

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

OCTOBER 2007 ISSUE

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2007 Annual Church & Charity Law Seminar

Hosted by Carters Professional Corporation in Toronto, Ontario.

Wednesday, November 7, 2007.

Register online at <http://www.carters.ca/pub/seminar/chrchlaw/2007/brochure.htm>.

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RECENT PUBLICATIONS AND NEWS RELEASES

Supreme Court of Canada Confirms the Common Law With Respect To Charity and Sports Organizations

by Karen J. Cooper and Terrance S. Carter in Charity Law Bulletin No. 126, October 17, 2007.

The Supreme Court of Canada, on October 5, 2007, unanimously upheld the Federal Court of Appeal's decision that an Ontario amateur youth soccer association does not qualify as a registered charity within the meaning of subsection 248(1) of the *Income Tax Act* ("ITA"). Writing for the majority, Justice Marshall Rothstein concluded that although some sports organizations, other than registered Canadian amateur athletic associations ("RCAAs"), might be found to be charities under the common law, the appellant did not qualify for charitable registration because its purposes and activities were not charitable. The majority judgment confirms the existing common law with respect to the determination of what is charitable in the context of sports organizations, indicating that recognition of an organization, such as the appellant, would result in a significant change to the common law beyond the incremental changes mandated by the jurisprudence and would be best left to Parliament.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb126.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb126.htm>

Draft Technical Amendments to the *Income Tax Act* (Canada) to Implement the Remaining Tax Measures Contained in the 2007 Federal Budget

by Theresa L.M. Man.

On October 2, 2007, the long-awaited technical amendments to the *Income Tax Act* (Canada) to implement the remaining tax measures contained in the March 19, 2007 federal budget was released. Among these remaining tax measures are a number of proposed changes that have a substantial impact on tax planning for charities and their donors. These proposed changes include elimination of capital gains tax on publicly-listed securities donated to private foundations, new excess business holding rules that limit the shareholdings of private foundations, and a special deduction for corporations that make donations of medicines from their inventory to registered charities that have received a disbursement under a program of the Canadian International Development Agency in respect of activities of the charity outside of Canada. Details of these new proposed changes will be reviewed in a *Charity Law Bulletin* in the near future. The legislative proposal is available on the Department of Finance's website at http://www.fin.gc.ca/drleg/BIA207_e.html.

Submission to the Air India Inquiry on the Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance

by Terrance S. Carter, assisted by Sean S. Carter and Nancy E. Claridge in a submission to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182.

On October 26, 2007, Terrance S. Carter, Managing Partner of Carters Professional Corporation, made a presentation to the Commission of Inquiry into the Investigation of the Bombing of Air India. Mr. Carter provided testimony with respect to the impact of Canada's current anti-terrorism legislation and terrorist financing regulations on the charitable sector in Canada. In support of this testimony, Mr. Carter provided the Commission with a written submission, which he authored with the assistance of Sean S. Carter, a third year law student, and Nancy E. Claridge of Carters. This submission analyzes Canada's current anti-terrorism legislation and discusses the international initiatives, conventions and multilateral agreements that have impacted the Canadian regime. This submission also includes numerous recommendations which are aimed at achieving an appropriate balance between thwarting terrorist financing and protecting *bona fide* charitable activities.

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2007/tsc1026.pdf>

Canada-U.S. Income Tax Treaty: 5th Protocol

by Theresa L.M. Man.

The 5th Protocol to the Canada-U.S. Income Tax Convention (the "Treaty") was signed on September 21, 2007, after having been negotiated the past 10 years. It introduces many changes to the Treaty, including elimination of withholding tax on interest, extension of treaty benefits to owners of limited liability companies, modification of rules dealing with residence and corporate emigration, and changes to the ways in which various personal tax considerations are handled. The 5th Protocol comes into effect the later of January 1, 2008 and day when both governments have completed their constitutional and statutory requirements to ratify the Protocol and have exchanged their instruments of ratification. Article XXI of the Treaty deals with cross-border issues of tax-exempt organizations. Article XXI of the Treaty is amended in the 5th Protocol so that dividend income (referred to Article X) and interest income (referred to in Article XI) of tax exempt organizations are exempt from income tax. The 5th Protocol is available on the Department of Finance's website at http://www.fin.gc.ca/treaties/USA_1e.html.

Meaning of Gift in Quebec

by Karen J. Cooper.

