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**CHARITY LAW 2008 – THE YEAR IN REVIEW**

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**A. INTRODUCTION**

The charitable sector in Canada has seen a number of important legislative, regulatory and common law developments in 2008 which have significantly impacted how charities operate in Canada and abroad. This *Charity Law Bulletin* provides a brief summary of some of the more important of these developments, including recent changes under the *Income Tax Act*<sup>1</sup> (“ITA”), new policies and publications from the Charities Directorate of the Canada Revenue Agency (“CRA”), select federal and provincial legislative issues affecting charities, as well as a selection of some of the more significant court decisions during the past year.

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\* During the last 12 months, various lawyers at Carters Professional Corporation (Terrance S. Carter, Jane Burke-Robertson, Karen J. Cooper, Theresa L.M. Man, Jacqueline M. Demczur, Esther S.J. Oh, and Nancy E. Claridge) published numerous articles in *Charity Law Bulletins* and *Charity Law Updates* (available at [www.charitylaw.ca](http://www.charitylaw.ca)), as well as *The Lawyers Weekly*, *Charitable Thoughts* (Ontario Bar Association), *Canadian Fundraiser*, *The Bottom Line*, and *International Journal of Civil Society Law*, *The Globe and Mail*, *Good Times Magazine*, *Bar-Ex News*, *The Ottawa Citizen*, *Linex Legal*, and *Inside Internal Control*. Portions of these previous articles have been incorporated into this Bulletin as a compilation, and as such, the authors would like to acknowledge these contributions by the other mentioned authors at Carters. The authors would also like to acknowledge Pamela Shin, articling student at Carters, for her assistance in the compilation and editing of this *Charity Law Bulletin*, as well as prior articling students Derek B. Mix-Ross and Kimberly A. LeBlanc, and Sean S. Carter, articling student at Fasken Martineau DuMoulin, for their assistance with the various excerpted articles.

<sup>1</sup> R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) as amended.

## B. RECENT CHANGES, RULINGS AND INTERPRETATIONS UNDER THE *INCOME TAX ACT*

### 1. 2008 Federal Budget Passed as Bill C-50<sup>2</sup>

Following the release of the federal budget on February 26, 2008, some of the proposals contained in the federal budget were implemented by the enactment of Bill C-50, the *Budget Implementation Act, 2008*, which received Royal Assent on June 18, 2008. Certain proposals contained in the federal budget that relate to charities were contained in Bill C-50, including extending the capital gains tax exemption for certain donations of listed securities to certain exchangeable shares and partnership interests, and providing tax incentive for donations of medicines benefitting recipients in developing countries. The proposed changes to the excess business holding rules contained in the 2008 federal budget were not contained in Bill C-50. Instead, on July 14, 2008, the Minister of Finance released for consultation draft legislative proposals to implement these proposed changes. A Notice of Ways and Means Motion to implement these proposed changes was tabled in Parliament on November 28, 2008. Since Parliament was prorogued on December 4, 2008, a new motion will need to be introduced when Parliament is in session again, which is scheduled to open on January 26, 2009.

### 2. Bill C-10 Proposed Amendments to the *Income Tax Act* Affecting Charities

Bill C-10 amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003, February 27, 2004, July 18, 2005, November 18, 2006, and October 29, 2007. On September 7, 2008, Bill C-10 died on Order Paper as a result of the dissolution of Parliament. Some of the changes proposed in Bill C-10 involved split-receipting rules, provisions which curtail abusive donation tax shelter schemes, and new definitions for charitable organizations and public foundations (replacing the “contribution test” with a “control test”).

### 3. CRA Rulings on Flow-Through Shares

CRA approved flow-through share (“FTS”) gifting arrangements in the following four recent rulings on February 6, 2008 ruling (2007–0242361R3), May 14, 2008 ruling (2007–0232271R3), and July 23, 2008 (2008–0281941R3 and 2008-0269281R3). Generally, these gifting arrangements included the donation of flow-through shares to a charity and a resource company arranged for a “liquidity provider”

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<sup>2</sup> For more information, see Theresa L.M. Man and Terrance S. Carter, “Federal Budget 2008: Highlights for Charities” in *Charity Law Bulletin No. 135* (February 27, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb135.pdf>.

to purchase the FTS from the charity immediately after the donation (and prior to the completion of the hold period that would otherwise apply). These arrangements provided liquidity to the charity and allowed both the donor and the charity to be certain about the appropriate value for the charity's official donation receipt. In addition, the rulings generally approve of a gifting arrangement that allows for the use of tax expenditure dollars to fund charities and their charitable activities. CRA confirmed that the tax benefits from the renounced exploration expenses on the investment tax credits are not "advantages" for receipting purposes. However, caution is still needed in a number of areas because CRA's position may change if the facts are different.<sup>3</sup> Also, with the downturn in the economy the liquidity providers that facilitated the structure have left the market.

### C. NEW POLICIES AND PUBLICATIONS FROM CANADA REVENUE AGENCY

#### 1. Proposed Guidelines for Research as a Charitable Activity<sup>4</sup>

On January 9, 2008, CRA published the draft policy *Consultation on Proposed Guidelines for Research as a Charitable Activity*<sup>5</sup> ("Proposed Guidelines"). CRA sets out its policy in the Proposed Guidelines pertaining to "the legal and administrative requirements a registered charity is expected to fulfil in order to conduct or fund research as a charitable activity." CRA generally defines research, in the charitable sense, as "the systematic investigation into and study of materials and sources on any non-frivolous subject to discover or improve knowledge." CRA also states that "to be considered charitable, the research must be disseminated and made freely available to others who might want access to it."<sup>6</sup> The Proposed Guidelines apply to charitable organizations with a charitable purpose, as set out in their governing documents, to conduct or fund research in a particular field. In addition, the Proposed Guidelines also apply to charitable organizations that have some other charitable purpose, such as organizations of a hospital or a school, and carry out research as a way of furthering or achieving that purpose.<sup>7</sup> It is not clear at this time when the final guidelines will be issued.

<sup>3</sup> For more information, see Theresa L.M. Man, Karen J. Cooper, and Terrance S. Carter, "Donation Tax Shelters Involving Flow-Through Shares" in *Charity Law Bulletin No. 116* (June 12, 2007) online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb116.pdf>.

<sup>4</sup> For more information on this draft policy, see Terrance S. Carter, and Jacqueline M. Demczur, "Proposed Guidelines for Research as a Charitable Activity" in *Charity Law Bulletin No. 134* (February 26, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb134.pdf>.

<sup>5</sup> Canada Revenue Agency, Consultation Paper, "Consultation on Proposed Guidelines for Research as a Charitable Activity" (9 January 2008), available online at: [http://www.cra-arc.gc.ca/tx/chrts/cnslttns/rsrch\\_gdlns-eng.html](http://www.cra-arc.gc.ca/tx/chrts/cnslttns/rsrch_gdlns-eng.html).

<sup>6</sup> *Ibid.* at para 2.

<sup>7</sup> *Ibid.* at para 3.

2. New CRA Guide on Charitable Work and Ethnocultural Groups<sup>8</sup>

On January 29, 2008, CRA released a new guide to help ethnocultural organizations that want to apply for charitable status. The purpose of the guide, entitled *Charitable Work and Ethnocultural Groups – Information on registering as a charity*<sup>9</sup> (the “Guide”), is to “put important general information together in one place.” The Guide is intended to complement the more detailed information contained in CRA’s Policy Statement CPS-023, *Applicants Assisting Ethnocultural Communities*.<sup>10</sup>

The Guide discusses the role of the Charities Directorate, the steps involved in applying for charitable status, and the requirements an organization must meet in order to qualify as “charitable.” The Guide reiterates much of what is discussed in Policy Statement CPS-023, such as the definition of “Ethnocultural”, the Public Benefit test, and examples of ethnocultural group activities that could qualify as charitable under each of the four heads of charity. Many of the examples provided by the Guide under each heading are already listed in Policy Statement CPS-023. However, the Guide does provide some further guidance on the “advancement of religion” head of charity. It should be noted that, although the Guide states that it is written specifically to assist ethnocultural groups, its contents provide general guidance that will be of assistance to all charities.

3. New CRA Consultation and Proposed Policy on Fundraising<sup>11</sup>

On March 31, 2008, CRA released a consultation paper regarding the preparation of a proposed policy on fundraising by registered charities (“Proposed Policy”). The stated objective of the Proposed Policy is to replace the previous CRA policy statement “Applicants that are Established to Hold Periodic Fundraisers” and to provide all registered charities with information pertinent to the use of resources for fundraising and the limits imposed by law. Specifically, the Proposed Policy aims to assist charities by explaining how to distinguish between fundraising and other expenditures, clarifying how to classify and report activities intended to both raise funds and advance charitable programming, explaining when

<sup>8</sup> For more information, see Terrance S. Carter, “New CRA Guide on Charitable Work and Ethnocultural Groups”, in *Charity Law Bulletin No. 137* (March 28, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb137.pdf>.

<sup>9</sup> Canada Revenue Agency, Guide, “Charitable Work and Ethnocultural Groups – Information on registering as a charity” (29 January 2008), available online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/thn-eng.html>.

<sup>10</sup> Canada Revenue Agency, Policy Statement, “Applicants Assisting Ethnocultural Communities” (30 June 2005), available online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-023-eng.html>.

<sup>11</sup> For more information on the Proposed Policy, see Theresa L.M. Man and Terrance S. Carter, “Be Careful What You Ask For: CRA Proposed Policy on Fundraising”, in *Charity Law Bulletin No. 142* (August 5, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb142.pdf>.

fundraising activities may preclude registration or result in revocation of registration, and explaining what factors are considered by CRA when assessing whether the fundraising undertaken puts a charity's registration status at risk.

Following the release of the Proposed Policy on fundraising on March 31, 2008 CRA released a 30-page background information document on June 26, 2008 providing a detailed explanation of various terms and concepts contained in the Proposed Policy. On December 10, 2008, CRA announced that it expects to have the final version of the revised document up on its website early in 2009.<sup>12</sup>

#### 4. New CRA Policies on the Promotion of Volunteerism<sup>13</sup>

CRA has released a number of new policies which indicate that organizations established to promote volunteerism in the community-at-large through broad-based activities can qualify for charitable registration. CRA's policy position on this issue is set out in the Summary Policy on Volunteerism (CSP-V02)<sup>14</sup> dated May 6, 2008, as well as the Policy Statement entitled "Promotion of Volunteerism" (CPS-025) effective May 1, 2008 (the "Policy").<sup>15</sup>

In articulating its position on the promotion of volunteerism, CRA indicated that the promotion of volunteerism is analogous to other charitable purposes recognized by legal authorities in the United Kingdom, such as the charitable purpose to foster good citizenship. The promotion of industry, commerce, agriculture, horticulture and craftsmanship have been held to be charitable where the organization's mandate was directed to providing a benefit to the general public by enhancing the activity in question, such as providing for greater efficiency and higher standards. CRA notes that given the scope of the voluntary sector as the third major sector of activity in Canada, in addition to the public and private sectors, promoting volunteerism could arguably be compared to promoting industry, trade and commerce for the benefit of the community-at-large.

<sup>12</sup> <http://www.cra-arc.gc.ca/tx/chrts/whtsnw/menu-eng.html>.

<sup>13</sup> For more information on the Policy Statement, see Jacqueline M. Demczur, "Canada Revenue Agency ("CRA") Outlines Policy on Organizations That Promote Volunteerism", in *Charity Law Update*, May 2008 at p. 4, online: <http://www.carters.ca/pub/update/charity/08/may08.pdf> and for more information on the Summary Policy, see Esther S.J. Oh, "New CRA Policies on the Promotion of Volunteerism", in *Charity Law Bulletin No. 140* (July 31, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb140.pdf>.

<sup>14</sup> Canada Revenue Agency, Summary Policy, "Summary Policy on Volunteerism" (6 May 2008), available online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-v02-eng.html>.

<sup>15</sup> Canada Revenue Agency, Policy Statement, "Promotion of Volunteerism" (1 May 2008), available online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-025-eng.html>.

The Policy also emphasizes the importance of volunteerism in Canadian society. In addition, CRA indicates that its position on volunteerism in the Policy is consistent with an international trend being followed by national governments and governmental organizations in recognizing the importance of volunteerism.

5. Final CRA Policy Statement on Umbrella and Title Holding Organizations<sup>16</sup>

On May 6, 2008, CRA released a new policy statement entitled “Guidelines for the Registration of Umbrella Organizations and Title Holding Organizations”<sup>17</sup> (“Guidelines”). The Guidelines replace CRA’s earlier policy statements on similar issues, namely CPS-008<sup>18</sup> and CPS-009<sup>19</sup>, in their entirety. The Guidelines are intended to clarify certain portions of subsection 149.1(1) of the ITA<sup>20</sup>, which sets out the basic framework for the registration of an organization as a charity. Specifically, CRA identifies the following part of this subsection as being most relevant in relation to the Guidelines:

...“charitable” organization means an organization, whether or not incorporated, (a) all of the resources of which are devoted to charitable activities carried on by the organization itself.”<sup>21</sup>

Generally, in order to be registered as a charity under this subsection of the ITA an organization must show that its activities are charitable in the sense understood by law and that those said activities are carried on by the organization itself. However, CRA makes clear that “an organization does not have to work directly with individual charitable beneficiaries in order to be considered to be advancing a charitable purpose.”<sup>22</sup> Rather, it is indicated that CRA “accepts that Umbrella Organizations can advance a charitable purpose by directing their activities at improving and enhancing the charitable activities of other generally community-level organizations.”<sup>23</sup> The activities being carried out by

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<sup>16</sup> For more information, see Jacqueline M. Demczur and Terrance S. Carter, “Update on Umbrella Organizations and Title Holding Organizations: Final Version of CRA’s Policy Recently Released”, in *Charity Law Bulletin No. 141* (August 5, 2008), online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb141.pdf>.

<sup>17</sup> Canada Revenue Agency, Policy Statement, “Guidelines for the Registration of Umbrella Organizations and Title Holding Organization” (6 May 2008), available online at: <http://www.cra-arc.gc.ca/tx/chrts/ply/cps/cps-026-eng.html>.

<sup>18</sup> Canada Revenue Agency, Policy Statement, “Organizations Established to Assist Other Charities CPS-008” (12 January 1996).

<sup>19</sup> Canada Revenue Agency, Policy Statement, “Holding of Property for Charities CPS – 009” (12 March 1996, Revised January 14, 2003).

<sup>20</sup> *Supra* note 1.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Supra* note 17.

<sup>23</sup> *Ibid.*



umbrella organizations are viewed by CRA as being “charitable in so far as [they] contribute to an improvement in the quality of service to the public, as well as increasing the level of service available to the public.”<sup>24</sup> CRA does make it clear that, while the Guidelines anticipate that arrangements will be established whereby a registered charity may work with and through non-charitable entities, registered charities are still prohibited from making gifts of their charitable property to non-qualified donees, as well as operating or using their resources for the private benefit of non-qualified donees.<sup>25</sup>

#### 6. New CRA Draft Policy on Sports and Charitable Registration<sup>26</sup>

Following the Supreme Court of Canada’s decision in *A.Y.S.A. Amateur Youth Soccer Association v. Canada*<sup>27</sup> (“A.Y.S.A.”) in the fall of 2007, CRA’s Charities Directorate released, on May 15, 2008, a draft policy entitled, *Consultation on Proposed Guidelines for Sport and Charitable Registration under the Income Tax Act*<sup>28</sup> (“Draft Policy”). The Draft Policy is intended to consolidate and clarify CRA’s actual practices and interpretations concerning sport activities carried out by registered charities and organizations applying for charitable status.

Generally, organizations applying for charitable registration must pursue purposes that are both charitable at law and for the benefit of the public. The promotion of sports is not currently recognized as an independent charitable purpose in Canada. The nineteenth-century case of *Re Nottage*<sup>29</sup> was the first to decide that there was no common law authority for the proposition that a gift that encourages a sport is charitable, and the courts have since maintained the position, most recently re-affirmed by the Supreme Court of Canada in *A.Y.S.A.*<sup>30</sup>

<sup>24</sup> *Ibid.*

<sup>25</sup> These guidelines were first proposed by CRA in 2005 in the form of a consultation paper entitled “Consultation on Proposed Guidelines for the Registration of Umbrella Organization” For more information, see Terrance S. Carter and Jacqueline M. Connor, “New CRA Policy on Umbrella Organizations”, in *Charity Law Bulletin No. 78* (October 12, 2005), online: <http://www.carters.ca/pub/bulletin/charity/2005/chylb78.pdf>

<sup>26</sup> For more information, See Karen J. Cooper, “CRA Draft Policy on Sports and Charitable Registration”, in *Charity Law Bulletin No. 143* (August 6, 2008), online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb143.pdf>.

<sup>27</sup> *A.Y.S.A. Amateur Youth Soccer Association v. Canada Revenue Agency* (2006), 267 D.L.R. (4th) 724 (F.C.A.).

<sup>28</sup> Canada Revenue Agency, Draft Policy, “Consultation on Proposed Guidelines for Sport and Charitable Registration under the Income Tax Act” (15 May 2008), available online at: <http://www.cra-arc.gc.ca/tx/chrts/cnslttns/sprt-eng.html>.

<sup>29</sup> *Re Nottage*, [1895] 2 Ch. 649.

<sup>30</sup> For commentary on *A.Y.S.A.*, see Karen J. Cooper, Terrance S. Carter, “Supreme Court of Canada Confirms the Common Law With Respect to Charity and Sports Organizations”, in *Charity Law Bulletin No. 126* (October 17, 2007), online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb126.htm>.

Following on the A.Y.S.A. decision, the Draft Policy identifies two potential ways, from CRA's perspective, in which organizations involved in sport activities may be registered as a charity. They are: 1) If the sports activities pursued relate to and support the organization's general charitable purpose(s) and the sports activities are a reasonable means to achieve those purposes; and 2) If the sports activities pursued are incidental in nature, meaning that only a small portion of the organization's total resources' are devoted to the sport activity in question. It is unclear at this time when the final policy will be issued.

7. The Canada Revenue Agency Introduces a New Registered Charity Information Return for Fiscal Periods Ending On or After January 1, 2009<sup>31</sup>

CRA's new Registered Charity Information Return package, which includes Form T3010B (09), Registered Charity Information Return, Form T1235 (09), Directors/Trustees and Like Officials Worksheet, and Form T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations, is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009, only. For fiscal periods ending on or before December 31, 2008, registered charities must continue to use Form T3010A (05), with accompanying Forms T1235 and T1236. Returns filed on the wrong form will be returned with requests to file on the right form. The Registered Charity Information Return is now comprised of a simple core form with topic-related schedules. CRA anticipates that the new form will reduce the filing burden for smaller charities. It will also provide the public with more meaningful information about registered charities, allowing them to make better informed donor decisions.

