# THE 2008 ANNUAL
# CHURCH & CHARITY LAW™ SEMINAR

## Toronto – November 6, 2008

# Highlights in Charity Law:
# The Year in Review

**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent**
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The 2008 Annual
**CHURCH & CHARITY LAW™ SEMINAR**
**Toronto – November 6, 2008**

# Highlights in Charity Law: The Past Year In Review

**(Current as of October 31, 2008)**

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## A. INTRODUCTION

- **This presentation provides brief highlights of the following affecting charities:**
  - **Recent Changes, Rulings, and Tax Decisions Under the *Income Tax Act* ("ITA")**
  - **New Policies, Publications, and Sanctions by Canada Revenue Agency ("CRA")**
  - **Other Recent Federal and Provincial Issues Affecting Charities**
  - **Other Recent Case Law Affecting Charities**

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## B. RECENT CHANGES, RULINGS, AND TAX DECISIONS UNDER THE *INCOME TAX ACT* ("ITA")

### 1. Bill C-10 Proposed Amendments to the *Income Tax Act* Affecting Charities

- **Bill C-10 amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003, February 27, 2004, July 18, 2005, November 18, 2006, and October 29, 2007**
- **On September 7, 2008, Bill C-10 died on Order Paper as a result of the dissolution of Parliament**

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- **Some of the changes proposed in Bill C-10 involved:**
  - **Split-receipting rules**
  - **Provisions which curtail abusive donation tax shelter schemes**
  - **New definitions for charitable organizations and public foundations**
    - **The new definition replaced the "contribution test" with a "control test"**
    - **Charities that do not meet this test would be designated as private foundations**

**2. 2007 Federal Budget Passed as Bill C-28**

- **The March 19, 2007 Budget ("2007 Budget") introduced a number of important measures for charities**

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- **The 2007 budget was legislated in Bill C-28, which received Royal Assent on December 14, 2007, subject to amendments in the February 26, 2008 Budget**
- **Extension of Capital Gains Exemption to Private Foundations**
  - **Eliminates the taxation of capital gains on donations of publicly-listed securities to private foundations**
  - **Exemption also applies to donations to private foundations of publicly listed securities by an arms-length employee who acquires the security under an option granted by the employer**

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**3. 2008 Federal Budget**

- **The February 26, 2008 Federal Budget proposes a number of measures which will impact registered charities**
- **Bill C-50, an act to implement certain provisions of the 2008 Budget, received Royal Assent on June 18, 2008, and includes some, but not all of the 2008 Budget's provisions dealing with charities**

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**Included in Bill C-50**

- **Provisions to extend the capital gains tax exemption to donations of unlisted securities that are exchanged for publicly traded securities before being gifted to a registered charity on or after February 26, 2008, within 30 days of the exchange**

**Not included in Bill C-50**

- **The 2008 Budget's measures to amend the excess business holding rules that were enacted in December 2007, by:**
  - **Exempting certain unlisted shares that were held on March 18, 2007 from the divestiture requirements, subject to certain exceptions**

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  - **New rules with respect to shares held on March 18, 2007 by "non arm's-length" trusts**
  - **Extending anti-avoidance provisions to address certain inappropriate uses of trusts**
  - **Introducing concept of "substituted shares"**
    - **"Substituted shares" are shares acquired in a corporate reorganization in exchange for other shares**
    - **"Substituted shares" will be treated the same as the shares for which they were exchanged for purposes of applying the exemption from the excess business holding rules**

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**4. CRA Rulings on Flow-through Shares**

- **CRA released a number of advance income tax rulings approving the donation of flow-through shares**
  - **February 6, 2008 ruling (2007–0242361R3)**
  - **May 14, 2008 ruling (2007–0232271R3)**
  - **July 23, 2008 (2008–0281941R3 and 2008-0269281R3)**
- **However, there is need for caution in valuing flow-through shares for receipting purposes**

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**5. Supreme Court of Canada Decision on CRA's Access to Donor Information**

- **The SCC released its judgment on July 31, 2008 in *Redeemer Foundation v. Canada (Minister of National Revenue)*, upholding the Federal Court of Appeal's decision**
- **The appellant Foundation, a registered charity, operated a forgivable loan program that financed the education of students at an affiliated college**
- **CRA was concerned that some donations to the program were not valid charitable donations because the donors' contributions were made to finance their children's education**

