

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

APRIL 2007 ISSUE

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Employee Safety and Work-Related Injury: Recent Trends in the Law and Managing your Risk

Hosted by Carters Professional Corporation and RTS Consulting Inc. in Mississauga, Ontario

Tuesday, May 29, 2007.

At the Living Arts Centre. See Upcoming Events for more information.

Get on Our Mailing List: To automatically receive the free monthly *Charity Law Update*, send an email to info@carters.ca with "Subscribe" in the subject line. Please feel free to forward this Update to anyone (internal or external to your organization) who may be interested in being put on our monthly mailing list.

RECENT PUBLICATIONS AND NEWS RELEASES

Supreme Court of Canada to Hear Appeal regarding Amateur Sports

by Karen J. Cooper

On May 16, 2007, the Supreme Court of Canada will hear the appeal in the case of *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency*, 2006 F.C.A. 136 (F.C.A.). In that case, the organization, which was established to promote amateur youth soccer in Ontario, was refused registration as a charitable organization on the basis that the promotion of sport is not recognized as a charitable purpose at common law. The applicant lost its appeal to the Federal Court of Appeal (see the related notice in the April 2006 Issue of *Charity Law Update* available at <http://www.carters.ca/pub/update/charity/06/apr06.pdf>) but its appeal of that decision was granted leave by the Supreme Court of Canada last September. The Appellants main argument in the F.C.A. 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 as a Registered Canadian Amateur Athletic Association (RCAAA), which expressly precludes the possibility of its being registered as a charitable organization.

Major Changes to Anti-terrorism Laws Recommended by House of Commons Subcommittee Report

by Terrance S. Carter and Sean S. Carter in *Anti-Terrorism and Charity Law Alert No.13 April 18, 2007*.

Even amidst the perception of urgency in the fall of 2001, federal legislators introducing the unprecedented powers under Canada's new anti-terrorism legislation recognized that these powers would need to be periodically reassessed and monitored by Parliament. And while charities are the specific focus of a substantial portion of the anti-terrorism legislation, there has historically been little recognition by Parliament that the legislation poses any ongoing impediment to the operations of charities. However, with the publication of the final report of the House of Commons Subcommittee on the Review of the Anti-terrorism Act ("House Subcommittee") on March 27, 2007, pursuant to Section 145 of the Anti-Terrorism Act ("ATA"), there seems to be the first echoes of acknowledgement from Parliament of the distressing reality that charities face under this legislation.

Read More:

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA13.pdf>

Charity Tax Credit Increased in Alberta

by Karen J. Cooper.

As part of its budget for the 2007-2008 fiscal year, the government of Alberta announced on April 19, 2007, that it will increase its tax credit for total annual charitable contributions in excess of \$200 from 12.75 percent to 21 percent. When combined with the federal charitable donations credit, Albertans will receive a 50 cent tax credit for every dollar donated over the \$200 threshold. For more information about the Alberta budget and its impact on charities, see <http://www.gov.ab.ca/budget2007/index.cfm?page=1625>.

The Income Tax – Technical News No. 35 is available at <http://www.cra-arc.gc.ca/E/pub/tp/itnews-35/itnews-35-e.html>.

Update on Case Law Involving Cross-Over and Vicarious Liability for Charitable and Non-Profit Organizations

by Esther S.J. Oh and Nancy E. Claridge, and assisted by Paula J. Thomas in *Charity Law Bulletin No. 114, April 23, 2007*.

Over the past decade, a number of lawsuits have arisen involving incidents of abuse that were committed between the 1940s and the 1960s by employees of religious institutions involved with the operation of residential schools. These schools were designed specifically for First Nations children by the Canadian government under the *Indian Act* (Canada) in conjunction with various religious institutions.

Charity Law Bulletin No. 19, published in January 2003 (“CLB No. 19”), provided a general commentary concerning the legal principles reflected in the residential schools cases. This commentary was presented in order to assist charities and non-profit organizations in taking steps to protect against liability in situations where an employee of either an affiliated member entity or a governing umbrella organization is found liable for damages in a lawsuit. CLB No. 19 used the term “cross-over liability” to describe the liability that can occur between affiliated corporations in this regard. Since the court decisions available as of the date of that bulletin were generally inconsistent with each other, a clear conclusion could not be drawn in this area of the law.

