

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

## MAY 2012

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### **Impact of the 2012 Federal Budget on Political Activities by Charities**

Imagine Canada's Charity Tax Tools Webinar being presented by Terrance S. Carter.

**June 19, 2012.**

Details and online registration available at <http://charitytax.imaginecanada.ca/demand-webinars>.

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## **RECENT PUBLICATIONS AND NEWS RELEASES**

### **Canada's Counter-Terrorism Strategy Singles out Environmentalism**

Terrance S. Carter and Nancy E. Claridge in *Anti-terrorism & Charity Law Alert* No. 31, May 30, 2012.

Canada's Minister of Public Safety, the Honourable Vic Toews, announced on February 9, 2012, the release of Canada's first counter-terrorism strategy, *Building Resilience Against Terrorism: Canada's Counter-terrorism Strategy* (the "Strategy"). The Strategy assesses the nature and scale of the threat of terrorism, and sets out basic principles and elements that underpin the government's counter-terrorism activities. With an overarching goal of countering domestic and international terrorism in order to protect Canada, Canadians and Canadian interests, the Strategy is meant to prioritize the government's counter-terrorism efforts and promote an open discussion with Canadians on threats faced. As will be discussed in the commentary that follows at the end of this *Alert*, environmentalism is singled out as an example of domestic issue-based extremism, next to "white supremacy" and the Oklahoma City bombings in 1995, as well as the Norway terrorist attacks in 2011.

#### **Read More:**

[PDF] <http://www.carters.ca/pub/alert/ATCLA/ATCLA31.pdf>

### **CRA News**

Karen J. Cooper.

#### ***CRA Revokes Charitable Status of Help Eliminate Disease and Addiction Canada***

CRA has revoked the charitable registration of Help Eliminate Disease and Addiction Canada, effective May 5, 2012. CRA indicates that its audit revealed that from January 1, 2008 to December 31, 2009 the organization issued in excess of \$113 million in receipts for medicine units received through the Relief Lending Group Program tax shelter gifting arrangement and that the receipted amounts were far in excess of the actual value of the property donated. CRA also indicates that there was insufficient separation between the organization's operations and the personal business and financial interests of those responsible for its operation. In particular, CRA found that the organization entered into collusive arrangements with directors and related parties as well as the tax shelter program promoters, which resulted in substantially all of the actual cash received being diverted into the hands of the promoters and related companies rather than used for charitable purposes.

See CRA's news release for more information, available at <http://www.cra-arc.gc.ca/nwsrm/rlss/2012/m05/nr120504d-eng.html>.

### ***CRA Revokes Charitable Status of Power Zone Outreach Ministries***

CRA revoked the charitable registration of Power Zone Outreach Ministries, effective May 5, 2012. CRA indicates that the organization failed to maintain proper books and records and did not devote all its resources to charitable purposes and activities. CRA found that the organization acted as a conduit for a non-qualified donee, issued donation receipts on behalf of a non-qualified donee, and did not demonstrate that it maintained adequate direction and control over resources purportedly used in foreign programs that were not approved by the Charities Directorate.

See CRA's news release for more information, available at <http://www.cra-arc.gc.ca/nwsrm/rlss/2012/m05/nr120504c-eng.html>.

### ***CRA to Ease Burden on Tax Exempt Corporations***

CRA recently concluded its review and has determined that refunds or rebates will not be withheld from tax-exempt incorporated municipalities, universities, schools, hospitals (MUSH), non-profit organizations (NPOs), federal crown corporations, and Indian band councils when they have outstanding T2 corporate tax returns. This decision effectively adopts indefinitely CRA's 2008 administrative position on this issue (see discussion in May 2011 *Charity Law Update*). Though refunds and rebates will not be withheld because of outstanding T2 returns, this administrative position does not remove the legal responsibility of a tax-exempt corporation to file an annual T2 return. For more information please see the CRA website at <http://www.cra-arc.gc.ca/nwsrm/fctshts/2012/m04/fs120425-eng.html>.

### ***CRA Adds New Webpages for Budget 2012***

CRA recently added two new webpages to respond to questions about the 2012 Budget, entitled "Transparency and Accountability" and "Gifts to Foreign Charitable Organizations". The "Transparency and Accountability" page addresses questions about the new rules for charities involved in political activities and can be accessed here: <http://www.cra-arc.gc.ca/gncy/bdgt/2012/qa01-eng.html>. The "Gifts to Foreign Charitable Organizations" page addresses questions about the new requirements for the registration of foreign charities in order to have qualified donee status for receipting purposes. This page can be accessed here: <http://www.cra-arc.gc.ca/gncy/bdgt/2012/qa02-eng.html>.

## *CRA and Revenu Québec Issue New Brochure*

CRA and Revenu Québec have recently issued a new brochure entitled “The QST and the GST/HST: How They Apply to Charities” (document #IN-228-V), which can be accessed here: <http://www.revenuquebec.ca/en/sep/publications/in/in-228.aspx>. This brochure provides information for charities on the registration for the GST/HST and QST, exempt sales, taxable sales, rebates, input tax credits, input tax refunds, the net tax calculation method, immovables and forms and publications.

