

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

APRIL 2009 ISSUE

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CBA/OBA Charity Law Symposium

The Canadian Bar Association and Ontario Bar Association are jointly hosting this symposium in Toronto, Ontario.

Thursday, May 7, 2009.

Register online at http://www.cba.org/CBA/CLE/main/char_09.aspx.

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RECENT PUBLICATIONS AND NEWS RELEASES

Update on New Federal Legislation Governing Non-Share Capital Corporations (Bill C-4)

Jacqueline M. Demczur

After holding meetings on March 12, 2009 and March 31, 2009 with various sector representatives, the Standing Committee on Industry, Science and Technology made some limited amendments to Bill C-4, *An Act respecting not-for-profit corporations and certain other corporations*. An amended version of Bill C-4 was subsequently released by the Standing Committee on Industry, Science and Technology as a working copy for the use of the House of Commons of Canada at Report Stage, which was reported to the House on April 23, 2009.

The contents of the amended Bill C-4 are largely the same as the version of the Bill which received first reading in the House of Commons on January 28, 2009. Some of the main differences include, but are not limited to: the addition of a defined term, "soliciting corporation", in section 2(5.1); addition of an equivalency provision in section 7(3.1), which allows minimum by-law requirements to be met if such provisions are included in the letters patent; deletion of section 29 dealing with the ability of directors to issue debt obligations for consideration consisting of money or other property or past services; changes to section 161(2) related to the Director's authority to authorize corporations to delay the calling of an annual meeting of members if the members will not be prejudiced; and clarification in section 210(a.1) of how to determine whether an amalgamated corporation is a soliciting corporation.

As previously reported in *Charity Law Bulletin No. 139*, Bill C-4 is intended to replace Parts II and III of the current *Canada Corporations Act*, a statute first enacted in 1917 but not substantively changed since that time, which Parts govern non-share capital corporations. Bill C-4 is now the third attempt by the Federal Government to reform the *Canada Corporations Act*, with earlier Bills C-62 (2008) introduced by the Conservatives and C-21 (2004) introduced by the Liberals, each dying on the order papers in the House of Commons when Parliament was dissolved for a general election. For the most part, the content of Bill C-4 is largely similar to what was contained in its predecessor, Bill C-62.

For more information, see the amended Bill at

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3829002&file=4>:

Charity Law Bulletin No. 139, summarizing the earlier Bill C-62 entitled "Bill C-62: Changes Afoot For Federal Non-Profit Corporations", available at

<http://www.carters.ca/pub/bulletin/charity/2008/chylb139.htm>.

Charity Law Bulletin No. 60 summarizing the earlier Bill C-21 entitled “New Canada Not-For-Profit Corporations Act and Its Impact on Charitable and Non-Profit Corporations”, available at <http://www.carters.ca/pub/bulletin/charity/2004/chylb60-04.pdf>.

Directed Gift to Municipality

Karen J. Cooper

In a recent technical interpretation (document #2008-030447, dated March 16, 2009), CRA considered whether a municipality could issue donation receipts in circumstances where a gift received by the municipality is directed by the donor to a separate non-profit organization (“NPO”). The NPO is responsible for the maintenance of a building on a site owned by the municipality and to which it has been delegated the operation of several municipal programs. CRA indicated that a municipality in Canada is a “qualified donee” and the municipality may issue an official tax receipt for the eligible amount of the gift. Further, CRA indicated that donations can be receipted by a municipality in Canada on behalf of an organization which operates under the authority of the municipality (e.g., a committee established by a municipal bylaw) provided the municipality retains discretion as to how the donated funds are to be spent. However, if the municipality is merely collecting funds from donors on behalf of the non-profit organization and the latter is legally or otherwise entitled to the property so transferred, the municipality is not in receipt of a gift and cannot issue a donation receipt. In that case, the municipality is merely acting as a conduit for the other organization and it is CRA’s view that payments received by the municipality on behalf of the organization could not qualify as gifts to a municipality in Canada for purposes of subsections 118.1(1) and 110.1(1) of the *Income Tax Act*.

Technical Interpretations are only available through commercial subscription services or a direct request to CRA.

CRA News Release on Auditing Charities to Enforce Compliance

Theresa L.M. Man

On April 14, 2009 the Canada Revenue Agency (“CRA”) issued a news release entitled “Protecting the money given to charity,” which summarizes the activities the CRA conducts to ensure that charities are complying with tax laws.

The news release explains that the CRA will undertake an audit of a charity when it suspects a charity is not complying with tax laws, which is typically a result of public complaints or the information reported in the charity’s annual information return. Last year, CRA audited 845 charities, of which the charitable status of 38 charities were revoked for serious infractions of the law, while many others were revoked because of their failure to file the annual information return. The news release explains that a charity’s charitable status might be revoked if the audit identifies serious instances of non-compliance, which

include having significant non-charitable activity; directing private benefits towards directors and/or related persons; issuing tax receipts in excess of actual gifts received or directing them to specific persons; failing to spend sufficient amounts on charitable activities; having gaps in or non-existent books and records; and/or not exercising control and/or direction over the expenditure of funds. The CRA publishes the names of charities that have lost their charitable status on CRA's website. Further information on the grounds for revocation is available by contacting the CRA.