The purpose of this Bulletin is to provide an update on CLB No. 19, including a brief summary and analysis of some of the key court decisions which contain a discussion of cross-over and vicarious liability as it relates to the abuse of children and youth by authority figures in charitable organizations (e.g., residential schools, churches, etc.). As well, this Bulletin provides practical suggestions which charities and non-profit organizations can consider in order to protect against cross-over liability and vicarious liability to the extent that it is possible to do so.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb114.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb114.htm>

Guidelines for Applying the New Sanctions

by Karen J. Cooper.

On April 10, 2007, the Canada Revenue Agency ("CRA") released a new policy document, "Guidelines for Applying the New Sanctions", which is available at <http://www.cra-arc.gc.ca/tax/charities/policy/newsanctions-e.html>. This document sets out CRA's approach to the application of the new penalties and sanctions resulting from amendments to *the Income Tax Act* (the "Act") enacted by Bill C-33, *A second Act to implement certain provisions of the budget tabled in Parliament on March 23, 2004*, which received Royal Assent on May 13, 2005 (see *Charity Law Bulletin* No. 82 entitled "Changes to Sanctions, Penalties and Appeals Process for Charities"). CRA monitors registered charities' compliance with the Act through the audit process, which includes examining a charity's financial affairs, reviewing its activities to determine if it is operating in accordance with its charitable purposes, and reviewing any evidence that might indicate whether or not it is satisfying its legal obligations under the Act.

Until recently, the end product of an audit was either revocation of the charity's registered status or the issuance of an undertaking letter requiring the charity to undertake certain corrective actions to become compliant. Under the new regime, CRA will have four (4) tools to ensure compliance: education (either general publications or a letter specifically addressed to a charity explaining its obligations under the Act), a compliance agreement (similar to the undertaking letter), imposition of an interim sanction or penalty, or revocation. Most cases of non-compliance related to issues that can be sanctioned under the new legislation will be addressed through the use of a compliance agreement, which will outline the non-compliance issues and remedial actions that the charity has agreed to undertake in order to comply with their obligations under the Act and will include a paragraph that advises the charity that a penalty and/or suspension could apply if the agreement is not upheld. As a general rule, the Directorate intends to start with educational methods to obtain compliance, and then move progressively through compliance agreements, sanctions, and the ultimate sanction of revocation, if necessary. However, in cases of serious non-compliance, CRA intends to move directly to the imposition of a sanction or revocation. The Guidelines identify examples of serious non-compliance from CRA's perspective, including where the non-compliance involves breaches of the Criminal Code or when a charity does not file its annual return.

A *Charity Law Bulletin* reviewing the effects of this policy document on the operations of charities will be forthcoming.

Effective Asset Protection Through Multiple Corporate Structures

by Jacqueline M. Demczur and Terrance S. Carter in *Charity Law Bulletin* No. 115, April 24, 2007.

This *Charity Law Bulletin* ("Bulletin") discusses effective ways to contain liabilities and protect assets through the use of multiple corporate structures. The three main types of multiple corporate structures are

discussed: parallel operating charities, parallel foundations and umbrella associations. In addition, this Bulletin reviews how, in using a multiple corporate structure, a governing organization can co-ordinate and standardize the operations of the separately incorporated member organizations by way of contractual and/or licensing mechanisms. In this regard, through the appropriate use of inter-corporate relational mechanisms, a governing organization can create an effective contractual relationship with its member organizations by enumerating the requirements for the relationship, the consequences of losing that relationship based upon the licensing of trade-marks, industry names, domain names and copyrights owned by the governing organization.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb115.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb115.htm>

Canada Revenue Agency Income Tax – Technical News No. 35 on Treaty Residence

by Theresa L.M. Man

Canada Revenue Agency issued Income Tax – Technical News No. 35 on February 26, 2007 to clarify the residency requirement under Canada's tax treaties. In order to qualify for the benefits under Canada's tax treaties, a person must be considered a resident of a contracting state for the purposes of the relevant treaty. To be a resident of a contracting state, a person must be "liable to tax" in that state by virtue of a criterion referred to in the residence article of the relevant tax treaty. It has been the long-standing position of Canada Revenue Agency ("CRA") that, to be considered "liable to tax" for the purposes of the residence article of Canada's tax treaties, a person must be subject to the most comprehensive form of taxation as exists in the relevant country. For Canada, this generally means full tax liability on worldwide income. Tax professionals have suggested that this rationale could adversely affect charities and pensions which are not subject to tax in the contracting state.

