

CHARITY LAW UPDATE

FEBRUARY 2007

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

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RECENT PUBLICATIONS AND NEWS RELEASES

GST/HST on Memberships

by Karen J. Cooper in Charity Law Bulletin No. 111, February 23, 2007.

The Canada Revenue Agency ("CRA") recently released a ruling issued in the fall of 2006 with respect to whether Goods and Services Tax ("GST") should be charged in respect of membership fees paid to a non-profit organization. The ruling provides a useful discussion of the considerations involved in making the determination of whether a registered charity or non-profit organization should be charging GST in respect of its membership fees. This *Charity Law Bulletin* provides background to the determination and summarizes some of the applicable principles. The GST rules present a minefield that charities or non-profit organizations and their boards of directors must navigate. As the CRA does not provide a definitive answer to the question, it is advisable that organizations seek advice from GST legal and accounting professionals or confirmation from CRA in order to make the proper determination and avoid unexpected liability exposure.

Read More:

[PDF] http://www.carters.ca/pub/bulletin/charity/2007/chylb111.pdf
[WEB] http://www.carters.ca/pub/bulletin/charity/2007/chylb111.htm

Non-Share Capital Corporations Must Interpret By-Laws Fairly, Reasonably and In Good Faith

by Terrance S. Carter and by Paula J. Thomas in Charity Law Bulletin No. 110, February 21, 2007.

This *Charity Law Bulletin* examines *Chu v. Scarborough Hospital Corp.*, an Ontario Superior Court decision released on December 28, 2006. The decision involved a dispute between Lai Chu, an annual member of the Scarborough Hospital, and the hospital's board of directors. The decision considers several provisions of the *Corporations Act* (Ontario), the statute under which many Ontario not-for-profit organizations incorporate. The hospital's governance structure, classes and terms of membership, the calling of special meetings and the interpretation of by-laws are carefully canvassed by Justice David Brown. Included in his decision to grant Chu's application was a sound admonishment of the board of directors for having acted unfairly toward the hospital's membership. In stating that "a board of directors of a *Corporations Act* corporation must interpret and apply its by-laws fairly, reasonably and in good faith," this decision joins a growing body of jurisprudence which indicates that non-share capital corporations must rigorously follow corporate governance procedures.

Read More:

[PDF] http://www.carters.ca/pub/bulletin/charity/2007/chylb110.pdf
[WEB] http://www.carters.ca/pub/bulletin/charity/2007/chylb110.htm



Corporate Giving: A Tax Perspective

by Theresa L.M. Man, posted February 2007.

Corporate giving has been on the rise recently. However, the tax rules that apply to corporate contributions have not been well understood by corporate givers, fundraisers, and charities in general. This paper reviews why corporations give to support charitable and philanthropic causes. This is followed by a review of the treatment of various types of charitable gifts, including cash and in-kind gifts, sponsorship, inventory, services under the *Income Tax Act* (Canada) from the perspective of taxation of those corporations that have made contributions to charities. The paper also reviews the impact of proposed amendments to the *Income Tax Act* (Canada) on corporate giving.

Read More:

[PDF] http://www.carters.ca/pub/article/charity/2007/tlm corpgiving.pdf

Charity Law – The Year 2006 in Review

by Terrance S. Carter for the Ontario Bar Association 2007 Institute of Continuing Education Trusts & Estates Section, February 6, 2007.

The charitable sector in Canada has seen a number of important legislative, regulatory and common law developments during the last year which have significantly impacted how charities will operate both in Canada and abroad. The following article provides a summary of some of the more important of these developments, including recent changes under the *Income Tax Act*, new policies and publications from the Charities Directorate of the Canada Revenue Agency, select federal and provincial legislative issues in Ontario affecting charities, as well as a selection of some of the more significant court decisions during the past year.

Read More:

[PDF] http://www.carters.ca/pub/article/charity/2007/tsc0206.pdf

Supreme Court strikes down security certificates

by Nancy E. Claridge

In a unanimous decision of the Supreme Court of Canada on February 23, 2007, Canada's controversial procedure for determining the reasonableness of security certificates and the detention review procedure, the substance of which has been a fixture in immigration law for well over a decade, and which predates the bulk of Canada's anti-terrorism legislation enacted since the fall of 2001, was held to contravene the *Canadian Charter of Rights and Freedoms*. In making this decision, Chief Beverly McLachlin, writing for the Court in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 ("*Charkaoui*"), confirmed that "the right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who must decide on the facts and the law, the right to know the case put against one, and the right to answer that case." But the secrecy required by the certificate and detention review was found to deny the person named in a



certificate the opportunity to know the case put against him or her, and hence to challenge the government's case. Although the procedure for the judicial approval of certificates was held to be of no force or effect, the Court suspended the declaration for one year in order to provide the federal government the opportunity to respond.

