CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

HEALTHCARE PHILANTHROPY:
Check-up 2012
Toronto – May 16, 2012

Essential Charity Law Update

By Terrance S. Carter, B.A., LL.B., TEP, Trade-mark Agent
tcarter@carters.ca
1-877-942-0001

OVERVIEW

- Federal Budget 2012
- Update on Federal Budget 2011
- Other Recent Federal Initiatives
- Recent CRA Publications
- Legislative Update
- Recent Case Law

A. FEDERAL BUDGET 2012

- The 2012 Federal Budget ("Budget 2012") was introduced on March 29, 2012 and is available online at http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html
- Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* was introduced and passed First Reading on April 26, 2012, online at http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5524772
- 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

4

1. New Rules and Sanctions Involving Political Activities

- Budget 2012 could have been much worse for charities concerning political activities
- No significant changes to rules on political activities
- No changes to the current CRA Policy on Political Activities
- As such, Budget 2012 changes do not stop charities from conducting political activities
- However, charities will need to carefully understand the rules that do apply and be careful in documenting their involvement in political activities
- It is therefore essential to understand what the rules concerning political activities are before discussing the impact of the Bill C-38

www.charitylaw.ca www.carters.ca

5

- Currently, politically related activities undertaken by a registered charity can be separated into three categories:

(1) 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

6

(2) Political Activities (Permitted Up To Prescribed Limits)

- An activity is presumed to 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 are: non-partisan, connected to and subordinate to charity's purpose, and falls within 10% of resource spending limit
- Resources used on political activities do not count towards the 3.5% disbursement quota

www.charitylaw.ca www.carters.ca

7

(3) Prohibited Activities

- Prohibited activities either illegal or involve partisan political activities and therefore are not permitted at all
- "partisan political activity" involves the "direct or indirect support of, or opposition to, any political party or candidate for public office"
- CRA Advisory contains examples of prohibited partisan political activity such as:
  - 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, etc.

8

- Budget 2012 will impact charities and RCAAAs with regards to political activities in three ways when the Budget comes into effect upon Royal Assent
  - First, Budget 2012 expands the definition of political activities to include certain gifts to qualified donees
    - Specifically, Budget revises the definition of "political activities" under subsection 149.1(1) to: "includes 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" [emphasis added]
    - This would result in a double count of political activities, once by the transferor and once by the transferee QD
  - Three possible scenarios in determining "can reasonably be considered":

9

- 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 refers to "a purpose"
- Funding charities that are caught by the new rules will have to track and report political activities the same way as active charities
- Therefore, funding charities that do not want to track political activities should designate in writing that gifts are not to be used for the political activities of the QD

10

- Second, Budget 2012 introduces new intermediate sanctions :
  - Where a registered charity exceeds the limits in the ITA for political contributions (generally 10% of its total resources a year), CRA can impose a one year suspension of tax receipting privileges; and
  - Where a registered 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 receipting privileges until CRA notifies the charity that it has received the required information

www.charitylaw.ca www.carters.ca

11

    - This second sanction emphasizes the importance of having board members and also having legal and accounting professionals review and approve the T3010 annual return before filing it with CRA
  - $8 million committed to enforcement by CRA in the Budget
- Third, Budget 2012 states there will be more disclosure required concerning political activities
  - More information about political activities will be required in the T3010, (incl. foreign donors) although details of what that involves were not addressed in Bill C-38

www.charitylaw.ca www.carters.ca

12

  - There would be privacy concerns about identifying foreign donors if that was required
  - CRA is expected to include a schedule to require description of political activities, calculations of resources toward political activities, and the amount of funding from foreign donors, including from what area of the globe
  - Foreign donors who don't want to be tracked could give through a Canadian NPO and then the funds could be transferred to the charity to avoid the charity having to report it in its T3010

www.charitylaw.ca www.carters.ca

13

- Practical implications for charities
  - Ensure that activities are either "charitable activities" or are "permitted political activities"
  - Ensure that any permitted political activities undertaken fall within the 10% resource limitation
  - Remember that any resources expended on permitted political activities cannot be included in amount used to meet a charity's disbursement quota

www.charitylaw.ca www.carters.ca

14

  - Keep careful records and allocations of all expenditures with respect to permitted political activities
  - Avoid any prohibited partisan political activities
  - Gifts to QDs should generally include a written designation not to use the gift for the political activity of the QD
  - Have the board of directors as well as legal and accounting professionals review and approve the T3010 prior to filing, due to the imposition of new intermediate sanctions

www.charitylaw.ca www.carters.ca

15

2. 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 "qualified donees" under the ITA, and may therefore issue donation receipts to Canadian donors and receive gifts from registered charities
- There are currently only 6 of these foreign charitable organizations, including William J. Clinton Foundation
- Budget 2012 proposes that the Minister may register, in consultation with the Minister of Finance, a foreign organization for a 24-month period that includes the time at which Her Majesty in right of Canada has made a gift to the foreign organization, if
  a) The foreign organization is a charitable organization that is not resident in Canada; and

www.charitylaw.ca www.carters.ca

16

b) The Minister is satisfied that the organization is:
- Carrying on relief activities in response to a disaster;
- Providing urgent humanitarian aid; or
- Carrying on activities in the national interest of Canada

