
**HOSPITALS AND FOUNDATIONS SEMINAR SERIES
HEALTHCARE PHILANTHROPY:
CHECK-UP 2009**

Toronto - June 11, 2009

**Highlights in Charity Law:
The Year in Review**

**By Terrance S. Carter, Carters Professional Corporation
and M. Elena Hoffstein, Fasken Martineau DuMoulin LLP**

CARTERS™.ca

**Carters Professional Corporation
www.charitylaw.ca**

**FASKEN
MARTINEAU** 

**Fasken Martineau DuMoulin LLP
www.fasken.com**

HOSPITALS AND FOUNDATIONS SEMINAR SERIES
HEALTHCARE PHILANTHROPY:
CHECK-UP 2009
Toronto – June 11, 2009

**Highlights in Charity Law:
The Year in Review**
(as of June 5, 2009)

By Terrance S. Carter, Carters Professional Corporation
and M. Elena Hoffstein, Fasken Martineau

CARTERS.ca
Carters Professional Corporation
www.charitylaw.ca

**FASKEN
MARTINEAU**
Fasken Martineau DuMoulin LLP
www.fasken.com

A. INTRODUCTION

- This presentation provides brief highlights of recent developments at Canada Revenue Agency (“CRA”) that fundraisers and charities should know:
 - Recent Changes, Rulings, and Interpretations Under the *Income Tax Act* (“ITA”)
 - Some of the More Significant Tax Court Decisions Affecting Charities
 - New Policies, Publications and Guidances from CRA
 - Other Recent Case Law Affecting Charities
- See CLB #155 “Charity Law 2008 – the Year in Review”, and other publications at <http://www.carters.ca/pub/bulletin/charity/2009/chylb155.pdf>

CARTERS.ca 2 **FASKEN
MARTINEAU**

**B. RECENT CHANGES, RULINGS,
INTERPRETATIONS AND TAX
DECISIONS UNDER THE ITA**

1. Bill C-10 Proposed Amendments to the *ITA* Affecting Charities (Split-receipting)
 - Bill C-10 amended and consolidated earlier proposed amendments released on December 20, 2002, December 5, 2003, February 27, 2004, July 18, 2005, November 18, 2006, and October 29, 2007
 - On September 7, 2008, Bill C-10 died on Order Paper as a result of the dissolution of Parliament
 - Expected to be finally passed sometime in 2009

CARTERS.ca 3 **FASKEN
MARTINEAU**

2. 2008 Federal Budget

- The February 26, 2008 Federal Budget proposed a number of measures that will impact registered charities
- Bill C-50, an act to implement certain provisions of the 2008 Budget, received Royal Assent on June 18, 2008, and includes some, but not all of the 2008 Budget's provisions dealing with charities
- Bill C-10 that received Royal Assent on March 12, 2009 included provisions from the 2008 Budget dealing with changes to excess business holding rules affecting private foundations

CARTERS.ca 4 FASKEN MARTINEAU

Included in Bill C-50 (June 18, 2008)

- Provisions to extend the capital gains tax exemption to donations of unlisted securities that are exchanged for publicly traded securities before being gifted to a registered charity on or after February 26, 2008, within 30 days of the exchange

Included in Bill C-10 (March 12, 2009)

- The 2008 Budget's measures to amend the excess business holding rules that were enacted in December 2007, by:
 - Exempting certain unlisted shares that were held on March 18, 2007 from the divestiture requirements, subject to certain exceptions



CARTERS.ca 5 FASKEN MARTINEAU

- New rules with respect to shares held on March 18, 2007 by “non arm’s-length” trusts
- Extending anti-avoidance provisions to address certain inappropriate uses of trusts
- Introducing concept of “substituted shares”
 - “Substituted shares” are shares acquired in a corporate reorganization in exchange for other shares
 - “Substituted shares” will be treated the same as the shares for which they were exchanged for purposes of applying the exemption from the excess business holding rules
- See CLB #135 “Federal Budget 2008 Highlights for Charities at <http://www.carters.ca/pub/bulletin/charity/2008/chv1b135.pdf>



CARTERS.ca 6 FASKEN MARTINEAU

3. 2009 Federal Budget



- On January 27, 2009, the federal government released its annual budget
- Bill C-10 was introduced on January 27, 2009, to implement the proposed changes contained in the 2009 federal budget
- Bill C-10 received Royal Assent on March 12, 2009
- In the lead up to the Budget, Imagine Canada submitted a brief on behalf of the charitable sector to Finance (“the Brief”)

 7 

- The Brief put forward the following three key stimulative measures to assist Canada’s vulnerable populations and the charitable and non-profit sector that supports them:
 - i. Maintain direct funding through federal grants and contributions agreements
 - ii. Earmark federal infrastructure funding for community and social services, arts and culture, sports and recreation and green retrofit initiatives
 - iii. Provide a time-limited enhanced tax credit measure to stimulate giving

 8 

- The sector expressed disappointment that, while the Budget provided for various grants, contributions, and earmarks that will benefit charities and non-profits, it did not establish any new tax incentives that might stimulate giving
- Also contained in Bill C-10 were the changes to the excess business holdings rules affecting private foundations that were contained in the 2008 federal budget (see above at slide 5)

 9 

4. CRA Rulings on Flow-through Shares

- CRA released a number of advance income tax rulings approving the donation of flow-through shares (February 6, 2008 ruling (2007–0242361R3), May 14, 2008 ruling (2007–0232271R3), and July 23, 2008 (2008–0281941R3 and 2008-0269281R3))
- However, there is need for caution in valuing flow-through shares for receipting purposes and many of these structures are no longer available as a result of the market collapse

CARTERS.ca

10

FASKEN
MARTINEAU

5. Supreme Court of Canada Decision on CRA’s Access to Donor Information

- The SCC released its judgment on July 31, 2008 in *Redeemer Foundation v. Canada (Minister of National Revenue)*, upholding the Federal Court of Appeal’s decision
- The appellant Foundation, a registered charity, operated a forgivable loan program that financed the education of students at an affiliated college
- CRA requested donor information, which the Foundation ultimately refused to provide

CARTERS.ca

11

FASKEN
MARTINEAU

- The SCC held that CRA was not required to obtain prior judicial authorization for the requested donor information, as the Minister was entitled to it under paragraph 230(2)(a) and subsection 231(1) of the ITA, which set out book and record keeping requirements for inspection, audit, and examination purposes
- As well, the information was requested for a legitimate purpose, which was to investigate the validity of the charity’s loan program
- The lesson to be learned from this decision is that donors need to be made aware that their identity can be obtained on demand by CRA from a charity at any time

CARTERS.ca

12

FASKEN
MARTINEAU

6. Donating the Temporary Use of a Cottage is not a Gift

- In a technical interpretation dated November 12, 2008, CRA confirmed its position that the gratuitous loan of property, including money or a cottage, is not a gift for purposes of sections 110.1 and 118.1 of the ITA since a loan does not constitute a transfer of property
- However, it is possible for a charity to pay rent or interest on a loan of property and later accept the return of all or a portion of the payment as a gift, provided the return of the funds is voluntary

CARTERS.ca 13 FASKEN MARTINEAU

7. Split-receipting for Cemetery Plots

- CRA issued technical interpretation dated November 24, 2008, which deals with the issuance of charitable donation receipts in a situation where a member-donor is entitled to pay less for a cemetery plot than a non-member
- CRA stated that in applying the proposed split-receipting amendments, the “eligible amount” of the gift will be reduced by the value of the “advantage” provided to the members, which would include the right to purchase a cemetery plot at a discount

