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**THE 2009 ANNUAL  
CHURCH & CHARITY LAW™ SEMINAR**

**Toronto – November 10, 2009**

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**Highlights in Charity Law:  
The Year in Review**

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**By Terrance S. Carter, B.A., LL.B., Trade-mark Agent**

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A. INTRODUCTION

- This presentation provides a brief overview of recent developments in charity law over the last 12 months, including:
  - Recent Developments, Technical Interpretations and Decisions Under the *Income Tax Act* (“ITA”)
  - New Canada Revenue Agency (“CRA”) Guidance, Commentaries and Other Publications
  - Other Federal Legislation Affecting Charities
  - Provincial Legislation Affecting Charities
- For more information see newsletters at <http://www.charitylaw.ca/>

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A. B. RECENT DEVELOPMENTS,  
INTERPRETATIONS AND DECISION UNDER  
THE INCOME TAX ACT

1. 2009 Federal Budget
  - On January 27, 2009, the federal government released its annual budget
  - The charities sector expressed disappointment that, while the Budget provided for various grants and contributions that benefit charities and non-profits, it did not establish any new tax incentives that might stimulate giving
  - For more details see CLB #156 “Federal Budget 2009: Grants, Contributions and Earmarks, but No New Tax Incentives at <http://www.carters.ca/pub/bulletin/charity/2008/chv1b156.pdf>

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**2. Possible Disbursement Quota Reform**

- The National Charity and Not-for-profit Law Section of the Canadian Bar Association submitted a concept paper on July 20, 2009 to the Department of Finance and CRA concerning reform of the disbursement quota (“DQ”)
- The concept paper recommends alternative mechanisms to the current DQ regime
- DQ requirements are currently overly complex and arbitrary, creating difficulties, especially for smaller charities that depend mainly on donor funds as opposed to grants from the government

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- Examples of current problems with the DQ include difficult terminology, such as “enduring property” and “capital gains pool”, which do not have clear definitions or application
- The submission suggests either the simplification of the current DQ formula by repealing the 80% component of the DQ formula, or repealing the DQ formula entirely and replacing it with a penalty tax on “undue accumulations”

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**3. Donating the Temporary Use of a Cottage is not a Gift**

- In a technical interpretation dated November 12, 2008, CRA confirmed its position that the gratuitous loan of property, including money or a cottage, is not a gift for purposes of sections 110.1 and 118.1 of the ITA, since a loan does not constitute a transfer of property
- However, it is possible for a charity to pay rent or interest on a loan of property and later accept the return of all or a portion of the payment as a gift, provided the return of the funds is voluntary

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**4. Split-receipting for Cemetery Plots**

- CRA issued a technical interpretation dated November 24, 2008, which deals with the issuance of charitable donation receipts in a situation where a member-donor is entitled to pay less for a cemetery plot than a non-member
- CRA stated that in applying the proposed split-receipting amendments, the “eligible amount” of the gift will be reduced by the value of the “advantage” provided to the members, which would include the right to purchase a cemetery plot at a discount

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**5. Federal Court of Appeal Decides Operating a Hostel is Not Charitable**

- In a December 2008 decision, the Federal Court of Appeal upheld the Minister of National Revenue’s (the “Minister”) decision to revoke the charitable status of *Hostelling International Canada – Ontario East Region*
- The Court held that simply providing an opportunity for people to educate themselves by making available tourist accommodation is not sufficient for the activity to be charitable

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**6. CRA Withdraws Compliance Agreement**

- *Christ Apostolic Church of God Mission Intl. v. The Queen* – Federal Court of Appeal, (May 30, 2009):
- Church appealed the decision to revoke its charitable status
- Church’s principle argument was that a “compliance agreement” it signed during an audit could not be unilaterally withdrawn by the Minister
- Court rejected argument
- The court held that it was open to the Minister to conclude that the church’s non-compliance could not have been remedied by promise made by the church in the agreement

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**C. NEW CRA GUIDANCE, COMMENTARIES AND OTHER PUBLICATIONS**

**1. 3.5% DQ Extended to Charitable Organizations**

- As of January 1, 2009, the 3.5% DQ has been extended to all charitable organizations with assets not used in charitable activities or administration in excess of \$25,000, in addition to public and private foundations
- 3.5 DQ is based on an average fair market value of those assets averaged over the previous 2 years

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**2. New T2050 Application Form for Charitable Status**

