
**CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES
7TH Annual CSAE Trillium Chapter
SUMMER SUMMIT**

Collingwood – July 12, 2012

**Part 1: Essential Legal Update for
Not-for-Profit and Charitable Organizations:
What You Need to Know**

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	CANADIAN SOCIETY OF ASSOCIATION EXECUTIVES 7TH Annual CSAE Trillium Chapter SUMMER SUMMIT Collingwood – July 12, 2012
<p>Essential Legal Update for Not-for-Profit and Charitable Organizations: What You Need to Know</p> <p>By Terrance S. Carter and Theresa L.M. Man tcarter@carters.ca and tman@carters.ca 1-877-942-0001</p> <p>© 2012 Carters Professional Corporation</p>	
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OVERVIEW	
<ul style="list-style-type: none">• Corporate Update• Non-profit Organizations (NPO) Status Update• Federal Budget 2012• Update on Federal Budget 2011• Other Recent Federal Initiatives• Recent CRA Publications• Recent Case Law	
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A. CORPORATE UPDATE	
1. New Canada Not-for-Profit Corporations Act ("CNCA")	
<ul style="list-style-type: none">• <i>Canada Corporations Act</i> ("CCA") has not been substantively amended since 1917• On June 23, 2009 <i>Canada Not-for-Profit Corporations Act</i> ("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• See various Charity Law Bulletins on "Countdown to the Canada Not-For-Profit Corporations Act - Practice Tips #1-9" at http://www.carters.ca/nfp/index.htm	
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- Key considerations on continuance under the CNCA
 - Need to review current corporate documents to see what needs to be changed
 - Corporate objects
 - General operating bylaw and amendments
 - Special resolutions
 - Need to compare existing corporate documents to the provisions of the CNCA, and its regulations in order to determine what options are available
 - Need to determine if multiple membership classes are desirable and/or should be maintained, including non-voting members

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- May need to eliminate non-voting members and other membership classes prior to continuance in order to avoid them having class veto rights over the continuance process, as well as future fundamental changes and changes to membership classes
- May need to establish alternative terminology for non-voting members, such as “supporters”, “constituents”, “associates”
- If current bylaws are badly out of date, may need to consider updating bylaw prior to continuance
- If the corporation is a charity, any changes to the charitable objects would require CRA approval
- Application for articles of continuance will need to be approved by both the board of directors and by the members

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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
- Now expected to be proclaimed in force on January 1, 2013
- It is expected that an outline of the proposed regulations will be released shortly
- See Charity Law Bulletin No.262 “The Nuts and Bolts of the Ontario Not-for-Profit Corporations Act, 2010 at <http://www.carters.ca/pub/bulletin/charity/2011/chylb262.pdf>

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- Ontario corporations under the OCA will have three years from the date of proclamation to complete their transition to the ONCA
- However, unlike the CNCA, an Ontario corporation under the OCA will not automatically be dissolved after the expiration of the three-year time frame
- Instead, its letters patent and general operating bylaw will be deemed to be amended to comply with the provisions of the ONCA
- However, since deemed compliance would create considerable confusion, it will be important for Ontario corporations to transition under the ONCA within the three-year time limit

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B. NON-PROFIT ORGANIZATIONS UPDATE

1. Summary of NPO Requirements Under the ITA

- To qualify as an NPO, an organization must meet all 4 criteria under paragraph 149(1)(l) of the ITA throughout any taxation year in order to maintain tax-exempt status
 - Not be a charity
 - Be organized exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 - Be operated exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit
 - Not distribute or otherwise make available for the personal benefit of a member any of its income

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2. Current Position of CRA on NPO Status

- Over the last two years, CRA has been conducting audits of NPOs as part of a CRA audit project
- As well, CRA has issued a number of rulings and technical interpretations in the past few years that have caused concern in the NPO sector
- CRA's most recent position appears to be that they are returning to a more traditional position as reflected in case law and CRA's IT-496R
- Current CRA's position
 - An NPO can make a profit from operations provided that it is unintentional and incidental
 - An NPO can build up a reserve provided it is for capital or operating purposes
 - Although it is acceptable for an NPO to own a for-profit business, it is not clear if the for-profit can invest in an NPO through equity or debt infusion

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3. Summary of Recent CRA Publications and Rulings

a) CRA to Ease Burden on Tax Exempt Corporations (April 25, 2012)

