

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

FEBRUARY 2006 ISSUE

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RECENT PUBLICATIONS AND NEWS RELEASES

Foundations Incurring Debts to Purchase Investments

by Theresa L.M. Man in *Charity Law Bulletin No. 86, February 7, 2006.*

On October 21, 2005, Canada Revenue Agency reversed its strict position with respect to public and private foundations incurring debts for the purpose of acquiring investment, enabling both to now do so. Previously, CRA had always been of the view that the phrase “debts incurred in connection with the purchase and sale of investments” in paragraphs 149.1(3)(d) and 149.1(4)(d) of the *Income Tax Act* (Canada) would only permit a miscellaneous type of debt, such as brokerage fees or other incidental amounts that could relate either to the purchase or the sale. CRA explained that the reason for the change in their policy was because “jurisprudence has confirmed that the phrase ‘in connection with’ has a very broad meaning.” However, CRA indicated that debt arrangements would continue to be reviewed by CRA, especially those involving non arm’s length parties, in order to ensure that there are no other issues, such as personal benefit. This *Charity Law Bulletin* reviews CRA’s new technical interpretation concerning foundations incurring debts.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2006/chylb86.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2006/chylb86.htm>

Beware of Donation Tax Shelter Valuations

by Karen J. Cooper and Terrance S. Carter in *Charity Law Bulletin No. 87, February 8, 2006.*

Registered charities and donors should be wary of the valuations provided by promoters of donation tax shelters following a recent Federal Court of Appeal decision in *Nash v. Canada* overturning the Tax Court of Canada. This decision concerned receipts issued to donors involved in an art-flip donation program run by CVI Art Management, which the taxpayers learned about from their financial planners. The release of the Federal Court of Appeal’s decision coincided with Canada Revenue Agency’s *Taxpayer Alert* dated November 22, 2005, reminding potential investors to exercise caution with respect to certain donation arrangements, including gifting trust arrangements, leveraged cash donations, and buy-low donate-high arrangements. This *Charity Law Bulletin* reviews the recent case law concerning donation tax shelters and their implications for donors.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2006/chylb87.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2006/chylb87.htm>

Deadlines For Removal or Upgrade of Ontario's Fuel Oil Storage Tanks Fast Approaching

by Terrance S. Carter, assisted by Nancy E. Claridge and Derek Ross in *Charity Law Bulletin No. 88, February 8, 2005.*

For more than sixty years, fuel oil storage tanks have been installed and used in properties owned by Ontario charities, in particular churches, synagogues, mosques and other religious organizations, including residences for their spiritual leaders. In addition to the rising cost of fuel to heat these charitable facilities, owners of properties with fuel oil storage tanks should be aware of the fast approaching deadlines contained in Ontario's strict regulations that may require the fuel oil storage tank to be upgraded or removed. Some requirements may be particularly onerous for small charities; particularly some charities with aging facilities, but the potential for significant liability should there be a leak into the environment makes it an issue that charities in Ontario cannot ignore. This *Charity Law Bulletin* looks at recent developments regarding requirements for the proper management of fuel oil storage tanks in Ontario.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/charity/2006/chylb88.pdf>

[WEB] <http://www.carters.ca/pub/bulletin/charity/2006/chylb88.htm>

Decision in Favour of Acorn Foundation Extends Judicial Review to Undertaking Letters

Subsequent to the release of CRA's new technical interpretation with respect to debts of private foundations (which is discussed in *Charity Law Bulletin No. 86*, referred to above), the Federal Court of Canada issued an order in *Acorn Foundation v. M.N.R.* (16 December 2005) (court file no. T-1784-05) on a preliminary motion in a case involving the CRA's application of the provisions of the *Income Tax Act* limiting the debt incurred by charitable foundations. The order allowing the Acorn Foundation's case to proceed concludes that in some circumstances a CRA "undertaking letter" may be considered a decision subject to judicial review and may require CRA to extend rights of administrative fairness to the charities that receive them.

Chronically Absent Employees: How Can Employers Cope?

by Anne-Marie Langan in *Employment Law Bulletin No. 2, February 8, 2005.*

Chronic absenteeism of employees is a serious and frustrating problem for charities and not-for-profit organizations in Ontario. Absenteeism generally refers to an absence from work that is unplanned, and does not include holiday time or pre-approved days off. Studies have indicated that, on average, one day of an employee's absence costs an employer \$2,500.00 in direct and indirect costs, taking into account the decrease in productivity, financial costs and administrative costs. On average, employees are absent eight days a year. In total, absenteeism costs all employers in Canada an estimated 10 billion dollars annually. Absenteeism may be caused by any number of things such as a serious accident or illness, low morale, poor working conditions,

boredom, lack of job satisfaction, personal problems, bad lifestyle choices, transportation problems, stress, workload or conflicts between employees or with management.

