3010 annual return before filing it with CRA
 - \$8 million committed to enforcement by CRA

www.charitylaw.ca www.carters.ca

14

- #3 - More disclosure
 - More information about political activities will be required in the T3010, (including foreign donors)
 - Focus is on disclosure of funding of political activities by foreign donor
 - Such funding does not have to be counted towards the 10% resource limit until it is actually expended on political activities
 - Director General's Speech in May 2012 explores the type of disclosure about political activities that will be required in the T3010 in the future

www.charitylaw.ca www.carters.ca

15

- New political activities schedule as part of T3010
 - Indicate the type of political activity that a charity has devoted resources to (financial, property or human)
 - Explain the relationship between such political activities and its charitable purpose
 - Need to indicate the amount received from foreign sources for political activities
 - No need to identify the name of the foreign donor
- Revised T3010 should be available in early 2013

www.charitylaw.ca www.carters.ca

16

5. Practical Implications for Charities

- Know the rules before becoming involved in political activities
- Ensure that activities are either “charitable activities” or are “permitted political activities”
- Involvement in permitted political activities should be authorized by the board of directors
- Ensure that any permitted political activities undertaken fall within 10% resource limit)
- Keep careful books and records and do appropriate allocations of all expenditures with respect to permitted political activities

www.charitylaw.ca www.carters.ca

17

- Avoid any prohibited partisan political activities
- Gifts to QDs should generally include a written designation which states that the gift should not be used for the political activities of the recipient QD
- Have the board of directors, and accounting and legal professionals, review and approve the T3010 intermediate sanctions and greater public scrutiny
- See Charity Law Bulletin No. 286, “*Playing By the Rules: Political Activities Fair Game for Charities*”

www.charitylaw.ca www.carters.ca

18

GIFTS TO FOREIGN CHARITABLE ORGANIZATIONS

- Certain foreign charitable organizations that have received a gift from the Government of Canada in the previous 24 months are currently deemed to be QDs under the ITA, and may issue donation receipts to Canadian donors and receive gifts from registered charities
- Currently only 9 of these foreign charitable organizations, including William J. Clinton Foundation
- Budget 2012 proposes that foreign charitable organizations that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities:
 - (i) That relate to disaster relief or urgent humanitarian aid; or
 - (ii) Are in the national interest of Canada

www.charitylaw.ca www.carters.ca

- After consultation with the Minister of Finance, the Minister of National Revenue will have the discretionary power to grant qualified donee status to foreign charitable organizations that meet the above criteria
- Qualified donee status will be made public and will be granted for a 24 month period, beginning on a date to be chosen by CRA
- CRA will develop guidance regarding of this measure
- Foreign charitable organizations that currently have qualified donee status will continue to be qualified donees until the expiration of that current status
- Measures will apply to applications made on or after the later of January 1, 2013

C. HIGHLIGHTS OF FEDERAL BUDGET 2011

- The 2011 Federal Budget ("Budget 2011") was originally introduced on March 22, 2011 and was reintroduced in almost the identical form on June 6, 2011
- Bill C-13, which implements Budget 2011, received Royal Assent on December 15, 2011
- Budget 2011 contained significant changes to the regulation of charities and other qualified donees, and introduced the concept of "ineligible persons"
- CRA comment on Budget 2011 <http://www.cra-arc.gc.ca/chrts-qvng/chrts/bdqt/2011/menu-eng.html>
- For more information on the Budget see Charity Law Bulletin Nos.245 and 253 at www.charitylaw.ca

1. New Regulatory Regime for Qualified Donees
 - "Qualified donee" (QD) is defined in the ITA - may issue official donation receipts for gifts and may receive gifts from registered charities
 - Budget 2011 extends certain regulatory requirements, that in the past only applied to charities to the following types of QDs
 - Registered Canadian Amateur Athletic Associations
 - 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