- Qualified donee status will be made public and will be granted for a 24 month period of time
- Measures will apply to registrations made after January 1, 2013

www.charitylaw.ca www.carters.ca

17

3. Tax Shelter Administrative Changes

- Budget 2012 proposes to encourage tax shelter reporting by:
  - Modifying the calculation of the penalty
  - Introducing a new penalty for a promoter who fails to meet their reporting obligations with respect to annual information returns and
  - Limiting the period for which a tax shelter identification number is valid to one calendar year
- Currently, the penalty for selling an interest in, or accepting consideration in respect of a tax shelter that is not registered with CRA, or filing false information in an application to register a tax shelter is the greater of $500 and 25% of the consideration received or receivable in respect of the tax shelter

www.charitylaw.ca www.carters.ca

18

- Budget 2012 proposes the penalty be changed to the greater of the amount determined under the existing rules and 25% of the amount asserted by the promoter to be the value of the property that participants in the tax shelter can transfer to a donee
- Budget 2012 also proposes an additional penalty be imposed if a promoter fails to either:
  - File an annual information return in response to a demand by the CRA to file the return; or
  - Report in the return an amount paid by a participant in respect of the tax shelter

www.charitylaw.ca www.carters.ca

19

- This new penalty will be 25% of the greater of:
  - The consideration received or receivable by a promoter in respect of all interests in the tax shelter that should have been, but were not, reported in an annual information return, and
  - The amount asserted by the promoter to be the value of the property that those participants can transfer to a donee
- The measure will generally apply on Royal Assent of the enacting legislation

20

4. GST Rebate for Books to be Given Away for Free by Prescribed Literacy Organizations

- Currently, a rebate of the GST (and the federal part of the HST) is given for printed books acquired by public libraries, educational institutions, charities and qualifying non-profit organizations prescribed by regulation and whose primary purpose is the promotion of literacy
- However, this rebate does not apply to tax paid on printed books to be sold or given away
- Budget 2012 proposes to allow charity and qualifying non-profit literacy organizations prescribed by regulation to claim a rebate of the GST (and the federal part of the HST) they pay to acquire printed books to be given away
- This measure will apply as of Budget Day

21

B. UPDATE ON FEDERAL BUDGET 2011 (JUNE 6, 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-gvng/chrts/bdgts/2011/menu-eng.html
- For more information on the Budget see Charity Law Bulletin Nos.245 and 253 at www.charitylaw.ca

22

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 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

www.charitylaw.ca www.carters.ca

23

  - Prescribed universities
  - Charitable organizations outside of Canada that received a gift from Her Majesty in right of Canada in the current or preceding year (subject to 2012 Budget)
- 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 was January 1, 2012

www.charitylaw.ca www.carters.ca

24

- 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

25

- 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

26

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 RCAAA based on these grounds

www.charitylaw.ca www.carters.ca

27

- Budget 2011 allows CRA to refuse or revoke the registration of a charity or a RCAAA 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 RCAAA 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

28

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

www.charitylaw.ca www.carters.ca

29

- 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 RCAAA 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 RCAAA participated and the registration of the charity or RCAAA has been revoked within the past five years for reasons that included or were related to its participation

www.charitylaw.ca www.carters.ca

30

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

www.charitylaw.ca www.carters.ca

31

- 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

32

- 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?
- How does a charity deal with a director or officer that is an ineligible individual – usually only the members can remove a director?
- How does a charity remove a staff member that is an ineligible individual – could have important employment law ramifications?

