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2012 Essential Charity Law Update

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OVERVIEW

- Federal Budget 2012
- Other Recent Federal and Provincial Initiatives
- Recent CRA Publications
- Corporate Update
- Recent Case Law

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A. FEDERAL BUDGET 2012

- The 2012 Federal Budget (“Budget 2012”) was introduced on March 29, 2012 and available online at <http://www.budget.gc.ca/2012/plan/toc-tdm-eng.html>
- Budget 2012 largely focuses on measures dealing with the perceived lack of transparency and accountability concerning political activities, as well as a number of other *ad hoc* charity issues
- See Charity Bulletin No. 280, “2012 Federal Budget: Including New Rules and Sanctions for Charities Conducting Political Activities” for more details, online at <http://www.carters.ca/pub/bulletin/charity/2012/chylb280.htm>

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1. New Rules and Sanctions Involving Political Activities

- Recent Senate debates have raised the fear that “foreign foundations” have been funding Canadian charities, and that Canadian charities, particularly environmental charities, have been using those funds for untoward political objectives
- Budget 2012 has responded in a number of ways to address this alleged concern, all of which came into force upon Royal Assent and will apply to registered charities
- For more information see Karen J. Cooper “Playing by the Rules: Political Activities Fair Game for Charities” later this morning

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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 qualified donees under the ITA, and may therefore issue donation receipts to Canadian donors and receive gifts from registered charities
- Budget 2012 proposes that foreign charitable organizations that receive a gift from the Government of Canada may apply for qualified donee status if they pursue activities:
 - That relate to disaster relief or urgent humanitarian aid; or
 - Are in the national interest of Canada

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- After consultation with the Minister of Finance, the Minister of National Revenue will have the discretionary power to grant qualified donee status to foreign charitable organizations that meet the above criteria
 - Qualified donee status will be made public and will be granted for a 24 month period, beginning on a date to be chosen by Minister of National Revenue
 - CRA will develop guidance regarding this measure
 - Foreign charitable organizations that currently have qualified donee status will continue to be qualified donees until the expiration of that current status
 - Measures will apply to applications made on or after the later of January 1, 2013

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B. OTHER RECENT FEDERAL INITIATIVES

1. National Philanthropy Day Bill Receives Third Reading

- On October 16, 2012, Senator Terry M. Mercer presented Bill S-201 - *An Act Respecting A National Philanthropy Day*, to the Standing Committee on Canadian Heritage
- Bill S-201 received its Third Reading in the House of Commons on November 5, 2012
- The proposed legislation will recognize November 15 as National Philanthropy Day
- Royal assent is expected in the coming weeks

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2. Bill C-458 Supporting Canada's Charitable Sector Introduced

- Peter Braid, Member of Parliament for Kitchener-Waterloo, introduced Private Member's Bill C-458 *Supporting Canada's Charitable Sector* on October 31, 2012
- Bill C-458 would extend the tax deadline for charitable donations would establish the last week of February each year to be National Charities Week
- Postponing the deadline from the time of year when people are thinking about holidays until the time when people are strategizing about their finances may cause people to donate more

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3. Notice of Ways and Means Motion to Amend Income Tax Act Released

- On October 24, 2012, the Department of Finance released draft legislative proposals to implement outstanding income tax technical measures
- Included are proposed changes that will substantially impact the operations of registered charities in Canada, including changes to the definition of "gift," split-receipting, designation of charitable organizations and public foundations, revocation of charitable registrations, etc
- These changes were first introduced by Finance on December 20, 2002, which then underwent various incarnations over the years

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4. 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
- Expected to come into force in 2013
- 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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5. Toby’s Act (Right to be Free from Discrimination and Harassment because of Gender Identity or Gender Expression), 2012

- On June 13, 2012, the Ontario Legislature passed third reading of Bill 33
- Bill 33 will amend the Ontario Human Rights Code (the “Code”) to prohibit discrimination in Ontario on the basis of gender identity or expression
- The Code will provide that every person has the right to equal treatment without discrimination because of “gender identity” or “gender expression”
- Exemptions under the Code for bona fide occupational requirements and special interest groups (i.e., churches and religious organizations) will continue

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C. RECENT CRA PUBLICATIONS

1. New Fundraising Guidance (Revised 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

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2. New Guidance on Community Economic Development

- On July 26, 2012, Canada Revenue Agency (CRA) released Guidance CG-014, *Community Economic Development Activities and Charitable Registration*
- The Guidance replaces Guide RC4143, *Registered Charities: Community Economic Development Programs*, which had been available from CRA since December 23, 1999
- For more information see Terrance S. Carter "Practical Implications of CRA's new CED Policy" later this morning

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3. New Guidance on Charitable Organizations Outside Canada that Have Received a Gift from Her Majesty in Right of Canada

