

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

## JANUARY 2013

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## Ottawa Region *Charity & Not-for-Profit Law Seminar*

Hosted by Carters Professional Corporation in Nepean, Ontario.

**Thursday, February 7, 2013.**

Details and online registration available at <http://www.charitylaw.ca>.

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## RECENT PUBLICATIONS AND NEWS RELEASES

### **Timely Reminder to Apply for Continuance Under the CNCA**

Terrance S. Carter and Jane Burke-Robertson.

While many federal not-for profit corporations incorporated under the *Canada Corporations Act* (CCA) have taken steps to continue under the *Canada Not-for-profit Corporations Act* (CNCA), the vast majority of CCA corporations have not yet done so. A recent Industry Canada Outreach Session reported that only about 500 of the approximately 13,000 federal not-for-profit corporations incorporated under the CCA have applied to continue under the CNCA. Failure to continue under the CNCA within the three year transition period expiring on October 17, 2014 will result in those corporations being dissolved. As a result, there are approximately 12,500 corporations still under the CCA that will need to continue under the CNCA over the next 20 months, which is more than 20 times the 500 corporations that have applied to continue so far during the first 16 months of the three year deadline.

For those corporations that have a large membership base, obtaining the necessary membership approval to continue under the CNCA will normally be done at their annual general meeting (AGM). Although membership approval could also be obtained at a special membership meeting, most not-for-profit corporations with a large membership base will prefer not to put its membership to the trouble of having to participate in a special membership meeting when approval could be obtained at a regularly scheduled AGM. In order to avoid being under pressure to have to seek membership approval at an AGM in 2014 with the looming deadline date of October 17, 2014, corporations should consider commencing the continuance process in 2013 by working with their legal counsel to prepare the necessary CNCA continuance documents for approval at their 2013 AGM.

For corporations that may need to do some pre-continuance corporate restructuring (such as collapsing a multiple membership class structure), it will be important to start the process as soon as possible. This is because the restructuring may need to be approved at the organization's 2013 AGM so that the continuance can be approved at the 2014 AGM. As such, time is of the essence for some corporations even at this point. For more information about the CNCA and the steps required to continue under it, reference can be made to a series of "Practice Tips" by Jane Burke-Robertson and Theresa Man, as well as a paper and presentation by Theresa Man on "The Practical Impact of the *Canada Not-For-Profit Corporations Act*," all available at <http://www.carters.ca/nfp/index.htm>.

## **CRA News**

Karen J. Cooper.

### **New T3010 Forms Released**

CRA released new T3010 forms for charities with fiscal periods ending **on or after January 1, 2013**. The new legislative measures requiring charities to give more details about their political activities have resulted in these changes, and charities must ensure that they submit the proper form to CRA or it will be returned to them to refile.

For more information, see online at: <http://www.cra-arc.gc.ca/E/pbg/tf/t3010/>

### **CRA and Finance Canada Remind Charities of New Fundraising Opportunity**

As of February 4, 2013 the Royal Canadian Mint will no longer be distributing pennies, which presents a unique fundraising opportunity for charities, as the Canadian government is encouraging Canadians to donate their pennies to charities. Charities interested in holding penny drives as part of their yearly fundraising events should contact their financial institutions before starting any fundraising campaigns in order to determine best practices for the collection and redemption of the coins. For more detailed information, see online at: <http://www.fin.gc.ca/1cent/faq3-eng.asp>

### **New Flame Deliverance Ministries Charitable Status Revoked**

On December 8, 2012, New Flame Deliverance Ministries had its charitable status revoked. Pursuant to an audit, CRA determined that the organization issued donation receipts for monies not received. The organization reported revenues of \$241,692 in 2009 and \$44,279 in 2010, and issued official donation receipts totaling \$222,287 in 2009 and \$207,931 in 2010. However, CRA also determined that bank deposits for those two years, were found to total only \$23,815.92 and \$40,618.12, respectively. Also, CRA determined that the organization had only provided donation receipts totaling \$45,753 for 2010 with the balance being obtained from the tax returns of individuals.

In addition, the President of the organization had signed and issued donation receipts for monies which were not received and received \$12,000 from her accountant as a payment for the purchase of donation receipts.

For more information see: <http://www.cra-arc.gc.ca/nwsrm/flss/2012/m12/nr121207-eng.html>

### **Trinity Divine Outreach Ministries Charitable Status Revoked**

On January 12, 2013, Trinity Divine Outreach Ministries had its charitable status revoked. A CRA audit of the organization found that the organization had participated in a donation arrangement promoted by

Innovative Gifting Inc., a charitable donation tax shelter promoter. The organization was found to have issued 40 donation receipts totaling over \$1.1 million for shares that had been allegedly traded on the Frankfurt Stock Exchange. The CRA revoked the organization's status on the basis that the shares for which the tax receipts were issued did not legally qualify as gifts; the organization failed to demonstrate that it had actually received the tax-receipted shares; and the organization failed to report the fair market value of the shares purportedly gifted.