As a result of concerns from tax professionals on this issue, CRA reviewed its position regarding the level of taxation a jurisdiction must levy on a person's income before that person would be considered "liable to tax" under a tax treaty. In Technical News #35, CRA confirmed its long standing position that to be considered "liable to tax" for the purposes of the residence article of Canada's tax treaties, a person must generally be subject to the most comprehensive form of taxation as exists in the relevant country. However, CRA acknowledged that this does not necessarily mean that a person must pay tax to a particular jurisdiction. CRA recognized that there may be situations where a person's worldwide income is subject to a contracting state's full taxing jurisdiction but that state's domestic law does not levy tax on a person's taxable income or taxes it at low rates. In these cases, CRA will generally accept that the person is a resident of the other contracting state unless the arrangement is abusive. CRA further indicated that the determination of residency for the

purposes of a tax treaty is a question of fact, and each case will be decided on its own facts with an eye to the intention of the parties of the particular convention and the purpose of international tax treaties.

Carters is pleased to announce three lawyers have recently been admitted as partners

We'd like to congratulate Jane Burke-Robertson, Theresa L.M. Man and Jacqueline M. Demczur on becoming partners. Each of these lawyers brings a considerable amount of experience to the firm, and their becoming partners is a positive step for the firm. See the announcement below for more information.

Read More:

[PDF] <http://www.carters.ca/news/2007/firm/partner.pdf>

Carters Professional Corporation Wins Award of Excellence

The Greater Dufferin Area Chamber of Commerce selected Carters as winner in the category of Industrial/Commercial Business Excellence (in excess of 26 employees) at the Business Excellence Awards 2007 dinner on April 24, 2007.

How to Conduct Board and Members' Meetings of Non-Share Capital Corporations

by Theresa L.M. Man and Terrance S. Carter for the Ontario Bar Association Business Law Section, February 22, 2007.

This article was previously included in the March *Charity Law Update*, but unfortunately the link was incorrect. Below is the correct link.

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2007/tlmtsc0222.pdf>

IN THE PRESS

Anti-Terrorism Report: Recognizes draconian legislation's deleterious effect on charities by Sean S. Carter and Terrance S. Carter.

Canadian Fundraiser, Volume 17 No. 7, April 15, 2007

[WEB] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=2277>

Non-share capital corporations must apply rules as rigorously and fairly as those with shares by Terrance Carter and Paula Thomas.

Lawyers Weekly, Volume 26 No. 45, April 6, 2007

[PDF] <http://www.carters.ca/news/2007/lawyerwkly/tscpj0406.pdf>

Canadian Fundraiser eNews included a link to Charity Law Bulletin No. 110 entitled " Non-Share Capital Corporations Must Interpret By-Laws Fairly, Reasonably and in Good Faith" by Terrance S. Carter and Paula J. Thomas.

Canadian Fundraiser, Volume 17 No. 6, March 31, 2007

[WEB] http://www.canadianfundraiser.com/Newsletter/issue_viewer.asp?Issue_ID=156

RECENT EVENTS AND PRESENTATION MATERIALS

Canadian Association of Gift Planners (CAGP) Annual Conference was held from April 11 to 13, 2007, in Halifax, Nova Scotia, with the following presentations from Carters and Fasken Martineau:

“Donation Tax Shelters: Past, Present and Future” Terrance S. Carter and Theresa L.M. Man;

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsctlm0412.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsctlm0412.pdf>

“Alter Ego Trusts: An Effective Vehicle for Making Large Gifts” Karen J. Cooper and M. Elena Hoffstein;

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/mehkjc0412.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/mehkjc0412.pdf>

“Asset Protection: Inspiring Donor Confidence in a Charity’s Legal Structure” Terrance S. Carter and Edgar A. Frechette;

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsceaf0412.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsceaf0412.pdf>

“Unusual and New Gifts” Karen J. Cooper, Edgar A. Frechette and M. Elena Hoffstein.

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/kcehef0412.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/kcehef0412.pdf>

Canadian National Hearings of the International Commission of Jurists - Eminent Jurists Panel included submissions from Terrance S. Carter in Toronto, Ontario, on April 24, 2007.

