

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

FEBRUARY 2010 ISSUE

SECTIONS

Recent Publications and News Releases	1
In the Press	9
Recent Events and Presentations	10
Upcoming Events and Presentations	10
Contributors	11
Acknowledgements, Errata and other Miscellaneous Items	13

HIGHLIGHTS

Countdown to the Canada Not-For-Profit Corporations Act -
Practice Tip #2: Continuance of CCA Part II Corporations

Non-Profit Organizations Not Being Charities

Gifts of Ecological Land in Inventory

CRA News

Investment Powers of Charities and Not-For-Profits under
Ontario's *Trustee Act*

The Application of the Competition Act to Fundraising by Charities
and Not-For-Profit Organizations

Federal Court Of Appeal Rules Successful Human Rights
Complainants Cannot Be Awarded Their Legal Costs

Do Public Officials Have the Right to Refuse Public Services On
The Basis Of Personal Conviction

Advising the Charitable Client: Risk Management Strategies

Business Activities – Raising Revenue Through Business Activities
Without Violating Legal Principles

Federal Court of Australia Aid/Watch decision

Charity Tax Tuesdays Webinar Series from Imagine Canada
Announced

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RECENT PUBLICATIONS AND NEWS RELEASES

Countdown to the *Canada Not-For-Profit Corporations Act* - Practice Tip #2: Continuance of CCA Part II Corporations

Jane Burke-Robertson in *Charity Law Bulletin* No. 193, February 25, 2010.

This is the second in a series of monthly practice tips for existing federal not-for-profit corporations that will be continuing or those interested in incorporating under the new *Canada Not-for-profit Corporations Act* when it is proclaimed in force, sometime in 2010 or 2011. This *Charity Law Bulletin* outlines how corporations incorporated under Part II of the *Canada Corporations Act* will have a period of three years within which to comply with the new Act by applying for a certificate of continuance.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2010/chylb193.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2010/chylb193.htm>

Non-Profit Organizations Not Being Charities

Theresa L.M. Man.

At a Round Table on Federal Taxation held at the APFF (L'Association de planification fiscale et financiere) 2009 conference in October 2009, representatives from Canada Revenue Agency (CRA) responded to the question of how an organization can meet one of the four requirements for a non-profit organization (NPO) in paragraph 149(1)(l) of the *Income Tax Act* (Canada) that it is not a charity within the meaning assigned by subsection 149.1(1) of the Act "in the opinion of the Minister." CRA released a document (2009-0329991C6) on October 9, 2009 in relation to the response they provided at the conference. While CRA's clarification is helpful, it confirms that the question of whether an organization is a charity for the purpose of meeting the requirement under paragraph 149(1)(l) is a question of fact that would need to be determined from year to year.

Firstly, CRA explained that the Canadian tax system is founded on the principle of self-assessment and therefore an organization would have to examine how it is organized and operated in order to determine if it meets the requirements in paragraph 149(1)(l) to be an NPO. There is no registration process for NPOs under the Act.

Secondly, CRA indicated that the organization can refer to the Charities Directorate's website in relation to the requirements on whether it could qualify for charitable registration. However, CRA indicated that if the organization is denied charitable registration, this does not automatically mean that it is not a charity. An example in this regard is that a charity that does not reside in Canada could not be registered

even though it could be, in the opinion of the Minister, a charity within the meaning assigned by subsection 149.1(1) of the Act.

Thirdly, CRA indicates that paragraph 149(1)(l) of the Act states that the organization must not be a charity in the opinion of the Minister; but this paragraph does not require that the organization obtain such an opinion from the Minister. CRA further indicated that even if the organization did receive an opinion from the Minister that it is not a charity, this does not necessarily mean that it was not previously or will not subsequently be a charity, because this is a question of fact to be decided at the end of the fiscal year.

Fourthly, although it is possible for an organization to seek an advanced ruling from CRA, a ruling could only be issued on the question of whether the organization was *organized* exclusively for social welfare, civic improvement, pleasure, recreation or any other purpose except profit as required under the Act. However, CRA would not issue a ruling in relation to the question of whether the organization is *operated* for such non-profit purposes, because it is a question of fact which can only be resolved by considering all the activities of the organization during the year in question and cannot be determined in advance or in a particular year, but only at the end of the year.

Lastly, CRA indicated that the question of whether the organization is a charity can be addressed in the course of its audit program, and that an organization that wishes to confirm its admissibility with respect to paragraph 149(1)(l) of the Act in regard to its activities can contact its tax services office. In that regard, a determination can be made whether past activities would meet the requirement that an NPO must be operated for non-profit purposes.