For more information see: <http://www.cra-arc.gc.ca/nwsrm/rlss/2013/m01/nr130111-eng.html>

### **International Fellowship Mission Inc. Charitable Status Revoked**

On January 12, 2013, International Fellowship Mission Inc. had its charitable status revoked for failing to devote its resources exclusively to its own charitable activities by participating in the Universal Barter Group, a registered tax shelter. According to CRA, from January 1, 2007 to December 31, 2008, the corporation issued \$1.1 million in donation receipts for non-qualifying gifts and did so at the direction of the tax shelter promoter. CRA also determined that the corporation also failed to maintain or provide adequate books and records and was unable to show that the pharmaceuticals it allegedly acquired were distributed under its direction.

For more information see: <http://www.cra-arc.gc.ca/nwsrm/rlss/2013/m01/nr130111b-eng.html>

### **Changes to Definition of Qualified Donee for 2012 Income Tax Year**

CRA – Charities and Giving, has updated the Pamphlet P113, “Gifts and Income Tax 2012” to reflect which donations taxpayers may claim to reflect changes to the definition of qualified donee as applicable to the 2012 taxation year.

[http://www.cra-arc.gc.ca/E/pub/tg/p113/p113-e.html#P97\\_6347](http://www.cra-arc.gc.ca/E/pub/tg/p113/p113-e.html#P97_6347)

### **Updates to CRA Publications**

CRA – Charities and Giving, has updated its guide, “Registering a Charity for Income Tax Purposes.” This guide will help organizations complete Form T2050, *Application to Register a Charity under the Income Tax Act*. For a copy of the guide, see online at: <http://www.cra-arc.gc.ca/E/pub/tg/t4063/t4063-12e.pdf>.

## **CRA Guidance on *Arts Activities and Charitable Registration* Released**

Theresa L.M. Man.

On December 14, 2012, the Canada Revenue Agency (CRA) released the *Arts Activities and Charitable Registration* Guidance CG-018 (“New Guidance”), which replaced Summary Policy CSP-A08, *Arts*, and Summary Policy CSP-A24, *Artists*. The New Guidance is similar in substance to the draft *Guidance on Arts Organizations and Charitable Registration*, which was released on November 1, 2011 for public consultation. The New Guidance explains CRA’s interpretation of the relevant common law and the *Income Tax Act*, describing the factors CRA uses to determine whether an organization is furthering a charitable purpose through arts activities and thus potentially eligible for registration as a charity under the Act.

A *Charity Law Bulletin* on the draft Guidance can be found at:

<http://www.carters.ca/pub/bulletin/charity/2011/chylb271.htm>.

The final version of the New Guidance is located at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/rts-ctvts-eng.html>.

## **Tax Court Considers Timeshare Tax Shelter**

Karen J. Cooper.

The Tax Court of Canada recently released its decision in *Berg A. v. The Queen* (2012 TCC 406, available online at: <http://canlii.ca/t/ftxms>). This decision relates to appeals from CRA reassessments for the 2002, 2003 and 2004 taxation years that disallowed charitable gifts claimed in the amounts of \$2,420,000, \$1,067,620 and \$718,380, respectively. The appellant had participated in a charitable donation program that involved a series of pre-determined transactions with Young Island Timeshare Inc. (“YITI”) and SVG Bancorp. The appellant purchased timeshare units in 2002 with a cash payment and a \$2,178,000 promissory note in favour of YITI. The appellant pledged the timeshare units to YITI as security for his obligations under the promissory note and was provided with a written discharge of his obligations. At the same time, the appellant entered into a guarantee agreement with SVG pursuant to which he paid a fee to SVG to guarantee his obligations under the promissory note to YITI. YITI then released the appellant from his pledge of the timeshare units. Approximately one month later, the appellant transferred the units to Cheder Chabad, a registered charity. Cheder Chabad issued a gift receipt in the amount of \$2,420,000 to the appellant. The appellant entered into similar transactions in 2003.

Given that the appellant had no intention of making a payment on the promissory notes (and had yet to up to the date of trial), the Court held that the “promissory notes, pledge agreements and guarantee agreements were merely pretenses and did not, at any time, reflect *bona fide* obligations of the Appellant to YITI or SVG.” Even so, the appellant claimed that his charitable gifts should not be disallowed in their entirety, as he had donative intent when he transferred the units to Cheder Chabad. After reviewing the case, the Court agreed with the appellant, and stated that even though he was most likely only “marginally motivated by donative intent”, he was “impoverished by, paid valuable consideration for, intended to give, and conveyed” the units which were then received by the charity. Given no benefits were received by the appellant, beyond his inflated gift receipts, the Court found that his cash payments for the timeshares (\$242,000 and \$133,950) met the legal test of a charitable gift and he was entitled to claim a charitable donation in these amounts. It is interesting to note that there is no discussion of whether these amounts represent the fair market value of the property transferred to the registered charity, the Court seems to assume that since this is the amount paid by the appellant for the units it must be the fair market value of the units.