- CRA recently concluded a review and has determined that refunds or rebates will not be withheld from NPOs when they have outstanding T2 corporate tax returns (though must still file their T2 return)
- This decision effectively adopts indefinitely CRA's 2008 administrative position on this issue
- Available online, <http://www.cra-arc.gc.ca/nwsrm/fctshs/2012/m04/fs120425-eng.html>

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b) Member Benefits and Conferences (document #2011-039520)

- CRA responded to question - Does the payment of conference fees for members of an NPO constitute a member benefit that would affect the organization's non-profit status?
- Payment by the organization is acceptable if the member attends the conference to further the objectives of the organization (such as a delegate for the organization) and not for the member's own benefit
- If a member volunteers to assist at a national conference of the organization, a lower conference fee may be charged in exchange for services provided to the organization by the member, as long as the reduction in the fee is a reasonable amount

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c) Sports Organizations and Tax Exempt Status

- CRA recently expressed its views in response to questions involving NPO sports organizations
- An NPO generally cannot provide financial assistance to its members out of surplus derived from third parties without having a profit purpose (document # 2011-040468117) – in that case, a sports association provides financial assistance, obtains sponsorships and sells advertising rights for its members
- Recreational community sports NPO organizations (e.g., minor-level hockey, soccer or baseball, or speed or figure skating) may receive free or subsidized equipment, such as team jerseys, by local businesses (document # 2011-042600117)

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C. 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, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures* received Royal Assent on June 29, 2012
<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

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1. New Rules and Sanctions Involving Political Activities

a) Putting The Budget 2012 In Context

- In the last six months, there have been numerous allegations made against environmental charities, including:
 - Politicians questioning the appropriateness of foreign funding of environmental charities
 - Government “Strategy on Counter-Terrorism” equating environmentalism with white supremacy and the terrorist activities in Oklahoma City in 1995 and Norway in 2011
- This has had the unfortunate effect of creating a chill for charities becoming involved in political activities

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- Notwithstanding these concerns, Budget 2012 could have been worse for charities concerning political activities
- No significant changes to rules permitting political activities under the ITA
- No changes to the current CRA Policy on Political Activities
- As such, the changes in Budget 2012 discussed below do not stop charities from becoming involved in 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 first understand what the rules are concerning political activities before discussing the impact of Budget 2012

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b) Key CRA Policies, Income Tax Act (“ITA”) Provisions And Resource Materials

- 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 <http://www.cra-arc.gc.ca/chrts-qvng/chrts/plcy/menu-eng.html> and provide information for registered charities on political activity and allowable limits under the ITA, as well as the common law

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c) Three Categories of Activities

- 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)

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(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 they are: non-partisan, connected to and subordinate to charity’s purpose, and falls within 10% of resource spending limit
- However, how resources (i.e., funds, property and people) is to be calculated is not clear

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(3) Prohibited Activities

- Prohibited activities are 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

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d) Impact of Budget 2012 on Political Activities

- Budget 2012 impacts charities and RCAAAs with regards to political activities in three ways
- First, Budget 2012 expands the definition of political activities to include certain gifts to qualified donees
 - Budget 2012 expands the definition of “political activities” under subsection 149.1(1), 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” (“QDs”)
 - The focus is on the intent of the donor charity, not the intent of the recipient QD
 - This change would result in a double count of political activities, once by the donor charity and once by the recipient QD

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- 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

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- 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
- As a result, 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

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- 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 (in addition to revocation)
 - 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

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- This second sanction emphasizes the importance of having the board, as well as 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 Budget 2012, including educational initiatives and webinars

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- Third, Budget 2012 states there will be more disclosure required concerning political activities
 - More information about political activities will be required in the T3010, (including foreign donors) although details of what that involves were not addressed in Budget 2012
 - 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

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- Charities involved in political activities will need to complete a new political activities schedule (revised from the 2002 version)
 - Will need to indicate the type of political activity that a charity has devoted resources to (financial, property or human)
 - Charity will need to explain the relationship between such political activities and its charitable purpose
- Charities will need to indicate the amount received from foreign sources for political activities
- However, there will be no need to identify the name of the foreign donor
- The revised T3010 should be available in early 2013

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e) 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"
- The decision to become involved in permitted political activities should be authorized by the board of directors of the charity
- Ensure that any permitted political activities undertaken fall within expenditure limit (i.e., generally within the 10% resource limit)

