THE 2010 ANNUAL
CHURCH & CHARITY LAW™ SEMINAR

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Essential Charity Law Update

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The 2010 Annual
Church & Charity Law Seminar
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Essential Charity Law Update
(Current as of September 23, 2010)

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A. INTRODUCTION

- Brief highlights of the following:
  - Recent legislative initiatives under the *Income Tax Act* ("ITA")
  - Recent publications from Canada Revenue Agency ("CRA")
  - Changes to corporate law
  - Anti-Terrorism law update
  - Ontario legislative update
  - Recent case law affecting charities
- For more details, see Bulletins and newsletters available at www.carters.ca, www.charitylaw.ca, and www.antiterrorismlaw.ca

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B. RECENT LEGISLATIVE INITIATIVES UNDER THE *INCOME TAX ACT*

1. Disbursement Quota Reform under Federal Budget 2010

- 2010 Budget released March 4, 2010
- Draft legislation released on August 27, 2010
- Repeal of 80% DQ and related concepts
- See presentation by Theresa Man

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2. July 2010 Draft Amendments

- On July 16, 2010, Finance released draft legislative proposals to implement outstanding income tax technical measures (the "July 2010 Amendments")
- Included within the July 2010 Amendments are proposed changes that will substantially impact the operations of registered charities in Canada, including split-receipting provisions and new definitions of charitable organizations and public foundations

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- Many of the proposed changes included in the July 2010 Amendments were first introduced by Finance on December 20, 2002 and in numerous amendments since then
- Although these proposed changes have yet to be enacted into law, many have already been implemented by CRA in their administrative policies
- The following is a list of some of the key amendments relating to charities in the July 2010 Amendments:

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- – The split-receipting rules allow a donor to receive a limited advantage in respect of a gift having been made with only the "eligible amount" of a gift to be receipted
- – Complicated rules to curtail abusive donation tax shelter schemes based on a receipts for a deemed fair market value of cost (or adjusted cost base) for certain types of transactions

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- New definitions of charitable organization and public foundation replace the contribution test with the control test, permitting a charity to receive contributions of more than 50% of its capital from a donor, provided that the donor does not control the charity or represent more than 50% of the directors and trustees of the charity
- Gifts made by a charity to a non qualified donee are cause for revocation of the charity's status

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3. Amendments to ITA Regulations Add a New Prescribed Donee

- On September 23, 2010, an amendment to the ITA Regulations adds a new prescribed donee, American Friends of Canadian Land Trusts
- This amendment allows non-resident owners of Canadian real property to make a gift to a U.S. charity (resulting in U.S. donation tax benefits) and still benefit from a reduction in the amount of capital gains subject to Canadian tax

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4. Bill C-470, Private Members' Bill

- Bill C-470 would give CRA the discretion to revoke charitable status of a charity if it pays a single executive or employee annual compensation over $250,000.00
- It would also allow CRA to publish the name, job title and annual compensation of each of a charity's five highest paid employees and executives
- If passed, effective 2011 onward
- Received second reading, now going to Finance Committee this month

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C. RECENT PUBLICATIONS FROM CRA

1. Fundraising Guidance

- From the media's perspective this is a number one compliance issue for charities
- With repeal of 80/20 DQ, emphasis will now be on fundraising expenses
- While the CRA accepts that charities can have fundraising costs, its expectation is that these expenses be reasonable and proportionate to the charitable activity being conducted

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- CPS-028, *Fundraising by Registered Charities* ("Guidance") available at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cps/cps-028-eng.html
  - The Guidance was released in June 2009 but is still not widely understood by charities
  - Focus on the calculation of fundraising ratio, i.e. the ratio of fundraising costs compared to fundraising revenue on an annual basis
  - The ratio will place a charity in 1 of 3 categories:

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- Under 35%: Unlikely to generate questions or concerns by CRA
- 35% to 70%: 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 will raise concerns with CRA and the charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable

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– Seven best practice indicators that will decrease the risk of CRA finding unacceptable fundraising
  1. Prudent planning processes
  2. Appropriate procurement processes
  3. Good staffing processes
  4. Ongoing management and supervision of fundraising practice