Libraries and the Law was hosted by the Southern Ontario Library Services at the Burlington Public Library, in Burlington, Ontario, on April 24, 2007, with U. Shen Goh presenting.

“Children, Libraries and the Law”; and

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/usg0424a.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/usg0424a.pdf>

“Protection of Privacy.”

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/usg0424b.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/usg0424b.pdf>

UPCOMING EVENTS AND PRESENTATIONS

Hospitals and Foundations Seminar Series: New Developments in Planned Giving and Charity Law is being hosted by Carters Professional Corporation and Fasken Martineau DuMoulin LLP at The Estates of Sunnybrook in Toronto, Ontario, on May 1, 2007. Speakers will include Terrance S. Carter, and Theresa L.M. Man of Carters Professional Corporation, with M. Elena Hoffstein of Fasken Martineau.

More details are available at <http://www.carters.ca/pub/seminar/notice/2007/CAFA0501.pdf>.

Libraries and the Law is being hosted by the Southern Ontario Library Services at the Aurora Public Library, in Aurora, Ontario, on May 1, 2007, with U. Shen Goh presenting “Children, Libraries and the Law” and “Protection of Privacy.”

Details are available at <http://www.sols.org/librarydev/training/clinicsworkshops/workshop4.htm>

Ottawa Estate Planning Council is hosting a seminar in Ottawa, Ontario, on May 1, 2007, with Karen J. Cooper presenting “To Be or Not To Be A Director/Trustee of a Charity.”

Professional Institute of the Public Service of Canada is hosting an event in Ottawa, Ontario, on May 3, 2007, with Karen J. Cooper presenting “Governance 101.”

County of Carleton Law Association (CCLA) 13th East Region Solicitors Conference 2007 – is being held in Ottawa, Ontario, on May 5, 2007, and will include a presentation by Karen J. Cooper on “When is a Donation Charitable?”

2007 National Charity Law Symposium is being hosted by the Canadian Bar Association May 10, 2007, and will include Theresa L.M. Man and Jane Burke-Robertson as speakers. Terrance S. Carter is co-chair.

More details can be found at http://www.cba.org/cba/cle/cle00/char_07.aspx

Association of Health Care Philanthropy is hosting a roundtable breakfast discussion facilitated by Terrance Carter on the topic of “Directors and Officers Liability and Beyond” on May 15, 2007.

PFC (Philanthropic Foundations Canada) – 2007 Professional Development Program being held on May 15, 2007, will include a presentation by Terrance S. Carter on “The Year End Process.”

Law Society of Upper Canada – Advanced Roundtable in Estates and Trusts – is being held on May 15, 2007. One of the roundtable discussions will be lead by Terrance S. Carter on the topic of “Structuring Charitable Trusts as Endowment Agreements.”

Tax Law Update: CRA & Practitioners’ Roundtables is being hosted by STEP Ottawa on May 16, 2007, with Karen J. Cooper presenting.

Details available at <http://www.step.ca/pdf/06.07.prelim.ottawa.pdf>

Arts Consultants Canada/Consultants canadiens en arts (ACCA) Symposium is being held on May 28, 2007, with Donald J. Bourgeois presenting “What Arts Consultants Need to Know About Copyright Law and Intellectual Property.”

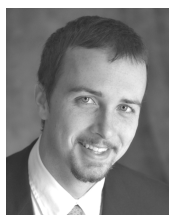
Employee Safety and Work-Related Injury: Recent Trends in the Law and Managing your Risk is being jointly hosted by Carters Professional Corporation and RTS Consulting Inc. at the Living Arts Centre in Mississauga, Ontario, on May 29, 2007.

Details are available at <http://www.carters.ca/pub/seminar/notice/2007/emphs.htm>.

CONTRIBUTORS



Terrance S. Carter – Managing Partner, Terrance 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 Technical Issues Committee, past member of CRA’s Charities Advisory Committee, past Chair of the National Charity and Not-for-Profit Section of the Canadian Bar Association, and has been recognized as a leading expert in Canada by *Lexpert* and *Best Lawyers in Canada*. Mr. Carter is also editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorismlaw.ca, and a consulting editor of *Charities Legislation and Commentary 2007 Ed.*



Sean S. Carter – A second year law student at Osgoode Hall Law School, having obtained his Bachelor of Arts in Political Science and Philosophy from the University of Toronto, Sean has gained valuable experience as research assistant with Fasken Martineau DuMoulin LLP, as well as at Carters, with considerable experience writing on anti-terrorism law, including publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*.