The Charkaoui decision is a promising condemnation of the government's anti-terror laws and may provide some hope for charities that might find themselves facing a similar process under the Charities Registration Act (the "Act"), which was enacted under Part VI of the Anti-terrorism Act. Under this Act, the government can revoke the charitable status of an existing charity or deny a new charitable status application if it is determined that the charity has supported or will support terrorist activity. Among the many criticisms of the review process under the Act, is the ability of the government to introduce evidence which the impugned charity is not able to know or challenge. Similar to the criticism in Charkaoui, the secrecy undermines the reviewing judge's ability to come to a decision based on all the relevant facts and law. Despite the promise given in Charkaoui, charities who are exposed to the Act's deregistration process will have to wait for future litigation focused on the Act's procedures to see if similar principles of fundamental justice will apply to an organization's charitable status as it does to the detention of individuals.

Employee Donations

by Karen J. Cooper

CRA has recently ruled that a charity can issue tax receipts for donations received from its employees to a donor-supported fund the purpose of which is to further the professional development of the employees of the organization (CRA Income Tax Rulings, document no. 2005-015977). The objects of the charity were to provide educational programs and services which enable adults to continue their education, to improve their employment opportunities, and to enhance their quality of life. The proposed employee donation policy provides that eligibility for participation in professional development activities of the organization is not contingent on making donations to the Development Funds, nor do employee donations have any bearing on the charity's decision concerning who can participate in professional development activities. Having regard to the proposed guidelines for the disbursement of funds from the donor-supported fund and provided that no correlation exists between an employee's donation to the Development Funds and the employee's receipt of an award, the employee donations qualify as gifts for the purposes of the *Income Tax Act*.

Report released from the Special Senate Committee on the *Anti-Terrorism Act*

by Sean S. Carter

On February 22, 2007 the Senate Special Committee on the *Anti-terrorism Act* issued its main report entitled "Fundamental Justice in Extraordinary Times: Main Report of the Special Senate Committee on the *Anti-*



Terrorism Act" available at http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/anti-e/rep-e/rep02feb07-e.htm. The Committee, formed in December 2005, had been holding hearings since April 2006 and had undertaken a "comprehensive review of the provisions and operation of the *Anti-terrorism Act*, (S.C. 2001, c.41)". The Committee makes a variety of recommendations concerning aspects of Canada's anti-terrorism legislation including:

- removing the motive requirement from the *Criminal Code* definition of "terrorist activity"
- legislating a single definition of terrorism for federal purposes
- appointing a 'special advocate' to challenge the allegations against a party, and argue in favour of the disclosure of information, in anti-terrorism-related proceedings where the party does not have full access to the evidence
- extending the 'investigative hearings' and 'preventative arrest' provisions of the *Criminal Code* until the end of the fifteenth sitting day of Parliament after December 31, 2009.

The report also upholds the perceived utility and need for the current anti-terrorist financing laws and the deregistration process for charities under the *Charities Registration (Security Information) Act*.

Micro-lending - Individual Development Accounts

by Karen J. Cooper

A number of charities and non-profit organizations that have become involved in micro-lending or microfinancing have programs which promote savings by low-income individuals for acquiring basic needs, such as health care, education, housing, employment and self-employment ("individual development accounts" or "IDA"). IDA programs attempt to encourage personal savings through a savings program whereby individuals are entitled to receive grants in proportion to the amounts saved by them, usually in a ratio of 3:1. Generally, eligibility for grants is based on individuals having income below a certain threshold, as well as meeting other established criteria, such as having minimal assets and a manageable debt load. In many instances grants are not issued directly to an individual, but to third party vendors or service providers. In a recent technical interpretation (document number 2006-018028, dated February 2, 2007), CRA discuss the income tax treatment of amounts paid from an IDA to Canadian taxpayers. Generally, amounts paid in respect of housing and health care would be social assistance payments that, because they are paid as lumpsums, would be excluded from income by virtue of subsection 233(2) of the Regulations. Amounts paid for education would generally be considered scholarships or bursaries and included in income under paragraph 56(1)(n). Grants paid to individuals to assist them in starting their own businesses would likely be included in income under paragraph 12(1)(x) of the Act. However, the particular facts of each payment under such programs should be carefully reviewed and that the income tax consequences may change depending upon the particular circumstances of the organization and the recipient.