The CRA news release is available on CRA's website at <http://www.cra-arc.gc.ca/nwsrm/rlss/2009/m04/nr090414-eng.html>, and CRA's directory of charities can be found at www.cra.gc.ca/donors.

The Exposure of Directors to Costs in Litigation: A Case Comment

Barry W. Kwasniewski, assisted by Jeremy I. Tam, articling student, *Charity Law Bulletin* No. 163, April 28, 2009.

On February 6, 2009, Justice R.C. Boswell of the Ontario Superior Court of Justice released his costs endorsement in *Alaimo v. Di Maio* ("Alaimo"), litigation between former volunteer directors of a charity. From the perspective of charitable and non-profit organizations, the most pertinent aspect of the Court's endorsement was the determination that the applicants, who were former volunteer directors of the charity Hospice Vaughan, were liable for the costs of litigation despite the fact that the litigation was generally related to the charity. In this regard, the result of the Court's decision differs from the result of the Ontario Court of Appeal in *The St. James' Preservation Society v. Toronto (City)* ("St. James' Preservation Society") where the directors of a non-profit corporation were not held to be personally liable for the costs of litigation. However, in determining that the facts of the *Alaimo* case warranted costs to be ordered against the Applicants, the reasoning of Justice Boswell accords with the general principles of costs liability that were set out by the Court of Appeal in *St. James' Preservation Society*.

This *Charity Law Bulletin* reviews the Hospice Vaughan Case and discusses its implications for charities and their directors.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2009/chylb163.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2009/chylb163.htm>

CRA's New Anti-Terrorism Checklist –A Step in the Right Direction

Terrance S. Carter and Nancy E. Claridge, *Anti-Terrorism and Charity Law Alert* No. 17, April 29, 2009.

Canada Revenue Agency ("CRA") has recently released the long-awaited Checklist for Charities on Avoiding Terrorist Abuse (the "Checklist"), a checklist that is intended to help Canadian charities identify vulnerabilities to terrorist abuse and develop good management practices. CRA indicates that

the Checklist is based on international and domestic concerns, experience, and guidance, and is not meant to be a comprehensive guide. Rather it is intended to help Canadian registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals. This *Anti-Terrorism and Charity Law Alert* reviews the contents of the Checklist, as well as provides some comments on the Checklist.

Read More:

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>

Valuation of Gifts of Life Insurance - Update

Karen J. Cooper

In the May 2008 issue of *Charity Law Update*, it was noted that in a technical interpretation issued on February 25, 2008, that CRA had changed its previous position regarding the valuation of gifts of life insurance and indicated that the factors listed in paragraphs 40 and 41 of IC 89-3 should be taken into consideration when determining the eligible amount of a gift and that paragraph 3 of IT-244R3 should now be read taking into account this new position. At the *Association de planification fiscale et financière* Roundtable on the Taxation of Financial Strategies and Instruments held in October 2008, CRA was asked to consider two situations where a taxpayer may acquire a life insurance policy to meet a temporary need but intends eventually to make a gift of the policy: (1) an individual who is the owner of a business acquires a life insurance policy, under which his own life is insured, in order to cover his taxes at death but 2 years after acquiring the policy, he sells his business and pays the taxes arising from the sale - less than three years after acquiring the life insurance policy, he gifts it to a registered charity; and (2) an individual who is aware that the cost of life insurance increases with age decides to purchase a life insurance policy with the intention of gifting it later to a registered charity - after holding the policy for eight years, he creates a private charitable foundation and gifts his policy to the foundation, which is a registered charity, and he will continue to pay the premium each year. In both situations, the life insurance policy is fully assigned to a qualified donee who becomes the policyholder and the beneficiary. CRA was asked whether 248(35) (the proposed deemed disposition at cost rules) of the *Income Tax Act* ("ITA") should not apply and whether it would be appropriate to add to the exceptions provided in subsection 248(37) of the ITA, the donation of life insurance policies?

CRA indicated that it is of the view that proposed subsection 248(35) of the ITA will apply to establish the fair market value of the life insurance policies in question and that whether or not it is appropriate to add the gifting of life insurance policies to the list of exceptions enumerated in proposed subsection 248(37) of the ITA is a matter of tax policy and the responsibility of the Department of Finance. However, CRA noted that with respect to the payment of premiums, IT-244R3 8 states that "if the premiums on the policy are paid directly to the insurance company at the request of, or with the

concurrence of, the donee, this action is considered to be constructive payment of a donation to the donee and therefore a charitable gift for the purposes of the Act.” As such, CRA was of the view that proposed subsection 248(35) of the ITA will not have an impact on the cash payment of the premiums that the individual will continue to make.

For more information, see IT-244R3 at: <http://www.cra-arc.gc.ca/E/pub/tp/it244r3/it244r3-e.html> and IC89-3 at: <http://www.cra-arc.gc.ca/E/pub/tp/ic89-3/ic89-3-e.html>, and CRA technical Interpretation #2008-028446. Technical Interpretations are only available through commercial subscription services or a direct request to CRA.