8. New Position by CRA on the Value of a Donated Life Insurance Policy<sup>32</sup>

CRA's Interpretation Bulletin, IT-244R3 – *Gifts by Individuals of Life Insurance Policies as Gifts*<sup>33</sup> ("IT-244R3"), sets out CRA's previous policy and interpretation of the ITA as it relates to gifts by an individual of a life insurance policy to a registered charity or other qualified donee. Paragraph 3 of IT-244R3 provides that the amount of the gift is equal to the value of the policy (the cash surrender value

<sup>31</sup> All CRA forms and publications are available on the CRA's Web site at [www.cra.gc.ca/tx/chrts/formspubs/menu-eng.html](http://www.cra.gc.ca/tx/chrts/formspubs/menu-eng.html), or by calling 1-800-267-2384.

<sup>32</sup> For more information, see Karen J. Cooper, "New Position by CRA on the Value of a Donated Life Insurance Policy", in *Charity Law Update*, May 2008 at p. 5, online: <http://www.carters.ca/pub/update/charity/08/may08.pdf>.

<sup>33</sup> Canada Revenue Agency, Income Tax Interpretation Bulletin, "Gifts by Individuals of Life Insurance Policies as Gifts" (6 September 1991), available online at: <http://www.cra-arc.gc.ca/E/pub/tp/it244r3/it244r3-e.html>.



of the policy less any outstanding policy loans) and any accumulated dividends and interest. This valuation method has always been inconsistent with the factors listed in an Income Tax Information Circular, IC89-3 – *Policy Statement on Business Equity Valuations*,<sup>34</sup> to be considered in valuing a life insurance policy.

CRA Technical Interpretation (#2008-026709)<sup>35</sup> issued on February 25, 2008 indicates that the following factors should now be considered when determining the fair market value of a gift of life insurance: the health and life expectancy of the insured; any conversion privileges; the replacement value; and any other important policy terms. It is important that this new position be taken into account in the context of paragraph 3 of IT-244R3 when determining the eligible amount of a gift.

#### D. SIGNIFICANT CRA REVOCATIONS INVOLVING TAX SHELTERS

Through its various news releases throughout the year, CRA has been sending a strong reminder to registered charities that it is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter, and investor.<sup>36</sup> The following is a non-exhaustive list of organizations that had their registered status revoked in part because of their participation in a donation tax shelter: Francis Jude Wilson Foundation,<sup>37</sup> Canadian Amateur Football Association,<sup>38</sup> International Charity Association Network,<sup>39</sup>

<sup>34</sup> Canada Revenue Agency, Income Tax Information Circular, “Policy Statement on Business Equity Valuations” (25 August 1989), available online at: <http://www.cra-arc.gc.ca/E/pub/tp/ic89-3/ic89-3-e.html>.

<sup>35</sup> Available only through commercial subscription or direct request to CRA.

<sup>36</sup> For more information, see CRA's Taxpayer Alert, “Warning: Participating in tax shelter gifting arrangement is likely to result in a tax bill!” (13 August 2007), available online at: <http://www.cra-arc.gc.ca/nwsrm/lrts/2007/070813-eng.html>, as well as “Donation Tax Shelters Involving Flow-Through Shares” in *Charity Law Bulletin No. 116* (June 12, 2007), online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb116.pdf>, seminar materials entitled “Donation Tax Shelters & Flow Through Shares” presented by Terrance S. Carter and Theresa L.M. Man on January 29, 2008, and the article entitled “Tax Shelters and Charitable Donations – a Miss-Match” by Theresa L.M. Man, available at [www.charitylaw.ca](http://www.charitylaw.ca).

<sup>37</sup> For more information, see Karen J. Cooper, “Revocation of Francis Jude Wilson Foundation—CRA News Release”, in *Charity Law Update*, March 2008 at p. 5, online: <http://www.carters.ca/pub/update/charity/08/mar08.pdf>. See also the news release at: <http://www.cra-arc.gc.ca/newsroom/releases/2008/mar/nr080305-e.html>.

<sup>38</sup> For more information, see Theresa L.M. Man, “Deregistration of Registered Charities and RCAA Involved With Donation Tax Shelters – Canadian Amateur Football Association”, in *Charity Law Update*, September 2008 at p. 2, online: <http://www.carters.ca/pub/update/charity/08/sep08.pdf>. See also the news release at: <http://www.cra-arc.gc.ca/nwsrm/rlss/2008/m09/nr080903-eng.html>.

<sup>39</sup> For more information, see Karen J. Cooper, “Deregistration of Registered Charities and RCAA Involved With Donation Tax Shelters – International Charity Association Network”, in *Charity Law Update*, September 2008 at p. 2, online: <http://www.carters.ca/pub/update/charity/08/sep08.pdf>.