Controversial Anti-terrorism Provisions Set To Expire

by Sean S. Carter

Two of the *Anti-Terrorism Act's* ("ATA") extraordinary and controversial *Criminal Code* provisions subject to a five-year sunset clause are set to expire on March 1, 2007. The 'preventative arrest' and 'investigative hearings' provisions of the ATA have yet to be used and will expire unless the motion by the Harper government to renew these provisions passes by March 1, 2007. These provisions have stood as a lightning rod for critics of the legislation who have highlighted them as stark examples of the unprecedented and "draconian" nature of the anti-terrorism legislation. Regardless of whether these two provisions expire, the rest of the expansive and controversial body of anti-terrorism legislation in Canada will remain in force.

U.K. passes new charities legislation

by Nancy E. Claridge, adapted from Bates Wells & Braithwaite, Charity & Social Enterprise Law Update (Spring 2007)

Significant changes are on the horizon for U.K. charities with the new *Charities Act 2006* (the "Act"), which received Royal Asset in late 2006. The Act will be implemented over a period of three years, starting this year. Among the developments in the Act: changes to audit thresholds; power for unincorporated charities change their administrative provisions without prior Charity Commission consent; power for the Charity Commission to determine who a charity's members are on the application of the charity; rules designed to facilitate merger of charities; more regulation for exempt and excepted charities, including registration with the Commission in many cases; a new Charity Tribunal, which will hear appeals from Charity Commission decisions; a new limited liability form created especially for charities, the Charitable Incorporated Organisation; power for charities to pay some trustees for services provided to the charity, provided some pre-conditions are met; relaxation of the rules about spending permanent endowment; and new statements will be required from those fundraising for charity, as well as a completely new licensing regime for public collections.

Read More:

More information about the Act can be obtained from the Bates Wells & Braithwaite website at www.bateswells.co.uk/charitiesact.htm.



IN THE PRESS

Charity Law - Looking back at legislative, judicial impacts on charities by Terrance S. Carter and M. Elena Hoffstein.

Canadian Fundraiser, Volume 17 No. 3, February 15, 2007.

http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=2216

2006 charity and not-for-profit law developments: the year in review by Terrance S. Carter and M. Elena Hoffstein.

Bar-Ex.com, February 6, 2007.

Anti-terrorism law increases burden for charities by Terrance S. Carter & Sean S. Carter.

Law Times Vol. 18 No. 5 February 5, 2007.

http://www.carters.ca//news/2007/lawtimes/tscssc0205.htm

New anti-terrorist financing law has direct impact for charities by Terrance S. Carter and Sean S. Carter. *Bar-Ex.com, February 2, 2007.*

Charity law expert warns Catholic Church, other religions to remain vigilant about tax status loss by Deborah Gyapong included comments from Terrance S. Carter of Carters Professional Corporation. *Catholic Online, January 31, 2007.*

http://www.catholic.org/international/international story.php?id=22885

Planned Giving for High Net Worth Clients by Karen J. Copper and Theresa L.M. Man in this semi-annual newsletter of the Canadian Cancer Society.

The Advisor Update, Vol. 3, Iss. 1, Winter 2007.

http://www.cancer.ca/files/ontario/email/advisor/pdf/advisor_winter07_PG_for_Hi_Net_Worth.pdf

RECENT EVENTS AND PRESENTATION MATERIALS

Ontario Bar Association 2007 Institute of Continuing Legal Education included a talk by Terrance S. Carter entitled "Charity Law - the Year in Review" as part of the Trusts & Estates session "Gone..But Not Forgotten" held on February 6, 2007, in Toronto, Ontario.

[WEB] http://www.carters.ca/pub/seminar/charity/2007/tsc0206.htm

[PDF] http://www.carters.ca/pub/seminar/charity/2007/tsc0206.pdf

[Paper] http://www.carters.ca/pub/seminar/charity/2007/tsc0206.pdf

The Canadian Institute's 7th National Summit on Institutional Liability for Sexual Assault & Abuse included a talk entitled "Abuse Policies – A Proactive Approach to Vicarious Liability for Non-Profit Organizations" by Mervyn F. White on February 19, 2007, in Toronto, Ontario.

