

Updating Charities and Not-For-Profit Organizations on recent legal developments and risk management considerations.

APRIL 2006 ISSUE

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RECENT PUBLICATIONS AND NEWS RELEASES

CRA Releases New Policy on Meeting the Public Benefit Test

by Terrance S. Carter and Karen J. Cooper in Charity Law Bulletin No. 93, April 19, 2006.

To be charitable at common law, an organization must not only engage in activities that are intended to achieve its charitable purpose, but such activities must also result in a benefit to the public, or a sufficient section of it. The meaning and significance of this notion of “public benefit,” however, has been surrounded with much confusion, leading charitable organizations and legal commentators to express concerns with its lack of clarity and certainty. In response to this confusion, Canada Revenue Agency finally released on March 10, 2006, its long-awaited policy on meeting the public benefit test, entitled “Guidelines for Registering a Charity: Meeting the Public Benefit Test.” The Guidelines attempt to clarify the meaning of the term “public benefit” and explain how it factors into CRA’s determination of charitable status. Thus, the Guidelines will be of great interest to both potential and current charitable organizations, as they set out the CRA’s requirements for meeting and maintaining its standards with respect to the public benefit test, which is described in the Guidelines’ introduction as being “at the heart of every inquiry into an organization’s claim to charitable status.” What remains to be seen is whether the Guidelines will serve their intended purpose of providing clarity to the notion of “public benefit.” This *Charity Law Bulletin* examines the substance of these requirements, summarizes their content, and comments on some of their more important aspects.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2006/chylb93.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2006/chylb93.htm>

Publication of Magazines for the Advancement of Education

by Theresa L.M. Man in Charity Law Bulletin No. 92, April 18, 2006.

On February 3, 2006, the Canada Revenue Agency ("CRA") issued Policy Commentary CPC - 027 entitled "Charitable purposes - Whether publishing a magazine can be considered a charitable activity under the advancement of education" (the "Policy") to clarify their position on granting charitable status to organizations that publish magazines in furtherance of educational purposes. The Policy was adopted by the CRA as a result of their granting charitable status to The Walrus Foundation, established to publish the Walrus Magazine. This bulletin summarizes the Policy and reviews the implications of its application.

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Comment on Canada's National Ballet School Trade-Mark Case

by *U. Shen Goh and Terrance S. Carter in Charity Law Bulletin No. 91, April 11, 2006.*

In a judgement dated January 24, 2006, The Honourable Pepita Capriolo of the Quebec Superior Court issued a permanent injunction against a Montreal-based school from using the name *École nationale de ballet contemporain* or any other name that is similar to The National Ballet School/L'École nationale de ballet. This case serves as a reminder to charities and not-for-profit organizations that they should exercise due diligence when naming their organization to spare them from embarrassing allegations of trade-mark infringement, passing off or confusion. It can also save the charity and not-for-profit organization from expending valuable money, time and effort to promote and advertise something that it cannot trade-mark.

More importantly, The National Ballet School/L'École nationale de ballet case encourages all charities and not-for-profit organizations to be diligent in protecting and enforcing their trade-mark rights. This will help in preventing the trade-marks from becoming wasting assets and will instead enable the trade-marks to preserve their significance as one of the most important assets that a charitable or not-for-profit organization will ever possess, as the trade-mark protects the organization's goodwill and enhances its reputation and associated branding.

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[WEB] <http://www.carters.ca/pub/bulletin/charity/2006/chylb91.htm>

Decisions Precluding Amateur Sport Organizations from Attaining Charitable Status