The Banyan Tree Foundation,<sup>40</sup> Choson Kallah Fund of Toronto,<sup>41</sup> Pinnacle Foundation,<sup>42</sup> and Fondation des Arts H.B. Ltée/H.B. Arts Foundation Ltd.<sup>43</sup> The message is clear that charities that participate in tax shelter programs do so at their peril.

## E. OTHER FEDERAL AND PROVINCIAL LEGISLATION AFFECTING CHARITIES

### 1. First Charge Laid under Canada's Anti-Terrorism Financing Regime<sup>44</sup>

On March 14, 2008, the first person in Canada to be charged under Canada's anti-terrorism financing laws was arrested in New Westminster, British Columbia. The accused, a Toronto area resident, has been charged with committing an offence under section 83.03(b) of the *Criminal Code*,<sup>45</sup> the section that makes it an offence to provide, or make available property or services for terrorist purposes. It is alleged that the accused solicited donations in British Columbia for the World Tamil Movement (WTM), a humanitarian organization, which the police claim is the leading Liberation Tigers of Tamil Eelam ("LTTE") front organization in Canada.

The Canadian government in 2006 designated the LTTE as a 'listed entity' under the amendments to the *Criminal Code* brought about by the Anti-terrorism Act in late 2001. This case represents the first time formal charges have been laid under Canada's sweeping and controversial anti-terrorism financing regime. This case will merit careful attention from charities and not-for-profits, as it highlights the need to take seriously the impact of anti-terrorism financing laws on fundraising and operational procedures.

<sup>40</sup> For more information, see Theresa L.M. Man, "Deregistration of Registered Charities and RCAA Involved With Donation Tax Shelters – The Banyan Tree Foundation", in *Charity Law Update*, September 2008 at p. 3, online:

<http://www.carters.ca/pub/update/charity/08/sep08.pdf>.

<sup>41</sup> For more information, see Theresa L.M. Man, "Deregistration of Registered Charities Involved With Donation Tax Shelters – Choson Kallah Fund of Toronto", in *Charity Law Update*, November 2008 at p. 3, online: <http://www.carters.ca/pub/update/charity/08/nov08.pdf>.

<sup>42</sup> For more information, see Theresa L.M. Man, "Deregistration of Registered Charities Involved With Donation Tax Shelters – Pinnacle foundation", in *Charity Law Update*, November 2008 at p. 4, online: <http://www.carters.ca/pub/update/charity/08/nov08.pdf>.

<sup>43</sup> For more information, see Karen J. Cooper, "CRA Revocations Continue", in *Charity Law Update*, December 2008 at p. 3, online:

<http://www.carters.ca/pub/update/charity/08/dec08.pdf>.

<sup>44</sup> For more information, See Sean S. Carter, "First Charge Laid Under Canada's Anti-Terrorism Financing Regime", in *Charity Law Update*, March 2008 at p. 7, online: <http://www.carters.ca/pub/update/charity/08/mar08.pdf>.

<sup>45</sup> R.S.C. 1985, c. C-46.

2. First Canadian Non-Profit Added to Terrorism List<sup>46</sup>

A growing aspect of the federal government's anti-terrorism initiative is the designation of organizations to a list established under the terrorism provisions of the *Criminal Code*. Until now, the entities on this list have primarily included widely-recognized foreign organizations, such as Hezbollah and Al-Qaeda. However, for the first time since the list was established in 2002, a Canadian non-profit organization, the World Tamil Movement, has been added to the list of over forty entities deemed to have facilitated or been associated with terrorist activities. Both not-for-profit organizations and registered charities, therefore, should take note of the federal government and its regulatory agencies' increasing scrutiny of fundraising activities and their willingness to utilize the considerable enforcement powers afforded to them by Canada's extensive anti-terrorism legislation.

3. Do-Not-Call List, Telemarketing Rules in Effect<sup>47</sup>

On September 30, 2008, the Canadian Radio-television and Telecommunications Commission ("CRTC") launched Canada's National Do-Not-Call List ("National DNC List"), a nationwide registry to assist the public in reducing the number of unsolicited telemarketing calls. Registered charities are among a select list of organizations exempted from the National DNC Rules.<sup>48</sup> Despite this exemption, amendments made to the Unsolicited Telecommunications Rules in May 2008 mean that all telemarketers and clients of telemarketers, including those exclusively making unsolicited telecommunications that are exempt from the National DNC Rules, are required to register with, and provide information to the National DNC List operator (Bell Canada), pay applicable fees that may be charged by the Complaints Investigator, and maintain records on registration and payment. September 30, 2008, also marked the introduction of the new telemarketing rules that apply to all telemarketers, even those exempted under the National DNC Rules. Although the CRTC intended to delegate the

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<sup>46</sup> For more information, see Terrance S. Carter and Sean S. Carter, "First Canadian Non-Profit Added to Terrorism List", in *Anti-Terrorism and Charity Law Alert No. 15* (June 25, 2008), online: <http://www.carters.ca/pub/alert/ATCLA/ATCLA15.pdf>.

<sup>47</sup> For more information, see Nancy E. Claridge, "Do-Not-Call List, Telemarketing Rules in Effect", in *Charity Law Update*, October 2008 at p. 4, online: <http://www.carters.ca/pub/update/charity/08/oct08.pdf>.

<sup>48</sup> For more information, see Terrance S. Carter and Nancy E. Claridge, "Charities, Telemarketing and the National Do Not Call List: An Update on Recent CRTC Changes", in *Charity Law Bulletin No. 119* (July 30, 2007), online: <http://www.carters.ca/pub/bulletin/charity/2007/chylb119.pdf>.

investigation of complaints, it was unable to identify an appropriate third party and will now investigate complaints itself.<sup>49</sup>

4. Introduction of Short-lived New Federal Legislation Governing Non-Share Capital Corporations (Bill C-4)<sup>50</sup>

On December 3, 2008, and one day prior to Parliament being prorogued, Bill C-4, An Act respecting not-for-profit corporations and certain other corporations,<sup>51</sup> received first reading in the House of Commons of Canada before dying on the Order Paper. Bill C-4 was intended to replace Parts II and III of the current Canada Corporations Act,<sup>52</sup> a statute that was first enacted in 1917 and has not been substantively changed since that time, which Parts govern federal non-share capital corporations. This was the third attempt by the Federal Government to reform the Canada Corporations Act, with earlier Bills C-62 (2008)<sup>53</sup> introduced by the Conservatives and C-21 (2004)<sup>54</sup> 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 was largely identical to what was contained in its predecessor, Bill C-62. However, there are a few differences including, but not limited to, clarification of section 154 which deals with the filing of by-laws with the Director of Industry Canada, several changes in relation to Special Act non-share capital corporations and several changes related to the implementation of bijuralism, i.e. the co-existence of two legal systems (English common law and French civil law) in the proposed legislation.

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<sup>49</sup> Both consumers and telemarketers may go to the National Do Not Call List website at: <https://www.lnnte-dncl.gc.ca/index-eng> to register and obtain additional information.

<sup>50</sup> For more information, see Jacqueline M. Demczur, "Introduction of Short-lived New Federal Legislation Governing Non-Share Capital Corporations (Bill C-4)", in *Charity Law Update*, December 2008 p. 2, online: <http://www.carters.ca/pub/update/charity/08/dec08.pdf>.

<sup>51</sup> For more information, see the Bill at [http://www2.parl.gc.ca/content/hoc/Bills/401/Government/C-4/C-4\\_1/C-4\\_1.PDF](http://www2.parl.gc.ca/content/hoc/Bills/401/Government/C-4/C-4_1/C-4_1.PDF).

<sup>52</sup> R.S.C. 1970, c. C-32.

<sup>53</sup> For more information, see Jane Burke-Robertson, "Bill C-62: Changes Afoot for Federal Non-Profit Corporations", in *Charity Law Bulletin No. 139* (June 25, 2008), online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb139.pdf>.

<sup>54</sup> For more information, see Jacqueline M. Connor, Terrance S. Carter, and D. Ann Walters, "New Canada Not-For-Profit Corporations Act and its Impact on Charitable and Non-Profit Corporations", in *Charity Law Bulletin No. 60* (December 30, 2004), online: <http://www.carters.ca/pub/bulletin/charity/2004/chylb60-04.pdf>.

5. Lobbyist Registration Legislation: Impact on Ontario Charities and Non-Profit Organizations<sup>55</sup>

Lobbyist registration legislation has been in place in Canada since the passage of federal lobbyist registration legislation some twenty years ago.<sup>56</sup> The *Lobbyist Registration Act* (“Federal LRA”) was the first Canadian legislation to govern the conduct of lobbyists by requiring them to register and file reports to a lobbyist registry. Ontario was the first Canadian province to regulate lobbying activity and the *Lobbyist Registration Act*,<sup>57</sup> (“Ontario LRA”) was enacted in 1998 with similar provisions and registration requirements to the Federal LRA. Many other provinces have since followed suit and enacted similar legislation.

The *Federal Accountability Act*<sup>58</sup> (“FAA”) was enacted in December 2006 in an effort to improve the transparency of lobbying and the accountability of government decision-making.

The FAA both amended and renamed the Federal LRA and on July 2, 2008, the *Lobbying Act*<sup>59</sup> (“Federal LA”) and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists.

