
**THE OTTAWA REGION
Charity & Not-for-Profit Law Seminar**

Ottawa – February 18, 2010

**Highlights in Charity and Not-for-Profit Law:
The Year in Review**

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A. INTRODUCTION

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

B. LEGISLATIVE DEVELOPMENTS
AFFECTING CHARITIES AND NPOs

1. Bill C-10 Proposed Amendments to the *ITA* Affecting Charities (Split-receipting)
 - Bill C-10 amended and consolidated earlier proposed amendments
 - On September 7, 2008, Bill C-10 died on Order Paper as a result of the dissolution of Parliament
 - CRA has been applying provisions as if enacted
 - The Department of Finance has indicated that they will likely be re-introduced in 2010, possibly by the time of delivery of the 2010 budget

2. 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
- 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*”

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3. 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
- Many of its provisions are severely outdated and are no longer relevant to the not-for-profit sector in Ontario

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- 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

4. Good Government Act, 2009

- On December 15, 2009, the *Good Government Act, 2009* (“the Act”) received Royal Assent, as a result, changes to legislation affecting charities in Ontario are now in force
- The Act contains significant reforms for the charitable sector in the province of Ontario
 - The Act repealed 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

- The Act amended 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 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)

– *Accumulations Act* amended 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* amended so that the 40 year term limit for which a religious organization may lease land is repealed

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5. Proposed *Consumer Product Safety Act*

- Bill C-6, the *Canada Consumer Product Safety Act*, died on the Order Paper when Parliament was prorogued
- The bill had the objective of protecting the public by addressing dangers to human health or safety that are posed by consumer products
- The bill would have established a regulatory framework that would 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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6. 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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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 the those assets averaged over the previous 2 years

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2. 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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3. 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

- 4. 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

- 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/chylb158.pdf>
- For more information see presentation by Barbara Wallace entitled “Tips and Traps of the New T3010B” at the 2009 Church & Charity Law Seminar

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

- 7. CRA Guidances**
- **Guidance on Sports and Charitable Registration – see CLB #143 available at <http://www.carters.ca/pub/bulletin/charity/2008/chv1b143.pdf>**
 - **Proposed Guidance on the Protection of Human Rights and Charitable Registration – see CLB # 166 available at <http://www.carters.ca/pub/bulletin/charity/2009/chv1b166.htm>**
 - **Pending CRA Guidance on Advancement of Religion as a Charitable Purpose – see presentation by Jennifer Leddy at the 2009 Church & Charity Law Seminar, available at http://www.carters.ca/pub/seminar/chrchlaw/2009/jml1110_files/frame.htm**

- **New Guidance on Fundraising - see presentation by Theresa Man entitled “CRA’s New Guidance on Fundraising: What It Means in Practice”**
- **Draft Guidance on Charities Operating Outside Canada – see presentation by Karen Cooper entitled “CRA’s Proposed New Guidance for Charities Operating Outside Canada and Its Implications”**

8. 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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D. RECENT TECHNICAL INTERPRETATIONS AND DECISIONS

1. Commercial Activities and Other Issues Involving Non-Profit Organizations

- On November 5, 2009, CRA released a technical interpretation clarifying its position on various issues involving NPOs, such as whether NPOs can earn a profit or engage in commercial activities, and whether CRA maintains a list of NPOs
- CRA stated that the *Income Tax Act* does not prohibit an NPO from engaging in certain types of activities, including commercial activities, and therefore it is permissible for NPOs to compete against taxable entities

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- CRA’s view is that an NPO can earn a profit, provided that it is unanticipated and incidental to carrying out the NPO’s exclusively not-for-profit purposes
- CRA also expressed its view that incorporation under federal or provincial not-for-profit corporate legislation does not necessarily mean that such corporation would qualify to be an NPO under the *ITA*, because the requirements under the corporate legislation and the *ITA* are different
- CRA indicated that it does not maintain a list of NPOs, since they are not required to register with CRA

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2. Payments to Members on Winding Up of Non-Profit Organizations

- CRA issued two technical interpretations, dated August 14, 2009 and August 25, 2009, clarifying how amounts distributed to members of a NPO upon winding up are to be treated for income tax purposes
- The treatment of the amount received by the member for income tax purposes differs depending on whether the NPO is organized as a share capital corporation, non-share capital corporation or an unincorporated association

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- If the NPO is a share capital corporation, the amount received by the member in excess of paid-up capital would be deemed to be a dividend
- If the NPO is a non-share capital corporation or if it is an unincorporated entity, the membership interest would likely be a capital property to the member and therefore the disposition of the member's interest would result in either a capital gain or loss depending on the adjusted cost base of the interest

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- When determining a member's adjusted cost base, only the amount initially paid by a member would be included. Any yearly fees paid by the members would be viewed as fees for services
- Where "members" of a non-share capital corporation have rights and obligations similar to "shareholders" as defined in subsection 248(1) of the Income Tax Act, the members may be considered to have received a dividend upon winding up even though the NPO does not have shares

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3. 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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4. Tax Credit Denied for Leveraged Donation

- The issue in *Maréchaux v. The Queen*, 2009 TCC 587 was whether a charitable donation tax credit was available in respect of a payment made under an arrangement known as the 2001 Donation Program for Medical Science and Technology (the “Program”)
- The participants in the program each donated a minimum of \$100K to a registered charity, the majority of the donation being financed by a non-interest bearing 20-year loan

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- The appellant contributed \$30K and received an \$80K loan, \$70K of which went to the charity for a total of \$100K, \$10K went to the lender for fees, security deposit and insurance
- The Tax Court of Canada ruled that the \$100K payment was not eligible for a tax credit because it was not a gift
- The interest-free loan, coupled with favourable repayment terms, constituted a substantial benefit to the appellant in return for his donation
- Note that the donation was made before the split-receipting amendments were proposed

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5. Banyan Tree Class Action

- In *Robinson v. Rochester et al.*, 2010 ONSC 463, the Court certified a class proceeding brought on behalf of 2,825 individuals who participated in the Banyan Tree Foundation Gift Program against the promoters of the program and a law firm that provided legal opinions in support of the program
- The decision is significant because it is the first certification of a class action relating to leveraged donation gifting arrangements in Canada

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- The Gift Program was operated from 2003 to 2007. It appears from the Court's decision that CRA has determined that the Gift Program was a sham and that it has or will have reassessed all of the participants to deny their claims for a charitable donation tax credit
- In their claim against the promoters, the plaintiffs pled breach of contract and negligence and sought a declaration that promissory notes issued by the participants as part of the Gift Program are void and unenforceable

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- The plaintiffs allege that the law firm was negligent in the preparation of the opinions
- The judge applied the test for certification set out in Section 5(1) of the *Class Proceeding Act* and determined that the plaintiffs had met each requirement for certification
- The claim against the Gift Program promoters and the law firm will now proceed as a class action

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6. 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

- 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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