Gifts of Ecological Land in Inventory

Karen J. Cooper.

CRA recently released a response to a question submitted at the 2009 APFF (Association de planification fiscale et financière) Round Table on Federal Taxation regarding gifts of ecological land in inventory (Document #2009-0330321). CRA was asked whether it would be prepared to grant, by administrative policy, a partial or total tax rebate to a taxpayer who donates ecologically sensitive land held in inventory. Gifts of real estate are usually considered gifts of capital property, which generally result in taxable capital gains for the donor. However, like gifts of publicly-traded securities, subsection 38(a.2) of the ITA reduces to zero any taxable capital gains arising from a qualifying donation of ecologically sensitive land and interests in ecologically sensitive land, such as servitudes, covenants or easements. Where donated property is inventory of a business (for example, a developer of a subdivision often owns land as inventory rather than as a long-term investment), it is not considered capital property and the proceeds of disposition must be included in the donor's business income under

section 9 of the ITA and will trigger a tax obligation. CRA indicates that the ITA does not contain a provision that eliminates the business income resulting from the donation of ecologically sensitive land owned in inventory, similar to the elimination of taxable capital gains, and that an amendment to the ITA would be necessary for CRA to grant such an incentive.

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

CRA News

Terrance S. Carter.

Gifts from other registered charities:

CRA has posted a reminder that registered charities should not issue official donation receipts for gifts received from other registered charities. Official donation receipts are required for tax deduction or credit purposes only. Because registered charities do not pay income tax, they do not need a donation receipt. CRA suggests that a charity can acknowledge gifts received from other registered charities with a letter or ordinary receipt. A receipt issued to a registered charity should not state that it is an official receipt for income tax purposes. Even though no official receipt is issued, charities should still provide their registration number to donor charities for the donor's reporting requirements. Registered charities must also keep track of donations from other registered charities for use in their disbursement quota calculation.

Disbursement quota calculation and Disbursement quota checklist:

The web pages for the Disbursement Quota Calculation and the Disbursement Quota Checklist have been updated to reflect where a charity's prior year return has been filed using the new Form T3010B. Form T3010B is the new annual information return for registered charities that is to be used for fiscal periods ending on or after January 1, 2009. Charities with fiscal periods ending on December 31, 2008 and earlier were required to use the old T3010A.

Charities whose prior year return was filed using the new Form T3010B should refer to the information on the following web pages when calculating their disbursement quota:

- Meeting the disbursement quota when filing the T3010B return, available at: <http://www.cra-arc.gc.ca/tx/chrts/prtnng/spndng/clclb-eng.html>
- Disbursement quota calculation when filing Form T3010B, available at: <http://www.cra-arc.gc.ca/tx/chrts/prtnng/spndng/clclb-eng.html>

Charities whose prior year return was filed using the old Form T3010A should refer to the information on the following pages:

- Meeting the disbursement quota when filing the T3010B return – prior year filed on Form T3010A, available at: <http://www.cra-arc.gc.ca/tx/chrts/chcklsts/dqb-pry-eng.html>
- Disbursement quota calculation when filing Form T3010B – prior year filed on Form T3010A, available at: <http://www.cra-arc.gc.ca/tx/chrts/prtng/spndng/clclb-pry-eng.html>.

Investment Powers of Charities and Not-For-Profits under Ontario's *Trustee Act*

Terrance S. Carter in *Charity Law Bulletin* No. 192, February 25, 2010.

When deciding how and where to invest, charities must be diligent in ensuring they comply with the legislation in the applicable provincial jurisdiction. In Ontario, charities are bound by the investment powers contained in the *Trustee Act*. However, not-for-profit organizations operating in Ontario can also be bound by the *Trustee Act* where they hold monies in trust for charitable purposes. For instance, when a not-for-profit organization fundraises for a charity, the not-for-profit will be deemed to be a trustee of those funds, and will be required to comply with the prudent investor standard in the *Trustee Act*, as discussed in more detail below.

The purpose of this Bulletin is to provide assistance to charities, and to a limited extent not-for-profit organizations, in understanding the application of Ontario's *Trustee Act* to their organization. Although charities and not-for-profits must become familiar with the entire Act, this Bulletin summarizes the sections that those organizations should have particular regard to, such as the applicable standard of care, delegation, agency relationships, the ability to obtain investment advice, as well as the statutory protections available to trustees under the *Trustee Act*.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2010/chylb192.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2010/chylb192.htm>

The Application of the *Competition Act* to Fundraising by Charities and Not-For-Profit Organizations

Terrance S. Carter in *Charity Law Bulletin* No. 194, February 25, 2010.

