
CHARITY LAW 2009 – YEAR IN REVIEW

*By Terrance S. Carter, Karen J. Cooper and Theresa L.M. Man **

A. INTRODUCTION¹

The charitable sector in Canada has again seen a number of important regulatory and common law developments over the past 12 months at both the federal and provincial level that will have a significant impact on how charities operate in Canada and abroad. To this end, this *Charity Law Bulletin* is intended to provide a brief overview of some of the more important of these recent developments, including changes to the *Income Tax Act*² (“ITA”), new guidance, commentaries and other publications from the Charities Directorate of the Canada Revenue Agency (“CRA”), technical interpretations from CRA, court decisions, as well as other federal and provincial initiatives affecting charities, including the repeal in Ontario of the *Charitable Gifts Act*³ and the changes to the *Charities Accounting Act*.⁴ For those readers who would like

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¹ This *Bulletin* is a shortened and updated version of the paper presented by Terrance S. Carter at the 2009 Law Society of Upper Canada

12th Annual Estates and Trusts Summit, entitled “Charity Law Update for Estates and Trusts Practitioners: The Year in Review” available online: <http://www.carters.ca/pub/article/charity/2009/tsc1112.pdf>.

² R.S.C. 1985, c. 1 (5th Supp.) as amended.

³ R.S.O. 1990, c. C.8.

more details concerning any of the topics discussed below, reference to source documents and other resource materials are included throughout the *Bulletin*.

B. RECENT LEGISLATIVE INITIATIVES UNDER THE INCOME TAX ACT

1. 2009 Federal Budget⁵

Although there has been much activity from CRA over the past year concerning the administration of charities, the 2009 Federal Budget, released on January 27, 2009, was noticeably devoid of any significant legislative developments concerning the regulation of charities with regard to either tax incentives or technical amendments. The exception to this were a few minor amendments with regard to refining provisions concerning the excess business holding rules for private foundations.⁶

Unfortunately, the budget did not provide any direct mechanism to encourage charitable donations through enhanced tax-measures. The charitable sector had been hoping for tax incentives, such as enhanced tax credits, but ended up with only a few sector specific government grants and contributions. Specifically, the budget provided a targeted, two-year fund of \$60 million to support infrastructure-related costs for local and community cultural and heritage institutions.

2. Possible Disbursement Quota Reform⁷

In an attempt to motivate discussions concerning an alternative regime to the confusion surrounding the current disbursement quota calculation, the Charity and Not-For-Profit Law Section of the Canadian Bar Association submitted a concept paper to the Department of Finance on July 20, 2009, as part of a submission regarding the upcoming 2010 Federal Budget. While the regulatory objectives of ensuring that current gifts are disbursed and that charities do not accumulate income or defer capital gains forever are important, the arbitrary 80% and 3.5% disbursement quotas are not efficient means of

⁴ R.S.O. 1990, c. C.10.

⁵ For more information, see Terrance S. Carter and Karen J. Cooper, "Federal Budget 2009: Grants, Contributions and Earmarks, but no New Tax Incentives" in *Charity Law Bulletin* No. 156 (January 30, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb156.pdf>.

⁶ The excess business holding rules were introduced in the 2007 Federal Budget, which extended the elimination of the capital gains tax on gifts of publicly listed securities to private foundations. The excess business holding rules are intended to prevent abuse by persons connected with a private foundation who might, by virtue of their and the foundation's combined shareholdings, be able to exercise undue influence for their own benefit.

⁷ For more information, see National Charities and Not-For-Profit Law Section, Canadian Bar Association, "Concept Paper on Reform of the Disbursement Quota Regime", (July 2009), online: <http://www.cba.org/CBA/submissions/pdf/09-40-eng.pdf>.

ensuring that the maximum amount of resources go towards the charitable purposes and activities of charities. The concept paper suggests that the reform of the disbursement quota regime should attempt to better pursue these policy objectives, respect donor restrictions on gifts, allow more flexibility in the timing of expenditures and investment strategies for charities and aim at regulatory simplicity with regard to compliance.

