

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

JULY/AUGUST 2007 ISSUE

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2007 Annual Church & Charity Law Seminar

Hosted by Carters Professional Corporation in Toronto, Ontario.

Wednesday, November 7, 2007.

Will be held at the Young - Nak Korean Presbyterian Church of Toronto. More details will be available in the fall.

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RECENT PUBLICATIONS AND NEWS RELEASES

CRA Begins to Administer New Charity Designation Test

by *Theresa L.M. Man.*

CRA has clarified that although Bill C-33 has not been enacted, CRA has begun reviewing applications for charitable status and for re-designation by using the proposed new definition for charitable organization and public foundation (which also affect the definition for private foundation). The new definition replaced the “contribution test” with a “control test.” Under the new “control test,” more than 50% of the capital of a charitable organization or public foundation can be contributed by a person or a group of related persons, provided that they do not control the charity in any way. In addition, this person, or members of the related group, may not represent more than 50% of the directors, trustees, officers and similar officials of the charitable organization or public foundation. Charities that do not meet this test will be designated as private foundations.

Applications for re-designation can be made retroactively for taxation years that begin after 1999. Registered charities have until 90 days after Bill C-33 receives Royal Assent to apply for retroactive re-designation. Applications received after that date will fall under these new rules, but the re-designation will only become effective for future taxation years. CRA is currently developing guidelines for applying the new “control test.” To view further details on the administration of these changes, please refer to CRA’s website at <http://www.cra-arc.gc.ca/tax/charities/whatsnew/changes-e.html>.

Ontario Divisional Court Update on Fair and Reasonable Interpretation of By-Laws

by *Terrance S. Carter and Paula J. Thomas in Charity Law Bulletin No. 118, July 30, 2007.*

Charity Law Bulletin No. 118 is a follow-up to *Charity Law Bulletin* No. 110 entitled *Non-Share Capital Corporations Must Interpret By-Laws Fairly, Reasonably and in Good Faith*, dated February 21, 2007. The trial decision in *Chu v. Scarborough Hospital Corp.*, released on December 28, 2006, involved the interpretation of by-laws, the calling of special meetings, classes and terms of membership, and the Hospital's governance structure. In granting Ms. Chu's application, the trial judge ordered that the Hospital's membership run for a full twelve months and for the Board of the Hospital to call a general meeting of the Hospital's membership, to be held no later than January 31, 2007. The Hospital appealed to the Ontario Divisional Court, requesting that the order be set aside, and the decision was released on July 7, 2007. The appeal turned on whether Ms. Chu's request to the Board to call and hold a special meeting was valid. In that regard, the Divisional Court had to determine whether she was an approved annual member at the time that she made the said request. In dismissing the Hospital's appeal, the Divisional Court affirmed that an annual membership should be exactly that: a membership which runs for a period of twelve months, rather than four

or five months which until then had been the case. As such, Ms. Chu was an approved annual member at the time she requested the special meeting, and the request was therefore valid. These two court decisions endorse the vital importance of the fair and reasonable interpretation of by-laws and the right of members to have meaningful input into governance matters. *Charity Law Bulletin* No. 118 provides further commentary on the *Chu v. Scarborough Hospital Corp.* decision.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb118.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb118.htm>

Charities, Telemarketing and the National Do Not Call List: An Update on Recent CRTC Changes

by Terrance S. Carter and Nancy E. Claridge in *Charity Law Bulletin* No. 119, July 30, 2007.

The Canadian Radio-Television and Telecommunications Commission has laid the foundation for Canada's first national do-not call list and has provided further clarification and modification of the telemarketing rules with the release of Telecom Decision CRTC 2007-48. Although registered charities obtained a legislated exemption from the national do-not-call list, those organizations and other charities and not-for-profit organizations will have to make themselves aware of this new regulatory regime. This *Charity Law Bulletin* reviews aspects of that decision that are relevant to charities and provides an update to *Charity Law Bulletin* No. 46, posted in June 2004, which provided an overview of the details of Telecom Decision CRTC 2004-35 that originally introduced the telemarketing rules.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb119.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb119.htm>

Recent CRA Ruling - Gift of Art subject to a Loanback

by Karen J. Cooper.