- In December 2008, CRA released a revised Form T2050, Application for Charitable Status
- A revised guide T4063 (“the Guide”) on how to complete Form T2050 was also released at the same time
- The revised Form T2050 requires more detailed information to be provided in order to allow CRA to make a determination in light of the various policies that were put in place since the release of the last version of Form T2050 in 2001

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- Some of the more detailed areas of inquiry include:
  - More detailed questions on fundraising activities and associated costs
  - Questions on anticipated source of revenue from major donors
  - Detailed questions on activities outside of Canada
  - Questions on revenue from sources outside of Canada
- When completing Form T2050, the applicants will need to carefully review the explanation in the Guide and provide sufficient information to CRA

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**3. New T3010B Annual Information Return**

- In February 2009, CRA released the new Registered Charity Information Return package, which includes the following Forms:
  - T3010B (09), Registered Charity Information Return
  - T1235 (09), Directors/Trustees and Like Officials Worksheet
  - T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations
- New T3010B is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009

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- The new T3010B is now comprised of a simple core form with topic-related schedules
- Concerns about new T3010B
  - Confidential disclosure to CRA of non-resident donors of donations over \$10,000
  - Public disclosure of intermediaries outside of Canada
- See CLB #158 “Commentary on the New T3010B Annual Information Return” at <http://www.carters.ca/pub/bulletin/charity/2009/chv1b158.pdf>
- For more information see presentation by Barbara Wallace entitled “Tips and Traps of the New T3010B” at the 2009 Church & Charity Law Seminar

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- 4. CRA Releases Policy Commentary on Requests for Disbursement Quota Relief**
- On April 6, 2009, the CRA released a Policy Commentary to clarify the procedure for applications for disbursement quota relief
  - A charity may apply for relief from its disbursement quota requirements but if granted, would only be applicable to the particular tax year in question
  - The following are the relevant considerations:
    - A charity may apply a disbursement excess from one year to offset disbursement shortfalls

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- The excess may be applied in the year before the year of the shortfall and in the five years immediately following
- The charity must first use all disbursement excesses from previous years
- The charity must be unable to meet the disbursement quota due to unforeseen circumstances that are beyond its control
- The charity must demonstrate that it is incapable of making up any part of the disbursement shortfall in the following year
- All of the charity's information returns must be filed before any requests are considered, and relief will not be granted in advance or anticipation of a shortfall

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5. Checklist on Avoiding Terrorist Abuse
- On April 16, 2009, CRA released the Checklist on Avoiding Terrorist Abuse intended to help registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals
  - The House of Commons Subcommittee on the Review of the *Anti-Terrorism Act* recommended that CRA consult with the charitable sector to develop "made in Canada" best practice guidelines that incorporates general policies and checklists that could be administered by applicants and registered charities in carrying out their due diligence assessments

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- The checklist is comprised of a number of questions to ask and provides a number of links to websites and international guidelines for more information
- Concerns about the usefulness of the checklist:
  - Not sufficient context for charities
  - Potential undue sense of simplicity
  - Continued delegation to foreign governments and quasi-governmental bodies
  - Excessive nature of recommendations
- See ATCLA #17 "CRA's New Anti-Terrorism Checklist – A Step in the Right Direction" at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>

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**6. CRA Releases Q&A on the Treatment of Enduring Property and Disbursement Quota**

- On April 20, 2009, the CRA released a Q&A to answer questions regarding a charity’s ability to encroach on the capital of its endowment fund in order to meet its disbursement quota
- The Q&A provides clarification on a number of issues in this regard
  - Such as the circumstances under which a charity may encroach on its enduring property

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- How ten-year gifts are required to be tracked
- The impact on the charity’s disbursement quota if it encroaches on its enduring property
- The questions and answers are of a highly technical nature
- See Charity Law Bulletin #171 entitled “Enduring Property and the Disbursement Quota”
- For more information see presentation by Elena Hoffstein entitled “Managing Disbursement Quota Issues During Recessionary Times” at 2009 Church & Charity Law Seminar

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**7. CRA Releases Guidelines for Sports and Charitable Registration**

- On April 30, 2009, CRA released the final form of guidelines on sports 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 charitable purpose(s) and be a reasonable way to do so, 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 to be achieved
- See CLB #143 “Sports and Charitable Registration” at <http://www.carters.ca/pub/bulletin/charity/2008/chv1b143.pdf>

