
CHARITY LAW 2010 – YEAR IN REVIEW

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

A. INTRODUCTION

The charitable sector in Canada has again seen a number of important regulatory and common law developments in 2010 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*¹ (“ITA”), new guidance, commentaries and other publications from the Charities Directorate of the Canada Revenue Agency (“CRA”), court decisions, as well as other federal and provincial initiatives affecting charities, including the new *Canada Not-for-profit Corporations Act* and the *Ontario Not-for-profit Corporations Act*. For those readers who would like more details concerning any of the topics discussed below, reference to source documents and other resource materials are included throughout the *Bulletin*.

* Terrance S. Carter, B.A., LL.B., Trade-Mark Agent, is managing partner of Carters Professional Corporation, and counsel to Fasken Martineau DuMoulin LLP on charitable matters. Karen J. Cooper, LL.B., LL.L., TEP, is a partner at Carters Professional Corporation, also practicing charity and not-for-profit law with an emphasis on tax issues. Theresa L.M. Man, B.Sc., M. Mus., LL.B., LL.M., is a partner at Carters Professional Corporation, practicing in the area of charity and not-for-profit law. During the last 12 months, Terrance S. Carter, Theresa L.M. Man, Karen J. Cooper, and other lawyers at Carters Professional Corporation (Specifically, Jacqueline M. Demczur, Jane Burke-Robertson, Esther S.J. Oh, Nancy E. Claridge, Barry W. Kwasniewski, and Ryan M. Prendergast.) have published numerous articles in *Charity Law Bulletins* and in *Charity Law Updates* of the firm (available at www.charitylaw.ca), as well as in *The Lawyers Weekly*, *Charity Talk* (Canadian Bar Association), *Charitable Thoughts* (Ontario Bar Association), *Canadian Fundraiser* and *The Bottom Line*. Portions of these articles have been incorporated into this *Bulletin* as a compilation, and as such, the author would like to acknowledge and thank the other authors at Carters for their contributions. The authors would also like to acknowledge and thank Colin Thurston, Student-at-Law, for his assistance in the compilation and editing of this *Charity Law Bulletin*.

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

B. RECENT LEGISLATIVE INITIATIVES UNDER THE *INCOME TAX ACT*

1. Disbursement Quota Reform under Federal Budget 2010²

The Federal Government's 2010 Budget³ brought in significant reform of the disbursement quota ("DQ") regime that applies to registered charities. Over the years, the DQ has created an unnecessarily onerous administrative burden on registered charities that few charities and their staff have had the ability to comply with, let alone understand.

Following the announcement in the Federal Budget in March 2010, corresponding amendments to the ITA were brought in by Bill C-47, which received Royal Assent on December 15, 2010.

One of the most significant changes is the elimination of the 80% DQ and related concepts, including enduring property (ten-year gifts), capital gains pools and specified gifts. These new changes have greatly simplified the disbursement requirement that registered charities have to comply with. As a result, charities are now only required to meet the 3.5% DQ. In addition, the existing threshold for charitable organizations to which the 3.5% DQ applies is increased from \$25,000 to \$100,000. This means that for charitable organizations, only investment assets over \$100,000 would be subject to the 3.5% DQ. The threshold for charitable foundations remains at \$25,000. The *Income Tax Regulations* have also been revised to reflect calculation of the new disbursement requirements.

Accompanying the changes to the DQ are expanded anti-avoidance provisions, aimed at preventing potential abuses of the 3.5% DQ. These new provisions extend existing anti-avoidance rules to situations where it can reasonably be considered that a purpose of a transaction was to unduly delay or avoid applications of DQ. In addition, a new disbursement requirement was introduced to require 100% of the fair market value of property received from a non-arm's length charity be expended by the recipient charity on charitable activities by the end of the following taxation year (in addition to the recipient charity's 3.5% DQ), unless

² For more information, see Terrance S. Carter and Karen J. Cooper, "Significant Benefit for Charities in 2010 Federal Budget DQ Reform" in *Charity Law Bulletin* No. 197 (March 8, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb197.pdf>.