CRA recently issued an advance income tax ruling involving a situation where the donors have gifted various works of art to a designated cultural institution. The gift is subject to a loan agreement which provides that when the works are not being used by the institution for exhibition, research or other related purposes, the works are to be loaned to the donors. The conditions of the loanback require that the donors not earn any revenue from the art and that the art be properly maintained. If the art is required by the institution for any purpose or the donors do not respect their obligations under the loan agreement, the art must be returned to the institution. CRA concluded that the loanback arrangement was an advantage within the meaning of proposed subsection 248(32) of the *Income Tax Act*, that the existence of the advantage will not, in and of itself, nullify the gift, and that the proposed deemed fair market value provision will not apply if the art is certified cultural property.

Comments on a Consultation Paper for Reform of the *Corporations Act* (Ontario)

by Jacqueline M. Demczur, assisted by Dawn E. Phillips, in *Charity Law Bulletin* No. 120, July 31, 2007.

The Ontario Ministry of Government Services recently released their first consultation paper on reform to the Ontario *Corporations Act* ("OCA"). This consultation paper, *Modernization of the Legal Framework Governing Ontario Not-For-Profit Corporations*, marks the Ministry's first step in a project that aims to develop a new framework for governing the structure and activities of charities and not-for-profit corporations in Ontario. The consultation paper focuses on a number of broad issues, each of which the Ministry has provided background information and consideration questions for. They have also invited feedback on the consultation paper from stakeholders and the public to assist them in developing draft reform legislation. This *Charity Law Bulletin* briefly summarizes the issues that are focused on in the paper and will highlight some questions that the Ministry will need to address before they can implement actual reform to the OCA..

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb120.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb120.htm>

Recent CRA Technical Interpretation - Funding Gifts of Life Insurance

by Karen J. Cooper.

Generally, where a life insurance policy has been absolutely assigned to a charity and the charity has become the registered beneficiary of the policy, the individual will be entitled to claim a charitable donations tax credit in respect of the value of the policy at the time of the transfer. Further, if the individual makes a donation to the charity to enable the charity to pay the premiums on the policy, the amount donated will also qualify as a charitable gift. In a recent technical interpretation, CRA discusses the disbursement quota implications of making a gift of a life insurance policy and the premiums related thereto subject to a direction that both be held for a period of at least ten years. The gift would be considered a gift of "enduring property" and would not be included in the charity's disbursement quota in the year following receipt but would be included in the year in which the charity expends or transfers the property. In addition, while enduring property must be considered when determining the value of property for the charity's 3.5% disbursement quota requirement, a life insurance policy (but not the proceeds) is deemed to have a value of nil for this purpose. CRA also considers the application of paragraph 8 of IT-244R3, *Gifts of Individuals of Life Insurance Policies as Charitable Donations*, to a situation where a charity uses one or more ten-year gifts to pay the annual premiums on a life insurance policy it has acquired directly from an insurer and indicates that the charity must hold the life insurance policy and any proceeds on the policy until such time that the ten-year period has elapsed from the date of the last premium payment.

A Review of the New B.C. Charitable Purposes Preservation Act

by Terrance S. Carter and Nancy E. Claridge in *Charity Law Bulletin* No. 122, August 2, 2007.

The long-awaited *Charitable Purposes Preservation Act* was proclaimed in force by British Columbia's provincial government on March 8, 2007. Originally introduced in October 2004 in response to various court decisions to allow special purpose charitable property to be exigible to satisfy debts of the trustee charity, the Act is intended to address the resulting uncertainty surrounding the protection of donations that have been given for a specific charitable purpose, and seeks to prevent such donations from being used for objects other than those intended by the donor, particularly on a bankruptcy or insolvency. This *Charity Law Bulletin* reviews the background of the Act, summarize its content, and provide a brief commentary on its significance for charitable organizations in British Columbia and the rest of Canada.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb122.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb122.htm>

Comments on the CRA Charitable Sector Stakeholder Forum

by Theresa L.M. Man.

Representatives from a wide variety of organizations from the charitable sector met with CRA's Charities Directorate at the Charitable Sector Stakeholder Forum in Ottawa on March 28 and 29, 2007. The purpose of the forum was to provide an opportunity for consultation and communication between the Charities Directorate and various stakeholders in the charitable sector. At the forum, CRA updated attendees on their progress in the fourth year of their five-year plan to implement the recommendations of the Joint Regulatory Table, provided an overview of their audit program discussed the application of the proposed excess business holding rules to private foundations contained in the 2007 federal budget, and discussed the issue of charitable fundraising as a CRA policy priority. Elizabeth Tromp, then Director General of the Charities Directorate, indicated that CRA's performance target is to provide a meaningful response within two months for straightforward applications, and within six months for complex applications, 80% of the time. CRA also listened to stakeholders' concerns about various issues affecting charities, such as the complexity of the disbursement quota rules.