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

34

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 2011 extended 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 2011 also created new anti-avoidance rules
- Effective for securities disposed of by donees on or after March 22, 2011

www.charitylaw.ca www.carters.ca

35

5. Granting of Options to Qualified Donees

- Budget 2011 delays 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 2011 delays 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

www.charitylaw.ca www.carters.ca

36

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

- Previously, 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
- Budget 2011 limits 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 new rules apply where a taxpayer acquires shares issued pursuant to a FTS agreement entered into on or after March 22, 2011

www.charitylaw.ca www.carters.ca

37

C. OTHER RECENT FEDERAL INITIATIVES

1. Standing Committee of Finance Study on Tax Incentives for Charitable Donations

- Motion 559 referenced in Budget 2011 called 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; and
  - Consider the feasibility of implementing these measures
- FINA received an "Order of Reference" to proceed with its study

www.charitylaw.ca www.carters.ca

38

- On September 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
- FINA commenced the study and meetings have been held
- When FINA moved to undertake its study in September 2011, it slightly expanded the parameters of its review to also include consideration of the cost of changes to existing tax measures, as well as the implementation of new tax incentives
- There is now some concern in the charitable sector that there may be few, if any, limitations on what FINA can look at in their study and that broader issues may be brought up that fall beyond the parameters of the original motion

www.charitylaw.ca www.carters.ca

39

- The lack of limitations may cause members of FINA to possibly focus on other issues rather than on the main issue at hand of charitable donation incentives
- The charitable sector will need to carefully monitor FINA's study, as the findings of the study will be reported back to the House of Commons for possible legislative consideration
- In mid-February 2012, FINA hearings were suspended while FINA dealt with legislation referred to it by the House of Commons
- The hearings recommenced on May 3, 2012 and are currently underway
- Some of the issues raised include lack of transparency, particularly in relation to the T3010-1, the stretch tax credit and the $8 million CRA budget for investigations

www.charitylaw.ca www.carters.ca

40

2. 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 15, 2010, and is expected to come into force once regulations by Industry Canada have been finalized
- Charities and non-profit organizations that send "commercial electronic messages" will need to ensure that they comply with the Anti-spam Legislation
  - "commercial electronic messages" ("CEMs") are emails containing offers concerning goods, products or services, or that advertise or promote such opportunities as defined in the Anti-spam Legislation

41

- Prohibition on sending CEMs without:
  - The express or implied consent of the recipient; and
  - Ensuring that certain form/ content requirements are met, including an unsubscribe mechanism
- Requests for express consent must contain certain information (e.g. purpose(s) for which consent is sought)
- Implied consent can arise from "existing non-business relationships" (e.g. a donation or gift to, membership in, and/or volunteering with a charity or non-profit organization) – subject to a two year limit
- Significant monetary penalties for non-compliance (e.g. maximum penalty is $1 million (individuals) and $10 million (any other person)) and private right of action is available for breach of the prohibition

42

- CRTC's finalized *Electronic Commerce Protection Regulations* were released on March 7, 2012 and published in the Canada Gazette on March 28, 2012, available online at http://www.gazette.gc.ca/rp-pr/p2/2012/2012-03-28/html/sor-dors36-eng.html
  - Amended regulations require that the unsubscribe mechanism be able to be "readily performed" only, without mandating how many clicks are necessary
  - A request for express consent for the purposes of sending a "commercial electronic message" can be obtained orally, as opposed to being strictly in writing
- It is anticipated that Industry Canada's finalized regulations will be released later in 2012 - draft version is available online at http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-09/html/reg1-eng.html

43

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

44

- 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

45

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

46

- 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

47

3. Guidance for The Promotion of Animal Welfare and Charitable Registration
- On August 19, 2011, CRA released the final form of Guidance CG-011, *Promotion of Animal Welfare and Charitable Registration* ("Guidance") (http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwlfr-eng.html)
- 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

www.charitylaw.ca www.carters.ca

48

4. Guidance on Arts Organizations and Charitable Registration under the ITA
- On November 1, 2011 CRA released draft *Guidance on Arts Organizations and Charitable Registration* ("Guidance") for public consultation (http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/rts-eng.html#_edn4)
- Once finalized, the Guidance will replace Summary Policy CSP-A08 and Summary Policy CSP-A0A24
- Guidance 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)

www.charitylaw.ca www.carters.ca

49

- There is a presumption that a public benefit exists in relation to second head but not the fourth head
- Arts organizations that fall under the fourth head will have to meet CRA's specific public benefit criteria
  - Artistic form and style: there must be a common or widespread acceptance of the form and style of art within the Canadian arts community
  - Artistic merit: the quality of a presentation, exhibition, performance, etc. must be sufficiently high
- Guidance would not apply to:
  - National arts service organizations, or
  - Organizations that seek to further other charitable purposes through arts programs, e.g. providing art therapy to relieve conditions associated with illness or disability

50

5. New Fundraising Guidance (Revised 2012)

- From the media's perspective this is the number one compliance issue for charities
- The new Fundraising Guidance is a significant improvement over the 2009 version but is a longer document at 39 pages compared to 31 pages before
- 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
- For more information, see presentation "The In's and Out's of CRA's New Fundraising Guidance" by M. Elena Hoffstein