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- **CRA requested donor information, which the Foundation ultimately refused to provide**
- **The SCC held that CRA was not required to obtain prior judicial authorization for the requested donor information, as the Minister was entitled to it under paragraph 230(2)(a) and subsection 231(1) of the ITA, which set out book and record keeping requirements for inspection, audit, and examination purposes**
- **As well, the information was requested for a legitimate purpose, which was to investigate the validity of the loan program operated by the Foundation**

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**C. NEW POLICIES, PUBLICATIONS, AND SANCTIONS BY CANADA REVENUE AGENCY ("CRA")**

**1. CRA Publishes Proposed Guidelines for Research as a Charitable Activity**

- **On January 9, 2008, CRA published the draft policy *Consultation on Proposed Guidelines for Research as a Charitable Activity***
- **CRA generally defines research, for charitable purposes, as "the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge"**

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- **To be considered charitable, the research must be disseminated and made freely available to others who might want access to it, as opposed to being used for private or commercial purposes**
- **The mere accumulation and production of information on a given subject or about a specific event, or the gathering of market research about consumers' needs and preferences, will not, in and of itself, be considered to be a charitable research activity**

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**2. New CRA Guide on Charitable Work and Ethnocultural Groups**

- **On January 29, 2008, CRA released a new Guide to help ethnocultural organizations that want to apply for charitable status**
- **The Guide also provides some direction on the "advancement of religion" head of charity**
  - **The Guide reiterates that "it is a charitable purpose for an organization to teach the religious tenets, doctrines, practices, or culture associated with a specific faith or religion" but adds that "the religious beliefs or practices must not be subversive or immoral"**

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  - **"[T]eaching ethics or morals is not enough to qualify as a charity in the advancement-of-religion category"**
  - **"There has to be a spiritual element to the teachings and the religious activities have to serve the public good"**
- **A group's social events or cultural celebrations, such as "banquets, picnics, and Canada Day celebrations", are not considered charitable purposes by CRA**

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**3. New Checklists and Forms for Charities**

- **On March 26, 2008, CRA released a number of new checklists:**
  - **Basic Guidelines Checklist**
  - **Activities Checklist**
  - **Books and Records Checklist**
  - **Receipting Checklist**
  - **Spending Requirement Checklist**
  - **Receipting Checklist**
  - **T3010 Checklist**
  - **Legal Status Checklist**
  - **Change Checklist**
- **On January 1, 2009, new T3010B to be introduced**

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**4. CRA Proposed Policy on Fundraising by Registered Charities**

- **On March 31, 2008, CRA released its proposed policy in fundraising to provide registered charities with information pertaining to the use of resources for fundraising and the limits imposed by law**
- **On June 26, 2008, CRA released a 30-page background information document explaining the proposed policy**
- **The proposed policy provides a framework that explains how to distinguish between fundraising and other expenditures, and when fundraising activities may preclude registration or may result in revocation of registration**

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- **Consultation on the proposed policy was open until August 31, 2008 for comments and has now come to a close**
- **On October 16, 2008, CRA announced that it plans to share the results of the consultation with the sector within the next few months**
- **For more details on this topic, reference should be made to Teresa Douma's *2008 Church and Charity Law Seminar* presentation entitled, "The New CRA Proposed Fundraising Policy: What it Means for Your Church or Charity"**

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5. **CRA Policy Statement on Promotion of Volunteerism**

- **On May 1, 2008, CRA released a policy statement and summary policy in relation to organizations established to promote volunteerism in the community-at-large through broad-based activities**
- **To be registered under this policy, the applicant has to satisfy the following criteria:**
  - **Its formal purposes must clearly state that it is promoting volunteerism generally for the benefit of the community-at-large**
  - **It must accomplish its purpose through broad-based activities, which may or may not be set out in the objects, but must not be limited merely to fundraising**

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- **The applicant has to clearly promote volunteerism to the community-at-large as opposed to supporting only one organization or one particular type of organization that reflects a single interest, unless the beneficiaries are registered charities or otherwise qualified donees**
- **The applicant can provide services only to qualified donees and non-profit organizations**
- **If the applicant funds any organizations, they must be registered charities and other qualified donees**

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6. **CRA Policy Statement on Umbrella and Title Holding Organizations**