For further details on these and other topics discussed at the forum, interested parties can refer to the forum minutes that were recently published on CRA's website at <http://www.cra-arc.gc.ca/tax/charities/cssf0703-e.html>.

Court Upholds Corporation's Right to Regulate Qualifications of Directors

by Nancy E. Claridge and Terrance S. Carter in *Charity Law Bulletin No.121*, July 31, 2007.

Although courts have traditionally expressed reluctance to interfere in the internal affairs of associations and clubs, in *Rakowski v. Malagerio* (2007), 84 O.R. (3d) 696 (Sup. C.J.), a judge of the Ontario Superior Court of Justice concluded that the court has jurisdiction to intervene in the affairs of an incorporated student federation in order to determine if a policy prohibiting members of other student associations or student advocacy groups from serving on the board of directors was unreasonable, discriminatory, inconsistent with the objects of the corporation, contrary to the *Canadian Charter of Rights and Freedoms* and the *Corporations Act* (Ontario), and passed in bad faith. The court concluded that as the impugned policy was enacted to prevent conflicts of interest, it was neither objectionable on its face, nor was it discriminatory, contrary to public policy or public interest and did not interfere with Charter rights. This *Charity Law Bulletin* reviews the decision and discuss its impact for charitable and not-for-profit corporations.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb121.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb121.htm>

'Closing the Gaps': New Draft Regulations Bring Lawyers Under the Purview of Terrorist Financing Laws

by Terrance S. Carter and Sean S. Carter in *Anti-Terrorism and Charity Law Alert No.14*, July 31, 2007.

From the inception of Canada's post 9/11 anti-terrorism legislative regime, it has been apparent that the federal government has intended that lawyers be subject to responsibilities under terrorist financing legislation. However, because of an outcry from the legal community and a subsequent court challenge, the legal profession was at least temporarily exempt from the most invasive requirements of Canada's terrorist financing laws. The proposed "Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (2007-2)" ["Draft Regulations"] that were published on June 30, 2007, is the most recent initiative by the federal government to bring legal counsel under the direct purview of terrorist financing obligations.

The perceived need for the Draft Regulations was made clear by the Department of Finance when it stated that the legal profession is a "potential conduit" for terrorist financing activity. The Department of Finance also emphasized that the Draft Regulations are an essential step in "closing the gaps" in Canada anti-terrorist financing regime as section of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* may now apply to lawyers. If adopted, the impact of the Draft Regulations will be felt throughout the legal community and will necessitate a restructuring of legal counsel's procedures concerning advising clients on monetary transactions and the development of internal anti-terrorism due diligence procedures. This *Anti-Terrorism and Charity Law Alert* provides a review and commentary of the Draft Regulations.

Read More:

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA14.pdf>

Best Lawyers in Canada Rankings

[Jane Burke-Robertson](#) and [Terrance S. Carter](#) were again recognized as leaders in the area of Trusts & Estates, with a Charities/Not-for-Profit subspecialty, by *The Best Lawyers in Canada*, which employs a peer-review survey for inclusion.

Read More:

[WEB] <http://www.bestlawyers.com>

IN THE PRESS

Charities / Not-for-Profit Law: Recent Developments of Importance by Terrance S. Carter and M. Elena Hoffstein.

The Canadian Legal Lexpert Directory 2007.

[PDF] <http://www.carters.ca/news/2007/lexpert07.pdf>

[WEB] <http://www.lexpert.ca>

RECENT EVENTS AND PRESENTATION MATERIALS

What Arts Consultants Need to Know About Copyright Law and Intellectual Property was presented by Donald J. Bourgeois at a Symposium of the Arts Consultants Canada/Consultants Canadiens en arts on May 28, 2007.