22

- 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
- Most conservation authorities are considered municipalities or public bodies performing a function of government and will have to comply with these rules
- The effective date of these proposals was January 1, 2012

www.charitylaw.ca

www.carters.ca

23

- The new requirements that apply to QDs listed above
 - QDs are to be identified in a publicly available list maintained by CRA
 - If a QD does not issue donation receipts in accordance with the ITA 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 are 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

www.charitylaw.ca

www.carters.ca

24

- Additional regulatory requirements to RCAAAs that in the past only applied 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 receipting privileges, or revocation if an RCAAA 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)

www.charitylaw.ca

www.carters.ca

25

- 2. New Governance Regime for Registered Charities and RCAAAs ("Ineligible Individuals")
 - Budget 2011 identified a CRA concern that applications for charitable status were being submitted by individuals who have been involved with other charities and RCAAAs that have had their status revoked for serious non-compliance
 - In the past, CRA could not refuse to register or revoke the status of a registered charity or RCAA based on these grounds

www.charitylaw.ca www.carters.ca

26

- Budget 2011 allows 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" – convicted 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

www.charitylaw.ca www.carters.ca

27

- Has a "relevant offence" – convicted of an offence in Canada in 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)

www.charitylaw.ca www.carters.ca

28

- 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

www.charitylaw.ca www.carters.ca

29

- Budget 2011 stated that CRA will look at the particular circumstances of a charity or RCAA but does not state what those circumstances are
- Budget 2011 stated 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?

www.charitylaw.ca www.carters.ca

30

- Budget 2011 stated that a charity will not be required to conduct background checks, but even if the charity wanted to review 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

www.charitylaw.ca www.carters.ca

31

- 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
- Are all charities going to be required to conduct police checks even if not dealing with ineligible individuals as a simple matter of due diligence?

www.charitylaw.ca www.carters.ca

32

- 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 a staff member that is an ineligible individual – could have important employment law ramifications?

www.charitylaw.ca www.carters.ca

33

3. Clarification on Charitable Gifts Returned to Donors

- Budget 2011 clarified the effect of a charity returning a donation with respect to the ITA
- CRA can now 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 the donation and subsequently returns the gift to the donor, if the fair market value of the returned property is greater than \$50, the charity must file an information return (e.g. a letter) with CRA and provide a copy to the donor within 90 days after the return of the gift
- 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 common law
- Legal advice should be sought in this regard

www.charitylaw.ca www.carters.ca

34

D. RECENT CRA PUBLICATIONS

1. Guidance on Working With an Intermediary in Canada
 - On June 20, 2011, CRA released Guidance CG-004, *Using an Intermediary to Carry out a Charity's Activities within Canada* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html>)
 - The 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)
 - The Guidance is a modified version of Guidance CG-002, *Canadian Registered Charities Carrying out Activities Outside of Canada*, and contains relatively little new information

www.charitylaw.ca www.carters.ca

35

- However, the Guidance modifies the examples provided in CG-002 with respect to intermediaries (e.g. agents and contractors)
- It is recommended that charities, even if they do not conduct any activities outside of Canada, who are conducting any activities through an intermediary review both Guidances, to ensure that they are adequately documenting the necessary direction and control over their charitable resources

www.charitylaw.ca www.carters.ca

36

2. Guidance on Trust Document
 - On August 15, 2011, CRA released Guidance CG-009, *Trust Document* ("Guidance") (<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/trsts-eng.html>)
 - A trust document is one of three types of governing documents that may be used to establish a charity for the purpose of registration as a registered charity
 - For designation purposes, a trust document may be used for charitable organizations and private or public foundations
 - Guidance sets out the requirements for the contents of a trust document (e.g. name of trust, charitable purposes of trust, rules governing how trustees will administer all property etc.)

www.charitylaw.ca www.carters.ca

37

- These requirements must be met for registration purposes, should the organization choose to use a trust document to be its governing document
- CRA recommends that applicants submit a draft copy of the trust document for its review because amendments to a pre-established trust may not be possible or may require court approval
- CRA will review draft governing documents, including trust documents, on a one-time basis when submitted with a complete application
- If CRA approves the application, applicants will have to submit a signed trust document prior to registration

www.charitylaw.ca www.carters.ca

38

3. New Fundraising Guidance (Revised 2012)

a) Introduction

- From the media's perspective this is the number one compliance issue for charities
- The new Guidance is a significant improvement but is a longer document at 39 pages compared to 31 pages
- Although much improved, the new Guidance is still a complex document and will therefore require careful reading
- The Guidance will have impact on current CRA audits, not just future audits
- The Guidance will apply to all registered charities and to both receipted and non-receipted fundraising

www.charitylaw.ca www.carters.ca

39

- The Guidance is more directive than previous versions of the Guidance
- Charities must still meet their other obligations, including the 3.5% disbursement quota
- An organization carrying out unacceptable fundraising may result in denial of charitable registration or, for registered charities, sanctions or even revocation of charitable status
- The fundraising ratio referenced in this Guidance forms part of a charity's T3010 that is made available to the public on the web
- It is therefore important for the board of a charity to review and approve the T3010 for a charity before it is filed with CRA

www.charitylaw.ca www.carters.ca

40

b) What is Fundraising?