- **On May 6, 2008, CRA released its final form of policy statement and summary policy in relation to umbrella organizations and title holding organizations**
- **Umbrella organizations are described as organizations that support the charitable sector by promoting the efficiency and/or effectiveness of registered charities, or that advance a charitable purpose by working with and through member groups**
- **Title holding organizations can also be charitable if they are holding property for a registered charity or other qualified donee**

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**7. CRA Releases a Consultation Paper for Proposed Guidelines for Sport and Charitable Registration**

- **On May 9, 2008, CRA released a consultation draft policy intended to clarify the ways in which organizations carrying out activities that include sport can potentially qualify for charitable registration**
- **Although the promotion of sport is not recognized as charitable, there are circumstances in which sports activities can be used to further a charitable purpose**

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- **For an organization to be registered, the sport activities an organization pursues should:**
  - **Relate to and support its wholly charitable purpose(s) and be a reasonable way to achieve them, such as:**
    - **Promotion of health**
    - **Advancement of education**
    - **Advancement of religion**
    - **Relieving conditions associated with disabilities**
  - **Be incidental in nature**
- **Whether or not a sports activity will be acceptable will depend on the facts of each case and the charitable purpose the activity is intended to further**

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**8. CRA Releases Model Objects**

- **On May 21, 2008, CRA released a non-exhaustive list of model objects that would be acceptable to CRA in order to assist organizations that wish to apply for charitable status or registered charities that want to amend one or more of their purposes**
- **CRA indicates that it will likely only need to consider whether:**
  - **The organization will deliver a public benefit**
  - **The proposed activities are charitable, will be carried out in a manner allowed by the Act, and will further one of its charitable objects**
  - **The organization is appropriately set up**

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**9. CRA Revises Policy Regarding Valuation of Gifts of Life Insurance**

- **CRA's Interpretation Bulletin, IT-244R3 – *Gifts by Individuals of Life Insurance Policies as Charitable Donation*, sets out CRA's previous policy and interpretation of the ITA as it relates to gifts by an individual of a life insurance policy to a registered charity or other qualified donee**
- **Paragraph 3 of IT-244R3 provides that the amount of the gift is equal to the value of the policy (the cash surrender value of the policy less any outstanding policy loans) and any accumulated dividends and interest**

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- **However, CRA Technical Interpretation (#2008-026709) issued on February 25, 2008 indicates that the following factors should now be considered when determining the fair market value of a gift of life insurance:**
  - **The health and life expectancy of the insured**
  - **Any conversion privileges**
  - **The replacement value**
  - **Any other important policy terms**
- **It is important that this new position be taken into account in the context of paragraph 3 of IT-244R3 when determining the eligible amount of a gift**

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**10. Application of New Intermediate Sanctions by CRA Leading to Revocation of Charitable Status**

- **On March 5, 2008, CRA revoked the charitable status of the Francis Jude Wilson Foundation**
  - **The Foundation was apparently involved in a donation tax shelter arrangement resulting in the Foundation receiving actual cash returns of only $23,716 in fiscal 2005 and $81,951 in fiscal 2006 while issuing receipts totaling $10,560,650**

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- **Effective August 9, 2008, CRA revoked the registered charity status of International Charity Association Network ("ICAN")**
  - **CRA's news release dated August 11, 2008 indicates that CRA alleged that in 2006, ICAN, having only 16 employees, issued charitable donation receipts totaling approximately $464 million, almost five times the total charitable donation receipts issued by United Way of Greater Toronto in the same year, which had 165 full-time and 43 part-time employees**

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- **CRA also alleged that ICAN failed to provide the auditor with evidence that it had carried on its charitable activities on the scale on which it claimed to operate**
- **In addition, CRA alleged that ICAN actively participated in tax shelter schemes that resulted in ICAN receiving property for which tax receipts were issued in amounts far in excess of the value of the property**

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- **Effective August 30, 2008, CRA revoked the status of the Canadian Amateur Football Association as a registered Canadian amateur athletic association ("RCAAA")**
  - **RCAAAs are non-profit organizations that were established for the primary purpose of promoting amateur athletics in Canada on a nationwide basis**
  - **CRA's news release on September 3, 2008 indicates that the revocation was pursuant paragraph 168(1)(d) of the ITA for having issued donation tax receipts that contained false information**