## *Director General’s Speech at the National Charity Law Symposium*

The Charities Directorate’s Director General’s speech to the National Charity Law Symposium held on May 4, 2012, is now available on CRA’s website and can be obtained here: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/bdgt/2012/dgspch-eng.html>. In her speech, the Director General addresses the changes affecting charities resulting from the 2011 Budget and the 2012 Budget, including ineligible individuals, the new qualified donee listings, changes to allowable spending on political activities and changes to the rules for foreign charitable organizations.

## **Is Attending a Conference a Member Benefit?**

Theresa L.M. Man.

CRA recently released its answers to taxpayer questions regarding Interpretation Bulletin IT-496R (available here: <http://www.cra-arc.gc.ca/E/pub/tp/it496r/>) and the payment of conference fees for members of non-profit organizations, and whether this constitutes a member benefit that would affect the corporation’s non-profit status (document #2011-039520). CRA indicated that so long as the member attends the conference, convention or meeting to further the objectives of the corporation and not for the member’s own benefit, the payment of fees by the corporation is acceptable. Further, if a member wishes to attend a conference of the corporation and attendance would be for the member’s benefit, it would be permissible to charge a lower conference fee in exchange for services provided to the corporation by the member, as long as the reduction in fees is a reasonable amount. Finally, whether a member receives a personal benefit from the corporation is a question of fact, but will generally not include activities primarily undertaken for the benefit of the corporation or services provided to the member that are funded out of membership fees.

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

## **New Ineligibility Requirements for Directors, Officers and Staff of Registered Charities**

Presented by Karen J. Cooper at the 2012 National Charity Law Symposium, a joint program of the Canadian Bar Association's and the Ontario Bar Association's Charity and Not-For-Profit Law Sections held in Toronto, Ontario, on May 4, 2012.

Under the rubric of "Strengthening the Charitable Sector," the 2011 federal Budget Plan, which received Royal Assent on December 15, 2011, contained several provisions that will have a substantial impact on the governance of registered charities and registered Canadian amateur athletic associations (RCAAs). These provisions introduced a number of amendments to the *Income Tax Act* (ITA), the principal regulatory regime affecting registered charities. One of the most significant of these amendments is the introduction of provisions rendering certain individuals ineligible to serve on the board of or in a senior capacity within a registered charity.

The "ineligible individual" provisions came into force January 1, 2012, but the consequences of their implementation have yet to be felt in the charitable sector. In light of the significance and the uncertainty with respect to practical implementation of the amendments, the purpose of this paper is to promote discussion about the provisions and their potential consequences. In order to achieve this, we first provide an overview of the "ineligible individual" provisions in Canada followed by a description and discussion of parallel provisions that have been recently implemented in both the United Kingdom and New Zealand. Finally, we examine the provisions from a constitutional law perspective.

### **Read More:**

[PDF] <http://www.carters.ca/pub/article/charity/2012/kjc0504.pdf>

## **SCOF Resumes Study on Tax Incentives for Charitable Donations**

Terrance S. Carter.

After having recessed on February 14, 2012 for almost 12 weeks, the Standing Committee on Finance ("SCOF") resumed its study of tax incentives for charitable donations with meeting number six of twelve on May 3, 2012. SCOF heard from representatives of the charitable sector, including Association of Fundraising Professionals, CanadaHelps, Canadians for Tax Fairness, Mobile Giving Foundation Canada and Volunteer Canada. The Stretch Tax Credit, as proposed by Imagine Canada, was discussed as well as the general lack of civic engagement in Canada.

Meeting seven took place on May 8, 2012 with representatives from various organisations, including Canadian Diabetes Association, Food Banks Canada, Women's College Hospital Foundation, and Social Innovation Generation. This meeting centred on transparency of charities and the new \$8 million for

CRA from the federal Budget 2012, tax shelters, confidence in the charitable sector, social innovation, and planned giving.

The study has again been put on hold in order for SCOF to address Bill C-38 pursuant to the Order of Reference of May 14, 2012. The Clerk of the Committee has commented that the return to this study may not occur until September 2012, after SCOF has completed the study of Bill C-38.

The meetings have been an important opportunity to educate SCOF on the charitable sector's collective contributions and to propose new tax incentives to encourage charitable giving. SCOF's report to the House of Commons after completion of their study will be greatly anticipated.

## **CRA Issues Draft GST/HST Policy Statement for Comments**

Theresa L.M. Man.

CRA is disseminating a GST/HST policy statement entitled "Research Activities Undertaken by Hospital Authorities – Entitlement to Rebates and Tax Status of Services" in draft form for discussion purposes. This policy sets out CRA's position concerning the eligibility of hospital authorities to claim an 83% rebate of the GST and the federal part of the HST, as well any corresponding rebate of the provincial part of the HST for the non-creditable tax that is incurred by hospital authorities in the course of carrying on research activities. Generally, research activities that are related to the care provided to inpatients and outpatients of a public hospital are eligible for the above rebate. This policy provides direction to hospital authorities by setting out guidelines on the application of the hospital authority public service body rebate to research activities carried on by these organizations. The policy statement is available at <http://www.cra-arc.gc.ca/E/pub/gi/notice274/notice274-e.pdf>.