- In general, fundraising is any activity that includes solicitation of present or future donations of cash or gifts in kind, or the sale of goods or services to raise funds, whether explicit or implied
- For the purpose of the Guidance, fundraising does not include (i.e. to be excluded from revenue and expenses):
 - Seeking grants, gifts, contributions, or other funding from other charities or government
 - Recruiting volunteers (except for fundraising volunteers)
 - Related business activities

www.charitylaw.ca www.carters.ca

41

- Examples of fundraising activities
 - The sale of goods or services
 - Donor stewardship
 - Membership programs
 - Cause-related marketing/social marketing ventures
 - Planning or researching fundraising activities
 - Donor recognition
- c) When is Fundraising not Acceptable?
 - The following conduct will be prohibited and will be grounds for revocation of a registered charity's status, imposition of sanctions or other compliance actions, or denial of charitable registration

www.charitylaw.ca www.carters.ca

42

- Fundraising that is a purpose of the charity (a collateral non-charitable purpose)
- Fundraising that delivers more than an incidental private benefit
- Fundraising that is illegal or contrary to public policy
- Fundraising that is deceptive
- Fundraising that is an unrelated business

d) Allocating Fundraising Expenditures

- Registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010
- Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, or political activities

www.charitylaw.ca www.carters.ca

43

- Onus is on the charity to explain and justify the allocation
- The following are CRA's guidelines for allocation:
 - 100% allocation to fundraising
 - No allocation of costs to fundraising
 - Pro-rated allocation of costs
- e) Evaluating a Charity's Fundraising
 - Resources devoted to fundraising are disproportionate to resources devoted to charitable activities
 - Fundraising without an identifiable use or need for the proceeds
 - Inappropriate purchasing or staffing practices
 - Fundraising activities where most of the gross revenues go to contracted third parties

www.charitylaw.ca www.carters.ca

44

- Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations
- Misrepresentations in fundraising solicitations or disclosure about fundraising costs, revenues, or practices
- Fundraising initiatives or arrangements that are not well documented
- High fundraising expense ratio
- It is important to note that a charity's fundraising ratio can serve as a general self-assessment tool, although its not determinative on its own
 - The fundraising ratio is the ratio of fundraising costs to fundraising revenue calculated on an annual basis
 - It is a global calculation for a fiscal period

www.charitylaw.ca www.carters.ca

45

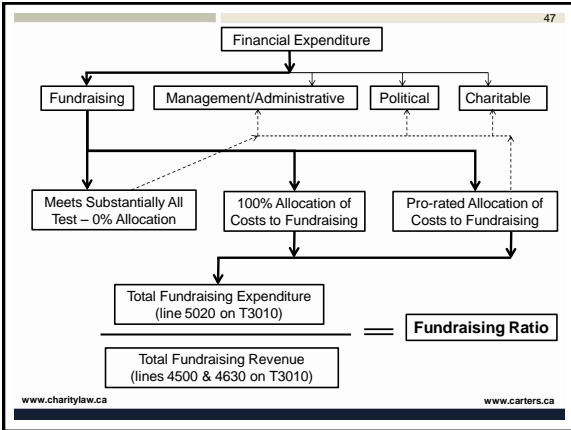
- However, a high fundraising ratio for an individual event may be an indicator of unacceptable fundraising
- It is totally distinct from the 3.5% disbursement quota, although elements of it overlap in the ratio
- Fundraising revenues include amounts reported in the T3010 on line 4500 (receipted donations, regardless of whether these amounts can be traced to fundraising activity) and line 4630 (all amounts for which a tax receipt was not issued and that were generated as a direct result of fundraising expenses)
- Fundraising expenditures will include all amounts reported on line 5020 as fundraising expenses in accordance with the Guidance

