
**THE 18TH ANNUAL
CHURCH & CHARITY LAWTM SEMINAR**

Toronto – November 10, 2011

Essential Charity Law Update

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A. OVERVIEW

- Federal Budget 2011
- Recent Federal Legislative Initiatives
- Recent Canada Revenue Agency (“CRA”) publications
- Clergy Residence Deduction
- Changes to Corporate Law
- Other Federal Legislative Updates
- Ontario Legislative Updates
- Recent Case Law Affecting Charities

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B. FEDERAL BUDGET 2011

- The 2011 Federal Budget (“Budget”) was initially introduced on March 22, 2011 and was reintroduced on June 6, 2011
- The Budget contains some important changes to the regulation of charities, particularly with regard to governance requirements
- For more information on the Budget, see “Governance and Other Issues From the Budget Affecting Churches and Charities”, presentation by Karen J. Cooper

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C. RECENT FEDERAL LEGISLATIVE INITIATIVES

1. Bill C-470, Private Members' Bill
 - Bill C-470 proposed a disclosure obligation requiring registered charities to disclose the name, job title, and annual compensation of all executives or employees of a charity who receive \$100,000 or more in compensation, including both taxable and non-taxable income
 - Prior to amendments, Bill C-470 would have given CRA the discretion to revoke the charitable status of a charity that paid a single executive or employee annual compensation over \$250,000.00

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- As a result of the dissolution of Parliament on March 26, 2011, Bill C-470 died on the order paper
- Now that Bill C-470 has died, it is unlikely that the Bill will be re-introduced, since Bill C-470 had had its genesis as a private member's bill
- However, the charitable sector will need to carefully monitor what may develop in the future concerning compensation disclosure requirements

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2. Motion 559 on Tax Incentives for Charitable Donations
 - Motion 559 referenced in the 2011 Budget calls for the Standing Committee on Finance ("FINA") to study current tax incentives for charitable donations:
 - Review changes to the charitable tax credit amount;
 - Review the possible extension of the capital gains exemption to private company shares and real estate when donated to a charitable organization; and
 - Consider the feasibility of implementing these measures

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- FINA has received the "Order of Reference" to proceed with its study
- On Sept. 20, 2011, FINA approved a motion to undertake a comprehensive study of no less than 12 meetings on the current tax incentives for charitable donations with a view to encouraging increased giving
- FINA will begin the study immediately following the Pre-Budget Consultations 2011, the results of which are due in a report to the House for December 2011

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- As part of the study, witnesses may be invited to appear before FINA or organizations can communicate with FINA by presenting a brief to the Clerk of FINA
- Churches and other charities interested in participating in discussions may want to do so through their denomination or an umbrella organization in order to participate
- For more information, see FINA's website www.parl.gc.ca/FINA-e for scheduled meetings open to the public or to view webcasts or read meeting minutes

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D. RECENT PUBLICATIONS FROM CRA

1. Fundraising Guidance
 - From the media's perspective this is the number one compliance issue for charities
 - CRA is expected to release a new Fundraising Guidance in early 2012
 - For more information, see "Complying with CRA's New Fundraising Guidance (Revised 2011)", presentation by Terrance S. Carter

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2. Proposed Guidance for The Promotion of Animal Welfare and Charitable Registration

- This past spring, CRA released draft Guidance for public feedback
- On Aug. 19, 2011, the new Guidance became effective
- The document sets out guidelines on promoting the welfare of animals and charitable registration
- Focus at common law is on what is for the benefit of humans rather than what is for the benefit of animals
- The Guidance can be found online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/nmlwifr-eng.html>

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3. Working with Intermediaries

- On June 20, 2011, CRA released the *Guidance on Using an Intermediary to Carry out a Charity's Activities Within Canada*
- The Guidance will assist charities and applicants for charitable status who intend on conducting charitable activities through an intermediary within Canada
- An intermediary is defined by CRA as an individual or a non-qualified donee (e.g. a non-registered charity)

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- Clarifies that CRA's administrative Guidance *Canadian Registered Charities Carrying Out Activities Outside Canada* applies equally within Canada
- Contains relatively little new information, but does modify certain provisions of old Guidance (e.g. examples of intermediaries)
- The Guidance can be found online at <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/ntrmdry-eng.html?rss>

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4. Guidance on Arts Organizations and Charitable Registration under the *Income Tax Act*

- On Nov. 1, 2011 CRA released its proposed guidance for consultation with feedback accepted until Jan. 13, 2012
- The document sets out draft 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), or
 - Other purposes beneficial to the community (4th)