by *Karen J. Cooper*

A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency (April 5, 2006), 2006 F.C.A. 136 (F.C.A.). The Federal Court of Appeal considered the refusal of an application to register the appellant as a charitable organization. The purposes of the organization were to promote amateur youth soccer and offer youths the opportunity to develop pride in their abilities and soccer skills. The Appellants main argument focused on language in an Ontario court decision, *Re Laidlaw Foundation* [(1984), 13 D.L.R. (4th) 491 at 506 and 523-24 (Ont. H.C.J.)], which held that the promotion of amateur sport involving the pursuit of physical fitness is a charitable purpose. The appellant argued that since the common law in Ontario recognizes the promotion of amateur sport as a charitable purpose and the proposed activities are confined to Ontario, the law of Ontario should apply to the determination of its charitable status. The F.C.A. held that there was no need to have recourse to the common law of Ontario since the Income Tax Act provides for the tax status of the appellant which precludes the possibility of its being registered as a charitable organization. In providing for the status of a registered Canadian amateur athletic Association in 1972, "Parliament must be taken to have been aware that no association which has, as its main purpose, the pursuit of amateur sport

could qualify as a charity under the common law, and hence, under the Act.” The scheme of the Act precludes the possibility of an amateur sport organization being registered as a charity.

Recent Court Decision Concerning Agency Relationships

by Karen J. Cooper

Bayit Lepletot v. Minister of National Revenue (March 28, 2006), 2006 F.C.A.128 (F.C.A.). In this case, the Federal Court of Appeal considered whether a Canadian charitable organization was carrying on its own charitable activities when it funded an orphanage in Israel of the same name through an agent. The agent requested funds from the appellant, who approved the request, transferred the funds to the agent and then the agent disbursed them to the orphanage. The Court noted that the agent was part of the “Directorate in residence” of the orphanage and that there was no evidence that he exercised any control over the activities of the orphanage in his capacity as agent of the appellant. The Court affirms the position that CRA has taken with respect to agency relationships: it must be shown that the agent is actually carrying on the charitable works of the Canadian charity and the activities of the agent must be subject to the Canadian charity’s control. The decision can be found online at <http://decisions.fca-caf.gc.ca/fca/2006/2006fca128.shtml>.

Recent Court Decision Concerning Gifts

by Theresa L.M. Man

Benquesus et al v. The Queen (March 24, 2006), 2006 T.C.C. 193. In 1997, Mr. Benqueses transferred funds to a charitable foundation in Ontario. In a letter from Mr. Benqueses to the foundation accompanying the funds, he indicated that he was transferring the funds on behalf of his four children as interest-free loans, and that should the children require the funds, the foundation was to repay it. The letter further indicated that should the children forgive the loans, the foundation should then treat them as donations. In 1999, the children forgave part of the loan and charitable receipts were issued to the children by the foundation for the amounts forgiven. In reassessing the children's tax returns, the CRA disallowed the children's charitable donation tax credits claimed for the forgiven loans. At issue was whether the father gifted the funds to the children, leaving it up to them to decide how much to donate to the foundation, or whether the father made the donations himself and transferred the donation credits to his children. After reviewing the three requirements for a valid gift at common law (i.e. an intention to donate, acceptance of the gift by the donee, and delivery of the gift to the donee), the court found that all three requirements were met and found that Mr. Benqueses did gift the funds to the children and it was up to the children to decide how much to donate to the foundation.

Health Integration Network Legislation Receives Royal Assent

by Nancy E. Claridge

Ontario's *Local Health Integration Act* (Bill 36), the subject of *Charity Law Bulletin* No. 90 (16 March 2006) available at www.charitylaw.ca, received Royal Assent on March 28, 2006. The Act will mean significant changes for the province's health care system as well as the registered charities and non-profit organizations who work in the health care system. As discussed in *Charity Law Bulletin* No. 90, a number of issues still need to be resolved through regulation. However, at the present time, no regulations have been presented for consultation. The Act requires public consultation before making regulations.

U.K.'s new Counterterrorism Legislation receives Royal Assent

by Nancy E. Claridge

The fourth major addition to the U.K.'s counterterrorism legislative package since the September 11, 2001 attacks on the U.S. received Royal Assent on March 30, 2006. The *Terrorism Act 2006*, among other things, creates the new offence of "encouragement" or "glorification" of terrorism, and provides law enforcement authorities the ability to detain terror suspects without charge for a period of 28 days, up from the previous fourteen days. Prime Minister Tony Blair's Labour government originally proposed a 90-day detention period, a measure that led to the Labour government's first defeat in the House of Commons since coming to power. The Act has received significant criticism for its potential abuse of the U.K.'s human rights obligations. For a discussion on the draft legislation and its impact on Canadian counterterrorism efforts, see *Anti-Terrorism and Charity Law Alert* No. 8 (20 October 2005), available at www.antiterrorismlaw.ca.