Fundraising, by necessity, is occupying a greater role for charities in recent years, due to a combination of government cutbacks in support for charities, competition amongst charities for available donations, and an increased demand for services being placed upon charities by the public. Budgetary pressures and time constraints may preclude a charity from properly evaluating the legal consequences of the various fundraising programs it undertakes, but the risks associated with improper fundraising programs can, however, easily negate any benefit that is realized.

This Bulletin focuses on one particular area of liability for charities and not-for-profits in the sphere of fundraising, which is the application of the federal *Competition Act*. The 1999 amendments to the

Competition Act created increased exposure to liability for charities and not-for-profits that are involved in fundraising programs. Accordingly, charities and not-for-profits must be careful not to embark on a fundraising campaign before considering their responsibilities under the *Competition Act*.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2010/chylb194.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2010/chylb194.htm>

Federal Court Of Appeal Rules Successful Human Rights Complainants Cannot Be Awarded Their Legal Costs

Barry W. Kwasniewski in *Charity Law Bulletin* No. 195, February 25, 2010.

In a judgment released on October 26, 2009 in *Canada (Attorney General) v. Mowat*, the Federal Court of Appeal ruled on the contentious issue concerning whether the Canadian Human Rights Tribunal (hereinafter the “CHRT”) had authority to make an award of legal costs to a successful complainant under the *Canadian Human Rights Act*. The issue came by way of an appeal by the Attorney General from a Federal Court decision which upheld the CHRT’s determination that it did have authority to award costs to a successful complainant, who had brought a proceeding against her employer, the Canadian Forces, for sexual harassment. The CHRT awarded the complainant damages and \$47,000.00 for legal costs.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2010/chylb195.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2010/chylb195.htm>

Do Public Officials Have the Right to Refuse Public Services On The Basis Of Personal Conviction

Jennifer M. Leddy.

The Government of Saskatchewan has referred to the Court of Appeal two possible legislative options that would allow civil marriage commissioners not to perform marriages that are contrary to their religious beliefs. The Government is seeking the Court’s opinion on whether either or both options would meet the requirements of the *Canadian Charter of Rights and Freedoms*.

The implications of the Reference are wider than the marriage issue because the case concerns the right of public officials, as distinct from religious officials, to refuse to provide a public service on the basis of personal conviction. The issue has attracted a number of intervenors, including: the Canadian Civil Liberties Association, the Evangelical Fellowship of Canada, the Christian Legal Fellowship and EGALE Canada. The Reference is scheduled to be heard by the Saskatchewan Court of Appeal on May 13-14, 2010.

Advising the Charitable Client: Risk Management Strategies

Presented by Terrance S. Carter at The 2010 OBA Institute Charity and Not-for-Profit Law: Doing Good, While Avoiding Legal and Liability Problems: A Primer for Lawyers on Advising and Sitting on Non-Profit Boards and Charities in Toronto, Ontario on February 16, 2010.

Advising the charitable client extends beyond simply “doing good” by assisting individuals who wish to benefit the community. Instead, it requires the provision of professional advice on complicated areas of the law, rendered in a manner that reflects an increasing reliance by clients on counsel to identify legal risks and provide recommendations on how those risks can be avoided. To that end, this paper suggests a more active professional mindset is required to deal with charities, and lawyers should assist charities in identifying areas of risk by utilizing tools such as a charity legal risk management checklist, a sample of which is attached to this paper as an appendix. The paper also explains a number of problems that lawyers may encounter from time to time in advising charities. The paper concludes by emphasizing the importance of communicating with the charitable client and providing informational reports to both assist the client and establish clear evidence of the advice rendered by the lawyer. Accordingly, this paper is not a technical discussion of legal issues, but instead attempts to provide a practical guide for practitioners who wish to develop a proactive approach in advising charitable clients.

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2010/tsc0216.pdf>

Business Activities – Raising Revenue Through Business Activities Without Violating Legal Principles

Donald J. Bourgeois in *Charity Law Bulletin* No. 196, February 25, 2010.