## **Non-Profit Festivals**

Karen J. Cooper.

CRA recently expressed its views in response to a taxpayer question regarding profits earned by non-profit organizations (document #2011-042946). The taxpayer in question is a non-profit corporation, incorporated under Part III of the Québec *Companies Act* that presents, organizes and promotes a large-scale festival. As a part of staging this festival, the corporation sells food, wine and beer to attendees, from which it has earned a profit. The corporation enquired of CRA whether its involvement in retail activities disqualified it from being a non-profit organization under section 149(1)(l) of the ITA. CRA responded that because the corporation's retail activities were a part of the operation of the festival and because the scale of the retail activity and the amount of money involved were minimal in comparison to

the operation of the corporation as a whole, the activities would not affect the corporation's non-profit status, as they were undertaken to achieve the non-profit purposes of the corporation and were not serving a profit purpose.

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

## **Cost Estimates of Proposed Measures to Encourage Charitable Donations**

Terrance S. Carter.

On May 18, 2012, the Parliamentary Budget Officer (PBO) released its response to the House of Commons Standing Committee on Finance's March 2012 request to estimate the cost of proposed enhancements to tax incentives for charitable donations. This request included the cost of following three proposals under consideration: eliminating the capital gains tax on charitable donations of private company shares; eliminating the capital gains tax on charitable donations of real estate; and extending the carry-forward period from 5 to 10 years for which charitable donations of ecological gifts can be claimed as a tax credit in future tax years. With respect to proposed capital gains exemptions, the PBO provided two estimates, one which assumes there would be no changes in donations (static) and one which assumes that donations would increase with the implementation of the exemptions (dynamic). The PBO estimated that the annual revenue that would be forgone with the capital gains exemptions would be roughly \$100 million per year on average in a static scenario and roughly \$270 million per year on average for a dynamic scenario. With respect to the proposed extension of the carry-forward period for ecological gifts, the PBO estimated \$25 million in forgone tax revenue over a ten-year period, assuming a static scenario. The PBO's full report can be accessed here: [http://www.parl.gc.ca/PBO-DPB/documents/Charitable\\_donations\\_EN.pdf](http://www.parl.gc.ca/PBO-DPB/documents/Charitable_donations_EN.pdf).

## **Can a Public Foundation Have Only One Trustee?**

Karen J. Cooper.

The Federal Court of Appeal recently addressed whether a charitable foundation could be a public foundation if it only had one trustee in *The Sheldon Inwentash and Lynn Factor Charitable Foundation v. the Queen*, 2012 FCA 136. This case is an appeal from a decision taken by CRA that the foundation in question did not qualify as a public foundation because it had only one trustee. Section 149.1 of the *Income Tax Act* (ITA) defines a "private foundation" as a "charitable foundation that is not a public foundation" and defines a "public foundation" by several requirements, including a requirement that

“more than 50% of the directors, trustees, officers or like officials deal with each other at arm’s length”. The Minister reasoned that if there was only one trustee of the foundation, it was impossible for more than 50% to deal at arm’s length. As such, the Minister concluded that the foundation must be a private foundation. Applying the judicial review standard of correctness, the Court agreed with the conclusion of the Minister. The Court interpreted the relevant sections of the ITA and determined that the language used requiring that 50% of the trustees be arm’s length and the use of the term “each other” indicated that Parliament intended for there to be more than one trustee of a public foundation. Further, the history of the provisions supports this conclusion because these provisions were implemented in order to provide greater assurance that a public foundation would not be used for tax avoidance purposes.

This decision can be accessed at: <http://www.canlii.org/en/ca/fca/doc/2012/2012fca136/2012fca136.pdf>.

## **Community Development Pastor Satisfies Test For Clergy Residence Deduction**

Jennifer M. Leddy.

On April 2, 2012 the Income Tax Rulings Directorate (the “Directorate”) of the Canada Revenue Agency (CRA) released a memorandum that it provided to a Tax Services Office (the “TSO”) on the function test for the clergy residence deduction. The memorandum concluded, on the basis of the job description provided, that if the community development pastor satisfied the status test, that she would satisfy the function test of “ministering to a diocese parish or congregation.” According to her job description, the community development pastor was involved in outreach and services to the surrounding community in both “practical and spiritual terms”, including programs to assist women and spiritual support to new immigrants. The Directorate noted that “ministering” is a very broad concept and that “if a person who meets the status test is employed within a congregation, he or she is considered to be ministering to a congregation if he or she is fulfilling a pastoral or ministerial role in the manner requested by that congregation”. The Directorate decided that, based on the job description, the taxpayer would satisfy the function test and the matter was sent back to the TSO with the reminder that the taxpayer must also meet the status test.

This case also involved a procedural matter. The taxpayer had requested from the Directorate an advance income tax ruling. The Directorate affirmed that advance income tax rulings are only given where transactions are proposed, not where, as in this case, the taxpayer has been corresponding with a TSO. Once a taxpayer is dealing with a TSO, the Directorate will not deal with the taxpayer directly, but will only provide its views to the TSO to assist it in resolving the issues. Since the taxpayer had only requested the Directorate’s opinion on whether she met the function test, the Directorate did not deal



with the status test beyond noting that in the taxpayer's view she is a member of the clergy. It is well established that to be eligible for the clergy residence deduction, the taxpayer must satisfy both the status and function test.

## **Anti-Spam Legislation Expected to come into Force in 2013**

Ryan M. Prendergast.

On April 24, 2012, the Minister of Industry commented that it was expected that Bill C-28 (the "Anti-Spam Legislation"), would not come into force until 2013. Previous Charity Law Updates had indicated that the Anti-Spam Legislation was to come into force in 2012. The [March 2012 Charity Law Update](#) reported that the Canadian Radio-television and Telecommunications Commission ("CRTC") had released the final form of its regulations.

The Anti-Spam legislation cannot yet come into force, as the draft regulations previously released by Industry Canada have not yet been released for public comment with revisions. For information concerning the first draft of the regulations released by Industry Canada, see *Charity Law Bulletin* No. 257, dated August 18, 2011 available at <http://www.carters.ca/pub/bulletin/charity/2011/chylb257.htm>, which reported on the draft regulations released by Industry Canada and the CRTC concerning the Anti-Spam Legislation at that time.

Once the second round of public consultations on Industry Canada's regulations is complete, it is expected that the Anti-Spam Legislation will come into force shortly thereafter. Charities and non-profit organizations that may be affected by the Anti-Spam legislation should continue to follow the progress of the coming into force of the Anti-Spam Legislation.

The text of the Minister of Industry's speech can be found online at: <http://news.gc.ca/web/article-eng.do?mthd=tp&crtr.page=1&nid=670849&crtr.tp1D=4>

## **Imagine Canada launches Standards Program**

Terrance S. Carter.

Imagine Canada launched its Standards Program at the beginning of May, which is a program designed to improve the public's confidence in the charitable and nonprofit sector. This program involves voluntary accreditation, whereby organizations wishing to publically demonstrate their compliance with standards set out by Imagine Canada may do so through a third-party peer review. As well, the program provides resources and opportunities for continuous learning to organizations. Certain organizations participated in a pilot group to test and validate the accreditation process used in the Standards Program.

Many of the participants in the pilot group are among the first organizations to be accredited, which include World Vision Canada and the SickKids Foundation.

Organizations that submit their participation agreement and application fee by June 15, 2012 will receive free access to resources, such as the Managing Risk with Confidence Video site, which has videos on topics that will assist with obtaining accreditation (e.g. governance and risk management). Other free resources include My Risk Management Plan and My Risk Management Policies.

For more information on the Standards Program, see *Charity Law Bulletin* No. 254, “Imagine Canada to Launch its Standards Program in 2011”, available online at <http://www.carters.ca/pub/bulletin/charity/2011/chylb254.htm>.

### **Liability Waiver Upheld By B.C. Court Of Appeal**

Barry W. Kwasniewski in *Charity Law Bulletin* No. 284, May 29, 2012.

Liability waivers are familiar to most of us; we see them when we wish to go downhill skiing, participate in running races or engage in other activities that entail some risk of personal injury. Consumers are frequently required by service-providers to sign forms that release the service-provider from any liability for a consumer’s injury. Liability waivers are also often used by charities and not-for-profits as a legal liability shield, particularly where the organization is carrying out activities which may pose a risk of injury to participants. Over the years, there have been numerous cases across Canada where courts have been asked to determine the enforceability of liability waivers in a variety of circumstances. Most recently, the British Columbia Court of Appeal in *Loychuk v. Cougar Mountain Adventures Limited* has affirmed that a properly drafted waiver, that is understood and signed by the participant, may protect an organization from liability for serious injuries or even death caused by the negligence of its own employees. This *Charity Law Bulletin* outlines this decision, which upheld a waiver releasing a zip-line operator from liability.

#### **Read More:**

[PDF] <http://www.carters.ca/pub/bulletin/charity/2012/chylb284.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2012/chylb284.htm>

### **Ontario Government Amends Draft Anti-Bullying Legislation**

Esther S.J. Oh.

The Ontario Government introduced on May 28, 2012, amendments to Bill 13, the *Accepting Schools Act, 2012*. Bill 13 was originally sponsored by the Honorable Lauren C. Broten, Minister of Education in November 2011. The bill, which passed First Reading on November 30, 2011, is currently being

considered by the Standing Committee on Social Policy. If enacted, Bill 13 would amend *the Education Act* to include definitions of “bullying” and “cyber-bullying”. Every school board would be required to establish a bullying prevention plan, which, upon approval by the Minister of Education, would be distributed among students, teachers, staff, school volunteers, parents, guardians and the school council.

Given the recent media attention to “gay-straight alliances” in Ontario schools, it is significant to note that the bill would require school boards to support students that wish to establish and lead activities or organizations that:

- promote gender equity;
- promote anti-racism;
- promote the awareness and understanding of, and respect for, people with disabilities; or
- promote the awareness and understanding of, and respect for, people of all sexual orientations and gender identities, including organizations with the name “gay-straight alliance” or another name.

A copy of Bill 13 is available online at

[http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=2550](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2550).

## **Internal Revenue Service Warns Nonprofits to Protect Privacy**

Colin J. Thurston.

Canadian charities which are required to file a Form 990 (the Annual Return) in the United States or have U.S. affiliates that do should take note of a recent warning by Lois Lerner, Director, Exempt Organizations, of the Internal Revenue Service (“IRS”) regarding the filing of Form 990, *Return of Organization Exempt From Income Tax*. In a speech given on April 19, 2012, during a legal education conference at Georgetown University, the Director warned U.S. nonprofit organizations about the dangers of including Social Security numbers anywhere on the Form 990. This is because information provided on Form 990 must be made public by the IRS, and that if an organization does include Social Security numbers on their Form 990, the IRS does not have the discretion to redact that information.

The Director cited a recent report by the *Chronicle of Philanthropy*, which found that nearly one in five exempt organizations have included Social Security numbers in their Form 990 from 2001-2006. Most of the Social Security numbers were those of donors, trustees, employees, directors and scholarship winners. As well, one third of tax preparers omitted to write their Preparer Tax Identification Numbers and instead included their own Social Security number. This occurred in spite of the fact that the IRS does not request Social Security numbers on the Form 990.

Canadian charities which file a Form 990, or which have tax exempt affiliates in the U.S. should take note of this warning, as there is a very serious concern that nonprofit organizations could be exposing their supporters and/or employees to potential identity theft by including Social Security numbers, or possibly other sensitive personal information, in their Form 990 returns. Canadian organizations which share information about donors, members, employees, etc. with a U.S. affiliate need to ensure that that personal information is used or disclosed in compliance with applicable privacy laws, including the Canadian *Personal Information Protection and Electronic Documents Act*. In this regard, if personal information disclosed in a Form 990 were collected by a Canadian organization, which then shared the information with the U.S. organization (*e.g.*, through a shared computer network or server based in the U.S.), then the Canadian organization might be subject to sanction under Canadian federal or provincial privacy legislation if it did not ensure that the shared information was used and disclosed in accordance with those laws. The inappropriate disclosure might also lead to findings of liability against an organization if an identity theft were to occur as a result of such a disclosure. For these reasons it is crucial that organizations adopt policies for the proper collection, use and disclosure of personal information, and that the individuals responsible for disclosing personal information to government agencies, such as the IRS, review the requirements for disclosure and ensure that unnecessary personal information is not disclosed in forms that will be made available to the public.

A copy of Director Lerner's speech is available online at [http://www.irs.gov/pub/irs-tege/georgetown\\_04192011.pdf](http://www.irs.gov/pub/irs-tege/georgetown_04192011.pdf).

## **IRS Releases Proposed Regulations on Program-Related Investments**

Jacqueline M. Demczur.

On April 19, 2012, the Internal Revenue Service ("IRS") released proposed regulations on program-related investments ("PRI") that are permitted for private foundations in the Federal Register. According to the IRS, PRIs are investments whose primary purpose is to accomplish one or more of a private foundation's exempt purposes. The production of income or appreciation of property is not a "significant purpose" of PRIs according to the IRS. As well, PRIs cannot have the purpose of influencing legislation or taking part in political campaigns. Presently, there are 10 examples of qualifying PRIs. The new regulations will add nine new examples of the types of investments that will qualify as PRIs.

The proposed examples include investment in a recycling business in a developing country and a loan to a social welfare organization to fund the purchase of a large art exhibition area. Although the expanded

list of PRIs are obviously limited to U.S. private foundations, they do provide interesting examples for CRA to consider in possibly expanding the concept of PRIs for Canadian charities.

A copy of the proposed IRS regulations is available online at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-19/pdf/2012-9468.pdf>.

## **KindHearts Charity Gets Favourable Settlement**

Nancy E. Claridge.

KindHearts for Charitable Humanitarian Development (“KindHearts”), a Toledo, Ohio based charity, has announced it has entered into a settlement agreement with the United States Treasury Department, without any admission of liability or wrongdoing by either party. The settlement brings to a conclusion a lengthy battle between KindHearts and the Treasury Department over allegations that the organization was providing material support to Hamas. It will also permit the charity to pay its debts and distribute the remaining funds, and result in the delisting of the charity, a first in the U.S.

The U.S. charity was originally shut down in February 2006 under a provisional determination by the Office of Foreign Assets Control (“OFAC”) of the Treasury Department that KindHearts is a Specially Designated Global Terrorist (“SDGT”). KindHearts was alleged to have provided material support to Hamas, which is designated as a terrorist organization by the U.S. government. OFAC seized and froze KindHearts’ assets “pending investigation” into whether or not the group is a supporter of terrorism.