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- 8. CRA Proposed Guidance on the Protection of Human Rights and Charitable Registration**
- On May 8, 2009, CRA released a draft guidance for consultation regarding human rights charities (“Guidance”)
  - According to the Guidance, “protecting human rights” refers to activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically, such as the Canadian *Charter of Rights and Freedoms*, or U.N. Conventions
  - It does not include advocating for the establishment of new legal rights

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- The Guidance indicates that CRA recognizes that the protection of human rights can further all four heads of charity
- Human rights charities often work outside existing legal and political structures but must ensure that their purposes are not political in nature, which is not charitable, e.g. to investigate and report violations of specified human rights instruments is not political in nature
- On the other hand, an unacceptable purpose would be to focus on one particular country, and pressure its legislature or government to sign an international human rights convention

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**9. CRA's New Guidance on Fundraising**

- After public consultation, **Guidance (CPS-028): Fundraising by Registered Charities ("Guidance")** was released on **June 11, 2009**, together with a **23 page Additional Information on the Guidance**, which collectively need to be read as one document
- For summary overview, see **Charity Law Bulletin #169** entitled **"The Revised CRA Guidance on Fundraising: Improved but Still Challenging"**
- For more detail see presentation by **Theresa Man** entitled **"CRA's New Guidance on Fundraising: What It Means in Practice"** at the **2009 Church & Charity Law Seminar**

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**10. CRA Draft Guidance on Charities Operating Outside Canada**

- On **June 30, 2009**, CRA released its much anticipated draft consultation paper entitled *Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities* ("**Proposed Guidance**")
- For summary overview, see **Charity Law Bulletin #172** entitled **"CRA's Proposed New Guidance for Charities Operating Outside of Canada"**
- For more details see presentation by **Karen Cooper** entitled **"Charities Operating Outside Canada"** at the **2009 Church & Charity Law Seminar**

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**11. Pending CRA Guidance on Advancement of Religion as a Charitable Purpose**

- CRA has been working on a draft **Guidance** for almost two years
- A draft is expected to be released in the near future but will need to be carefully reviewed by religious charities
- For more information see presentation by **Jennifer Leddy** entitled **"CRA's Proposed New Guidance on Advancement of Religion and Its Implications for Churches and Religious Charities"** at **2009 Church & Charity Law Seminar**

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**12. Clergy Residency Reduction Clarification**

- Confusion regarding Canada Revenue Agency's ("CRA") position on the filing of form T1213 for those eligible to receive the Clergy Residence Deduction
- Previously, where an employee was eligible for the deduction, so long as they informed their employer there was no requirement to file form T1213 Request to Reduce Income at Source
- CRA position is that if an employee lives in their own house or rents a property and claims the deduction, they are required to file a T1213
- If approved by the CRA, the employer then reduces the employee's taxable income by the amount of the deduction and withholds the income tax at source on the difference

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- There is no requirement to file form T1213 if the employee lives in employer provided accommodations, such as a manse or parsonage, and claims the deduction
- When determining the amount of income subject to withholding tax, the employer should include the taxable benefit relating to employer provided accommodations in the employee's income. The employee's taxable income should then be reduced by the clergy residence deduction which the employee will be claiming
- See CRA Registered Charities Newsletter No. 23 <http://www.craarc.gc.ca/E/pub/tg/charitiesnews-23/charitiesnews-23-e.html> (updated July 10, 2009)

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**D. OTHER FEDERAL LEGISLATION AFFECTING CHARITIES**

**1. Canada Not-for-profit Corporations Act**

- On June 23, 2009, Bill C-4, the *Canada Not-for-profit Corporations Act* received its third reading in the Senate and received Royal Assent on the same day
- Intended to replace Parts II and III of the current *Canada Corporations Act*, a statute first enacted in 1917 and substantively unchanged since that time, which Parts govern federal non-share capital corporations

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- Provisions of the new Act will only come into force on a day or days still to be fixed by order of the Governor in Council
- The order is not expected until the regulations proposed by Industry Canada have been approved
- The New Act is similar in substance to Bill C-21 from 2004, with certain exceptions
- Every federal corporation under Part II of the *Canada Corporations Act* will need to continue under the new Act within 3 years of the new Act coming into force
- For more information see presentation by Jane Burke-Robertson entitled “The Ins and Outs of the New *Canada Not-for-Profit Corporations Act*” at 2009 Church & Charity Law Seminar