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- It is essential to keep careful books and records and do appropriate 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 which states that the gift should not be used for the political activities of the recipient QD
- Have the board of directors, as well as accounting and legal professionals, review and approve the T3010 prior to filing, due to the imposition of new intermediate sanctions and greater public scrutiny
- For more information, see Charity Law Bulletin No. 286, "Playing By the Rules: Political Activities Fair Game for Charities"

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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 QDs 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 provides 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

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- a) The foreign organization is a charitable organization that is not resident in Canada; and
- 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

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3. Tax Shelter Administrative Changes

- Budget 2012 attempts to encourage tax shelter reporting by
 - Modifying the calculation of the penalty
 - Introducing a new penalty for promoters who fail 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

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

- Currently, a rebate of 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 and given away
- Budget 2012 allows 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 applies as of Budget Day (i.e. March 29, 2012)

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D. 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-qvng/chrts/bdqtts/2011/menu-eng.html>
- For more information on the Budget see Charity Law Bulletin Nos.245 and 253 at www.charitylaw.ca

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1. New Regulatory Regime for Qualified Donees

- QD is defined in the ITA – may issue official donation receipts for gifts and may receive gifts from registered charities
- Budget 2011 extended certain regulatory requirements, which in the past only applied to charities, to the following types of QDs
 - Registered Canadian Amateur Athletic Associations (“RCAAs”)
 - 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

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- 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

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- 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
 - RCAAs 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

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- Additional regulatory requirements apply to RCAAAs (which 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 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)

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2. New Governance Regime for Registered Charities and RCAAAs (“Ineligible Individuals”)

- For more information, see “Qualified to be a Director? Considerations in Becoming and Remaining a Director”, presented by Terrance S. Carter and Theresa L.M. Man

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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

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4. Other Budget 2011 Technical Provisions

- Extends rules for gifts of non-qualifying securities to all registered charities
- Delays the recognition of a gift of or option to acquire property given to a qualified donee
- Limits the availability of capital gains tax exemption on flow-through shares to only the capital gains that accrue beyond the original cost of the flow-through shares

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E. 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
- 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
- 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

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- 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
- Some of the issues raised include lack of transparency, particularly in relation to the T3010, the stretch tax credit and the \$8 million CRA budget for investigations
- 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, but recommenced on May 3, 2012
- The hearings were halted for a second time and are expected to recommence again in September 2012

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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

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- 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

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- 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. According to recent reports, it is anticipated that Industry Canada’s finalized regulations will be released in 2013
- The draft version of the regulations is available online at <http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-09/html/reg1-eng.html>

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F. RECENT CRA PUBLICATIONS

1. 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-qvng/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)

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- 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
- See Charity Law Bulletin No. 271

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2. New Fundraising Guidance (Revised 2012)

a) Introduction

- From the media's perspective this is the number one compliance issue for charities
- CRA is expected to release a revised Fundraising Guidance in April 2012
- 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

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- 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

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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

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- 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

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- 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

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- 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

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- 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

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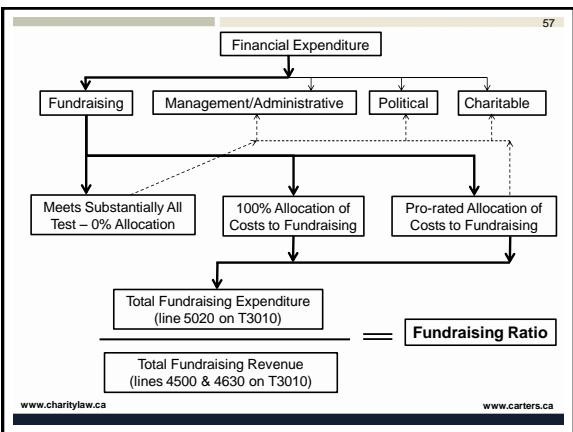
- However, a high fundraising ratio for an individual event may be an indicator of unacceptable fundraising
- It is totally distinct from the 3.5% disbursement quota, although elements of it overlap in the ratio
- Fundraising revenues include amounts reported in the T3010 on line 4500 (receipted donations, 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

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- 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)

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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
 - 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

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- 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

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- 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

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G. RECENT CASE LAW

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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

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- 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

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2. *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

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- 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 denomination
- The introduction of a class action into a church dispute may be the first in Ontario, if not Canada
- Decision could have broader application

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3. 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


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4. 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

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