**F. RECENT CASE LAW AFFECTING CHARITIES**

1. Supreme Court of Canada Releases Decision on CRA’s Access to Donor Information<sup>60</sup>

The Supreme Court of Canada (“SCC”) released its judgment on July 31, 2008 in *Redeemer Foundation v. Canada (Minister of National Revenue)*,<sup>61</sup> upholding the Federal Court of Appeal’s (“FCA”) decision by a 4-3 majority. The appellant Foundation, a registered charity, operated a forgivable loan program that financed the education of students at an affiliated college. CRA was concerned that some donations to the program were not valid charitable donations because the donors’ contributions were made solely to finance the education of their own children. CRA requested the

<sup>55</sup> For more information, see Jane Burke-Robertson, “Lobbyist Registration Legislation: Impact on Ontario Charities and Non-Profit Organizations”, in *Charity Law Bulletin No. 147* (October 24, 2008), online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb147.pdf>.

<sup>56</sup> R.S.C. 1985, c.44 (4th supp.) as am. by S.C. 1993, c.12, S.C. 1995, c.12, S.C. 2003, c.10 and S.C. 2004, c.7.

<sup>57</sup> S.O. 1998, c. 27, Sched. C, s. 62.

<sup>58</sup> S.C. 2006, c. 9.

<sup>59</sup> R.S.C. 1985, c. 44 (4th Supp.) as am. by S.C. 2006, c. 9.

<sup>60</sup> For more information, see Karen J. Cooper, “Supreme Court of Canada Releases Decision on CRA’s Access to Donor Information”, in *Charity Law Update*, July/August 2008 at p. 2, online: <http://www.carters.ca/pub/update/charity/08/julaug08.pdf>.

<sup>61</sup> 2008 SCC 46.

donor information, which the Foundation initially provided, but later refused in respect of subsequent taxation years. The Foundation applied for judicial review of the auditor's request for donor information on the basis that the auditor should have followed the process provided for in subsection 231.2(2) of the ITA requiring prior judicial authorization. The reviewing judge declared that the request was improper without prior judicial authorization and that the Minister of National Revenue ("Minister") should be prevented from acting upon the information originally provided to reassess the donors. CRA appealed and the FCA overturned the decision on the basis that there were other provisions in the ITA that authorized the auditor to make the request that he did and to use that information for the purposes of subsequent tax assessments.

The Foundation appealed to the SCC and the appeal was dismissed. The SCC held that the Minister was not required to obtain prior judicial authorization. The Minister was entitled to the donor information through the combined effects of paragraph 230(2)(a) and subsection 231(1) of the ITA. Moreover, the Minister requested that information for a legitimate purpose, which was to investigate the validity of the loan program operated by the Foundation.

## 2. Christian Horizons Decision<sup>62</sup>

On April 28, 2008, the Ontario Human Rights Tribunal (HRTO) released its decision in the case of *Heintz v. Christian Horizons*<sup>63</sup> ("the Decision"). The respondent, Christian Horizons is a charity that required one of its employees (Ms. Heintz) to sign a Lifestyle and Morality Statement, which (among other things) prohibited employees from engaging in homosexual relationships. Heintz identifies herself as a Christian who (during her employment with Christian Horizons) came to an understanding that she is also a lesbian.

Ms. Heintz eventually resigned from her position at Christian Horizons after an encounter with her supervisor who confronted her about her sexual orientation. Although she resigned, representatives of Christian Horizons admitted that she would have been terminated had she not done so. After her resignation, Ms. Heintz filed a human rights complaint with the HRTO.

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<sup>62</sup> For more information, see Terrance S. Carter, "The Christian Horizons Decision: A Case Comment", in *Church Law Bulletin No. 22* (May 28, 2008), <http://www.carters.ca/pub/bulletin/church/2008/chchlb22.pdf>.

<sup>63</sup> 2008 HRTO 22.



Chief Commissioner Barbara Hall asserted what the Decision means for charities' compliance with the *Human Rights Code* (Ontario). She says, "[the case] sets out that when faith-based and other organizations move beyond serving the interests of their particular community to serving the general public, the rights of others, including employees, must be respected."<sup>64</sup> Whether one agrees with her statements or not is open to debate; nevertheless, the Decision highlights the need for charities to consider the human rights implications of their actions and policies.

It should be noted that Christian Horizons, has filed its Notice of Appeal, and as such, any comments on the lasting impact of the decision may be subject to change, depending on the outcome of that appeal.

## G. CONCLUDING COMMENTS

2008 brought a number of significant changes to the area of charity law which will be of particular interest for charities, as well as for their legal counsel. The number of legislative changes, CRA policy initiatives and CRA rulings that have occurred during 2008, as well as the release of numerous significant decisions from the courts, underscore how complicated the law pertaining to charities has become in Canada. It is therefore important for those interested in the sector to keep abreast of developments in the law as they occur.

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<sup>64</sup> Ontario Human Rights Commission, "Tribunal Rules on Employee Lifestyle and Morality Statement," online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/news/heintzhorizons>.