CARTERS.ca 14 FASKEN MARTINEAU

8. Taxpayer Jailed for Providing False Donation Tax Receipts

- In December 2008, Ambrose Danso Dapaah was sentenced to 51 months in jail after pleading guilty of fraud related to providing false donation tax receipts
- CRA’s news release indicated that Dapaah helped his clients claim over \$21 million in false charitable donations, which resulted in approximately \$6 million in non-refundable tax credits

CARTERS.ca 15 FASKEN MARTINEAU

- He accomplished this by providing fictitious or overstated charitable donations receipts from several charities, including one of which he was the president, CanAfrica International Foundation (“CIF”)
- CRA noted that individuals who have not filed returns for previous years or have not reported all of their income because of such donation receipts can still voluntarily correct their tax affairs

CARTERS.ca 16 FASKEN MARTINEAU

9. Federal Court of Appeal Decides Operating a Hostel is Not Charitable

- In a December 2008 decision, the Federal Court of Appeal upheld the Minister of National Revenue’s (the “Minister”) decision to revoke the charitable status of Hostelling International Canada – Ontario East Region
- The organization had been registered as a charity since 1973 for the purpose of promoting education by providing affordable accommodation to youth in order to encourage them to have a greater knowledge and appreciation of the world

CARTERS.ca 17 FASKEN MARTINEAU

- The Court held that simply providing an opportunity for people to educate themselves by making available tourist accommodation is not sufficient for the activity to be charitable
- Although the organization argued that the Minister should have annulled its charitable status, instead of revoking it, the Court noted that the power of the Minister to annul the charitable status of an organization is a discretionary one and it was open for the Minister to proceed with a revocation in this case

CARTERS.ca 18 FASKEN MARTINEAU

10. CRA Reneges on Compliance Agreement

- *Christ Apostolic Church of God Mission Intl. v. The Queen* – Federal Court of Appeal, (May 30, 2009):
- Church appealed the decision to revoke its charitable status
- Church’s principle argument was that a “compliance agreement” it signed during an audit could not be unilaterally withdrawn by the Minister
- Court rejected argument
- It was open to the Minister to conclude that the church’s non-compliance could not have been remedied by promise made by the church in the agreement

CARTERS.ca 19 FASKEN MARTINEAU

11. CRA Concerns Regarding Record Keeping

- *Triumphant Church of Christ Intl. v. The Queen* – Federal Court of Appeal, (May 20, 2009) Church had its status revoked. Church appealed
- Church argued that the Minister failed to observe requirements of natural justice and procedural fairness
- Court rejected Church’s argument saying the church had been made aware of the Minister’s concerns regarding record keeping and was giving several opportunities to respond to these concerns
- It was open to the Minister to conclude that the Church had not complied with its legal obligations as a registered charity and that its registration should be revoked

CARTERS.ca 20 FASKEN MARTINEAU

12. Gifts of Marketable Securities – Enduring Property?

- In a technical interpretation dated January 15, 2009, CRA considered whether the donation of marketable securities to a charity may be characterized as a gift of enduring property and, if so, would the charity be prevented from disposing of the marketable securities and maintaining the substitute property as enduring property
- CRA confirmed that gifts of marketable securities will qualify as enduring property if the donor provides written direction at the time of the donation that the securities are to be held by the charity for ten years or longer

CARTERS.ca 21 FASKEN MARTINEAU

13. Gift of Capital Property by Will

- In a technical interpretation dated February 4, 2009, regarding gifts of capital property by will, CRA confirmed that proposed subsections 118.1(5.4) and (6) contained in Bill C-10 will override the application of paragraph 70(5)(a) of the ITA
- As such, where a Canadian resident dies making a bequest of a capital property by his will to a registered charity and the FMV of the capital property immediately before the individual's death exceeds its ACB, the legal representative can designate an amount between the FMV and ACB which will be deemed to be the individual's disposition of property