This *Employment Law Bulletin*, which will be of interest to charities and not-for-profit organizations, distinguishes between culpable and non-culpable absenteeism and will provide suggestions to employers as to strategies they can use to minimize both types of absenteeism, focusing on how to appropriately manage the situation where employees are absent due to work and non-work related physical or mental disabilities.

Read More:

[PDF] <http://www.carters.ca/pub/bulletin/employment/emplb02.pdf>

National Ballet School Wins Injunction in Trade-mark Battle

by U. Shen Goh.

On January 24, 2006, the National Ballet School/l'École nationale de ballet ("NBS/ENB") succeeded in defending its name and trade-mark from being used in a confusing manner by another ballet school operating under the name École national de ballet contemporain. NBS/ENB won a permanent injunction prohibiting the other school from using the name École national de ballet contemporain or any other name that is similar to National Ballet School/l'École nationale de ballet. Look for next month's *Charity Law Update* for a bulletin discussing this case and advising on how to monitor and protect the name and trade-mark of a charity or not-for-profit organization.

New CRA Policy on Publishing Magazines and Advancement of Education

On February 3, 2006, CRA released a new Policy Commentary (CPC-024) with respect the Charities Directorate's policy regarding organizations publishing magazines in furtherance of educational purposes. The Policy Commentary indicates that CRA accepts that registered charities can advance education through the publication and distribution of magazines, but the contents of the publications must be predominantly educational in the sense understood by charity law. Material that would not be considered educational - for example, games, entertainment, opinion, advertising, is allowable provided that it is highly limited and always remains ancillary and incidental to the main educational purpose (available at <http://www.cra-arc.gc.ca/tax/charities/policy/cpc/cpc-024-e.html>).

Legal Status of Pledges in the U.S.

The following is an excerpt dealing with the legal status of pledges from *Nonprofit Alert*, November / December 2005 Issue, from the Washington, D.C. law firm of Gammon & Grange, P.C. which specializes in U.S. tax exempt organizations.

“A New York court has held that pledges made by former congregation members are legally enforceable, in certain circumstances. A religious temple sought to hold a former congregant to his pledge of yearly dues, [although] the congregant and his wife had formally resigned their memberships in the temple.

Ordinarily, absent a contractual commitment, charitable pledges are not legally enforceable because of the lack of “bargained for consideration,” or negotiated exchange of value, between the parties. In this case, however, the court found that the pledge was enforceable under the doctrine of “promissory estoppel”; that is, the temple relied to its detriment on the promise of the congregant, such reliance was reasonable, and the temple would have been harmed if the member were allowed to back out of his pledge. ... The court noted that to decide otherwise would frustrate the reasonable expectations of donees, and violate public policy.”

Gammon & Grange noted the limited precedential value of this case in the U.S., as it only applies to nonprofits in the district of New York in which it was litigated, and cautioned nonprofits to enter into written agreements with donors as opposed to relying on pledges.

The full case comment can be found at www.gg-law.com. For an explanation of the law concerning pledges in Canada, see *Charity Law Bulletin* Nos. 49 and 69, entitled “Ontario Court of Appeal Affirms Unenforceability of Pledges” and “Creating Enforceable Pledge Agreements” available at www.charitylaw.ca.

IN THE PRESS

Inquiries Still Required When Charities Issue Donation Receipts by Theresa L.M. Man and Terrance S. Carter.

Charitable Thoughts, Vol. 9, No. 3, January 2006 (Ontario Bar Association).

B.C. Court of Appeal Affirms Lower Court Ruling Upholding the CRA Split-Receipting Guidelines by Terrance S. Carter and Nancy E. Claridge.

Charitable Thoughts, Vol. 9, No. 3, January 2006 (Ontario Bar Association).

Investment Executive article “Appreciation” gifts lower sum on donation receipt” cites Terrance S. Carter on split-receipting, by Stewart Lewis.

Investment Executive, February 2006 Issue.

[Link] [http://www.investmentexecutive.com/client/en/News/DetailNews.asp?IdPub=127
&Id=32451&cat=30&IdSection=30&PageMem=&nbNews=](http://www.investmentexecutive.com/client/en/News/DetailNews.asp?IdPub=127&Id=32451&cat=30&IdSection=30&PageMem=&nbNews=)

Church Law Bulletin No. 16 Reproduced in *The Christian Legal Journal Winter 2006 Issue* by Anne-Marie Langan and Terrance S. Carter.

The Christian Legal Journal, Winter 2006.