After numerous attempts to contest the charges against the charity, KindHearts filed suit in 2008 challenging the constitutionality of the Treasury’s process. In 2009, Chief Justice James G. Carr of the Northern District of Ohio Federal Court ruled that the Treasury Department 1) violated KindHearts’ Fourth Amendment rights by failing to obtain a warrant based on probable cause; 2) violated KindHearts’ Fifth Amendment rights by relying on criteria for the asset seizure pending investigation that are unconstitutionally vague as applied, and by failing to provide KindHearts with adequate notice and a meaningful opportunity to respond; and 3) acted arbitrarily and capriciously in restricting KindHearts’ access to its own funds to pay counsel for its own defense. In a motion for interim relief and/or a temporary restraining order in October 2009, Justice Carr analogized that Treasury’s actions towards KindHearts not only blindfolded, but also tied its hands behind its back.

This case demonstrates the need for the U.S. Treasury Department to bring its procedures with respect to the seizing and freezing of an organization’s assets pending investigation and possible designation as an SDGT into conformity with the U.S. Constitution.

The court's ruling can be found at: [http://www.aclu.org/files/pdfs/natsec/kindheartsvgeithner\\_order.pdf](http://www.aclu.org/files/pdfs/natsec/kindheartsvgeithner_order.pdf).

The full settlement agreement can be found at:

[http://www.aclu.org/files/assets/kindhearts\\_v\\_geithner\\_settlement.pdf](http://www.aclu.org/files/assets/kindhearts_v_geithner_settlement.pdf).

## **U.S. Material Support Law Obstructs Humanitarian Relief**

Nancy E. Claridge and Terrance S. Carter.

The Charity and Security Network (“the Network”) published a paper on April 27, 2012, that analyzes how U.S. national security measures affect the speed and mobility of humanitarian relief in the wake of disaster, and considers two cases, the 2011 famine in Somalia and the summer 2010 floods in Pakistan.

The paper finds that the politicization of disaster response in conflict zones obstructs timely and effective aid delivery and also jeopardizes the safety of aid workers. Two U.S. counter-terrorism laws in particular create problems: the broad prohibition on providing “material support” to foreign terrorist organizations listed by the Department of State, and the Treasury Department’s ban on any transactions with them or groups listed as their supporters. Neither law provides legal protection for aid groups that must have contact with listed groups in order to access civilians in need.

The concerns raised in this paper are not novel (see, for example, *Anti-terrorism & Charity Law Alert No. 26* at <http://www.carters.ca/pub/alert/ATCLA/ATCLA26.pdf>). While the cost of terrorism has been felt all over the world, in recent years the measures adopted to counter such terrorism have themselves created serious problems. The future evolution of counter-terrorism strategies on a worldwide basis is unknown. However, it is hoped that studies such as this will provide the practical context needed in order to encourage changes that are more compliant with human rights and the rule of law.

The full paper can be found at <http://charityandsecurity.org/deadlycombination>.

## **IN THE PRESS**

**Charity Law Update and Terrance Carter in ARNOVA Member News** as a resource on charity law issues in Canada and the U.S..

*ARNOVA News, Association for Research on Nonprofit Organizations and Voluntary Action, May 2012.* <http://www.arnova.org>

**Non-Profit Act Gives Charity Members More Say** by Donalee Moulton includes quotes from an interview with Terrance Carter.

*The Lawyers Weekly, Vol. 31, No. 42, March 16, 2012.*

**Overview of CRA Draft Guidance on Arts Organizations and Charitable Registration** by Theresa L. M. Man.

*Charity Talk – CBA National Charities and Not-for-Profit Law Section, February 2012.*

[Link] [http://www.cba.org/cba/newsletters-sections/2012/2012-02\\_charity.aspx](http://www.cba.org/cba/newsletters-sections/2012/2012-02_charity.aspx)

**Ineligible Individuals - New Governance Provisions for Charities** by Karen J. Cooper.

*Charity Talk – CBA National Charities and Not-for-Profit Law Section, February 2012.*

[Link] [http://www.cba.org/cba/newsletters-sections/2012/2012-02\\_charity.aspx](http://www.cba.org/cba/newsletters-sections/2012/2012-02_charity.aspx)

## RECENT EVENTS AND PRESENTATIONS

**The 2012 National Charity Law Symposium** a joint program of the Canadian Bar Association's and the Ontario Bar Association's Charity and Not-For-Profit Law Sections held in Toronto, Ontario, on May 4, 2012, brought together leading experts from across Canada to speak about the latest developments in this rapidly changing area. Terrance S. Carter was co-chair of the symposium, and Karen J. Cooper presented "New Eligibility Requirements for Directors, Officers and Staff of Registered Charities."

[Web] <http://www.carters.ca/pub/seminar/charity/2012/kjc0504.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2012/kjc0504.pdf>

[Paper] <http://www.carters.ca/pub/article/charity/2012/kjc0504.pdf>

**American Bar Association Section of Taxation 2012 May Meeting** held in Washington, D.C., included Terrance S. Carter in the breakfast roundtable discussions of the Exempt Organization Subcommittee on Religious Organizations on May 11, 2012.

**County of Carleton Law Association (CCLA) 18th East Region Solicitors Conference 2012** held in Montebello, Quebec, on May 12, 2012, included a presentation by Karen J. Cooper on "The *Not-for-Profit Corporations Act*."