Charities and not-for-profit organizations need money. That basic principle is inescapable. Money is necessary to pay rent, purchase supplies, hire employees, run programs, and support volunteers. But charities are not supposed to be in the business of making money. This dichotomy raises an ongoing issue, especially for charities, one for which there is no easy resolution. This column is the first of three that examines the issue of charities and not-for-profit organizations carrying out business activities to raise funds.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2010/chylb196.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2010/chylb196.htm>

Federal Court of Australia Aid/Watch decision

Terrance S. Carter.

On September 23, 2009, the Federal Court of Australia decision *Commissioner of Taxation v. Aid/Watch Incorporated* caused the charitable sector in Australia to have significant concerns for charities involved in activist campaigning. The decision concerned the charitable status of Aid/Watch, which monitored, researched and campaigned for the delivery of effective Australian and multinational aid. Aid/Watch had been advised on October 2, 2006, that its status as a charity relative to the applicable legislation had been revoked.

Although successful before the Administrative Appeals Tribunal, which had restored Aid/Watch's charitable status, the Federal Court subsequently ruled the main purpose of the charity was political because the "natural and probably" consequences of their activities would have an effect on public opinion and then on government opinion. The organization's concern with the effectiveness of aid delivery was clearly aimed at the relief of poverty, as well as having an educational element to their research activities, and Aid/Watch never sought to influence the government by direct contact. However, the court found that the prevailing aim of Aid/Watch was to influence government so that the delivery of aid should conform to its own view on how best to distribute it.

Aid/Watch had indicated on their website that they have applied to the High Court of Australia to win back their charitable status. The Canada Revenue Agency has similarly revoked charitable status where non-charitable political purposes are more than ancillary to a charity's purposes. As such, it is possible that this decision could prove to be a relevant precedent for consideration either by the CRA or by the courts in Canada.

Full decision available online at: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2009/128.html>

CRA policy regarding political activities is available online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>.

Charity Tax Tuesdays Webinar Series from Imagine Canada Announced

Terrance S. Carter.

To support the overall Charity Tax Tools program goal of providing information to Canadian charities in the areas of receipting, fundraising activities, maintaining books and records and reporting to the CRA is a series of FREE Charity Tax Tuesdays webinars, presented in both English and French by Imagine Canada. These webinars will offer an opportunity to delve into specific topic areas and serve as a chance to dialogue with subject experts in an online format. Several of the webinars will be presented by lawyers from Carters as part of the firm's sponsorship commitment to the Charity Tax Tools website. The first of the seminars will be held on March 2nd, 2010, with Karen Cooper of Carters presenting.

For more information, see the announcement at

<http://www.industrymailout.com/Industry/View.aspx?id=190873>.

IN THE PRESS

Employer Responsibilities towards Pregnant Employees by Barry Kwasniewski.

Employment Practices Risk Management Column, Imagine Canada, February 2010.

[Link] <http://nonprofitrisk.imaginecanada.ca/node/910>

Imagine Canada Insurance & Liability Resource Centre for Non-Profits lists *Church Law Bulletin* No. 28 entitled “Cornwall Inquiry Releases Report with Recommendations Regarding the Prevention Of and Responses to Child Abuse” among its resources.

[Link] <http://nonprofitrisk.imaginecanada.ca/>

Imagine Canada Insurance & Liability Resource Centre for Non-Profits lists *Charity Law Bulletin* No. 189 entitled “Ontario Bill 168 Receives Royal Assent: Employers Will Need to Address Workplace Violence and Harassment Prevention” among its Employment Practices resources.

[Link] <http://nonprofitrisk.imaginecanada.ca/node/886>

Improved CRA fundraising guidance still poses challenges by Terrance S. Carter.

Charity Talk, January 2010.

[Link] http://www.cba.org/CBA/newsletters-sections/2010/2010-01_charities.aspx

Civil Society Under Strain references “Canadian Charities: The forgotten victims of Canada’s anti-terrorism legislation” by Terrance S. Carter in the *International Journal of Civil Society* 4: 10-16.

Civil Society Under Strain: Counter-Terrorism Policy, Civil Society and Aid Post-9/11, Ed. Jude Howell and Jeremy Lind. Kumarian Press. Sterling, VA, 2010.

Donation Fraud – Banyan Tree Class Action Receives Certification by Karen J. Cooper.

Canadian Fundraising & Philanthropy eNews, Volume 20, No 2, January 31, 2010.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=3219>

Canada – Large Class Action for Defrauded Donors Certified in Ontario included a link to *Charity Law Bulletin* No. 190 by Karen J. Cooper.

International Journal of Civil Society Law Newsletter, Volume 7, Issue 2, 2010.