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5. Adequate evaluation processes
6. Use made of volunteer time and volunteered services or resources
7. Disclosure of fundraising costs, revenues and practice

- See also Office of the Public Guardian and Trustee, *Charitable Fundraising: Tips for Directors and Trustees* http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bulletin-8.asp

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2. CRA Provides Instruction on Avoiding Improper Receipting

- On December 21, 2009, CRA released *Registered Charities Newsletter No. 33*, which provides education on receipting
- Improper receipting occurs when a receipt is issued which violates the ITA, which can include receipts with inaccurate or missing information or for transactions that do not qualify as a gift, receipts for an inflated amounts, and issuing a receipt on behalf of another organization

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3. CRA Guidance: Upholding Human Rights and Charitable Registration

- On May 17, 2010, CRA released *Upholding Human Rights and Charitable Registration* ("Guidance") available at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/hmn-rghts-eng.html
- "Upholding 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

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4. CRA Guidance on Charities Carrying on Activities Outside Canada

- July 8, 2010, CRA released Guidance entitled *Canadian Registered Charities Carrying on Activities Outside of Canada* ("Guidance") available at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html
- Updates and replaces the previous CRA publication on foreign activities entitled *Registered Charities: Operating Outside Canada* RC4106 and Registered Charities Newsletter No. 20

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- Two means available under the ITA by which a registered charity can pursue its charitable purposes
  a) The charity can make gifts to qualified donees (generally other registered charities)
  b) The charity can carry out its own charitable activities, which in turn would require that the charity must control all of its activities and resources (referred to as the "own activities test")

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- The key consideration that a charity must have when carrying on activities abroad is whether it meets the "own activities" test
- Defined in the Guidance as activities

  "which are directly under the charity's control and supervision, and for which it can account for any funds expended."
- Charities cannot act as a passive funding body or conduit for a non-qualified donee

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- One part of the "own activities" test is the control and direction that the charity exercises over its resources
- A charity should always have an agreement in place with any intermediaries that it works with
- In some cases, the agreement may only require a verbal discussion, while other situations will call for all six measures of control recommended by CRA

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- Six "measures of control" to assist in meeting the "own activities test"

  a) Written agreements

  b) Description of activities

  c) Monitoring and supervision

  d) Ongoing instruction

  e) Segregated funds (if agency)

  f) Periodic transfers

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- Additional issues addressed by Guidance
  - Compliance with local laws
  - Activities that put people at risk
  - Disclosure of names of recipients
  - Anti-terrorism considerations
  - Foreign activities and the disbursement quota
  - CRA treatment of funding from CIDA

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D. CORPORATE UPDATE

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

- Received Royal Assent June 23, 2009
- Not yet proclaimed in force – current estimate is sometime in 2011
- See presentation by Terrance Carter

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2. New *Ontario Not-For-Profit Corporations Act* (ONCA)

- On October 25, 2010, Bill 65, The *Ontario Not-for-profit Corporations Act* ("ONCA" or the "Bill") received Royal Assent
- It is not expected to be proclaimed until sometime in 2012
- See presentation by Terrance Carter

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E. ANTI-TERRORISM LAW UPDATE

1. Bill C-17: *Combating Terrorism Act*

- Bill C-17, *Combating Terrorism Act* received first reading in House of Commons April 23, 2010, awaiting second reading
- Bill C-17 proposes to reintroduce *Criminal Code* provisions relating to investigative hearings and recognizance which first came into force with Bill C-36 *Anti Terrorism Act,* but had expired on March 1, 2007

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2. Report of the Air India Inquiry – Terrorist Financing

- The final report of the Air India Inquiry was released on June 17, 2010
- Selected findings regarding terrorist financing laws include the following:
  - Neither FINTRAC nor CRA are sufficiently incorporated into the flow of intelligence to maximize attempts at detecting terrorist financing

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- Terrorists can use charities and NPO's as a way to finance their activities although it is not possible to state how many registered Canadian charities have been involved in terrorist financing
- CRA has reported that a significant number of charities related to terrorism have been denied registration – these denials are based on traditional CRA powers and not new powers from the anti-terrorism legislation