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/DJB0528.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/DJB0528.pdf>

Director's and Officer's Liability: The Essentials and beyond for Non-Profits was presented by Terrance S. Carter at the Wild Rose Foundation – Vitalize 2007 conference in Calgary on June 8, 2007, and included the following:

“Part I: The Legal Duties of Directors and Officers of Charities and Not-for-Profits (Alberta)”

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsc0608a.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsc0608a.pdf>

[Summary A] <http://www.carters.ca/pub/article/charity/2007/tsc0608a.pdf>

“Part II: Due Diligence in Avoiding Liability for Directors and Officers of Charities and Not-for-Profit (Alberta)”

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsc0608b.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsc0608b.pdf>

[Summary B] <http://www.carters.ca/pub/article/charity/2007/tsc0608b.pdf>

UPCOMING EVENTS AND PRESENTATIONS

Highlights of CRA Compliance Requirements is being presented by Terrance S. Carter and Karen J. Cooper for St. Paul University, in Ottawa, Ontario, on August 13, 2007

Details available at http://www.ustpaul.ca/CanonLaw/Documents/announcement_registration.pdf.

Current Issues Under the *Income Tax Act* is being presented by Terrance S. Carter and Theresa L.M. Man for this workshop hosted by Canadian Fundraiser in Toronto, Ontario, on September 19, 2007.

Details available at http://www.canadianfundraiser.com/workshop_Viewer.asp?workshop_ID=249.

Does Your Will Reflect Your Intentions will be presented by Karen J. Cooper at an Estate Planning Seminar sponsored by the CNIB, the Canadian War Museum, the National Arts Centre Foundation, the Ottawa Humane Society, the Perley and Rideau Veterans' Health Centre Foundation, Saint Paul University and The Ottawa Mission. The seminar is being held at the Canadian War Museum in Ottawa, Ontario, on September 24, 2007.

CCCC Conference 2007, being held in Mississauga, Ontario, from September 25th to 27th, will include the following presentations by Terrance S. Carter:

“Pro-Active Legal Audits: What They Are and How to Benefit From One” and

“Do's and Don'ts of Establishing and Managing Endowed Gifts.”

Conference Brochure http://www.cccc.org/conference/2007/Brochure_2007.pdf.

The American Bar Association's Taxation Section 2007 Joint Fall CLE Meeting –being held in Vancouver, B.C., from September 27th to 29th, 2007, will include a Panel Discussion on Cross Border Anti-Terrorism Issues with Terrance S. Carter as a panellist on September 28th.

More details at https://meetings.abanet.org/meeting/tax/FALL07/gen_info.cfm.

CLF 2007 National Conference, being held in Mississauga, Ontario, will include a presentation by Terrance S. Carter entitled “How to Advise your Charitable Clients on Multiple Corporate Structures” on September 29th, 2007.

Details available at <http://www.christianlegalfellowship.org>.

Navigating a CRA Audit and Living to Tell the Tale will be presented by Karen J. Cooper at the 20th Annual General Conference of ATRI being held in Saint John, New Brunswick, on September 29th and 30th, 2007.

Details available at <http://www.atri.on.ca>.

2007 Annual Church & Charity Law Seminar will be held on Wednesday, November 7, 2007 at the Young-Nak Korean Presbyterian Church of Toronto. Registration and speaker details will be available soon.

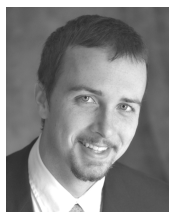
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Donald J. Bourgeois – Counsel to Carters in the area of charity and not-for-profit law, governance and fundraising, Mr. Bourgeois is author of *The Law of Charitable and Not-for-Profit Organizations, 1st, 2nd and 3rd Editions*, the *Charities and Not-for-Profit Fundraising Handbook*, *Charities and Not-for-Profit Administration and Governance Handbook* and *Public Law in Canada* published by LexisNexis Butterworths.



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.antiterrorism.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 – Practices in 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 on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity Law Bulletin*, among others. Mrs. Demczur is also a regular speaker at the annual *Church & Charity LawTM Seminar*.



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*, 2006 Edition, published by 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™* 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*.



Paula J. Thomas – Called to the Ontario Bar in 2007 after articling with the firm, Ms. Thomas joined Carters to practice in the area of charity and not-for-profit law. She has contributed to a variety of publications, including the *Charity Law Bulletin* and *The Lawyers Weekly*. Ms. Thomas is also actively involved in community service, currently serving on the Constitution and Canons Committee for the Anglican Diocese of Toronto and as a Board Member of the Dewdney Family Charitable Foundation.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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