The Canada Revenue Agency ("CRA") recently expressed its views on the meaning of gift for the purposes of issuing a donation tax receipt in Quebec in the context of the acquisition of property during a fundraising auction (see CRA Technical interpretation #2007-024845, issued in French on September 20, 2007). The

donor acquired the property from the Foundation during a live fundraising auction paying a price in excess of the fair market value of the property. CRA was asked whether the difference between the price paid and the fair market value of the property would be eligible for a donation tax receipt. CRA indicated that for the purposes of determining whether a gift had been made in Quebec, the relevant law is the *Civil Code* of Quebec and that the proposed split-receipting rules do not all apply to gifts made in Quebec. Specifically, it is CRA's view that proposed subsection 248(30) is intended to alter the common law presumption that if consideration is received when making a gift there is no donative intent by providing that the receipt of consideration will not, in itself, invalidate a gift and that where the value of the consideration received represents 80% or less than the value of the gift an intention to give will be presumed. Since, according to the civil law in Quebec, it is possible to make a gift where consideration is received in return, CRA is of the view that the presumption in subsection 248(30) would not apply. Therefore, determining whether a receipt can be issued in the circumstances will involve more than the simple mathematical calculation of whether the value of the property received is 80% or less than the price paid at the auction. For split-receipted gifts in Quebec organizations will have to examine all of the circumstances surrounding the gift to determine whether a gift has been made according to the civil law in Quebec.

Legal Risk Management Checklist for Charities

by Terrance S. Carter and Jacqueline M. Demczur, Updated September 2007.

The *Legal Risk Management Checklist for Charities* that is available free of charge through our websites has been updated as of September 2007. In this regard, the operations of charities have become complex and the possibility of litigation against charities occurring as a result of their operation is greater than ever before. The exposure of charities to liability goes further than the loss of charitable assets and/or the insolvency or winding up of a charity. Directors of charities may also personally face legal actions against themselves by donors, members, third parties and governmental authorities for breach of their fiduciary duties or even breach of trust in failing to adequately protect or apply the assets of a charity. Given the increased risks to both charities and their directors, there is an increasing need to protect charitable assets from lawsuits and creditors on a pro-active basis.

The purpose of this updated legal risk management checklist is to provide a brief outline of some of the more important issues that directors and/or executive staff of a charity, whether incorporated or not, may need to consider in ensuring due diligence in the operation of the charity, as well as an overview of liability exposure faced by charities in Canada and some of the steps that can be taken to protect charities against such risks. As it is impossible to adequately address all aspects of liabilities faced by charities, and the pro-active steps which should be taken to protect against such risks, this checklist provides only a general overview of the many considerations that charities and their boards of directors may need to be aware of to both identify and

manage legal risks. Some of the comments and recommended procedures contained in this legal risk management checklist may also be applicable to not-for-profit non-charitable organizations.

Read More:

[PDF] <http://www.carters.ca/pub/checklst/charity.pdf>

Ministry Releases Second Consultation Paper on Corporate Reform of the *Corporations Act*

by Jacqueline M. Demczur and Kimberley A. LeBlanc.

Recognizing the important role of the directors and officers of charities and not-for-profit corporations in Ontario, the Ontario Ministry of Government Services released its second discussion paper, *Consultation Paper #2 – Modernization of the Legal Framework Governing Ontario Not-for-Profit Corporations*, on August 22, 2007. This release follows the Ministry's initial consultation document, which was released on May 7, 2007, as outlined in detail in *Charity Law Bulletin* No. 120 dated July 31, 2007 (available online at: <http://www.charitylawbulletin.ca>). While the first discussion paper focused on a number of broad issues and background information, this second paper raises questions and makes recommendations pertaining to the subject of directors and officers, and specifically deals with issues such as board composition, term of office, delegation of powers, directors' meetings, directors' and officers' liability, conflicts of interest and resignation, removal and vacancies. Within the second discussion paper, the Ministry notes that it intends to release additional discussion papers throughout its review of this reform initiative.

CRA Consults With Small and Rural Charities

by Kimberley A. LeBlanc.

Throughout the month of October, 2007, CRA has conducted a series of consultations with representatives of small and rural charities across Canada. The sessions are aimed at recognizing the unique needs of these organizations resulting from their often limited resources, and have been scheduled to take place in Toronto, Saskatoon, Lethbridge, Kelowna, Trois-Rivières and Moncton. During each workshop, CRA planned to canvass various areas of concern to small and rural charities, such as reporting mechanisms and obligations, compliance and enforcement, charitable registration requirements and the effectiveness of CRA's education initiatives.

