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

**Ottawa – February 16, 2011**

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## **Essential Charity and Not-for-Profit Law Update**

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

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Seminar  
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Update**

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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
  - Legislative update
  - Recent case law affecting charities and not-for-profits
- For more details see Bulletins and Newsletters available at [www.carters.ca](http://www.carters.ca), [www.charitylaw.ca](http://www.charitylaw.ca) and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca)

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**B. RECENT LEGISLATIVE INITIATIVES UNDER THE  
INCOME TAX ACT ("ITA")**

- Disbursement Quota Reform under Federal Budget 2010
  - 2010 Budget released March 4, 2010
  - Implementing legislation passed in December 2010
  - Repeal of 80% DQ and related concepts
  - For more details 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
- The broad definition of "advantage" reduces the eligible amount of a charitable receipt where the donor received an advantage
- Complicated rules to curtail abusive donation tax shelter schemes based on a receipt 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

- As passed at Second Reading, Bill C-470 would have given 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 have allowed CRA to publish the name, job title and annual compensation of each of a charity's five highest paid employees and executives
- The Bill was substantially amended by the Standing Committee on Finance, which presented its report to the House of Commons on December 10, 2010

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- The amended Bill-C470 no longer includes a salary cap provision
- A compensation disclosure floor of \$100,000 has been added
- The compensation disclosure requirement has been expanded to apply to all executives or employees of a charity who receive \$100,000 or more in compensation from a charity, rather than only the five highest-paid employees or affiliates
- The Standing Committee on Finance also made it mandatory for the Minister to make compensation disclosures available to the public unless "it is otherwise justified"

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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 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>
- According to the Guidance, "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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- It does not include advocating for the establishment of new legal rights
- 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

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- However, it would be unacceptable to focus on one particular country and pressure its legislature or government to sign an international human rights convention
- The Guidance adds additional information with respect to political activities and anti-terrorism issues, as well as a helpful Appendix containing questions and answers for both applicants and registered charities that wish to pursue charitable purposes that "uphold human rights"

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3. 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
  - The charity can make gifts to qualified donees (generally other registered charities)
  - 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”
  - 1) Written agreements
  - 2) Description of activities
  - 3) Monitoring and supervision
  - 4) Ongoing instruction
  - 5) Segregated funds (if agency)
  - 6) 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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4. Proposed Guidance for The Promotion of Animal Welfare and Charitable Registration

- On February 4, 2011, CRA released its proposed Guidance for consultation
- The document sets out draft guidelines on promoting the welfare of animals and charitable registration
- CRA is requesting feedback on the Guidance from charities, individuals, government departments and agencies, and the general public and will consider all comments received by March 31, 2011
- The proposed Guidance can be found online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cnslttns/pwcr-eng.html>

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5. CRA Views on Not-for-Profit (NPO) Status

- A number of recent CRA technical interpretations and comments on
  - Capacity of NPOs to earn profits
  - Carrying on a trade or business through an NPO
  - Tax consequences of losing NPO tax exemption
- For more detail see presentation by Karen Cooper

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**D. CORPORATE UPDATE**

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

- There have been several attempts at legislative reform to the *Canada Corporations Act* ("CCA")
- On June 23, 2009 *Canada Not-for-Profit Corporations Act* ("CNCA") received Royal Assent, but not yet proclaimed in force
- Draft regulations were published by Industry Canada on June 25, 2010 but not yet finalized
- Estimated that CNCA will likely come into force in mid 2011
- For more details see presentation by Jane Burke-Robertson

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

- The Ontario *Corporation Act* ("OCA") has not been substantively amended since 1953
- Bill 65 introduced the new Ontario *Not-For-Profit Corporations Act* ("ONCA")
- ONCA introduced on May 12, 2010 and received Royal Assent on October 25, 2010
- However, ONCA not expected to be proclaimed in force until sometime in 2012
- Regulations have not yet been released
- For more details see presentation by Jane Burke-Robertson

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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
  - The lack of prosecutions indicates a possible lack of "significant success"

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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
- 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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3. Ontario Court of Appeal rules on *R. v. Khawaja*

- On December 17, 2010, the Ontario Court of Appeal overruled a lower court decision regarding the Criminal Code definition of “terrorist activity”
- According to the Court of Appeal, the definition’s requirement that an act be committed “in whole or in part for a political, religious or ideological purpose, objective or cause” is not unconstitutional
- The Court of Appeal also saw fit to increase the accused’s sentence to life imprisonment, stating that “When [terrorism] is detected, it must be dealt with in the severest of terms”

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**F. OTHER FEDERAL LEGISLATIVE UPDATE**