C. NEW GUIDANCE, COMMENTARIES AND OTHER PUBLICATIONS FROM THE CANADA REVENUE AGENCY

1. 3.5% Disbursement Quota Extended to All Charitable Organizations⁸

On November 28, 2008, CRA published a reminder to the charitable sector that for the fiscal period beginning on or after January 1, 2009, the 3.5% disbursement quota is to apply to charitable organizations registered before March 23, 2004. Charitable foundations (both public and private) and charitable organizations registered after March 22, 2004 were already subject to the 3.5% disbursement quota.

The calculation of the 3.5% disbursement quota is based on the average value of property owned by the charity, which was not used directly in charitable activities or administration, in the 24 months before the beginning of the fiscal period in question.⁹ For charitable organizations registered before March 23, 2004, they must know that value for 2007 and 2008 when calculating the 3.5% disbursement quota for the 2009 fiscal year. However, if the average value of the charity's property not used for charitable activities or administration is \$25,000 or less, the charity does not have to calculate the 3.5% disbursement quota.

2. Introduction of New T3010B Annual Information Return

On February 20, 2009, CRA released online the new form T3010B, which is the new annual information return for registered charities that is to be used for fiscal periods ending on or after January 1, 2009. The new T3010B form is CRA's response to many requests from registered charities to simplify the information return and reduce the filing burden for small charities that may have limited

⁸ For more information, see Terrance S. Carter, "CRA Releases Publication Outlining Important Changes for Registered Charities" in *Charity Law Bulletin* No. 154 (January 24, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb154.pdf>.

⁹ For more information, see Theresa L.M. Man, "Calculation Of 3.5% Disbursement Quota For All Registered Charities" in *Charity Law Bulletin* No. 150 (December 18, 2008) online: <http://www.carters.ca/pub/bulletin/charity/2008/chylb150.pdf>.

resources for addressing administrative requirements. Most importantly, the simplified financial information sections will be a welcome development for eligible smaller charities. While the new form is anticipated to generally benefit smaller charities, the form is also designed to require additional information from larger charities, which will likely be filling in more information than they did in the previous form.

In order to address other provisions concerning donors under the ITA, as amended by Bill C-25,¹⁰ an important addition to the new form now includes a question to determine if the charity received a donation valued at \$10,000 or more from a donor who was not a resident in Canada and was not: a Canadian citizen; employed in Canada; carrying on a business in Canada; or has disposed of taxable Canadian property. If such a donation was received, then the charity must provide information (which the CRA considers confidential) concerning the donor and the amount donated. Charities will need to ensure that they have the requisite information from non-resident donors to satisfy these reporting requirements. Obtaining this information from donors may be difficult given the fact that Bill C-25 also provides that the information can be shared with CSIS, the RCMP, as well as foreign governments and agencies.

3. CRA Introduces Anti-Terrorism Checklist¹¹

On March 29, 2009, CRA released its long-awaited Checklist for Charities on Avoiding Terrorist Abuse (the “Checklist”),¹² a checklist that is intended to help Canadian charities identify vulnerabilities to terrorist abuse and develop good management practices. CRA indicates that the checklist is based on international and domestic concerns, experience and guidance, and is not meant to be a comprehensive guide. Rather, it is intended to help Canadian registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals.

¹⁰Bill C-25, *An Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act* (“Bill C-25”), which received Royal Assent on December 14, 2006, expanded the definition of designated information under the *Proceeds of Crime Act* to include “the name, address, electronic mail address and telephone number of each partner, director or officer” of the charity and “any other similar identifying information.” Under the Bill C-25 amendments, the expanded designated information could also be disclosed to the Canada Border Services Agency, CSIS and Communications Security Establishment.