CRA Policy Commentary on Requests for Disbursement Quota Relief

Terrance S. Carter

Canada Revenue Agency (“CRA”) has released a policy commentary (CPC-029) regarding requests for disbursement quote relief. For readers who are unfamiliar with the concept of the disbursement quota, it is generally defined by CRA as “the minimum amount that a registered charity must spend each year on charitable activities carried on by it or on gifts to qualified donees.” A charity may apply for relief from its disbursement quota requirements. If granted, the relief would be applicable to the particular tax year only. The following is a summary of relevant considerations mentioned in the policy commentary applicable to applying for relief from disbursement quota requirements:

- A charity may apply a disbursement excess from one year to offset shortfalls in its disbursement. The excess may be applied in the year before the year of the shortfall and in the five years immediately following. The charity must use all disbursement excesses from previous years before relief will be granted.
- The charity must demonstrate that it is incapable of making up any part of the disbursement shortfall in the following tax year. Therefore, all of the charity’s information returns must be filed before any requests are considered, and relief will not be granted in advance or anticipation of a shortfall.
- The charity must be unable to meet the disbursement quota due to unforeseen circumstances that are beyond the charity’s control.

To apply for relief, a charity must complete Form T2094, *Registered Charities: Application to Reduce Disbursement Quota*. In deciding whether or not to grant relief, CRA will check that the charity: is not in a shortfall situation simply because of a miscalculation of its disbursement quota; has no available excesses; has disbursed all available income; and is doing everything in its power to meet its disbursement quota, such as drawing upon unrestricted funds to meet the quota. For more details, see: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cpc/cpc-029-eng.html>.

For a discussion on how disbursement quota relief may be useful in managing a charity's endowment funds, see *Charity Law Bulletin* No. 161, "Managing Endowments During Difficult Financial Times", available at <http://www.carters.ca/pub/bulletin/charity/2009/chylb161.htm>.

CRA Questions and Answers on Disbursement Quota

Theresa L.M. Man

On April 22, 2009, the Canada Revenue Agency released a "question and answer" regarding the treatment of enduring property for the purposes of the disbursement quota. As a result of the recent downturn of the economy, many charities have questions regarding their ability to encroach on the capital of their endowment fund (which is a type of "enduring property" under the *Income Tax Act*) in order to meet their disbursement quota. This CRA document provides helpful clarification on a number of issues in this regard, such as the circumstances under which a charity may encroach on its enduring property, how ten-year gifts are required to be tracked, and the impact on the charity's disbursement quota if it encroaches on its enduring property. This publication is available at <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-e10-fqs-eng.html>). Further details regarding the treatment of enduring property for the purposes of the disbursement quota will be addressed in a future *Charity Law Bulletin*.

Supreme Court of Canada News

Karen J. Cooper

Choson Kallah Fund of Toronto

In the November 2008 *Charity Law Update*, the available facts regarding the charitable status of the Choson Kallah Fund of Toronto (Fund) were summarised. CRA's news release on November 3, 2008, indicates that CRA's audit identified that the Fund's original purpose in providing funding for relief of poverty to impoverished individuals was sidetracked by operating primarily or collaterally for the purpose of furthering a tax shelter donation arrangement. The Minister of National Revenue issued a Notice of Intention to Revoke the charitable status of the Fund on December 21, 2007 (the "Notice"). The Fund brought an application for a stay of the publication of the Notice, which would defer the effective date of the revocation until after a determination is reached on the substantive issues related to its revocation. On October 17, 2008, the Court dismissed the Fund's motion seeking deferment because the Fund failed to establish that it will suffer irreparable harm from the loss of receipting privileges. The Court found it unable to conclude that "the receipt of donations at levels lower than those received by the Fund in prior years would have any impact upon the Fund, other than enabling it to distribute a smaller amount of money to needy persons" (see decision available at *Choson Kallah Fund of Toronto v. Canada (National Revenue)* (2008 FCA 311) A-38-08, October 17, 2008 at <http://decisions.fca-caf.gc.ca/en/2008/2008fca311/2008fca311.html>). On April 23, 2009, the Fund's application for leave to

appeal the Federal Court of Appeal's decision to the Supreme Court of Canada was dismissed with costs (*Choson Kallah Fund of Toronto v. M.N.R.* (SCC), 2008 CarswellNat 4147 (FCA): SCC file 32958).

Faith Assemblies Mission International

Also on April 23, 2009, the Supreme Court of Canada dismissed the application of Faith Assemblies Mission International (the "Charity") (see *R. v. Faith Assemblies Mission International* ([2009] S.C.C.A. No. 37 (QL)) for leave to appeal in respect of a decision by a judge of the Federal Court of Appeal which denied the Charity the right to file a supplementary affidavit in their stay application. The actual stay application is yet to be heard by the Federal Court of Appeal, but the Crown, on behalf of CRA, has filed a Motion for an interlocutory injunction against the Charity, enjoining it from soliciting charitable donations, accepting charitable donations and issuing or distributing receipts. Since the Notice of Intent to Revoke has not yet been published in the *Canada Gazette*, the revocation is not yet effective and it is unclear at this time what is the basis for the proposed revocation.