www.charitylaw.ca www.carters.ca

46

- The fundraising ratio will place a charity into one of three categories:
 - Under 35%: unlikely to generate questions or concerns by CRA
 - 35% and above: 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 level will raise concerns with CRA. The charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable
- See logic chart on next page (not by CRA)

www.charitylaw.ca www.carters.ca



48

f) Factors that may Influence CRA's Evaluation of a Charity's Fundraising

- CRA recognizes that the charitable sector is very diverse and fundraising efforts will vary between organizations
- CRA will look at a number of factors to evaluate a charitable fundraising activity that involves high fundraising costs
- Examples of relevant case-specific factors include the following:
 - The size of the charity, which may have an impact on fundraising efficiency (i.e. revenues under \$100,000)
 - Causes with limited appeal which could create particular fundraising challenges

www.charitylaw.ca www.carters.ca

49

- Donor development programs where fundraising activities could result in financial returns only being realized in future years (long-term investments)
- Gaming activities, such as lotteries or bingos, where it's commonly considered acceptable to have cost to revenue ratios of 70% or higher

g) Best Practices for Managing Fundraising

- Adopting best practices may decrease the risk of CRA finding that a charity is engaging in unacceptable fundraising
- The Guidance describes the following best practices in further detail:
 - Prudent planning processes
 - Adequate evaluation processes

www.charitylaw.ca www.carters.ca

50

- Appropriate procurement and staffing processes
- Managing risks associated with hiring contracted (third party) fundraisers
- Ongoing management and supervision of fundraising
- Keeping complete and detailed records relating to fundraising activities
- Providing disclosures about fundraising costs, revenues, practices and arrangements
- Maintain a reserve fund policy and ensuring that fundraising is for an identified use or need

www.charitylaw.ca www.carters.ca

51

4. Community Economic Development (CED)

- On July 26, 2012, the CRA released Guidance CG-014, *Community Economic Development Activities and Charitable Registration*
- This replaced Guide RC4143, *Registered Charities: Community Economic Development Programs*, which had operated since December 23, 1999
- New Guidance relaxes some of the requirements on specific forms of CED – will make it easier for charities to engage in CED
- See *Charity Law Bulletin* No. 287

www.charitylaw.ca www.carters.ca

52

a) Definition

- Generally, CED involves improving the economic opportunities and social conditions of an identified community
- CED activities are often referred to as "community capacity building", "social enterprise" and "social finance"
- Common forms of CED include:
 - Activities that relieve unemployment
 - Grants and loans
 - Program-related investments
 - Social businesses for individuals with disabilities
 - Community land trusts

www.charitylaw.ca www.carters.ca

53

b) Requirements of "Charitable" CEDs

- The law in Canada does not recognize CED as a charitable purpose in and of itself
 - Therefore, in order to be considered "charitable", CED activities must directly further one of the four heads of charity
- A CED activity must not provide any private benefit that is more than incidental if it is to be considered "charitable"
 - This means any private benefit must be necessary, reasonable, and not disproportionate to the public benefit

www.charitylaw.ca www.carters.ca

54

c) Types of CED Include:

(1) Activities that relieve unemployment

- These activities are only charitable if they further a head of charity
- To pass the public benefit test, the emphasis of these activities must be helping beneficiaries find employment, not helping employers recruit employees
- On-the-job training programs must focus on providing training, not indefinite employment

(2) Social businesses for individuals with disabilities

- Social businesses employ people with disabilities or support people with disabilities who are self-employed. They seek to provide permanent employment for such individuals

www.charitylaw.ca www.carters.ca

55

(3) Program-related investments (PRIs)

(i) Definition

- A PRI is an investment that is undertaken to further a charitable purpose. It may or may not involve the return of capital and interest
- PRIs can take the form of:
 - Loans
 - Loan guarantees
 - Share purchases
 - Leases of land or buildings
- New Guidance greatly expands opportunities for charities to engage in PRIs

www.charitylaw.ca www.carters.ca

56

(ii) Non-qualified donees may now be recipients

- New Guidance no longer prohibits a charity from making a PRI with a non-qualified donee
- However, a charity that makes a PRI with a non-qualified donee must "maintain direction and control over the activity" in which it has invested
 - In essence, the recipient is merely the intermediary and the activity is that of the investor charity
- If the charity cannot maintain direction and control, it could invest in the activity as a conventional investment, provided it receives market rates and the investment meets the charity's conventional investment requirements

www.charitylaw.ca www.carters.ca

57

(iii) When making a PRI, a charity must:

- Have a policy that stipulates the criteria it applies to PRI related decisions and explains how each PRI furthers its charitable purpose
- Include an exit mechanism that allows the charity to withdraw from the PRI or convert it to a regular investment in case the PRI no longer furthers the charitable purpose or the charity loses control over the activity of a non-qualified donee
- Ensure that its PRIs meet all applicable trust, corporate or other legal or regulatory requirements
- Maintain records that establish its direction and control over any PRIs with non-qualified donees

www.charitylaw.ca www.carters.ca

58

(iv) Commentary on PRIs

- A charity may only make a PRI with an arm's length corporation
- Although a charity is not required to include the value of its PRIs in calculating its 3.5% disbursement quota, a charity is not permitted to include the PRI as a charitable expenditure
- All types of charities can make PRIs in the form of share purchases, but public and private charitable foundations cannot acquire a controlling interest in a company
 - Furthermore, if a private foundation acquires more than 20% of any class of shares in a company, it may trigger divestment obligations and sanctions

www.charitylaw.ca www.carters.ca

59

(4) CED that promotes commerce or industry

- This type of CED can be charitable if it benefits the public or a sufficient section of the public, and not just members of the industry. Unlike other type of charitable CED, it is not required to benefit a specific eligible beneficiary
- Examples of purposes that may be acceptable are
 - Promoting greater efficiency within an industry
 - Promoting the achievement or preservation of high standards of practice within an industry
- Organizations that conduct these types of activities and wish to obtain charitable status will require independent and objective expert opinions stating their activities benefit the public

www.charitylaw.ca www.carters.ca

60

(5) CED in socially and economically deprived areas

- CED may be charitable if it improves socio-economic conditions for the public benefit in deprived areas
- The prohibition on private benefits that are more than incidental is relaxed for a CED in deprived areas. For example, a charity could provide job training for a specific employer to keep it from closing its factory
- "Deprived areas" have rates at least 1.5% higher than the national average in one of the following:
 - Unemployment (for at least 2 consecutive years)
 - Crime, including family violence
 - Health problems, e.g. mental health and addiction
 - Children and youth taken into care or dropping out of school

www.charitylaw.ca www.carters.ca

E. RECENT CASE LAW

61

1. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (CanLII) (September 27, 2011)
 - A parallel foundation unilaterally amended its objects so that it could disburse both existing and current funds to charities other than its operating charity
 - 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
 - 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
 - Above funds were to be held in trust for operating charity

www.charitylaw.ca

www.carters.ca

62

- To change the charitable purpose of funds, charities must seek the approval of the Ontario Public Guardian and Trustee ("OPGT") under the *Charities Accounting Act*, not "self-help" remedies
- Supplemental reasons were issued on March 7, 2012 (2012 ONSC 1527 (CanLII))
 - The Court awarded the claimed costs of \$454,686.19 to the charity and \$24,853.95 to the OPGT on a substantial indemnity cost basis
 - The foundation's unsubstantiated and unproven allegations of dishonesty and deceit on the part of the charity, misrepresentations and refusal of two offers to settle justified the said costs
 - The OPGT has the right to claim against the directors for their role in the litigation

www.charitylaw.ca


www.carters.ca

63

2. *Robinson v. Rochester Financial Limited*, 2012 ONSC 911 (CanLII) (February 7, 2012)
 - Ontario Superior court approved an \$11 million settlement of the class action relating to the "Banyan Tree" tax shelter
 - Small donations by donors were purportedly increased through a "loan" to donors
 - CRA disallowed donors' tax credits because the "donations" were not gifts
 - The defendant was a law firm which provided a legal opinion that the tax shelter complied with applicable tax legislation and that the tax receipts issued by the tax shelter should be recognized by CRA

www.charitylaw.ca

www.carters.ca

 <p>BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Disclaimer</h2>
<p>This powerpoint handout is provided as an information service by Carters Professional Corporation. 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.</p> <p>© 2012 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Ottawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</p>