¹¹ For more information see Terrence S. Carter and Nancy E. Claridge, “CRA’s New Anti-Terrorism Checklist – A Step in the Right Direction” in *Anti-Terrorism and Charity Law Alert* No. 17 (April 29, 2009) online:

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

¹² Available at <http://www.cra-arc.gc.ca/tx/chrts/chcklsts/vtb-eng.html>.

While the introduction of the checklist is certainly a step in the right direction in recognizing the need to provide guidance to the Canadian charitable sector, a review of the checklist suggests that CRA may not have gone far enough in providing the necessary practical guidance. Canadian charities deserve comprehensive guidelines and guidance from CRA that does not force the charity to reconcile multiple international standards in order to comply with Canadian anti-terrorism legislation in a vacuum.

4. CRA Releases Policy Commentary on Requests for Disbursement Quota Relief¹³

On April 6, 2009, CRA released a policy commentary (CPC-029) regarding requests for disbursement quota relief. CRA describes the disbursement quota as the “the minimum amount that a registered charity must spend each year on charitable activities carried on by it or on gifts to qualified donees.” Subsection 149.1(5) of the ITA states that a charity may apply for relief from its disbursement quota requirements. If granted, the relief would be applicable to the particular tax year only.

In deciding whether or not to grant relief, CRA will require confirmation that the charity: is not in a shortfall situation simply because of a miscalculation of its disbursement quota; has no available excesses; has disbursed all available income; and is doing everything in its power to meet its disbursement quota, such as drawing upon unrestricted funds to meet the quota.¹⁴

5. Clarification by CRA on Enduring Property for Purposes of the Disbursement Quota¹⁵

On April 20, 2009, CRA released a document entitled “Treatment of Enduring Property for Purposes of the Disbursement Quota”¹⁶ setting out answers to nine frequently asked questions on this issue. The term “enduring property” (i.e., 10 year gifts, bequests, testamentary gifts of RRSPs and life insurance, and inter-charity transfers of such property, and 5 year inter-charity gifts to charitable organizations are all excluded from the 80% disbursement quota) was introduced in the 2004 Federal Budget (which became law in 2005) and has had a substantial impact on the calculation of the disbursement quota of charities and the ability of charities to encroach on ten-year gifts to meet its 3.5% disbursement

¹³ Excerpted from Terrance S. Carter, “CRA Policy Commentary on Requests for Disbursement Quota Relief” in *Charity Law Update* (April 2009) online: <http://www.carters.ca/pub/update/charity/09/apr09.pdf>.

¹⁴ For more details, see: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cpc/cpc-029-eng.html>.

¹⁵ For more information, see Theresa L.M. Man, “Enduring Property and the Disbursement Quota” in *Charity Law Bulletin* No. 171 (July 29, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb171.pdf>.

¹⁶ Available on CRA’s website at <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-e10-fqs-eng.html>.

quota.¹⁷ Since the introduction of this term and other related rules on the disbursement quota, there have been many questions that the charitable sector has raised concerning the treatment of enduring property for disbursement quota purposes, which CRA attempted to answer in this document.

6. CRA Releases a Policy and Guidance on Sports and Charitable Registration¹⁸

On April 30, 2009, CRA released a revised Summary Policy on Sport (CSP-S14), which outlines the requirements for charities engaged in sports to be eligible for charitable status, emphasizing that the promotion of sports is not recognized as being inherently charitable and therefore such organizations must demonstrate how sports carries out their charitable purposes. CRA also released its final form of Guidance on Sports and Charitable Registration (CPS-027) on April 30, 2009, which provides further discussion on how those requirements might be achieved. However, the Guidance does not apply to Canadian amateur athletic associations. The Guidance will be of particular interest to religious charities that conduct sports activities because it specifically states that it must be clear that the sport element of a charity's activities is not a "collateral non-charitable purpose". However, the Guidance does not provide any further elaboration on how a sports activity might become a collateral non-charitable purpose of a religious charity instead of simply being a means to achieve advancement of religion.¹⁹