³ See Department of Finance website at <http://www.budget.gc.ca/2010/plan/anx5-eng.html> for details.

the transferor charity elects that the gift will not count toward satisfying its own 3.5% DQ (“designated gift”).⁴

CRA will be given discretion to exclude accumulated property from the 3.5% DQ, and has discretion to allow charities to accumulate property for a particular purpose, such as a building project. Currently, property accumulated (and income earned) with CRA approval is deemed to have been spent on charitable activities.

These new changes are effective for fiscal years that ended on or after March 4, 2010. The Department of Finance will monitor the effectiveness of CRA’s Fundraising Guidance and take action if needed to ensure its stated objectives are achieved.

These amendments will effectively simplify DQ calculation, and ease the administrative burden for charities. It is for these reasons that the reform of the disbursement quota regime is a change that will be welcomed by charities.⁵ Although the implications of these new rules are still not entirely clear, the simplicity of the new disbursement requirements is certainly a welcomed change.

2. July 2010 Draft Amendments⁶

On July 16, 2010, the Department of Finance released draft legislative proposals to implement outstanding income tax technical measures (the “July 2010 Amendments”).⁷ Included within the July 2010 Amendments are proposed changes that will substantially impact the operations of registered charities in Canada, including changes to the definition of “gift,” split-receipting, designation of charitable organizations and public foundations, revocation of charitable registrations, etc. Many of the proposed changes included in the July 2010 Amendments were first introduced on December 20, 2002. These amendments underwent various incarnations over the years since 2002, with the last version of draft legislation (Bill C-10) died on the Order Paper on September 7, 2008 when Parliament was dissolved after an election was called.

⁴ For more information, see Theresa L. M. Man, “New Changes in Disbursement Quota Rules” in *Charity Law Update* (September 2010) online: <http://www.carters.ca/pub/update/charity/10/sep10.pdf>.

⁵ For more information, see Theresa L. M. Man, “What the Federal Budget Disbursement Quota Reform Will Mean for your Charity” presented at *The 2010 Annual Church & Charity Law Seminar* (November 18, 2010) online: <http://www.carters.ca/pub/seminar/chrchl/2010/tlm1118.pdf>.

⁶ For more information, see Theresa L. M. Man, “Recent *Income Tax Act* Amendments that Affect Charities” in *Charity Law Bulletin* No. 221 (July 29, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb221.pdf>.

⁷ See Department of Finance Canada <http://www.fin.gc.ca/drleg-apl/itaJuly10-eng.asp>.

Although these proposed changes have yet to be enacted into law, many have already been implemented by CRA in their administrative policies. For example, CRA has been enforcing the split-receipting rules since 2002 and has begun reviewing applications for charitable status and for re-designation using the proposed new definitions for charitable organization and public foundation.

3. Amendments to ITA Regulations Add a New Prescribed Donee

On September 23, 2010, an amendment to the Income Tax Regulations (P.C. 2010-1112) with respect to charitable donations was promulgated and subsequently published in the Canada Gazette, Part II on October 13, 2010.⁸ The amendment deals with the addition of American Friends of Canadian Land Trusts (AFCLT) to section 3504 of the Income Tax Regulations. More specifically, the U.S. charity (which was created by a group of Canadian registered charities to facilitate cross-border gifts of land) is now designated as a “prescribed donee.” This amendment allows non-resident owners of Canadian real property to make a gift to a U.S. charity (resulting in U.S. donation tax benefits) and still benefit from a reduction in the amount of capital gains subject to Canadian tax. The amendment provides the description and rationale of the organization, as well as the implementation and enforcement standards that will be followed. The federal Minister of Finance noted the importance of cross-border land donations for the continued protection of Canada’s important natural spaces.⁹

4. Bill C-470, Private Members’ Bill¹⁰

Private Members' Bill C-470, *An Act to Amend the Income Tax Act (revocation of registration)*, originally proposed a compensation cap of \$250,000 for any executive or employee of a charity, and mandatory disclosure of compensation for its five highest-paid executives or employees. The Bill was introduced on March 3, 2010 and had been referred to the Standing Committee on Finance for review in November 2010. In this regard, the Committee commenced hearings on November 29, 2010, at which time amendments to the Bill were introduced by Albina Guarnieri, MP for Mississauga East - Cooksville, the sponsor of the Bill. The amendments to Bill C-470 proposed by Ms. Guarnieri included the elimination of the \$250,000 compensation cap, and the introduction of a threshold of \$100,000 for compensation disclosure requirements.