51

E. CORPORATE UPDATE

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

- *Canada Corporations Act* ("CCA") has not been substantively amended since 1917
- On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent
- CNCA was proclaimed into force on October 17, 2011
- The new rules do not apply automatically to CCA corporations
- Existing CCA corporations will have until October 17, 2014 to continue under the CNCA or face dissolution

52

2. New Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA")

- The Ontario *Corporations Act* ("OCA") has not been substantively amended since 1953
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- Not expected to be proclaimed in force until late 2012
- It is expected that an outline of the proposed regulations will be released in the first half of 2012 for public comment
- See Charity Law Bulletin No.262 "The Nuts and Bolts of the Ontario Not-for-Profit Corporations Act, 2010"
- For more information, see presentation "The Ontario Not-for-Profit Corporations Act (ONCA) and You" by Theresa L.M. Man

53

F. RECENT CASE LAW

1. *Nigerians in Diaspora Organization Canada (NIDO) v. Peter Ozemoyah* 2011 ONSC 4696 (CanLII) (August 15, 2011)

- No new members were ever admitted to a federal corporation yet certain individuals (other than the incorporators) called a meeting and purported to elect a new board
- Since the election and composition of the board is governed by CCA and the general operating by-laws of the corporation only the first incorporators were valid directors

54

2. *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

55

- 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

56

3. *St. John's Evangelical Lutheran Church of Toronto v. Steers*, 2011 ONSC 6308 (CanLII) (October 24, 2011)

- There was a series of disputes between the leaders and members of the congregation and the defendants (The English District Lutheran Church Missouri Synod (Canada) and The English District Lutheran Church Missouri Synod (U.S.A.)) regarding the ownership, autonomy, and operation of a church and its property
- A motion for certification of a class proceeding under the *Class Proceedings Act* ("CPA") was ultimately brought
- The parties ultimately settled their disputes, but the CPA requires a proceeding commenced or certified as a class proceeding under it to be discontinued or abandoned only with the approval of the court

57

- Therefore, the class proceeding was certified on the basis of a number of common issues including: breach of fiduciary duty; negligent misrepresentation (regarding the defendants' authority and legal status to install their own church council without the approval of the members and to appropriate church property); and conspiracy (to disband and disenfranchise the class members)
- Under terms of court approved settlement, the defendants agreed to release their claim to the church's property and the church agreed to resign from the English District Lutheran Church Missouri Synod
- The introduction of a class action into a church dispute may be the first in Ontario, if not Canada

58

4. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728 (CanLII) (November 22, 2011)

- Pastor was removed from office and brought an action for damages for constructive dismissal against Archdiocese
- One of the exceptions to the general rule that the courts have jurisdiction to decide claims for wrongful dismissal is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process
- A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization

www.charitylaw.ca www.carters.ca

59

- The courts will only interfere in the internal affairs of a self-governing organization if the internal process is unfair or does not meet the rules of natural justice or where the complainant has exhausted the internal processes
- Subject to any enabling statutory provision, if the complainant has exhausted the internal processes, the Court will not consider the merits of the decision but only whether the organization's rules were followed and the decision made in accordance with natural justice

www.charitylaw.ca www.carters.ca

60

5. *Sikh Cultural Society v. Kooner*, 2011 ONSC 5513 (CanLII) (December 8, 2011)

- Two factions were in competition with each other over the leadership of a religious not-for-profit corporation
- Previous executive committee, who failed to be re-elected in most recent election, attempted to take control of the corporation from the newly elected executive committee
- Disagreement over who was a valid member – new executive committee approved membership applications that the previous executive committee had failed to approve in a timely manner
- Adequate recordkeeping helps with the determination of membership and can be relied upon as evidence

www.charitylaw.ca www.carters.ca

61

6. *Cannon v. Funds for Canada Foundation,* 2012 ONSC 399 (CanLII) (January 18, 2012)

- The Ontario Superior Court certified a class action involving a charitable donation tax scheme
- In summary, a donor's original donation of $2,500 was purportedly increased to $7,500 through the exchange of sub-trust units between the various trusts involved, therefore making the original donation seem larger than it actually was
- The recipient charities agreed to return 99% of the donations to the promoters to use a software program
- CRA disallowed donors' tax deductions because donations were not gifts and charged interest on outstanding taxes owing due to the disallowance

62

7. *Robinson v. Rochester Financial Limited*, 2012 ONSC 911 (CanLII) (February 7, 2012)

- Ontario Superior Court of Justice 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

CARTERS
BARRISTERS
SOLICITORS
TRADEMARK AGENTS

Disclaimer

CARTERS PROFESSIONAL CORPORATION
TOLL FREE: 1-877-942-0001

Ottawa Toronto Mississauga Orangeville
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca