

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

NOVEMBER 2004 ISSUE

SECTIONS

Recent Publications and news Releases	2
In The Press	6
Recent Events and Presentation Materials	
Upcoming Events and Presentations	8
Contributors	10
Acknowledgements, Errata and other Miscellaneous Items	11

HIGHLIGHTS

September 16, 2004, Draft Amendments to the Income Tax Act – A Series of Four Bulletins

Highlights of the National Survey of Nonprofit and Voluntary Organizations

Diversions of Charitable Assets: Crimes and Punishments in Canada

Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law

Share Capital Social Clubs as NPOS: Issues to Consider

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Will include presentations by the Director General and the Director of Policy and Communications, Charities Directorate, Canada Revenue Agency. See Upcoming Events for registration details.

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RECENT PUBLICATIONS AND NEWS RELEASES

September 16, 2004, Draft Amendments to the *Income Tax Act* – A Series of Four Bulletins

On September 16, 2004, the Department of Finance released draft amendments to the *Income Tax Act* (the “Act”) that, when adopted, will implement the initiative of the Federal Government in rewriting the rules concerning the taxation and administration of charities as set out in the Federal Budget announced on March 23, 2004 (“the 2004 Budget”). In general, these initiatives include changes to the Act in the following areas:

- ◆ No trading in charitable donations;
- ◆ New intermediate sanctions and related matters, such as the transfer of assets upon revocation of charitable status and new rules regarding the annulment of registered charities;
- ◆ New appeal regime for registered charities, including a new internal reconsideration process and the appeal of taxes and penalties to the Tax Court of Canada;
- ◆ Transparency and accessibility of information concerning registered charities, including release of more information to the public concerning registered charities and organizations that are denied registration, inclusion of more information on official tax receipts, and increased information on the website of Canada Revenue Agency; and
- ◆ New disbursement quota rules.

Since the changes to the Act that would give effect to the above are voluminous, these proposed amendments are covered in a series of four *Charity Law Bulletins*, three of which are reported in this update. It is important to note that the proposals set out in the 2004 Budget, which were commented on in *Charity Law Bulletin* No. 41 dated March 30, 2004, should be read in addition to the February 27, 2004 revised draft technical amendments, which were commented on in *Charity Law Bulletin* No. 40 dated March 29, 2004, as well as in a paper by the authors entitled “Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts (current to March 1, 2004).”

Intermediate Penalties and Sanctions in September 16, 2004, Draft Amendments to the *Income Tax Act*

by Theresa L.M. Man, and Terrance S. Carter in *Charity Law Bulletin* No. 54, October 29, 2004.

The first in the series of *Charity Law Bulletins* on the September 16, 2004, Draft Amendments to the *Income Tax Act*, this *Charity Law Bulletin* summarizes only those proposed amendments that relate to intermediate sanctions.

Read More:

[PDF] www.carters.ca/pub/bulletin/charity/2004/chylb54.pdf

[WEB] www.carters.ca/pub/bulletin/charity/2004/chylb54.htm

Revocation and Annulment of Registered Charities in September 16, 2004, Draft Amendments to the *Income Tax Act*

by Theresa L.M. Man, and Terrance S. Carter in Charity Law Bulletin No. 55, October 30, 2004.

The second in the series of *Charity Law Bulletins* on the September 16, 2004, Draft Amendments to the *Income Tax Act*, this *Charity Law Bulletin* provides a commentary on the amendments to the Act in relation to revocation and annulment of registered charities.

Read More:

[PDF] www.carters.ca/pub/bulletin/charity/2004/chylb55.pdf

[WEB] www.carters.ca/pub/bulletin/charity/2004/chylb55.htm

Trading of Charitable Donations, Appeal Regime, and Transparency and Accessibility of Information in September 16, 2004, Draft Amendments to the *Income Tax Act*

by Theresa L.M. Man, and Terrance S. Carter in Charity Law Bulletin No. 56, October 31, 2004.

The third in a series of *Charity Law Bulletins* on the September 16, 2004, Draft Amendments to the *Income Tax Act*, this *Charity Law Bulletin* provides a commentary on the amendments to the Act that would give effect to the following proposals set out in the 2004 Budget:

- ♦ No trading in charitable donations;
- ♦ New appeal regime for registered charities, including a new internal reconsideration process and the appeal of taxes and penalties to the Tax Court of Canada; and
- ♦ Transparency and accessibility of information concerning registered charities, including release of more information to the public concerning registered charities and organizations that are denied registration, inclusion of more information on official tax receipts, and increased information on the website of Canada Revenue Agency.

Changes to the Act in relation to new disbursement quota rules will be commented upon in the fourth *Charity Law Bulletin* in this series to be posted next month at www.charitylaw.ca.

Read More:

[PDF] www.carters.ca/pub/bulletin/charity/2004/chylb56.pdf

[WEB] www.carters.ca/pub/bulletin/charity/2004/chylb56.htm

Highlights of the National Survey of Nonprofit and Voluntary Organizations

by Terrance S. Carter and Nancy E. Claridge in *Charity Law Bulletin No.57, October 31, 2004.*

“Statistics Canada’s new report, *Cornerstones of the Community: Highlights of the National Survey of Nonprofit and Voluntary Organizations*, is the first comprehensive study of nonprofit and voluntary organizations in Canada. Based on information collected in 2003 for the National Survey of Nonprofit and Voluntary Organizations, which surveyed 13,000 incorporated nonprofit organizations and registered charities, the report adds substantially to our understanding of the organizations operating in Canada; the areas in which they operate; the financial and human resources they rely on; regional variations; and the challenges faced by nonprofit and voluntary organizations in fulfilling their missions.” The survey provides critical baseline information that will enable the voluntary sector to focus more attention on areas where organizations need help to improve their capacity to fulfill their missions and meet their objectives. This *Charity Law Bulletin* will review the results of the survey.

Read More:

[PDF] www.carters.ca/pub/bulletin/charity/2004/chylb57.pdf

[WEB] www.carters.ca/pub/bulletin/charity/2004/chylb57.htm

Diversions of Charitable Assets: Crimes and Punishments in Canada

by Terrance S. Carter for the New York University School of Law National Center on Philanthropy and the Law Conference, October 28-29, 2004.

This paper is intended to provide a selective overview of legal issues involving the diversion of charitable assets and related misuse, sanctions and enforcement in Canada. The commentary provided in this paper spans a multitude of legislative, common law and policy directives in the Canadian context with regard to charitable assets that are diverted from their charitable purposes. Diversions of charitable assets can be intentional as well as unintentional, and can involve employees, volunteers, and officers, as well as members of the board of directors. This paper also provides a general overview of the responsibility of charities and their boards of directors to oversee charitable property raised from fundraising programs and the proper application of that property to appropriate charitable purposes, ensure the proper administration of donor restricted charitable trusts, protect the intellectual property of a charity, as well as to avoid violations of applicable *Criminal Code* sanctions. This paper also discusses the major initiative by the Government of Canada in rewriting the rules concerning the taxation and administration of charities as it relates to the introduction of new sanctions and penalties. These proposals, as contained in the Federal Budget announced on March 23, 2004 and as reflected in draft legislation released by the Federal Government on September 16, 2004, are the culmination of a decade of discussions between the federal government and the charitable sector in Canada regarding their respective requirements and responsibilities.

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2004/tsc1028b.pdf>

Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law

by Terrance S. Carter for the New York University School of Law National Center on Philanthropy and the Law Conference, October 28-29, 2004.

“This paper examines Canada’s recent legislative initiatives to combat terrorism and their impact on Canadian charities and those who advise them. The paper will demonstrate that recent anti-terrorism legislation directly affects many Canadian charities and their activities both inside and outside Canada. Charitable activities that were until recently thought to be commonplace and uneventful may now lead to a charity becoming susceptible to criminal charges for having facilitated “terrorist activities” or for supporting “terrorist groups.” This, in turn, could result in the charity losing its charitable status and its directors being exposed to personal liability. In addition, financial transactions involving charities may lead to allegations of terrorist financing or to the surveillance and monitoring of a charity’s financial activities. Lawyers handling transactions on behalf of charitable clients or on behalf of estates dealing with charities may also find themselves in situations involving a legal duty to report under the new money laundering legislation.”

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2004/tsc1028a.pdf>

Share Capital Social Clubs as NPOS: Issues to Consider

by Theresa L.M. Man and Terrance S. Carter for the Ontario Bar Association Seminar on Legal Issues of Charitable and Not-for-Profit Organizations, October 27, 2004.

“There are many “social clubs” in Ontario, which term, for the purposes of this paper, is meant to include clubs such as country clubs, golf clubs, tennis clubs, flying clubs, curling clubs, bowling clubs, ski clubs, lawn bowling clubs, boating clubs, yacht clubs, swimming clubs, soccer clubs, badminton clubs, recreational clubs and fraternal clubs, etc. Some of these clubs are organized as share capital corporations under the *Business Corporations Act* (Ontario).” “Often, the historical reason for structuring social clubs as share capital corporations has arisen because of a need to raise funds for capital and operational needs for the clubs.” “However, there are a number of unique issues faced by social clubs that operate as NPOs but have decided for various historical reasons to utilize a public share capital corporation structure as their corporate vehicle.” This paper discusses the legal issues that share capital social clubs need to consider.

Read More:

[PDF] <http://www.carters.ca/pub/article/charity/2004/tlmtsc1027.pdf>

IN THE PRESS

Legal Liabilities in Fundraising: Complying with anti-terrorism legislation is another challenge, by Terrance S. Carter - The tenth in a series of articles providing a practical overview of legal risks associated with charitable fundraising in Canada. *Canadian Fundraiser Vol. 14 No. 20*. October 31, 2004.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=1507>

Charitable Thoughts recently published "Charities and the GST / HST – Part I" by Terrance S. Carter assisted by Nancy E. Claridge (Vol. 8 No. 2, October 2004).

Canadian Fundraiser eNews reviews *Charity Law Bulletin* No. 53 "Cy Pres Granted to Enable Charitable Trust to Meet Disbursement Quota," by Terrance S. Carter and Nancy E. Claridge, in its article entitled "Disbursement Quota - Lesson: make sure trust terms are broad enough to permit change" (Vol. 14 No. 20, October 31, 2004).

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=1509>

Charity Village recently published "Supreme Court of Canada Adopts Broad View of Religious Freedom" by Terrance S. Carter and Nancy E. Claridge as a featured article (October 12, 2004).

[Link] <http://www.charityvillage.com/cv/research/rlegal20.html>

Christian Legal Journal reproduced *Church Law Bulletin* No. 5, entitled "Supreme Court of Canada Adopts Broad View of Religious Freedom" by Terrance S. Carter (Fall 2004).

Legal Liabilities in Fundraising: Own securities can be source of funds, undertaken correctly, by Terrance S. Carter - The ninth in a series of articles providing a practical overview of the legal risks associated with charitable fundraising in Canada. *Canadian Fundraiser Vol. 14 No. 19*. October 15, 2004.

[Link] <http://www.canadianfundraiser.com/newsletter/article.asp?ArticleID=1492>

The Philanthropist recently published "Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law" by Terrance S. Carter. (Vol. 19 No. 1, September 2004).

[Link] <http://www.carters.ca/news/2004/Philanth/vol19no1.pdf>

RECENT EVENTS AND PRESENTATION MATERIALS

Carter & Associates is pleased to welcome two new associates.

Suzanne E. White, B.A., LL.B., Ontario Bar, 2004, Charity and Not-for-Profit Law, and litigation.

U. Shen Goh, LL.B., LL.M., Ontario Bar, 2004, Trade-marks, Privacy and Information Protection.

Donald J. Bourgeois has recently been appointed to the Liability Working Group of the Insurance Bureau of Canada and Voluntary Sector Forum.

Jane Burke-Robertson will be teaching a course on the law of charities and not-for-profit organizations at the Faculty of Law, University of Ottawa, in the Winter/Spring 2005 term.

Terrance S. Carter has recently been appointed to the Canadian Bar Association's Legislation and Law Reform Committee reviewing Canada's anti-terrorism legislation.

New York University School of Law, National Center on Philanthropy and the Law invited Terrance S. Carter to present the following papers at their conference, "Diversions of Charitable Assets: Misuse, Sanctions & Enforcements," on October 28-29, 2004.

"Charities and Compliance with Anti-Terrorism Legislation: The Shadow of the Law"

[Paper] <http://www.carters.ca/pub/article/charity/2004/tsc1028a.pdf>

"Diversions of Charitable Assets: Crimes and Punishments in Canada"

[Paper] <http://www.carters.ca/pub/article/charity/2004/tsc1028b.pdf>

Ontario Bar Association Charity & Not-for-Profit Seminar "Apples, Oranges or Lemons? – Legal Issues Arising in Form, Function and Fundraising of Charitable and Not-for-Profit Organizations" was held in Toronto, Ontario, October 27, 2004, with Terrance S. Carter and Theresa L.M. Man presenting on "Share Capital Social Clubs as NPOs."

[Paper] <http://www.carters.ca/pub/article/charity/2004/tlmtsc1027.pdf>

[Web] <http://www.carters.ca/pub/seminar/charity/2004/tlmtsc1027.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2004/tlmtsc1027.pdf>

Institute of Chartered Accountants of Ontario (Toronto Branch) - Director & Officer Liability & Beyond was held in Toronto, Ontario, on October 22, 2004, with Terrance S. Carter presenting on the following topics;

"The Legal Duties of Directors of Charities and Not-for-Profits",

"Good Governance in Meeting the Duties of Directors of Charities and Not-for-Profits",

"Due Diligence in Avoiding Risks for Directors of Charities and Not-for-Profits",
"How to Avoid Liability in Fundraising", and
"Recent Changes to the *Income Tax Act* and Policies Relating to Charities and Charitable Gifts".

Senior Estates & Trusts Practitioners' Forum was held on October 18, 2004 in Cambridge, Ontario with the following presentations:

"Changes to the Income Tax Act and Policies Affecting Charities," by Terrance S. Carter, and
[PDF] <http://www.carters.ca/pub/seminar/charity/2004/tsc1018.pdf>
[Web] <http://www.carters.ca/pub/seminar/charity/2004/tsc1018.htm>

"Budget Proposals - March 23, 2004," by M. Elena Hoffstein of our affiliated firm Fasken Martineau DuMoulin LLP.
[PDF] <http://www.carters.ca/pub/seminar/charity/2004/meh1018.pdf>

Hospice Association of Ontario 15th Annual Conference was held in Alliston, Ontario, October 16, 2004, with Donald J. Bourgeois presenting "Policy Based Board Governance: What Works and What Doesn't."

[PDF] <http://www.carters.ca/pub/seminar/charity/2004/djb1016.pdf>
[Web] <http://www.carters.ca/pub/seminar/charity/2004/djb1016.htm>

UPCOMING EVENTS AND PRESENTATIONS

The 2004 Annual Church & Charity Law Seminar hosted by Carter & Associates will be held on November 10, 2004, in Toronto, Ontario, and will include presentations by the both the Director General, Elizabeth Tromp, and the Director of Policy and Communications, Terry DeMarch, from the Charities Directorate, Canada Revenue Agency, among others. The seminar is designed to provide practical information to assist churches and charities in understanding and complying with recent developments in the law and has been held annually since 1994. Last year more than 550 people were in attendance.

[PDF] Brochure and Registration form - www.carters.ca/pub/seminar/notice/2004/brochure-web.pdf
[Web] Brochure - <http://www.carters.ca/pub/seminar/chrchlaw/2004/brochure.htm>
[PDF] Registration form - <http://www.carters.ca/pub/seminar/chrchlaw/2004/register.htm>

Niagara Community Foundation 2004 Journeys in Charitable Giving is to be held in Thorold, Ontario, on November 17, 2004, with Terrance S. Carter presenting "Looking a Gift Horse in the Mouth – Legal Liabilities in Fundraising, including Testamentary Gifts."

See link below for details.

http://www.niagaracommunityfoundation.org/subpages/mr_2004.html

Brantford General Hospital Foundation Seminar is being held in Brantford, Ontario, on November 17, 2004, with Terrance S. Carter presenting “Looking a Gift Horse in the Mouth – The Do’s and Don’ts of Fundraising.”

See link below for details.

http://www.bchsys.org/int_html/BGHEvents.html

Institute of Chartered Accountants of Ontario - Director & Officer Liability & Beyond to be held in London, Ontario, on November 26, 2004, and in Ottawa, Ontario, on December 7, 2004, with Terrance S. Carter presenting on the following topics;

"The Legal Duties of Directors of Charities and Not-for-Profits",

"Good Governance in Meeting the Duties of Directors of Charities and Not-for-Profits",

"Due Diligence in Avoiding Risks for Directors of Charities and Not-for-Profits",

"How to Avoid Legal Liability in Fundraising", and

"Recent Changes to the Income Tax Act and Policies Relating to Charities and Charitable Gifts".

See link below for details.