Lawyers Who Lobby On Behalf Of Charities and Non-Profits

Theresa L.M. Man, *Charity Law Bulletin* No. 164, April 29, 2009.

Lobbying legislation in Canada has been in place since 1988. On July 2, 2008, the federal lobbying statute was amended by the *Federal Accountability Act* and was renamed the *Lobbying Act*. Various provinces also have lobbyist registration legislation. The province of Ontario's *Lobbyist Registration Act* has been around since 1998. Although there are differences between these statutes (such as what constitutes lobbying, when registration is required, etc.), both of them apply to charities and non-profits. Many charities and non-profits are not aware of the existence of these statutes, or are uncertain that some of their programs constitute lobbying and therefore require them to register under these statutes.

This *Charity Law Bulletin* summarizes the issues and required registrations that arise from lawyers lobbying on behalf of charity and non-profit clients.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2009/chylb164.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2009/chylb164.htm>

Proposed Ontario Legislation Would Require Teachers and Principals to Report Incidents of Violence and Misconduct

Esther S.J. Oh and Jeremy I. Tam, articling student

The Ontario government has introduced legislation which, if passed, will establish mandatory reporting requirements that apply to incidents occurring at schools, school-related activities or other circumstances that would impact the school climate. The legislation would be the first of its kind in Canada. On March 12, 2009, the first reading of Bill 157 (the *Education Amendment Act (Keeping Our Kids Safe at School)*,

2009) was carried in the Ontario Legislative Assembly. The bill is currently being reviewed by the Standing Committee on Social Policy.

Generally speaking, Bill 157 sets out a chain of reporting requirements whereby teachers and other employees of a district school board must report incidents involving student violence or other forms of disruption to the principal, who must in turn report those incidents to parents and guardians.

Bill 157 creates new reporting requirements that will apply to teachers and other employees of the school board under the *Education Act*. In this regard, the incidents that must be reported to a principal are those already enumerated in subsection 306(1) and subsection 310(1) of the current *Education Act* outlining grounds for suspension of a student. Under subsection 306(1), activities that may result in the suspension of a student include the following: uttering a threat to inflict serious bodily harm on another person; possessing alcohol or illegal drugs; being under the influence of alcohol; swearing at a teacher or at another person in a position of authority; committing an act of vandalism that causes extensive damage to school property at the pupil's school or to property located on the premises of the pupil's school; and bullying. Subsection 310(1) lists more serious activities that would result in automatic suspension of a student, including possession of a weapon, various forms of assault, as well as other activities listed in the section.

Where a principal believes that a student of the school has been harmed as a result of an activity described in subsection 306(1) or 310(1), the principal must, as soon as reasonably possible, notify the parent or guardian of the student and must disclose the activity that harmed the student, the nature of the harm, and the steps taken to protect the student, including any disciplinary measures being taken. However, a principal would require the student's consent in order to notify a parent or guardian where the student is 18 years or older or has withdrawn from parental control. In addition, a principal would be precluded from notifying a parent or guardian if doing so would put the student at risk of harm from the parent or guardian.

If passed, the amendment is expected to come into force on February 1, 2010.

The full text of Bill 157 is available at:

http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2161

The full text of the existing *Education Act* is available at: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e02_e.htm

CRA Updated Topics on Applying for Registration for Charitable Status

Theresa L.M. Man

On April 22, 2009, the Charities Directorate of the Canada Revenue Agency (“CRA”) released four documents on the issues that potential applicants for charitable status should consider before deciding whether to submit an application. These documents are posted under the subsection “Is registration right for you?”, under the “Applying for Registration” section of the CRA’s website, which is available at <http://www.cra-arc.gc.ca/tx/chrts/pplyng/rgstrtn/menu-eng.html>. These documents are:

- 1) “Make an Informed Decision” – This document explains that the decision to apply for registration as a charity is an important one. It lists a number of options to consider before applying for registration as a charity (such as working with an existing charity, or becoming a tax-exempt non-profit organization), and provides a list of questions for interested applicants to determine whether registration is a viable path to achieve their goals.
- 2) “Advantages of registration” – This document lists a number of main advantages of being a registered charity, such as the issuance of official donation tax receipts for gifts it receives, exemption from paying income tax, etc.
- 3) “Obligation of Registration” – This document explains that after a charity is registered, it will have many obligations to meet each year, such as filing an annual information return (T3010), meeting a spending requirement, keeping books and records, etc. It also explains that a charity has obligations to the recipients of its charitable activities, to its volunteers, to its donors, and to the general public.
- 4) “Consequences of Terminating Registration” – This document explains that if a charity changes its mind after registration and wants to wind up or dissolve, it must ask to have its registered status voluntarily revoked. It briefly outlines the process for voluntary revocation and the consequences of a revocation (e.g. a revoked charity must give all its assets to another registered charity, or pay a revocation tax equivalent to the full value of its remaining assets).