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- **Effective September 20, 2008, CRA revoked the registered charity status of Banyan Tree Foundation**
  - **Earlier in 2008, CRA investigated the donation tax shelter, Banyan Tree Foundation Gift Program**
  - **CRA stated that the Charity had operated for the non-charitable purpose of promoting a tax shelter arrangement and for the private benefit of its directors**

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- **CRA concluded that the Charity's original purpose, which was simply to provide funding to qualified donees, had been exploited for the purpose of participating in and promotion of an abusive tax shelter arrangement**
- **The revocation notice indicates that the revocation was pursuant to paragraph 168(1)(b) of the ITA for failing to comply with requirements for registered charities in the ITA and paragraph 169(1)(d) of the ITA for issuing donation tax receipts that do not comply with the ITA or contains false information**

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- **CRA is currently in the process of disallowing donation tax receipts claimed by donors for the period between 2003 to 2007**
- **A group of donors who participated in Banyan Tree has decided to look to the promoters of Banyan Tree to recover any losses they may suffer as a result of the CRA reassessments and has launched a class action law suit**

- **These recent revocations are vivid reminders that CRA is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter and investor**

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**11. Application of New Intermediate Sanctions by CRA Leading to Notice of Suspension**

- **On March 12, 2008, CRA suspended the tax receipting privileges of the Adath Israel Poale Zedek Anshei Ozeroff synagogue ("Adath Israel") in Montreal for one year and imposed a monetary penalty of $499,055**
- **The suspension arose as a result of CRA's allegations that Adath Israel issued improper tax receipts in relation to the sale of cemetery plots and child nursery expenses**
- **Adath Israel offered $10,000 plots to its congregants for $3,750, provided that they pay an annual membership fee. The fees were treated like donations and members received receipts for tax purposes**

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- **CRA stated that the privileges conveyed by membership, namely purchasing plots in the synagogue cemetery, clearly constituted a benefit**
- **Adath Israel also issued tax receipts to parents for fees they paid to have their children attend a synagogue-run nursery**
- **There is no indication from CRA with respect to whether or not it will immediately seek revocation of Adath Israel's charitable status**

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**D. OTHER RECENT FEDERAL AND PROVINCIAL ISSUES AFFECTING CHARITIES**

**1. First Charge Laid Under Canada's Anti-Terrorism Financing Regime**

- **On March 14, 2008, the first formal charges under Canada's sweeping anti-terrorism financing regime were laid against Prapaharan (Prapa) Thambithurai**
- **The accused was charged with committing an offence under s. 83.03(b) of the *Criminal Code* which makes it an offence to provide, or make available property or services for terrorist purposes**
- **It is alleged that the accused solicited donations for a humanitarian organization that the police claim is the Canadian front organization for a "listed entity", i.e. the Tamil Tigers**

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**2. First Canadian Non-Profit Organization Placed on Terrorist List**

- **On June 16, 2008, the World Tamil Movement "WTM" was added to the "List of Entities" under s.85.05 of the Criminal Code**
- **The WTM (an Ontario non-profit association) is the first Canadian non-profit organization to be added to the over 40 entities listed under s.85.05 which have been deemed to have associated with or facilitated a "terrorist activity"**
- **No notice was given to WTM prior to their designation as a listed entity and the appeal process is very limited**

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**3. Telemarketing and the National Do Not Call List**

- **The CRTC launched Canada's National Do-Not-Call List ("National DNC List") and the new Telemarketing Rules on September 30, 2008**
- **Registered charities are exempted from the National DNC List, but they must still comply with the Telemarketing Rules, which require that they maintain their own do-not-call list**
- **Registered charities must also register with, and provide information to the National DNC List operator (Bell Canada), pay applicable fees and maintain records on registration and payment**

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**4. Reform of Not-for-Profit Corporations Legislation in Ontario**

- **In the spring of 2007, the Ontario Ministry of Government and Consumer Services ("Ministry") announced that it was undertaking a project to review and revise the Ontario *Corporations Act* (the "OCA")**
- **Currently, the OCA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations**
- **The primary basis for proposing reform to the OCA was the concern that the OCA is antiquated, cumbersome, and unable to meet requirements of the modern not-for-profit sector**