## **CRA View Says that NPOs can Refund Membership Fees – with Caution**

Theresa L.M. Man.

On October 25, 2012, Canada Revenue Agency (CRA) released a technical interpretation (document 2012-045384) involving whether a non-profit organization (NPO) could lose its tax-exempt status by refunding membership fees to its members. The association in question raises funds through membership fees and fundraising activities. Every year the organization refunds its surplus funds to its members. CRA responded that an NPO generally will not be denied NPO exempt status merely because it overestimates the membership fees it requires and refunds the excess. CRA did provide some words of caution, however. In particular, CRA stipulated that the facts surrounding the distribution and the organization’s financial records must suggest that the amounts provided to members are in fact refunds. Furthermore, to support this characterization, payments should be available to all members on a proportionate basis. CRA also warned that a surplus resulting from a mixture of membership fees and fundraising activities may indicate that the NPO is fundraising more than necessary and thus has a profit purpose. The scope of an NPO’s fundraising activities, especially compared to other activities, should not be so significant as to suggest a profit purpose.

## **CRA Makes Changes to the Clergy Residence Deduction Form**

Terrance S. Carter.

The 2012 version of Canada Revenue Agency's T1223 – Clergy Residence Deduction form includes a few amendments from the 2011 version that may impact the ability of some clergy members to receive the deduction. Part B, section 1.a., now requires the applicant to “provide a copy of his or her ordination certificate.” This requirement could prevent some clergy members who do not have an ordination certificate from receiving the deduction. The Canadian Council for Christian Charities has noted that CRA's Interpretation Bulletin-141R “Consolidated – Clergy Residence Deduction”, defines a member of the clergy as a “person set apart from the other members of the church or religious denomination as a spiritual leader”. The description specifies that “it is not necessary that the process of appointment be referred to as ordination” and does not suggest that the process must be formalized through written documentation. For these reasons, it would appear to be inconsistent for CRA to now require clergy members to provide a copy of their ordination certificate in order to claim the Clergy Residence Deduction.

The form includes two other changes, but these do not appear to be as potentially problematic because they simply require additional descriptions. Part B, section 1.b. now requires an applicant to “provide the name of the religious denomination and describe how he or she was appointed” and Part B, section 3.c. also now requires applicants to describe how they were appointed.

A copy of the current T1223 Clergy Residence Deduction form is available at: <http://www.cra-arc.gc.ca/E/pbg/tf/t1223/README.html>

For a more detailed commentary on the implications of these changes, see an excellent discussion by the Canadian Council for Christian Charities at: [http://www.cccc.org/news\\_release/136](http://www.cccc.org/news_release/136) (hyperlinked with permission).

## **Federal Court of Appeal Comments on Bill C-48**

Karen J. Cooper.

The Federal Court of Appeal (FCA) recently released their decision in *Edwards M. v. The Queen* (2012 FCA 330), in which they overturned the Tax Court of Canada's decision to not allow Michael Edwards an adjournment of his appeal. Michael Edwards had brought his motion in regard to his 2003 reassessment in which CRA disallowed a \$10,000 charitable donation he claimed under “The ParkLane

Charitable Donation Program”, a leveraged donation program in which he made a \$3,150 donation in return for a \$10,000 tax receipt.

CRA estimates that the amount of donations given through leveraged programs over the years has been approximately \$500 million, with around half of the 18,000 taxpayers participating in these types of programs having been reassessed to date. The *Edwards* case is the lead case for eight other appeals that are being held in abeyance pending the outcome of his appeal and thousands of other taxpayers are waiting on the case’s outcome as well. The purpose of the request for adjournment was to determine the impact of pending amendments to the *Income Tax Act* in regard to split-receipting of charitable gifts. Mr. Edwards’ argument was centered on the fact that if the amendments were enacted they might assist him in winning his appeal or help him in reaching a settlement with the Minister of Revenue. Given that the March 2012 Budget had proposed to enact the amendments retroactive to December 2002, when they were first announced, he had requested an adjournment from the Tax Court of Canada, which was denied in July 2012.

Although the FCA did not disagree with the Tax Court’s reason for denying Mr. Edwards’ appeal, they overturned the decision based on the recent introduction of *Bill C-48*, which included the proposed amendments related to split-receipting. The FCA adjourned Mr. Edwards’ appeal until November 26, 2013 (or such earlier date as the proposed amendments were enacted, defeated or withdrawn). Although not applying their opinion specifically to the *Edwards* case, the FCA did state that they believed that there was “something fundamentally unfair in the CRA’s administration of proposed amendments to the *Income Tax Act* for the past ten years as if they were already law” given that taxpayers are unable to challenge CRA decisions that state that the “proposed amendments do not apply to the circumstances of the taxpayer.”

For more information, see the decision online at: <http://canlii.ca/t/fvpcj>

## **CRA Views on NPOs with Taxable Subsidiaries and Non-Profit Parent**

Theresa L.M. Man.

In November 2012, Canada Revenue Agency (CRA) released two technical interpretations involving non-profit organizations (NPOs) under paragraph 149(1)(1) of the *Income Tax Act* (Act) having taxable subsidiaries and non-profit parent organizations.