[WEB] http://www.carters.ca/pub/seminar/charity/2007/mfw0219.htm

[PDF] http://www.carters.ca/pub/seminar/charity/2007/mfw0219.pdf





The Nuts and Bolts of Running Company Meetings, a Continuing Legal Education program hosted by the Ontario Bar Association in Toronto, Ontario, on February 22, 2007, included a talk by Terrance S. Carter and Theresa L.M. Man entitled "How To Conduct Board and Members' Meetings of Non-Share Capital Corporations."

Presentation materials will be available soon.

UPCOMING EVENTS AND PRESENTATIONS

Waterloo Regional Arts Council is hosting Board School on Saturday, March 3, 2007, at Kitchener City Hall, Conestoga Room, Kitchener, with Donald J. Bourgeois presenting "Human Resources: Investing in and Managing and Organizations Key Assets."

Governance 101, a Professional Development program being hosted by the Certified General Accountants of Ontario Ottawa Chapter on March 6, 2007, will include Karen J. Cooper presenting on governance and directors and officers liability.

Details available at http://www.cga-ontario.org/contentfiles/chapters/ottawa/events.aspx .

York District Chartered Accountant Association is hosting a dinner seminar on March 13, 2007, with a presentation by Terrance S. Carter entitled "Not-for-Profit Organizations – Directors and Officers Liability: The Essentials and Beyond."

United Way of Simcoe is hosting a seminar with D. Ann Walters presenting "Insurance and Risk Management Issues for Volunteer Management," in Barrie, Ontario, on March 14, 2007.

Canadian Mental Health Association of Peel is hosting a workshop with U. Shen Goh presenting "Employment Law, Legislation and Guidelines" and "Diversity & Human Resources" on March 19, 2007.

The United Way of Windsor is hosting a seminar on March 22, 2007 with Terrance S. Carter presenting "Legal Risk Management for Charities & Not-for-Profit Organizations."

Canadian Association of Gift Planners (CAGP) Annual Conference is being 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;
- "Alter Ego Trusts: An Effective Vehicle for Making Large Gifts" Karen J. Cooper and M. Elena Hoffstein;
- "Asset Protection: Inspiring Donor Confidence in a Charity's Legal Structure" Terrance S. Carter and Edgar A. Frechette; and
- "Unusual and New Gifts" Karen J. Cooper, Edgar A. Frechette and M. Elena Hoffstein. Details are available at http://www.cagp-acpdp.org/ancon-frame.htm.



Libraries and the Law is being 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 "Protection of Privacy."

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

Marking your Territory – Creating and Protecting Your Non-Profit Brand Advantage is being hosted by Canadian Fundraiser on April 25, 2007, at Osgoode Hall in Toronto, Ontario, with Terrance S. Carter, U. Shen Goh and John Vanduzer presenting.

More details will be available shortly at http://www.canadianfundraiser.com.

Vancouver Church & Charity Law Seminar has been rescheduled to October 12, 2007. Details to follow.

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.

CONTRIBUTORS



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 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 leader in his field in Canada by *Lexpert* and *Best Lawyers in Canada*. Mr. Carter is also editor of www.charitylaw.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* and Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.

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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).



M. Elena Hoffstein – From the affiliated firm, Fasken Martineau DuMoulin LLP - Toronto office, Ms. Hoffstein practices in the area of charity and not-for-profit law 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 a consulting editor of *Charities Legislation & Commentary*, 2007 Edition, published by Butterworths.



Theresa L.M. Man – Practices in the area of charity and not-for-profit law, with particular emphasis on tax issues. She is a member of the Taxation Section, 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*, *Planned Giving Pulse*, *International Journal of Civil Society Law*, *The Bottom Line*, *Chinese Christian Herald Crusades*, and *Charity Law Bulletin*.



Paula J. Thomas – Articling at the Orangeville office of Carters Professional Corporation in the areas of litigation and 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 for the Anglican Diocese of Toronto as a member of the Constitution and Canons Committee.



Mervyn F. White —Practices litigation and dispute resolution in areas of the law including charity and not-for-profit law, human rights complaints, and risk management assessments relating to insurance law and human rights. Mr. White is a contributing author to *The Lawyers Weekly*, *Charity Law Bulletin* and *Church Law Bulletin*, and a regular speaker at the annual *Church & Charity Law*TM Seminar and guest speaker for organizations such as Canadian Fundraiser, the Association of Fundraising Professionals, and the Christian Legal Intervention Academy.



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