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- **The original version of the OCA was enacted in 1907 and has not been substantially revised since 1953. During this 50 year period where there has been no substantial change to legislation, the not-for-profit sector itself has experienced tremendous change**
- **The Ministry's main goal of reform is to "create a new statute dedicated to non-profit corporations that is easily understood and that responds to the realities of the 21st century nonprofit sector" [the "new Act"]**
- **Draft legislation is expected later in 2009**

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**5. Proposed *Canada Not-for-Profit Corporations Act* and Bill C-62**

- **The proposed *Canada Not-for-Profit Corporations Act* was re-introduced as Bill C-62 in Parliament on June 13, 2008**
- **Bill C-62 recently died on Order Paper when Parliament dissolved on September 7, 2008**
- **However, a draft bill containing proposals similar to those in Bill C-62 is expected to be introduced in the near future**
- **Bill C-62 contains a provision that would have provided voting rights to non-voting members in the case of fundamental changes**

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**6. Lobbyists Registration Legislation**

- **The *Federal Accountability Act* (enacted in December 2006) both amended and renamed the Federal *Lobbyist Registration Act* and on July 2, 2008, the *Lobbying Act* and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists**
- **Ontario also has a *Lobbyists Registration Act*, which has been in effect since 1998**
- **Some charities and non-profit organizations are either unaware of the existence of lobbyist registration legislation or are uncertain of its application to them**

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**7. Human Rights Regime Change in Ontario**

- **The *Ontario Human Rights Code Amendment Act*, 2006 (also referred to as Bill 107) came into effect on June 30, 2008**
- **As a result, the Human Rights Tribunal of Ontario will now be processing human rights complaints instead of the Ontario Human Rights Commission**
- **Other humans rights regime changes include the addition of an administrative branch, removing restrictions on damage awards for mental anguish, and permitting human rights violations pleadings in civil actions**

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**E. OTHER RECENT CASE LAW AFFECTING CHARITIES**

**Regulation and Governance of Charities**

**1. Supreme Court of Canada Decision Permits Judicial Interference In Religious Disputes**

- **On December 14, 2007, the SCC held that the failure to perform a religious obligation may give rise to civil damages**
- ***Bruker v. Marcovitz* the SCC upheld a Quebec decision ordering a Jewish husband to pay $47,500 in damages to his ex-wife for withholding his consent to a religious divorce, or a *get*, despite contractually agreeing to do so 15 years earlier**

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- **The majority concluded that agreement to give a *get* was a valid and binding contractual obligation**
- **The majority held, "any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment is significantly outweighed by the harm caused by his unilateral decision not to honour it"**
- **The dissent concluded that the wife's claim was <u>not</u> justiciable, stating that courts have long refused to intervene in religious disputes, unless some property or civil right is affected**

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**2. The Christian Horizons Decision (Ontario Human Rights Tribunal: April 28, 2008)**

- **The Ontario Human Rights Tribunal found that Christian Horizons ("CH") had violated Connie Heintz's rights under the *Human Rights Code* (Ontario)**
  - **CH offered its services to the general public and did not restrict its services to "co-religionists"**
  - **Compliance with the Lifestyle and Morality Statement was not a reasonable or *bona fide* qualification for employment**
  - **CH also infringed the complainant's rights as a result of the work environment and how she was treated once her sexual orientation came to light**

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**3. First Conviction Under C-45 Criminal Code Amendments**

- **Bill C-45 creates a *Criminal Code* duty for organizations and their representatives to take every reasonable precaution in order to protect their workers, as well as the general public**
- **In *R. c. Transpavé inc*., 2008 QCCQ 1598, Transpavé inc. pled guilty to criminal negligence causing death after a 2005 workplace fatality**
- **Although only the corporation was charged, all employers and boards of directors can be liable under the *Criminal Code* for failing to adhere to industry and regulatory standards for health and safety in the workplace, including volunteer workplaces operated by charities**

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**4. Procedural Rights and Requirements in Club Discipline Process**

- **On June 15, 2008, the British Columbia Court of Appeal ("BCCA") released its decision in *Struchen v. Burrard Yacht Club* ("Decision")**
- **The issue before the court was whether Burrard Yacht Club's disciplinary process provided the degree of fairness required by law**
- **The Court ruled that at a minimum, individuals in the context of a voluntary association who are facing discipline are entitled to the opportunity to be heard by an unbiased decision maker**

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