In document number 2012-043995, CRA was of the view that an association that received management fees, rents, interest income, or other types of income from a taxable subsidiary indicated a profit purpose



and therefore did not qualify as an NPO under the Act. In that case, funds from the unrestricted capital reserve account of an association were invested in a for-profit taxable subsidiary. The investment was recorded in the books of the subsidiary as common shares, equity in earning and loans. CRA acknowledged that it is acceptable for an NPO to engage in an income generating activity that is carried out in a taxable wholly-owned subsidiary, and the subsidiary pays dividends out of its after-tax profits to the NPO for it to carry out not-for-profit activities. In spite of such an acknowledgment, CRA expressed the view that if an association has sufficient excess funds available to purchase and make loans to a taxable entity, this would suggest that the association operates with a for-profit motive. The fact that the funds were available from the association's retained earnings meant that its earnings were larger than what was necessary to meet its own non-profit objectives. Whether the objects of the taxable organization are connected to the objects of the association is not a relevant factor for CRA's analysis. Lastly, CRA was also of the view that the association does not meet the requirements for NPOs because of its large reserves and annual excess of revenues over expenditures.

In document 2012-0455501I7, the only member of an association was its parent corporation which was also an NPO. As well, the association owned a percentage of the shares of a for-profit subsidiary. The remaining shares of the subsidiary were owned by another for-profit company. The association paid a management fee annually to its NPO parent. CRA found that the management fee paid to the NPO parent was unreasonable in comparison to actual work done by the parent. Without the management fee, the association would show a profit in the years under audit. CRA was also concerned that the management fees paid to the NPO parent were not on a cost-recovery basis. As such, CRA was of the view that the association did not meet the requirements for NPOs because income of the association was made available to its members by transferring amounts (in the form of management fee) to its NPO parent in excess of costs. In relation to the ownership of a taxable subsidiary, CRA was of the view that the association had excess funds available to invest in a taxable corporation and there was no evidence to support that the use of funds in this manner supported the organization's not-for-profit objectives. This, therefore, was a further reason why the association did not meet the requirements to be an NPO.

Technical interpretations are only available by subscription or written request to CRA.

## **Keeping Proper Records Important for Charities and Donors**

Karen J. Cooper.

The Tax Court of Canada recently released their decision in *Afovia v. The Queen*, 2012 TCC 391 (available online at: <http://canlii.ca/t/fvfw8>), a decision related to the revocation of the charitable status of “Parole de Grace London” (PDGL). In 2010, an audit of PDGL resulted in CRA being unable to determine whether donations had been received or deposited into PDGL’s bank account, resulting in PDGL’s charitable status being revoked for failing to maintain adequate books and records. The revocation then triggered reassessments by CRA of the four taxpayers in *Afovia* who, in 2007, claimed cash donations to PDGL. In reassessing the taxpayers, CRA determined that they had not made the donations in question, as they had not requested receipts for each of their donations and were unable to produce bank statements to confirm the cash donations. On the appeal from these reassessments, the Court found that PDGL’s charitable donation receipts did not contain the required information, as per section 3501 of the *Income Tax Act Regulations* and that the appeals could be dismissed on this basis alone. The Court further found that the taxpayers had not made the donations in issue. None of the taxpayers were able to produce credible evidence to support the donations beyond the receipts provided by PDGL. Given that the size of the supposed donations were large, the taxpayers had no previous history of making substantial donations, none of taxpayers lived in the charity’s vicinity, and none provided independent evidence as to having attended its services, it was implausible that taxpayers made the substantial donations they claimed to have made.

For more information the requirements for receipts imposed by section 3501, see online at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/chcklsts/rcpts-eng.html>.

## **Transitioning Under the New Ontario Not-For-Profit Corporations Act**

Theresa L.M. Man in *Charity Law Bulletin* No. 299, January 30, 2013.

With the Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”) expected to be proclaimed on July 1, 2013, not-for-profit corporations incorporated under Part III of the Ontario *Corporations Act* (“OCA”) should begin familiarizing themselves with how the ONCA will change their future corporate structure and governance and how they will need to transition under the ONCA.

Bill 65, *An Act to revise the law in respect of not-for-profit corporations, 2010*, was introduced on May 12, 2010 and received Royal Assent on October 25, 2010. The administration of the ONCA will be shared by the Ministry of Consumer Services and the Ministry of Government Services. The Ministries have not yet released the regulations under the ONCA and are currently finalizing tools to assist not-for-

profit corporations complete the transition. In December 2012, the Ministry of Consumer Services released helpful information on their website, including a transition checklist, and a list of frequently asked questions. Additional tools that will be available in future include a plain language guide explaining the ONCA's most significant sections, and default by-laws. Once the ONCA is in force, the OCA, which has not been substantively amended since 1953, will no longer apply to non-share capital corporations incorporated under Part III of the OCA. This Bulletin will review issues that Part III OCA corporations may need to consider in transitioning into the ONCA.