Nancy E. Claridge – Called to the Ontario Bar in 2006 after articling with the firm, Ms. Claridge joins Carters to practice in the areas of charity, corporate and commercial law, in addition to being the firm’s research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean’s Gold Key Award and Student Honour Award.



Karen J. Cooper – Practices charity and not-for-profit law with an emphasis on tax issues at Carters’ Ottawa office, having formerly been a Senior Rulings Officer with the Income Tax Rulings Directorate of Canada Revenue Agency, as well as former counsel for the Department of Justice in tax litigation. Ms. Cooper also has considerable teaching experience, including as part-time professor at the University of Ottawa, Faculty of Common Law, and is a contributing author to *The Management of Charitable and Not-for-Profit Organizations in Canada* (LexisNexis Butterworths).



Jacqueline M. Demczur – A partner with Carters, Mrs. Demczur practices charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews, as well as wills, estate planning and estate administration. She is a contributing author to Industry Canada’s *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles for the *Lawyers Weekly*, *The Philanthropist* and *Charity Law Bulletin*, among others. Mrs. Demczur is also a regular speaker at the annual *Church & Charity Law™ Seminar*.



Edgar A. Frechette - A partner with Fasken Martineau DuMoulin LLP, Mr. Frechette practices in the areas of estate planning, taxation, trusts and charities law. Mr. Frechette is currently a visiting lecturer at Simon Fraser University) and has lectured for many organizations including the Institute of Chartered Accountants of British Columbia, the Continuing Legal Education Society of British Columbia, the Pacific Business & Law Institute, the Professional Legal Training Course, the Canadian Association of Gift Planners and Community Foundations of Canada.



U. Shen Goh – Ms. Goh practices in the areas of employment law, intellectual property, focusing on trade-marks, privacy and information protection. She 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 United Way, Greater Dufferin Area Chamber of Commerce and the Social Planning Council of Peel, and has also written for *The Lawyers Weekly* and *Charity Law Bulletin*.



M. Elena Hoffstein – Director of the Wealth Management and Charities practice group at the Toronto office of Fasken Martineau DuMoulin LLP, Ms. Hoffstein practices in the area of charity and not-for-profit law and estate planning, and has been ranked by LEXPERT as one of the most frequently recommended Toronto private client practitioners and as one of the top 500 lawyers in Canada. Ms. Hoffstein was also co-editor of *Charities Legislation & Commentary*, 2007 Ed (Butterworths).



Theresa L.M. Man – A partner with Carters, Mrs. Man practices in the area of charity and not-for-profit law, with particular emphasis on tax issues. She is an Executive Member of both the Charity and Not-for-Profit Sections of the Ontario Bar Association and the Canadian 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*TM Seminar, Mrs. Man has also written articles for *The Lawyers Weekly*, *The Philanthropist*, *Planned Giving Pulse*, *International Journal of Civil Society Law*, *The Bottom Line*, *Canadian Fundraiser eNews*, and *Charity Law Bulletin*.



Esther S.J. Oh – Practices primarily in charity and not-for-profit law. Ms. Oh is also a frequent contributor to www.charitylaw.ca and the *Charity Law Bulletin*, and has spoken at the annual *Church & Charity Law*TM Seminar as well as at the Canadian Bar Association/Ontario Bar Association's 2nd National Symposium on Charity Law. Ms. Oh currently serves as director and corporate secretary of the Evangelical Fellowship of Canada, and is involved with speaking engagements to various university student groups across Ontario.



Paula J. Thomas – Articling at the Orangeville office of Carters Professional Corporation in the area of charity and not-for-profit law, Ms. Thomas received her law degree from Osgoode Hall Law School. After obtaining her B.A. at the University of Toronto, she worked in the area of sales and marketing, and later at a graduate school of theology. Ms. Thomas is actively involved in community service, including serving on the board of directors of the Dewdney Family Foundation, and as a member of the Constitution and Canons Committee for the Anglican Diocese of Toronto.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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