[Web] <http://www.carters.ca/pub/seminar/charity/2012/kjc0512.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2012/kjc0512.pdf>

**Carters/Fasken Martineau Healthcare Philanthropy: Check-Up 2012** was a free seminar held at the Toronto office of Fasken Martineau DuMoulin LLP on May 16, 2012, and included the following presentations:

"Essential Charity Law Update" by Terrance S. Carter; and

[Web] <http://www.carters.ca/pub/seminar/charity/2012/tsc0516.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2012/tsc0516.pdf>

"The Ontario *Not-for-Profit Corporations Act* (ONCA) and You" by Theresa L.M. Man.

[Web] <http://www.carters.ca/pub/seminar/charity/2012/tlm0516.htm>

[PDF] <http://www.carters.ca/pub/seminar/charity/2012/tlm0516.pdf>

## UPCOMING EVENTS AND PRESENTATIONS

**The Six-Minute Business Lawyer**, an annual program of the Law Society of Upper Canada being held in Toronto, Ontario, on June 7, 2012, will include a presentation by Terrance Carter entitled “What’s New in the Governance of Not-for-Profit Corporations? (CNCA/ONCA).”

Details available at <http://ecom.lsuc.on.ca/cpd/product.jsp?id=CLE12-0060301>.

**STEP Canada’s 14th National Conference** being held in Toronto will include Karen J. Cooper as a presenter in the Charity and Not-for-Profit Update Workshop on June 11, 2012.

Details available at <http://www.step.ca/2012.conference.asp>.

**Imagine Canada’s Charity Tax Tools Webinar** on June 19, 2012, is a webinar being presented by Terrance S. Carter entitled “The Impact of the 2012 Federal Budget on Political Activities by Charities.”

Details available at <http://charitytax.imaginecanada.ca/demand-webinars>.

**Canadian Society of Association Executives (CSAE) 7<sup>th</sup> Annual Summer Summit** will include the following presentations by Terrance Carter and Theresa Man on July 12, 2012:

“Qualified to be a Director? Considerations in Becoming and Remaining a Director” and

“Essential Legal Update for NFP and Charitable Organizations: What You Need to Know.”

<http://www.csae.com/CoursesEvents/Details/tabid/176/ArticleId/1485/7th-Annual-Summer-Summit.aspx>

**The Canadian Legal Conference**, an annual program of the Canadian Bar Association being held in Vancouver, British Columbia, will include Theresa Man as a speaker in Session 2.3 - Charities and Social Enterprises on August 13, 2012.

Details available at [http://www.cba.org/cba/Vancouver2012/cba-pd/2\\_3.aspx](http://www.cba.org/cba/Vancouver2012/cba-pd/2_3.aspx).

**The 19<sup>th</sup> Annual Church & Charity Law™ Seminar** will be held at Portico Community Church in Mississauga, Ontario, on Thursday, November 15, 2012.

Save the date! Details and online registration will be available soon.



## CONTRIBUTORS

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Assistant Editor: Nancy E. Claridge



**Terrance S. Carter** – Managing Partner of Carters, Mr. Carter practices in the area of charity and not-for-profit law, is counsel to Fasken Martineau DuMoulin LLP on charitable matters, is a member of the Technical Issues Group of Canada Revenue Agency's (CRA) Charities Directorate representing the Canadian Bar Association (CBA), a past member of CRA's Charity Advisory Committee, Past Chair of the CBA National Charities and Not-for-Profit Section, and is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*. He is also consulting editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2010), and editor of [www.charitylaw.ca](http://www.charitylaw.ca), [www.churchlaw.ca](http://www.churchlaw.ca) and [www.antiterrorismlaw.ca](http://www.antiterrorismlaw.ca).



**Nancy E. Claridge** – Called to the Ontario Bar in 2006, Ms. Claridge is a partner with Carters practicing in the areas of charity, anti-terrorism, real estate, corporate and commercial law, and wills and estates, in addition to being the firm's research lawyer and assistant editor of *Charity Law Update*. After obtaining a Masters degree, she spent several years developing legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was a Senior Editor of the *Osgoode Hall Law Journal*, Editor-in-Chief of the *Obiter Dicta* newspaper, and was awarded the Dean's Gold Key Award and Student Honour Award.



**Karen J. Cooper** – A partner with the firm, Ms. Cooper is recognized as a leading expert by *Lexpert* and *Best Lawyers* practicing charity and not-for-profit law with an emphasis on tax issues at Carters' Ottawa office, having formerly been a Senior Rulings Officer with the Income Tax Rulings Directorate of Canada Revenue Agency, as well as former counsel for the Department of Justice in tax litigation. Ms. Cooper also has considerable teaching experience, including as part-time professor at the University of Ottawa, Faculty of Common Law, and is a contributing author to *The Management of Charitable and Not-for-Profit Organizations in Canada* (LexisNexis Butterworths).



**Jacqueline M. Demczur** – A partner with the firm, Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Her practice includes incorporation, corporate restructuring, and legal risk management reviews, as well as wills, estate planning and estate administration. She is a contributing author to Industry Canada's *Primer for Directors of Not-For-Profit Corporations*, and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Church & Charity Law*<sup>TM</sup> Seminar.