Following the consultations, a six to nine member panel, comprised of members from small and rural charities, and chaired by the CRA, will meet throughout the month of November to review the findings of the workshops and develop recommendations "aimed at improving and enhancing services and reducing the administrative burden for small and rural charities." The panel is expected to release a report on the consultations and subsequent review late in 2007 or early in 2008. Additional information on the small and rural charities initiative is available on CRA's website www.cra.gc.ca/charities.

What Constitutes a Service Available to the Public Under B.C. Human Rights Legislation?

by Dawn E. Philips and Terrance S. Carter in *Charity Law Bulletin No. 127, October 29, 2007.*

The human rights legislation in each Canadian province or territory contains a provision that prohibits discrimination with respect to the provision of a service (“Service Provision”). In each jurisdiction, except Ontario and Nova Scotia, this Service Provision applies only to services that are made generally available to the public. This *Charity Law Bulletin* (“Bulletin”) examines the recent British Columbia Court of Appeal decision, *Buntain et al. v. Marine Drive Golf Club*, which outlines when a private, membership based, non-profit organization will be considered ‘providing services generally available to the public’, and thus when that organization may be subject to a Service Provision under applicable human rights legislation.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2007/chylb127.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2007/chylb127.htm>

UK Government Releases Final Report on Third Sector Review

by Kimberley A. LeBlanc.

In the United Kingdom (“UK”), the third sector is defined as organizations that are: independent of government; work to achieve social, environmental or cultural aims; and mainly reinvest any profits they make to achieve the aforementioned aims. In recognition of the third sector’s unique contribution to UK society, the UK’s 2006 Budget announced its government’s largest ever consultation with the third sector, which subsequently was conducted from May 2006 to July 2007. On July 24, 2007, the government released a report on the above mentioned review entitled, *The Future Role of the Third Sector in Social and Economic Regeneration: Final Report*.

The report sets out various measures which will be undertaken from 2008 to 2011 in a concerted effort to build the partnership between the government and the third sector in the United Kingdom. The report details the government’s investment in excess of \$1 Billion, which is being committed to third sector programs in order to: achieve the objectives of campaigning and helping third sector organizations give people a voice; improving governments ability to work with the sector to strengthen communities; transforming the public service through increased partnership with third sector organizations; encouraging social enterprise; and supporting the environment for a healthy third sector. The final report is available at the HM Treasury website: www.hm-treasury.gov.uk.

IN THE PRESS

Telemarketers May Feel Pinch of National Do-Not-Call List by Terrance Carter and Nancy Claridge.
The Lawyers Weekly, Vol. 27 No. 20, September 28, 2007.
[Link] <http://www.carters.ca/news/2007/lawyerwkly/tscnec0928.pdf>

RECENT EVENTS AND PRESENTATION MATERIALS

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

“Pro-Active Legal Audits: What They Are and How to Benefit From One” and
[WEB] <http://www.carters.ca/pub/seminar/church/2007/tsc0925b.htm>
[PDF] <http://www.carters.ca/pub/seminar/church/2007/tsc0925b.pdf>

“Do's and Don'ts of Establishing and Managing Endowed Gifts.”
[WEB] <http://www.carters.ca/pub/seminar/church/2007/tsc0925.htm>
[PDF] <http://www.carters.ca/pub/seminar/church/2007/tsc0925.pdf>

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

CLF 2007 National Conference, held in Mississauga, Ontario, included a presentation by Terrance S. Carter entitled “How to Advise your Charitable Clients on Multiple Corporate Structures” on September 29th, 2007.
[WEB] <http://www.carters.ca/pub/seminar/church/2007/tsc0929.htm>
[PDF] <http://www.carters.ca/pub/seminar/church/2007/tsc0929.pdf>

Navigating a CRA Audit and Living to Tell the Tale was presented by Karen J. Cooper at the 20th Annual General Conference of ATRI held in Saint John, New Brunswick, on September 29th and 30th, 2007.
[WEB] <http://www.carters.ca/pub/seminar/church/2007/kjc0929.htm>
[PDF] <http://www.carters.ca/pub/seminar/church/2007/kjc0929.pdf>
[Supplementary Materials] <http://www.carters.ca/pub/seminar/church/2007/kjc0929s.pdf>

Charity Law: The Past Year in Review was presented by Terrance S. Carter at the Canadian Association of Gift Planners (CAGP) Golden Horseshoe Seminar in Burlington, Ontario, on October 19th, 2007.
[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsc1019.htm>
[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsc1019.pdf>

Recent Tax Changes and How They Affect Your Land Trust was presented by Karen J. Cooper at the Canadian Land Trust Conference 2007 being held in Ottawa, Ontario, on October 19th, 2007.
[WEB] <http://www.carters.ca/pub/seminar/charity/2007/kjc1019.htm>
[PDF] <http://www.carters.ca/pub/seminar/charity/2007/kjc1019.pdf>

The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance was presented by Terrance S. Carter to the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 in Ottawa, Ontario, on October 26th, 2007.