Freedom of Speech Upheld in Hugh Owens Appeal

by Anne-Marie Langan

On April 13, 2006, the Saskatchewan Court of Appeal concluded that a newspaper advertisement paid for by Mr. Owens did not violate s.14(1)(b) of the *Saskatchewan Human Rights Code*. This controversial advertisement consisted of four biblical passages followed by an equal sign then two stickmen holding hands surrounded by a circle with a diagonal line across it. The Saskatchewan Queen's Bench and Human Rights Tribunal had found that the advertisement in question "exposed or tended to expose homosexuals to hatred or ridicule, or may otherwise affront their dignity on the basis of their sexual orientation" and did not constitute a permissible exercise of the freedom of speech within the meaning of s.14(2) of the Code.

The Court of Appeal overturned this decision, legally interpreting the notions of "hatred", "ridicule" "belittlement" and "affronts to dignity" found in s.14(1)(b) to be aimed at expressions involving feelings of an "ardent and extreme nature" and, in particular, "unusually strong and deep-felt emotions of detestation, calumny and vilification." The advertisement in question, taken in context and measured against an objective standard, was not found to promote the kind of extreme emotion required for a finding that it violated the

Human Rights Code. Furthermore, the advertisement was seen to “take on the character of a position advanced in a continuing public policy debate.” The Court of Appeal found that the biblical passages in the advertisement, when taken in their context, would be assessed in different ways by objective observers and ascribed different meanings, and as such were highly unlikely to incite hatred for homosexuals.

Commentary on the Royal Winnipeg Ballet Employment Case

by *U. Shen Goh*

Charities and not-for-profit organizations should be aware of a recent Federal Court of Appeal ruling that the “intention of the parties” with respect to the nature of an employment relationship will be examined and given appropriate weight in determining whether the hired party is an employee or an independent contractor. In the recent case of *The Royal Winnipeg Ballet v. The Minister of National Revenue*, the Federal Court of Appeal overturned the Tax Court of Canada decision and affirmed that the three dancers in question were independent contractors, such that the Royal Winnipeg Ballet did not have to pay contributions under the Canada Pension Plan and premiums under the *Employment Insurance Act*.

In addition to considering factors of control, equipment, financial risk and degree of responsibility; the Federal Court of Appeal also considered the fact that, although there was no written contract characterizing the dancers as independent contractors, it was the understanding between the parties and they acted in accordance with that understanding. In its decision, the Court affirmed that “[w]hen a contract is genuinely entered into as a contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search.” This is a welcome decision for organizations that use independent contractors to fulfil their workforce needs.

IN THE PRESS

Health Care - Integration has Several Implications for Hospital Funds by *Terrance S. Carter*.

Canadian Fundraiser Vol.16 No.7 April 15, 2006.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=1938>

Canada Revenue Agency releases Guidelines on Public Benefit Test by *Terrance S. Carter and Karen J. Cooper*.

The Lawyers Weekly, Vol. 25, No. 45 April 7, 2006.

[Link] <http://www.carters.ca/news/2006/lawyerwkly/tsckjc0407.pdf>

CRA Reversal Means Foundations can Now Incur Debts by *Theresa Man.*

The Bottom Line, Vol.22 No. 4, April 2006.

[Link] http://www.carters.ca/news/2006/bottomline/tlm_april.pdf

Proposed Elimination of Tax on Gifts of Public Company Shares by *Karen J. Cooper.*

Charitable Thoughts, Vol. 9, No. 4, March 2006 (Ontario Bar Association).

Canadian Fundraiser eNews included a link to "Proposed Elimination of Tax on Gifts of Public Company Shares" by Karen J. Cooper.

Canadian Fundraiser Vol.16 No.5 March 15,2006.