More Federal Court of Appeal Applications

Karen J. Cooper

Holy Alpha and Omega Church of Toronto

In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, a judge of the Federal Court of Appeal considered a motion by the Crown to file a supplementary affidavit in an application by the Holy Alpha and Omega Church of Toronto (“HAOC”) for an order under paragraph 168(2)(b) of the *Income Tax Act* for delay the revocation of its registration as a charity until its objection and any resulting appeals are resolved. In support of its application for a stay, HOAC filed two affidavits and the Crown filed the affidavit of a CRA official. The CRA official was cross-examined on his

affidavit. The Crown affidavit explains that HOAC came to the attention of the tax authorities as the result of a project initiated to investigate allegations that certain charities and tax preparers in the Toronto area were engaged in the selling of false charitable donation receipts. In cross-examination, the official stated that the investigation had produced “no clear indication” that HOAC directly sold donation receipts, but that tax officials had identified tax preparers that were selling HOAC’s receipts to taxpayers. He also stated that the investigation is ongoing and the intended revocation of HOAC’s registration as a charity is not based on any allegation that HOAC was involved in the selling of false donation receipts. The new affidavit the Crown wishes to file is a second affidavit of the official which appends documents, which became available after the first affidavit was sworn and the cross-examination, and the official indicates that the “CRA believes” that these documents comprise evidence that the tax preparer paid HOAC a percentage of the value of the false receipts, and also that certain amounts were paid to the Pastor, thus implicating HOAC in the receipt selling scheme. The Court concluded that while the official was not personally aware of the new evidence until December 18, 2008, he is not the only tax authority involved in this matter and that the Crown has not discharged its onus of proving that the Crown could not have obtained the new evidence prior to filing the first affidavit. The Court dismissed the motion.

Universal Aide Society

The Universal Aide Society (the “Society”) also brought an application pursuant to paragraph 168(2)(b) of the *Income Tax Act* for an order delaying the publication of the Notice of Intent to Revoke issued in respect of the Society on July 18, 2008 (the “Notice”). The Society also requested a declaration that legal and accounting costs that it may incur in responding to the Notice be treated as expenses incurred in pursuit of a charitable activity and a declaration that the Notice was not properly served on the Society and is of no force and effect. With respect to the latter, the Society argued that the Notice is of no force and effect because it was allegedly sent to the wrong address, but the Court noted that the Society received the Notice nonetheless and found that since the Notice was responded to twice it was not invalid. Regarding the application of the tri-partite test for a stay set out in the recent jurisprudence, the Court found that the Society did not meet the “irreparable harm” part of the test, in that it did not establish that it will suffer irreparable harm if the revocation was allowed to proceed. In this regard, its affidavit evidence did not provide any evidence of any actual harm, reputational or otherwise, that it would suffer if the requested order was not granted. The assertion that the financial effects of a revocation of its status as a registered charity would be dramatic was unsupported by any evidence. Regarding the request by the Society for a declaration with respect to the treatment of certain costs and expenses that it may incur in responding to the Notice, the Court took the view that, in effect, the Society was asking the Court to provide the equivalent of an advance income tax ruling of the type that

can be requested from CRA, that a party cannot bring in isolation an action for a declaration on a mere interpretation of the Act, and that it lacked jurisdiction to provide the relief requested.

The court decision that was made from the Bench on April 2, 2009, *Universal Aide Society v. Canada (Minister of National Revenue)*, 2009 FCA 107 is available at <http://www.canlii.org/en/ca/fca/doc/2009/2009fca107/2009fca107.html>. The CRA News Release is available at <http://www.cra-arc.gc.ca/nwsrm/rlss/2009/m04/nr090427-eng.html>.

CRA News Release on Enforcing Legal Compliance of Taxpayers

Theresa L.M. Man

On April 3, 2009, the Canada Revenue Agency (“CRA”) issued a news release “The CRA takes action to enforce tax laws,” which summarizes the activities that the CRA conducts to ensure that taxpayers (both individuals and corporations) are complying with tax laws. These measures are intended to address “tax cheating” and correct honest mistakes. The news release explains that from 2007-2008, the CRA undertook a variety of measures to enforce the legal compliance of taxpayers, including obtaining tax returns from taxpayers who had failed to file; adjusting information in individual tax returns based on comparisons with third parties (e.g. employers); conducting audits and reviews; reviewing businesses to ensure that proper books and records were kept; etc. In relation to donations, the news release indicates that CRA reassessed over 20,000 individuals who had participated in one or more of 20 unacceptable tax shelter gifting arrangements.

The CRA news release is available on CRA’s website at <http://www.cra-arc.gc.ca/nwsrm/rlss/2009/m04/nr090403-eng.html>, and a detailed report of the CRA’s enforcement activities can be found at www.cra.gc.ca/annualreport.

Papers Presented at the Modernising Charity Law Conference in Brisbane, Australia

Terrance S. Carter, Modernising Charity Law Conference, April 18, 2009

The following papers were presented by Terrance S. Carter at the Modernising Charity Law Conference held at Queensland University of Technology in Brisbane, Australia, from April 16 to 18, 2009, as part of the session on ‘Policy and Strategies to Encourage Philanthropy.’ The papers were presented for panels entitled “Overview of the Main Policies used to Encourage Philanthropy” and “What Works, Why, and at What Cost? Tax Credits and Capital Gains Strategies.” Also during the conference, Mr. Carter participated as a discussant in a session dealing with Advancement of Religion as a head of charity.