**Christine Kellowan** – Christine graduated from Osgoode Hall Law School with a Juris Doctor. Prior to attending law school, Christine graduated from York University's Faculty of Arts with a B.A. (Hons.) in Political Science, *summa cum laude*. While in law school, Christine was a Senior Contributing Editor for *The Court* and a volunteer with Pro Bono Students Canada. Before articling with Carters, Christine gained legal experience working in the Compliance Division at the Ontario's Independent System Operator of the electricity market. She also interned at a Toronto law firm and the National Legal Institute in Mongolia.



**Barry W. Kwasniewski** - Mr. Kwasniewski joined Carters' Ottawa office in October 2008 to practice in the areas of employment law, charity related litigation, and risk management. Called to the Ontario Bar in 1990, Barry has a wide range of litigation experience, including in commercial disputes, personal injury, long-term disability, employment, insurance defence, and professional liability. Barry is a volunteer lawyer at Reach Canada, is on the Board of directors of the Vista Centre, and has assisted in several United Way campaigns.



**Jennifer Leddy** – Ms. Leddy joined Carters’ Ottawa office in March 2009 to practice charity and not-for-profit law following a career in both private practice and public policy. Ms. Leddy practiced with the Toronto office of Lang Michener prior to joining the staff of the Canadian Conference of Catholic Bishops (CCCCB). In 2005, she returned to private practice until she went to the Charities Directorate of the Canada Revenue Agency in 2008 as part of a one year Interchange program, to work on the proposed “Guidelines on the Meaning of Advancement of Religion as a Charitable Purpose.”



**Theresa L.M. Man** – A partner with Carters, Ms. Man practices charity and not-for-profit law and is recognized as a leading expert by *Lexpert* and *Best Lawyers*. She is an Executive Member of both the Charity and Not-for-Profit Sections of the Ontario Bar Association (OBA) and the Canadian Bar Association (CBA). In addition to being a frequent speaker at seminars hosted by Carters, the CBA and the OBA, Ms. Man has also written articles for numerous publications, including *The Lawyers Weekly*, *The Philanthropist*, *Planned Giving Pulse*, *International Journal of Civil Society Law*, *The Bottom Line*, *Canadian Fundraiser*, and *Charity Law Bulletin*.



**Esther S.J. Oh** – A partner with the firm, Ms. Oh practices in charity and not-for-profit at Carters’ Mississauga office, and is recognized as a leading expert in charity and not-for-profit law by *Lexpert*. Ms. Oh is a frequent contributor to [www.charitylaw.ca](http://www.charitylaw.ca) and the *Charity Law Bulletin*, and has spoken at the annual *Church & Charity Law™* Seminar as well as at the Canadian Bar Association/Ontario Bar Association’s 2nd National Symposium on Charity Law. Ms. Oh’s volunteer experience includes formerly serving as board member and corporate secretary of a national umbrella organization, and a director at a local community organization.



**Ryan Prendergast** – Ryan was called to the Ontario Bar in 2010 and joined Carters to practice in the areas of charity and not-for-profit law, corporate and commercial law, and human rights law. A graduate of the University of Ottawa, Faculty of Law, Ryan was a student caseworker for the Criminal Division at the University of Ottawa Community Legal Aid Clinic, completed a research project for Ecology Ottawa on municipal by-laws, and worked for the Crown Attorney’s Office in Toronto as a summer student. During his articles, Ryan acquired experience in charity and not-for-profit law, and contributed to several *Charity Law Bulletins* and other publications.



**Michelle Thériault** – A graduate of the University of Ottawa, Faculty of Law, 2011, Michelle has an Honours Bachelor of Social Sciences degree in Criminology from the University of Ottawa, and worked in the charitable sector as a social worker from 2002 to 2008. During law school, Michelle was a caseworker in Community Legal Education, a division leader in Criminal Law at the Legal Aid Clinic, a Research Assistant, and she co-established and sat on the Steering Committee of the University of Ottawa branch of the Law Union, a group for students interested in social justice. Currently, Michelle is on the Board of Directors for the John Howard Society of Ontario.



**Colin Thurston** – Called to the Ontario Bar in 2011, Colin joined Carters to practice in the area of intellectual property. A graduate of Queen’s University, Faculty of Law, Colin volunteered at the Queen’s Legal Aid clinic throughout his years at Queen’s and his responsibilities grew from hands-on legal research, writing, and litigation, to supervision and training of his fellow law students, to input on clinic operations from a policy level. Colin has gained litigation experience before numerous courts and tribunals and received numerous awards, including the Sabbath Prize in Wills and Estate Planning from Queen’s University, Faculty of Law.



**Kristen D. van Arnhem** – Kristen graduated from the University of Ottawa, Faculty of Law, in 2011 on the Dean’s List of Honour, ranking in the top ten percent of her class. Prior to law school, Kristen graduated with Distinction from the University of Guelph with an Honours Bachelor of Arts in Sociology. She has participated in two international law school exchanges in Australia and Puerto Rico. Before articling with Carters, Kristen gained legal experience as a summer student working for a family law firm in Guelph. Kristen has volunteered with Ottawa’s Supervised Access Program, Legal Aid Clinic in Ottawa, and was a note taker for students with disabilities.

## ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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