CARTERS.ca

22

FASKEN
MARTINEAU

14. Directed Gift to Municipality

- In a technical interpretation dated March 16, 2009, CRA indicated that donations can be received by a municipality in Canada on behalf of an organization which operates under the authority of the municipality (e.g., a committee established by a municipal bylaw) provided the municipality retains discretion as to how the donated funds are to be spent
- However, if the municipality is merely collecting funds from donors on behalf of the non-profit organization and the latter is legally or otherwise entitled to the property so transferred, the municipality is not in receipt of a gift and cannot issue a donation receipt

CARTERS.ca

23

FASKEN
MARTINEAU

15. CRA Reiterates That Benefits Will Be Deducted From the Eligible Gift Amount

- In a technical interpretation dated April 30, 2009 the CRA considered a situation where an orchestra took people on a trip to another country
 - The persons taking part in the trip all paid fixed amounts that were intended to cover the expenses of the trip
 - Purpose of the trip was to perform concerts and to visit the country
 - CRA said that the donors obtained benefits (the trip) in consideration for the monetary contribution (fixed fee)

CARTERS.ca

24

FASKEN
MARTINEAU

- Orchestra had an obligation to deduct the value of the trip from the monetary contribution to determine the eligible amount of the gift
- In this case CRA was discussing the membership dues paid by persons for the general operations of the orchestra
- If the donor receives no advantage then the eligible amount of the gift will be the amount of the contribution
- CRA also stated that if members did not gain any kind of benefit by purchasing their membership then the full amount of the membership fee would be considered a gift

CARTERS.ca 25 FASKEN MARTINEAU

C. NEW POLICIES, PUBLICATIONS AND GUIDELINES FROM CRA

1. New Annual Information Return

- In February 2009, CRA released the new Registered Charity Information Return package, which includes the following Forms:
 - T3010B (09), Registered Charity Information Return
 - T1235 (09), Directors/Trustees and Like Officials Worksheet
 - T1236 (09), Qualified Donees Worksheet/Amounts Provided to Other Organizations

CARTERS.ca 26 FASKEN MARTINEAU

- New T3010B is to be used when filing annual information returns for fiscal periods ending on or after January 1, 2009, only
- For fiscal periods ending on or before December 31, 2008, registered charities must continue to use Form T3010A (05), with accompanying Forms T1235 and T1236
- The new T3010B is now comprised of a simple core form with topic-related schedules

CARTERS.ca 27 FASKEN MARTINEAU

- **Concerns about new T3010B**
 - Confidential disclosure to CRA of non-resident donors of donations over \$10,000
 - Public disclosure of intermediary recipients outside of Canada could put individuals in jeopardy in certain high risk countries
- See CLB #158 “Commentary on the New T3010B Annual Information Return” at <http://www.carters.ca/pub/bulletin/charity/2009/chv1b158.pdf>

CARTERS.ca 28 FASKEN MARTINEAU

2. CRA Revocations/Annulments Regarding Involving Tax Shelters

- Through its various news releases, CRA has been sending a strong reminder to registered charities that it is reviewing all tax shelter-related donation arrangements and that it plans to audit every participating charity, promoter, and investor
- The following are some organizations that had their registered status revoked due in part to their participation in a donation tax shelter:
 - Francis Jude Wilson Foundation
 - Canadian Amateur Football Association
 - ICAN
 - The Banyan Tree Foundation
 - Millennium Charity Foundation
 - The Phoenix Community Works Foundation
 - Choson Kallah Fund of Toronto
 - Universal Aide Society
 - The Children’s Emergency Foundation

CARTERS.ca 29 FASKEN MARTINEAU



3. CRA News Release on Enforcing Legal Compliance of Taxpayers

- On April 3, 2009, CRA a news release “The CRA takes action to enforce tax laws,” which summarizes the activities that CRA conducts to ensure that taxpayers (both individuals and corporations) are complying with tax laws. These measures are intended to address “tax cheating” and correct honest mistakes
- In relation to donations, the news release indicates that CRA reassessed over 20,000 individuals who had participated in one or more of 20 unacceptable tax shelter gifting arrangements