- On August 10, 2012, CRA released a new Guidance, Charitable Organizations Outside Canada that Have Received a Gift from Her Majesty in Right of Canada
- The Guidance replaces Policy Commentary CPC-030, *Foreign charities: Requirements for qualified donee status, and Information Circular IC84-3R6, Gifts to Certain Charitable Organizations Outside Canada.*
- List of charitable organizations outside Canada that have received a gift from Her Majesty in right of Canada replaces the Attachment to IC84 3R6

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- The Guidance addresses the changes introduced by Federal Budget 2011
- CRA will apply a two-part test in making the determination:
 - The information given must clearly show that the organization received a gift from the Government of Canada; and
 - The organization must meet the Canadian common law definition of charitable, and generally be eligible for registration in Canada, if it were established in Canada

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- The Federal Budget 2012 further modifies the rules for the registration of these charitable organizations by replacing them with *designated* foreign organizations, which will be limited to those foreign charitable organizations that pursue activities that are either related to disaster relief or urgent humanitarian aid or in the national interest of Canada
- These measures will apply to applications made by foreign charitable organizations on January 1, 2013
- It is therefore anticipated that the Guidance will be further revised in the near future

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4. Clergy Residence Deduction #2011-0413541E5

- Clarification concerning the clergy residence deduction and whether a housing allowance from an employer should be included in determining the value of the deduction
- To be eligible for the clergy residence deduction, an individual must:
 - be a member of the clergy / a member of a religious order or a regular minister of a religious denomination; and
 - be in charge of, or ministering to, a diocese, parish or congregation, or engaged exclusively in full-time administrative service by appointment of a religious order or religious denomination

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- CRA clarified that where an individual satisfies the above conditions and rents accommodations, the amount of the deduction is calculated regardless of whether the individual received a housing allowance
- A housing allowance is a taxable benefit and should therefore be included in the individual's "remuneration for the year from the office or employment" for the purpose of computing the residence deduction

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5. Split Receipting for Fundraising Dinner #2010-0391511E5

- Mrs. A agrees to host a dinner to benefit a registered charity by hiring a caterer and donating some of her wine collection for the dinner
- Mrs. A requested a donation receipt for the wine and catering services
- CRA indicated that charity can reimburse an individual for expenses incurred on its behalf and accept the return of the payment as a gift if the amount is returned voluntarily

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- Provided that host is entitled to be reimbursed under terms of agreement with charity
- Guests would hypothetically pay a pre-determined amount to Mrs. A for the charity or purchase an auction ticket for the dinner
- CRA suggested the value of a comparable meal in a restaurant be used to determine receipt about for former, and the receipt should be the difference between the amount bid and the value of the right to attend the dinner for the latter, so long as the amount is ascertainable

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D. CORPORATE UPDATE

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

- *Canada Corporations Act* ("CCA") has not been substantively amended since 1917
- On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("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

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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
- Expected to be proclaimed in force on July 1, 2013
- Only an outline of the proposed regulations has been released for public comment
- For more information see Theresa L.M Man "How to Get Ready for the New Ontario Not-for-profit Corporations Act, 2010" later this morning

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E. RECENT CASE LAW

1. *Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728, November 22, 2011

- Pastor was removed from office and brought an action for damages for constructive dismissal
- One of the exceptions to the general rule that the courts have jurisdiction to decide claims for wrongful dismissal is where the rules of a self-governing organization, especially a religious organization, provide an internal dispute resolution process
- A person who voluntarily chooses to be a member of a self-governing organization and who has been aggrieved by a decision of that organization must seek redress in the internal procedures of the organization

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- The courts will only interfere in the internal affairs of a self-governing organization if the internal process is unfair or does not meet the rules of natural justice or where the complainant has exhausted the internal processes
- Subject to any enabling statutory provision, if the complainant has exhausted the internal processes, the Court will not consider the merits of the decision but only whether the organization's rules were followed and the decision made in accordance with natural justice

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2. *S.L. and D.J. v Commission scolaire des Chênes and Attorney General of Quebec*, 2012 SCC 7, February 17, 2012

- Supreme Court of Canada refused application of Catholic parents in Quebec to have their children in a public school exempted from taking the Ethics and Religious Culture (ERC) course mandated by the Quebec Government
- SCC reiterated that applicants must show
 - Sincere belief or practice, having a nexus with religion which is required to be followed whether it is mandated by official teaching or religious authorities

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- Provide objective evidence that the practice has in fact been infringed
- Parents were able to establish, from a subjective perspective, that their Catholic faith required them to educate their children in their faith, they were unable to establish, from an objective perspective, that the ERC actually interfered with that practice
- The parents took the position that the ERC program is not neutral but promotes relativism by putting all religions on an equal footing, thereby causing confusion and interfering with the parents' ability and right to pass on their faith