7. CRA Proposed Guidance on the Protection of Human Rights and Charitable Registration²⁰

On May 8, 2009, CRA released a draft policy document entitled *Consultation on proposed Guidance on the Protection of Human Rights and Charitable Registration*.²¹ The purpose of the draft Guidance is to provide guidelines for determining whether or not an organization that is established to protect human rights can be registered as a charity under the ITA. As such, the draft Guidance will be highly

¹⁷ The 2004 federal budget was released in March 2004. Draft amendments to the *Income Tax Act* (Canada) were released on September 16, 2004, which were revised on December 6, 2004. The proposed amendments were introduced as Bill C-33, which was enacted on May 13, 2005 as the *Budget Implementation Act, 2004, No. 2*. R.S.C. 2005, c. 19.

¹⁸ Excerpted from Terrance S. Carter, "New CRA Summary Policy and Guidance on Sports" in *Charity Law Update*, (May 2009) online: <http://www.carters.ca/pub/update/charity/09/may09.pdf>.

¹⁹ These documents are available through the following links:

Summary Policy: <http://www.cra-arc.gc.ca/tx/chrts/plcy/csp/csp-s14-eng.html>

Guidance: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-027-eng.html>

²⁰ For more information see Terrance S. Carter, "CRA Draft Guidance on the Protection of Human Rights and Charitable Registration" in *Charity Bulletin* No. 166 (May 28, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb166.pdf>.

²¹ Canada Revenue Agency, *Consultation on Proposed Guidance on the Protection of Human Rights and Charitable Registration* (May 6, 2009), online: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cnslttns/ghrg-eng.html>

relevant to human rights organizations that are considering charitable registration and existing charities that engage in the protection of human rights. In general terms, organizations that are seeking to become registered charities must have purposes that are considered, at law, to be charitable and for the benefit of the public. The “protection of human rights” is defined in the draft Guidance as “activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically.” It is expressly stated that the protection of human rights does not include advocacy for new legal rights at any level, both nationally and internationally.

8. CRA’s New Guidance on Fundraising²²

On June 11, 2009, CRA released its much anticipated Guidance (CPS-028): Fundraising by Registered Charities (the “Fundraising Guidance”).²³ The Fundraising Guidance, which includes an additional 23 page document to elaborate on the Guidance, replaces CRA’s previous policy on fundraising (CPS-001) entitled “Applicants that are Established to Hold Periodic Fundraisers.” CRA previously released draft versions of the Fundraising Guidance and additional information entitled “Consultation on Proposed Policy on Fundraising by Registered Charities” and “Background information for Proposed Policy on Fundraising by Registered Charities” in March and June of 2008, respectively.

Given the importance of fundraising to the charitable sector, its release has been closely followed by most stakeholders. While the Fundraising Guidance is clearly a marked improvement over the proposed policy released in March, it will likely prove to be a challenging document for charities and their lawyers and professional accountants to work with. As a result, it may take the charitable sector some time to fully comprehend its implications. Given that the Fundraising Guidance is only intended to constitute a clarification of CRA’s existing position on fundraising, the Fundraising Guidance will apply to audits related to both future and past years. As such, it is important that all registered charities that depend on fundraising, together with their staff, board members and professional advisors, become familiar with the content of the Fundraising Guidance.

²² For more information see Terrance S. Carter, “The Revised CRA Guidance On Fundraising: Improved But Still Challenging” in *Charity Law Bulletin* 169 (June 25, 2009), online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb169.htm>.

²³ The full Guidance can be found online at: <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-028-eng.html>.

9. CRA's Proposed New Guidance for Charities Operating Outside Canada²⁴

On June 30, 2009, CRA released a draft consultation paper entitled "Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities". The proposed Guidance is intended to apply to all activities carried on through intermediaries both outside and within Canada, notwithstanding that the name of the proposed Guidance would suggest otherwise. Highlights of the proposed Guidance include an exception to the requirement for a formal written agreement where the amount disbursed is below a certain threshold, a concrete list of "measures of control" which clarifies CRA's expectations for a charity operating through an intermediary, clarification of compliance with local laws, and elaboration of the forms of intermediary relationship. The proposed Guidance also recognizes the important role that foreign activities play in the Canadian charitable sector.