[Link] <http://www.christianlegalfellowship.org/Journal/journalhome.htm>

RECENT EVENTS AND PRESENTATION MATERIALS

The Institute of Chartered Accountants of Ontario hosted a workshop in Markham, Ontario, with Karen J. Cooper presenting “Partnerships: From Soup to Nuts” on January 10, 2006.

The Waterloo Regional Arts Council and Carters Professional Corporation hosted a Board School program entitled “Incorporation: It’s not as scary as you think” by Donald J. Bourgeois of Carters at Kitchener City Hall on January 14, 2006.

Compliance Issues for Charities and Not-for-Profit Organizations was a one-day conference hosted by The United Way/Centreaide Windsor-Essex County at the Giovanni Caboto Club, Windsor, Ontario, on January 19, 2006, with Terrance S. Carter presenting.

[PDF] <http://www.carters.ca/pub/seminar/charity/2006/tsc0119.pdf>

[WEB] <http://www.carters.ca/pub/seminar/charity/2006/tsc0119.htm>

Privacy Essentials: Tips, Traps, and Hot Issues, was hosted by The Ontario Bar Association Institute in Toronto, Ontario, on January 23, 2006, and included a panel discussion entitled “Tips from the Pros on Privacy” with Shen Goh from Carter & Associates participating along with other privacy law practitioners.

[Paper] <http://www.carters.ca/pub/seminar/charity/2006/usg0123.pdf>

Risk Management for Directors and Officers of Charities was presented by Jane Burke-Robertson for the Autism Society (Ontario) in Toronto on January 28, 2006.

Changes to Sanctions, Penalties and Appeals Process for Charities was presented by Karen J. Cooper for the Canadian Bar Association Calgary Charities Section on January 30, 2006.

[PDF] <http://www.carters.ca/pub/seminar/charity/2006/kjc0130.pdf>

[WEB] <http://www.carters.ca/pub/seminar/charity/2006/kjc0130.htm>

Recent Tax Changes Affecting Charities That You Need to Know was hosted by Canadian Fundraiser in Toronto, Ontario, on February 1, 2006, with Terrance S. Carter and Theresa L.M. Man of Carter & Associates presenting.

The Greater Dufferin Area Chamber of Commerce hosted a lunch seminar on February 9, 2006, entitled “Essential Employment Law Issues for Employers,” with Mervyn F. White presenting “New Criminal Liability in the Work Place (Bill C-45) – How to Avoid Liability;” Anne-Marie Langan presenting “Duty to Accommodate – Human Rights Issues for Employers;” and U. Shen Goh presenting “Wrongful Dismissal – What Employers Need to Know,” at Hockley Valley Resort near Orangeville, Ontario.

UPCOMING EVENTS AND PRESENTATIONS

The 2006 National CLF Student Conference is being hosted by the Christian Legal Fellowship on February 24, 2006, at the University of Western Ontario, with Terrance S. Carter participating in a panel discussion entitled “Integration of Faith & Practice / Law as a Ministry.”

For more information, see <http://www.christianlegalfellowship.org/studentconference.htm>.

Directors and Officers Liability and Beyond is being hosted by Canadian Fundraiser on Wednesday, March 1, 2006, at the Osgoode Professional Development Centre in Toronto, Ontario with Terrance S. Carter presenting.

For more information, see http://www.canadianfundraiser.com/workshop_Agenda_viewer.asp?workshop_ID=109

Health and Charity Law Seminar hosted by Fasken Martineau DuMoulin LLP is being held on March 8, 2006, at the Estates of Sunnybrook, Vaughan Estates in Toronto, Ontario. Terrance S. Carter will be speaking on the charitable implications of the new LHIN legislation.

Contact events@tor.fasken.com for more information or to register.

Charity Law Update will be presented by Terrance S. Carter and David P. Stevens as part of “The Six-Minute Estates Lawyer” to be hosted by The Law Society of Upper Canada in Toronto, Ontario, on March 22, 2006.

Details available at <http://ecom.lsuc.on.ca/pdf/flyers/2006/sixMinuteEstatesLawyer.pdf>.

The Waterloo Regional Arts Council and Carters Professional Corporation are hosting a Board School program entitled “Charitable Registration and Compliance” to be held on March 25, 2006 in Kitchener, Ontario, with Donald J. Bourgeois from Carters presenting.

Register by email to wrac@golden.net.

The University of Waterloo Master of Taxation Program will be hosting a session on “Recent Changes to the *Income Tax Act* Affecting Charities,” presented by Terrance S. Carter on March 27, 2006, for students studying in the Master of Taxation Program.