“An Overview of Tax Credits for Charitable Donations as a Philanthropic Incentive in Canada”
[PDF] <http://www.carters.ca/pub/article/charity/2009/tsc0418a.pdf>

“An Overview of Capital Gains Tax Exemptions as a Philanthropic Incentive in Canada”
PDF] <http://www.carters.ca/pub/article/charity/2009/tsc0418b.pdf>

Case Comment and Analysis of an Employee's Duty to Mitigate Wrongful Dismissal Damages

Barry W. Kwasniewski, *Charity Law Bulletin* No. 165, April 29, 2009.

Canac Kitchens Ltd. shut down its Canadian manufacturing operations in Thornhill, Ontario on May 27, 2008 due to a major slow down in business. Canac paid many of its employees the statutory termination and severance minimums required under the *Employment Standards Act*, 2000 (the “ESA”). Many wrongful dismissal lawsuits by these former Canac employees ensued, claiming additional common law damages for wrongful dismissal. Two of these recent decisions, *Moldovanyi v. Canac Kitchens Ltd.*, [2009] O.J. No. 771 (Ont. S.C.J.) (“*Moldovanyi*”) and *Zaman v. Canac Kitchens Ltd.*, [2009] O.J. No. 872 (Ont. S.C.J.) (“*Zaman*”), both rendered by the Honourable Mr. Justice D.M. Brown in February and March of 2009, raise important issues concerning the extent of an employee’s duty to mitigate, or reduce, damages for wrongful dismissal. The purpose of this *Charity Law Bulletin* is to review these principles and to provide some guidance to the employers and employees for charities and non-profit organizations faced with this situation.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2009/chylb165.pdf>
[WEB] <http://www.carters.ca/pub/bulletin/charity/2009/chylb165.htm>

Constitutionality of the Assisted Human Reproduction Act Challenged in the Supreme Court of Canada

Jennifer M. Leddy

On April 24, 2009, five years after the *Assisted Human Reproduction Act* (the “Act”) was passed by the Parliament of Canada, the Supreme Court of Canada heard arguments presented by the Province of Quebec that sections of the Act are unconstitutional. The Act deals with activities that are outright prohibited, such as human cloning, and the commercialization of the reproductive functions of men and women. Other “controlled” activities (e.g. *in vitro fertilization*) are prohibited unless carried out in accordance with regulations under the Act, pursuant to a licence and in licensed premises.

Generally, the Province of Quebec takes the position that the challenged provisions, which are largely the controlled provisions, intrude on provincial jurisdiction relating to the regulation of health care and medical practice. The Federal Government argues that the Act deals with a single subject and seeks to respond in an integrated matter to the various aspects. According to the Federal Government, the Act deals not only with health but also with morality and public safety and is thus an appropriate subject for the criminal law power.

Two religious organizations involved at many stages in the development of the policy and Act were granted intervener status in the Supreme Court of Canada and allowed to file a written argument, but not to make oral submissions. The Evangelical Fellowship of Canada and the Canadian Conference of Catholic Bishops argued that the appeal raised profound social, moral and philosophical questions which engage not only the question of division of powers but the underlying principles of our Constitution and legal system. They asserted that human life and dignity as well as the dignity of human procreation should be respected and protected uniformly across Canada.

The Act was the result of fifteen years of public consultations, beginning with the Royal Commission on New Reproductive Technologies that was established in 1989. Given its long gestation period, the many organizations and professionals from diverse sectors that participated in the process will be most interested in the decision of the Supreme Court of Canada.

Animal Rights Activist Added to the FBI's "Most Wanted Terrorists List"

Terrance S. Carter and Sean S. Carter, articling student, Fasken Martineau DuMoulin LLP

On April 21, 2009, the Federal Bureau of Investigation ("FBI") added Daniel Andreas San Diego to the FBI's "Most Wanted Terrorists List," describing Mr. San Diego as an "animal rights extremist." This marks the first time that a purported "domestic terrorist" has been added to the FBI list, which is primarily populated by those associated with the attacks of September 2001 and Al-Qaeda. Mr. San Diego is accused of being involved with bombings that resulted in property damage to several office buildings and laboratories in the United States.

The FBI's recent action reaffirms the sweeping scope of anti-terrorism laws and enforcement actions in the United States, particularly with respect to the potential application to groups and individuals with a wide variety of religious, political and ideological affiliations. Even in Canada, it is evident in the *Criminal Code* definition of "terrorist activity" and from several years of law enforcement actions that the application of anti-terrorism laws is not restricted to individuals with a particular religious or political affiliation. Canada's anti-terrorism laws potentially encompass individuals or groups associated with a wide variety of ideological issues, including animal rights and environmental protection. Charities need to be aware of the scope of potential application of these laws when assessing their operations to avoid inadvertent contravention of anti-terrorism laws, particularly when reviewing associations with, or support of, other domestic and international organizations. For more information regarding the application of Canada's anti-terrorism laws to individuals and groups associated with animal rights and environmental issues, please see *Anti-terrorism and Charity Law Alert No. 1*, available at <http://www.carters.ca/pub/alert/ATCLA/atcla01.pdf>.