The proposed Guidance, however, has challenging aspects to it, such as the burdensome requirement that an intermediary produce receipts, invoices and vouchers at the end of a charitable program, even when the charitable program involves utilization of third party contractors. In addition, the "own activities" requirement imposed by CRA unduly restricts Canadian charities' ability to participate in charitable activities overseas. As well, the requirement that books and records be kept in Canada is particularly onerous when the information required by CRA to determine compliance is normally readily available through electronic records. Despite these deficiencies, the proposed Guidance is a welcome improvement over RC4106 and as such would need to be carefully studied by charities and their advisors.

10. CRA Webpages on Specified Gift and Ten-year Gift²⁵

On December 2, 2009, CRA released two new webpages to clarify the meaning of specified gift and 10-year gift.²⁶ CRA explains that a specified gift is a type of inter-charity gift that may affect their disbursement quota requirements. In relation to 10-year gifts, CRA explains that a 10-year gift is a donation made to a registered charity that is subject to a donor's written trust or direction that the gift,

²⁴ For more information, see Terrance S. Carter and Karen J. Cooper, "CRA's Proposed New Guidance For Charities Operating Outside Of Canada" in Charity Law Bulletin No. 172 (July 30, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb172.pdf>.

²⁵ For more information, see Theresa L.M. Man, "Canada Revenue Agency Webpages on Specified Gift and 10-Year Gift" in Charity Law Update (December 2009) online: <http://www.carters.ca/pub/update/charity/09/dec09.pdf>.

²⁶ Online at: <http://www.cra-arc.gc.ca/tx/chrts/prtng/gfts/spcftgft-eng.html> and <http://www.craarc.gc.ca/tx/chrts/prtng/gfts/10gft-eng.html>.

or any property substituted for it, be held by the recipient charity, or another registered charity (if the gift is transferred) for 10 years or more from the date the gift was made.

The webpage regarding 10-year gifts is useful because the webpage sets out sample language for a 10-year gift direction and permission to encroach on the capital for the purpose of meeting the charity's disbursement quota. However, the treatment of 10-year gifts for disbursement quota purposes is much more complicated than the simplified explanation contained on this webpage and it is a concern that the reader may not be aware of the complexities involved and therefore may be misled as a result of the simplified explanation on this webpage.

11. CRA Provides Instructions on Avoiding Improper Receipting²⁷

On December 21, 2009, CRA released Registered Charity Newsletter No. 23, which provides information on proper receipting procedures for registered charities. CRA reminds charities that the ability to provide official donation receipts is a significant tax privilege granted to registered charities and therefore comes with substantial responsibility. In this regard, CRA notes that improper receipting practices can occur where receipts are issued: with inaccurate or missing information; for transactions that do not qualify as a gift; on behalf of another organization; or for an inflated amount. In this Newsletter, CRA sets out a non-exhaustive list of good governance practices a charity could adopt to prevent improper receipts being issued. The board of directors of a registered charity is encouraged to adopt such practices in a code of conduct and to adhere to it at all times. CRA reminds charities that the issuance of donation receipts is central to ensuring that Canadians continue to have confidence when giving to charities.

D. RECENT TECHNICAL INTERPRETATIONS AND COURT DECISIONS UNDER THE *INCOME TAX ACT*

1. Gifts of Marketable Securities – Enduring Property?²⁸

In a technical interpretation dated January 15, 2009, (CRA document #2008-0268731E5), CRA considered whether the donation of marketable securities to a registered charity may be characterized as a gift of enduring property and, if so, would the charity be prevented from disposing of the

²⁷ For more information, see Terrance S. Carter and Karen J. Cooper “Highlights of CRA Registered Charities Newsletter Fall 2009” in *Charity Law Bulletin* No. 186 (January 28, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb186.htm>.