**Read More:**

[PDF] <http://www.carters.ca/pub/bulletin/charity/2013/chylb299.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2013/chylb299.htm>

**Industry Canada Publishes Revised Anti-spam Regulations**

Ryan M. Prendergast in *Charity Law Bulletin* No. 298, January 30, 2013.

On January 5, 2013, a revised set of the proposed Electronic Commerce Protection Regulations (the "Proposed IC Regulations") were pre-published by Industry Canada in Part I of the *Canada Gazette* Vol. 147, No. 1 for a consultation period of 30 days. The Proposed IC Regulations are Industry Canada's regulations under Bill C-28 ("Anti-spam Legislation"), which has been reported on in previous *Charity Law Bulletins and Charity Law Updates*.

For information concerning the first draft of the regulations released by Industry Canada, as well as more information on the Anti-spam Legislation, see *Charity Law Bulletin No. 257*, dated August 18, 2011, available at <http://www.carters.ca/pub/bulletin/charity/2011/chylb257.htm>.

This *Charity Law Bulletin* will briefly review the portions of the Proposed IC Regulations that, although not new under the Proposed IC Regulations, remain of concern to not-for-profits and provides further commentary on the Anti-spam Legislation.

**Read More:**

[PDF] <http://www.carters.ca/pub/bulletin/charity/2013/chylb298.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2013/chylb298.htm>

**Top Court Affirms Balanced Approach to Competing Charter Rights**

Jennifer M. Leddy in *Church Law Bulletin* No. 43, November 29, 2012.

On December 20, 2012, the Supreme Court of Canada released a decision of interest to religious charities because of its respectful and serious treatment of the constitutional right to freedom of religion,

as well as to other charities because of the framework outlined in the majority decision for balancing competing rights under the *Canadian Charter of Rights and Freedoms* (“Charter”).

In this case, a Muslim woman invoked freedom of religion to wear a niqab, a veil covering her face other than her eyes, while testifying as the complainant in a criminal trial concerning historical sexual assaults. The woman asserted that her religious beliefs required that she must be covered in public or in the presence of men who are not direct relatives. The accused, the woman’s uncle and cousin, responded by asserting that their constitutional right to make full answer and defence required the complainant to uncover her face when testifying.

The decision of the Supreme Court of Canada has three sets of reasons: the majority decision written by Chief Justice McLachlin for herself and Justices Deschamps, Fish and Cromwell, concurring reasons written by Justice Lebel for himself and Justice Rothstein, and dissenting reasons by Justice Abella. The focus of this Bulletin is on the majority reasons for decision.

**Read More:**

[PDF] <http://www.carters.ca/pub/bulletin/church/2013/chchlb43.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/church/2013/chchlb43.htm>

## **Limiting Slip and Fall Liability for Charities and NPOs**

Barry W. Kwasniewski in *Charity Law Bulletin* No. 297, January 29, 2013.

The winter months in Canada are the high season for slip and fall injuries. Snow and ice on parking lots and sidewalks, and wet floors inside buildings, increase the risks of injuries occurring. Sometimes those injuries result in claims and lawsuits. Charities and not-for-profits which own or lease premises are not immune from such claims, and the liability risks, while heightened during winter, are not limited to this time of the year. In the recent Ontario Court of Appeal decision *Farias v. Peel District School Board*, the Court of Appeal affirmed a trial judgment which found the respondent School Board not liable for injuries suffered by an individual on one of the School Board’s properties. The Court held that the School Board had not breached its duty under the *Occupiers’ Liability Act* (the “Act”) and that the Appellant was personally responsible for her injuries.

This *Charity Law Bulletin* explains the above decision, discusses the Act and suggests ways for charities and not-for-profits to limit their liability risk for slip and fall injuries.

**Read More:**

[PDF] <http://www.carters.ca/pub/bulletin/charity/2013/chylb297.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2013/chylb297.htm>

**Nova Scotia Passes *Community Interest Companies Act***

Terrance S. Carter.

On December 6, 2012, Nova Scotia's *Community Interest Companies Act*, Bill No. 153 ("the Act") received Royal Assent, allowing businesses to seek designation as a "community interest company" ("CIC"). This legislation is aimed at supporting social entrepreneurship initiatives. According to John MacDonell, Minister of Service Nova Scotia and Municipal Relations, CICs will "benefit the economy and create employment, while contributing to a social good". Nova Scotia follows British Columbia, which passed similar legislation in April, 2012.

To qualify for the CIC designation, a company must have a "community purpose," which the Act defines as "a purpose beneficial to society at large, or a segment of society that is broader than the group of persons who are related to the community interest company". A CIC must have at least three directors, all of whom must act in accordance with the company's community purpose when exercising their powers and performing their functions. CICs are restricted in their ability to pay dividends and distribute assets on dissolution or otherwise and they must file a community interest report each year. The legislation does not change the *Income Tax Act*, so CICs must either comply with the rules for not-for-profit organizations or pay tax as a for-profit corporation.