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- There is a presumption that a public benefit exists in relation to second head but not the fourth head
- Accordingly, arts organizations with purposes 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

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- 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
- The proposed Guidance can be found online at http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/rts-eng.html#_edn4

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E. CLERGY RESIDENCE DEDUCTION

- CRA released a series of technical interpretations on the clergy residence deduction provided for in paragraph 8(1)(c) of the *Income Tax Act* ("ITA") and Interpretation Bulletin IT-141R
- For religious charities that have clergy or other employees claiming the deduction, it is important to monitor technical interpretations being issued by CRA
- Under paragraph 8(1)(c) of the ITA, a taxpayer may claim an income tax deduction in respect of his or her residence if he or she meets the applicable requirements

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- Firstly, under the status test, a taxpayer must be one of the following:
 - a) A member of the clergy;
 - b) A member of a religious order; or
 - c) A regular minister of a religious denomination
- Secondly, under the function test, a taxpayer must perform one of the following functions:
 - Be in charge of or ministering to a diocese, parish or congregation, or
 - Be engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination

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- In a Feb. 1, 2011 technical interpretation, an applicant was found not to be a member of a religious order (status test) because his/her organization's primary purpose was community services, i.e. not a religious order
- In a Mar. 10, 2011 technical interpretation, an ordained minister who worked as a spiritual care coordinator in a medical service centre was found to be eligible for the deduction
 - The provision of spiritual care for admitted in-patients, residents, clients and their families and staff was found to be ministering to a congregation under the function test

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- In an Apr. 5, 2011 technical interpretation, a university campus minister was found to be eligible for the deduction
 - The applicant was ministering to a congregation, i.e. providing religious instruction, not teaching academic instruction
- In a June 13, 2011 technical interpretation, CRA was unable to determine whether an individual employed as a full-time student ministries associate qualified for the deduction
 - Insufficient information was provided by the applicant

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- Practical implications of the technical interpretations:
 - Organizations should ensure that the charitable objects in their letters patent clearly describe the religious purpose of the organization
 - Organizations should ensure that their applications provide sufficient and detailed information explaining how the requirements under the ITA and IT-141R are satisfied
 - For further information, reference can be made to Church Law Bulletins No. 3 and No. 38, available at www.churchlaw.ca

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F. CORPORATE UPDATE

1. *New Canada Not-for-Profit Corporations Act* (“CNCA”)
 - On June 23, 2009 *Canada Not-for-Profit Corporations Act* (“CNCA”) received Royal Assent
 - CNCA was proclaimed into force on Oct. 17, 2011
 - CCA corporations will have until Oct. 17, 2014 to transfer or continue under the CNCA
 - For more information, see “Overview of Continuing Under the CNCA and ONCA”, presentation by Theresa L. Man

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

- Ontario *Corporations Act* (“OCA”) has not been substantively amended since 1953
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- Not expected to be proclaimed in force until late 2012
- It is expected that an outline of the proposed regulations will be released early January 2012 for public comment
- For more information, see “Overview of Continuing Under the CNCA and ONCA”, presentation by Theresa L. Man

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G. OTHER FEDERAL LEGISLATIVE UPDATE

1. Bill C-28 (“Anti-spam Legislation”)

- Bill C-28 creates a new regulatory scheme for spam and related unsolicited electronic messages
- Received Royal Assent on December 14, 2010, and is expected to come into force in early 2012
- Draft regulations were recently released by both Industry Canada and the Canadian Radio-television and Telecommunications Commission for public consultation – deadline for submissions has passed
- Final regulations to be released later this fall

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- 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
- 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

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- 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
- For information, see Charity Law Bulletin Nos. 238, 257

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H. ONTARIO LEGISLATIVE UPDATE

1. *Accessibility for Ontarians with Disabilities Act, 2005*

- As of Jan. 1, 2010, government offices, ministries, and municipalities were required to comply with accessibility standards for customer service under in O. Reg. 429/07 entitled *Accessibility Standards for Customer Service* under the *Accessibility for Ontarians with Disabilities Act, 2005* (“AODA”)
- Beginning Jan. 1, 2012, those standards will also apply to all providers of goods and services (“providers”) within the province of Ontario, including charities and not-for-profit organizations

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- AODA's purpose is to develop, implement and enforce accessibility standards to achieve accessibility for Ontarians with disabilities with respect to goods, services, facilities, accommodation, employment, buildings, structures and premises by Jan. 1, 2025
- The regulation generally requires:
 - Providers to establish policies, and procedures governing the provision of its goods or services to persons with disabilities
 - That reasonable efforts be taken to ensure that the provider's policies are consistent with certain prescribed principles under the regulation