²⁸ Excerpted from Theresa L.M. Man, “Gifts of Marketable Securities – Enduring Property?” in *Charity Law Update* (January 2009) online: <http://www.carters.ca/pub/update/charity/09/jan09.pdf>.

marketable securities and maintaining the substitute property as enduring property (i.e., 10 year gifts, bequests, testamentary gifts of RRSPs and life insurance, and inter-charity transfers of such property, as well as 5 year inter-charity gifts to charitable organizations are all excluded from the 80% disbursement quota). CRA confirmed that gifts of marketable securities will qualify as enduring property if the donor provides written direction at the time of the donation that the securities are to be held by the charity for ten years or longer. Provided that the donor has given the charity permission to dispose of the securities within the 10-year period, property later substituted for the original securities will also be considered enduring property. Charities receiving gifts of marketable securities should ensure that donors include the permission to substitute property at the time of the donation.

2. Gift of Capital Property by Will²⁹

In a technical interpretation dated February 4, 2009, regarding gifts of capital property by will (CRA document # 2008-027364), CRA confirmed that proposed subsections 118.1(5.4) and (6) of the ITA as contained in an earlier version of Bill C-10 will override the application of paragraph 70(5)(a) of the ITA. Proposed subsections 118.1(5.4) and (6) of the ITA provide that where a Canadian resident individual dies making a bequest of a capital property by will to a registered charity and the fair market value ("FMV") of the capital property immediately before the individual's death exceeds its adjusted cost base ("ACB"), the individual's legal representative can designate in the deceased's terminal income tax return an amount between the FMV and the ACB, which will be deemed to be the individual's proceeds of disposition of the capital property and, for the purpose of proposed subsection 248(31) of the ITA, the FMV of the gift. Paragraph 70(5)(a) of the ITA deems each capital property owned by a deceased taxpayer to have been, immediately before his or her death, disposed of by the deceased taxpayer for proceeds of disposition equal to its FMV immediately before his or her death. CRA notes that paragraph 70(5)(a) of the ITA is a general provision and states that it is its view that it is the amount that is designated by the legal representative pursuant to subsection 118.1(6) of the ITA that would be used in calculating the amount of the capital gain arising on the deemed disposition of the gifted property to be included in the individual's final return.

²⁹ Excerpted from Karen J. Cooper, "Gift of Capital Property by Will" in Charity Law Update (March 2009) online: <http://www.carters.ca/pub/update/charity/09/mar09.pdf>.

3. Directed Gift to Municipality³⁰

In a technical interpretation, dated March 16, 2009 (CRA document #2008-030447), CRA considered whether a municipality could issue donation receipts in circumstances where a gift received by the municipality is directed by the donor to a separate non-profit organization. The non-profit organization was responsible for the maintenance of a building on a site owned by the municipality and to which it had been delegated the operation of several municipal programs. CRA indicated that a municipality in Canada is a “qualified donee” and the municipality may issue an official tax receipt for the eligible amount of the gift. Further, CRA indicated that donations can be receipted by a municipality in Canada on behalf of an organization which operates under the authority of the municipality (e.g., a committee established by a municipal bylaw), provided the municipality retains discretion concerning how the donated funds are to be spent. If the municipality is merely collecting funds from donors on behalf of the non-profit organization which is entitled to the property so transferred, the municipality would not be in receipt of a gift and could not issue a donation receipt.

4. CRA Withdraws Compliance Agreement³¹

In the May 20, 2009 decision of *Christ Apostolic Church of God Mission International v. Canada (Minister of National Revenue)*,³² the Federal Court of Appeal held that CRA could withdraw a compliance agreement it had made with the organization in the course of an audit of its charitable status. In general, compliance agreements are agreements that are negotiated between CRA and a registered charity as a result of a charity’s failure to comply with its requirements under the ITA. Typically, a deficiency is identified as a result of a CRA audit, and a compliance agreement provides the charity with a chance to address and correct such non-compliance. The Court’s decision now provides CRA with authority to change a particular sanction from a compliance agreement, which has been signed by both CRA and a registered charity, directly to the revocation of charitable status if it so chooses. More specifically, the decision indicates that a compliance agreement can be unilaterally withdrawn by CRA and, therefore, is obviously not binding on CRA.