⁸ Available online at <http://gazette.gc.ca/rp-pr/p2/2010/2010-10-13/html/sor-dors197-eng.html>.

⁹ See press release available online at <http://nsnt.ca/af/>.

¹⁰ For more information see Terrance S. Carter, “Amendments made to Bill C-470 by Standing Committee on Finance” available online at <http://www.carters.ca/news/2011/billc-470.htm>.

On December 6, 2010, a further hearing commenced before the Standing Committee on Finance, at which time members of the charitable sector voiced strong opposition to the Bill. Nonetheless, the Committee reported an amended version of Bill C-470 to the House of Commons on December 10, 2010. The amended Bill C-470 no longer includes a compensation cap provision, and a disclosure floor of \$100,000 has been added, as was proposed by Ms. Guarnieri. The Committee also made further amendments to the Bill which were not recommended by Ms. Guarnieri. The amended Bill C-470 expands the compensation disclosure requirement to all executives or employees of a charity who receive \$100,000 or more in compensation, rather than only the five highest-paid employees receiving \$100,000 or more. The \$100,000 disclosure floor is to be indexed, in respect of 2012 and following taxation years as if it were referred to in ss.117.1(1). The Committee also made it mandatory for the Minister to make compensation disclosures available to the public, but added an allowance for Ministerial discretion not to do so where "it is otherwise justified."¹¹

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

1. CRA Guidance: Upholding Human Rights and Charitable Registration¹²

On May 17, 2010, Canada Revenue Agency released in final form its guidance on registering and operating a charity to uphold human rights entitled Upholding Human Rights and Charitable Registration ("the Guidance"). On May 28, 2009, CRA had released its draft guidance as part of the consultation process with the charitable sector. The Guidance replaces CRA's Summary Policy CSP-HO8, Human Rights, released on September 2, 2003. While the Guidance does not contain substantial amendments from the draft guidance released in 2009, CRA has provided additional information with respect to political activities and anti-terrorism issues, as well as a helpful appendix containing questions and answers for both applicants and registered charities that wish to pursue charitable purposes that uphold human rights.

¹¹ Bill C-470, as amended by the Standing Committee on Finance, can be viewed online at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4873932&file=4>.

¹² For more information see Terrance S. Carter, "CRA Draft Guidance on the Protection of Human Rights and Charitable Registration" in *Charity Law Bulletin* No. 166 (May 28, 2009) available online at: <http://www.carters.ca/pub/bulletin/charity/2009/chylb166.htm>.

2. CRA Guidance on Charities Carrying Out Activities Outside Canada¹³

In June of 2009, Canada Revenue Agency had released a draft consultation paper entitled Consultation on the Proposed Guidance on Activities Outside of Canada for Canadian Registered Charities (the “Proposed Guidance”) and accepted comments until September 30, 2009. Many organizations provided submissions to CRA on the Proposed Guidance, including the Charities and Not-for-Profit Law Section of the Canadian Bar Association (“CBA”). On July 8, 2010 CRA released the final version of the Guidance entitled Canadian Registered Charities Carrying Out Activities Outside Canada (the “Guidance”). The Guidance updates and replaces the previous CRA publication on foreign activities entitled Registered Charities: Operating Outside Canada RC4106. The Guidance does not have the force of law, but is intended “to enable registered charities and applicants for charitable registration carrying on activities outside Canada to understand CRA’s interpretation of, and expectations related to, the provisions of the ITA concerning charitable registration. As reflected in its title, the Guidance generally assumes that a charity working with an intermediary is doing so to carry on activities outside Canada. However, the Guidance is intended to apply to all activities carried on through intermediaries both outside and within Canada. In this regard, the Guidance refers to an upcoming CRA guidance entitled Carrying Out a Charity’s Own Activities Within Canada Through an Intermediary. This upcoming publication should clear up any confusion about the requirements applicable to activities within Canada.

D. CORPORATE UPDATE

1. Proposed Regulations for the *Canada Not-For-Profit Corporations Act* (CNCA)

Corporations Canada posted the proposed regulations for the *Canada Not-for-profit Corporations Act* (CNCA) in late June 2010 on its website for consultation.¹⁴ The CNCA received Royal Assent on June 23, 2009. The CNCA requires regulations before it can come into force because the CNCA specifies that certain details of its regime will be set out in regulation, including the definition of “soliciting corporation,” information required to be kept corporate records and registers, rules for the granting of corporate names,

¹³ For more information see Terrance S. Carter & Karen J. Cooper, “CRA’s Revised Guidance for Canadian Registered Charities Carrying Out Activities Outside Canada” in *Charity Law Bulletin* No. 219 (July 29, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb219.pdf>.

¹⁴ The draft regulations may be viewed online at <http://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs04099.html>.

rules regarding electronic communications and documents, methods of giving notice of meetings of members, rules for absentee voting, different levels of financial review and user fees.¹⁵

2. New Ontario Not-For-Profit Corporations Act (ONCA)¹⁶

The new *Ontario Not-for-Profit Corporations Act, 2010*, (“Bill 65”) passed third reading in the Ontario Legislature on October 19, 2010 and received Royal Assent on October 25, 2010. However, the Ministry of Consumer Services has advised that Bill 65 is not expected to be proclaimed until sometime in 2012. Bill 65 represents a significant modernization of not-for-profit legislation in Ontario and the first major statutory change in Ontario not-for-profit corporate law in decades. In this regard, the new Act, once it is proclaimed into force, will serve as a replacement for the *Corporations Act* (Ontario).¹⁷

The new legislation replaces the discretionary letters patent system of the *Corporations Act* (Ontario) with a statutory right of incorporation. Additionally, the ONCA will provide for a minimum of three directors, while permitting *ex officio* directors. Directors will be held to an objective standard of care and the statute provides for a due diligence defence. As well, members will be entitled to new rights and remedies under the ONCA, including the oppression remedy.

E. ANTI-TERRORISM LAW UPDATE

1. Bill C-17: Combating Terrorism Act¹⁸

On September 22, 2010 Bill C-17, also known as *the Combating Terrorism Act*, received its second reading in the House of Commons and has now passed through to the committee stage. Bill C-17, which was first introduced and received first reading on April 23, 2010 proposes to reintroduce Criminal Code provisions

¹⁵ For more information regarding the coming into force of the *Canada Not-for-profit Corporations Act* see the “Countdown to the *Canada Not-for-profit Corporations Act*” series of *Charity Law Bulletin*’s by Jane Burke-Robertson available online at <http://www.carters.ca/pub/bulletin/charity/index.html>.

¹⁶ For more information see Terrance S. Carter & Jane Burke-Robertson, “Changes to Bill 65, the Ontario Not-For-Profit Corporations Act, 2010, Pending Third Reading” in *Charity Law Bulletin* No. 228 (September 30, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb229.pdf>; and Terrance S. Carter & Jane Burke-Robertson, “Introduction of Bill 65, the Ontario Not-For-Profit Corporations Act” in *Charity Law Bulletin* No. 210 (May 25, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb210.pdf>.

¹⁷ R.S.O. 1990, c. C.38.

¹⁸ For more information see Terrance S. Carter, “Combating Terrorism Act passes Second Reading in the House of Commons” in *Charity Law Update* (November 2010) online: <http://www.carters.ca/pub/update/charity/10/nov10.pdf>.

relating to investigative hearings and recognizance with conditions that first came into force with Bill C-36, the *Anti-Terrorism Act*, in December 2001.

Whether or not Bill C-17 will be passed into law remains to be seen. However, the Bill signals a trend by the Federal Government to revert back to the more draconian provisions originally contained in the Anti-Terrorism Act when it was first introduced shortly after 9/11.¹⁹

2. Report of the Air India Inquiry – Terrorist Financing²⁰

On June 17, 2010, the long-awaited Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (the “Report”) was released. The Report, authored by the Honourable John C. Major (“Commissioner Major”), deals with the bombing of Air India Flight 182 that killed three hundred and twenty-nine persons. Commissioner Major, a former Justice of the Supreme Court of Canada who oversaw the inquiry, identified within the Report’s findings a series of errors made by authorities and Government agencies. These findings are split into five volumes, with the fifth volume dealing with terrorist financing. Terrorist financing legislation is obviously a concern for charities and not-for-profits (“NPOs”) as such organizations can be caught under the anti-terrorism legislative provisions.

3. Ontario Court of Appeal rules on *R. v. Khawaja*

Since the first wave of anti-terrorism legislation was declared in force in late 2001, its shadow has loomed large over Canadian charities and their foreign operations. The case of Mohammad Momin Khawaja, the first person to be charged under the core “terrorism” provisions in Part II.1 of the *Criminal Code* (“Code”), presented essentially the first chance to judicially review this controversial law. In *R. v. Khawaja*, [2006] O.J. No. 4245, Mr. Justice Rutherford of the Ontario Superior Court of Justice struck down a portion of a definition of “terrorist activity” in the *Code* that dealt with purpose and motive.²¹

¹⁹ A review of Bill C-36, the Anti-Terrorism Act, is available at: <http://www.carters.ca/pub/alert/ATCLA/atcla07.pdf>.

²⁰ For more information see Terrance S. Carter, Nancy E. Claridge & Sean S. Carter in *Anti-terrorism and Charity Law Alert* No. 22 (July 29, 2010) online: <http://www.carters.ca/pub/alert/ATCLA/ATCLA22.pdf>.

²¹ For more information on the Ontario Superior Court of Justice decision see Terrance s. Carter & Sean S. Carter, “Khawaja Decision Affords Little Relief for Charities” in *Anti-Terrorism and Charity Law Alert* No. 11 (December 20, 2006) online: <http://www.carters.ca/pub/alert/ATCLA/ATCLA11.pdf>.

An appeal of that decision was heard at the Ontario Court of Appeal in May, 2010 and on December 17, 2010 the Court released its decision.²² The Court of Appeal reversed Justice Rutherford's ruling that the portion of the definition of "terrorist activity" which requires that an act be committed "in whole or in part for a political, religious or ideological purpose, objective or cause" is unconstitutional. The Court also saw fit to increase the accused's sentence to life imprisonment, stating that "When [terrorism] is detected, it must be dealt with in the severest of terms."

F. ONTARIO LEGISLATIVE UPDATE

1. Bill 168: The Occupational Health and Safety Amendment Act²³

The *Occupational Health and Safety Amendment Act, (Violence and Harassment in the Workplace), 2009* received Royal Assent on December 15, 2009. The law came into force on June 15, 2010, and makes a number of significant changes to the Ontario *Occupational Health and Safety Act*²⁴ (the "OHSA"). The purpose of the new legislation is to safeguard workers from workplace violence and harassment. The legislation designates workplace violence and harassment as occupational health and safety hazards under the OHSA and establishes new obligations for employers with respect to workplace violence and harassment prevention.

2. Land Transfer Tax Regulation Affecting Charities²⁵

On October 1, 2010 the Ontario Ministry of Finance filed Ontario Regulation 386/10 made under the *Land Transfer Tax Act* (Ontario), which permits the exemption from land transfer tax for certain transfers of property between charities, implementing the proposal announced in the March 2010 Ontario Budget. The Regulation is deemed to have come into force as of March 26, 2010 and therefore all qualifying transfers of land since that date may claim an exemption from the tax payable under the Act. The new rules are explained in Tax Bulletin LTT 2-2010, October 2010.

²² *R. v. Khawaja*, 2010 ONCA 862.

²³ For more information see Barry W. Kwasniewski, "Ontario Bill 168 Receives Royal Assent: Employers Will Need to Address Workplace Violence and Harassment Prevention" in *Charity Law Bulletin* No. 189 (January 28, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb189.pdf>.

²⁴ S.O. 2009, c. 23.

²⁵ For more information see Theresa L. M. Man, "Exemption for Charities under New Regulation to the Land Transfer Tax Act (Ontario)" in *Charity Law Bulletin* No. 230 (October 27, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb230.pdf>.

3. Amendments to the Ontario *Pension Benefits Act*²⁶

On December 8, 2010, Bill 120, the *Securing Pension Plan Benefits Now and for the Future Act, 2010*, received royal assent. The changes will make it easier and less expensive for employees of several related charities to participate in a single pension plan. The expansion of the definition of “affiliate” in the Act will allow affiliated non-share capital companies to qualify for the exemption from the “multi-employer pension plan” provisions. The amendments contained in the Bill will also allow those employees the protection provided by the Pension Benefits Guarantee Fund.

4. Accessibility for Ontarians with Disabilities Act, 2005²⁷

Since January 1, 2010, government offices, ministries, and municipalities have been required to comply with the accessibility standards for customer service prescribed in Ontario Regulation 429/07 (“the Regulation”) entitled *Accessibility Standards for Customer Service* under the *Accessibility for Ontarians with Disabilities Act, 2005* (“the Act”). Beginning January 1, 2012, those standards will apply to all providers of goods and services within the province of Ontario, including charities and not-for-profit organizations.

Under Ontario Regulation 429/07, *Accessibility Standards for Customer Service*, providers of goods and services will be required to establish policies, practices, and procedures governing the provision of goods or services to persons with disabilities. Key provisions of the Regulation will also require providers of goods and services to allow people with disabilities to be accompanied by their guide dog or service animal in areas of their premises that are open to the public, to give notice of any service disruption to the public and explain the reason for, and expected duration of any disruption, to provide ongoing training to staff regarding the provision of goods and services to people with disabilities, and to establish a process for receiving and responding to feedback regarding the manner in which it provides goods or services to persons with disabilities. Goods and service providers will also be subject to annual reporting requirements.

5. Fighting Internet and Wireless Spam Act (FISA)

On December 14, 2010, Bill C-28, the *Fighting Internet and Wireless Spam Act* (“FISA”) received Royal Assent. FISA is a revived version of Bill C-27, the *Electronic Commerce and Protection Act*, which died on

²⁶ For more information see Richard E. Johnston, “New Pension Planning Opportunities for Charities and Not-For-Profits” in *Charity Law Bulletin* No. 232 (November 23, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb232.pdf>.

²⁷ For more information see Terrance S. Carter, “Ontario Charities and Not-For-Profits Will Need to Meet Accessibility Standards in 2012” in *Charity Law Bulletin* No. 235 (November 30, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb235.pdf>.

Order Paper during the 2nd Session of the 40th Parliament due to the prorogation of Parliament on December 30, 2009. FISA creates a new regulatory scheme for spam and related unsolicited electronic messages, as well as amending four existing statutes dealing with privacy and telecommunications. These include the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), of which organizations with existing privacy obligations may already be aware.

Although FISA is not yet in force, registered charities and other non-profit organizations will want to review their privacy and electronic communications policies to comply with FISA when it comes into force, and that they are keeping records of all donors and volunteers prior to sending them an electronic message.²⁸

G. RECENT CASE LAW AFFECTING CHARITIES

1. Christian Horizons Decision

On May 14, 2010, the Divisional Court of Ontario issued a significant decision in the Appeal brought by Christian Horizons from a ruling by the Human Rights Tribunal²⁹ of Ontario on April 15, 2008. The case addresses the broad issue of religious organizations maintaining their religious identity while serving the public and the particular issue of when religious organizations can require employees to comply with a “Statement of Personal Lifestyle and Morality Standards Expected of Staff” (“Lifestyle Statement”) when such statements contain discriminatory qualifications on their face.

The decision also affirms an important principle that religious organizations, whether they provide services directly to their own members or to the public, are eligible for the statutory exemption in section 24 (1) (a) of the *Ontario Human Rights Code* that allows them to hire co-religionists. The findings on the definition of religion, particularly that social service is an expression of faith, will be helpful in other contexts.

However, the decision that it is not a *bona fide occupational qualification* for Christian Horizons to require support workers to sign a Lifestyle Statement that includes a provision to abstain from same-sex relationships is problematic, given the clear findings of fact that Christian Horizons seeks to “establish a Christian home environment” for its residents and that many of its employees see their work as “Christian

²⁸ More information regarding FISA as well as the text of the legislation can be found online at:

<http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=7019&Session=23&List=toc>.

²⁹ For an analysis of the Tribunal’s decision see Terrance S. Carter and Derek B. Mix-Ross, “The Christian Horizons Decision: A Case Comment,” *Church Law Bulletin* No. 22 (May 28, 2008) online: <http://www.carters.ca/pub/bulletin/church/2008/chchlb22.pdf>.

ministry.” As well, the holding that Christian Horizons created a “poisoned work environment”, independently of whether it came within the statutory exemption, is also concerning because little guidance about what constitutes a “poisoned work environment” is provided and as such may open the door to allegations that could otherwise be defended on the basis of the statutory exemption.³⁰

2. *Innovative Gifting Inc. v. House of Good Shepherd et al.*³¹

In *Innovative Gifting Inc. v. House of the Good Shepherd*,³² released May 18, 2010, the Ontario Superior Court of Justice dismissed four applications brought by Innovative Gifting Inc. (the “Applicant”) against four charitable organizations and their senior officers to enforce its written standard form of agreement and obtain payment for fundraising services rendered to the respondent charities.

The Applicant in this case had charged exorbitant commissions and also misrepresented the legality of its fundraising activities. The arrangement was that if shares and cash were gifted, then a commission of 40% would be paid, but if cash were gifted, then a commission of 90% would be paid. The court ordered that the fundraiser pay back the commissions it received from four charities.

3. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*³³

On April 13, 2010, Justice Brown of the Ontario Superior Court of Justice released the most recent decision³⁴ in the ongoing litigation involving the Ontario Society for the Prevention of Cruelty to Animals (“OSPCA”) and the Toronto Humane Society (“THS”). The decision affirms that directors of charitable organizations have fiduciary duties toward the charity, and also emphasizes that with these enhanced duties comes an enhanced power of the courts to monitor and regulate charities. In fact, the jurisdiction of the courts to oversee the management of charitable property extends so far as to provide them with the authority to order the destruction of charitable property, as the April 13, 2010 decision illustrates.

³⁰ For more information see Jennifer M. Leddy & Terrance S. Carter, “Divisional Court Decision Provides Mixed Results In Christian Horizons Appeal” in *Church Law Bulletin* No. 29 (May 26, 2010) online: <http://www.carters.ca/pub/bulletin/church/2010/chchlb29.pdf>.

³¹ For more information see Terrance S. Carter, “Applications for Enforcement of Fundraising Agreements Dismissed” in *Charity Law Bulletin* No. 217 (June 24, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb217.pdf>.

³² [2010] O.J. No. 2210.

³³ For more information see Terrance S. Carter, “Ontario Court Affirms the Fiduciary Obligations Owed by Directors Of Charitable Organizations” in *Charity Law Bulletin* No. 209 (May 25, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb209.pdf>.

³⁴ *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 2182.

4. Paterson v. CRA³⁵

On June 15, 2010, the Federal Court released its judgment in *Paterson v. Canada (Revenue Agency)*. In this case, CRA denied the applicant, a tax preparer, permission to file his clients' income tax returns electronically as provided for by section 150.1 of the ITA on the grounds that his conduct was disreputable in nature. The applicant was involved in a scheme wherein he knowingly assisted his clients in obtaining donation tax receipts for amounts which grossly exceeded the amounts actually donated. The applicant would receive \$25 for each receipt generated and he then used the receipts in preparation of his clients' returns.

The applicant claimed that he did not believe that he was doing anything wrong. He argued that he was not aware that he was engaged in any misconduct or fraud, and he had no reason to suspect that the enhanced receipts were in any way fraudulent. However, the Federal Court accepted that it was reasonable for CRA to deny his electronic filing privileges on the basis of the conduct itself. While citing the applicant's wilful blindness in his conduct, the crux of the decision is that ignorance of the charitable receipting rules was no excuse for the applicant's participation in the scheme. The ruling serves as a warning to professionals who deal with charities that they should be aware of the laws applicable to their dealings with charities and the potential areas for fraud or abuse.

5. London Humane Society (Re)³⁶

On November 12, 2010, the Ontario Superior Court of Justice released its decision in *London Humane Society (Re)* ("the Decision"), which discusses fiduciary duties of directors of charitable corporations and their relationship with corporate members.³⁷ The Decision relates to an application for direction from the court by the directors of the London Humane Society, ("LHS") regarding who should constitute the membership of the charity for the purposes of a special meeting of members. LHS intended to significantly alter the voting privileges of its members pending the outcome a special meeting of members for the purpose of approving a new by-law.

³⁵ See Theresa L. M. Man, "Ignorance of Charitable Receipting Rules is No Excuse for Participation in Donation Fraud Scheme" in *Charity Law Update* (September 2010) online: <http://www.carters.ca/pub/update/charity/10/sep10.pdf>.

³⁶ For more information see Terrance S. Carter & Ryan M. Prendergast in "Case Comment: London Humane Society Case Affirms Directors Of Charities Must Act In Good Faith" in *Charity Law Bulletin* No. 236 (November 30, 2010) online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb236.pdf>.

³⁷ *London Human Society (Re)*, 2010 ONSC 5775. The full decision is available through the Canadian Legal Information Institute online at: <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc5775/2010onsc5775.html>.

The Decision affirms that directors of charitable and not-for-profit corporations are fiduciaries to the corporation, and must act in good faith in accordance with their by-law. The Decision also provides protection to directors who adjust the process for membership approval or renewal, without necessarily making an amendment to the corporation's general operating by-law. It is important to note from the Decision, however, that when members take a different philosophical approach to that of the board, particularly with organizations which have varying ideologies, as in animal welfare organizations, the board cannot act arbitrarily with respect to approval of membership.

While the court found in the case at bar that the applicant directors had complied with their statutory and common law duties to the corporation to the detriment of the respondent members, directors of charitable and not-for-profit organizations with large memberships, such as LHS, will need to be aware that the new *Canada Not-for-profit Corporations Act*, as well as the *Ontario Not-for-profit Corporations Act*, will provide new remedies to their members, such as the oppression remedy, which could lead to a different result.

6. *Aid/Watch v. Commissioner of Taxation*³⁸

On December 1, 2010, the High Court of Australia ruled that the Not-for-Profit organization Aid/Watch Inc. was entitled to charitable status, notwithstanding the "political" nature of its goals and activities. In *Aid/Watch Inc. v. Commissioner of Taxation* the High Court reversed a lower court's decision which held that Aid/Watch's tax exempt status was properly revoked. The Court concluded that "the generation by lawful means of public debate...concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head of *Pemsel*." The Australian High Court's consideration of the laws governing political activities by charities is of interest not only in Australia, but in other common law jurisdictions as well, such as the UK, the United States, and Canada.

³⁸ *Aid/Watch Inc. v. Commissioner of Taxation*, [2010] HCA 42

H. CONCLUSION

As can be seen from the above overview, 2010 has seen a significant number of changes with regard to the law of charities 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.