CARTERS.ca 30 FASKEN MARTINEAU

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

- On April 6, 2009, the CRA released a Policy Commentary to clarify the procedure for applications for disbursement quota relief
- A charity may apply for relief from its disbursement quota requirements. If granted, the relief would be applicable to the particular tax year only
- The following are the relevant considerations mentioned in the policy commentary applicable to applying for relief from disbursement quota requirements:

 31 



- A charity may apply a disbursement excess from one year to offset shortfalls in its disbursement
- The excess may be applied in the year before the year of the shortfall and in the five years immediately following
- The charity must use all disbursement excesses from previous years before relief will be granted
- The charity must be unable to meet the disbursement quota due to unforeseen circumstances that are beyond the charity's control

 32 

- The charity must demonstrate that it is incapable of making up any part of the disbursement shortfall in the following tax year
- Therefore, all of the charity's information returns must be filed before any requests are considered, and relief will not be granted in advance or anticipation of a shortfall

5. CRA Policy on Fundraising by Registered Charities

- See presentation by Laura West for explanations of the CRA new fundraising policy

 33 

6. CRA News Release on Auditing Charities to Enforce Compliance

- On April 14, 2009, CRA issued a news release entitled “Protecting the money given to charity,” which summarizes the activities CRA conducts to ensure that charities are complying with tax laws
- Last year, CRA audited 845 charities, of which the charitable status of 38 charities were revoked for serious infractions of the law, while many others were revoked because of their failure to file the annual information return

CARTERS.ca 34 FASKEN MARTINEAU

- The news release explains that a charity’s charitable status might be revoked if the audit identifies serious instances of non-compliance, which include:
 - Having significant non-charitable activities
 - Directing private benefits towards directors and/or related persons
 - Issuing tax receipts in excess of actual gifts received or directing them to specific persons
 - Failing to spend sufficient amounts on charitable activities;
 - Having gaps in or non-existent books and records
 - Not exercising control and/or direction over the expenditure of funds



CARTERS.ca 35 FASKEN MARTINEAU

7. Checklist on Avoiding Terrorist Abuse

- On April 16, 2009, CRA released the Checklist on Avoiding Terrorist Abuse intended to help registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals
- The House of Commons Subcommittee on the Review of the *Anti-Terrorism Act* recommended that CRA consult with the charitable sector to develop “made in Canada” best practice guidelines that incorporate general policies and checklists that could be administered by applicants and registered charities in carrying out their due diligence assessments



CARTERS.ca 36 FASKEN MARTINEAU

- The checklist is comprised of a number of questions to ask and provide a number of links to websites and international guidelines for more information
- Concerns about the usefulness of the checklist:
 - Not sufficient context for charities
 - Potential undue sense of simplicity
 - Continued delegation to foreign governments & quasi-governmental bodies
 - Excessive nature of recommendations
- See ATCLA #17 “CRA’s New Anti-Terrorism Checklist – A Step in the Right Direction” at <http://www.carters.ca/pub/alert/ATCLA/ATCLA17.pdf>

 37 



8. CRA Releases Q&A on the Treatment of Enduring Property and Disbursement Quota

- On April 22, 2009, the CRA released a Q&A to answer questions regarding a charity’s ability to encroach on the capital of its endowment fund in order to meet its disbursement quota
- The Q&A provides clarification on a number of issues in this regard, such as the circumstances under which a charity may encroach on its enduring property, how ten-year gifts are required to be tracked, and the impact on the charity’s disbursement quota if it encroaches on its enduring property

 38 

9. CRA Releases Guidelines for Sports and Charitable Registration

- On April 30, 2009, CRA released the final form of guidelines on sports to clarify the ways in which organizations carrying out activities that include sport can potentially qualify for charitable registration
- Although the promotion of sport is not recognized as charitable, there are circumstances in which sports activities can be used to further a charitable purpose
- For an organization to be registered, the sport activities an organization pursues should:

 39 

- **Relate to and support its wholly charitable purpose(s) and be a reasonable way to achieve them, such as:**
 - **Promotion of health**
 - **Advancement of education**
 - **Advancement of religion**
 - **Relieving conditions associated with disabilities**
- **Be incidental in nature**
- **Whether or not a sports activity will be acceptable will depend on the facts of each case and the charitable purpose to be achieved**
- **See CLB #143 “Sports and Charitable Registration” at**
<http://www.carters.ca/pub/bulletin/charity/2008/chv1b143.pdf>

CARTERS.ca 40 FASKEN MARTINEAU

10. CRA Proposed Guidance on the Protection of Human Rights and Charitable Registration

- **On May 8, 2009, CRA released a draft guidance, for consultation, regarding human rights charities**
- **CRA will accept comments regarding the draft guidance until July 31, 2009**
- **The guidance will be used to determine if an organization established to protect human rights can be registered as a charity**

CARTERS.ca 41 FASKEN MARTINEAU

- **According to the guidance, “protecting human rights” refers to activities that seek to encourage, support, and uphold human rights that have been secured by law, internationally or domestically, such as the Canadian *Charter of Rights and Freedoms*, or U.N. Conventions. It does not include advocating for the establishment of new legal rights**
- **The guidance indicates that CRA recognizes that the protection of human rights can further all four heads of charity**

CARTERS.ca 42 FASKEN MARTINEAU

- **Human rights charities often work outside existing legal and political structures and must ensure that their purposes are not political in nature, which is not charitable**
- **For example, an acceptable purpose would be to investigate and report violations of specified human rights instruments**
- **On the other hand, an unacceptable purpose would be to focus on one particular country, and pressure its legislature or government to sign an international human rights convention**

CARTERS.ca 43 **FASKEN MARTINEAU**

11. Pending CRA Guidance on Advancement of Religion as a Charitable Purpose (Taken from a slide presentation by Terry de March of CRA) on April 24, 2009

a) **Definition of Religion**

- **No precise definition of religion in the case law**
- **Case law does, however, identify three key attributes of religion:**
 - **Faith in a “higher unseen power”, such as God, a Supreme Being or Entity, that exists outside our bodies and lives**

CARTERS.ca 44 **FASKEN MARTINEAU**

- **Worship**
- **Comprehensive or particular system of doctrines, observances and practices**

b) **Advancement of Religion**

- **Advancement involves promoting and manifesting doctrines, observances, and practices**
- **It involves both sustaining and increasing religious belief**
- **Advancement is not limited to faith and worship but may be done in a wide variety of ways that further a religious purpose**

CARTERS.ca 45 **FASKEN MARTINEAU**

- A religion must be advanced and as such the key attributes of religion must to some degree be manifest in the organization
- Advancing religion may be done through separate organizations
- Advancing religion may focus on one or two tenets of religion
- CRA has concerns about ulterior aims
- CRA also has concerns about charities that pursue non-religious collateral purposes

CARTERS.ca 46 FASKEN MARTINEAU

c) Public Benefit

- Two components:
 - i. Identifiable benefit; and
 - ii. Benefit to the public or section of the public
- Advancement of religion is a presumed benefit unless evidence rebuts the presumption
- Some reasons for the presumption
 - Religion provides a moral framework for living
 - Builds social capital and cohesion
 - Provides rites of passage, services to needy and vulnerable
 - Encourages service to others



CARTERS.ca 47 FASKEN MARTINEAU

- Examples where benefit may be rebutted
 - Significant private benefit
 - Evidence that organization incited hatred or violence against other groups
 - Evidence of actual physical or mental harm to adherents
- Celebration of a religious rite in public confers sufficient public benefit
- Where access is restricted to members, indirect benefit flows from adherents practicing their religion in the wider world