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- The Court was unable to conclude that exposing children to "a comprehensive presentation of various religions without forcing the children to join them," indoctrinated the students or infringed the parents' freedom of religion
- The Court also noted that it was a fact of life in Canadian society to encounter a variety of beliefs and that while it might be confusing and even cause friction, it did not prevent parents from passing on their beliefs to their children

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3. *Adams v. Association of Professional Engineers, 2012 ONSC 3850, June 28, 2012*

- In Adams, a member of Council for the Association of Professional Engineers of Ontario ("PEO") submitted a resignation by email to the other Council members indicating that he had resigned. The following day he sent a further email to the Council of PEO indicating that his resignation would be effective at the next annual general meeting of PEO

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- Ten days after sending this resignation the Council member sent a further email indicating that he was revoking his resignation
- The court noted that the rationale that directors of for-profit corporations should be able to effectively resign without having their resignation accepted applied equally to directors of non-share capital corporations
- Having found that the resignation was unequivocal, the court found that the resigning director could not thereafter revoke his resignation without the consent of the other directors

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4. *R v. Gour*, 2012 ONSC 4082, June 28, 2012

- On November 2, 2012, Adam Gour was sentenced to 15 months in jail and nearly \$300,000 in fines after he was found guilty on June 28, 2012 for defrauding the public while operating a charity fundraiser scheme
- Gour's organization solicited funds under the guise of helping sick children, often using pictures of sick children from Ontario without consent from their parents
- He paid his employees commissions ranging from 14-35% and instructed them to keep their commission secret

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- McIsaac J. held that, when potential donors asked Gour's employees about their remuneration, most of the employees lied as instructed
- This misinformation was material, in that it would have affected the decision of a reasonable person
- McIsaac J. was required to determine whether failure to disclose a commission of 14-35% constitutes fraud in Canadian criminal law – he decided in the affirmative
- The severity of this decision is likely attributable to its egregious facts and is unlikely to be generally applied
- The decision is likely to be appealed

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5. *Martin, J. v. The Queen*, 2012 TCC 239, August 27, 2012

- Tax Court of Canada decision which discusses director liability in relation to GST/HST and payroll remittances owing under the *Excise Tax Act and Income Tax Act*
- Taxpayer was appealing assessment as the sole director/shareholder of a group of share capital corporations as the sole director/shareholder of a group of share capital corporations
- The only issue before the court in this decision was whether or not the due diligence defence available

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- The court applied the 2004 Supreme Court of Canada decision of *Peoples Department Stores Inc. (Trustee of) v. Wise*, which stated that an examination of the care, diligence and skill that a reasonably prudent person exercised requires an analysis of the circumstances
- Court recognized that the appellant and his group of companies took on a contract much larger than they had experience with in the past, and that reasonable efforts were made through consulting with legal and financial advisors to address the liability for remittances
- The court allowed the appeal of the assessments in part and referred them back to the Minister for reassessment

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6. *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, September 27, 2012

- Supreme Court of Canada (SCC) decision
- In 2010, an unknown individual (the "Imposter"), posted a fake profile on Facebook using a picture of A.B., a fifteen year old girl, along with some of her identifying particulars and a slightly modified version of her name
- The Imposter then proceeded to post sexually explicit references and unflattering comments about A.B.'s appearance
- A.B. requested anonymity during the proceedings and a publication ban on the content of the profile

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- Two media enterprises, The Halifax Herald and Global Television, opposed the identity ban
- SCC noted that the freedom of the press can be restricted where children need to be protected from cyberbullying and where their privacy rights need to be protected
- SCC recognized that children are inherently vulnerable, and that in a court application involving cyberbullying, no child needs to demonstrate that he or she is vulnerable based on their personal sensitivities
- SCC also noted that if children are not allowed anonymity in such court applications, then they may experience inevitable harm by not being able to undertake steps to protect themselves

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7. *Guindon v. The Queen*, 2012 TCC 287, October 2, 2012


- The case dealt with third party penalties provided under section 163.2 of the *Income Tax Act*
- The basic purpose of s. 163.2 is to provide for monetary penalties assessable against third parties who, participate in, promote, or assist conduct that results in another taxpayer making a false statement or omission in a tax return
- Court concluded that the penalties under s. 163.2 are criminal in nature meant that the penalties would therefore have to be prosecuted not in a tax court

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- Decision is likely to be appealed
- If the decision is left to stand, it will become significantly more difficult to impose penalties on advisors backing abusive donation schemes (or other forms of excessively aggressive tax planning).
- The decision not only brings attention to abuses of donation incentives at a crucial moment of policymaking in this area of law, it also calls into question the current capacity of the Canada Revenue Agency to police such abuses

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