IN THE PRESS

Endowment Management by Terrance Carter.

Canadian Fundraising & Philanthropy eNews, Vol. 19, No. 7, April 15, 2009.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=2948>

In Brief – Canada’s charities vulnerable to abuse, says OECD references a contribution in the March 2009 *Charity Law Update* by Terrance S. Carter and Sean S. Carter.

Canadian Fundraising & Philanthropy eNews, Vol. 19, No. 7, April 15, 2009.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=2957>

Managing Endowments During Difficult Financial Times by Terrance S. Carter

CharityVillage.com, April 13, 2009.

[Link] <http://www.charityvillage.com/cv/research/rim24.html>

RECENT EVENTS AND PRESENTATIONS

CANNEXUS 2009 National Career Development Conference was held in Toronto, Ontario, and included a presentation by Karen J. Cooper on April 6, 2009, entitled “Charities and Not-for-Profits: Surviving a CRA Audit.”

[WEB] <http://www.carters.ca/pub/seminar/charity/2009/kjc0406.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2009/kjc0406.pdf>

Modernizing Charity Law Conference, hosted by Queensland University of Technology in Brisbane, Australia, from April 16 through 18, 2009 included the following presentations by Terrance S. Carter:

“An Overview of Tax Credits for Charitable Donations as a Philanthropic Incentive in Canada”; and

[WEB] <http://www.carters.ca/pub/seminar/charity/2009/tsc0418a.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2009/tsc0418a.pdf>

[Paper] <http://www.carters.ca/pub/article/charity/2009/tsc0418a.pdf>

“An Overview of Capital Gains Tax Exemptions as a Philanthropic Incentive in Canada.”

[WEB] <http://www.carters.ca/pub/seminar/charity/2009/tsc0418b.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2009/tsc0418b.pdf>

[Paper] <http://www.carters.ca/pub/article/charity/2009/tsc0418b.pdf>

The 16th Annual National CAGP-ACPDPTM Conference “Planned Giving: Harnessing the Power” was held in Niagara Falls, Ontario, from April 23-24, 2009, and included the following presentations:

“Developing a Gift Acceptance Policy” by Theresa L.M. Man of Carters; and

[WEB] <http://www.carters.ca/pub/seminar/charity/2009/tlm0423.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2009/tlm0423.pdf>

“Essential Charity Law Update: What Every Gift Planner Needs to Know” by Terrance S. Carter and Karen J. Cooper of Carters.

[WEB] <http://www.carters.ca/pub/seminar/charity/2009/tsckjc0423.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2009/tsckjc0423.pdf>

UPCOMING EVENTS AND PRESENTATIONS

The 2009 National Charity Law Symposium, being presented by the CBA and OBA Charity and Not-for-Profit Law Sections and the Continuing Legal Education Committee in Toronto, Ontario, on May 7, 2009, will include a presentation by Terrance S. Carter and Theresa L.M. Man entitled "Business Activities and Social Enterprise: Towards a New Paradigm."

More details available at http://www.cba.org/CBA/CLE/main/char_09.aspx

Fundraising Day, being hosted by the Association of Fundraising Professionals in Toronto, Ontario, on May 28, 2009, will include a presentation by Terrance S. Carter entitled "What's New at Canada Revenue Agency."

More details available at <http://afptoronto.org/index.php/fundraising-day>

Healthcare Philanthropy: Check-Up 2009, hosted by Fasken Martineau DuMoulin LLP and Carters Professional Corporation, is being held at The Estates of Sunnybrook in Toronto, Ontario, on June 11, 2009, and will include the following presentations:

"Highlights in Charity Law: The Year in Review" by M. Elena Hoffstein of Fasken Martineau and Terrance S. Carter of Carters;

"Understanding Gifts of Real Estate and How to Develop Them" by Karen J. Cooper of Carters;

"The New CRA Proposed Fundraising Policy: What it Means to Your Hospital and Foundation" by Laura West of Fasken Martineau; and

"Encroachments on Enduring Property" by M. Elena Hoffstein of Fasken Martineau; and

"Charity, Business and Profit: A Contradiction in Terms?" by Theresa L.M. Man of Carters.

More details at http://www.fasken.com/healthcare_philanthropy_06_11_09/.

The Institute of Chartered Accountants Professional Development Seminars will include a presentation by Karen J. Cooper in Ottawa, Ontario, on July 9, 2009 entitled "Current Issues Under the *Income Tax Act* Affecting Charities."

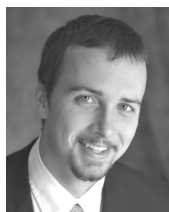
Details at https://ebusiness.icao.on.ca/pd/pdCourseFilter_Detail.aspx?coursecode=23301OT0.