[WEB] <http://www.carters.ca/pub/seminar/charity/2007/tsc1026.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2007/tsc1026.pdf>

[Paper] <http://www.carters.ca/pub/article/charity/2007/tsc1026.pdf>

UPCOMING EVENTS AND PRESENTATIONS

2007 Annual Church & Charity Law Seminar will be held on Wednesday, November 7, 2007 at the Young-Nak Korean Presbyterian Church of Toronto. *Almost sold out and last day of early registration fee.*

Register online at <http://www.carters.ca/pub/seminar/chrchlaw/2007/brochure.htm>.

Employee Safety & Work-Related Injury: Recent Trends in the Law and Managing Your Risks is a half day workshop being hosted by Carters Professional Corporation and RTS Consulting at the Living Arts Centre in Mississauga, Ontario, on November 29, 2007.

Register online at <http://www.carters.ca/pub/seminar/notice/2007/emphs.htm>.

Charity Law Update – The Past Year in Review is being presented by Terrance S. Carter at The Law Society of Upper Canada’s 10th Annual Estates and Trusts Summit being held in Toronto, Ontario, on November 5, 2007.

Details online at <http://ecom.lsuc.on.ca/cle/program.jsp?id=CLE07-0110400-A-REG>.

The Association of Fundraising Professionals (AFP) Greater Toronto Chapter’s Congress 2007, being held in Toronto, Ontario, will include the following presentations on November 14, 2007:

“Corporate Giving, A Going Concern” by Terrance S. Carter and Theresa L.M. Man; and

“Donor Rights & Remedies” by M. Elena Hoffstein and Terrance S. Carter.

Register online at <http://www.afptoronto.org/index.php/congress>.

Where it all Starts: Governance and Fiduciary Risk is a three part talk to be presented by Terrance S. Carter at The John McIninch Foundation Symposium being held in Toronto, Ontario, on November 23, 2007.

Directors’ and Officers’ Liability: The Essentials and Beyond for Your Nonprofit will be presented by Terrance S. Carter for a workshop being hosted by Canadian Fundraiser in Toronto, Ontario, on November 28, 2007.

Register online at http://www.canadianfundraiser.com/workshop_Viewer.asp?workshop_ID=250.

Institute of Chartered Accountants will be hosting a workshop in Markham, Ontario, on December 12, 2007, which will include the following presentations:

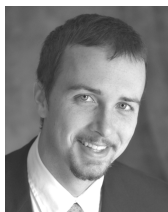
“Directors’ and Officers’ Liability and Beyond” by Terrance S. Carter; and

“Current Issues Under the *Income Tax Act* Affecting Charities” by Terrance S. Carter and Theresa L.M. Man.

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 Group, 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 third 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 a research assistant with 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*. Sean also has worked as a Summer Research Student with Fasken Martineau DuMoulin LLP.



Nancy E. Claridge – Called to the Ontario Bar in 2006 after articling with the firm, Ms. Claridge joined 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 Law™* Seminar.



Kimberley A. LeBlanc - Kimberley graduated from Osgoode Hall Law School, and is articling with Carters. Kim has participated in a number of volunteer programs, including Best Buddies Canada, the Canada Revenue Agency’s Community Volunteer Income Tax Program at Queen’s University, and ARCH: A Legal Resource for Persons with Disabilities, as well as with Pro Bono Students Canada’s Family Law Project at Osgoode, where she later became the school’s Project Coordinator for the 2006 – 2007 program.



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*.

Dawn E. Philips – Currently a third year student at the University of Western Ontario Law School, Dawn worked as a Summer Research Student with Carters in 2007 and contributed to numerous firm writing projects. Prior to this Dawn completed a Bachelor of Arts in Political Science at Brock University in St. Catharines. Dawn has a strong interest in family law, estate planning and income tax law.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

Errata: Clarification concerning effective date of CICA Standards and Guidance Accounting Handbook Section 3855. The September 2007 issue of the *Charity Law Update* pointed out that the mandatory effective date for Section 3855 was deferred for many entities (for whom the new standard now applies to annual financial statements relating to fiscal years beginning on or after October 1, 2007), but it neglected to point out that this deferral did not apply to not-for-profits for whom the changes were effective October 1, 2006. A revised Update to include this clarification was posted on October 10, 2007.

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