1. *Fighting Internet and Wireless Spam Act* (FISA)

- FISA, which creates a new regulatory scheme for spam and related unsolicited electronic messages, received Royal Assent on December 14, 2010, but not expected to be in force until mid-2011
- Contains broad definitions of “electronic message” and “commercial activity” and will include charities
- Prohibits sending an electronic message without the express or implied consent of the recipient
- Implied consent can arise from a donation or gift made to a charity within the previous two years, or from membership in a non-profit
- FISA imposes significant monetary penalties, which can include a maximum fine of \$10,000,000 for a corporation

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**G. ONTARIO LEGISLATIVE UPDATE**

1. 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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- The new legislation will require employers to:
  - Develop and communicate workplace violence and harassment prevention policies and programs to workers
  - Assess the risks of workplace violence, and take reasonable precautions to protect workers from possible domestic violence in the workplace
  - Allow workers to remove themselves from harmful situations if they have reason to believe that they are at risk of imminent danger due to workplace violence

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2. Land Transfer Tax Amendments Affecting Charities
  - October 1, 2010 the Ontario Ministry of Finance filed Ontario Regulation 386/10 made under the *Land Transfer Tax Act* which permits the exemption from land transfer tax for certain transfers of property between charities
  - Announced as part of March 2010 Budget
  - 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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3. Amendments to the *Pension Benefits Act*

- Amendments introduced in Bill 120 on October 19, 2010 will make it simpler for related charities and non-profits companies to participate in a single registered pension plan
- Expansion of the definition of “affiliate” will allow affiliated non-share capital companies to qualify for exemption from “multi-employer pension plan” provisions
- Will provide members of affiliated non-share companies access to the Pension Benefits Guarantee Fund
- Bill 120 received Royal Assent on December 8, 2010

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

- Ontario Regulation 429/07, Accessibility Standards for Customer Service, requires that providers of goods and services establish policies, practices and procedures governing the provision of goods or services to persons with disabilities
- Requirements will include policies for accessibility, service animals and support persons, notice of disruptions to service, staff training, and extensive reporting obligations
- Will apply to charities and not-for-profits as of January 1, 2012
- See [www.accession.ca](http://www.accession.ca) for more information

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**H. RECENT CASE LAW AFFECTING CHARITIES**

1. *Christian Horizons* Decision
- The *Christian Horizons* (2010 ONSC 2105) decision in May 2010 by the Ontario Divisional Court provides churches and religious organizations with insight into how to carefully plan, document and implement employee lifestyle statements where such statements are on their face contrary to the *Human Rights Code*

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- The decision affirmed that in order for a religious organization to claim the benefit of the s.24(1)(a) exemption with regard to a lifestyle statement that is contrary to the Code, the religious organization must prove that:
  1. It is a religious organization
  2. It is primarily engaged in serving the interests of people identified by their creed and employs only people similarly identified

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3. The restriction in employment to persons similarly identified by creed is a reasonable and *bona fide* qualification because of the nature of the employment ("BFOQ requirement")
- The Court found that Christian Horizons met requirements 1 and 2 above but not requirement 3
- The Court also found that in any event there was evidence of a "poisoned work environment" but provided little guidance concerning what constitutes a "poisoned work environment"

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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
- The court based its decision on the statute under which the parishes were incorporated

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- 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"
- The ruling was appealed to the B.C. Court of Appeal, which upheld the decision of the Superior Court based upon a broader principle of trust law
- Currently under appeal to the SCC

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

- Ontario Superior Court Decision released on May 18, 2010
- 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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5. *Paterson v. CRA*, 2010 FC 644

- Federal Court Decision released on June 15, 2010
- 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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6. *London Humane Society (Re)*

- Judgment of the Ontario Superior Court of Justice, Released November 12, 2010
- Affirms that directors of charitable and not-for-profit corporations are fiduciaries to the corporation and must act in good faith in accordance with their by-law
- Provides protection to directors who partake in a procedurally flawed process to adjust the process for membership renewal or approval
- However, states that the board cannot act arbitrarily with respect to approval of membership

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7. Marriage Reference Case

- In January 2011 the Sask. Court of Appeal ruled that proposed legislation which would exempt marriage commissioners from performing marriages contrary to their religious beliefs violated the equality provisions of the Charter
- The worthy objective of accommodating the commissioners' religious beliefs was outweighed by the effects of
  - Continuing discrimination against same-sex couples
  - Harmful personal impact on couples refused services
  - Undermining the basis principle that government services must be provided on an impartial basis
- For more detail see presentation by Jennifer Leddy

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