CONTRIBUTORS

Editor: Terrance S. Carter
Assistant Editor: Nancy E. Claridge



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.antiterrorism.ca, and a consulting editor of *Charities Legislation and Commentary* 2007 Ed.



Sean S. Carter – A graduate of Osgoode Hall Law School with a Bachelor of Laws degree, having obtained his Bachelor of Arts in Political Science and Philosophy from the University of Toronto, Sean has gained valuable experience as a summer and now as an articling student with Fasken Martineau DuMoulin LLP, as well as being a research assistant 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.



Karen J. Cooper – A partner with the firm, Ms. 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 the firm, Ms. 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*.



Barry Kwasniewski - Mr. Kwasniewski joined Carters' Ottawa office in October 2008 to practice in the areas of employment law, charity related litigation, and risk management. Called to the Ontario Bar in 1990, Barry has a wide range of litigation experience, including in commercial disputes, personal injury, long-term disability, employment, insurance defence, and professional liability. Barry is a volunteer lawyer at Reach Canada, is on the Board of directors of the Vista Centre, and has assisted in several United Way campaigns.



Jennifer M. Leddy – Ms. Leddy joined Carters’ Ottawa office to practice charity and not-for-profit law following a distinguished career in both private practice and public policy. Her experiences include acting as a legal and policy advisor to the Canadian Conference of Catholic Bishops; and working with the Charities Directorate of the Canada Revenue Agency on the proposed “Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose.” Ms. Leddy was also a co-director of the Catholic Organization for Life and Family, and a member of the Joint Regulatory Table of the Voluntary Sector Initiative on the legislative and regulatory environment of the sector.



Theresa L.M. Man – A partner with Carters, Ms. 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. In addition to being a regular speaker at the annual *Church & Charity Law*TM Seminar, Ms. 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 – A partner with the firm, Ms. Oh practices in charity and not-for-profit at Carter’s Mississauga office. Ms. Oh is 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’s volunteer experience includes formerly serving as director and corporate secretary of the Evangelical Fellowship of Canada, and involvement with speaking engagements to various university student groups across Ontario.



Jeremy I. Tam – Jeremy graduated from the University of Western Ontario, Faculty of Law. Prior to his legal studies, he graduated with an Honours Bachelor of Arts from the University of Toronto, focusing on Urban Studies, History, and Sociology. Outside of law school, Jeremy gained experience as a summer student at two Hong Kong law firms, interning at International Justice Mission Canada, researching and writing for Pro Bono Students Canada, and serving as President of the UWO Christian Legal Fellowship.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

Charity Law Bulletin No. 161 Revised April 27, 2009: As a result of clarifications made by CRA concerning encroachments on enduring property on April 22, 2009, *Charity Law Bulletin* No. 161 has been slightly revised to reflect the CRA clarifications.

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**CARTERS PROFESSIONAL CORPORATION
SOCIÉTÉ PROFESSIONNELLE CARTERS**

PARTNERS:

Terrance S. Carter B.A., LL.B.
(Counsel to Fasken Martineau DuMoulin LLP)
Jane Burke-Robertson B.Soc.Sci., LL.B.
Mervyn F. White B.A., LL.B.
Karen Cooper B.Soc.Sci., LL.B., LL.L., TEP
Theresa L.M. Man B.Sc., M.Mus., LL.B., LL.M.
Jacqueline M. Demczur B.A., LL.B.
Esther S.J. Oh B.A., LL.B.

tcarter@carters.ca

janebr@carters.ca
mwhite@carters.ca
kcooper@carters.ca
tman@carters.ca
jdemczur@carters.ca
estheroh@carters.ca

ASSOCIATES:

Jennifer M. Leddy B.A., LL.B.
Barry W. Kwasniewski B.B.A., LL.B.
U. Shen Goh LL.B., LL.M.
Nancy E. Claridge B.A., M.A., LL.B.

jleddy@carters.ca
bwk@carters.ca
sgoh@carters.ca
nclaridge@carters.ca

COUNSEL:

Bruce W. Long B.A., LL.B.
Donald J. Bourgeois B.A., LL.B.

blong@carters.ca
dbourgeois@carters.ca

Main Office

211 Broadway, P.O. Box 440
Orangeville, Ontario, Canada L9W 1K4
Tel: (519) 942-0001
Fax: (519) 942-0300
Toll Free: (877) 942-0001

Meeting Locations by Appointment

Toronto Dominion Bank Tower, Suite 4200
Toronto, Ontario, Canada
(416) 675-3766

59 Woolwich Street
Guelph, Ontario
(519) 838-2004

2100 - 1075 West Georgia Street
Vancouver, British Columbia
(877) 942-0001

Mississauga Office

2 Robert Speck Parkway, Suite 750
Mississauga, Ontario, Canada, L4Z 1H8
Tel: (905) 306-2791
Fax: (905) 306-3434
Toll Free: (877) 942-0001

info@carters.ca
www.carters.ca
www.charitylaw.ca
www.churchlaw.ca
www.antiterrorismlaw.ca

Ottawa Office

70 Gloucester Street
Ottawa, Ontario, Canada
Tel: (613) 235-4774
Fax: (613) 235-9838
Toll Free: (866) 388-9596