[Link] http://www.canadianfundraiser.com/Newsletter/issue_viewer.asp?Issue_ID=131

RECENT EVENTS AND PRESENTATION MATERIALS

Recent Tax Changes Affecting Charities: Stuff You Need to Know was hosted by Canadian Fundraiser on Wednesday, April 12, 2006, in Ottawa, Ontario, with Terrance S. Carter and Karen J. Cooper presenting.

Details available at http://www.canadianfundraiser.com/workshop_viewer.asp?workshop_ID=116

Health and Charity Law Seminar, hosted by Carters Professional Corporation and Fasken Martineau DuMoulin LLP, was held at the Estates of Sunnybrook, Vaughan Estates in Toronto, Ontario, on April 5, 2006.

The University of Waterloo Master of Taxation Program hosted a session on "Recent Changes to the *Income Tax Act* Affecting Charities," presented by Terrance S. Carter on March 27, 2006, for students studying in the Master of Taxation Program.

The Waterloo Regional Arts Council and Carters Professional Corporation hosted a Board School program entitled "Charitable Registration and Compliance" on March 25, 2006, in Kitchener, Ontario, with Donald J. Bourgeois from Carters presenting.

The Six-Minute Estates Lawyer 2006 was hosted by the Law Society of Upper Canada in Toronto, Ontario, and included a talk entitled "2005 Charity Law Update" presented by Terrance S. Carter and David P. Stevens, on March 22, 2006.

UPCOMING EVENTS AND PRESENTATIONS

“What are the Implications of Ontario’s New Health Legislation on Charities?” is being hosted by the Ontario Bar Association Charity and Not-for-Profit Law Section on Monday, April 24, 2006, at the OBA offices in Toronto, Ontario, with Terrance S. Carter presenting.

For more details, see http://www.oba.org/en/cle_pdf/06CHA0424T.pdf

The 13th Annual National CAGP-ACPDPTM Conference “Pipeline to the Future” is being hosted by the Canadian Association of Gift Planners from April 18-21, 2006, in Calgary, Alberta. The following sessions will be presented on Friday, April 21, 2006:

Terrance S. Carter and M.Elena Hoffstein will be speaking on “The Do’s and Don’ts of Establishing and Managing Endowed Gifts”.

Karen J. Cooper, along with Blair Hammond and Thea Silver, will be presenting “A Green Legacy for Tomorrow – A Tax Break for Today”.

More information can be obtained at http://www.cagp-acpdp.org/ancon_frame.htm

Charities and Not-for-Profits CLE Primer II is being hosted by the Volunteer Lawyer Service on Wednesday, April 26, 2006, at the offices of Fasken Martineau DuMoulin LLP in Toronto, Ontario. Terrance S. Carter and M. Elena Hoffstein will be presenting on various topics throughout the morning.

For more details, see <http://www.pblo.org/lawyers/index.cfm>

Canadian Fundraiser will be hosting a seminar entitled “Recent Tax Changes Affecting Charities: Stuff You Need to Know” on Tuesday, May 2, 2006 from 9:00 am – 12:30 pm, at the J.J. Wettlaufer Executive Centre, Mississauga Ontario, with Terrance S. Carter and Theresa L.M. Man presenting.

For more details, see http://www.canadianfundraiser.com/workshop_viewer.asp?workshop_ID=122

12th East Region Solicitors Conference will be hosting 2006 Hot Topics For Solicitors presented by the County of Carleton Law Association at Château Montebello, Montebello, Québec, on May 5 - 6, 2006. Karen J. Cooper will be presenting “Recent Tax Changes Affecting Charities” on Friday, May 5, 2006.

The Canadian Bar Association – Continuing Legal Education is hosting the **4th National Symposium on Charity Law** on Thursday, May 11, 2006, at the Ontario Bar Association Conference Centre in Toronto, Ontario. The following lawyers from Carters are speaking at the Symposium:

- Karen J. Cooper - Control: Who, How, What, When and Why?
- Theresa L.M. Man and Elena Hoffstein (Fasken Martineau) - When is an Advantage Not an Advantage?
- Donald J. Bourgeois - Policy Structured By-Laws
- Terrance S. Carter - The What, Where and When of Anti-Terrorism Legislation

For more information on the Symposium, please see http://www.cba.org/CBA/cle/pdf/charity_2006.pdf

Christian Legal Fellowship will be hosting the Church Leadership & the Law Conference on Thursday, May 25 in Winnipeg, Manitoba, with Mervyn F. White and Terrance S. Carter presenting.