CONTRIBUTORS



Donald J. Bourgeois – Counsel to Carters in the area of charity and not-for-profit law, governance and fundraising, Mr. Bourgeois is author of *The Law of Charitable and Not-for-Profit Organizations, 1st, 2nd and 3rd Editions*, the *Charities and Not-for-Profit Fundraising Handbook*, *Charities and Not-for-Profit Administration and Governance Handbook* and *Public Law in Canada* published by Butterworths, as well as Editor of *The Philanthropist*.



Terrance S. Carter – Practices primarily in the area of charity and not-for-profit law and is counsel to Fasken Martineau DuMoulin LLP. Mr. Carter is a member of Canada Revenue Agency's Charities Advisory Committee and Technical Issues Committee, past Chair of the National Charity and Not-for-Profit Section of the Canadian Bar Association, and has been recognized as one of the leading experts in the area of charity and not-for-profit law in Canada by *Lexpert*. Mr. Carter is also editor of www.charitylaw.ca, www.churchlaw.ca and www.antiterrorism.ca, and a consulting editor of *Charities Legislation and Commentary* (LexisNexis Butterworths, 2006).



Nancy E. Claridge – Articling with Carters, Ms. Claridge was a Senior Editor of the Osgoode Hall Law Journal and Editor-in-Chief of the *Obiter Dicta* newspaper. After obtaining her Masters degree in Political Science, she spent several years developing online Canadian legal databases for LexisNexis Canada, before attending Osgoode Hall Law School where she was awarded the Dean's Gold Key Award for exceptional leadership, commitment and enthusiasm.



Karen J. Cooper – Practicing charity and not-for-profit law at Carters' Ottawa office, with an emphasis on tax issues, while on leave from her position as Senior Rulings Officer with the Income Tax Rulings Directorate of Canada Revenue Agency. Ms. Cooper also has experience as counsel for the Department of Justice in tax litigation, as well as considerable teaching experience, including currently as part-time professor at the University of Ottawa, Faculty of Common Law. In addition, Ms. Cooper has contributed articles to *The Lawyers Weekly* and *The Bottom Line*.



U. Shen Goh – Ms. Goh practices in the area of intellectual property, focusing on trade-marks, privacy and information protection. She has a Master of Laws degree from the University of San Diego School of Law and an LL.B. from Osgoode Hall Law School. Ms. Goh has also been an invited speaker for the Greater Dufferin Area Chamber of Commerce and the Social Planning Council of Peel, and has also written on privacy issues for *The Lawyers Weekly* and *Charity Law Bulletin*.



Anne-Marie Langan – Practices at Carters in the areas of human rights, employment litigation and family law. Ms. Langan received her law degree from Queen’s University, where she was awarded the Legal Aid Ontario Award and the Community Commitment Award for her involvement in the Queen’s Legal Aid Clinic and the Family Law Project, and won an award for her paper entitled “Unrepresented Litigants in the Family Courts of Ontario” (*Queen’s Law Journal*, Spring 2005). Ms. Langan is a frequent contributor to the *Church Law Bulletin* at www.churchlaw.ca.



Theresa L.M. Man – Practices primarily in the area of charity and not-for-profit, with particular emphasis on tax issues. She is a member of the Taxation Section and the Charity and Not-for-Profit Section of the Ontario Bar Association, and is currently pursuing her LL.M. in Tax Law. In addition to being a regular speaker at the annual *Church & Charity Law*TM Seminar, Mrs. Man has also written articles for *The Lawyers Weekly*, *Planned Giving Pulse*, *International Journal of Civil Society Law*, *The Bottom Line*, *Chinese Christian Herald Crusades*, and *Charity Law Bulletin*.



Mervyn F. White – Practices litigation and dispute resolution in areas of the law including employment law, charity and not-for-profit law, and human rights complaints, as well as performing risk management assessments relating to insurance law and human rights. Mr. White is a contributing author to *The Lawyers Weekly*, *Charity Law Bulletin* and *Church Law Bulletin*, and a regular speaker at the annual *Church & Charity Law*TM Seminar and guest speaker for organizations such as Canadian Fundraiser, the Association of Fundraising Professionals, and the Christian Legal Intervention Academy.

ACKNOWLEDGEMENTS, ERRATA AND OTHER MISCELLANEOUS ITEMS

Errata Notice: *Charity Law Bulletin* No. 82 has been revised at the bottom of page 2 to replace \$250,000 in respect of imposed penalties with the correct amount being in excess of \$25,000. The revised version was posted on our website on January 30, 2006.

Errata Notice: *Charity Law Bulletin* No. 76 has been revised to replace 'substitutive' with 'substantive' in respect of gifts in the second last bullet point on page 16. The revised version was posted on our website on February 3, 2006.

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