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a) Establishment of policies, practices and procedures

- Providers of goods and services are to take reasonable efforts to prepare policies that ensure the following:
 - The goods or services must be provided in a manner that respects the dignity and independence of persons with disabilities
 - The provision of goods or services to persons with disabilities and others must be integrated unless an alternate measure is necessary
 - Persons with disabilities must be given an opportunity equal to that given to others to obtain, use and benefit from the goods or services

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- Specific matters that must be addressed in the policies:
 - The use of assistive devices by persons with disabilities
 - The access and use of guide dogs or other service animals
 - The access of support persons to assist persons with disabilities
 - Training of employees that deal with the public
 - The process for providing feedback to a provider

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b) Use of service animals and support persons

- People with disabilities are to be allowed to be accompanied by their guide dog or service animal in areas that are open to the public, unless the animal is otherwise excluded by law, in which case other measures are to be made available
- People with disabilities who use a support person, must be allowed to bring the support person with them while accessing goods or services

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c) Notice of temporary disruptions

- Where persons with disabilities usually use particular facilities or services
 - The provider must give notice of any temporary disruption to the public by a posting in a conspicuous place
 - The posting must explain the reason for the disruption, the expected duration of the disruption and describe any alternative facilities that may be available

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d) Training for staff

- Employees involved in the delivery of goods or services will be required to receive ongoing training regarding the provision of goods and services to persons with disabilities and, how to interact and communicate with persons with various types of disability

e) Miscellaneous

- Requirement to establish a process for reviewing and responding to feedback regarding the manner in which goods and services are provided to persons with disabilities

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- Requirement to file an annual accessibility report with the government will initially apply to organizations having 20 or more employees
- It is recommended that charities and non-profit organizations in Ontario begin to take steps to comply with the *Accessibility Standards for Customer Service* in anticipation of the Jan. 2012 deadline
- The Government of Ontario has published a number of helpful guidance documents on the Ministry of Community and Social Services website <http://www.mcscs.gov.on.ca/en/mcscs/programs/accessibility/>

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2. Community Dialogue on Human Rights Relating to Freedom of Religion

- On Sept. 22, 2011, the Ontario Human Rights Commission (OHRC) announced that it will host a community dialogue on human rights relating to religious belief and practice in January, 2012
- OHRC solicited proposals on the content of papers for this community dialogue – deadline has passed and selected proposals were to be confirmed Nov. 1, 2011
- Potential paper themes and questions include the following issues:

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- Human rights and the protection of religious belief and practice in a secular society
- Experiences and concerns of religious-identified individuals, groups and organizations as it relates to discrimination on the basis of creed/religion
- OHRC is co-hosting a legal forum in March with Osgoode Hall Law School, and will be requesting law-oriented papers on roughly the same topics as set out in the community dialogue's request for papers
- Details on the legal forum will become available shortly

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I. RECENT CASE LAW AFFECTING CHARITIES

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

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

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2. *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (Unreported)

- A parallel foundation unilaterally amended its objects so that it could disburse both existing and current funds to charities other than the operating charity that had created it
- 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

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- Superior Court 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
- The funds raised on the basis that they would go to the operating charity were to be held in trust for the charity
- To change the charitable purpose of funds, charities need to seek the approval of the Public Guardian and Trustee under the *Charities Accounting Act*, not "self-help" remedies

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3. *Bentley v. Anglican Synod of the Diocese of New Westminster* 2010 BCCA 506

- On June 16, 2011, the Supreme Court of Canada refused to grant leave to appeal in *Bentley*
- In Nov. 25, 2009 decision, B.C. Supreme Court ruled that the properties of four incorporated parishes were to remain within the Anglican Church of Canada ("ACC")
- B.C. Supreme Court based its decision on the parishes' incorporating statute

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- Even though the parishes were separate corporations, the act of incorporation, the making and amending of by-laws, rules, regulations etc. were all subject to the consent of the executive committee and local bishop of the ACC
- B.C. Court of Appeal upheld the lower court's decision on the basis that the purpose of the trusts upon which the parish corporations held the buildings and other assets was to further "Anglican ministry in accordance with Anglican doctrine"

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- Implications of refusal to grant leave by the SCC:
 - The Court of Appeal decision remains the law
 - Based on the Court of Appeal's reasoning that the final determination of doctrine rests with the ACC and its willingness to make a determination as to who has the final say in doctrinal matters when it comes to a dispute over property, other Episcopal denominations may be affected

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