More details can be found at <http://www.christianlegalfellowship.org/lawchurchleadership/index2006.htm>

CONTRIBUTORS



Donald J. Bourgeois – Counsel to Carters in the area of charity and not-for-profit law, governance and fundraising, Mr. Bourgeois is a member of the Liability Working Group of the Insurance Bureau of Canada and Voluntary Sector Forum, Legal Editor and member of the Editorial Advisory Board of *The Philanthropist*, and author of *The Law of Charitable and Not-for-Profit Organizations, 1st, 2nd and 3rd Editions*, the *Charities and Not-for-Profit Fundraising Handbook*, *Charities and Not-for-Profit Administration and Governance Handbook* and *Public Law in Canada* (Butterworths).



Terrance S. Carter – Practices primarily in the area of charity and not-for-profit law and is counsel to Fasken Martineau DuMoulin LLP. Mr. Carter is a member of Canada Revenue Agency's Charities Advisory Committee and Technical Issues Committee, past Chair of the National Charity and Not-for-Profit Section of the Canadian Bar Association, and has been recognized as one of the leading experts in the area of charity and not-for-profit law in Canada by *Lexpert*. Mr. Carter is also editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorism.ca, and a consulting editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2006).



Nancy E. Claridge – Articling with Carters, Ms. Claridge was a Senior Editor of the Osgoode Hall Law Journal and Editor-in-Chief of the *Obiter Dicta* newspaper. After obtaining her Masters degree in Political Science, she spent several years developing online Canadian legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was awarded the Dean's Gold Key Award for exceptional leadership, commitment and enthusiasm.



Karen J. Cooper – Practicing charity and not-for-profit law at Carters' Ottawa office, with an emphasis on tax issues, while on leave from her position as Senior Rulings Officer with the Income Tax Rulings Directorate of Canada Revenue Agency. Ms. Cooper also has experience as counsel for the Department of Justice in tax litigation, as well as considerable teaching experience, including currently as part-time professor at the University of Ottawa, Faculty of Common Law. In addition, Ms. Cooper has contributed articles to *The Lawyers Weekly* and *The Bottom Line*.



U. Shen Goh – Ms. Goh practices in the area of intellectual property, focusing on trade-marks, privacy and information protection. She is a Registered Trade-mark Agent, has a Master of Law degree from the University of San Diego School of Law and an LL.B. from Osgoode Hall Law School. Ms. Goh has also been an invited speaker for the Greater Dufferin Area Chamber of Commerce and the Social Planning Council of Peel, and has also written on intellectual property and privacy issues for *The Lawyers Weekly* and *Charity Law Bulletin*.



Anne-Marie Langan – Practices at Carters in the areas of human rights, employment litigation and family law. Ms. Langan received her law degree from Queen's University, where she was awarded the Legal Aid Ontario Award and the Community Commitment Award for her involvement in the Queen's Legal Aid Clinic and the Family Law Project, and won an award for her paper entitled "Unrepresented Litigants in the Family Courts of Ontario" (*Queen's Law Journal*, Spring 2005). Ms. Langan is a frequent contributor to the *Church Law Bulletin* at www.churchlaw.ca.



Theresa L.M. Man – Practices primarily in the area of charity and not-for-profit, with particular emphasis on tax issues. She is a member of the Taxation Section and the Charity and Not-for-Profit Section of the Ontario Bar Association, and is currently pursuing her LL.M. in Tax Law. In addition to being a regular speaker at the annual *Church & Charity Law*™ Seminar, Mrs. Man has also written articles for *The Lawyers Weekly*, *Planned Giving Pulse*, *International Journal of Civil Society Law*, *The Bottom Line*, *Chinese Christian Herald Crusades*, and *Charity Law Bulletin*.

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