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2. Proposed *Consumer Product Safety Act*
- Bill C-6, the *Canada Consumer Product Safety Act*, passed by the House of Commons on June 12, 2009 and is currently being debated by the Senate
  - The bill has the objective of protecting the public by addressing dangers to human health or safety that are posed by consumer products
  - Intends to establish a regulatory framework that will prohibit the sale of certain products and set requirements for testing, record-keeping and responding to incidents

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- There is no exemption for charities or not-for-profit organizations
- Record-keeping requirements include:
  - Documenting the identity and address of the person from whom they obtained the product
  - Location where and the period during which they sold the product
- Requirements are raising concerns within the charitable sector regarding the ability of charities, such as those who run thrift stores or other types of donation programs, to comply

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**E. ONTARIO LEGISLATION EFFECTING CHARITIES**

**1. Ontario Corporate Update**

- In the spring of 2007, the Ontario Ministry of Government and Consumer Services announced that it was undertaking a project to review and revise the *Ontario Corporations Act* (the “OCA”)
- OCA provides the statutory framework governing the creation, governance, and dissolution of non-share capital corporations, including charitable corporations in Ontario

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- Many of its provisions are severely outdated and are no longer relevant to the not-for-profit sector in Ontario
- The new legislation, to be entitled the Ontario *Not-for-profit Corporations Act*, is currently in its drafting stage, with a first reading expected in late Spring, 2010
- The new legal framework will be essential to ensure that Ontario will continue to be an attractive jurisdiction for the incorporation of non-share capital corporations, given the significant reform that has occurred at the federal level

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**2. Good Government Act, 2009**

- On October 27, 2009, the *Good Government Act, 2009* (“the Act”) was introduced in the Ontario legislature
- The Act contains significant reforms for the charitable sector in the province of Ontario
  - Among these proposed changes is the repealing of the *Charitable Gifts Act*, which limited the ability of charities in Ontario to own more than a 10% interest in a business or undertake business activities

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– Act proposes amendments to the *Charities Accounting Act*

- Expands power of the Ontario Public Guardian and Trustee (“OPGT”) to require documents and make inquiries where an executor or trustee holds a substantial interest in an entity (i.e. more than 20%)
- New proposed section 8 provides that a person who holds an interest in real or personal property for a charitable purpose must use the property for the charitable purpose (old section 8 permitted OPGT to vest real property in its name if the property had not been used for charitable purposes within 3 years)

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– Amendment to the *Accumulations Act* to the effect that the common law and statutory rules regarding accumulations do not and are deemed to have never applied to a charitable purpose trust

– *Religious Organizations’ Lands Act* would be amended so that the 40 year term limit for which a religious organization may lease land is repealed

- Some clarification will be needed before the bill becomes law, particularly with regard to the *Charities Accounting Act*

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3. Ontario Public Guardian and Trustee Releases Advice on Fundraising

- The OPGT released a bulletin in July 2009 entitled “Charitable Fundraising: Tips for Directors and Trustees” available at <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bulletin-8.asp>
- Provides helpful information to directors and trustees of charities in Ontario on conducting charitable fundraising
- Reminds charities that they cannot conduct fundraising activities as a charitable purpose in their own right
- Needs to be read in conjunction with CRA Guidance on Fundraising

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**F. FREEDOM OF RELIGION**

**1. Top Court Minimizes Freedom of Religion in Hutterite Case**

- On July 24, 2009 the Supreme Court of Canada held in *Alberta v. Hutterian Brethren of Wilson Colony* 2009 SCC 37, that the Alberta Government's regulation that all driver's licences include a photo of the driver was a reasonable limit on freedom of religion that could be justified in a free and democratic society
  - A split decision by the Supreme Court of Canada of 4-3
- Majority decision focused on a very technical, and narrow section 1 Charter analysis

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- Majority found impugned regulation constitutional even though adherents have to violate their faith by having their pictures taken to comply
- Dissenting opinions found the photo requirement was not a proportionate limit on the claimants' freedom of religion, given the alternative means available
- The dissents provide a strong appreciation of both the individual and collective aspects of freedom of religion
- For more information, see *Church Law Bulletin* No. 27, available at: <http://www.carters.ca/pub/bulletin/church/2009/chclb27.pdf>

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