<https://ebusiness.icao.on.ca/eso/source/Calendar/Index.cfm?CFID=356928&CFTOKEN=65230381#21301015>

Philanthropic Foundation Canada is being held in Toronto, Ontario, on December 1, 2004, with Terrance S. Carter presenting “Duties and Obligations of Directors: Basics for Foundations.”

Seventh Annual Estates & Trusts Law Summit, hosted by the Law Society of Upper Canada, is being held in Toronto, Ontario, on December 1, 2004, with Terrance S. Carter presenting “Essential Recent Developments in Charity Law.”

See link below for details.

<http://ecom.lsuc.on.ca/index.html?cle/dates/2004/alldates2004.jsp>

Association of Fundraising Professionals 2004 Congress is being held in Toronto, Ontario, on December 2, 2004, with lawyers from Carter & Associates and our affiliated firm Fasken Martineau DuMoulin LLP presenting on the following topics:

“Proposed New Tax Rules Affecting Fundraising,” by Terrance S. Carter;

“Proposed 2004 Budget Provisions Affecting Charitable Giving,” by M. Elena Hoffstein;

“New Privacy Legislation and its Impact on Fundraising,” by Mark J. Wong;

“Estate Administration Issues with Charitable Gifts,” by M. Elena Hoffstein; and

“Legal Liabilities in Fundraising,” by Terrance S. Carter.

See link below for details.

<http://www.afptoronto.org/congress2004/index.htm>

CONTRIBUTORS



Terrance S. Carter – Practices primarily in the area of Charity and Not-for-Profit Law, Mr. Carter is member of the Charities Advisory Committee and the Technical Issues Committee advising Canada Revenue Agency, as well as a consulting editor of *Charities Law, 2003/2004 Ed.* published by Butterworths, contributing author to Industry Canada’s *Primer for Directors of Not-For-Profit Corporations*, and editor of www.carters.ca, www.charitylaw.ca and www.antiterrorism.ca.



Donald J. Bourgeois – Counsel to Carter & Associates 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 Butterworth.



M. Elena Hoffstein – From the affiliated firm, Fasken Martineau DuMoulin LLP - Toronto office, Ms. Hoffstein practices in the area of Charity and Not-for-Profit Law and has been ranked by LEXPERT as one of the most frequently recommended Toronto private client practitioners and as one of the top 500 lawyers in Canada. Ms. Hoffstein was also a consulting editor of *Charities Law, 2003/2004 Ed.* published by Butterworths



Theresa L.M. Man – Practices in charity and not-for-profit, real estate, corporate and commercial law, with particular emphasis surrounding tax issues. Mrs. Man is a regular speaker at the annual *Church & the Law™* Seminar and has also written on various legal topics for *The Lawyers Weekly*, *Chinese Christian Herald Crusades*, *Charity Law Bulletin* and www.charitylaw.ca.



Nancy E. Claridge – A Third Year student at Osgoode Hall Law School, Ms. Claridge is a Senior Editor of the Law Journal and Co-Editor-in-Chief of the *Obiter Dicta* newspaper. After obtaining her Masters degree in Political Science, she spent several years developing online Canadian legal databases for LexisNexis Canada, and continues to publish in the areas of legal research and personal injury law. Nancy was a summer student at Carter and Associates and will return for her articles.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

Since publishing the revised version of “**Looking a Gift Horse in the Mouth: Avoiding Liability in Fundraising**” in April 2004, we have amended the relevant sections to include reference to the new *Financial Institutions Act* Regulation 219/2002, which was put into force in British Columbia on July 26, 2002, as well as a Competition Bureau publication entitled “Misleading Advertising Guidelines.” The most recent edition of “Looking a Gift Horse in the Mouth: Legal Liabilities in Fundraising – Revised November 4, 2004,” has been posted to our website at <http://www.carters.ca/pub/article/charity/2004/tsc0416.pdf>. Changes from the previous edition can be found on pages 77 through 79, 85 to 86 and 120.

Charity Law Bulletin No. 49, previously entitled “Ontario Court of Appeal Affirms Unenforceability of Pledges,” is now entitled “Ontario Superior Court of Justice Reaffirms Unenforceability of Pledges.” Quicklaw has recently confirmed that the case cited as an appeal of the trial decision actually refers to a related proceeding for the assessment of costs, and not the merits of the decision. We thank Timothy Pinos of Cassels Brock & Blackwell LLP, who was counsel on this matter, for notifying us of this discrepancy.

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