The Act is available at: [http://nslegislature.ca/legc/bills/61st\\_4th/1st\\_read/b153.htm](http://nslegislature.ca/legc/bills/61st_4th/1st_read/b153.htm). To read the Service Nova Scotia and Municipal Relations press release, go to:

<http://novascotia.ca/news/release/?id=20121128010>

**Hospital Foundation Required to Pay Municipal Taxes on Office Space**

Jacqueline M. Demczur.

On November 9, 2012, the Divisional Court ("Court") upheld the decision of Mr. Justice McEwen of the Ontario Superior Court of Justice ("Application Judge") that the office space owned by The Hospital for Sick Children ("Hospital") and occupied by The Hospital for Sick Children Foundation ("Foundation") is not exempt from municipal taxation. Section 3(1)6 of the *Assessment Act* (Ontario), exempts the land used and occupied by a public hospital from tax, but excludes any portion of the land occupied by tenants of a hospital. Writing on behalf of the Court, Madam Justice Swinton concurred that the Foundation is a tenant of the Hospital and that the two entities do not share a patrimony such that one could conclude the Legislature intended to provide the same exemption to the Foundation as it provides to the Hospital.

In its decision, the Court found no error in the Application Judge's conclusion that, even though the Foundation did not have a lease or pay rent to the Hospital, it was still a "tenant" because of its continuous use of the premises, payment of the common expenses and control over access to the space. Further, the Court concurred with the Application Judge's assessment of the following issues: that the Hospital and Foundation did not have a shared patrimony because they are separate corporate organizations; that this separation is not merely for costs purposes; and the Foundation is not merely carrying out the Hospital's activities or is controlled by the Hospital. For these reasons, the Foundation's appeal was dismissed.

To read the judgment, go to:

<http://www.canlii.org/en/on/onscdc/doc/2012/2012onsc6112/2012onsc6112.html>

## **Court Provides Comments on Who Owns a Charity**

Ryan M. Prendergast.

On January 3, 2013, the Ontario Superior Court of Justice issued its decision regarding costs in the matter of *Kandolo v. Kabelu*. *Charity Law Bulletin No. 292* reported on the initial decision and provided the facts and background to the case. The Bulletin can be found online at: <http://www.carters.ca/pub/bulletin/charity/2012/chylb292.htm>. As a brief review, the decision concerned the effective date of the resignations of two directors of the Olangi Washo Foundation (the "Foundation"), a non-share capital corporation under the *Canada Corporations Act* and registered charity, and whether or not the directors could revoke their resignations.

Two directors of the Foundation, who were involved in the founding of the Foundation, initially resigned after an internal dispute with other members and brought an action against the Foundation for \$249,000. In a sudden change of tactics, the two directors subsequently unilaterally revoked their resignations and assumed control of the Foundation. The court found that the directors were not entitled to revoke their resignations.

Although the two directors were unsuccessful, they argued they were entitled to costs and that it would not be fair for them to leave the Foundation with nothing after having devoted ten years of their life and their own funds to it. The court did not agree with this submission, and, rather obviously, pointed out that the property of the Foundation was not the personal property of the directors. The court stated at paragraph 19 of the costs decision that, "the Foundation is a charitable non-share capital corporation whose purpose is spiritual in nature namely to promote the 'combat spirituel' [*sic*] which is a part of a

Christian evangelical group. The Foundation is a registered charity and as such, the Kabelus were not the owners of this charity and therefore could not have been seeking to enrich themselves financially through their efforts to promote the Foundation. The Foundation may be financially enriched by the efforts and donations of members of the congregation but an individual member is not financially enriched but may be spiritually enriched.”

After considering a number of factors, the court ordered the directors to pay costs of \$65,000 to the successful party, plus applicable HST and \$7,000 in disbursements. Although the costs decision does not involve new law, the decision serves as a helpful reminder to directors, officers, and members of registered charities that no matter how much time and effort they put into the charity, this does not give them any ownership in the charity.

The costs decision can be found online at:

<http://canlii.ca/en/on/onsc/doc/2013/2013onsc73/2013onsc73.html>.

## **Supreme Court Upholds ‘Motive Provision’ of Terrorism Law**

Sean S. Carter.

In a decision released on December 14, 2012 (*R. v. Khawaja*, 2012 SSC 69), the Supreme Court unanimously upheld the two key terrorism provisions in the *Criminal Code*, including the controversial ‘motive clause’ in the definition of “terrorist activities” in section 83.01(1). Mr. Khawaja was the first person to be charged under the sweeping anti-terrorism provisions brought into law after 9/11 and challenged these laws on, among other grounds of appeal, the *Charter* grounds of being overbroad and prohibiting expressive activity.