CARTERS.ca 48 FASKEN MARTINEAU



d) Private Benefit

- Private benefit is acceptable only if it arises directly through pursuit of the charitable purpose, is incidental to the pursuit of that purpose, and is reasonable in the circumstances
- Does not include benefits people receive as adherents (e.g. worship services, incidental social activities)
- Questionable benefits: generous salaries, luxurious living expenses, travel, self promotion of leader

 49 



12. Pending CRA Guidance on Foreign Activities

- A proposed new CRA guidance on foreign activities is expected to be posted on the CRA website in early June, 2009
- It is expected that the guidance will consolidate and better organize CRA's existing guidance position on foreign activities from various CRA sources into one document
- However, it is not expected that the guidance will provide for any significant new developments

 50 

13. CRA Summary Policy on Research

- Policy #CPS-029, dated April 30, 2009
- Outlines the general requirements for the activity of research to be considered charitable
- Provides a detailed discussion about the legal and administrative requirements of charities that conduct research or fund research
- Explains how CRA assesses whether or not the requirements are being met

 51 

14. Registered Charities Newsletter No. 32 (Summer 2009)

- Gives advice for organizations applying for registration
- Provides a summary of the application process and answers questions about the new Charity Information Return Form T3010B(09)
- Also contains the address for the Appeals Branch for objections to Charity’s Directorate determination

CARTERS.ca 52 FASKEN MARTINEAU

15. Expenses Incurred by Volunteers

- Policy Commentary CPC-012, revised on April 25, 2009, deals with expenses incurred by volunteers while doing work for a charity
- Allows a charity to reimburse a volunteer for expenses incurred by issuing an official donation receipt in the amount of the expense
- The volunteer must be willing to accept this as return for the expense. CRA still encourages an exchange of cheques.

CARTERS.ca 53 FASKEN MARTINEAU

D. OTHER RECENT FEDERAL AND PROVINCIAL ISSUES AFFECTING CHARITIES

1. Corporate Update

- Reform of Not-for-Profit Corporations Legislation in Ontario
 - In the spring of 2007, the Ontario Ministry of Government and Consumer Services (“Ministry”) announced that it was undertaking a project to review and revise the Ontario *Corporations Act* (the “OCA”)
 - Currently, the OCA provides the statutory framework governing the creation, governance, and dissolution of not-for-profit corporations, including charitable corporations

CARTERS.ca 54 FASKEN MARTINEAU

- The primary basis for proposing reform to the OCA was the concern that the OCA is antiquated, cumbersome, and unable to meet requirements of the modern not-for-profit sector
- The original version of the OCA was enacted in 1907 and has not been substantially revised since 1953. During this 50 year period where there has been no substantial change to legislation, the not-for-profit sector itself has experienced tremendous change
- The Ministry's main goal of reform is to "create a new statute dedicated to non-profit corporations that is easily understood and that responds to the realities of the 21st century nonprofit sector" [the "new Act"]

CARTERS.ca 55 FASKEN MARTINEAU

- Draft legislation is expected later in 2009 or early 2010
- See paper entitled "Reform of Not-for-Profit Corporations in Ontario" at <http://www.carters.ca/pub/article/charity/2008/tsc0604.pdf>
- Introduction of New Federal Legislation Governing Non-Share Capital Corporations
 - Bill C-4 (formerly Bill C-62), *An Act respecting not-for-profit corporations and certain other corporations*, has been passed by the House of Commons and passed first reading in the Senate as of May 5, 2009

CARTERS.ca 56 FASKEN MARTINEAU

- Bill C-4 is intended to replace Parts II and III of the current *Canada Corporations Act* ("CCA"), which govern federal non-share capital corporations
- For details see CLB #139 "Bill C-62: Changes Afoot for Federal Non-Profit Corporations" at <http://www.carters.ca/pub/bulletin/charity/2008/chylb139.pdf>
- There is ongoing debate concerning whether Bill C-4 may be providing too many rights to corporate members