³⁰ For more information see Karen J. Cooper, “Directed Gift to Municipality” in Charity Law Update (April 2009) online: <http://www.carters.ca/pub/update/charity/09/apr09.pdf>.

³¹ For more information, see Terrence S. Carter, “Federal Court of Appeal Allows CRA to Withdraw Compliance Agreement,” in *Charity Law Bulletin* No. 170 (July 29, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb170.pdf>.

³² 2009 FCA 162.

5. Tax Court of Canada Denies Leveraged Donation Tax Credit³³

On November 12, 2009, the Tax Court of Canada released its decision in *Maréchaux v. The Queen*.³⁴ The decision is significant because it is one of the first dealing with a leveraged donation gifting arrangement from the donor's perspective. Leveraged cash donations are one form of tax shelter gifting arrangement that has been flagged by CRA. In such arrangements, a taxpayer receives a pre-arranged loan and makes a donation of the loan proceeds plus additional cash to a registered charity. The taxpayer is not at risk for the loan and the charity must use the proceeds in a predetermined manner. CRA has issued several Taxpayer Alerts warning taxpayers that it intends to audit tax shelter gifting arrangements, including leveraged cash donations. Every such audit completed to date has resulted in a reassessment of taxes, plus interest and in some cases CRA has denied the gift completely.

E. OTHER FEDERAL AND PROVINCIAL INITIATIVES AFFECTING CHARITIES

1. Update on New Not-for-profit Canada Corporations Act³⁵

Bill C-4, *An Act respecting not-for-profit corporations and certain other corporations*, received third reading in the Senate on June 23, 2009 and received Royal Assent on the same day. Bill C-4 is intended to replace Parts II and III of the current *Canada Corporations Act*,³⁶ a statute first enacted in 1917 and substantively unchanged since that time, which Parts govern federal non-share capital corporations. This is the fourth attempt by the Federal Government to reform the *Canada Corporations Act*, with the previous Bill C-4 (2008) having died on the order paper in the House of Commons when Parliament was prorogued and earlier Bill C-62 (2008) (introduced by the Conservatives in June 2008) and Bill C-21 (2004) (introduced by the Liberals) each dying on the order paper in the House of Commons when Parliament was dissolved for a general election. In this regard, Bill C-4 provides that certain details will be set out in the regulations, including prescribed time periods, corporate name regulations, options for providing notice of members' meetings, absentee voting and service fees. The provisions of the Bill C-4 are not yet in force and will only come into

³³ For more information, see Karen J. Cooper "Tax Court of Canada Denies Leveraged Donation Tax Credit" in *Charity Law Bulletin* No. 184, (December 18, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb184.pdf>.

³⁴ 2009 TCC 587

³⁵ 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.htm>, which summarizes the earlier Bill C-62. See also Jacqueline M. Demczur and Terrance S. Carter, "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>, which summarizes the earlier Bill C-21.

³⁶ R.S.C. 1970, c. C-32.

force on a day or days still to be fixed by order of the Governor in Council. This is not expected until the regulations proposed by Industry Canada have been approved.³⁷

An analysis of the Bill C-4 is beyond the scope of this *Bulletin*. However, two things should be noted at this time. First, the content of the Bill C-4 is generally similar to the original Bill C-21 introduced in 2004 with certain exceptions. Second, once the Bill C-4 comes into force, all existing federal non-share capital corporations subject to Part II of the *Canada Corporations Act* will be required to apply for continuance under the Bill C-4 within three years of it coming into force.