[Link] http://www.iccsl.org/pubs/10-02_IJCSL-N.pdf

Legal Risk Management Checklist for Not-for-Profit Corporations by Terrance S. Carter and Jacqueline M. Demczur was referenced in a recent article from PracticePRO by LawPro.

[Link] <http://www.practicepro.ca/information/nonprofits.asp>

RECENT EVENTS AND PRESENTATIONS

Understanding CRA's New Guidance on Fundraising was presented by Terrance S. Carter as part of the Catholic Archdiocese of Toronto – ShareLife Agencies session on Thursday January 28, 2010.

[Web] <http://www.carters.ca/pub/seminar/church/2010/tsc0128.htm>

[PDF] <http://www.carters.ca/pub/seminar/church/2010/tsc0128.pdf>

Advising the Charitable Client: Risk Management Strategies was presented by Terrance Carter as part of a panel discussion with Bill Pashby entitled Lawyers on Non-Profit & Charity Boards: Prestige, Reward, Pro Bono, Anxiety, Conflicts of Interest and other Pitfalls at the OBA Institute on Tuesday February 16, 2010.

[PDF] <http://www.carters.ca/pub/article/charity/2010/tsc0216.pdf>

The Ottawa Region Charity & Not-for-Profit Law™ Seminar was held at Arlington Woods Free Methodist Church in Nepean, Ontario, on Thursday, February 18, 2010.

Handout materials will be available soon at <http://www.charitylaw.ca>.

Divine Perspectives on Your Career was presented by Jennifer Leddy at the 2010 National Christian Law Student Conference at the University of Ottawa on February 19, 2010.

UPCOMING EVENTS AND PRESENTATIONS

Upcoming Imagine Canada Charity Tax Tuesdays presented by Carters lawyers:

March 2 - Implications of Becoming a Charity by Karen J. Cooper

March 9 - Alternatives to Becoming a Charity by Terrance S. Carter

March 23 - Applying for Charitable Status by Theresa L.M. Man

Details and registration at <http://www.industrymailout.com/Industry/View.aspx?id=190873>.

Colliers International Breakfast Meeting at the Ontario Heritage Centre on March 31, 2010, will include a presentation by Terrance S. Carter entitled “The Implications of the New CRA Fundraising Guidance on Charities.”

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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.



Jane Burke-Robertson – A partner with Carters' Ottawa office, Ms. Burke-Robertson practices in the area of charity and not-for-profit law and has been ranked by *Lexpert* and *The Best Lawyers in Canada* as a leader in her field. She is co-author of *Non-Share Capital Corporations* published by Carswell, and a contributor to Industry Canada's *Primer for Directors of Not-for-Profit Corporations*. Ms. Burke-Robertson is a frequent speaker and lecturer on charitable and not-for-profit matters and recently taught an advanced seminar on the law of charities and non-profit organizations at the Faculty of Law, University of Ottawa.



Terrance S. Carter – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau DuMoulin LLP on charitable matters, is a member of the Technical Issues Group of Canada Revenue Agency's (CRA) Charities Directorate representing the Canadian Bar Association (CBA), a past member of CRA's Charity Advisory Committee, Chair of the National Charities and Not-for-Profit Section of the CBA, and has been recognized as a leading expert by *Lexpert* and *The 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* (LexisNexis Butterworths, 2010).



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).



Barry W. 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 frequent speaker at the annual *Church & Charity Law*™ Seminar, seminars hosted by the Canadian Bar Association and the Ontario Tax Foundation, 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*.



Ryan Prendergast - Ryan graduated from the University of Ottawa, Faculty of Law, in 2009. Prior to attending law school, Ryan graduated from Glendon College at York University, First Class, with a B.A. in History and a Certificate in Law and Social Thought. While in law school, Ryan was a student caseworker for the Criminal Division at the University of Ottawa Community Legal Aid Clinic. He also completed a volunteer research project for Ecology Ottawa on municipal by-laws. Before articling with Carters, Ryan gained legal experience as a summer student working for the Crown Attorney’s Office in Toronto.



Heather Reardon - Heather graduated *cum laude* from Michigan State University College of Law in 2008 and from the University of Ottawa, Faculty of Law in 2009. Before attending law school, she obtained a B.A. from Mount Allison University with a major in International Relations and a minor in Religious Studies. During law school, Heather obtained legal experience as a clinician at the Michigan State University Rental Housing Clinic and was a member of Michigan State’s Niagara International Law Moot Court team. Heather has also worked as an intern with the Department of Justice and a Member of Parliament.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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