One of the pervasive concerns regarding the “motive clause” of the definition of “terrorist activity” in 83.01(1) was that such an activity is committed “in whole or in part for political, religious or ideological purpose, objective or cause...” This definition had resulted in a number of concerns being raised regarding law enforcement investigations into individuals and corporations (including charities and not-for-profits), particularly that the ‘motive clause’ could legitimize law enforcement action aimed at scrutinizing individuals and organizations based primarily on their religious, political or ideological beliefs and practices. Due to the fact that no evidence of this feared “criminalization of expressive conduct” was raised during the initial trial of the issues, the Supreme Court chose not to infer it from the facts and ultimately upheld the ‘motive clause’ and dismissed Mr. Khawaja’s appeal on these, and several other, grounds.

It is important to remember that the implications of the Supreme Court's decision are much wider than simply investigations into individuals suspected of planning terrorist attacks.

The Supreme Court's resounding affirmation (at least on the facts of Mr. Khawaja's case) of the 'motive clause' means that a potential reality for individuals and organizations is one in which their political, religious or ideological purpose, objective or cause, may in and of itself be (at the very least) the impetus for law enforcement investigation. This is important to consider, particularly because law enforcement investigations themselves could be the basis for substantive action against the individual or organization, including the suspension or loss of charitable status under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* or the *Income Tax Act*. For more information regarding this Act, the initial Ontario Superior Court decision in Mr. Khawaja's case, and about investigations potentially leading to the de-registration of charities, please see [www.antiterrorism.ca](http://www.antiterrorism.ca).

### **Australia Establishes National Regulator for Charities**

Terrance S. Carter.

The *Australian Charities and Not-for-profits Commission Act 2012* received Royal Assent on December 3, 2012, establishing Australia's first national, independent regulator for the charitable sector. The Australian Charities and Not-for-profits Commission ("ACNC") was set up to "maintain, protect and enhance public trust and confidence in the sector through increased accountability and transparency; support and sustain a robust, vibrant, independent and innovative not-for-profit sector; and promote the reduction of unnecessary regulator obligations on the sector." To accomplish these objectives, the ACNC is tasked with registering organisations as charities; helping charities meet their obligations; maintaining a free public register so that anyone can look up information about registered charities; and working with state and territory governments to develop a reporting framework for charities.

Readers wishing to learn more about the ACNC may visit the Commission's website:

<http://www.acnc.gov.au/>.

### **UN Counter Terrorism Committee Discusses Not-for-Profit Sector**

Terrance S. Carter.

On November 20, 2012, the United Nations' Counter Terrorism Committee (CTC) conducted a special meeting with Member States and international, regional and subregional organizations to discuss preventing and suppressing terrorist financing. The Chair's Summary of the meeting spoke of the work



being done to introduce measures to prevent individuals from using the not-for-profit sector to distribute funds to terrorists. The summary went on to articulate, however, that “legitimate efforts to prevent abuse of the non-profit sector for terrorist financing purposes should not undermine the sector’s legitimate role and purpose. Therefore, a balanced regulatory approach, including dialogue with the NPO sector, is key to an effective implementation of the relevant international framework.”

This summary is an important reminder of the need for a balanced approach in dealing with issues concerning terrorist financing and the charitable sector, whether it be in Canada or abroad. Justice John Major made similar comments in his 2010 *Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182*. In particular, Justice Major stated “the work of honest charities should not be hindered because of unrealistic guidelines or best practices.”

More information about the special UN meeting is available at:

<http://www.un.org/en/sc/ctc/specialmeetings/2012/docs.html>

For further summary of the *Report of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182* see: [www.carters.ca/pub/alert/ATCLA/ATCLA21.pdf](http://www.carters.ca/pub/alert/ATCLA/ATCLA21.pdf)

## IN THE PRESS

**New guidance on consequences of returning donated property** by Ryan M. Prendergast.

*Hilborn eNews*, January 16, 2013.

[Link] <http://charityinfo.ca/articles/New-guidance-on-consequences-of-returning-donated-property>

**CRA updated guidance on community economic development** by Theresa L.M. Man, Terrance S. Carter and Ryan M. Prendergast.

*Charity Talk*, Canadian Bar Association, December 2012.

[Link] [http://www.cba.org/CBA/sections\\_charities/newsletters2012/cra.aspx](http://www.cba.org/CBA/sections_charities/newsletters2012/cra.aspx)

**Be sure you count all fundraising revenue in your T3010 return** by Terrance S. Carter.

*Hilborn eNews*, December 20, 2012.

[Link] <http://charityinfo.ca/articles/Be-sure-you-count-all-fundraising-revenue-in-your-T3010-return>

**Essential Charity Law Update** by Terrance S. Carter.

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[Link] [http://www.carters.ca/news/2012/TSC\\_HLiC33\\_2.pdf](http://www.carters.ca/news/2012/TSC_HLiC33_2.pdf)

## RECENT EVENTS AND PRESENTATIONS

**Imagine Canada's Charity Tax Tools Webinar** was a presentation by Terrance Carter on December 4, 2012 (postponed from October 16), entitled "An Extended Overview of Directors and Officers Duties and Liabilities."

Recording and handout available at <http://charitytax.imaginecanada.ca/demand-webinars>.

**Chartered Accountants of Ontario PD Seminar - Not-for-Profit Organizations and Registered Charities** included Karen J. Cooper as a course leader on January 15, 2013.