2. Bill 212, *Good Government Act 2009*, Proposed Reforms to Legislation Concerning Charities

On December 15, 2009 Bill 212, the *Good Government Act, 2009*³⁸ received Royal Assent in the Ontario Legislature. Bill 212 contains significant reforms for the charitable sector in the Province of Ontario. The most important among these changes is the repeal of the *Charitable Gifts Act*, which had limited the ability of charities in Ontario to own more than a 10% interest in a business. Bill 212 also amends the *Charities Accounting Act* so that the repeal of the *Charitable Gifts Act* extinguishes all obligations to dispose of any interest in a business that were in existence at the time of the repeal. This also applies in respect to obligations that came into existence under the *Charitable Gifts Act* at any time before its repeal.

Bill 212 also amends the *Charities Accounting Act*, by expanding the powers of the Ontario Public Guardian and Trustee (“OPGT”) to require documents and make inquiries where an executor or trustee holds a “substantial interest” in an entity, which is defined as being where an executor or trustee holds more than 20% of the voting rights or equity of a corporation through shares. The amended provisions allow the OPGT to apply to the Superior Court of Justice for an order to compel production of documents to provide information regarding the management, operation, ownership or control of the entity.

³⁷ For more information see Jane Burke-Robertson, “Draft Regulations Under the Canada Not-For-Profit Corporations Act” in *Charity Law Update* (October 2009) online: <http://www.carters.ca/pub/update/charity/09/oct09.pdf>.

³⁸ The proposed Bill 212 is available online at: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2235&detailPage=bills_detail_the_bill.

As well, section 8 of the *Charities Accounting Act*, which had permitted the OPGT to vest real property in its name if the real property of a charity had not been used for charitable purposes within 3 years, has been repealed. In its place, a new section 8 has been implemented which provides that a person who holds an interest in real or personal property for a charitable purpose must use the property for the charitable purpose.

Other changes include an amendment to the *Accumulations Act*,³⁹ which adds a section stating that the common law and statutory rules regarding accumulations do not apply and shall be deemed never to have applied to a trust created for a charitable purpose. Lastly, the *Religious Organizations' Lands Act*⁴⁰ is amended to remove the 40 year term limit for which a religious organization may lease land.

3. Ontario Public Guardian and Trustee Releases Advice on Fundraising⁴¹

The OPGT released a bulletin in July 2009 entitled “Charitable Fundraising: Tips for Directors and Trustees” that provides helpful information to directors and trustees of charities in Ontario on conducting charitable fundraising.⁴² The OPGT reminds directors and trustees of Ontario-based charitable organizations that a poorly conducted fundraising program not only damages the reputation of the individual charity, but also brings harm to the sector as a whole, as well as possibly exposing directors and trustees to personal liability. The OPGT also reminds charities that they cannot conduct fundraising activities as a charitable purpose in their own right; charities must be open and transparent about their fundraising activities; costs are to be reasonable and accurately recorded; and directors and trustees in Ontario have a fiduciary duty with regard to their charitable assets, as well as being in compliance not only with the ITA, but also with the *Trustee Act*⁴³ (Ontario) and the regulations under the *Charities Accounting Act* (Ontario).

³⁹ R.S.O. 1990, c. A.5.

⁴⁰ R.S.O. 1990, c. R.23.

⁴¹ For more information see Terrance S. Carter, “Ontario Public Guardian and Trustee Provides Tips on Charitable Fundraising” in *Charity Law Bulletin* No. 176 (September 29, 2009) online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb176.pdf>.

⁴² The full Bulletin can be found online at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/Bulletin-8.asp>, posted in July 2009.

⁴³ R.S.O. 1990, c. T.23.

Taken together with the recent CRA Guidance on Fundraising, the tips on fundraising provided by the OPGT provide a useful resource for directors and trustees in Ontario to ensure their fundraising practices are done in accordance with both federal and provincial requirements.

F. CONCLUSION

As can be seen from the above overview, the past 12 months have seen a significant number of changes with regard to the law of charity at both the federal and provincial level. The broad extent and number of changes that have occurred during the past 12 months 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.