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- Measures to defeat the use of charities for terrorist financing should not unnecessarily impede the valuable activities of legitimate organizations
- The work of honest charities should not be hindered by unrealistic guidelines or best practices

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F. ONTARIO LEGISLATIVE UPDATE

1. Bill 212: *Good Government Act*

- On December 15, 2009, the *Good Government Act*, 2009 ("the Act") received Royal Assent
- The Act contains significant reforms of the charitable sector in the province of Ontario
  - The Act repeals the *Charitable Gifts Act,* which had limited the ability of charities in Ontario to own no more than a 10% interest in a business

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- The Act also amended the *Charities Accounting Act*
  - Expands power of the Ontario Public Guardian and Trustee ("OPGT") to require documents and make inquiries
  - New 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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- *Accumulations Act* amended to the effect that the common law and statutory rules regarding accumulations do not and are deemed to have never been applied to a charitable purpose trust
- *Religious Organizations' Lands Act* amended so that the 40 year term limit for which a religious organization may lease land is repealed

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2. Bill 168: *The Occupational Health and Safety Amendment Act*

- The *Occupational Health and Safety Amendment Act, (Violence and Harassment in the Workplace), 2009* came into force on June 15, 2010
- The legislation designates workplace violence and harassment as occupational health and safety hazards under the OHSA
- Establishes new obligations for employers with respect to workplace violence and harassment prevention

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3. Land Transfer Tax Amendments Affecting Charities

- 2010 Ontario Budget proposes regulatory amendments to *Ontario Land Transfer Tax Act* to exempt certain transfers of land to registered charities from provincial land transfer tax
- Will facilitate reorganizations of charities that might have been subject to land transfer tax if there was an assumption of debt

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- Transfers of land after March 25, 2010 from trustees to a non share capital corporation or between two non share capital corporations will be eligible for exemption if :
  - The non share capital corporation will be continuing the same charitable purposes for the same members
  - No consideration is paid other than the assumption of any existing liabilities registered on the land

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G. RECENT CASE LAW AFFECTING CHARITIES

1. *Christian Horizons* Decision

- The Ontario Divisional Court released its decision in *Christian Horizons* (2010 ONSC 2105)
- See presentation by Jennifer Leddy

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2. *Bentley v. Anglican Synod of the Diocese of New Westminster,* 2009 BCSC 1608 (Nov 25, 2009)

- B.C. Supreme Court ruled that the properties of four incorporated parishes, which had voted to leave the Anglican Church of Canada, remain within the Anglican Diocese of New Westminster
- The Bishop had no jurisdiction to appoint or dismiss trustees of the parish corporations and they are required to exercise their authority in accordance with their incorporating Act, as well as the Constitution, Canons, Rules and Regulations of the Diocese

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- The court based its decision on the statute under which the parishes were incorporated
- Court held that "A parish does not have authority to unilaterally leave the Diocese, and it is consequently *ultra vires* for it to pass a resolution purporting to do so"
- "Additionally, while parish corporations may hold title to real property, the effect of the Act is that property effectively remains within the Diocese unless the Executive Committee and Bishop agree to mortgage, sell or otherwise dispose of it"

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3. *Innovative Gifting Inc. (IGI) v. House Of Good Shepherd et al.* [2010] O.J. 2210

- A fundraiser (IGI) charged exorbitant commissions and misrepresented legality of fundraising activities
- Arrangement was that if shares and cash gifted, 40% commission to be paid, but if cash gifted then commission would be 90%
- Court ordered fundraiser to pay back commissions it received from four charities

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4. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society,* 2010 ONSC 2182 (April 13, 2010)

- Affirms that directors of charitable organizations have fiduciary duties toward the charity
- Also emphasizes that with these enhanced duties comes an enhanced power of the courts to monitor and regulate charities
- This authority extends so far as to provide the court with the authority to order the destruction of charitable property

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5. *Paterson v. CRA*, 2010 FC 644

- CRA denied the applicant, a tax preparer, permission to file his clients' income tax returns electronically
- For a fee of $25, he assisted his clients in obtaining donation tax receipts for amounts in excess of the amounts actually donated
- The Court indicated that ignorance of the charitable receipting rules was no excuse for the applicant's participation in the scheme

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