**BDO Lunch & Learn** held in Guelph, Ontario, on January 16, 2013, included a presentation by Terrance S. Carter entitled "Essential Charity and Not-for-Profit Law Update."

**Young Lawyers Breakfast** held in Ottawa, Ontario, on January 23, 2013, included a presentation by Karen J. Cooper on "Professional & Ethical Issues."

**Enterprising Non Profits Webinar** held on January 25, 2013, was a presentation by Karen J. Cooper entitled "Legal Issues for Social Enterprises" (in French).

## UPCOMING EVENTS AND PRESENTATIONS

**The Ottawa Region Charity & Not-for-Profit Law™ Seminar** will be held in the Ottawa Region on Thursday, February 7, 2013. Register by February 1<sup>st</sup> for early bird discount.

Details and online registration available at <http://www.charitylaw.ca>.

**The Third Annual CSAE Trillium Chapter Winter Summit** will include the following presentations on February 8, 2013:

"The New Ontario *Not-for-Profit Corporations Act* (ONCA) and Why You Need to Get Ready Now" by Theresa L.M. Man, and

"Digging for Dirt – Accessing Corporate Records" by Terrance S. Carter.

Link: <http://www.csae.com/CoursesEvents/Details/tabid/176/ArticleId/1678/3rd-Annual-Winter-Summit.aspx>

**Imagine Canada's Strengthening Organizations Webinar Series for Charities and Nonprofits** will include a presentation by Barry W. Kwasniewski on February 20, 2013, entitled "Staff and Volunteer Policies that Protect Your People and Your Organization."

Register at <http://www.imaginecanada.ca/standards/training>.

**2013 FEO Conference (Festivals & Events Ontario)** will include a presentation by Terrance S. Carter on March 1, 2013, entitled "Not-for-Profit Law Potpourri – Key Issues to Consider."

Link: <http://www.cvent.com/events/celebrating-cultures-2013-feo-annual-conference/event-summary-bb2f61c6b9b74c64bf1628a2d3f04f71.aspx>

## CONTRIBUTORS

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**Dean E. Blachford** – Mr. Blachford graduated from McGill University in 2012 with degrees in civil and common law. During his legal studies, Mr. Blachford coordinated McGill’s High School Outreach Program which provides legal and civic education to underprivileged youth. He also proudly served on the board of directors for Montreal’s Mile End Community Mission. Prior to his legal studies, he spent two years teaching grade four in Inukjuak, Nunavik. Before leaving the North, he co-founded a summer program, called Proud Reunions, for children and youth in the region. Mr. Blachford continues to oversee the program, which has affected hundreds of young people.



**Jane Burke-Robertson** – A partner with Carters’ Ottawa office, Ms. Burke-Robertson practices in the area of charity and not-for-profit law, is recipient of the 2011 AMS/John Hodgson Award, and has been ranked by *Lexpert* and *The Best Lawyers in Canada* as a leader in her field. She is co-author of *Non-Share Capital Corporations* published by Carswell, and a contributor to Industry Canada’s *Primer for Directors of Not-for-Profit Corporations*. Ms. Burke-Robertson is a frequent speaker and lecturer on charitable and not-for-profit matters and recently taught an advanced seminar on the law of charities and non-profit organizations at the Faculty of Law, University of Ottawa.



**Tanya L. Carlton** – Ms. Carlton graduated from the University of Ottawa, Faculty of Law in 2011. Prior to attending law school, Tanya earned a B.Sc. (Hons.) in Biochemistry from Bishops University and a B.Ed. from the University of Western Ontario. After teaching high school math and chemistry for several years, she took a hiatus and started a family. Throughout this time, she maintained her status as an Ontario Certified Teacher and served as an elected Municipal Councillor. Before articling with Carters, Ms. Carlton gained legal experience during the summers as a research assistant for several Ottawa-based teaching lawyers.



**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, is recognized as a leading expert by *Lexpert* and *The Best Lawyers in Canada*, is consulting editor of *Charities Legislation and Commentary* (LexisNexis, 2013), 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).



**Sean S. Carter** – Called to the Ontario Bar in 2009, Sean practices general civil, commercial and charity related litigation. Formerly an associate at Fasken Martineau DuMoulin LLP, Sean has experience in matters relating to human rights and charter applications, international arbitrations, quasi-criminal and regulatory matters, proceedings against public authorities and the enforcement of foreign judgments. Sean also gained valuable experience as a research assistant at Carters, including for publications in *The International Journal of Not-for-Profit Law*, *The Lawyers Weekly*, *Charity Law Bulletin* and the *Anti-Terrorism and Charity Law Alert*.



**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 practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews, as well as wills, estate planning and estate administration. Mrs. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*. 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.



**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*.



**Ryan Prendergast** –Called to the Ontario Bar in 2010, Mr. Prendergast 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, Mr. Prendergast was a 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, he acquired experience in charity and not-for-profit law, and contributed to several *Charity Law Bulletins* and other publications.

## ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

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