CARTERS.ca 57 FASKEN MARTINEAU

2. Telemarketing and the National Do Not Call List

- The CRTC launched Canada’s National Do-Not-Call List (“National DNC List”) and the new Telemarketing Rules on September 30, 2008
- Registered charities are exempted from the National DNC List, but they must still comply with the Telemarketing Rules, which require that they maintain their own do-not-call list
- Registered charities must also register with, and provide information to the National DNC List operator (Bell Canada), pay applicable fees and maintain records on registration and payment

CARTERS.ca 58 FASKEN MARTINEAU

- Imagine Canada and The Association of Fundraising Professionals made a petition to the Governor in Council requesting it to require the CRTC to vary or rescind the requirement that all telemarketers (including those that are exempt from the National DNCL rules) to register with the National DNCL operator and to pay a fee to the National DNCL Investigator
- However, the federal cabinet has denied a request to relieve Canadian registered charities from requirements to register and pay fees in relation to Canada’s National DNCL

CARTERS.ca 59 FASKEN MARTINEAU

3. Human Rights Regime Change in Ontario

- The *Ontario Human Rights Code Amendment Act, 2006* (also referred to as Bill 107) came into effect on June 30, 2008
- As a result, the Human Rights Tribunal of Ontario will now be processing human rights complaints instead of the Ontario Human Rights Commission
- Other human rights regime changes include the addition of an administrative branch, removing restrictions on damage awards for mental anguish, and permitting human rights violations pleadings in civil actions
- See CLB #144 “Human Rights Regime Change in Ontario: What Charities Should Know” at <http://www.carters.ca/pub/bulletin/charity/2009/chvlb144.pdf>

CARTERS.ca 60 FASKEN MARTINEAU

E. OTHER RECENT CASE LAW AFFECTING CHARITIES

1. The Christian Horizons Decision

- On April 28, 2008, the Ontario Human Rights Tribunal found that Christian Horizons (“CH”) had violated Connie Heintz’s rights under the *Human Rights Code* (Ontario)
 - CH offered its services to the general public and did not restrict its services to “co-religionists”
 - Compliance with the Lifestyle and Morality Statement was not a reasonable or *bona fide* qualification for employment

CARTERS.ca 61 FASKEN MARTINEAU

- CH also infringed the complainant’s rights as a result of the work environment and how she was treated in light of her sexual orientation
- CH has filed its Notice of Appeal, and as such, any comments on the lasting impact of the decision may be subject to change, depending on the outcome of that appeal
- CCCC and Egale have been granted intervenor status
- See CLB #22 “The Christian Horizons Decision: A Case Comment” at <http://www.carters.ca/pub/bulletin/church/2008/chclb22.pdf>

CARTERS.ca 62 FASKEN MARTINEAU

2. *Alaimo v. Di Maio*

- Decision of Ontario Superior Court dated February 2, 2009 dealing with exposure of directors to costs in litigation
- The applicants were former members of the Board of Directors of Hospice Vaughan
- The case involved a dispute over the election of a new Board of Directors
- The applicants were the outgoing directors and the respondents were the incoming directors

CARTERS.ca 63 FASKEN MARTINEAU

- The court appointment an arbitrator. The applicants appealed a number of the arbitral rulings and sought to the have the election results set aside
- The applicants lost and were found liable for the costs of the court proceedings
- It did not matter that they were acting in the best interest of the charity. Purity of motives is not enough to overturn the legal principle that the losing party must pay costs
- Case seems to go in a different direction than earlier case law

CARTERS.ca

64

FASKEN
MARTINEAU

DISCLAIMER

This handout is provided as an information service by Carters Professional Corporation and Fasken Martineau DuMoulin LLP. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2009 Carters Professional Corporation
© 2009 Fasken Martineau DuMoulin LLP

CARTERS.ca

Carters Professional Corporation
www.charitylaw.ca

FASKEN
MARTINEAU

Fasken Martineau DuMoulin LLP
www.fasken.com
